

(2005) 06 KAR CK 0037

In the Karnataka High Court

Case No : Regular Second Appeal No. 49 of 2003

Dolfy A Pais@Adolphys Joseph Pais and Another

APPELLANT

Vs

Mrs. Lalitha Therasa Sequiera and Another

RESPONDENT

Date of Decision : 30-06-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 23 Rule 1, Order 23 Rule 3, Order 23 Rule 3A, 100
Urban Land (Ceiling and Regulation) Act, 1976 — Section 2 (q)

Citation : (2005) ILR (Kar) 4137

Hon'ble Judges : V.G. Sabhahit, J

Bench : Single Bench

Advocate : C.B. Srinivasan for K.N. Mahabaleshwara Rao, for the Appellant; P.N. Ramesh, for R. 1, for the Respondent

Final Decision : Allowed

Judgement

V.G. Sabhahit, J.—This appeal by defendants 1 and 2 is directed against the judgment and decree passed by the Court of Prl.District Judge, DK.,Mangalore, in RA. 15/1997 dated 27.9.2002 reversing the judgment and decree passed in O.S.No. 99/95 by the Court of I Addl.Civil Judge & CJM., Mangalore, dated 22.7.1997 and decreeing the suit of the plaintiff.

2. The essential facts of the case leading upto this appeal with reference to the rank of the parties before the Trial Court are as follows:

The plaintiff represented by her husband-PA holder filed O.S.No. 2/95 seeking for the following reliefs:

"1. For a declaration that the decree dated 16.8.1976 in O.S.397/76 on the file of the Munsiff of Mangalore was obtained by collusion and fraud in order to defeat the provisions of the Urban Land Ceiling Act, 1976 and the same is null and void, not enforceable and not binding on the plaintiff.

2. To cancel or set aside the decree dated 16.8.1976 in O.S.397/76 on the file of

the Munsiff of Mangalore as the same was obtained by fraud and collusion among the parties thereto.

3. Directing the defendants 1 and 2 to divide the schedule A and B properties into four equal shares by metes and bounds with reference to good and bad soil and allot and deliver one such share to the plaintiff.

4. For mesne profits from the date of filing of the suit until the share of the plaintiff is delivered to her.

5. For costs of this suit."

3. It is averred in the plaint that the plaintiff and defendants 1 to 3 are Christians and are related. They are the children of Anthony Piedade Pais. Plaintiff is the sister of the defendants. It is averred that the father of the plaintiff and the defendants died on 18.1.1991 and their mother Sybil Pais died on 15.6.1994. Plaintiff and dependants 1 to 3 each are entitled to 1/4th share in the estate of their father and in particular, the properties in A and B schedule and plaintiff and defendants have been in joint possession of the said properties as co-owners. It is averred that after the death of the father of the plaintiff and the defendants Anthony Pedade Pais plaintiff filed an administrative suit in the High Court of Judicature at Bombay in its ordinary original civil jurisdiction in suit No. 2656/ 1993 in respect of the estate of the said deceased which, inter alia includes schedule A and B properties herein pending disposal of the suit. The High Court made an interim order but not as regards schedule A and B properties as they are the subject of a decree in O.S.397/76 on the file of Munsiff, Mangalore. The said suit O.S.397/ 76 was filed by defendants 1 and 2 as plaintiffs against their father Anthony Pedade Pais for declaration that the properties schedule A and B therein (A and B schedule properties in the present suit) and one another property i.e. TS.No. 701, RS.No. 127 (therein shown as schedule C) situated in 90A Bolur village, Mangalore town belonged to them equally and in 1962 there was an oral partition under which A, B and C schedule properties were allotted to their share and they are in possession of their respective share ever since in May 1976 when the father had come down to Mangalore. He orally denied the partition and this had constrained the plaintiffs therein to file O.S.397/76 for declaration that the parties are the respective owners of the three properties. The suit came up for first orders on 15.7.1976. summons was issued to the defendant returnable on 16.8.1976 on which day the summons had not yet been returned to the Court, but, upon a petition of compromise signed by the Advocates for the parties, the suit was decreed and the decree drawn up and signed soon thereafter. The said suit O.S.397/ 76 was cleverly concocted and carefully concealed and the plaintiff had no knowledge whatsoever about it. Anthony pais had a large estate including schedule A and B properties. Upon his death, the entire estate came into the hands of his two sons. The mother was under their control and demanding the plaintiff and her husband requested particulars of the estate of the said deceased. The defendants 1 and 2 put off the issue with vague excuses and pleading for time. However promised that they

