
(2013) 04 PAT CK 0073

In the Patna High Court

Case No : Second Appeal No. 418 of 1994

Chakrapani Dubey @ Chandramani Dubey @ Bacha Dubey
and Others

APPELLANT

Vs

Babu Nand Dubey and Others

RESPONDENT

Date of Decision : 17-04-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 31, 100, 96

Citation : (2013) 3 PLJR 196

Hon'ble Judges : Chakradhari Sharan Singh, J

Bench : Single Bench

Advocate : Shashi Shekhar Dwivedi, Ranjan Kumar Dubey and Mrs. Sangeeta Sharma, for the Appellant; Vishwajeet Kumar Mishra, Anjani Parashar and Sanjay Kumar Pandey, for the Respondent

Final Decision : Dismissed

Judgement

Chakradhari Sharan Singh, J.—The appellants, who were defendants before the trial Court, are aggrieved by the judgment and decree dated 8.9.1994 passed by learned 6th Additional District Judge, Siwan in T.A. No. 51 of 1991, whereby he has affirmed the judgment and decree dated 12.8.1991 passed by learned 4th Subordinate Judge, Siwan in T.S. No. 123 of 1986 and thus dismissed the first appeal. The trial Court by judgment and decree dated 12.8.1991 and 26.8.1991 respectively had decreed the suit in favour of the plaintiffs/respondents ex parte.

2. According to the plaintiffs' case one Ramjee Dubey happened to be the common ancestor of the joint family to which the plaintiffs and defendants belonged. Ramjee Dubey had three sons, namely, Nand Lai, Shiv Dayal and Krishna. Shiv Dayal had a son Dal Singar who is said to have died issueless leaving behind his widow Raj Bansi Devi. Krishna had three sons. However, his heirs were formally impleaded as defendant second party though they were in no way connected with the disputed land.

3. Nand Lal is said to have died leaving behind two sons, namely, Janki and Hans

Raj. Hans Raj had two sons Ram Bhujawan and Mahendra. Both of them died young. Wife of Hans Raj Sokha Kuer had become invalid and, therefore, she kept a lady, namely, Baudhi to look after her. Some property which devolved upon Sokha Kuer was entered in the cadastral survey in the name of Baudhi for the services rendered by her to Sokha Kuer. Sokha Kuer and Hans Raj died after sometime. The property of Hans Raj and Sokha Kuer thus, devolved upon the branch of Janki, the brother of Hans Raj.

4. It was the plaintiffs' case that Janki and his heirs always remained joint with Hans Raj. Janki had two sons Murat and Ram Sahay. Janki and Ram Sahay died before cadastral survey operation. Ram Sahay had only one son Satya Narain. As Murat and Satya Narain were minors at the time of cadastral survey and Janki and Ram Sahay had died before cadastral survey, Hans Raj acted as a karta of the joint family.

5. The plaintiffs further pleaded that Hans Raj, accordingly, prepared three separate papers of land in the name of his wife Sokha Kuer, Murat (son of Janki) and Satya Narain son of Ram Sahay. As per the plaintiffs' case, there was no partition between the branch of Janki and Hans Raj and after death of Hans Raj entire property of Hans Raj came in possession of Murat and branch of Satya Narain. The plaintiffs claimed that the property which were recorded in the name of wife of Hans Raj and Boudhi remained inoperative and, therefore, half share each of the entire property should be allotted in favour of the plaintiffs and defendants. The plaintiffs also sought for a declaration that the gift deed dated 24.9.1913 executed by Sokha Kuer in the name of Satya Narain son of Ram Sahay be declared as void and inoperative.

6. The appellant No. 1 was defendant No. 1 before the trial Court and appellant Nos. 3, 4 and 5 defendant Nos. 3, 4 and 5 before trial Court. Appellant No. 2, widow of Gokhul Dubey died during the pendency of second appeal. Her name was accordingly expunged. Appellant No. 1 is son of Gokhul Dubey and grandson of late Satya Narayan Dubey. Appellant Nos. 3, 4 and 5 are daughters of Gokhul Dubey and grand-daughters of Satya Narayan.

