

---

**(2012) 02 BOM CK 0241**

**In the Bombay High Court**

**Case No :** Second Appeal No. 40 of 2011 with Civil Application No. 6484 of 2011

Bashiroddin Mohammad Afazal (died) through L.Rs. APPELLANT  
Niyajoddin Bashiroddin Mujawar and Others

Vs

Nasruddin Mohammad Fajal Mujawar and Jiauddin Jaharoddin RESPONDENT  
Mujawar

---

**Date of Decision :** 03-02-2012

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27

**Citation :** (2012) 2 ALLMR 787 : (2012) 3 BomCR 124 : (2012) 3 MhLj 665

**Hon'ble Judges :** S.S. Shinde, J

**Bench :** Single Bench

**Advocate :** S.S. Kazi, for the Appellant; V.G. Mete, for the Respondent

---

**Judgement**

S.S. Shinde, J.—This appeal was heard for admission on 09.08.2011 and this Court was pleased to issue notice to the respondents which was made returnable on 23.09.2011. Thereafter, the matter was heard from time to time. By order dated 20th December, 2011, the record and proceedings were called and accordingly the record and proceedings are received by the Registry. Those are placed for perusal before this Court. At the outset the Counsels appearing for the parties submit that this Second Appeal can be disposed of finally at the admission stage.

2. Learned Counsel appearing for the appellants submits that the Lower Appellate Court reversed the findings of the Trial Court without framing all points for its consideration/determination. The point of limitation which was specifically dealt with by the Trial Court was not framed by the Lower Appellate Court. It is submitted that in view of authoritative pronouncement of the Supreme Court in the case of Santosh Hazari Vs. Purushottam Tiwari (Dead) by LR. 2001 S.C.965., the Appellate Court is duty bound to frame all necessary points for consideration/determination. However, in the instant case the point of limitation was not framed by the Lower Appellate Court. It is further submitted that the

Lower Appellate Court while reversing the findings of the Trial Court has ordered and declared that the appellant is owner and is in possession of 74 x 32 ft. in Municipal House No.9-5 (1134). It is specific contention of the Counsel appearing for the appellants that the application at Exh.42 was filed by the plaintiffs i.e. appellants before the Lower Appellate Court for amendment of the plaint. Said application was allowed by the Lower Appellate Court on same day without affording opportunity of hearing to the respondents therein and on next day final judgment is pronounced. According to learned Counsel appearing for the appellants, in original plaint the declaration was sought by the plaintiff for area 74 x 64 ft. However, before the Appellate Court, application was filed at Exh.42 for correction of said area from 74 x 64 ft to 74 x 32 ft. However, without giving any opportunity to the appellants who are original defendants, said application is allowed on same day. That caused great prejudice to the appellants. If the Lower Appellate Court wanted to allow said application, it should have been done after due notice to the respondents and after giving them opportunity to put forth their contention. Learned Counsel further argues that even after such application is allowed, in the light of amended plaint, the issues were required to be re-casted. However, such procedure has not been followed by the Lower Appellate Court. It is further submitted that the Trial Court after taking into consideration entire evidence placed on record has taken a view that the plaintiff has failed to prove his title over the suit property. No documentary evidence was placed on record to show that the plaintiff has valid title over the suit property. The Trial Court after assessing evidence placed on record, which was only in the nature of tax receipts by Municipal Council has reached to the conclusion that the plaintiff did not produce on record any satisfactory evidence showing his title over the suit property. Learned Counsel further argues that so far the prayer for declaration is concerned, witnesses who were examined by the plaintiff have deposed that the suit property had taken on rent by the plaintiff from the defendant. According to learned Counsel appearing for the appellant, in absence of satisfactory evidence on record and without framing points for its adjudication the Lower Appellate Court was not correct in reversing the findings of the Trial Court and therefore this Second Appeal deserves consideration.

3. On the other hand, learned Counsel appearing for the respondents herein who are original plaintiffs, invited my attention to Exhs. 95 to 109, which formed part of original record and submitted that all these documents would clearly show that the original plaintiffs have continuously paid tax to the Municipal Council for House No. 9-5. It is further submitted that the relationship between the parties is not in dispute. Learned Counsel also tried to submit that there was some compromise between the parties in Civil Suit No. 89 of 1959 and the plaintiffs and respondents, perhaps their predecessors agreed to retain respective shares as stated in the said compromise. Accordingly the original plaintiffs are in possession of House No.9-5. The appellants herein who are defendants are in possession of House No.9-6. Therefore, according to learned Counsel appearing for original plaintiffs, the Lower Appellate Court while allowing the prayer of the

plaintiffs for declaration of ownership and possession had taken into consideration the Municipal record and other documents for 20 to 25 years and then allowed the appeal. Therefore, this Court may not interfere in the impugned judgment and order. It is submitted that since the original plaintiffs are in possession of the suit property atleast for more than 20 to 25 years, as it is evident from the documents produced on record by the plaintiffs, the Lower Appellate Court has rightly accepted the case of the plaintiffs that by way of prescription also they have become owner of the suit property and they are in continuous possession. Therefore, this Court may not interfere in the findings recorded by the Lower Appellate Court. Therefore, according to learned Counsel appearing for the respondents herein the Second Appeal deserves to be dismissed.

