

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO.363 OF 1991

Kishan Narayanrao Dhotre

..APPELLANT

Versus

Babasaheb Santoba Pawar
(deceased) through his Legal
Representatives :

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|------------------------------------|----|---|
| (1) Parwatibai w/o Babasaheb Pawar | .. | Abated vide
Registrar's order
dated 12.2.2014 |
| (2) Apparao Aabaji Borade | .. | Abated vide
Registrar's order
dated 29.7.1992 |
| 3. Bapurao Govindrao Thombare | | |
| (4) Bhaurao Appasaheb | .. | Abated vide |
| (5) Sonabai Narayanrao Dhotre | | Registrar's order |
| Age 58 years | | dated 29.7.1992 |
| | | ..RESPONDENTS |

Mrs A.N. Ansari, Advocate for appellant
Appeal abated as against respondents No.1 vide Registrar's order dated
12.2.2014 and against respondents No.2, 4 and 5 vide Registrar's order
dated 29.7.1992

CORAM : N.W. SAMBRE, J.

DATE : 10th June 2015

ORAL JUDGMENT

Heard Mrs A.N. Ansari for the appellant.

2. The appeal is by original plaintiff, who filed Regular Civil Suit
No.51 of 1979 before the Joint Civil Judge, Junior Division, Partur for
recovery of possession of the suit land with declaration that the sale-

deed dated 19th January 1968 executed by defendant No.6 (plaintiff-appellant) in favour of defendants not binding on him.

3. The suit property consists of Survey No.32/1 ad measuring 6 acres, 1 guntha and Survey No.31/S 5 acres, 36 gunthas situated at village Takali Rangopant, Taluka Partur. Admittedly, the sale-deed dated 19th January 1968 by the original defendant No.6 in favour of defendants No.1 to 4 was during minority of the plaintiff. The original defendants No.2 to 4, after purchasing the land vide sale-deed dated 19th January 1968 transferred their share to defendant No.1.

4. It was the case of the appellant before the learned trial Court that the sale-deed in question was in necessity and for his benefit when he was minor. The defendants, while responding to the claim came out with a case of sale of necessity, as according to them, the amount received out of consideration was paid for the education of the plaintiff.

5. Having regard to the claim put forth by the respective parties, learned trial Court framed following issues and answered the same accordingly :

ISSUES	FINDINGS
1. Does the plaintiff prove that the suit land is the ancestral property of the plaintiff ?	Yes
2. Do the defendants No.1 to 4 prove that the alienation is for legal necessity and for the benefit of estate ?	Yes
3. Does the plaintiff prove that the alienation is hit by the provisions of Hindu Minority and Guardianship Act, 1956 ?	Yes
4. Had the defendant No.6 right to alienate the suit land in favour of defendants No.1 to 4 ?	Yes
5. It is alienation beneficial to the plaintiff ?	Yes
6. Is the transfer of the suit land in favour of defendant No.5 by the defendant No.1 is hit by the provisions of Fragmentation and Consolidation of the Holdings Act ?	Yes
7. Are the alienation of the suit land are binding on the plaintiff ?	Yes

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|-----|---|-------------|
| 8. | Is the suit within limitation ? | No |
| 9. | Is the plaintiff entitled for
declaration sought for ? | No |
| 10. | Does the plaintiff prove that his
possession is agricultural ? | Not survive |
| 11. | What decree and order ? | As below |

6. Amongst other, the issue No.8 was in regard to the limitation which was answered against the present appellant.

7. This appeal was admitted for final hearing by order dated 27th August 1991, however, no substantial question of law was framed at that time.