7. The genealogical table of the family as claimed by the plaintiffs is being given hereinbelow for the sake of convenience:--

8. Defendant No. 1 who is the appellant herein, filed his written statement. He disputed that Ramji Dubey was the common ancestor and instead pleaded that Gopi Dubey was father of Nandlal and Shiv Dayal was father of Beni Pd. Dubey and Ram Bansraj Dubey. He claimed that Dal Singar was son of Beni Prasad and Rajbanshi was not the wife of Dal Singar. It was contended that Satya Narain son of Ram Sahay used to look after Sokha Kuer, the wife of Hans Raj and it was not Boudhi who according to the plaintiff looked her after. It was further claimed that Hans Raj died in separation, whereafter his wife Sokha Kuer inherited his property which he came in possession and his name was accordingly, recorded in the revisional survey Khatiyan. Appellant/defendant No. 1 as has been

mentioned above is the grandson of Satya Narain. The defendant No. 1 also contended in his written statement that there was no jointness in the branch of Murat and Ram Sahay and they" had separated much before the revisional survey and, therefore, their names were entered into the Khatiyani according to their shares. It was thus, contended that there was no property at all which was required to be partitioned. It also appears that defendant Nos. 5, 7 and 9 also filed their written statement asserting that Ramji had alias name Gopi Dubey. They also asserted that there was no partition amongst the heirs of Nand Lai. They thus, supported the plaintiffs" case.

9. The trial Court, on the basis of the rival pleadings framed altogether six issues including the main issue being issue "Gha" which reads thus:--

("Whether there is unity of title and possession over the suit property between the plaintiffs and the defendants?")

10. Before referring to the findings of the trial Court it would be apt to refer to the chain of events leading to ex-parte trial of the suit. Title Suit No. 123 of 1986 was filed in the Court of Sub-Judge, Siwan on 24.3.1986. Defendant No. 1 appeared in the suit on 17.6.1986. On 23.8.1986 a time petition was filed on behalf of defendant No. 1 for filing written statement. On 26.8.1986 defendant No. 1/appellant filed his written statement. Thereafter, the defendants absented themselves from proceedings of the suit. It further appears that under an order of the trial Court on 4.9.1989, the record of the suit were seen by the conducting lawyer for the defendant No. 1 but after that the defendant No. 1 neither appeared in the Court nor filed any petition. Ultimately, the suit was set for ex parte hearing. The plaintiffs thereafter appeared and the ex parte proceeding started. After more than one year on 6.12.1990 the defendant No. 1 appeared and filed a petition to recall the order for ex parte trial. On 18.12.1990 the defendant/appellant No. 1 pressed the application for recall of the order for ex parte trial by filing another application. On 20.12.1990 the defendant No. 1/appellant filed a petition for time. Vide order dated 8.1.1991 passed by the learned trial Court, the defendants were allowed to contest the suit on payment of cost of Rs. 250/- in the interest of justice. The defendant No. 1 did not pay the cost and instead filed an application before the trial Court on 8.2.1991 stating that he had to move before High Court against the said order dated 8.1.1991. It appears that the defendants filed the revision application against the order dated 8.1.1991 vide Civil Revision No. 534 of 1991. In the absence of any interim order from the High Court, the trial Court proceeded with the trial and passed the ex parte judgment dated 12.8.1991 in T.S. No. 123 of 1986, apparently for the reason that the defendants did not comply with the order dated 8.1.1991 by making payment of cost of Rs. 250/-.

11. Indisputably, appellant/defendant No. 1 did not adduce any evidence before the Courts below. In view of the above, on the basis of the evidence adduced by the plaintiffs both oral and documentary, learned trial Court came to the finding that there was unity of title and possession over the suit property between the

plaintiffs and the defendant first set and, accordingly, decreed the suit in favour of the plaintiffs. Learned trial Court held that the plaintiff was entitled for half share in the suit property.

