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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.382 OF 1989

1. Vishwanath Yeshwant Rohokale APPELLANT
(Died) Through his L. Rs.
 - 1-A) Ashok s/o Vishwanath Rohokale
Age-21 years, Occ- Agriculture
 - 1-B) Shivaji s/o Vishwanath Rohokale,
Age- 13 years, Minor, through his
mother Smt. Parubai Vishwanath Rohokale
 - 1-C) Sambhaji s/o Vishnath Rohokale,
Age-11 years, Minor through his mother
Smt. Parubai Vishwanath Rohokale
 - 1-D) Nandabai d/o Vishwanath Rohokale
Age- Minor through her mother
Smt. Parubai Vishwanath Rohokale
 - 1-E) Smt. Parubai w/o Vishwanath Rohokale
Age-45 years, Occ- Household
 - 1-F) Anusaya w/o Sampat Bhise
Age-19 years, Occ – Household

All R/o Bhalwani, Taluka-Parner,
District – Ahmednagar
2. Jagananth s/o Ananda Rohokale,
(Since Deceased) Through its L. Rs.
 - 2-A) Raju s/o Jagannath Rohokale,
Age-50 years, Occ - Agriculture
 - 2-B) Narayan s/o Jagananth Rohokale,
Age-46 years, Occ- Agriculture
 - 2-C) Aba s/o Jagannath Rohokale,
Age-65 years, Occ- Agriculture

All R/o Bhalwani, Taluka-Parner
District – Ahmednagar

3. Pandharinath s/o Keshav Rohokale,
(Since deceased) Through is L. Rs.

3-A) Nana s/o Pandharinath Rohokale,
Age-54 years, Occ- Agriculture

3-B) Subhash s/o Pandharinath Rohokale,
Age-45 years, Occ – Agriculture

Both R/o Bhalwani, Taluka- Parner
District- Ahmednagar

VERSUS

1. Narayan Gunaji Rohokale RESPONDENTS
(Since deceased) Through L.Rs.

1-A) Anjanabai Narayan Rohokale **DELETED**

1-B) Mandakini Sajan Adhav,
Age-45 years, Occ – Household & Agriculture

1-C) Nilesh Baban Shinde,
Age-15 years, Occ- Nil

1-D) Suvarna Baban Shinde,
Age-13 years, Occ-Nil

1-E) Baban Radhu Shinde,
Age-Major, Occ – Agriculture
R/o Bhalwani, Taluka-Parner
District – Ahmednagar

Respondents No.1-C and 1-D are minors
through u/g Respondent No.1-E
Baban Radhu Shinde

2. Kashinath Yeshwant Rohokale

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Mr. P. S. Dighe h/f Mr. V. R. Dhorde, Advocate for the appellants

Mr. N. K. Kakade, Advocate for respondents No.1-B to 1-D

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[CORAM : N. W. SAMBRE, J.]

RESERVED ON : 8th JANUARY, 2015

PRONOUNCED ON : 30th JANUARY, 2015

JUDGMENT :

1. This is an appeal by original plaintiffs. The plaintiffs have filed Regular Civil Suit No. 28 of 1974 on the file of learned Civil Judge, Junior Division, Parner, for declaration and injunction against the defendants. It is claimed that the heirship certificate obtained by defendant No.1 i.e. respondent No.1 herein, in Miscellaneous Application No. 1 of 1962 does not confer any right, title or interest in favour of defendant No.1, as it is obtained by defendant No.1 by practicing fraud upon the court, in not disclosing and joining the plaintiffs and defendant No.2 as parties, as they were necessary parties. It is further claimed that co-wife of deceased Sarubai i.e. Zutibai was not impleaded as a party to the proceedings, though at the relevant time she was alive and the suit property was mutated in record of rights in her name. As such, claimed that the certificate is void and does not confer any right, title and interest against defendant No.1 and as a consequential relief, it is further claimed that on the strength of heirship certificate, defendant No.1 should not obstruct the

lawful possession of the plaintiffs – appellants over the suit property, as tenants.

2. Defendant No.1 had filed his written statement to the said claim and asserted that the certificate was granted to him by the court after due course of inquiry. He further urged that the suit land was purchased by deceased Sarubai and as such, she became exclusive owner of said property. Said Sarubai died on 18th June, 1948 at Ahmednagar. He further claimed that after her death, the property was given management of courts of wards as there was no legal heir to deceased Sarubai.

3. Having regard to the claim put forth by the parties, learned trial court framed issues at Exhibit-35, which read thus -

"(1) Whether plaintiff prove that Sarubai was the owner of the suit land?

