

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO.30 OF 2020
WITH
CIVIL APPLICATION NO.7992 OF 2020

1. Karbhari Aashruba Ingle
Age: 60 years, Occu.: Agriculture,
R/o. Aurala, Tq. Kannad, Dist. Aurangabad
 2. Dadasaheb Karbhari Ingle
Age: 36 years, Occu.: Agriculture,
R/o. Aurala, Tq. Kannad, Dist. Aurangabad
- ... Appellants**

Versus

1. Dhannulal @ Dhanraj Bhikulal Bhartiya
Age: 68 Years, Occu.: Agriculture,
R/o. Aurala, Tq. Kannad, Dist. Aurangabad,
At present R/o. Hivarkheda, Tq. Kannad,
Dist. Aurangabad
 2. Mahendra Satyanarayan Bhartiya,
Age: 39 years, Occu.: Business and Agriculture,
R/o. Aurala, Tq. Kannad, Dist. Aurangabad
 3. Sau. Madhuri Rajesh Bharuka
Age: 37 years, Occu.: Household
R/o. Partur Tq. Partur, Dist. Jalna
 4. Santoshkumar Satyanarayan Bhartiya
Age: 35 years, Occu.: Business and Agriculture,
R/o. Aurala, Tq. Kannad, Dist. Aurangabad
- ... Respondents**

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Mr. P. F. Patni, Advocate for appellants.
Mr. V. A. Bagdiya, Advocate for respondents.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 5th February, 2021

JUDGMENT :-

. Present appeal from order has been filed by original defendants challenging the judgment and order passed in Regular Civil Appeal No.232 of 2014 by learned District Judge-12, Aurangabad on 24.02.2020, thereby setting aside the judgment and decree passed by learned 2nd Joint Civil Judge Junior Division, Kannad, District Aurangabad in Regular Civil Suit No.155 of 2011 on 22-08-2014 and remanding the suit for giving opportunity to both sides to lead the evidence, if any.

2. Heard learned Advocate Mr. P. F. Patni for appellants and learned Advocate Mr. V. A. Bagdiya for respondents.

3. It has been vehemently submitted on behalf of the appellants that the learned Trial Judge after considering the evidence on record had come to the conclusion that the suit was not within limitation. The said Court i.e. the Civil Court has no jurisdiction to try and entertain the said suit. The plaintiff had failed to prove that defendant No.1 is unauthorizedly possessing 3 Hectare 28 R land from the western side of Gut No.226 and defendant No.2 is possessing 1 Hectare 41 R land from eastern side of the said gut number unauthorizedly. The learned first Appellate Court on some surmises and interpretation held, that the suit

is within limitation and the Civil Court has jurisdiction to decide the suit and remanded the matter without framing other points, which were involved in the matter. In fact, as per the case before the Trial Court, the defendants claimed that one Vitthal Aba was declared as tenant in respect of the said agricultural land. Bhikulal Kisanlal Bhartiya was the owner, however, as Vitthal Aba was declared as tenant, he was the tenant on the Tillers' day also. He became the owner of the property. He was not having any issue, but he was residing with defendant No.1. Therefore, he executed will, bequeath the suit property to defendant No.1 and the mutation to that effect had taken place in the revenue record in the year 1976 itself. Defendant No.2 had purchased 1 Hectare 41 R land from one Shankar Sukhdev, who was one of the nephew of Vitthal Aba. In fact, the declaration of tenancy in favour of Vitthal Aba was challenged up to this Court in Civil Revision Application No.570 of 1958. The interpretation of the decision by this Court has been done by both the Courts below in different way. The learned Trial Judge held that the declaration granted in favour of Vitthal Aba was not set aside by competent Court, though this Court had given a conditional order. Only upon the proof of certain facts, the concerned competent Court was to take a decision regarding cancellation of the tenancy granted to Vitthal Aba, however, the plaintiffs have not filed any such document rather the

decision by the Agricultural Lands Tribunal. Under such circumstance, the learned Trial Judge had correctly held that the declaration continued and was not got set aside within limitation and, therefore, the Civil Court has no jurisdiction and the suit is not within limitation. Though the first Appellate Court accepted the position that no such record has been produced by the plaintiffs, went on to observe that when it is the question of ownership, it can be gone into by Civil Court and, therefore, the suit is within limitation. A total wrong approach has been adopted. Further, by setting aside the said order, the matter has been remanded, when it was, in fact, not even prayed for in the appeal memo. Learned Advocate for the appellants, therefore, prayed for setting aside the said judgment and order passed by the first Appellate Court.