12. Against the judgment and decree passed by the learned trial Court an appeal was preferred vide Title Appeal No. 51 of 1991 in the Court of learned District Judge, Siwan setting forth altogether 11 grounds of objection. On perusal of the memorandum of appeal, it would appear that out of 11 grounds, 9 grounds i.e. ground Nos. 2 to 10 raised objection to the judgment and decree of the trial Court only to the effect that the suit was wrongly tried ex parte. It would appear from the memo of appeal filed before the first appellate Court that the main thrust of the appellants' challenge to the judgment and decree of the learned trial Court was against ex parte trial of the suit. For the benefit of quick reference, ground Nos. 2 to 10 taken by the appellants in the first appeal are being quoted hereinbelow:--

(2) For that the learned lower court has acted illegally and arbitrarily in trying the suit ex parte, and preventing the appellant from contesting the same.

(3) For that since the appellant had already entered appearance and filed his written statement the suit could not have been posted for ex parte hearing nor it could have been tried ex parte.

(4) For that the learned court below has acted illegally in awarding an unreasonably heavy amount of Rs. 2507-as adjournment cost by order dated 8.1.1991 and making payment of cost a condition precedent for the appellant for contesting the suit.

(5) For that the learned court below has acted in undue haste. Since the appellant had already preferred C.R. No. 534 of 1991 against the order dated 8.1.1991 which, is still pending disposal before the Honourable High Court of Judicature at Patna, the learned lower Court ought to have stayed its hands and waited for the result of C.R. No. 534 of 1991 before hearing and disposing of the suit ex parte.

(6) For that realizing the attitude of the learned lower Court, the appellant tendered the amount of costs awarded by order dated 8.1.1991 to respondents first set and their lawyer who refused to receive the same whereupon the appellant filed application dated 9.8.1991 seeking permission to deposit the amount of cost by challan which was rejected by the learned court below the same day,

(7) For that the learned lower Court ought to have allowed appellants petition dated 9.8.1991 and permitted him to deposit the cost and to contest the suit.

(8) For that the learned Court below has grossly erred in preventing the appellant from contesting the suit and participating in trial.

(9) For that on account of denial of opportunity of contest and hearing to the

appellant, serious prejudice has been caused to him and there has been a miscarriage of justice.

(10) For that the appellant has all along been and is still ready and willing to contest the suit.

13. Ground Nos. 1 and 11 read as follows:--

(1) For that the impugned judgment and decreed are bad in law and on facts and are liable to be set aside.

(11) For that the impugned judgment and decree are liable to be set aside on other ground as well which shall be urged at the time of hearing.

14. Learned First Appellate Court, in view of the grounds taken on behalf of the appellants pertaining to ex parte trial of the title suit considered the aspect and came to a conclusion that the learned trial Court rightly passed the ex parte judgment which required no interference. It is true, that the learned First Appellate Court in its judgment did not discuss the evidence and material on record available in title suit on the basis of which learned trial Court had reached to the findings of fact and decreed the suit in favour of plaintiff.

15. Thereafter, the present second appeal has been filed by the appellants challenging the judgment and decree dated 8.8.1994 passed by the learned Additional District Judge, Siwan in T.A. No. 51 of 1991, whereby he affirmed the judgment and decree dated 12.8.1991 passed by learned Subordinate Judge, Siwan in T.S. No. 123 of 1996.

16. In the second appeal the appellants raised altogether nine substantial questions of law. The substantial questions of law particularly question Nos. 2, 3, 4 and 5, relate to findings of the learned trial Court which according to the appellants were erroneous on the basis of evidence available on record and that it was based on such document which were neither proved nor legally brought on record.

17. The other substantial questions of law relate to assailment of the judgment of the First Appellate Court on the ground of the same being cryptic, non-consideration of merits and on other technical grounds.

18. The second appeal was admitted by this Court vide order dated 29.11.1994 formulating the following substantial questions of law:--

(1) Whether on the alleged conduct of the defendants-appellants the suit could be decreed?

(2) Whether sufficient grounds were made out to decree the suit ex parte?

Any other question that may be raised with permission of the Court.