(2) If yes, whether they further prove that, after the death of Sarubai, Zutibai succeeded the property belonging to deceased Sarubai?

(3) Whether defendant proves that he was related to deceased Sarubai?

(4) If yes, whether he further proves that, he was the only nearest relative of deceased Sarubai?

(5) *Whether the plaintiff proves that the heir ship certificate obtained by defendant in Misc. Appn. No. 1 / 62 is obtained by defendant No.1 practicing a fraud upon the court?*

(6) *Whether plaintiff proves that Zutibai and plaintiff, and defendant No.2 were necessary parties to the proceedings in Misc. Application No. 1/62.*

(7) *If yes, what is the result of the certificate upon plaintiff and defendant No.2?*

(8) *Whether plaintiff prove that the proceedings followed in Misc. Application No. 1/62 is not correct, legal?*

(9) *If yes, what is the effect of it?*

(10) *Whether defendant No.1 proves that he is the owner of the suit lands in view of the certificate in Misc. Application No. 1/62?*

(11) *Whether plaintiff and defendant No. 2 proves their judicial possession of the suit property?*

(12) *Whether plaintiff is entitled to declaration sought?*

(13) *Whether defendant proves that the suit is bound by misjoinder of parties of property?*

(14) What order, what decree?"

4. Learned trial court, having regard to the claims put forth before it, decreed the suit by its order dated 31st December, 1980, thereby declaring that the heirship certificate obtained by defendant No. 1 in Miscellaneous Application No. 1 of 1962 was obtained without joining all the necessary parties and as such, the same does not confer any right, title or interest in the defendant and, therefore, held that said certificate is null and void.

5. present respondent No.1, feeling aggrieved thereby, preferred Regular Civil Appeal No. 73 of 1981. In said appeal, the learned lower appellate court framed points for its consideration and determination and answered the same, which read thus-

"(1) Whether plaintiff is entitled to relief sought? - No.

(2) Whether the suit is legally tenable? - No.

(3) Whether the suit is within limitation? - No.

(4) What order? - As per order below."

6. Learned lower appellate court has proceeded to reverse the decree on the ground that the claim put forth by the

plaintiffs- appellants is contrary to the provisions of section 34 of the Specific Relief Act. Learned lower appellate court has ignored the oral evidence led by the parties, as according to it, the appeal can be disposed of on legal considerations alone. It is also noted by the learned appellate court that except the evidence of the parties, no other evidence is brought on record, but for in the form of Exhibits, 5 to 7, 12 to 141 and judgment in Tenancy Case No. 3 of 1963 at Exhibit-31 and the impugned heirship certificate at Exhibit-53. Learned lower appellate court observed that a decree of declaration can be given only when a person claims legal character or right. The lower appellate court has taken into account the claim put forth by the plaintiffs – appellants, that they claimed to be tenants in suit land, which was admitted by the contesting defendant No.1.

7. In view of the above, the learned lower appellate court observed that the plaintiffs cannot seek a declaration that defendant No.1 is not the owner of the suit lands, when the plaintiffs themselves have claimed that they are the tenants over the suit property. Learned lower appellate court has relied upon the verdict given in Tenancy proceedings i.e. Tenancy Case No. 3 of 1963, which is placed at Exhibit-31.

8. In the background of above referred facts, learned counsel for the appellant Mr. Dighe, has strenuously urged that the lower appellate court has misconceived the claim put forth by the appellant-plaintiffs, as according to him, he has every right to claim a declaration that the heirship certificate was obtained by defendant No.1 by playing fraud. According to him, the lower appellate court has also considered point of limitation, whereas no opportunity to meet said issue was given to the plaintiffs. He further submits that once the issue of playing fraud on the court is pleaded and established, the issue of limitation cannot be attracted and as such, according to him, the appeal is liable to be allowed.

9. Perusal of the judgment rendered in Regular Civil appeal No.73 of 1981 and that of in Regular Civil Suit No. 28 of 1974 prevails upon me to frame following substantial questions of law in present second appeal -

I) Whether the lower appellate court has committed an error, apparent on the face of record in not offering an opportunity of hearing to the present appellants – plaintiffs on the issue of limitation, when the plaintiffs have come out with a specific case of fraud played by defendant No.1 in obtaining heirship

certificate?

II) Whether the judgment of the lower appellate court is in tune with the requirements of section 96 read with Order XLI of the Code of Civil Procedure, more particularly having regard to law laid down by the Apex Court in "Santosh Hazari V. Purushottam Tiwari" reported in (2001) 3 SCC 179?