would given their share in the properties. Plaintiffs accepted their defendants words and did not press the matter just then. Even after the passage of four months, defendants 1 and 2 showed no interest in holding any family meeting to discuss about the estate of the said deceased. The plaintiff therefore addressed a notice dated 6.5.1991 to defendants 1 and 2 through her Advocate. Accordingly, above said facts and requiring them to furnish full information of the estate of the said deceased that had come into their hands. The defendants neither acknowledge the said notice nor sent any reply thereto. Defendant through his Advocate sent a letter dated 25.5.91 acknowledging receipt of the notice and sent an interim reply denying the allegations and asking for inspection of the power of attorney executed by the plaintiff in favour of her husband Dr. Anthony J.S. Sequeira. The plaintiff avers that inspection of the power of attorney sought for by the second defendant inspite of the same, defendants 1 and 2 did not want to precipitate the crisis in the family. The third defendant, elder sister of defendants 1 and 2 and the plaintiff, intervened and persuaded the plaintiff to wait and have the matter sorted out in a family meeting. It is further averred that another notice was sent to the defendants on 6.6.1992 for which also defendant did not comply. It is further averred that a meeting was held in the office of the Advocate Mr. Jerome F.Saldanha at the instance of defendant NO. 2 and defendant No. 2 met the plaintiff's husband and Mr.S.F. Rego on 25.7.1992 and offered to share equally among the four children the immovable property at Bloor village in Mangalore and agreed to obtain the consent of his brother-defendant No. 1 who was not in Bombay and would get back within a fortnight to finalise the settlement in an amicable way. However, the second defendant did not settle the matter. It is further averred that the plaintiff, by her husband and constituted Attorney's letter dated 29.8.1992 addressed to Mr.J.F. Saldanha, Advocate for first defendant, recorded the acts leading to the meeting on 25.7.1992 and enclosed a copy of the minutes of the said meeting. It is further averred that the alleged will of the deceased executed at Mangalore in the year 1976 has not been probated and is of no consequences and some of the recitals in the purported will are not true to the facts. It is further averred that the plaintiff came to Mangalore, made enquiries and obtained copy of the plaint, compromise petition and decree and the order sheet in O.S.No. 397/76 and it only then and not before the plaintiff realised that the said suit was a hole and corner affair, where nobody else except the defendants 1 and 2 knew about it and that only their Advocate and not they, attended the Court. It is averred that the averment made in the plaint O.S.397/76 were cleverly concocted and carefully concealed and schedule A and B properties were owned wholly by the father and not along with defendants 1 and 2. Defendants 1 and 2 do not take any share in the suit properties and the concept of a joint family property where the son takes a share by birth as obtaining in Hindu law is alien to Christians. There was no partition at all. Defendants were not in possession of the properties at any time before or after the decree in the suit and the vendors allege denial of the petition is again a concoction. The allegations in that plaint are untrue the sequence of events following the suit also show fraud and collusion. The so called

will is only a cover-up for the suit. Decree obtained therein in the circumstances narrated above is not binding on the plaintiff and is therefore liable to be set aside and the cause of action arose on 1.4.93 when the plaintiff obtained certified copies of O.S.397/76 and wherefore the suit for above said reliefs.

