



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 517 OF 1999
WITH
CIVIL APPLICATION NO. 3488 OF 1999
IN
SECOND APPEAL NO. 517 OF 1999

Mirabai w/o Baburao Patil,
Age : 46 years,
Occupation : Agriculture & Household,
Resident of Chikhali (Bk), Post Harankhede,
Taluka Bhusawal,
District : Jalgaon.

... Appellant
[Ori. Plaintiff]

Versus

Sajanbai Ramrao Patil
Died through legal heirs:

- 1] Pushpabai w/o Yeshwant Patil
Age 58 years, Occ : Agri,
r/o Chikhali (Bk) Post
Harankhede Taluka Bodhwad
District Jalgaon.
- 2] Surendra s/o Yeshwant Patil
Age 40 years, Occ : Agri
r/o Chikhali (Bk) Post
Harankhede Taluka Bodhwad
District Jalgaon.
- 3] Vinod s/o Yeshwant Patil
Age 38 years, Occ : Agri
r/o Chikhali (Bk) Post
Harankhede Taluka Bodhwad
District Jalgaon.
- 4] Gajanan s/o Yeshwant Patil
Age 36 years, Occ : Agri
r/o Chikhali (Bk) Post
Harankhede Taluka Bodhwad
District Jalgaon.

5] Archana w/o Subhash Hiwale,
Age 34 years, Occ : Household
r/o Chikhali (Bk) Post
Harankhede Taluka Bodhwad
District Jalgaon.

6] Alkabai w/o Nivrutti Patil
Age 62 years, Occ : Household
r/o Chikhali (Bk) Post
Harankhede Taluka Bodhwad
District Jalgaon.

... Respondents

.....

Mr. N. K. Kakade, Advocate for the Appellant.

Mr. Navin S. Shah, Advocate h/f Mr. Swapnil S. Patil, Advocate for
respondent nos. 1 to 6

.....

CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 22.07.2024

Pronounced on : 14.08.2024

ORDER :

1. In this second appeal, exception has been taken to the judgment and order dated 29.10.1998 passed by learned Joint District Judge, Jalgaon in Regular Civil Appeal No. 149 of 1995 arising out of judgment and order dated 29.04.1995 in Special Civil Suit No. 195 of 1993.

FACTUAL MATRIX

2. Present Appellant, original plaintiff instituted Special Civil Suit No. 195 of 1993 for specific performance of contract for sale brought by the plaintiff against the defendant

3. Sum and substance of the plaintiff's case was that plaintiff and defendant/present respondent entered into an agreement to sale on 02.06.1988 regarding sale of 2 hector land owned by defendant in block no. 131 for a valuable consideration of Rs.40,000/-. Earnest amount of Rs.15,000/- was paid. It was agreed between the parties that plaintiff has to clear the encumbrances of the suit land as well as another land block no. 144 belonging to the defendant. Prior to sale deed, defendant was in need and hence obtained Rs.2,000/- from plaintiff and executed a receipt on stamp paper. Plaintiff paid encumbrances upon the suit land to the tune of Rs.4,537.50/- and Rs.10,670/- to clear the encumbrances upon another land block no. 144 as agreed and thus, total amount of Rs.32,207.50/- out of total consideration of Rs.40,000/- was paid to the defendant. Subsequently, plaintiff called upon defendant to execute the sale deed, but defendant deliberately failed to perform her part of contract and hence suit was instituted.

4. Defendant appeared and resisted the suit denying agreement of sale or receiving earnest amount and payment of encumbrances by plaintiff. Defence taken was that it was transaction of pure hand loan. On blank paper, defendant's signatures were obtained and suit has been instituted.

