

(2022) 10 GUJ CK 0100
In the Gujarat High Court

Case No : R/Second Appeal No. 87 Of 2021, Civil Application (For Stay) No. 1 Of 2021

Meramanbhai Ramabhai Odedra

APPELLANT

Vs

Dhaniben Jivabhai Khijdariya

RESPONDENT

Date of Decision : 17-10-2022

Acts Referred:

Code Of Civil Procedure, 1908 — Section 96, 100, Order 8 Rule 2, Order 8 Rule 3, Order 10 Rule 1, Order 10 Rule 1(5), Order 41, Order 41 Rule 11, Order 41 Rule 14, Order 41 Rule 15, Order 41 Rule 31, Order 41 Rule 33

Citation : (2022) 10 GUJ CK 0100

Hon'ble Judges : Hemant M. Prachchhak, J

Bench : Single Bench

Advocate : Ashish M Dagli, Namrata Harishbhai Chauhan

Final Decision : Disposed Of

Judgement

Hemant M. Prachchhak, J

1. Being aggrieved and dissatisfied with the judgment and order dated 23.3.2021 passed by the learned 3rd Additional District Judge, Porbandar in Regular Civil Appeal No.12 of 2015, the appellant has filed the present Appeal.

2. Heard learned Counsel appearing for the appellant. Though notice is served, learned advocate for the respondent did not remain present on earlier occasion. Today, also learned advocate for the respondent is not present, at the time of hearing of the appeal. Therefore, this Court has no other option but to proceed with the appeal.

3. I have perused the judgment and order passed by both the Courts below and also taken into account the material placed on record of the appeal.

4. The learned First Appellate Court has in very capricious manner decided the appeal pending before the Court. On the basis of only one issue and one paragraph, the Appeal was decided by the learned First Appellate Court in very

casual manner. The First Appellate Court has to apply its mind independently and frame the issues appropriately and independently. The provisions of Order 41 of C.P.C. provides that how the Appellate Court has to deal with the Appeal under Section 96 of the Code and the procedure is to be followed as per Order 41 of C.P.C. Therefore this is a fit case to exercise the power under the provision of Order 41 Rule 31 of the C.P.C.

5. In the recent judgment of the Hon'ble Apex Court in case of K. Karuppuraj vs M. Ganesan reported in 2021 (10) SCC 777, the Hon'ble Apex Court has held that while deciding the First Appeal, compliance of Order 41 Rule 31 of C.P.C. is mandatory.

6. In the recent judgment of the Hon'ble Apex Court in case of K. Karuppuraj (supra) and Judgments of this Court, which are referred hereinafter, time and again reiterated by this Court and Hon'ble Apex Court that how and in which manner the First Appellate Court has to decide the Appeal under Section 96 of the Code.

6.1 In the decision in case of Lakhu Karman Bharwad vs. State of Gujarat reported in 2015 LawSuit(Guj) 855, the Court has held as under:

"10. Now considering the points which are formulated by the lower Appellate Court, I am of the opinion that, the lower Appellate Court has committed error in not properly formulating the points for determination. The lower Appellate Court ought to have framed points for determination in accordance with Order 41 Rules 11, 14, 15 and 31 of the Code as well as Para No. 414 of the Bombay Civil Manual and ought to have given reasons for its decision on each point independently. The Apex Court in the case of H. Siddiqui (dead) by LRs. (supra) in the context of Order 41 Rule 31 of the Code has observed in paras 21 and 22 as under:

"21. The said provisions provided guidelines for the appellate Court as to how the Court has to proceed and decide the case. The provisions should be read in such a way as to require that the various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the appellate Court that the Court has properly appreciated the facts/evidence, applied its mind and decided case considering the material on record. It would amount to substantial compliance of the said provisions if the appellate Courts judgment is based on the independent assessment of the relevant evidence on all important aspect of the matter and the findings of the appellate Court are well founded and quite convincing. It is mandatory for the appellate Court to independently asses the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final Court of fact, 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 such point independently to that of the trial Court. Thus, the entire evidence must be considered and discussed in detail.