19. At the time of final hearing of present second appeal, Mr. Shashi Shekhar Dwivedi, learned Senior Counsel appearing on behalf of the appellants raised

three more questions of law which according to him were substantial questions of law which the present second appeal involved, summary of which is as follows:--

1. Whether in view of the pleadings of the parties, the suit could be decreed in absence of the following issues and determination thereof:--

A. Whether the C.S. entry and R.S. entry in the name of Sokha Kuer are incorrect?

B. Whether the registered gift deed dated 24.9.2013 executed by Sokha Kuer to Satya Narayan Dubey never having been challenged nor a prayer regarding the same made in the suit, the instant suit for partition could be decreed in favour of the plaintiff to the extent of one half?

2. Whether when the aforesaid issues not having been framed and no finding on them having been recorded by either of the courts below, the whole proceeding in the suit amounts to mistrial?

3. Whether the appellate Court judgment is at all a judgment in the eyes of Order 41 Rule 31 of the CPC and is simply perverse?

20. Mr. Shashi Shekhar Dwivedi, learned senior counsel appearing on behalf of the appellants has emphatically urged that on the basis of the pleadings of the parties, learned Trial Court was obliged to frame issues as indicated above and in the absence of such issues having been framed, proceeding before the trial Court was a mistrial and judgment on the basis of such proceeding had no sanctity in the eye of law. He has further submitted that it was obligatory for the First Appellate Court to have considered the aspect as to whether the trial Court correctly framed the issues and arrived at the findings as per the evidence on record, it being the final Court of fact, even though no such ground was specifically taken in the first appeal. He submits that the learned First Appellate Court failed to comply with the requirement of Order 41 Rule 31 of the CPC as the judgment does not contain points for determination nor the reasons for the decision and, therefore, the same cannot be treated to be a judgment within the meaning of the said provision of the Code of Civil Procedure.

21. Learned Senior Counsel has submitted that there was specific averment in the written statement that Sokha Kuer had made a gift in favour of Satya Narain Dubey and there was partition in the family before revisional survey. According to him there was also specific assertions in the written statement that Janki and Hansraj had partitioned before the cadastral survey operation. However, no issue was framed by the learned trial Court as regards correctness of entries in cadastral survey and revisional survey Khatiyan which show that Sokha Kuer was the absolute owner of the suit property. He also contended that as the registered deed of gift executed by Sokha Kuer in favour of Satya Narain was not challenged, the trial Court could not decree the suit in favour of the plaintiffs.

22. Assailing the order of learned First Appellate Court Mr. Dwivedi has submitted that it did not touch the merits of the case and decided the appeal considering

the point of ex parte trial only, as taken by the appellants.

23. He has further submitted that if the names of female members are recorded in the record of rights then there would be presumption of partition in the family. In support of his contention he has placed reliance on the judgments reported in AIR 1938 67 (Privy Council) and Mt. Afti Vs. Mt. Sukni and Others, .

24. This is to be noted that this is an admitted position that these points which are being raised by the learned Senior Counsel Shashi Shekhar Dwivedi in course of hearing of the second appeal were not set forth in the memo of appeal before the First Appellate Court. The memo of appeal before the First Appellate Court was largely confined to the question of ex parte trial by the trial Court. No ground has been taken in present appeal that some point was urged before the learned First Appellate Court to show that the findings of the trial Court were incorrect/erroneous even in course of hearing, which was not considered by the first appellate Court. Learned senior Counsel for the appellants has submitted that the appellants were not required to raise such grounds before the first appellate Court and it was the duty of the first appellate Court himself to see whether the findings of the trial Court were based on correct appreciation of evidence after framing of issues as required under the Code of Civil Procedure. He has placed reliance on Supreme Court judgment reported in Ramesh Chand Ardawatiya Vs. Anil Panjwani, , in order to contend that even if the suit proceeds ex parte the necessity of proof by plaintiff of his case to the satisfaction of the Court cannot be dispensed with.

25. Learned Senior Counsel for the appellants has also placed reliance on another judgment of the Supreme Court reported in Mohd. Laiquiddin and Another Vs. Kamala Devi Misra (Dead) by L.Rs. and Others, to contend that the High Court while dealing with an appeal u/s 100 of the CPC could entertain even a new question of law which was raised before it for the first time.