8. After admission of the appeal, the respondents though served, none appears.

9. Mrs Ansari, learned counsel for the appellant would urge that the judgment of the learned lower appellate Court is cryptic, as the lower appellate Court has not considered and answered all the issues which are considered and answered by the learned trial Court. In support of her contention, while praying for remand, has placed

reliance upon the judgment of Apex Court in the matter of **Santosh Hazari Vs. Purushottam Tiwari deceased by L.Rs.**, reported in **2001 (2) Mh.L.J. 786** and **Vinod Kumar Vs. Gangadhar**, reported in **2015(3) Mh.L.J.547**. In addition to this, Mrs Ansari would urge that whether the Court below was right in applying the Article 60 of the Limitation Act whereas the case in hand is governed by Article 65 of the Limitation Act. In addition to above, she has also sought to urge that the sale in question was not a sale of necessity and in support thereof, sought to place reliance upon the judgments of this Court in the matter of **Shripati s/o Santu Mane Vs. Goroba s/o Nivarti Ghutukade and anr.**, reported in **2008 (6) Mh.L.J.707** and in the matter of **Baliram Sahebrao Tidke and anr. Vs. Saheba s/o Patilba Tidke and ors.**, reported in **2010 (2) Mh.L.J. 117**. The above referred judgments were also sought to be relied upon while canvassing the issue about sale of necessity of the minor in an immovable property without permission of the Court, particularly having regard to the provisions of Section 8 of the Hindu Minority and Guardianship Act.

10. In the light of submissions made above and having regard to the fact that while admitting the appeal, no substantial question of law was framed, this Court proceeded to frame the questions of law, as are addressed by the appellant for its consideration which are as under :

(a) Whether the learned lower appellate Court has committed an error of law apparent on the face of record thereby deciding the appeal contrary to the scheme of Section 96 of the Code of Civil Procedure by answering the issue of limitation only without touching the other issues as are decided by the learned trial Court ?

(b) *Whether the sale in question of the suit property could be termed as sale of necessity ?*

(c) *Whether there is violation of provisions of Section 8 of the Hindu Minority and Guardianship Act, as the property belonging to minor was transferred without prior permission from the Court and particularly in absence of any permission under the provisions of Prevention of Fragmentation and Consolidation of Holdings Act ?*

11. So as to decide the issue in question with the assistance of Mrs Ansari, I have gone through the entire observations made by the learned trial Court and the first appellate Court. It is noticed that in support of the claim put forth by the plaintiff, he has relied upon the 7/12 extracts of the suit land at Exh.5, 6 and certified copy of *Khasra Patrak*. Defendants No.1, 3 and 5 filed their written statement at Exh.19 submitting that the sale of suit field by the defendant No.6 to defendants No.1 to 4 was lawful, as the same was a sale of legal necessity. It is claimed by them in their written statement that the consideration received after transfer of the suit property was spent

on the education of the appellant. It was also alleged that the defendant No.6 was not financially sound so as to meet the expenses of education of the appellant including that of the expenses incurred for her own maintenance and bringing up the appellant. In the written statement the defendants raised an issue of limitation, as according to them, the provisions of Article 60 of the Limitation Act are applicable.

12. As stated earlier, learned trial Court proceeded to decide all the issues on its merits and answered the same in favour of the present appellant, but for the issue of limitation. While dealing with the issue of limitation, learned trial Court has observed that the defendant No.6 being mother of the plaintiff-appellant and as such a natural guardian has alienated the suit property during the minority of the appellant and as such, provisions of Article 60 of the Limitation Act would be applicable. Learned trial Court noticed that so as to set aside the transfer of property made by guardian of a ward, if a suit is to be instituted, the period of three years limitation is provided which begins from the date of attaining majority by such minor. Learned trial Court, as such proceeded to record that the suit which was filed in 1979 was barred by limitation, as the appellant had reached to the status of majority sometime in 1974.

13. The said issue was looked into by the learned lower appellate Court and endorsed the view of the trial Court about applicability of Article 60 of the Limitation Act briefly analysing the evidence and the contentions of the parties.\

14. If the submission of learned Counsel for the appellant that Article 65 of the Limitation Act is attracted is to be considered, it is to be noted that on behalf of appellant, submission was made before the learned lower appellate Court that Article 64 of the Limitation Act is applicable. The said Article 64 reads thus :

Description of suit	Period of limitation	Time from which period begins to run
64. For possession of immovable property based on previous possession and not on title, when the plaintiff while in possession of the property has been dispossessed.	Twelve years	The date of dispossession.