4. The suit was resisted by the defendants. Defendant No. 1 filed the written statement averring that since the plaintiff had already filed an administrative suit in O.S.No. 2656/93 on the file of Hon''ble High Court of Bombay. This suit is barred by provisions of Civil Procedure and the plaintiff has to be non-suited on that ground alone. It is further averred that the suit is not maintainable in view of the provisions of Order 2 Rule 2 CPC, since the same prayer and same relief could have been sought and should have been sought in the administrative suit filed on the file of Hon''ble High Court of Bombay. It is averred that the valuation arrived by the plaintiff in the aforesaid suit is not correct. The plaintiff's valuation in Bombay High Court the property at Mangalore is valued at Rs. 18 lakhs and taking into consideration the valuation of the aforesaid suit is wrong and not maintainable. The plaintiff is fully aware of the escalation of the property which has been suppressed by the plaintiff without her lawful reason. The first defendant admitted the relationship between the parties and further averred that the plaintiff's allegation that the decree had been obtained in O.S.397/ 96 by collusion is absolutely wrong as plaintiff's father was a party to the said suit and he was represented by a very respectable senior Advocate of Mangalore. It is averred that the plaintiff is silent about the date of execution of the power of attorney, plaintiff has not executed a valid power of attorney so as to file a suit and plaintiff had not right to file a suit seeking the prayers therein as the same has been decided in O.S.No. 397/76 and the father of the plaintiff was a party to the suit and has enjoyed the portion of the property allotted in the partition decree until he sold it. The said decree had been acted upon. The plaintiff's father lawfully sold his portion of the property and the plaintiff's father has left a will dated 18.5.1976 which is also the evidence of the plaintiff mentioning the properties are absolutely owned by first and second defendants. It is further averred that plaintiff's father did not take any steps to set aside the decree, but on the other hand confirmed the decree and acted upon the said compromise decree which culminated in the portion allotted -to him. The father of the plaintiff having died leaving a will and the probate though not obtained for the purpose of appreciation of facts mentioned by this defendant, the same would show that the decree was acted upon. The compromise decree is passed in accordance with law and the same has not been challenged by the father of the plaintiff and the defendants. It is averred that A.P. Pais having secured the property by way of inheritance by his mother Iseballa and treated this property as the property of the family and thus the portions mentioned in the plaint were already in the control of defendants 1 and his younger brother defendant No. 2 and therefore to give a better and full effect to the same, the partition suit was filed. It is not true to say that just to avoid rigors of Urban Land (Ceiling & Regulation) Act, (for short "the Act") the said suit is filed and compromise decree was passed. The

father of the plaintiff was quiet hale and healthy and he died at the advanced age of 96 on 18.1.1991 and he did not interfere with the possession and enjoyment of the plaint mentioned properties by defendants 1 and 2. Though he continued to have the enjoyment of the rentals it was an arrangement between defendants 1 and 2 and there after the suit is barred by time as the decree in O.S.397/76 was passed in 1976 and plaintiff's father sold his portion of the property in 1980 and without prejudice to the said contentions it is averred that the father had girdled to defendants 1 and 2 and during the life time of the father of the plaintiff, plaintiff and third defendant were sufficiently compensated and they were given handsome amounts by the father of the plaintiff and defendants. This is in pursuance to the Roman Catholic Christian custom. This fact is known to the plaintiff very well as she has received the amounts to purchase a palatial flat which now costs more than Rs. 60 lakhs and therefore, the deceased A.P. Pais made a will on 18.5.1976 and the said will recognises the partition of the properties between himself and his sons. This defendant as executor under the will could not carry on the probating of the will because of his job at Hyderabad and other financial constraints. The plaintiff having received substantial amounts during the life time of Mr. A.P. Pais and she never showed any affection nor accorded any medical treatment to deceased A.P. Pais and his wife during their life time. Defendants 1 and 2 have nursed and looked after him very well and knowing fully well about these facts, the plaintiff has filed this suit only to harass this defendant and his younger brother. The plaintiffs father was looked after by first and second defendants only. It is averred that the date of will is 18.5.1976 and not 18.4.1976 and the averments made in the plaint that mother was under the control of the assets defendants 1 and 2 is false and she was also neglected by her daughters.

5. The second defendant filed separate written statement reiterating the averments made in the written statement filed by defendant No. 1.

6. The plaintiff filed a rejoinder to the written statement filed by the second defendant denying the averment made in the written statement pertaining to the allegation made in respect of power of attorney and denying the averment that the decree in O.S.397/76 was lawfully obtained. It is further averred that so called will is not and defendant cannot rely on it. It was denied that plaintiff had knowledge of the proceedings in O.S.No. 397/76 and she came to know of the said proceedings only when she received letter from her Advocate on 19.6.92. The averment made in the plaint that A.P. Pais purchased the flat was denied and it was averred that plaintiff had purchased the plot for a price of Rs. 42,000/-.