26. Learned Counsel appearing on behalf of the respondents, however, has contended that none of the grounds which are being raised in course of argument in the present second appeal on behalf of the appellants were raised before the First Appellate Court. Such questions he submits, cannot be gone into by the High Court in exercise of its jurisdiction vested u/s 100 of the Code of Civil Procedure. Learned counsel for the respondents has also placed reliance on a judgment reported in India Navigation Company Vs. Haryana State Industrial Development Corporation, to contend that a new plea raised for the first time at the stage of second appeal cannot be entertained.

27. Learned counsel for the respondents has submitted that the substantial questions of law framed by this Court at the time of admission in fact do not arise in the present second appeal in the facts and circumstances of the case. He has submitted, with reference to the judgment of the trial Court that it was not because of the conduct of the defendants/appellants that the suit was decreed but the same was based on appreciation of evidence adduced before the trial

Court. He further submits, referring to the judgment of the learned First Appellate Court that there were sufficient grounds for the trial Court to decree the suit *ex parte*.

28. I would be first dealing with the substantial question of law as formulated by this Court at the time of admission of the present second appeal which has been noted in paragraph 18 of this judgment. The first question which has been formulated is "whether on the alleged conduct of the defendants-appellants the suit could be decreed?" From the judgment of the learned trial Court, it will appear that on the basis of evidence of plaintiffs' witnesses learned trial Court came to a finding that there was jointness between plaintiffs and defendants first party and held that the plaintiffs were entitled for half share in the disputed property. Learned trial Court has considered the evidence on record and the fact that the defendants-appellants did not bring on record any evidence in support of their case of partition as alleged in the written statement. Learned trial Court came to a specific finding that the plaintiffs were entitled for half share in the suit property which was not partitioned by metes and bounds. It cannot, therefore, be said that the learned trial Court decreed the suit on the alleged conduct of the defendants-appellants; rather it decreed the suit on the basis of the evidence available on record. It could not be pointed out in course of argument, with reference to the judgment of the learned trial Court that the finding of the trial Court was based on the alleged conduct of the defendants appellants. In view of the above, in response to the first substantial question of law, I am of the view that it was not the conduct of the defendants-appellants which led to suit being decreed in favour of the plaintiffs; rather the same is based on appreciation of evidence adduced in course of trial.

29. As regards the second question i.e. "whether sufficient grounds were made out to decree the suit *ex parte*?", reference may be made to the details of chain of events which I have given in paragraph 11 of the present judgment. Those facts are not in dispute. This is not in dispute that after filing written statement the defendants absented themselves from the proceeding of the suit. The records of the suit were examined by learned conducting lawyer for the defendants on 4.9.1989. Even thereafter the defendants did not appear and, accordingly, vide order dated 19.9.1989 the suit was directed to be heard *ex parte*. On 8.12.1990 the defendants appeared and filed a petition to recall the *ex parte* order. Vide order dated 1.8.1991 the defendants were allowed to contest the suit on payment of cost of Rs. 250/-. The defendants did not pay the cost on the plea that they would be questioning the order by filing a Civil Revision application before the High Court. It seems that Civil Revision No. 534 of 1991 was filed. However, in the absence of any order of stay learned trial Court proceeded *ex parte* and finally decreed the suit.

30. This may be noticed that in the present memo of second appeal the legality of *ex parte* hearing has not been questioned as would appear from the substantial questions of law formulated in the memo of appeal. Even in course of

argument at the time of final hearing nothing has been pointed out by the learned senior counsel appearing on behalf of the appellants that there was no ground to decree the suit ex parte. The main plea which has been taken in the present second appeal is that the Courts below were duty bound to record their finding on the basis of the evidence available on record.

31. However, having noted above the circumstances, I am of the considered opinion that sufficient grounds has been made out for the trial Court to decree the suit ex parte.