10. The first question of law that is required to be addressed is in relation to issue of limitation and opportunity offered by the lower appellate court. In my opinion, perusal of the judgment reflects that the point for determination though was considered by the lower appellate court, however it does not reflect on the record as to whether the parties to the appeal were given an opportunity on said issue. *Prima facie*, it reflects that the lower appellate court has considered the said issue of limitation in paragraph No. 11 of its judgment, by referring to Article 58 of the Limitation Act, 1963. The other considerations, viz., the fact of fraud, on the issue of limitation or any other submission of the plaintiffs – appellants to that effect are neither considered nor dealt with by the learned lower appellate court. It is also required to be taken note of the fact that least that was

expected of the lower appellate court was to call upon the parties to address on said issue and to consider submissions, deal with them and give finding.

11. As far as second issue as regards approach of the lower appellate court, qua assessment of the judgment delivered by the trial court is concerned, the consideration of points canvassed before it and the findings on such issues are conspicuously absent in the judgment.

12. The scheme of section 96 read with Order XLI of the Civil Procedure Code mandates that the first appellate court should consider judgment of the trial court in its entirety, discuss the same and if the lower appellate court is not in agreement with the same, to analyze the verdict of the trial court and then to give its finding by recording reasons for upsetting judgment of the trial court.

13. Perusal of the judgment of the lower appellate court *prima facie* depicts that the lower appellate court has not dealt with the issues raised before the learned trial court. The lower appellate court, under the shelter of section 34 of the Specific Relief Act, has proceeded to infer that the plaintiffs have claimed that they are tenants and as such, the plaintiffs cannot claim right of

declaration of the alleged heirship certificate as illegal, as was obtained by playing fraud. Unless clear cut findings on the said issues are recorded, the judgment of the lower appellate court, in my opinion, is contrary to the above referred section of Civil Procedure Code. I am fortified in my view, in view of the law laid down by the Apex Court in "**Santosh Hazari V. Purushottam Tiwari**" reported in **(2001) 3 SCC 179**. Relevant paragraph No.15 of said judgment reads thus -

"A perusal of the judgment of the trial Court shows that it has extensively dealt with the oral and documentary evidence adduced by the parties for deciding the issues on which the parties went to trial. It also found that in support of his plea of adverse possession on the disputed land, the defendant did not produce any documentary evidence while the oral evidence adduced by the defendant was conflicting in nature and hence unworthy of reliance. The first appellate Court has, in a very cryptic manner, reversed the finding on question of possession and dispossession as alleged by the plaintiff as also on the question of adverse possession as pleaded by the defendant. 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. The task of an appellate Court affirming the findings of the trial Court is an easier one. The appellate Court agreeing with the view of the trial Court need not restate the effect of the evidence or reiterate the reasons given by the trial Court; expression of general agreement with reasons given by the Court, decision of which is under appeal, would ordinarily suffice (See Girijanandini Devi & Ors. Vs. Bijendra Narain Choudhary, AIR 1967 SC 1124). We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate Court for shirking the duty cast on it. While writing a judgment of reversal the appellate Court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial Court must weigh with the appellate Court, more so when the findings are based on oral evidence recorded by the same presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate Court is entitled to interfere with the finding of fact (See Madhusudan Das Vs. Smt. Narayani Bai & Ors., AIR 1983 SC 114). The rule is ___ and it is nothing more than a rule

of practice — that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judges notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate Court should not interfere with the finding of the trial Judge on a question of fact. (See Sarju Pershad Ramdeo Sahu Vs. Jwaleshwari Pratap Narain Singh & Ors., AIR 1951 SC 120). Secondly, 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. We need only remind the first appellate Courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate Court continues, as before, to be a final Court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate Court is also a final Court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate Court even on questions of law unless such question of law be a substantial one.”

14. In view of above, in my opinion, the verdict in first appeal is not sustainable, as such, judgment and order dated 7th July, 1983 passed in Regular Civil Appeal No.73 of 1981 is hereby set aside. Said appeal is remitted back to the Court of District Judge, Ahmednagar, who is directed to decide the same, either himself or by allotting it to any other district judge for decision in accordance with law, having regard to the findings recorded herein above. Second appeal, as such, stands disposed of.

15. As the proceedings are pending since 1973, it will be in the fitness of things that the lower appellate court decides the appeal within a period of three months from the date of communication of this order. The filing of paper book before the lower appellate court is dispensed with as parties undertake to submit all the relevant record. The parties agree that they shall appear before the lower appellate court on 16th February, 2015.

16. In view of disposal of the second appeal, Civil Application No. 9011 of 2014 does not survive and hence stands disposed of.

[N. W. SAMBRE, J.]