

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

SECOND APPEAL NO. 29 OF 2015

Shri. Jalindar Eknath Gonate,
Age: 33 years, Occ: Agri.,
R/o. At Ogadi, Tq. Kopargaon,
Dist. Ahmednagar

...Appellant

versus

1. Shri Shivaji Eknath Gonate,
Age: 45 years, Occ: Business,
2. Haushbai @ Hirabai Eknath Gonate,
Age: 67 years, Occ: Agri.,
Both R/o. At Ogadi, Tq.Kopargaon,
Dist. Ahmednagar.
3. Shri Eknath Laxman Gonate,
Age: 83 years, Occ: Agri.,
4. Kalyabai Eknath Gonate,
Age: 67 years, Occ: Agri.,
Both R/o. At Ogadi, Tq.Kopargaon,
Dist. Ahmednagar.
5. The Taluka Inspector of Land Records,
Kopargaon, Dist. Ahmednagar.
6. The Circle Inspector, Kopargaon,
Dist. Ahmednagar.
7. The Collector, Ahmednagar,
Dist. Ahmednagar.

...Respondents

.....

Mr. Mukul S. Kulkarni, Advocate for appellant
Mr. K.M. Nagarkar, Advocate for respondent Nos. 1 & 2
Mr. N.P. Ghanwat, Advocate for respondent Nos. 3 & 4
Mr. G.R. Ingole, A.G.P. for respondent Nos. 5 to 7

.....

CORAM : N.W. SAMBRE, J.

DATE : 3rd JULY, 2015

ORAL ORDER :

Heard Mr. Kulkarni, learned Counsel for the appellant and Mr. Nagarkar, learned Counsel for respondent Nos. 1 and 2.

2. Having heard the second appeal for some time, which is arising out of refusal to grant a decree for setting aside the judgment passed in earlier suit for partition and separate possession. Mr. Kulkarni, learned Counsel for the appellant-original plaintiff would urge that the judgment of the lower appellate Court is not in tune with the provisions of Section 96 read with Order 41 Rule 31 of the Code of Civil Procedure. In support thereof, he has placed reliance upon the judgment of the Apex Court in the matter of ***Santosh Hazari vs Purushottam Tiwari (Dead) by Lrs.*** reported in ***AIR 2001 SC 965(1)*** and in particular relevant paragraph-15 of the said judgment, which reads 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 Judge's 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*, 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.”

3. Mr. Nagarkar, learned Counsel for respondent Nos. 1 and 2 opposed the above referred contentions on the ground that as according to him, lower appellate Court has considered all facets of the matter. He supports the judgment of the Courts below and sought dismissal of the appeal.

4. In the light of rival submissions, in my opinion, following question of law falls for consideration;

Whether the lower appellate Court was right in dismissing the appeal preferred by the present appellant without adhering to the mandate of provisions under Section 96 read with Order 41 Rule 31 of Code of Civil Procedure?

5. It is required to be noted here that time and again this Court and Apex Court, particularly in the matter of **Santosh Hazari** referred supra, have directed the lower appellate Court that the said Court is required to reappreciate the entire evidence and give findings on each of the issues raised before it. Upon perusal of the judgment under challenge, it is noted that learned lower appellate Court has neither considered the pleadings in detail nor evidence led in support thereof. In a very cryptic manner, learned lower appellate Court has proceeded to decide the appeal without adhering to the mandate of Code of Civil Procedure.

6. In view of above, in my opinion, the judgment delivered by learned lower appellate Court is not sustainable. As such, judgment dated 31/05/2013 passed in Regular Civil Appeal No. 37 of 2005 by the District Judge-2, Kopargaon, Dist. Ahmednagar is hereby set aside. The appeal stands restored to the file of the said Court. The District Judge-2, Kopargaon is directed to decide the appeal within period of three months from the date of appearance of the parties to the present appeal. Parties hereto agree that they shall appear before the concerned Court on 13/07/2015 and shall not seek any adjournment and also extend full co-operation for deciding the appeal, as early as possible.

7. With above observations, the second appeal is partly allowed. Consequently, the civil application stands disposed of.

[N.W. SAMBRE, J.]