5. Trial was conducted before learned IInd Joint Civil Judge Senior Division, Jalgaon vide Special Civil Suit No. 195 of 1993, in which following issues came to be framed :

ISSUES	FINDING
1. Does plaintiff prove that she has share of E.1 and 4 anna as and defendant has share of Rs.9 and 8 annas in field gat No.132 of Chikali as described?	Affirmative
2. Does she prove that defendant has executed agreement deed on 02.06.1988?	Affirmative
3. Does she prove that she paid Rs.15,000/- towards earnest money to the defendant?	Affirmative
4. Does she prove that she was put in possession of suit field on 02.06.1988 and is in possession of it till filling of this suit?	Negative
5. Does she prove that she has paid the loan amount against suit field and field Gat No. 144?	Proved in respect of block no. 144.
6. Does she prove that she paid Rs.2000/- towards amount of consideration on 09.06.1989?	Negative.
7. Does she prove that it was agreed to execute the sale deed after payment of loan amount against suit field and gat No. 144?	Affirmative
8. Does she prove that she was and is willing to purchase the suit field?	Affirmative

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|--|---|
| 9. Does defendant prove that the document executed on 02.06.1988 is mortgage deed? | Does not survive. |
| 10. Does she proved that the plaintiff has 3 annas and 4 paise share in the suit field and she has 8 annas and her step son has 3 annas and 4 paise share in the suit field? | Does not survive in view of my finding on Issue No.1. |
| 11. Does she prove that the suit transaction is money lending transaction? | Negative. |
| 12. Does she prove that her thumb mark was obtained on blank stamp paper? | Negative. |
| 13. Whether the suit is barred by limitation? | Negative. |
| 14. Whether the plaintiff has paid insufficient court fee stamp? | Negative. |
| 15. What order, relief and decree? | As per final order below. |
6. After hearing both sides and appreciating the oral and documentary evidence, learned trial court partly decreed the suit. Suit for specific performance came to be dismissed, but plaintiff was held entitled to refund of amount of Rs.25,670/- along with 18% interest i.e. vide judgment dated 29.04.1995.

7. Said judgment was assailed by original plaintiff i.e. present appellant by filing Regular Civil Appeal No. 149 of 1995. Said Appeal came to be dismissed by the first appellate court on 29.10.1998 confirming the judgment passed by the court of IInd Joint CJSD, Jalgaon.

8. Feeling aggrieved by the dismissal of appeal, original plaintiff has knocked the doors of this Court by filing instant Second Appeal. This Court by order dated 05.08.1999, admitted the appeal by formulating two points which are as under :

“(i) Having once reached to the conclusion that the agreement at exhibit 66 was proved and that the amount received by way of earnest amount has been paid towards refund of the loan amount by the defendants, would it be appropriate, in such a case, not to grant the decree for specific performance of the contract merely by using the words “exercise of discretion by the Court?

and

(ii) Is it a case wherein can it be said that the courts below have judiciously exercised the discretion in refusing to grant the decree for specific performance of the contract?

SUBMISSIONS

On behalf of the appellants:

9. Learned counsel for appellant appraised the Court about the nature of suit in trial court contending that there was agreement to sale at Exhibit 66. Its Execution has not been denied. Defendant/respondent had accepted earnest amount. As agreed, present appellant had cleared the encumbrances. Thus, according to him, out of total consideration of Rs.40,000/- substantial amount of Rs.32,207.50/- was already borne and paid by plaintiff and was always ready and willing to perform her part of contract. Defendant avoided and therefore, as required under law, by two notices, defendant was called upon to perform her part of contract. According to him, all requirements for entitlement of relief of specific performance were available and made out in the trial court itself and therefore the suit ought to have been decreed. That, there was failure on the part of trial court in appreciating the evidence as well as settled law. That, suit was partly decreed, i.e. only for refund of money with interest, which was not the claim of plaintiff/appellant. Therefore, plaintiff had assailed the judgment of trial court.

10. He next submitted that, case was reiterated in appellate court. That, first appellate court also did not consider and appreciate

plaintiff's case in proper perspective. That, essential and mandatory requirements of Order XLI Rule 31 of the Code of Civil Procedure (CPC) were not adhered to by the first appellate court. Therefore, learned counsel prays to remand the matter back to the appellate court for fresh consideration.