4. I have given due consideration to the rival submissions. Upon perusal of the issues framed by the Trial Court and upon perusal of points framed by the Lower Appellate Court, on comparison, I find that the points framed by the Lower Appellate Court are only restricted to the claim of possession and declaration and consequential reliefs. The Lower Appellate Court in its judgment in para 15 has considered the point of limitation and also specific issue was framed as issue No.4-C on limitation. However, such point is not framed by the Lower Appellate Court. Secondly, it is admitted position that Exh.42 i.e. application filed by the plaintiff for amendment of the plaint was allowed by the Lower Appellate Court on same day, when the application was presented. It was incumbent upon the Lower Appellate Court to issue notice to the defendants and then to pass appropriate orders on such application. Though learned Counsel appearing for the respondent herein strenuously contended that the defendants were absent on the date when the application was filed and taken up for hearing, such argument is required to be rejected. It is not the case that the Lower Appellate Court had issued notices on said application or atleast deferred the hearing of the said application to enable the defendants to putforth their case. Therefore, the Lower Appellate Court was not correct and justified in allowing application for amendment of the plaint on same day without notice to the appellants herein. The amendment was vital and perhaps the defendants could have got opportunity if in-case there was notice on such application by the Lower Appellate Court to pass for recasting the issues.

However, the Lower Appellate Court did not issue such notice to the appellants herein. Therefore, I find considerable force in the arguments of learned Counsel appearing for the appellants that allowing such application without notice to the defendants was contrary to the procedure. I also find considerable force in the argument of learned Counsel for the appellants that the Lower Appellate Court hurriedly decided said application on the same day, and on next day final judgment in the appeal came to be pronounced.

5. Learned Counsel appearing for the original plaintiffs/respondents herein made attempt to submit before this Court that there was compromise between the

parties in Civil Suit No.89 of 1959. However, from perusal of record and also from reading judgments of the Courts below, no such point was framed or considered by the Courts below. Therefore, that point cannot be considered that too in absence of any material on record by the respondents herein to that effect.

6. Since this Court is finally hearing the Second Appeal, upon hearing Counsels for the parties and upon perusal of the pleadings, annexures thereto the following substantial questions of law arise for consideration in this Second Appeal.

i) Whether the Lower Appellate Court failed in its duties in not framing all points for its determination/consideration including point of limitation?

ii) Whether the Lower Appellate Court was justified in passing the orders on application at Exh.42 on the day of presentation without notice to the respondents?

iii) Whether the Lower Appellate Court has revisited all findings recorded by the Trial Court while reversing the same?

iv) Whether the Lower Appellate Court is right in granting relief of declaration of ownership and possession merely relying upon Exhs. 92, 95 to 109, which were placed on record?

7. Admit, on aforesaid substantial questions of law. On admission, learned Counsel appearing for the respondents waives service.

8. At this stage learned Counsels for the parties submit that they have no objection if R.C.A. No. 164 of 1999 is restored to its original file and same is heard by the Lower Appellate Court afresh. Therefore, in the aforesaid background instead of entering into merits of the matter, ends of justice would meet, if the matter is remitted back to the Lower Appellate Court with direction to the Lower Appellate Court, to frame all the necessary points for its determination/consideration including point of limitation and also to give opportunity to the appellants herein to file their reply to Exh.42, and to decide Exh.42 and also appeal afresh. Original plaintiffs also wish to file application under Order 41 Rule 27 of C.P.C. for bringing certain documents/order in Civil Suit No. 89 of 1959 on record.

9. Therefore, in the light of above, the impugned judgment and order passed by District Judge-1, Osmanabad, dated 01.10.2010 in R.C.A. No. 164 of 1999 is quashed and set aside. R.C.A. No. 164 of 1999 is restored to its original file. Application at Exh.42 also stands restored to its original file. The Lower Appellate Court after hearing the parties shall frame all the necessary and relevant points for its determination/consideration and then proceed to decide the appeal afresh on merits. The Lower Appellate Court shall also re-hear application at Exh.42 and then after giving opportunity to the appellants herein, pass appropriate orders on said application. It is made clear that any observations on merits of the matter in this order will not come in the way of the parties while prosecuting the R.C.A.

and the Lower Appellate Court will hear said R.C.A. by giving reasonable opportunity of hearing to the parties. It is made clear that, this Court has not expressed any opinion on merits and it is left open to the Lower Appellate Court to decide the matter on merits.

10. Both the sides are claiming that they are in possession of the suit property. Therefore, till the R.C.A. No. 164 of 1999 is decided afresh by the Lower Appellate Court, the parties shall maintain status quo as to the possession of the suit property as available on today. It is needless to clarify that whatever interim order was operating during the pendency of the Second Appeal, would merge in this order and today's order will govern the field.

11. In the result, the impugned judgment and order is quashed and set aside. The R.C.A. is restored to its original file. Since the parties are litigating for considerable period, it is desirable that the R.C.A. No. 164 of 1999 is heard and finally decided within six months from the receipt of this order. The record and proceedings should be sent back forthwith by the Registry without any delay to the concerned Court.

12. The Second Appeal stands disposed of. Consequently, the Civil Application also stands disposed of.