

HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE

1	Case No.	Second Appeal No.309/1996
2	Parties Name	Leela Bai Vs. Manorama Bai
3	Date of Judgment	10/10/2017
4	Bench constituted of	Hon'ble Shri Justice Prakash Shrivastava
5	Judgment delivered by	Hon'ble Shri Justice Prakash Shrivastava
6	Whether approved for reporting	Yes
7	Name of counsels for parties.	Shri A.S. Kutumbale, learned senior counsel with Shri Amit Purohit, learned counsel for the appellants. None for the respondents.
8	Law laid down	The first appellate court while reversing the finding of the trial Court must record its finding in clear terms and explain how the reasonings of the trial Court are erroneous.
9	Significant paragraph numbers	10, 11 & 12.

(PRAKASH SHRIVASTAVA)

J u d g e

HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE
(SB: HON. SHRI JUSTICE PRAKASH SHRIVASTAVA)

Second Appeal No.309/1996

Leela Bai W/o Ramchandra (deceased) Appellant
 Through LRs
 Govardhan and others.

Vs.

Manorama Bai Wd/o Chhotelal Respondents
 and others.

 Shri A.S. Kutumbale, learned senior counsel with Shri
 Amit Purohit, learned counsel for the appellants.
 None for the respondents.

Whether approved for reporting :

JUDGMENT

(Delivered on 10/10/2017)

1/ This second appeal under Section 100 of the CPC is at the instance of the defendants challenging the reversal judgment of the first appellate court dated 10.9.1996 passed in Appeal No.27-A/1989. Trial Court by the judgment dated 4.1.1989 had dismissed the C.S. No.223-A/83 and the first appellate court while reversing the judgment had decreed the suit.

2/ Though notice of this Second Appeal was duly served on the respondents, thereafter the LRs of the deceased respondent No.2 were also served, yet the respondents have not chosen to appear before this Court and defend their case.

3/ Undisputed relationship between the parties is that original plaintiff Chhotelal and defendant Ramchandra are the sons of Shivaji. Sundar Bai is Shivaji's wife, whereas defendant

Leela Bai is wife of Ramchandra. Since the original parties have died, therefore, parties are referred as plaintiff and defendant in the judgment.

4/ The plaintiffs had filed the suit with the plea that the suit house No.125 situated at Shantipath, Badnagar is the joint family property, in which Chhotelal and defendant Ramchandra had half-half share but since the plaintiff Chhotelal was in service and residing outside and Ramchandra was the Karta of the family, therefore, the suit house was registered in his name. On the death of Sundar Bai when plaintiff had demanded his half share, the defendant had denied it on the ground that a will was executed by Sundar Bai in his favour, hence the present suit for declaration and possession was filed.

5/ The defendants by filing the written statement had denied the plaint averment. They have raised the plea that Chhotelal was living separately and the suit house belonged to Nathulal and was given by Nathulal to Sundar Bai and Sundar Bai had executed the will in favour of defendant Leelabai. Other objections were also raised in the written statement.

6/ Trial Court while dismissing the suit had held that the respondent/plaintiff could not prove that the suit house was ancestral property. They also could not prove that the will was obtained by undue influence or it was void. The trial Court also found that the suit was properly valued and it had the pecuniary jurisdiction to decide the suit.

7/ The first appellate court has decreed the suit holding that the suit house was a joint family property, for which no partition has taken place. The first appellate court further found that the house which was purchased by Nathuji was a different house, therefore, Sundar Bai had no power to execute

the will in respect of the suit house.

8/ This Court while admitting the appeal by order dated 25.4.1997, had formulated following substantial questions of law:-

“1. Whether the judgment and decree of the first appellate court reversing the judgment and decree of the trial Court, are vitiated and are contrary to the principles of law laid down in AIR 1974 SC 405; Baburao Bagaji Karemore and Ors. Vs. Govnind and others?

2. Whether in the facts and circumstances of the case suit for mere declaration is tenable in law and as such whether the decree passed by the first appellate court is sustainable in law?”

9/ I have heard the learned counsel for the appellant and perused the record. Learned counsel for the appellant has advanced arguments only on question No.1, which relates to scope of power of the first appellate court in reversing the finding of trial Court.

10/ Though the first appellate court is the final facts finding court but when the first appellate court reverses the finding of the trial Court, it must record its finding in clear terms and explain how the reasonings of the trial Court are erroneous. While affirming the findings, the first appellate court need not repeat the effect of the evidence or the reasoning of the trial Court. Hence while reversing the finding of the trial Court the responsibility of the first appellate court is much higher and the judgment of the first appellate court must reflect the clear application of mind and its findings should be based on the evidence duly supported by the reasoning. In a case where the findings are recorded on the basis of the oral evidence, the first appellate court has to bear in mind that it does not have the advantage of judging the demeanour of the witnesses,

therefore, it should be slow in reversing such findings.

