

(2000) 06 MAD CK 0078

In the Madras High Court

Case No : S.A.No. 1026 of 1997 and C.M.P.No. 9923 of 1997

D. Sahul Hameed

APPELLANT

Vs

Swamy Nellaiappar Sri Kanthimathi Ambal Devasthanam
Tirunelveli

RESPONDENT

Date of Decision : 30-06-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33, 100, 105(1), 107
Constitution of India, 1950 — Article 227

Citation : (2000) 3 CTC 232 : (2000) 3 LW 806 : (2000) 4 RCR(Civil) 344

Hon'ble Judges : K. Sampath, J

Bench : Single Bench

Advocate : Mr. M. Ramadhas for Mr. K. Srikumaran Nair, for the Appellant; Mr. Srinath Sridevan, for the Respondent

Judgement

1. The defendant in O.S.No.946 of 1989 on the file of the Additional District Munsif, Thirunelveli is the appellant in the second appeal. The respondent temple filed the suit for recovery of possession of the suit property and for arrear of rent and future mesne profit at the rate of Rs.151 per month.

2. The case as set out in the plaint is as follows:

The defendant was the tenant of the plaint schedule property on a monthly rent of Rs. 75. The Municipality having raised the property tax, the plaintiff demanded rent at the rate of Rs.151 per month from 1.1.1989. Therefore, the plaintiff sent notice of enhancement on 15.12.1988. On 28.12.1988 the defendant sent a reply seeking reduction of rent by the plaintiff apart from making certain other allegations which were all false. Quit notice was issued on 4.4.1989, to which there was a reply sent by the defendant through Counsel on 23.4.1989. In the reply the defendant had denied the title of the plaintiff in the suit property. The plaintiff was the owner of the site as well as the building.

3. The suit was resisted by the defendant raising the following contentions:

Only the site belonged to the plaintiff. The defendant's father took the vacant site from the plaintiff and put up the superstructure. There was no rhyme or reason to raise the rent from Rs. 75 to Rs. 151. The plaintiff also claimed rent for the superstructure. The defendant sent a reply setting out true facts. The records of the plaintiff Devasthanam would prove that he was only the owner of the site. There was no question of any denial of right. The proceedings of the Commissioner, H.R. & C.E., would show that the lease was only for the vacant site. The defendant had always been ready and willing and it was only the plaintiff who had refused to receive the rent. The defendant had deposited the rent into Court. The claim for arrears had no basis. Notice to quit was not proper. The defendant was entitled to protection of the Tamil Nadu City Tenants Protection Act.

4. The trial Court framed the necessary issues and on the basis of the oral and documentary evidence let in, held that the plaintiff had established his case that it was entitled to a decree as prayed for.

5. The defendant filed appeal A.S.No.6 of 1995 before the Principal Subordinate Judge, Tirunelveli. The learned Subordinate judge framed the following point for consideration, viz. Whether the appeal has to be allowed? and after considering the materials available concurred with the decision of the trial Court and by judgment and decree dated 24.9.1996 dismissed the appeal. As against this the present second appeal has been filed.

6. Notice of motion was ordered on 30.7.1997 and after the plaintiff/respondent entered appearance through Counsel, by consent the main second appeal itself was taken up and heard.

7. The learned counsel for the appellant made the following submissions:

The lower Appellate Court did not formulate the necessary point for determination and thereby violated the mandatory provisions contained In Order 41 Rule 31 of the Code of Civil Procedure, the lower Appellate Court failed to note that in the appeal filed by the defendant, he had set-forth as a ground of objection in the memorandum of appeal with regard to the irregularity and error committed by the trial Court in not accepting the additional written statement filed along with I.A.No.814 of 1994. The Appellate Court ought to have received the additional written statement by exercising the powers u/s 105(1) of the Code of Civil Procedure, Assuming without conceding that the superstructure also belonged to the temple, in as much as P.W.1 had admitted that the lease was renewed with effect from 1.1.1992 and the rent was enhanced to Rs.205 per month, the lower Appellate Court erred in dismissing the appeal. It ought to have dismissed the suit as infructuous as a new lease had come into effect.