7. The Trial Court framed appropriate issues. On behalf of the plaintiff, husband of the plaintiff who is also Power of Attorney holder was examined as PW.1 and he got marked Exs.P1 to P40. On behalf of the defendants, defendant No. 1 was examined as DW.1 and he also examined DW.2-attestator to the will Ex.D5 and got marked Exs.D1 to D5. The Trial Court after considering the contention of the Learned Counsel appearing for the parties and the material on record by its

judgment dated 22.7.1997 held that the plaintiff had no locus standi to challenge the validity of the compromise decree passed in O.S.No. 397/76 in the year 1976. Even otherwise, plaintiff had failed to prove that said compromise decree was obtained by collusion and fraud and since the parties are Christians the plaintiff would inherit the property left by her father and would not have right to the property of her father during his life time and since the father of the plaintiff had already alienated the property that was allotted to his share, plaintiff was not entitled to his share in the schedule properties and she has no title to schedule properties and accordingly, dismissed the suit of the plaintiffs. Being aggrieved by the said judgment and decree, the plaintiff represented by her husband and Power of Attorney holder preferred RA.No. 15/97 on the file of District judge, D.K., Mangalore, and the first appellate court by its judgment dated 27.9.2002 reversed the judgment and decree passed by the Trial Court by holding that the compromise decree in O.S.397/ 76 dated 16.8.1976 was obtained to defeat the provisions of the Act and it was obtained by fraud and collusion and where fore not binding on the plaintiff and plaintiff was entitled to the schedule properties being the daughter of A.P. Pais and since the decree was obtained by fraud and collusion, the suit to declare the compromise decree in O.S.397/76 as null and void was maintainable and accordingly, decreed the suit of the plaintiff by declaring that judgment and decree dated J 6-8.1976 passed in O.S.397/76 on the file Munsiff, Mangalore, was obtained in collusion and fraud to defeat the provisions of the act and not binding upon the plaintiff and the same was set aside and further, the first appellate court declared that the appellant is entitled to 1/4 share in A and B schedule properties, respondents 1 and 2 are directed to divide into four equal shares by metes and bounds, 1/4th share to the appellant and to question of mesne profit is left open to be decided in final decree proceedings.

8. Being aggrieved by the said judgment and decree passed by the first appellate court dated 22.7.1997, defendants 1 and 2 have preferred this appeal and was admitted on 25.3.2003 for consideration of the following substantial questions of law:

"1. Whether the lower appellate Court is right in holding that the compromise arrived at was liable to be set aside without going into the question that plaintiff had locus standi to question the compromise?

2) Whether the Urban Land Ceiling Act is applicable to this case?"

9. I have heard the Learned Counsel appearing for the parties on the above said substantial questions of law. The earned Senior Counsel-C.B. Srinivasan appearing for the appellants-defendants 1 and 2 in the suit submitted that the judgment and decree passed by the first appellate Court is perverse and arbitrary. The first appellate Court was not justified in holding that the suit for declaration that the compromise decree passed in O.S.No. 397/76 was null and void and that it was not binding on the plaintiffs. The Learned Counsel submitted that in view of the provisions of Order 23 Rule 3 A the suit itself was not

maintainable for declaration that the decree passed in O.S.397/76 is null and void and the father of the plaintiff himself did not challenge the said compromise decree, he accepted the decree and has acted upon the same by executing the will and alienating the property and the material on record clearly shows that the plaintiff has failed to prove that the said decree was obtained by collusion and fraud to avoid rigor of provisions of the Act and the provisions of the Act was not applicable to the schedule properties as they are not open vacant site and the material on record clearly shows that as rightly held by the Trial Court that the suit was not maintainable and could not be decreed. The learned Senior Counsel further submitted that the parties being Christians the plaintiff could not claim any right in the property of her father during his life time and she would get the property left behind by her father and the father of the plaintiff himself did not challenge the compromise decree which was passed in 1976 till his death on 18.1.1991 and wherefore the first appellate Court was not at all justified in decreeing the suit of the plaintiff and ought to have confirmed the judgment and decree passed by the trial court. He has relied upon the decision of this Court in Bahubali Ramappa Padnad and Anr. v. Babu & Babu Rao S. Padnad and Ors. 1999(5) KLJ 562 wherein it is held that compromise decree cannot be reopened at instance of party who was not party to the compromise and the suit is not maintainable to set aside the compromise in view of the provisions of Order 23 Rule 3-A CPC, He has also relied upon the decision of the Hon''ble Supreme Court in Kunju Kesavan Vs. M.M. Philip I.C.S. and Others, in support of his contention. The learned counsel has also relied upon the decision of the Hon''ble Supreme Court in Banwari Lal Vs. Smt. Chando Devi (through L.R.) and another, wherein Hon''ble Supreme Court has considered in detail the provisions of Order 23 Rule 1, 3 and about the procedure by which compromise decree can be set aside.