On behalf of the defendants :

11. On the other hand, supporting the judgment passed by trial court as well as first appellate court, learned counsel Mr. Shah would submit that, taking disadvantage of defendant/respondent, an illiterate and rustic lady, transaction of hand loan was tried to be converted into alleged agreement to sale when there was none. That, defendant was a widow. Plaintiff did not substantiate her claim and did not approach court with clean hands. That, on complete appreciation, trial court formulated several issues and duly answered the same. According to him, there is no illegality or perversity in the conclusion reached at by trial court. He also took this court through the observations of trial court in para 33 to 35 and supported the same as well as the conclusion reached at. He branded the document Exhibit 66 to be fabricated one. He also supported the judgment passed by the first appellate court by submitting it to be just, legal

and proper and thereby prays to dismiss the Second Appeal and also resisted the prayer of remand.

Learned counsel for the defendants sought reliance on *Pemmada Prabhakar and others v. Youngmen's Vysya Association and others* (2015) 5 SCC 355 and *A. C. Arulappan v. Ahalya Naik* 2001 DGLS(Soft) 972/(2001) 6 SCC 600.

ANALYSIS

12. Here, suit was for specific performance of contract on the strength of agreement to sale. Perused the judgment of trial court. The issues framed at Exhibit 29 are already reproduced in aforesaid para. It seems that in trial court, to establish claim, plaintiff adduced her own evidence in the capacity as PW1 at Exhibit 38 and also adduced evidence of PW2 Samadhan and PW3 Pundlik and Exhibits 63 and 65 respectively.

13. The sum and substance of plaintiff's case in trial court is that agreement to sale Exhibit 66 was executed on 02.06.1988. As agreed, government encumbrances, which were to be borne by plaintiff, are duly paid and there is documentary evidence to that extent. Plaintiff

also claimed to have been put in possession on the day of agreement to sale itself.

14. All above averments, contentions and pleadings are refuted by defendant by examining herself at Exhibit 70 along with her evidence and written statement, she has also placed on record copies of replies dated 23.02.1993 as well as 05.04.1993 to the notices of plaintiff and also placed on record application for temporary injunction, order below Exhibit 6 in suit No. 163 of 1993 and certified copy of appeal preferred by her against the order of Tahsildar in respect of making entries of 8 anna share in the name of plaintiff in possession column. Precisely defence is that, there was no agreement to sale as alleged. She has not received any earnest amount as claimed. Rather, it was a simple hand loan transaction which is surreptitiously converted into agreement to sale. Plea of plaintiff about plaintiff to be in possession is also discarded in toto.

15. On going through the record, more particularly judgment of first appellate court, it is noticed that after hearing learned counsel for appellant and marking absence of learned counsel Mr. D. K. Chaudhary for respondent original defendant even though repeatedly called, and taking note of the fact that no cross objection or cross

appeal was filed questioning the findings of trial court which went against the defendant, learned trial court observed in para 5 as under :

“5. I have perused the entire case record and bestowed my thoughtful considerations to the submissions made by Mr. Akole, the learned counsel for the appellant. Since no cross-objection / cross appeal has been filed, the findings in respect of the issues, which has been answered against the defendant, has become final and they are not amenable to reassessment. Hence, the only point, which arise for my determination, is as under, along with my findings there against, for the reasons to be enumerated in subsequent paragraphs.

Points

Findings

1. Whether the learned trial court had exercised its discretion in legal and proper manner while refusing the relief of specific performance of contract by granting the relief of refund of consideration along with interest thereon?

Yes.

2. What order ?

The appeal is dismissed.

16. Thus, learned first appellate court formulated only and sole point for determination as above and appeal came to be dismissed confirming the judgment and order passed by learned Jt. CJSD, Jalgaon dated 29.04.1995.

17. Here, the fundamental and principal ground in Second Appeal is non-compliance of Order XLI Rule 31 of CPC and hence, prayers for remanding back the matter to the first appellate court for fresh and proper re-appreciation.

18. For proper apprehension and appreciation order XLI Rule 31 is reproduced as under :

“Order XLI : Appeals From Original Decrees

1. to 30.

31. Contents, date and signature of judgment.—The judgment of the Appellate Court shall be in writing and shall state—

- (a) the points for determination;
- (b) the decision thereon;
- (c) the reasons for the decision; and
- (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled, and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

19. Therefore short ground for consideration in this Second Appeal is, whether there is compliance of Order XLI Rule 31 in letter and spirit.