8. Per contra, the learned Counsel appearing for. the plaintiff submitted that though the lower Appellate Court has not strictly conformed to the requirements of Order 41, Rule 31 of the Code of Civil Procedure, it had indeed considered all the materials on record, adverted to all aspects of the matter and decided in

favour of the plaintiff and no exception could be taken to the same. Again, so far as the creation of the new lease is concerned, the learned Counsel submitted that the mere acceptance of the enhanced rent by the temple would not operate as waiver and that there must be something more to show that the temple had abandoned its earlier stand seeking eviction of the defendant. As regards the ownership of the superstructure, the learned Counsel submitted that the defendant conceded before the courts below that the superstructure? belonged only to the temple. There was therefore no question of invoking the provisions of the City Tenants Protection Act. Both Counsel relied on a number of decisions which will be referred to in the course of the judgment.

9. Having regard to the rival contentions, the following substantial questions of law arise for decision in the second appeals

(1) Whether the lower Appellate Court has violated the mandatory provisions contained in Order 41, Rule 31 of the Code of Civil Procedure? And

(2) Whether there had been any admission on the side of the plaintiff temple that the lease was renewed with effect from 1.1.1992 and the rent was enhanced to Rs.205 per month and therefore the suit had to be dismissed as infructuous?

10. The learned Counsel for the appellant vehemently submitted that the lower Appellate Court had shirked its responsibility, had flouted the express provisions of Order 41, Rule 31 of the CPC and that the mandatory provisions not having been complied with, the judgment has to be set aside. The learned Counsel relied on the judgment of a Bench of this Court in *Palanisami Pillai v. The Commissioner H.R. & C.E. (Admn.) Department Madras-34* and another, 1997 TLNJ 247 : 1997 (1) LW 174. It has been held in that decision that.

"It is the duty of the Appellate Court hearing an appeal to raise and set out the points for determination and to state the reasons for the decision and focus attention of the Court and the parties on the specific and rival contentions arising for determination."

11. As against this decision relied on by the teamed Counsel for the appellant, Mr. Srinath Sridevan, learned counsel appearing for the plaintiff temple relied on the judgment of an earlier Bench of this Court reported in *Mygapula Ganganna and others v. Sri Rajah Uppalapati Venkata Vijaya Gopalaraju Garu Bafhiyat Bashand*, 31 MLJ 870 where it has been held that.

"If an appellate judgment does not comply with the requirements of Order 41, Rule 31 of the Code of Civil Procedure, there is only an irregularity or error in procedure; and unless it is a substantial error which has affected the decision of the case on the merits, it is not a proper ground for second appeal u/s 100 of the Code."

The learned Counsel for the respondent also relied on the judgment of Ratnam, J. (as the learned Judge then was) in *Nachimuthu Vs. The State of Tamil Nadu*, by the Collector of Salem and Another, and the decision of Srinivasan, J. (as the

learned Judge then was) in Sivaprakasam Mudaliar Vs. Selvaraj Padayachi and Others, . The teamed Counsel also referred to a judgment of Karnataka High Court In Assistant Commissioner, Tumkur and Others Vs. K.N. Nagaraja, .

12. Lakshmanan, J. (as the learned Judge then was) Kannammal Vs. Kuppana Gounder, has held that the provisions of Order 41, Rule 31 of the CPC are mandatory and If the judgment of the Appellate Court does not follow the provisions of Order 41, Rule 31, the judgment is vitiated. Sitting in Bench with another learned Judge Raman, J. the learned Judge has reiterated the principle laid down in the earlier judgment.

13. In K.M.M. Kadar Hussain Vs. O.M.R. Selvaraj and Others, the same Bench has in another case set aside the decision of the learned single Judge and remitted the matter for fresh consideration for not following the mandatory provisions of Order 41 Rule 31 of the Code of Civil Procedure.

14. Let us have a look at the provisions of Order 41, Rule 31, C.P.C. They run as follows:

"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 bear the date on which it is pronounced and shall be signed by the Judge or the Judges concurring therein: Provided that, where the presiding Judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand-writer in open Court the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary be signed by the Judge."

15. A perusal of the provisions of Order 41, Rule 31 clearly shows that the judgment of an Appellate Court should be self-contained. The facts of the case have to be clearly set out. Only then one can understand as to what the points for determination relate and why they are raised. The first Appellate Court being the final Court of facts, it is only proper that its judgment must not be wanting in proper details, so that when the case reaches the High Court, the High Court should be in a position to have the full grasp of the facts as well as the points for determination without referring to the judgment of the trial Court.