Such exercise should be done after formulating the points for consideration in terms of the said provisions and the Court must proceed in adherence to the requirements of the said statutory provisions. (Vide: Sukhpal Singh v. Kalyan Singh, AIR 1963 SC 146; Girijanandini Devi v. Bijendra Narain Choudhary, AIR 1967 SC 1124; G. Amalorpavam v. R.C. Diocese of Madurai, 2006 (3) SCC 224; Shiv Kumar Sharma v. Santosh Kumari, 2007 (8) SCC 600; and Gannmani Anasuya v. Parvatini Amarendra Chowdhari, AIR 2007 (SC 2380: 2007 (10) SCC 296.

22. In B.V. Nagesh v. H.V. Sreenivasa Murthy, JT 2010 (10) SC 551: 2010 (13) SCC 530, while dealing with the issue, this Court held as under:

4. The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is 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. Sitting as a Court of appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide : Santosh Hazari v. Purushottam Tiwari, 2001 (3) SCC 179 and Madhukar v. Sangram, 2001 (4) SCC 756.”

11. In a recent case of Budhabhai Bhikhabhai Parmarand and another Vs. Shantaben Wd/o Bhalabhai Becharbhai, 2013(1) G.L.H.127, this Court, while dealing with the provision of Section

100 of the Code of Civil Procedure and the provisions of order41, Rule 31 of the Code by relying upon the case of H. Siddiqui (dead) by LRs. (supra), has held that the first Appellate Court has to decide the Appeal in accordance with law on merits and after framing points for determination as envisaged under Order41, Rule31 of the Code. It has also been observed that on each point, the Appellate Court has to give its own finding that too after reappraisal of entire evidence on record.

12. In addition to the above principles of provisions of Order 41 Rule 31 of the Code, the Bombay Civil Manual, which has been made applicable to the State of Gujarat, provides in detail the Civil Courts functioning. Different Chapters provided therein make the provisions of the Code amply clear that how the original Court, first appellate Court and second appellate Court has to function. To ensure the uniformity with regard to practice and procedure of civil proceedings, the Manual is an exhaustive guiding factors for a Court, who is deciding disputes between the parties of a civil nature.

12.1. As far as Appeals arising from the Trial Courts judgment, decree and order are concerned, ChapterXX of the Code deals with the same. Para/Rule414 of the Bombay Civil Manual provides about the manner, in which the appellate Court should frame the suitable points for determination while deciding the Appeal. Rule414 of the Bombay Civil Manual reads as under:

"414. The appellate Court should frame suitable points for determination in appeals in accordance with the same principles on which issues are framed in the trial Court."

12.2. In my opinion, combined reading of the Order41 Rule31 of the Code as well as Rule414 of the Bombay Civil Manual make it clear that the first appellate Court is bound to frame points for consideration as if it is framing the issues provided under the provisions of the Code. Paras/Rules53 and 54 of the Bombay Civil Manual provides the method of settlement/framing issues. Rules53 and 54 read as under:

"53. Issues should be framed by the Presiding Judge on the date fixed for the purpose. They indicate the points in controversy, on which the parties are to go trial and give them notice of the matters which they are required to establish by adducing evidence or otherwise. No trial is likely to be satisfactory unless the issues are complete and precise. It should be observed that a party has to produce evidence in support of the issues, which he is bound to prove (Order XVIII, rules 2 and 3) and that the judgment of the Court shall record its findings on the issues (Order XX, rule5). These provisions should make it plain that an essential preliminary to a satisfactory trial is the settlement of full and precise issues. A judicious use of the provisions of rule 1 of Order X and subrule (5) of rule 1 of Order XIV may be found of help for collecting material necessary for framing issues in seriously contested cases. The duty of framing issues under the law must be performed by the Court and the presiding Judge should not leave it to the parties or lawyers to frame the issues but should apply his own mind to the subject. There is however, no reason why the Court should not take suggestions from the parties as to the issues to be framed.

54. In framing issues the Court should proceed as follows:

(a) Every issue of fact shall be so framed as to indicate on whom the burden of proof lies.

(b) Every issue of law shall be so framed as to indicate the precise question of law to be decided.

Note: When the claim or any portion of it is alleged to be barred by any law the issue shall also state the Act and section or rule or other provision under which it is so barred.

