

IN THE HIGH COURT OF JUDICATURE AT PATNA
SECOND APPEAL No. 99 of 1989

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1. Mahangi Devi Daughter of Late Munar Kamkar, resident of Village Nautan, P.S. Nautan, Dist. Siwan.
 2. Sarswati Devi, Daughter of Late Munar Kamkar, resident of Village Nautan, P.S. Nautan, Dist. Siwan.
 - 3.1. Saraswati Devi Widow of Late Kanhaiya Kumar, resident of Village and Police Station-Nautan, District-Siwan.
 - 3.2. Gayatri Devi, daughter of Late Kanhaiya Kamkar and wife of Bankey Lall Prasad, resident of Village-Mohanpura, P.S. Mirganj, District-Gopalganj.
 - 3.3. Shail Devi, daughter of Late Kanhaiya Kamkar and wife of Khublal Prasad, resident of Village-Chhotka Manjha, P.S. Mairwa, District-Siwan.
 5. Bitandi Kamkar, S/o Late Chhingur Kamkar, resident of Village Nautan, P.S. Nautan, Dist. Siwan.

... .. Appellant/s

Versus

- 1.1. Awadhesh Prasad @ Awadhesh Kumar son of Late Baban Prasad, resident of Village and Police Station-Nautan, District Siwan at present residing at Village Kangoi (Gadda), Police Station and District-Dewariya (U.P.)
- 1.2. Anirudh Prasad son of Late Baban Prasad, resident of Village and Police Station-Nautan, District Siwan at present residing at Village Kangoi (Gadda), Police Station and District-Dewariya (U.P.)
- 1.3. Bhirgunath Lal, son of Late Baban Prasad, resident of Village and Police Station-Nautan, District Siwan at present residing at Village Kangoi (Gadda), Police Station and District-Dewariya (U.P.)

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr.Hare Krishna Kumar
For the Respondent/s	:	Mr.Ajay Mishra

CORAM: HONOURABLE MR. JUSTICE DR. ANSHUMAN

ORAL ORDER

27 15-04-2024 Counsel for the appellants and counsel for the respondents are present.

2. Both the parties have submitted their brief written argument in compliance of Order No. 26 dated 26.03.2024.

3. The appellant has filed the present second appeal being dissatisfied with the Judgment and decree dated 20.12.1988 passed by A.D.J.-6, Siwan in Title Appeal No. 45 of 1982 confirming the judgment and decree dated 29.03.1982



passed by 1st Additional Munsiff, Siwan in Title suit No. 70 of 1975/23 of 1980 preferred by the plaintiff-respondent with a prayer for declaration of title over the suit land.

4. The substantial question of law, vide order no. 7 dated 11.08.1989 as framed in this appeal are as follows:-

- *Whether the Court of appeal below erred in law in thinking it to be a case of Benami Transaction when according to the statements made in the plaint, it appears to be a case of Farzee Transaction?*
- *Whether the Judgment and decree passed by the Court below is bad in law for non-consideration of oral evidence?*

5. Counsel for the appellant submits that there are two substantial questions of law which have been framed. There is no need to pursue the first substantial question, therefore, he refrains himself to argue on first substantial question that, whether this case is the case of *benami transaction* or *farzi transaction*. Counsel further submits that he shall argue in support of second substantial question of law only i.e.

“Whether Judgment and Decree passed by the Court below is bad in law for non-consideration of oral evidence”.

6. He submits that paragraph 12 of the Appellate



Court judgment dated 20.12.1988 as decided by Additional District Judge- 6th, Siwan in Title Appeal No. 45/82 states as follows:

Paragraph-12: "The learned Lower Court has discussed the oral evidences of both the parties in his Judgment and has rightly found the evidence of plaintiff far superior".

