

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 356 OF 2013
WITH
CIVIL APPLICATION NO. 3841 OF 2015
AND
CIVIL APPLICATION NO. 6655 OF 2013

Fulchand S/o Dasu Saudagar,
Age: 47 years, Occu. Business,
R/o Dhoki, Tq. & Dist. Osmanabad

...APPELLANT
(Orig. Defendant)

VERSUS

Shahaji S/o Rangnath Ingale,
Age: 60 years, Occu. Retired,
R/o Dhoki, Tq. & Dist. Osmanabad

...RESPONDENT
(Orig. Plaintiff)

Mr A. G. Dalal, Advocate holding for Mr S. J. Salunke, Advocate for
appellant;
Mr Rajendra Deshmukh, Advocate for respondent

CORAM : N.W. SAMBRE, J.

Date : 22nd June, 2015

ORAL ORDER

The present appeal is by original defendant in Regular Civil Suit No.96 of of 1995, which was filed by the respondent herein for possession of the suit property.

2. Sometime in 1981, Shakilabi leased out 11 x 66 ft. land to the present appellant on monthly rent for eleven months and the tenancy was to start from first day of each English calender month.

3. It is claimed that on 22nd October, 1986, said Shakilabi sold 11 x 66 ft. of land of plot no.4 to the plaintiff, i.e. respondent herein by registered sale deed and on the same day she transferred middle portion of the plot to Janak Sahebrao Khot. It is further claimed that on 28th October, 1986, Shakilabi then executed sale deed of plot on the same size in favour of Mohmad Isak and as such transferred the entire property. The defendant, pursuant to an intimation, started paying rent to Janak.

4. On 28th July, 1987, the plaintiff having purchased the plot from Janak and Janak purchased the portion from Mohmad Isak. Accordingly, the plaintiff became owner of eastern and middle portion of plot no.4.

5. Based on the same, the plaintiff filed suit for possession.

6. The suit for possession was decreed by the learned Trial Court vide judgment and decree dated 30th October, 2004.

7. Feeling aggrieved by the judgment and decree dated 30th October, 2004, the appellant/defendant preferred Regular Civil Appeal No.113 of 2006 in the Court of the Principal District Judge, Osmanabad. The first appellate court confirmed the decree passed by the Trial Court and dismissed the appeal of the present appellant by judgment and decree

dated 15th October, 2012. Thus, present Second Appeal.

8. Mr A.G. Dalal, learned Counsel appearing on behalf of the appellant would urge that the judgment of the first appellate court is not in tune with the provisions of section 96 read with Order XLI, Rule 31 of the Code of Civil Procedure. According to him, perusal of the judgment would reflect that the first appellate court has failed to adhere to the mandate of the above referred provisions of the Code of Civil Procedure, as neither any factual matrix nor any evidence is discussed and re-appreciated while dismissing the appeal. He would urge that the said amounts to denial of principles of natural justice and as such sought to frame following substantial question of law :-

“Whether the first appellate court was right in dismissing the appeal of the appellant contrary to the provisions of Order XLI, Rule 31 read with section 96 of the Code of Civil Procedure ? ”

9. Learned Counsel appearing on behalf of the respondent/plaintiff, while assisting this Court though has tried to urge that the appellant herein has failed to demonstrate any prejudice from the judgment of the lower appellate court, was fair enough to concede the position of law as contemplated under Order XLI, Rule 31 of the Code of Civil Procedure.

10. Upon perusal of the judgment of the first appellate court, it is noticed that the said court in a very cryptic manner has considered the factual matrix and the evidence brought before it. The first appellate court in a single page judgment has recorded the reasons without re-appreciating the evidence and application of mind. The above referred approach of the first appellate court is contrary to the provisions of Order XLI, Rule 31 of the Code of Civil Procedure. I am supported in my above referred view, in the light of the law laid down by the Apex Court in the matter of **Santosh Hazari vs. Purushottam Tiwari (deceased) by L.Rs.**, reported in **(2001) 3 SCC 179**. The observations made by the Apex Court in paragraph 15 of the said judgment read 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 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, 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 lie, 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, 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.”

11. In view of above, the present Second Appeal succeeds. I, therefore, pass the following order :-

The judgment and decree dated 15th October, 2012, passed by Principal

District Judge, Osmanabad, in Regular Civil Appeal No.113 of 2006, is hereby set aside.

The appeal stands remanded to the court of Principal District Judge, Osmanabad, with a direction to decide the same afresh, in the light of the observations made herein above.

In the background of long pendency of the proceedings, the parties hereto agree that they shall appear before the learned Principal District Judge, Osmanabad along with entire case papers on 21st July, 2015, at 11.00 a.m.

The learned Principal District Judge, Osmanabad is directed to decide the appeal as expeditiously as possible and in any case, within a period of four months from the date of appearance of the parties.

The parties hereto assure that they shall co-operate the learned Principal District Judge, Osmanabad, in expeditious disposal of the appeal.

In view of above, Civil Application Nos.6655 of 2013 and 3841 of 2015 do not survive and stand disposed of.

(N.W. SAMBRE, J.)

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