32. Coming to the additional substantial questions of law raised on behalf of the appellants in course of hearing as has been noted in paragraph 21; I would be dealing with third question first upon which much emphasis has been given by the learned senior counsel appearing for the appellants. He has emphatically submitted that the judgment of the First Appellate Court was not complied with the mandatory provisions of Order 41 Rule 31 of the CPC inasmuch as it failed to state the points of determination, decision thereon and the reasons for such decisions. He submits that it was obligatory on the part of the First Appellate Court to have gone through the evidence on record and considered the entire matter including the judgment under appeal. This having been not done by the First Appellate Court, according to the learned Senior Counsel, the judgment of the First Appellate court is perverse. He has vehemently submitted that even if in the memorandum of appeal the specific grounds were not taken by the appellants, it was duty of the First Appellate Court to come to its independent finding after considering the evidence available on record.

33. In order to deal with his submission it would be proper to refer to the provisions under Order 41 of the Code of Civil Procedure. Order 41 Rules (1)(2) caste a duty upon the appellants to set forth concisely and under distinct heads, the grounds of objection to the decree appealed from and the same reads as follows:--

(2) Contents of memorandum.--The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively.

34. Rule 2 of Order 41 debars the appellants from urging or being heard in support of any ground of objection not set forth in the memo of appeal but at the same time it enables the appellate court to decide the appeal on other grounds provided the party who may be affected has had a sufficient opportunity of contesting the case on that ground. Order 41 Rule 2 is being quoted hereinbelow:--

2. Grounds which may be taken in appeal.--The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objections set forth in the

memorandum of appeal or taken by leave of the Court under this rule:

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

35. Order 41 Rule 31 of the Code provides for the manner in which the judgment of the appellate Court is to be delivered. The said provision is being quoted hereinbelow:--

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 Judges concurring therein.

36. In my opinion, the question of compliance of provisions of Rule 31 of Order 41 of the Code with respect to a point will arise only when such point is urged on behalf of the appellants in order to demonstrate that the judgment of the trial Court is incorrect. If the memorandum of appeal does not contain specific ground of objection to the decree appealed from, such ground cannot take the place for point for determination as contemplated by Rule 31 of Order 41. I am of the view that only after the appellant discharges his duty to urge a point/ground of objection to the decree appealed from, the appellate Court will be required to formulate points for consideration with respect to such ground or points. It is not the spirit of Order 41 Rule 31 that it casts a duty upon the appellate Court to find out as to what points for determination would be and then proceed to give a decision on those points.

37. In this connection, reference may be made to a three Judge judgment of the Supreme Court reported in Thakur Sukhpal Singh Vs. Thakur Kalyan Singh, , wherein the Supreme Court has held that it is the duty of the appellant to show that the judgment under appeal is erroneous for certain reasons and it is only after the appellant has shown this that the appellate Court would call upon the respondents to reply to the contention and it is only then that the judgment of the appellate Court can fully contain all various matters mentioned in Order 41 Rule 31. The Supreme Court in this case held that provisions of Rule 31 should be reasonably construed and should be held to require various particulars to be mentioned only when the appellant has actually raised certain points for determination by the appellate Court, and not when no such points have been raised. In the present case, as I have indicated above, out of 11 grounds taken

in the memo of appeal before the First Appellate Court, nine related to ex parte trial by the trial Court. The 11th ground mentioned only "for that the impugned judgment and decree are liable to be set aside on other ground as well which shall be urged at the time of hearing". In the present memo of second appeal no ground has been taken that any ground was urged before the First Appellate Court in terms of ground No. 11 which was not considered. The first ground simply reads "For that the impugned judgment and decree are bad in law and on facts and are liable to be set aside".

38. The Apex Court in case of Sukhpal Singh vs. Kalyan Singh (supra) considered the scope of Order 41 Rule 30 vis-à-vis provisions of Section 423 of the Code of Criminal Procedure which provides the procedure to be followed by the appellate Court in disposing of criminal appeals. Dealing with these two provisions, the Apex Court held in paragraph 9 as follows:--

9.....The appellate Court is thus enjoined to pass the final order in the appeal after it had perused the record and heard the appellant or his pleader and the Public Prosecutor. The perusal of the record is enjoined on the Court. The Court cannot dispose of the appeal merely after hearing the appellant or his pleader and the Public Prosecutor. It has to peruse the record. In this respect, these provisions are different from the provisions of R. 30. O. XLI C.P. C. and the Legislature specifically requires the perusal of the record by the appellate Court before deciding the appeal. It does not so provide in R. 30 O. XLI, C.P. C.