(c) When the question is whether a certain section of law applies, the issue should be framed in the words of that section e.g.,if the question is whether a transfer should be set aside under section 54 of the Provincial Insolvency Act, the

issue should not be Is the transfer bogus and fraudulent?

(d) Issues should be self-contained. The framing of issues such as Is the sale liable to be set aside for the reasons stated by the defendant in his written statement, dated... should be avoided.

(e) Every issue should form a single question and as far as possible should not be put in an alternative form.

(f) No proposition of fact which is not itself a material proposition, but is relevant only as tending to prove a material proposition, shall be made the subject of an issue.

(g) No question regarding admissibility of evidence shall be made the subject of an issue.

12.3. Now in the present case, it is apparent from the judgment and order of the lower Appellate Court that the provisions of Order 41 Rule 31 of the Code and Rule 14 of the Bombay Civil Manual are not followed.

14. A similar view was taken by this Court in the case of Mahmad Ahmadbhai vs. Fatmaben Abdulla & Ors. as reported in 2007 (4) GLR 2789; in the case of Prajapati Abraham Nagarbhai & Anr. Vs. Prajapati Harjibhai & Ors., 2010 (2) GLH 551 as well as in the case of Dumala Vahpara Gram Panchyat vs. Chunilal Tribhovandas Patel & Ors., as reported at 1999(2) GLH 959."

6.2 In the decision in case of Shah Keshavji Pashuji Vira (Decd) and ors vs. Shah Mavji Pasu-Decd and ors reported in 2014 LawSuit(guj) 293, the Court has held as under:

"5. As noted above, the merits of the case were not required to be gone into. At the outset, it is noticed on consideration of the judgment of the first appellate court that while exercising its appellate jurisdiction under section 96 of the Civil Procedure Code, 1908, it had not observed the mandatory requirements of Order 41 Rule 31 of the Code.

5.1 When the learned Additional District Judge was exercising appellate jurisdiction under Section 96 read with Order 41 Rule 31, CPC, it was incumbent on him to observe requirement of law for exercising the jurisdiction. Order 41, Rule 31, CPC provides the manner in which the appellate court would undertake adjudication process to arrive at a decision in the appeal before it. Order 41, Rule 31 reads as under:

"XLI Appeals from original decrees

1. 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.”

5.2 It is emphasised by the Apex Court as well as by this Court that the Appellate Court has to formulate specific points for determination. In *H. Siddiquy (Dead) by LRS.* (supra), the Apex Court emphasised necessity for strict adherence to the provisions of Order 41 Rule 31, CPC by observing as under:

“The said provisions provide guidelines for the appellate court as to how the court has to proceed and decide the case. The provisions should be read in such a way as to require that the various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the appellate court that the court has properly appreciated the facts/evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance with the said provisions if the appellate courts judgment is based on the independent assessment of the relevant evidence on all important aspects of the matter and the findings of the appellate court are well founded and quite convincing. 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. Being the final court of fact, 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. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory provisions.” (Para 21)

5.3 In *Union of India and another Vs Ranchhoddas and others* [(2007) 14 SCC 326], the Apex Court held that order of the High Court deciding the appeals under Section 54 of the Land Acquisition Act, 1954, showed a cryptic way without going into the merits of the rival contentions was not sustainable in view of noncompliance with Order 41 Rule 31, CPC. In *Parimal Vs Veena alias Bharti* [(2011) 5 SCC 545], it was held that the first Appellate Court should not disturb and interfere with the valuable rights of the parties which stand crystallised by Trial Court judgment, without opening the whole case for rehearing, both at question of facts and law. It observed that the First Appeal is a valuable right and the parties have right to be heard, both on the question of facts and on law. The Appellate Court should not modify the decree of the Trial Court by a cryptic order without taking note of all the relevant aspects, otherwise the order would be liable to be set aside.

