SUPREME COURT OF INDIA

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELALTE JURISDICTION

CIVIL APPEAL No. 324 OF 2015
(ARISING OUT OF SLP(C) No.14024/2013)

Shasidhar & Others Appellant(s)

VERSUS

Smt. Ashwini Uma Mathad & Anr.
Respondent(s)

JUDGMENT

J U D G M E N T

Abhay Manohar Sapre, J.

1. Leave granted.

2. This appeal is filed by the defendants against the judgment and order dated 06.12.2012 passed

by the Division Bench of the High Court of Karnataka Circuit Bench at Dharwad in Regular First Appeal No. 3052 of 2010, which in turn arises out of the judgment and decree dated 10.02.2010 passed by the Ist Additional Civil Judge (Sr. Division) at Hubli in Original Suit No. 73 of 2004.

3. In order to appreciate the short issue involved in this appeal, it is necessary to state a few relevant facts:

4. One Basavantayya Revanayya Mathad was married to Shantakka Mathad (defendant no. 2). Out of this wedlock, three children were born - one son Shashidhar (defendant no.1) and two daughters - Rajeshwari (Died in 2003) and - Gayatri (Died in 2004) - defendant no.3. Shashidhar was married to Uma and out of this wedlock, three daughters were born - Ashwini (plaintiff no. 1), Nivedita (plaintiff no.2) and Puja who was given in adoption to Uma's sister.

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Shashidhar divorced to Uma and re-married to Manjula (defendant no.4). Out of this second marriage, two daughters were born - Aishwarya (defendant no.5) and Vaishnavi (defendant no.6).

5. Basavantayya had extensive properties. On 21.07.1991, Basavantayya died leaving behind him the aforementioned members of his family. On his death and also on the death of his one unmarried daughter Rajeshwari, disputes arose between his legal representatives regarding their respective shares in the properties and also regarding ownership of some members of his family in relation to certain properties standing in the name of members of his family. The disputes unfortunately could not be settled amicably which led to filing of civil suit by the daughters of defendant No.1 from his first wife-Uma (deceased) against the other members of the family, i.e., their father, step-mother and step-sisters for

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determination of their respective shares, partition by meets and bounds and separate possession in the suit properties held and possessed by the members of the family of late Basavantayya . The defendants contested the civil suit by denying the plaintiffs' claim. The trial Court framed issues. Parties adduced evidence.

6. By judgment and decree dated 10.02.2010, the trial Court partly decreed the plaintiffs' suit and accordingly passed preliminary decree in relation to the suit properties. It was held that plaintiffs are entitled for partition and separate possession of their 1/6th share each in some properties specified in the decree whereas 1/10th share each in other suit properties as specified in the decree.

7. Dissatisfied with the preliminary decree, the defendants filed first appeal being R.F.A. No. 3052 of 2010 and the plaintiffs filed cross objections

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being R.F.A. CROB No. 103 of 2011 under Order XLI Rule 22 of the Civil Procedure Code, 1908 (in short "the Code"). This is how the entire preliminary decree became the subject-matter of first appeal filed by the defendants.

8. By impugned judgment and order dated 06.12.2012, the Division Bench of the High Court disposed of the appeal and cross objections and modified the judgment and decree of the trial court to the detriment of the defendants. It is against this judgment and order, the defendants have filed this appeal by way of special leave.

9. Learned Counsel for the appellants, while assailing the legality and correctness of the impugned judgment, contended that the High Court without adverting to all the factual details and various grounds raised in the first appeal, disposed of the same in a cryptic manner. According to learned counsel, the High Court

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neither dealt with any issue nor appreciated the ocular and documentary evidence adduced by the parties nor examined the legal principles applicable to the issues arising in the case and nor rendered its findings on any contentious issues though urged by the appellants herein in support of the appeal. Learned counsel further contended that it was the duty of the High Court being the first appellate Court exercising its appellate power under Section 96 read with Order XLI Rule 31 of the Code to have dealt with the submissions, which were urged by the appellants after appreciating the entire evidence on facts, independent of the findings recorded by the trial Court and should have come to its own conclusion keeping in view the legal principles governing the issues and since it was not done by the High Court, the impugned judgment is not legally sustainable. Lastly, the learned counsel urged that

in case his arguments are accepted, the remand of the case to the High Court to decide the appeal on merits afresh is inevitable.

10. In contra, learned counsel for the respondents (plaintiffs) vehemently urged that no interference in the impugned judgment is called for because firstly, the first appellate Court rendered the judgment on the appellants' concession and hence, it was not necessary for the High Court to record any elaborate finding on any of the issues; secondly, the suit is pending since two decades with no end and lastly, the determination of the shares of the suit properties made by the High Court, if examined on merits by this Court, would be found to be in accordance with law.