10. On the other hand, the Learned Counsel appearing for the respondent-plaintiff submitted that the first appellate Court has rightly decreed the suit of the plaintiff. The Learned Counsel submitted that the compromise decree had been entered into only to avoid rigors of the Act and to save the property. The Learned Counsel submitted that the said decree was obtained by fraud and collusion as there was no partition between defendants 1 and 2 and their father and the proceedings in the decree would show that the same was obtained illegally by exercising fraud on the Court and the parties to the compromise petition is not present in the Court when the same was recorded. The Learned Counsel further submitted that the suit filed by the plaintiff is for partition and for possession of her share by metes and bounds in the estate of A.S. Pais in respect of the schedule properties and compromise decree would not be binding on her and it was not necessary for her to seek declaration to set aside the compromise decree also as she was not bound by the same and the same had been obtained by fraud and collusion. He has relied upon the decision of Hon''ble Supreme Court in Pulavarthi Venkata Subba Rao and Others Vs. Valluri Jagannadha Rao and Others, wherein it is held that decree passed on compromise is not a decision by court and does not operate as resjudicata and

such a decree might create an estoppel by conduct. The learned counsel has also relied upon the decision of the Supreme Court in K.C. Aswatha Reddy v. M.Anjanappa 1994(2) KLJ 468 wherein this Court has emphasised the duty of the court to satisfy itself about the lawfulness and genuineness of the compromise and that compromise should not be recorded in a casual manner. He has also relied upon the decision in Banwari Lal Vs. Smt. Chando Devi (through L.R.) and another, wherein Hon''ble Supreme Court has held that a party challenging a compromise can file a petition under proviso to Rule 3 of Order 23 or an appeal u/s 96(1) of the Code in which he can now question the validity of the compromise in view of Rule 1A of Order 43 of the Code and if the agreement or the compromise itself is fraudulent then it shall be deemed to be null and void within the meaning of the explanation to the Proviso to Rule 3 and as such not lawful and can be recalled.

11. I have considered the contention of the learned counsel appearing for the parties with reference to the material on record in the light of the principles laid down by the Hon''ble Supreme Court and this Court in the decisions cited by the Learned Counsel appearing for the parties. I have been taken through the pleading, oral and documentary evidence on record and the judgment passed by the trial Court and the first appellate Court and I answer the substantial questions of law as follows:

No. 1: In the negative.

No. 2: In the negative as per the final order for the following:

REASONS

14. SUBSTANTIAL QUESTIONS OF LAW 1 AND 2:

These two questions are considered as together since they are inter connected and to avoid repetition. It is clear from the perusal of the pleading and the oral and documentary evidence adduced by the parties that there is no dispute about the relationship among the parties. Plaintiff is the sister of defendants and defendants 1 and 2 are the brothers of the plaintiff and defendant No. 3 is the elder sister of the plaintiff. It is the case of the plaintiff that she is entitled to 1/4th share in the schedule properties as she has succeeded to the properties of her father A.P. Pais and the compromise decree passed in O.S.397/76 is collusive and fraudulent and wherefore nullity and not binding on the plaintiffs and the will executed has not been probated and wherefore she is entitled to her share in the schedule properties. It is also clear from the material on record that the subject matter of the suit in the present case is only A and B schedule properties and the suit filed by the plaintiff for administration of the estate of the deceased is filed before the Bombay High Court in O.S.No. 2656/93 and leave has been taken in respect of the schedule properties in the present case. It is also clear from the perusal of the averments made in the plaint that the ground upon which the plaintiff claims that the compromise decree passed in O.S.397/76 is not binding on the plaintiff is on the ground that it is only to avoid the applicability of pro

visions of the Act and therefore not intended to acted upon.