4. Per contra, the learned Advocate appearing for the respondents submitted that since the Trial Court had erred in holding that the plaintiffs have failed to prove the ownership and, in fact, had come with the case that entire possession over the land of the defendants was not unauthorized, the respondents approached the Appellate Court. In fact, original owner Bhikulal was getting the land cultivated through Vitthal Aba in the year 1950. A wrong entry in respect of him as tenant was got mutated in the 7/12 extract in the year 1954. The declaration given in his name was cancelled by this Court in the said civil revision

application. Entry in respect of the decision by this Court has been taken in the revenue record and, therefore, it amounts to cancellation of the said declaration. In fact, when the alleged declaration was given, on that day, the plaintiff was minor and after death of Bhikulal, the property devolved on his widow and the minor son. In view of the defect in the title and the protection that was available under the tenancy laws, such declaration could not have been given. In fact, there was absolutely no relationship of tenant and landlord. Therefore, definitely, the dispute in respect of ownership was within the jurisdiction of Civil Court. The point of limitation was also not considered properly by the Trial Court and, therefore, it was considered properly by the first Appellate Court. The defendants were not claiming ownership by adverse possession and, therefore, for the reasons stated that since the core question which was required to be considered, was that of ownership of the parties, then opportunity should be given to the parties to lead evidence. Therefore, the remand of the matter was appropriate.

5. At the outset, perusal of the judgment of the first Appellate Court would give a clear picture that there is no adherence of Order 41, Rule 31 of the Code of Civil Procedure, which mandatorily requires framing of appropriate points. In *Santosh Hazari Vs. Purushottam Tiwari (Deceased) By LRS.*, (2001 (3) SCC 179), it has been observed :-

“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 & 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.”

6. Thereafter, the said view was reiterated in the decision of the three Judge Bench of the Hon’ble Supreme Court in ***Madhukar and others Vs. Sangram and others (2001 (4) SCC 756)***. Though in this case, it was the first appeal which was before the High Court, it was held that “it is the duty of the High Court as a Court of first appeal to deal with all the issues and the evidence led by the parties before recording its findings.” Further, in ***HKN Swami Vs. Irshad Basith Dead By Lrs. (2005 (10) SCC 243)***, it was held that “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 question 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.” Again in *B. V. Nagesh and another Vs. H.V. Sreenivasa Murthy (2010 (13) SCC 530)*, all the relevant provisions and the earlier decisions were considered and same observations have been made. In *Sudarsan Puhan Vs. Jayanta Kumar Mohanty and others, (2018 (10) SCC 552)*, the Hon’ble Apex Court considered the duties of the first Appellate Court and the manner in which the first appeal is to be decided has once again taken note of *Santosh Hazari* (Supra), *Madhukar and others* (Supra), *H. K. N. Swami* (Supra) and *B. V. Nagesh and another* (Supra) etc.

7. Here, in this case, only three points have been framed by the learned first Appellate Court. First is in respect of Civil Court’s jurisdiction, second is in respect of limitation and the third is in respect of interference in the Trial Court’s judgment. That means, the points which arose for determination on the basis of the contentions of the parties were not completely considered. In view of the said defect, the remand further suffers. Even if for the sake of arguments it is accepted that it is a complete judgment and order, yet, it is to be noted that the facts before the Court were that the original plaintiffs were coming with the case that one Bhikulal Bhartiya was the owner and possessor of land