11. Having heard learned counsel for the parties and on perusal of the record of the case and examining the issue arising in this appeal, we find

force in the submissions of the learned counsel for the appellants.

12. The powers of the first appellate Court, while deciding the first appeal under Section 96 read with Order XLI Rule 31 of the Code, are indeed well defined by various judicial pronouncements of this Court and are, therefore, no more *res integra*.

13. As far back in 1969, the learned Judge – V.R. Krishna Iyer, J (as His Lordship then was the judge of Kerala High Court) while deciding the first appeal under Section 96 of the CPC in ***Kurian Chacko*** vs. ***Varkey Ouseph,*** AIR 1969 Kerala 316, reminded the first appellate Court of its duty as to how the first appeal under Section 96 should be decided. In his distinctive style of writing and subtle power of expression, the learned judge held as under:

> **"1. The plaintiff, unsuccessful in two Courts, has come up here aggrieved by the dismissal of his suit which was one for declaration of title and recovery of possession. The defendant disputed the**

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plaintiff's title to the property as also his possession and claimed both in himself. The learned Munsif, who tried the suit, recorded findings against the plaintiff both on title and possession. But, in appeal, the learned Subordinate Judge disposed of the whole matter glibly and briefly, in a few sentences.
2. <u>An appellate court is the final Court of fact ordinarily and therefore a litigant is entitled to a full and fair and independent consideration of the evidence at the appellate stage. Anything less than this is unjust to him and I have no doubt that in the present case the learned Subordinate Judge has fallen far short of what is expected of him as an appellate Court.</u> Although there is furious contest between the counsel for the appellant and for the respondent, they appear to agree with me in this observation.....”

(Emphasis supplied)

14. This Court in a number of cases while affirming and then reiterating the aforesaid principle has laid down the scope and powers of the first appellate Court under Section 96 of the Code.

15. We consider it apposite to refer to some of the decisions.

16. In ***Santosh Hazari*** vs. ***Purushottam Tiwari (Deceased) by L.Rs***. (2001) 3 SCC 179, this Court

held (at pages 188-189) as under:

> **"………the appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein 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……while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it…………"**

17. The above view has been followed by a three-Judge Bench decision of this Court in ***Madhukar & Ors.*** v. ***Sangram & Ors.***,(2001) 4 SCC 756, wherein it was reiterated that sitting as a court of first appeal, it is the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings.

18. In ***H.K.N. Swami*** v. ***Irshad Basith***,*(2005)*

10 SCC 243, this Court (at p. 244) stated as under:

> **"*3*. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title."**

19. Again in ***Jagannath*** v. ***Arulappa & Anr***., *(2005) 12 SCC 303,* while considering the scope of Section 96 of the Code this Court (at pp. 303-04) observed as follows:

> **"*2*. A court of first appeal can reappreciate the entire evidence and come to a different conclusion………"**

20. Again in ***B.V Nagesh & Anr.*** vs. ***H.V. Sreenivasa Murthy****,* (2010) 13 SCC 530, this Court taking note of all the earlier judgments of this Court reiterated the aforementioned principle with these words:

> **"3. How the regular first appeal is to be disposed of by the appellate**

court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court 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.

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 is therein 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 first 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 at p. 188, para 15 and *Madhukar* v. *Sangram*, (2001) 4 SCC 756 at p. 758, para 5.)

5. In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the

obligation placed on it as a first appellate court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law."

21. The aforementioned cases were relied upon by this Court while reiterating the same principle in ***State Bank of India & Anr.*** vs. ***Emmsons International Ltd. & Anr.***, (2011) 12 SCC 174. This Court has recently taken the same view on similar facts arising in **Vinod Kumar vs. Gangadhar,** 2014(12) Scale 171.

22. Applying the aforesaid principle to the facts of the case, we find that the High Court while deciding the first appeal failed to keep the aforesaid principle in consideration and rendered the impugned decision. Indeed, it is clear by mere

reading of the impugned order quoted below:

> **"The appellants are defendants in the suit. The plaintiffs are the respondents. The respondents are the children of 1st appellant born in the wedlock between 1st appellant and his divorced wife Smt. Uma Mathad. It is admitted fact that the 1st appellant has married the 2nd respondent after the divorce and in the wedlock he has two children and they are appellant Nos.3 and 4. The suit properties at item Nos.1 and 4 are admitted to be the ancestral properties. Item Nos.2 and 3 are the properties belonging to the mother of the 1st appellant and after her demise the said properties are bequeathed to 1st appellant. Therefore, the said properties acquired the status of self-acquired properties.**
>
> **The respondents filed a suit for partition. The parties are governed by Bombay School of Hindu Law. In view of the provisions of Hindu Succession Amendment Act of 2005, the respondent Nos. 1 and 2 are entitled to a share as co-parceners in the ancestral properties. The wife who is the second appellant also would be entitled to a share in the partition. In that view, the appellant Nos. 1 and 2 and respondent Nos.1 and 2 will have 1/4th share each in item Nos.1 and 4 of the suit properties.**
>
> **The learned counsel for the appellants submitted that the appellants 2 to 4 would not claim any independent share in item Nos.1 and 4 of the suit properties, but they would take share in the 1/4th share allotted to their father.**
>
> **In view of the said submissions, the appellant Nos.1 and 2 and respondent Nos.1 and 2 would be entitled to 1/4th**