16. It has been held in AIR 1943 24 (Privy Council) that,

"since findings of fact by the first Appellate Court are to be treated as final they should at least be clear and specific - not ambiguous or inferential. A general approval given to the views of the trial Court will not necessarily incorporate all its findings in detail especially if accompanied by language which casts doubt on a particular point."

Ratnam, J. (as the learned Judge then was) in Nachimuthu Vs. The State of Tamil Nadu, by the Collector of Salem and Another, dealing with the scope of Order 41, Rule 31, C.P.C. has observed as follows:

"The framing of points for determination by the Appellate Court is only to enable it to concentrate and rivet its attention on the controversy between the parties and to facilitate the weighing and balancing of the evidence, facts and considerations appearing on both sides and to arrive at a conclusion on the merits of the controversy. The enumeration of the requirements under clauses (a) to (d) in Order 41, Rule 31, Civil Procedure Code, is intended only with a view to secure certainty in the ascertainment of what the judgment is. Those requirements enable the Appellate Court to appreciate the case apply its mind consider the evidence and arrive at a decision on the controversy. These requirements ensure a proper appraisal of the case and an adjudication thereon setting out the reasons therefor. The need for the consideration of the requirements (a) to (d) enumerated in Order 41, Rule 31, Civil Procedure Code, is not far to seek. First and foremost, the judgment should provide the reasons for the decision against a party so as to enable that party to decide by perusing the reasons whether any further appeal or revision or other step should be taken or not. In addition, the contents of a judgment given in the manner contemplated under Order 42, Rule 31, Civil Procedure Code, would throw considerable light and assist a higher forum as to why the Court came to the conclusion it did. At the same time, it has to be remembered that if the Appellate Court had properly addressed itself to the controversy between the parties and had weighed the evidence and the other circumstances appearing on both sides and arrived at a conclusion, the mere omission on its part to conform rigidly to the requirements of Order 41, Rule 31, Civil Procedure Code, would not in any manner vitiate the validity of the judgment, as in such a case there would be substantial compliance with the spirit of Order 41, Rule 31, Civil Procedure Code, though not the letter of it. Though Order 41, Rule 31, Civil Procedure Code, requires the judgment of the Appellate Court to state the points for determination, the decision thereon, the reason for the decision and where the decree appealed from is reversed or varied, the relief to which the appellant is entitled etc., it does not declare that any omission in this regard could in any manner invalidate the judgment or render it non est."

17. Srinivasan, J. (as the learned Judge then was) in *Sivaprakasam Mudaliar Vs. Selvaraj Padayachi and Others*, already referred to, has held that.

"mere non-framing of points for consideration does not vitiate the judgment when the Appellant Judge had considered the entire evidence on record and discussed the same in detail and ultimately came to the conclusion and the finding was supported by reasons. Inasmuch as there is a substantial compliance with the provisions of Order 41, Rule 31, C.P.C. the judgment cannot be stated to be vitiated by the absence of a point for consideration."

18. To the same effect is the judgment of the Karnataka High Court in *Assistant Commissioner, Tumkur and Others Vs. K.N. Nagaraja*, .

19. In the earlier Bench decision in *Mygapula Ganganna and others etc.*, 31 MLJ 870 it has been held that.

"where an appellate judgment does not comply with the requirements of Order 41, Rule 31 of the Code when there is only an irregularity or error in procedure and unless it is a substantial error which has affected the decision of the case on the merits it is not a proper ground for second appeal u/s 100 of the Code."

20. This earlier Bench decision apparently had not been brought to the notice of the learned Judge Lakshmanan, J. sitting singly and in Bench with Raman, J. In that case, the Bench has observed as follows:

"On a perusal of the judgment of the learned single Judge it appears to us that the reasons for his findings would not satisfy Order 41, Rule 31, C.P.C. This Court being the first Appellate Court and being the final court of facts. It is incumbent on it to consider all the evidence adduced by the parties in the case."

The Bench further observed that

"the learned single Judge had not even turned to the side of the plaintiffs who filed voluminous documents. The learned single Judge had not considered any facts and circumstances and the evidence adduced both oral and documentary by both sides, but merely recorded a finding by accepting the evidence of D.Ms. 1 and 2 without himself bestowing any consideration thereon."

