

(2019) 01 BOM CK 0041
In the Bombay High Court
Case No : Second Appeal No. 282 of 2015

Subabai Shivram Patil Lrs Chandrakant And Others	APPELLANT
Vs	
Dharamsing Julalsing Patil Lrs Jijabai And Others	RESPONDENT

Date of Decision : 09-01-2019

Acts Referred:

Code of Civil Procedure, 1908 — Order 41 Rule 31

Citation : (2019) 1 AllMR 903 : (2019) 3 MahLJ 400 : (2019) 203 AIC 460

Hon'ble Judges : Vibha Kankanwadi, J

Bench : Single Bench

Advocate : Satyajit S. Bora, S.B. Yawalkar, Vijay B. Patil

Final Decision : Partly Allowed

Judgement

VIBHA KANKANWADI, J.

1. Present second appeal has been filed by the original plaintiffs challenging the judgment and decree passed by learned District Judge-2, Bhusawal, District Jalgaon, in Regular Civil Appeal No. 275 of 2014 (Old No.8 of 2011), dated 30-03-2015, whereby the appeal filed by the present appellants came to be dismissed. The said appeal was arising out of dismissal of Regular Civil Suit No. 24 of 2012 by learned Civil Judge (Junior Division), Yawal, on 16-11-2010. The said suit for declaration and perpetual injunction was dismissed. The plaintiffs had come with a case that the suit properties i.e. block no.01 admeasuring 0.39 R, block no.94/1 admeasuring 1 hectare 60 R, block no.94/2 admeasuring 5 hectare 51 R and block no.206 (old survey no.252) admeasuring 3 hectare 79 R situated at Mauje Wirawali, Taluka Yawal, District Jalgaon, were belonging to one deceased Julalsing Ramsing Patil. The properties came to him as Inam. Subsequently, they were re-granted after enforcement of Inam Abolition Act, 1958. It is stated that after taking possession under re-grant, he expired. He had left behind him, second wife Dagubai, defendant no.01 Dharamsing, plaintiff no.01 Subabai and Nababai, who is stated to be the grandmother of plaintiffs no.02 to 04. Nababai had expired in 1985 leaving behind son Ajabrao, plaintiffs

no.05 and 06 and then added defendant no.03. Ajabrao expired in 1999 leaving behind plaintiffs no.02, 03 and 04. It is stated that the possession of the land was taken in 1997 by the legal heirs of Julalsing and the amount was in fact paid by defendant no.01. Thereafter, there was a family arrangement and as per the family arrangement, each one of them was cultivating the land as per the convenience. Block no.01 admeasuring 0.39 R was kept for common use for non-residential purpose. Thereafter, in the plaint, all details of the possession of each of them as per convenience has been given. It is stated that till August 1999, they cultivated their respective share and defendant no.01 did not raise any kind of objection. However, at the instigation of defendant no.02, he gave an application for correction of mutation entry no. 804 and the names of plaintiff and defendant no.03 were accordingly corrected. After the name of defendant no.01 alone was shown in the mutation, it is stated that he started distributing possession of the plaintiffs over the suit properties. Thereafter, he had entered into an agreement to sell block no.94/2 admeasuring 03 hectares 09 R to defendant no.02 and, therefore, they had filed the suit for perpetual injunction.

2. Defendants resisted claim by filing their written statement. Defendants no.01 and 02 did not dispute that the property was granted under the Inam Abolition Act to deceased Julalsing. It is also not in dispute, that the possession was sought by his legal representatives in 1997. They denied the averments regarding family arrangement. According to defendant no.01, he had paid the Najrana i.e. occupancy price and, therefore, those properties are his self-acquired properties. It was stated that mutation entry no.804 was wrongly taken and, therefore, it has been rightly corrected subsequently by the revenue authorities. It was stated that the plaintiffs have no right, title or interest as well as possession over the suit properties.

3. With these pleadings, parties went to the suit. Issues came to be framed. Evidence was led by both the parties. After considering the evidence and hearing both parties, the said suit came to be dismissed.