7. Counsel for the appellant further submits that observation made by the Appellant Court in Paragraph 12 of Judgment is absolutely perverse, as the Trial Court has not considered the oral evidence of the plaintiff at all but even then, he reached on finding made in Paragraph-12. He submits in this regard that the Trial Court himself observed in the paragraph 25 of its judgment dated 29.03.1882 passed by the Additional Munsiff, Siwan in Title Suit No. 70/75 of 23/80, as follows:

Paragraph 25-"I have not discussed the evidence of the PWs because it was not necessary to do in the case because of the documentary evidence and admitted oral evidences"

8. Counsel for the appellant submits that in the light of the above quoted paragraphs of the Appellate Court's Judgment in Paragraph 12 and Original Court's Judgment in



paragraph 25, it becomes crystal clear that the finding of the Appellate Court is absolutely against the finding of the Trial Court, and therefore, the said order passed by the Trial Court is not sustainable in the eye of law as it has been passed without appreciation and findings made by the Trial Court.

9. Counsel for the appellant further submits, that for the purpose of complete adjudication, consideration of oral evidences of the plaintiff are essential as in the Civil Litigation, it is the pleadings of the parties which have to be proved on the basis of the evidences, Similarly at the appellate stage, appreciation of the findings of the Trial Court is necessary to be considered by the Appellate Court on Fact and Law both. But here in the present case, the Appellate Court has committed mistake in appreciation of the original Court's observation that the original Court has not considered the evidences of PWs at all. Counsel for the appellant further submits that the present appellants were the defendants in the Title Suit, whereas the present respondents were the plaintiffs. The Suit has been filed with a prayer to declare the sale deed dated 17.07.1944 executed by plaintiff in favour of Most. Ramsakhiya Devi, as farzi and showy document, on the basis of which defendants will have no title, as the defendants are alleged to be the heirs



and legal representatives of the Most. Ramsakhiya Devi. Counsel submits that initially a declaratory suit was filed by the plaintiff, but during the pendency of the suit the relief of recovery of possession has been inserted by the virtue of the amendment. Plaintiff has prayed that prior to 31-32 years, on the date of filing the plaint, litigation was started between plaintiff who are *Gotiya/Patidaar* and on advice of well-wishers, plaintiff had executed a showy sale deed dated 17.07.1944 in favour of one Ramsakhiya Devi and kept original copy of the sale deed with him. It has been specifically pleaded that the said sale deed was farzi and showy document and has never acted upon. It has also been pleaded that Ramsakhiya had never come in possession on the land in question/suit property. But when appellant(defendants) got a farzi rent receipt, then they filed representation before the Circle Officer and upon enquiry, possession of plaintiff over the suit property was found, and hence, it was subsequently corrected. In support of his claim, plaintiff has also submitted that part of the suit land was acquired by the Government for which award was prepared in his name and he received amount of compensation but the defendants (appellants) started claiming the suit land which resulted into filing the present suit.



10. On the other hand, the case of the defendants (appellant) is that the sale deed dated 17.07.1944 executed in favour of Most. Ramsakhiya Devi through registration has transferred the right title and interest in favour of Ramsakhiya. The said Ramsakhiya and her heirs and legal representative are the rightful owner of the suit property, having valid title and lawful possession on it. The defendant-appellant further pleaded that the story of dispute between the plaintiff and gotiya is imaginary. The said sale deed was executed after full payment of consideration money, before registrar following the due process of law and original document was kept with Ramsakhiya Devi but the same was stolen from her house. Counsel also submits that in the land acquisition proceeding, on objection, the matter was referred to the sub-judge but subsequently, no notice was served and amount of compensation was received by the plaintiff, behind the back of the defendant. It has also been claimed by the defendants/appellant that they have constructed their house on the suit property, where they are residing and the rest part is under cultivation.

11. Counsel for the respondent on the other hand submits that substantial question of law relating to “*benami transaction*” and “*farzi & showy transaction*” are false and



may not be considered due to the reason that suit was filed in the year 1975 and Benami transaction (Prohibition) Act has been enacted in the year 1988. Counsel also submits that the question of Benami Transaction raised before second Appellate Court is the after thought of the appellant and this may not be considered at all. Counsel also submits that it is a dispute for declaration of title, and therefore, the deed in question being farzi and an inoperative deed may not be cancelled or set aside. He also submits that in the light of the Article 59 of the Limitation Act, 1963, there is no hurdle in rejecting the present appeal.