15. On the other hand, it is the case of the defendants 1 and 2 that there was an oral partition settling the properties at schedule A and B in the present suit in favour of defendants 1 and 2 since the father of the plaintiff denied the said oral partition, a suit was filed and after filing of the suit, the father of defendants 1 and 2 and the plaintiff agreed for settlement and compromise was entered into wherein a compromise decree has been passed and schedule A and B properties have been allotted to the share of defendants 1 and 2. The said decree is only a declaratory decree and was not fraudulent or collusive as averred by the plaintiff in her plaint and the same has been accepted and acted upon by the parties. The father of the plaintiff who was a party to the said proceedings has voluntarily entered into compromise did not challenge the said proceedings till the date of his death on 18.1.91 and he has acted upon the said decree and alienated some of the properties and executed a will during his life time and wherefore, the plaintiff is not entitled to challenge the decree in the present suit as the same is binding on her under the Indian Succession Act which governs the parties to the present suit as they are Christians Plaintiff is entitled to share of their father only in the estate left by him at the time of his death. The trial Court after considering the contention of the parties and the material on record, after a detail appreciation of the entire material on record in the proper perspective held that the only ground upon which the compromise decree was sought to be set aside was on the ground that it was collusive and fraudulent as the same was obtained for overcoming the provisions of the Act and the said contention has not been substantiated and wherefore in the absence of proof of fraud and collusion, the compromise decree could not be challenged by the plaintiff as the same had not been challenged by her father who is a party to the compromise decree till his death on 18.1.1991 and the material on record clearly shows that the father of the plaintiff was not aggrieved by the said compromise decree and he infact accepted the decree and acted upon the said compromise decree and the provisions of the Act were not applicable to the schedule properties as they are the properties with building and the material on record including the evidence of PW.1-the husband of the plaintiff itself show that even according to the opinion given by the Advocate he was informed that the provisions of the Act is not applicable to the site with building and wherefore the suit was liable to be dismissed. However, the first appellate Court has reversed the finding of the Trial Court and has proceeded to dismiss the suit. It is clear from the perusal of the judgment passed by the first appellate Court that has over looked the principles laid down by the Hon''ble Supreme Court to be born in mind by the first appellate Court while reversing the judgment of the trial court. The first appellate court has held that plaintiff has proved that compromise decree was entered into only to over come the provisions of the Act and wherefore it is collusive and fraudulent and once the decree is collusive and fraudulent, the same would not be binding on the plaintiff as it would be a nullity and wherefore the plaintiff is entitled to 1/4th share in the schedule properties.

16. The scope of the power of the First Appellate Court and the principles to be born in mind by the First Appellate Court while reversing the judgment passed by the Trial Court are well settled and the same has been reiterated by three Judges bench of the Supreme Court in *Santosh Hazari v. Purushottam Tiwari* AIR 2001 SC 965 wherein it is clearly observed as follows:

"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 the issues arising along with the contentions put forth and pressed by the parties for decision of the Appellate Court. The task of the 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 *Girijannadini Devi v. Bijendra Narain Choudhary* AIR 1967 SC 124). We would, however, like to sound a note of caution. Expression of general agreement 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 accorded 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 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. Narayanibai (Deceased) by Lrs. and Others*,). 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 Vs. Raja Jwaleshwari Pratap Narain Singh and Others*,). 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 question of law unless such question of law be a substantial one".