20. There are catena of judgments on the legal requirements of Order XLI Rule 31. Useful reference could be made to the known decisions and precedents on the above aspect wherein scope, power and duty of first appellate court while exercising powers under Section 96 of C.P.C. read with Order XLI Rule 31 are enunciated.

In ***Kurian Chacko v. Varkey Ouseph*** reported in AIR 1969 Ker 316, it has been observed as under ;

“2] An appellate court is the final Court of fact ordinarily and therefore a litigant is entitled to a full and fair and independent consideration of the evidence at the appellate stage. Anything less than this is unjust to him and I have no doubt that in the present case the learned Subordinate Judge has fallen far short of what is expected of him as an appellate Court.”

In ***Santosh Hazari v. Purushottam Tiwari*** reported in (2001) 3 SCC 179, the Hon’ble Apex Court in para 15 has observed that;

“15. The appellate Court has jurisdiction to reverse or affirm the findings of the Trial Court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate

Court must, therefore, reflect its conscious application of mind, and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate Court. while reversing a finding of fact the appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first appellate Court had discharged the duty expected of it.”

In ***H. K. N. Swami v. Irshad Basith***, reported in (2005) 10 SCC 243, the Hon’ble Apex Court reiterated the same principle in para 3 of the judgment, which reads as under :

“3. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title.”

Very recently, the Hon'ble Apex Court in the case of ***Manjua and others v. Shyamsundar and others***, reported in (2022) 3 SCC 90, observed as under :

“8. Section 96 of the Code of Civil Procedure, 1908 (for short, ‘CPC’) provides for filing of an appeal from the decree passed by a court of original jurisdiction. Order 41 Rule 31 of the CPC provides the guidelines to the appellate court for deciding the appeal. This rule mandates that the judgment of the appellate court shall state

- (a) points for determination;*
- (b) the decision thereon;*
- (c) the reasons for the decision; and*
- (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.*

Thus, the appellate court has the jurisdiction to reverse or affirm the findings of the trial court. It is settled law that an appeal is a continuation of the original proceedings. The appellate court’s jurisdiction involves a rehearing of appeal on questions of law as well as fact. The first appeal is a valuable right, and, at that stage, all questions of fact and law decided by the trial court are open for re-consideration. The judgment of the appellate court must, therefore, reflect conscious application of mind and must record the court’s findings, supported by reasons for its decision in respect of all the issues, along with the

contentions put forth and pressed by the parties. Needless to say, the first appellate court is required to comply with the requirements of Order 41 Rule 31 CPC and non-observance of these requirements lead to infirmity in the judgment.”

21. Keeping above settled precedents in mind and on reverting to the case in hand, it is noticed that the first appellate court has not adhered to the mandate spelt out in Order XLI Rule 31 of CPC. It is so evident from the body of the judgment, as only learned counsel for appellant was heard and solitary point for determination, reproduced above, was formulated and answered. Here, suit was for specific performance of contract. It was expected of first appellate court to re-appreciate all 15 issues casted by learned trial judge and ought to have independently recorded findings whether learned trial court was correct in the assessment while recording conclusion to each of the issues independently. Apparently this exercise of re-appreciation of all the issues and findings has not been undertaken by the first appellate court and resultantly, the mandatory requirement has not been complied with.

22. Learned counsel for respondent/original defendant merely supported the findings of first appellate court by relying on above

rulings which are legal issues. Admittedly, even when learned trial court has answered issue nos. 1 to 3, 7 and 8 against respondent/defendant, there is no cross objection or cross appeal.

23. In the light of above, there is force and substance in the point raised in Second Appeal regarding non compliance of Order XLI Rule 31 as a result of which, this Court is constrained to grant the prayers of remanding the appeal back for fresh consideration in toto, i.e. on all issues, by affording opportunity to both sides to re-agitate their claims. Hence, the following order:

ORDER

- I. Second Appeal is partly allowed.
- II. The matter is remanded to the first appellate court for fresh consideration.
- III. The first appellate court shall make every endeavour to deal with and decide the appeal as expeditiously as possible and more particularly within a period of six months from the date of appearance of the parties.
- IV. Pending Civil Application stands disposed of.

[ABHAY S. WAGHWASE, J.]