11/ The Supreme Court in the matter of **Baburao Bagaji Karemore and others Vs. Govind and others reported in AIR 1974 SC 405** has held that a finding arrived at on an appreciation of conflicting testimony by a trial judge who had the opportunity of observing the demeanour of witness while giving evidence, should not be lightly interfered with merely because an appellate court which had not the advantage of seeing and hearing the witnesses can take a different view. Before a finding of fact by trial Court can be set aside, it must be established that Trial Judge's findings were clearly unsound, perverse or have been based on grounds which are unsatisfactory by reason of material inconsistencies or inaccuracies. In the matter of **Smt. Om Prabha Jain Vs. Charan Dass and Another reported in 1975(4) SCC 849** it has been held that the finding based solely on demeanour of witness cannot be perverted in appeal but the conclusion of fact reached upon a consideration of the probabilities can be decided to see if they contain any serious error. In the matter of **Santosh Hazari Vs. Purushottam Tiwari reported in 2001(3) SCC 179** the Supreme Court while considering the scope of power of the first appellate court, has held as under:-

“13. In Deputy Commr., Hardoi v. Rama Krishna Narain [AIR 1953 SC 521], also it was held that a question of law of importance to the parties was a substantial question of law entitling the appellant to a certificate under (the then) Section 110 of the Code.

14. A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be “substantial”, a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law

“involving in the case” there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.

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 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 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.”

12/ In the matter of **Nopany Investments (P) Ltd. Vs. Santokh Singh (HUF) reported in 2008(2) SCC 728** the Supreme Court has held that in the case of reversal, the first appellate court ought to give some reason for reversing the finding of the trial Court whereas in the case of affirmation, the first appellate court accepts the reasons and findings of the trial Court. In the matter of **Smt. Rajbir Kaur and another Vs. M/s. S. Chokosiri and Co. reported in AIR 1988 SC 1845** it has been held that the appellate court should not too lightly interfere with the appreciation of oral evidence made by the trial Court, particularly based on credibility of the witness, whose demeanour the trial Court has had the advantage of observing but in cases where there is no question of credibility or reliability of any witness or the question is one of a proper inference to be drawn from proved facts, the appellate court is and should be generally in as good a position to evaluate the evidence as the trial judge is. That is the distinction between what is the 'perception' and what is 'evaluation'. This Court also in the matter of **Malti Bai Vs. Khilona Bahu reported in 2013(4) MPLJ 111** has taken the view that while reversing the finding of the trial Court, the first appellate court must meet out the reasons given by the trial Court.

13/ Since the judgment of the first appellate court in the present case is a reversal judgment, therefore, it is required to be examined in the light of the aforesaid settled position in law.

14/ The trial Court while dismissing the suit had appreciated the oral as well as the documentary evidence and had recorded a finding of fact that the suit house was purchased by Nathuji vide Ex.D/2. While recording this finding

the trial Court had duly considered the oral statement of witnesses of both the parties but the first appellate court had reversed this finding by holding that the boundaries of Ex.D/2 is different from the boundaries of house mentioned in the will (Ex.D/3), but while doing so it failed to appreciate that in both the documents it is reflected that on the east and west side of the house there is a road/passage and on the north and south there are houses. The trial Court has also found that the respondent-plaintiff could not prove as to how Shivaji had received the suit house. The trial Court had also examined the plea of the respondent that the appellant Ramchandra was Karta, therefore, his name was recorded in the revenue record and had found that no document was produced by the respondents to show that the name of Shivaji was recorded before entering the name of Ramchandra. The respondent had not produced any municipal record in this regard, therefore, adverse inference was drawn by the trial Court. The trial Court had, therefore, found that the respondent being the plaintiff the onus of proving the title of Shivaji was on them, which they had failed to discharge. This detailed reasoning of the trial Court has not been considered by the first appellate court while proceeding on the premises that the house of Nathuji and the suit house are different.

15/ The trial Court had also noted the conduct of the parties and had found that the conduct of the respondent was not natural inasmuch as the share of sister Laxmi Bai and mother Sundar Bai was totally sidetracked while claiming half share in the suit property. This reasoning and conclusion of the trial Court has also not been examined and reversed by the first appellate court. So far as the will Ex.D/3 executed by Sundar

Bai in favour of Leela Bai is concerned, the trial Court had examined it in detail while answering the issue No.1 and had found that it is a registered will which was executed by Sundar Bai being pleased with her care taken by Leela Bai. The respondents could not prove that the will was suspicious or was got executed by undue influence. This finding of the trial Court has not been disturbed by the first appellate court.

16/ The deposition of defendant's witnesses also reveal that after the death of Shivaji the suit house was reconstructed by Ramchandra and Sundar Bai.

17/ Since the first appellate court has reversed the judgment of the trial Court without considering and meeting out the above reasoning of the trial Court, therefore, considering the law laid down in judgments noted above, I am of the opinion that judgment of first appellate court can not be sustained.

18/ Having regard to the above analysis, I am of the opinion that appeal deserves to be allowed by answering questions of law in favour of the appellant. Accordingly appeal is allowed and judgment of first appellate court is set aside and judgment of the trial Court is restored.

(PRAKASH SHRIVASTAVA)
J u d g e

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