17. It is clear from the averments made in the pleading that in the body of the plaint only averment is that the compromise decree obtained in O.S.397/76 is collusive and fraudulent and was concealed there is no averment to the effect that the said decree was obtained only to overcome the provisions of the Act. It is only in the prayer column it is stated that the compromise decree in O.S.397/76 dated 16.8.1976 was obtained by collusion and fraud in order to defeat the provisions of Act and the same is null and void and not binding on the plaintiff. The said prayer is not supported by any specific averment made in the plaint or in the rejoinder filed by the plaintiff to the written statement filed by the defendants. It is also clear from the evidence adduced by the parties that the plaintiff has not examined herself, the husband of the plaintiff has been examined as PW.1 as Power of Attorney Holder and it is elicited in the cross examination of PW.1 that he was married to the plaintiff on 29.10.1967. The perusal of the evidence of PW.1 would show that he has also not stated specifically in his evidence that the decree obtained in O.S.397/76 was obtained to over come the provisions of the Act and therefore, it is collusive and fraudulent and it is clear from the facts elicited in his cross examination at para-16 of his deposition that he learnt from his Advocate that if the land had old buildings then the Act has no force and the provisions of the Act, are not applicable depending upon the area of the land and by glancing the plaint pleading and the relevant records of the said suit after receiving the said documents he came to the conclusion that the said partition proceeding is only come out of the provisions of the Act and his submission in cross examination in chief of the said suit was fraudulent and collusive is also based on the same facts and wherefore, it is clear that the entire case of the plaintiff that the compromise decree obtained in O.S.397/76 is collusive and fraudulent is based upon the allegation that the said decree was obtained to over come the provisions of the Act and the reasons assigned by the Trial Court have not been considered. The material on record would clearly show that there are four buildings in the schedule properties and even according to the opinion of the Advocate for the plaintiff, the act which had come into force would not be applicable depending upon the area of the land and in view of the provisions of Section 2(q) of the Act, the same would not be applicable to the land with buildings and there is no averment in the plaint or the evidence of PW.1 - the only witness examined on behalf of the plaintiff that provisions of the Act were applicable and wherefore the reasoning given by the First Appellate Court that the contention of the learned counsel that since the provisions of the Act had come into force on

6.2.1976 and the suit O.S. 397/76 was filed immediately after coming into force of the Act would probablise the contention of the plaintiffs that since the provisions of the Act had not been settled the compromise decree was obtained only to come out of the shadow of the Act is clearly baseless and wherefore perverse not being based upon any pleading or material on record including the oral evidence of the plaintiff- PW.1. The Trial Court has also rightly held that the compromise decree passed in O.S. 397/76 was not required to be registered as it did not create any fresh right in respect of the schedule property among the parties and the decree was only declaratory and parties were in possession of the properties by virtue of the oral partition in the year 1962 and therefore it did not require registration. Wherefore, the contention of the learned counsel for the respondent that the compromise decree is not registered and is not executed and wherefore not binding upon the plaintiff is devoid of any merit. The First Appellate Court has failed to consider the well considered reasoning given by the Trial Court that the provisions of the Act were not applicable and wherefore the finding that the decree was obtained only to over come the provisions of the Act is clearly perverse and arbitrary and the First Appellate Court has proceeded on the basis that once it is held that the decree was collusive and fraudulent the same would not bind the plaintiff as the decree would be a nullity is liable to be set aside as the same is based upon the finding which cannot be sustained. It is also clear from the perusal of the judgment of the first appellate court that the first appellate court has failed to consider the material fact that what is included in the schedule property is only schedule A and B properties which are allotted to the share of defendants 1 and 2 in O.S. No. 397/76 and schedule C which was the property allotted to the father of the plaintiff and the defendants has been alienated by the father of the plaintiff and non-inclusion of the said property would clearly show that the plaintiff was aware of the said alienation and in the said alienation Ex.D1- the material recital would clearly show that the father of the plaintiff has accepted the decree and has acted upon the said decree and alienated the property. Wherefore, it is clear that father of the plaintiff has himself accepted the decree and has acted upon and did not challenge the decree till 1991 and the said decree is binding upon the plaintiff. It is also clear that evidence of PW.1 is not much helpful regarding the proof of oral partition in 1962 as his evidence would show that he married to the plaintiff on 21.10.1967 and the material on record shows that decree passed in O.S. 397/76 is only a declaratory decree confirming the possession of the properties by the plaintiff as per the oral partition entered into in 1962 under which schedule A and B properties delivered in favour of defendants 1 and 2 in the present suit and wherefore, it is clear that the judgment and decree passed by the First Appellate Court is perverse and provisions of the Act were not applicable as rightly held by the Trial Court and accordingly, I answer the substantial questions of law and pass the following order :

The appeal is allowed. The judgment and decree passed by the Prl. District Judge, D.K., Mangalore, in RA 15/97 dated 27.9.2002 is set aside and judgment

and decree passed by the Trial Court in O.S. No. 99/1995 dated 22.7.1997 is restored.