This prompted the Bench to conclude that the judgment of the learned single Judge is not a judgment in the eye of law. After observing that the Bench without remitting the matter, went through the evidence and arrived at a decision. Thus this Court itself can consider the materials on record and decide the case for which there is adequate sanction in the Code itself in Section 107, though a decision of the Bombay High Court appears to strike a discordant note. This will be noticed later.

21. While sitting singly Lakshmanan, J. (as the learned Judge then was) in *Kannammal Vs. Kuppanna Gounder*, having regard to the facts of that case, held that,

"in this case, the lower Appellate Court had miserably failed to state the points for determination and the decisions thereon. The object of the Rule making it incumbent on the part of the lower Appellate Court to raise points for determination is to clear up the pleadings and focus the attention of the Court and of the parties on the specific and rival contentions which arise for decision. The provisions of Order 41, Rule 31 of the CPC are mandatory. In the instant case, the lower Appellate Court has failed to state the exact question which arises for consideration in the appeal and require determination. Therefore, the judgment of the lower Appellate Court has been rendered by completely overlooking the provisions of Order 41, Rule 31 of the Code of Civil Procedure. The lower Appellate Court has rendered the judgment in a casual manner and cavalier fashion."

The learned Judge remanded the matter.

22. In K.M.M. Kadar Hussain Vs. O.M.R. Selvaraj and Others, decided by the same Bench, there was no point for determination raised by the learned single Judge. The Bench followed its earlier decision in Palanisami Pillai's case, 1997 TLNJ 247 : 1997 (1) LW 174 but remitted the matter. It should also be incidentally pointed out that in that case the learned senior counsel for the respondents also did not have any objection to the matter being remitted. It is worthwhile to extract a portion of the judgment of the Bench in the latter case which is to the following effect:

"As observed by us, the law imposes upon the Court of appeal the Imperative duty and obligation of giving an adequate and satisfactory judgment as is required by law and it is the duty of the Court to explain its reasons for so doing, more especially when the court of first instance has gone go fully Into the facts and the reasons for the conclusions arrived at."

In the view of the Bench, it was not a satisfactory disposal by the learned single Judge.

23. From the various decisions referred to, it cannot be said that as an absolute and mandatory requirement that if points for determination are not framed, the judgment by the Appellate Court is vitiated and non est. There are further requirement to be satisfied as pointed out by Ratnam, J. and Srinivasan, J. (as the learned Judges then were) in the two decisions already referred to.

24. In my considered view non-framing of point nor determination by itself will not vitiate the judgment as long as the other requirements set out in Order 41, Rule 31 of the CPC are satisfied.

25. In Sri Ranganatha Thathachariar and Another Vs. Veeravalli Rajagopalachariar and Others, where the lower Appellate Court's judgment did not contain points for determination and no decision thereon and no reasons were given, the judgment was set aside and the case remanded. In that decision it was pointed out that there, were only two sentences in the whole of the judgment which could be regarded as containing the judgment of the Court and they were: (1) "On the evidence oil record this Court does not find reason to disagree with the decision and (2) the appeal is dismissed with costs." In those circumstances the learned single judge of this court held that.

"there was absolutely no indication whatever of the lower Appellate Court having brought a judicial mind to bear on the decision of the trial court with regard to the various points that arose for determination that the judgment should be set aside and the case remanded to that Court for fresh hearing and disposal."

26. In Tota Singh v. Labhoo Singh and another, AIR 1933 Lah. 332 it has been held that, "a judgment in which the provisions of Order 41, Rule 31 have not been complied with in no judgment in law." In that case the learned District Judge passed the following order in the appeal:

"The appeal is accepted ex parte with costs. Only two items of (1) Rs.200 and

(2) Rs.25 are contested by the appellant. These items are disallowed. The decree of the lower Court is modified. The possession of the land will be given on payment of Rs.297 only. The appellant's Mukhtar says that he has deposited the money in the lower Court. The judgment is a non est."