4. The plaintiff preferred the appeal challenging the said dismissal of their suit. The learned appellate court heard both sides and dismissed the appeal by judgment dated 30-03-2015.

5. Heard both sides.

6. At the time of submissions, learned Advocate Mr. S.S. Bora appearing for the appellants submitted that the first appellate court has not framed the points for determination as required under Order XLI Rule 31 of the Code of Civil Procedure, 1908. Whatever points are stated to have been framed in the judgment cannot be said to be the compliance of the law and, therefore, he prayed that the matter is required to be remanded for proper framing of points and deciding according to the issues in dispute. He relied on the decision in Khatunbi & others Vs. Aminabai 2006(6) Mh.L.J. 759, wherein it has been observed thus :

"5. Order 41, Rule 31 of the Code of Civil Procedure clearly provides that the judgment of the appellate Court shall be in writing and shall state the points for determination, the decision thereon, the reasons for the decision, and 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.

6. Plain reading of the said provision would disclose that the appellate Court before proceeding to deliver the judgment on merits of the case has to formulate the points for determination and with reference to such points for determination, analyse the materials on record and thereupon arrive at the conclusion to be delivered as its decision. Obviously the decision should disclose the reasons for the decision. However, the reasons for decision by themselves cannot constitute the points for determination. The points for determination have to be formulated in order to enable the Court to identify the exact points in controversy in the matter and with reference to those points, the Court has to appreciate the evidence led by the parties. In fact, the law on this aspect has been well settled by the decision of the learned Single Judge of this Court in Vishwas Balu v. Ghasiram Ramratan Jajum MANU/MH/0168/1975: AIR 1975 Bom. 278 wherein it has been held that the compliance of Order 41, Rule 31 is mandatory and the expression used therein "shall state" clearly discloses that the failure to comply with the said provision of law would not be a mere irregularity. Indeed, the phraseology used in Rule 31 apparently discloses that compliance of the said provision is not a mere formality and therefore failure thereof cannot be said to be a mere irregularity. This is also clear from Rule 30 of Order 41 and in particular Sub-rule (2) thereof. Rule 30(2) of Order 41 provides that "where a written judgment is to be pronounced, it shall be sufficient if the points for determination, the decision thereon and the final order passed in the appeal are read out and it shall not be necessary for the Court to read out the whole judgment, but a copy of the whole judgment shall be made available for the perusal of the parties or their pleaders immediately after the judgment is pronounced," Obviously, in cases where on conclusion of the arguments in appeal, the judgment is reserved to be delivered and thereafter it is sought to be pronounced, it is not sufficient merely to declare as to whether the appeal is allowed or not, but ultimate decision has to be made known to the parties along with the points for determination which have been considered in the appeal. This provision of law clearly discloses the necessity for formulation of the point for determination before the appellate Court proceeds to deliver the judgment in the appeal.

7. The learned Single Judge of this Court in Smt. Anita M. Barretto v. Abdul Wahid Sanaullah MANU/MH/0711/1984 : 1984 Mh.L.J 931 : AIR 1985 Bom.98, while dealing with the necessity of compliance of provisions of Order 41, Rule 31, held that when a requirement such as this is insisted upon by the procedural law of the land, one must try to understand the object and scope of such provision. Merely asking the question as to whether the judgment of the Court below is

correct, legal or valid is hopelessly an inadequate method of meeting the requirement of this legal provision. Further, while referring to the earlier decision in *Mhasu v. Davalat* (1905) 7 Bom. L.R. 174, it was also reminded that there was similar provision in the earlier Civil Procedure Code and it was pointed out that the object of the Legislature in making it incumbent on an 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 in the matter. It was further held that the points which must arise for determination by a Court of first appeal must cover all important questions involved in the case and they should not be general and vague. It was further held that it is a matter of almost textbook knowledge that the exact questions which arise in the appeal for determination must be stated in the judgment.