39. Reference may also be made to the judgment of Privy Council reported in 25 CWN 866 (Privy Council) which reads thus:--

In every appeal it is incumbent upon the appellants to show some reason why the judgment appealed from should be disturbed; there must be some balance in their favour when all the circumstances are considered, to justify the alteration of the judgment that stands. Their Lordships are unable to find that this duty has been discharged.

40. In view of the above, I am unable to accept the submissions made by learned Senior Counsel on behalf of the appellants that even if no ground was taken in the memo of appeal before the First Appellate Court showing some reasons as to why the judgment under appeal was incorrect, the appellate Court was obliged to peruse the evidence and find out for itself whether the judgment was right or wrong. Applying the ratio laid down by the Apex Court in case of Sukhpal Singh vs. Kalyan Singh (supra), I am of the view that the First Appellate Court was not required to decide the case after going through the evidence though no such point for consideration was raised before the First Appellate Court. This is to be noted and as would appear from the judgment of the First Appellate Court under challenge that the point which was raised by the appellants was considered by the First Appellate Court and the judgment of the First Appellate Court on such point refers to perusal of record on the question of ex parte hearing by the trial Court. There can be no second opinion about the

proposition that provision of Order 41 Rule 31 of the CPC has to be substantially complied with. The First Appellate Court being the final Court of fact has duty to formulate points for consideration and independently weigh the evidence on the issue which arise for adjudication and record reasons for its decision on the said point. However, the question of compliance of such requirement will arise only after the appellant sets forth the ground containing reason why the judgment of the trial Court is incorrect. In the absence of any specific ground against the correctness of finding of the trial Court, a duty cannot be cast upon the appellate Court itself to find out what the points for determination could be and then proceed to give decision on those points.

41. In case of H. Siddiqui (dead) by L.Rs. Vs. A. Ramalingam, , the Hon''ble Supreme Court dealing with Order 41 Rule 31 of the CPC reiterated that it is mandatory for the appellate Court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. It further held in paragraph 21 that the first appellate Court must not record mere general expression of concurrence with the trial Court judgment rather it must give reasons for its decision on each point independently to that of the trial Court. It further held that the entire evidence must be considered and discussed in detail which should be done after formulating the points for consideration in terms of the said provisions and the Court must proceed for adherence to the requirements of such statutory provisions.

42. This is to be noted that the judgment of the Apex Court in H. Siddiqui vs. V.A. Ramalingam (supra) has referred to the case of Sukhpal vs. Kalyan Singh (supra) which has been extensively dealt with hereinabove, wherein it has been held that the question of formulation of points for consideration under Order 41 Rule 31 would arise only when such point is raised questioning the correctness of the finding of the Courts below.

43. Learned counsel for the appellants has relied upon the Supreme Court judgment reported in B.V. Nagesh and Another Vs. H.V. Sreenivasa Murthy, to submit that the First Appellate Court committed a gross error by not complying with the provisions under Order 41 Rule 31 of the CPC and by not dealing with the issues led by the parties. In my opinion the said judgment will not help the appellants' case inasmuch as that was a case where the High Court in exercise of its power u/s 96 of the Code had reversed the finding of the learned trial Court without framing the points for determination and considering both facts and law. The present case is distinguishable for the reason that the point which was specifically raised in the memo of appeal before the First Appellate Court was considered and determined. In such circumstance, in the absence of any other points having been raised by the appellants before the First Appellate Court, it cannot be said that there was non-compliance of the requirement of Order 41 Rule 31 of the Code of Civil Procedure.

44. I have not dealt with other questions of law/grounds raised in the present

second appeal as they were not raised before the appellate Court and in my view do not constitute substantial question of law within the meaning of Section 100 of the Code of Civil Procedure. In view of the above, I do not find any reason to interfere with the judgment of the first appellate Court. The present second appeal, is, accordingly, dismissed.