In those circumstances, it was held that the judgment of the lower Appellate Court did not comply with the provisions of Order 41, Rule 31 of the Code of Civil Procedure,

27. In a Bombay decision reported in Vishwas Balu and Others Vs. Ghasiram Ramratan Jajum and Others, dealing with a case arising under Article 227 of the Constitution the learned single Judge held as follows:

"Where the High Court is sitting in exercise of its power of superintendence and when it is shown that the judgment of the first Appellate Court has failed to comply with the legal requirements of Order 41, Rule 31. it cannot be sustained by the High Court looking into the facts and arrogating to itself the role of a fact-finding Court. The provisions of Order 41, Rule 31 are mandatory. The judgment of the first Appellate Court has to set out points for determination, record the decision thereon and give its own reasons for said decisions. Looking to the plain language of that rule, it cannot be said that failure to comply with these provisions is a bare irregularity. The Legislature has laid down these rules so that either the second Appellate Court or the Court exercising such extraordinary jurisdiction as power of superintendence under Article 227 of the Constitution should be in a position to find out the track traversed by the Appellate Court. It cannot run away from its onerous duties of recording the finding of fact and/or discussing the evidence."

28. From this Judgment it does not appear that the non-framing of points for determination is such as to warrant upsetting the judgment of the lower Appellate Court. As long as the lower Appellate Court has adverted to the materials on record and given reasons for reaching the conclusions that it does the mere fact that it has not framed points for consideration would not vitiate the judgment.

29. In the light of the above discussion if we examine the materials on record and if we analyse the judgment of the lower Appellate Court, it is seen that the lower Appellate Court had gone into all aspects of the question and given its reasons for confirming the decision of the trial Court it has indeed framed a point for consideration. May be the framing is not satisfactory. But the proof of the pudding is in the eating. In as much as the lower Appellate Court has taken into consideration: the entire pleadings as also the oral and documentary evidence on record and its findings are supported by proper reasons the mere fact that proper and adequate points for consideration have not been framed cannot vitiate its judgment.

30. It has actually found and it has also been conceded by the defendant/appellant that the superstructure did not belong to him as claimed by him. It is

specifically observed by the lower Appellate Court in paragraph 11 of the judgment as follows:

"The learned counsel for the appellant did not press the plea regarding" superstructure in the lower court much in this Court though we lightly touched upon did open it."

31. Even otherwise, the appellant, it is found did not produce any documentary evidence to substantiate his plea that the superstructure belonged to him. There is therefore no substance in the contention raised by the learned counsel for the appellant that the appellant is entitled to the benefits of the City Tenants Protection Act. To claim benefits under the said Act the tenant should own the superstructure. It is not the case here and there has been denial of title and when the denial of title is not bona fide, the consequences should follow and the same had followed in the instant case. The non-reception of the additional written statement also does not in any way advance the case of the appellant.

32. The next question relates to waiver pleaded by the appellant. According to the appellant, he had agreed to pay enhanced rent and had been paying at this rate of Rs. 205 per month after the Filing of the suit and during the pendency of the suit. The enhanced rent if at all had been received by and on behalf of the respondent without prejudice to the claim in the suit. Neither the Executive Officer nor PW.I who had been examined on the side of the plaintiff had any power to enter into any fresh lease agreement. The provisions of the H.R. & C.E Act require sanction from the Commissioner for renewing the lease. In as much as no sanction had been given mere receipt of enhanced rent would not spell out a case of a new lease at revised terms. There is no waiver and the conclusion reached by the Courts below is unexceptionable.

33. The judgments of the recent Division Bench are clearly distinguishable. In fact in one of the cases as already noticed the Bench itself chose to consider the evidence and decide the matter.

34. In V.S.P. Subramanian Chettiar Vs. Commr. of Income Tax, Madras, , while dealing with the provisions of Order 41, Rule 31 vis-a-vis Section 100 of the CPC after observing that

"Where the appellate Judge instead of discussing each point separately and recording his finding has merely adopted the easier method of stating that he agreed with the conclusions of the subordinate Judge contained in Paras 13 to 19 (in that case)."

a learned single Judge of this Court concluded thus:

"This sort of disposal no doubt was not very satisfactory but on that ground the High Court would not be inclined to reverse the decision of the lower Appellate Court as it was an affirming judgment."

This judgment of the learned single Judge has been referred to and followed in

Nagam Siva Reddy Vs. B. Nazamuddin Saheb, .

35. For all the reasons stated above, I answer both the substantial questions raised in the second appeal against the appellant. The second appeal fails and the same is dismissed. However, there will be no order as to costs. Consequently, the stay petition C.M.P.No.pp23 of 1997 is closed.