12. In this background, it transpires to this Court, that oral evidence are necessary to be looked into for complete adjudication of this dispute, which was not at all considered by the Trial Court, as it transpires from the finding made by the Trial Court himself in Paragraph 25 of the Judgment, and subsequently, from paragraph 12 of the Appellate Court judgment that the evidences of PWs were not duly considered at all by the original Court. This Court is completely surprised by the findings made by the Appellate Court which is basically the final Court of fact and law both. As such, this Court decides the substantial question of law no. 2 in this way that the finding of



the Appellate Court is perverse and in this regard one Judgment in case of *C. Venkata Swamy Vs. H.N. Shivanna (D) by L.R.* reported in **2018 (1) PLJR SC 87** where it has been observed that:-

11. It is a settled principle of law that a right to file first appeal against the decree under Section 96 of the Code is a valuable legal right of the litigant. The jurisdiction of the first Appellate Court while hearing the first appeal is very wide like that of the Trial Court and it is open to the appellant to attack all findings of the fact or/and of law in first appeal. It is the duty of the first appellate Court to appreciate the entire evidence and arrive at its own independent conclusion, for reasons assigned, either of affirmance or difference.

12. Similarly, the powers of the first Appellate Court while deciding the first appeal are indeed well defined by various judicial pronouncements of this Court and are, therefore, no more res integra. It is apposite to take note of the law on this issue.

13. Upon going through the pleadings of the parties and perusal of the documents on records, it transpires to this Court that there is no need of passing any order on substantial question of law no. 1 relating to *Benami Transaction* or *Farzi Transaction* as both appellants and respondents are not inclined to pursue the said substantial question of law. This Court upon consideration of the point of *Benami Transaction* is also of the view that there is no need to give any finding on substantial question no. 1 relating to *Benami Transaction* as on the question of *Benami Transaction* both the parties refrained themselves to argue. It is at the appellate stage when the arguing counsel have



raised those points in the present matter. Therefore, this Court restrains to decide this matter on substantial question of law no. 1. So far as the substantial question of law no. 2 is concerned, that is, *to whether the judgment and decree passed by the Court is bad in law for non consideration of order evidence is concerned*, in this regard, Section 107(2) of C.P.C. is most relevant which states that the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein. The contention of law maker has been fully supported by the Judgment of *C. Venkata Swamy Vs. H.N. Shivanna (D) by L.R(Supra)* that it is the duty of the first Appellate Court to appreciate the entire evidence and arrive at its own independent conclusion, for reason assigned, either of affirmance or difference.

14. At the time of passing this judgment, it transpires to this Court that the Original Court has also committed mistake and passed judgment without consideration and appreciation of the evidences of the PWs as he himself mentioned in paragraph 25 of the Judgment of the title Suit. As in the eye of law, it is the abundant duty of the trial Court to



decide any suit only after appreciation of the evidence which had not been made in the present case as per the own observation of the Trial Court.

15. Hence, in the light of the reasons mentioned above, both orders ie order dated 20.12.1988 passed in Title Appeal No. 45 of 1982 by the learned A.D.J.-VI Siwan as well as the Judgment and decree dated 29.03.1982 passed by 1st Additional Munsiff, Siwan in Title suit No. 70 of 1975/23 of 1980 are hereby set aside and the matter is remanded back to the Trial Court to decide the suit a fresh.

16. Trial Court is directed to Issue notice to both the parties and upon their appearance, Trial Court shall pass judgment within 90 days from the date of their appearance after appreciation of oral evidences on record.

17. Accordingly, this appeal is hereby allowed.

18. L.C.R. is directed to be sent back forthwith.

(Dr. Anshuman, J)

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