8. It is thus clear that right from the beginning of 20th century consistent view taken by this Court is that the provision regarding the requirement of formulation of points for determination by the appellate Court while proceeding to deliver the judgment in appeal has been held to be mandatory in nature and not a mere irregularity. "

7. On behalf of the appellants, further reliance has been placed on the decision in *Abdul Kadar s/o. Mohammad Ibrahim*, Second Appeal No. 68 of 1991, decided by this Court on 14-10-2008. In this case also, reliance was placed on the above said decision of *Khatunbi & others Vs. Aminabai* and further reliance was placed on *Smt. Anita M. Barretto Vs. Abdul Wahid Sanaullah* (AIR 1985 Bom. 98). In both these above said cases, it was, therefore, held that when there is no proper framing of points in compliance of Order XLI Rule 31 of the Code of Civil Procedure, 1908, the matter deserves to be remanded.

8. Learned Advocate Mr. S.B. Yawalkar representing respondent no.02 and learned Advocate Mr. V.B. Patil representing respondent no.02A submitted that all the points in dispute were considered by the first appellate court. The plaintiffs' suit was dismissed. Though they had come with a case that they had family arrangement, thereafter they tried to put the theory of partition. There were also cross objections raised. Taking into consideration the facts, the appeal as well as cross objections have been dismissed. The points may not have been happily worded. But merely on the said technical ground, the matter need not be remanded. They also submitted that no substantial question of law has been raised by the appellants and, therefore, advantage cannot be given to the appellants regarding some technical point.

9. At present, a limited question is arising as to whether the judgment of the first appellate court is in pursuance to the compliance of Order XLI Rule 31 of the Code of Civil Procedure. The Division Bench of this Court in *Khatunbi & others* (supra) had considered the pronouncement of the judgments of this Court as well as by Apex Court in *Santosh Hazari Vs. Purushottam Tiwari deceased* by L.Rs. (2001(2) Mh.L.J. 786) and it was clearly observed that, compliance of Order XLI Rule 31 of the Code of Civil Procedure is not an empty formality. The

necessity of formulation of points for determination by the appellate Court cannot be considered lightly and brushed aside as benefit of technical plea cannot be granted. In fact, formulation of points for determination has to be such that it should cover all important issues in dispute. Therefore, such formulation of points for determination cannot be vague.

10. Here, in this case, the first appellate court has formulated following points and recorded findings thereon :-

Sr. No.

Points

Findings

01.

Whether Civil Court has committed jurisdictional error while entertaining the suit and passing judgment and order in the dispute brought before it in the form of suit for declaration and injunction ?

No.

02.

Whether Civil Court has committed error in giving logical reasons while answering the issues ?

Partly affirmative.

03.

Whether interference of this court is needed in the reasoning given by the civil court while arriving at findings ?

Partly affirmative.

04.

Whether learned Civil Court arrived at wrong conclusion in dismissing the suit ?

No.

05.

What order ?

Appeal and cross objections stand dismissed.

It can be seen that no point was framed or formulated by the first appellate court touching the facts of the case in dispute. The first appellate court was the last fact finding court and, therefore, points ought to have been formulated for determination considering the facts of the case involved, the law points also, if any. No specific point was also framed in respect of cross objections raised.

Therefore, taking into consideration this limited controversy, it may not be appropriate to touch the merits of the case. The matter deserves to be remanded to the first appellate court with a direction to decide the appeal together with cross objections afresh.

11. Hence, the following order :-

(a) The second appeal is partly allowed.

(b) The judgment and order passed by learned District Judge-2, Bhusawal, District Jalgaon, in Regular Civil Appeal No. 275 of 2014 (Old No.8 of 2011), dated 30- 03-2015, is set aside. Regular Civil Appeal No. 275 of 2014 (old No.8 of 2011) along with cross objections therein stand restored to the file of the first appellate court. The matter is remanded to the first appellate court with direction to formulate appropriate points for determination and to decide the appeal along with cross objections therein afresh on merits, within six months, as far as possible, after receipt of record & proceedings and copy of this judgment.

(c) There shall be no order as to costs.

(d) Record & proceedings be remitted to the first appellate court without delay.