> **share in item Nos.1 and 4 of the suit properties.**
>
> **Accordingly, a preliminary decree to be drawn and the appeal and cross objections are disposed of in the terms indicated above."**

23. In our considered opinion, the High Court did not deal with any of the submissions urged by the appellants and/or respondents nor it took note of the grounds taken by the appellants in grounds of appeal nor took note of cross objections filed by plaintiffs under Order XLI Rule 22 of the Code and nor made any attempt to appreciate the evidence adduced by the parties in the light of the settled legal principles and decided case laws applicable to the issues arising in the case with a view to find out as to whether the judgment of the trial Court can be sustained or not and if so, how, and if not, why?

24. We may consider it apposite to state being a well settled principle of law that in a suit filed by a co-sharerer, coparcener, co-owner or joint owner,

as the case may be, for partition and separate possession of his/her share *qua* others, it is necessary for the Court to examine, in the first instance, the nature and character of the properties in suit such as who was the original owner of the suit properties, how and by which source he/she acquired such properties, whether it was his/her self-acquired property or ancestral property, or joint property or coparcenery property in his/her hand and, if so, who are/were the coparceners or joint owners with him/her as the case may be. Secondly, how the devolution of his/her interest in the property took place consequent upon his/her death on surviving members of the family and in what proportion, whether he/she died intestate or left behind any testamentary succession in favour of any family member or outsider to inherit his/her share in properties and if so, its effect. Thirdly whether

the properties in suit are capable of being partitioned effectively and if so, in what manner? Lastly, whether all properties are included in the suit and all co-sharerers, coparceners, co-owners or joint-owners, as the case may be, are made parties to the suit? These issues, being material for proper disposal of the partition suit, have to be answered by the Court on the basis of family tree, *inter se* relations of family members, evidence adduced and the principles of law applicable to the case. **(see "Hindu Law" by Mulla 17th Edition, Chapter XVI Partition and Reunion – Mitakshara Law pages 493-547).**

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25. Being the first appellate Court, it was, therefore, the duty of the High Court to decide the first appeal keeping in view the scope and powers conferred on it under Section 96 read with Order XLI Rule 31 of the Code mentioned above. It was unfortunately not done, thereby, causing prejudice

to the appellants whose valuable right to prosecute the first appeal on facts and law was adversely affected which, in turn, deprived them of a hearing in the appeal in accordance with law.

26. We are not inclined to accept the submission of the learned counsel for the respondents when he urged that the impugned judgment is based on concession given by the appellants and hence no discussion on merits on any of the issues was called for. In the first place, the appellants did not make any application for settlement of the dispute in relation to any of the suit property in writing and secondly, there is nothing on record to show that the appellants wanted to give up their claim or/and wished to settle the matter in relation to some properties. In the light of this, we are of the view that the High Court ought to have gone into the merits of the claim of the respective parties in its proper perspective and then recorded a finding

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regarding extent of shares received by each coparcener/co-owner keeping in view the nature of properties such as whether it was self acquired property or ancestral property and, if so, in whose hands, its source of acquisition by such person, the manner of devolution on the legal representatives of such person etc. As observed supra, these findings were required to be recorded after appreciating the evidence keeping in view the provisions of the Hindu Succession Act and other related laws applicable to the issues arising in the case.

27. It is for these reasons, we are unable to uphold the impugned judgment of the High Court.

28. The appeal thus succeeds and is, accordingly, allowed. The impugned judgment is set aside and the case is remanded to the High Court for deciding the first appeal and cross-objections afresh, keeping in view the principle of law laid

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down by this Court as mentioned above.

29. However, we make it clear that we have not applied our mind to the merits of the issues involved in the case and hence, the High Court would decide the appeal strictly in accordance with law on merits uninfluenced by any of our observations, which we have refrained from making on merits. Needless to observe, the High Court will do so after affording an opportunity of hearing to all the parties.

30. Since the case is quite old, we request the High Court to expedite its hearing and dispose of the case preferably within six months.

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………………….
……..………………………………..J.
[FAKKIR MOHAMED IBRAHIM KALIFULLA]

………..
……………………………………………….J.
[ABHAY MANOHAR SAPRE]

New Delhi;
January 13, 2015.

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