Survey No.68/1-A, area 7 Acres 17 Gunthas and Survey No.68/1-B, area 5 Acres 13 Gunthas. Bhikulal is the father of plaintiff No.1 and grandfather of plaintiff Nos.2 to 4. He expired in the year 1950 leaving behind widow and two sons. Another son Satyanarayan and the widow expired on 11.01.1997 and 25.02.1999 respectively. The plaintiffs further contended that Bhikulal was getting the land cultivated with the help of Vitthal Aba. Vitthal Aba was treated as tenant in the year 1954 and a declaration was granted to him under the then Hyderabad Tenancy and Agricultural Lands Act, 1950. It was then contended that after the death of Vitthal Aba, defendant No.1 got his name mutated to Gut No.226 in collusion with Tahsildar and it is to the extent of 4 Hectare 69 R. It was further contended that one Shankar Sukhdev had no concern with the land, yet, he executed sale deed in respect of 1 Hectare 41 R land from the same gut number on 16.03.1994 in favour of defendant No.2. Plaintiffs had challenged the declaration given in favour of Vitthal Aba up to this Court in Civil Revision Application No.570 of 1958. This Court decided the said matter on 02-02-1960 and it was contended that the said declaration was cancelled. It is stated that the plaintiffs had applied for the certified copy of the said order on 17-03-2010 and, thereafter, demanded the possession to the defendants on 01-11-2011 which they denied and, therefore, the suit was filed.

8. The defendants had resisted the claim by saying that the Civil Court has no jurisdiction. Vitthal Aba was declared as tenant and the said declaration was not cancelled by any competent Court. The order that was given by this Court was conditional, however, no steps were further taken. The suit is not within limitation. As aforesaid, the learned Lower Court held that the suit is not within limitation and the Civil Court has no jurisdiction. It went on to further hold that the plaintiffs have failed to prove that the defendants are unauthorizedly possessing the said lands and thus, the suit came to be dismissed.

9. The first Appellate Court has interpreted the order passed by this Court and, in fact, it appears that inquiry was also made by the first Appellate Court with both the parties and it is observed that both the learned Advocates were unable to satisfy the query of the first Appellate Court. In spite of that fact, the learned first Appellate Court went on to hold that there is nothing on record to show that Bhikulal was alive on 10-06-1950 i.e. Tillers' day and the certificate shows that one Dhanraj Bhikulal has been shown as purchaser. Endorsement that Vitthal Aba had paid the entire amount and the entry also states about the note of the decision in civil revision application by this Court. It is observed that the Civil Court can very well decide the question of ownership and, therefore, it was held that the Civil Court has jurisdiction and the suit is

within limitation. A very cryptic order has been passed. The facts have not been analyzed properly by the first Appellate Court. When the first Appellate Court could not get a satisfactory answer to his question from both the Advocates and it can be seen from the judgment of the learned Lower Court that a conditional order was passed by this Court, then it was incumbent upon the first Appellate Court to consider whether the said condition has been fulfilled or not. If the condition is not fulfilled, then what could be the effect of the order ought to have been considered. Further, it can also be seen that the order that was passed by this Court which was of course conditional was on 02.02.1960, then merely because the plaintiffs had applied for the certified copy of the said order on 17.03.2010 and demanded the possession on 01.11.2011; whether would get cause of action to file the suit on 14.12.2011 was the question, which appears to be unanswered by the learned first Appellate Court. Since the judgment is cryptic and does not deal with all the questions involved, the said judgment and order deserves to be set aside. Appeal from order deserves to be allowed with direction to the first Appellate Court to decide the matter afresh as per the provisions of law. Hence, the following order :-

ORDER

- I) Appeal from Order stands allowed.

II) The judgment and order passed by the learned District Judge-12, Aurangabad in Regular Civil Appeal No.232 of 2014 on 24.02.2020 is hereby set aside. The said appeal is restored on the file of the District Court at its original number and is assigned on the file of learned Principal District Judge, Aurangabad for its disposal according to law.

III) If possible, the learned Principal District Judge, Aurangabad to decide the said appeal, which would be very much old and further taking into consideration the age of appellant No.1 and respondent No.2 therein; within a period of six months from the date of receipt of writ of this order.

IV) No order as to costs.

V) Pending Civil Application stands disposed of.

[SMT. VIBHA KANKANWADI, J.]

scm