15. The appellant, at the stage of Second Appeal has urged that it is Article 65 of the Limitation Act which is applicable, which reads thus :

Description of suit	Period of limitation	Time from which period begins to run
65. For possession of immovable property or any interest therein based on title. <i>Explanation</i> – For the purposes of this article - (a) Where the suit is by a remainderman, a reversioner (other than a landlord) or a devisee, the possession of the defendant shall be deemed to become adverse only when the estate of the remainderman, reversioner or devisee, as the case may be, falls into possession; (b) Where the suit is by a Hindu or Muslim entitled to the possession of	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.

immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies; (c) Where the suit is by a purchaser at a sale in execution of a decree when the judgment-debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgment-debtor who was out of possession.		
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16. Perusal of both these Articles, particularly in the background of language employed in Article 60, which reads thus,

Description of suit	Period of limitation	Time from which period begins to run
60. To set aside a transfer of property made by the guardian of a ward -		
(a) by the ward who has attained majority;	Three years	When the ward attains majority
(b) by the ward's legal representative -		
(I) When the ward dies within three years from the date of attaining majority;	Three years	When the ward attains majority
(ii) when the ward dies before attaining majority	Three years	When the ward dies

leaves no scope of any confusion as regard applicability of Article 60 to the facts of the present case. In the present case, the suit is for declaration and possession, initiated by a ward against his mother

upon attaining the age of majority. Article 64 or 65 do not speak of any such right on a ward to initiate such proceedings against his mother, particularly in the facts of the present case.

17. In view thereof, in my opinion, the approach of both the Courts below i.e. the learned trial Court and learned lower appellate Court in invoking the provisions of Article 60 of the Limitation Act is just and proper in the facts and evidence that was brought on record.

18. So far as the issue of scope of Section 96 of the Code of Civil Procedure particularly, in the light of the judgment of the Apex Court in the matter of Santosh Hazari Vs. Purushottam Tiwari (cited supra) is concerned, it is required to be noted that in paragraph 15 of the said judgment, the Apex Court has observed thus :

15. 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.

19. The Apex Court, in the matter of **Santosh Hazari Vs. Purushottam Tiwari deceased by L.Rs.** (cited supra), as reproduced herein above has endorsed the right of first appeal, as available right of the parties. The Apex Court further held that the first appeal being a statutory right, the Court is required to look into both law and facts and the judgment of the first appellate Court should reflect the application of mind and must record the findings after mentioning the points for determination and decisions thereof with the reason for decision. It was also clarified that the first appellate Court, upon re-appreciation of facts and evidence can take a different view than that of first Court, provided the material in law prompts so.

20. In the matter of **Vinod Kumar Vs. Gangadhar** (cited supra), the Apex Court has taken glimpse of entire law laid down by the Apex Court, particularly having regard to the scheme of Section 96 read with Order 41, Rule 31 of the Code of Civil Procedure and has recognised the right of the parties before the first appellate Court.

21. So far as the non-touching of other issues, particularly the sale of necessity and the transaction being hit by the provisions of Prevention of Fragmentation and Consolidation of Holdings Act is concerned, in my opinion, no specific evidence or violation is

established before both the Courts below in relation to the said issue about violation of provisions of Prevention of Fragmentation and Consolidation of Holdings Act. The prayer for remand of the case on the said ground, in my opinion, will not be just and proper particularly when the action in question is pending in the Court of law since 1979 and the appeal before this Court is pending since 1991. So far as the issue of sale of legal necessity is concerned, it will be inappropriate for this Court to re-appreciate the said issue, particularly to re-appreciate the evidence on the said aspect of the matter.

22. In view of above, in my opinion, no case for interference is made out. Second Appeal being devoid of merits, stands dismissed.

[N.W. SAMBRE, J.]