5.4 In *Babubhai Velani Vs Rameshbhai Prajapati* [2012(3) GLH 624], this High Court took similar view. In that case, the lower appellate court has framed points generally as to whether the appellants prove that the judgment of trial court was against the established principles of law and whether the learned trial judge had

committed error apparent on fact of record. It was observed that the aforesaid formulation could not be said to be raising proper points for determination while deciding the appeal under Section 96, CPC. The court referred to the decision of Supreme Court in B.V. Nagesh and another Vs H.V. Sreenivassamurthy [2010 (13) SCC 530] to observe that without framing the point of determination, without proper reason and discussion, the first appellate court cannot dispose of the first appeal under section 96, CPC. Again in Budhabhai Bhikabhai Parmar Vs Shantaben, wd/o Bhelabhai [2013 (1) GLH 217], the Court disapproved perfunctory manner in deciding the appeal in the appellate jurisdiction and stated that the Appellate Court has to give its own findings on all the points of determination. Similarly, in oral judgment dated 07th February, 2013 in Kanaiyalal Shambhubhai Vekariya Vs Shushilaben M. Joshi in Civil Revision Application No.319 of 2011 and in oral judgment dated 12th February, 2013 in Kasambhai Hasambhai Pinjara Vs Chunilal Bhimjibhai Dhanak in Civil Revision Application No.217 of 2009, this court reiterated the principles while taking note of Rules 53 and 54 in the Bombay Civil Manual.

6. Coming back to the facts of the case, the first appellate court was required to formulate specific points in relation to the disputed aspects of the matter. Only after formulating the specific points for determination, it could have focused the discussion on merits. Only then, it could have dealt with the evidence in proper context. Whatever ultimate conclusion the appellate court may reach as it may deem appropriate on merits and on evidence, however, the appellate decisional making process has to be guided by the mandatory requirement of law.

6.1 The whole purpose as to why the lower appellate court is expected to formulate specific point of determination in exercise of appellate jurisdiction is that it must reflect that it applied its mind to the subject matter. Secondly, it should also reveal that the court was aware of all the relevant points on which it was adjudicating as appellate court. The third purpose which is subserved by specific formulation of points and reasoned discussion on each of such points is that the litigants who are laymen, when read judgment, know as to what is actually decided by the court. Formulation of points adverting to the discussion thereon on the basis of the evidence on record and arriving at conclusion on that basis are all the necessary traits of judicial approach. When a judgment of any court satisfies such requirements, then only it acquires judicial character."

7. On bare perusal of the decision of the First Appellate Court, it is clearly borne out that the learned First Appellate Court has committed serious error in not deciding the appeal in accordance with the provisions of Order 41 of C.P.C. and therefore, present appeal is required to be remanded back to the First Appellate Court to determine the appeal in accordance with the provision of Order 41 Rule 11, 15, 31 and 33 and more particularly, considering the recent pronouncement of Hon'ble Apex Court and this Court, present appeal deserves to be allowed. The impugned judgment and order passed by the First Appellate Court is hereby quashed and set aside.

8. In view of the above settled principles of law by delivering the judgment, the First Appellate Court is required to substantially comply with the provision of Order 41 Rule 31 of the C.P.C.

9. In present case on perusal of the judgment and order of the lower Appellate Court, it is abundantly clear that the First Appellate Court has failed to discharge obligation placed on it as a First Appellate Court and therefore, in my opinion the judgment and order of the lower Appellate Court deserves to be quashed and set aside and the same is required to be remanded to the First Appellate Court for considering the same a fresh on merits and in accordance with law after framing point of determination in accordance with Order 41 Rule 11, 14, 15, 31 and 33 of the Code.

10. In the result, impugned judgment and order dated 23.3.2021 passed by the learned 3rd Additional District Judge, Porbandar in Regular Civil Appeal No.12 of 2015, is hereby quashed and set aside and the matter is remanded back to the First Appellate Court to decide the same a fresh on merits and in accordance with law after formulating the points of determination.

11. The learned First Appellate Court shall decide the same as expeditiously as possible and preferably within a period of 6 months from the date of receipt of certified copy of present order without influenced by any order or present order after hearing the contentions raised by learned advocates for respective parties. The learned Advocates for both the sides shall also cooperate in the proceedings and shall not seek any unnecessary adjournment. The learned First Appellate Court shall decide the matter independently on its own merits.

12. It is clarified that the matter is remanded only on the ground referred to herein above of the case and this Court has not entered into the merits of the case.

13. Accordingly, present Appeal stands disposed of accordingly.

ORDER IN CIVIL APPLICATION.

Since the main Appeal is disposed of, present Civil Application does not survive and the same stands disposed of accordingly.