

(2013) 07 BOM CK 0289

In the Bombay High Court

Case No : Second Appeal No. 78 of 2012

Mr. Alvito Gomes and Another

APPELLANT

Vs

Mrs. Alzira Carvalho e Costa

RESPONDENT

Date of Decision : 12-07-2013

Acts Referred:

Citation : (2014) 1 ALLMR 612

Hon'ble Judges : F.M. Reis, J

Bench : Single Bench

Judgement

F.M. Reis, J.—Heard Mr. V. Menezes, learned counsel appearing for the appellants and Mr. J.P. Mulgaonkar, learned counsel appearing for the respondent. Admit on the following substantial question of law:

Whether the Lower Appellate Court while disposing of the appeal preferred by the respondent has duly complied with the provisions of Order 41 Rule 31 read with Section 96 of the Civil Procedure Code?

2. Heard forthwith with the consent of the learned counsel.

3. The learned counsel appearing for the respondent waives service.

4. The respondent filed Regular Civil Suit No. 19/2000 inter-alia for mandatory injunction directing the appellants to demolish the portion of the compound wall constructed in the respondent's property and to remove the illegal encroachment made by the appellants. The respondent also sought for a relief to restore the boundary stones between the properties of the respondent and the appellants herein and for injunction restraining the appellants from using the suit access from the property of the respondent. The appellants who are the original defendants filed the written statement disputing the claim put forward by the respondent and also filed a counter claim inter-alia claiming that they have been using the suit access peacefully and that they are entitled to a free and unobstructed use of the traditional motorable access. The appellants also sought

for a permanent injunction to restrain the respondent from obstructing the use of the said traditional motorable access. The respondent filed the written statement to the said counter claim disputing the contention raised by the appellants herein in the counter claim. The learned Trial Judge by judgment dated 28.08.2009 decreed the suit filed by the respondent restraining the appellants herein from using the suit access and directing them to demolish the disputed compound wall constructed in the property of the respondent as well as the gates opened into the property of the respondent. A further relief was also granted to restore the boundary stones between the properties belonging to the respondent and the appellants. Being aggrieved by the said judgment, the appellants preferred an appeal before the learned District Judge, Margao, being Regular Civil Appeal No. 108/2009 which came to be disposed of by the impugned judgment dated 11.01.2012. Being aggrieved by the said judgment, the appellants have preferred the present appeal.

5. Mr. V. Menezes, learned counsel appearing for the appellants has pointed out that without going into the merits of the rival contentions raised in the present appeal, the learned counsel has submitted that on bare perusal of the judgment, it is evident that the learned Judge has not complied with the predicates expected from the Appellate Court in terms of Section 96 as well as Order 41 Rule 31 of Civil Procedure Code. The learned counsel further submits that though the appellants have a good case on merits to dispute the alleged claim put forward by the respondent in the suit, nevertheless, according to him, there is no scrutiny or appreciation of evidence on record by the learned Judge while passing the impugned judgment. The learned counsel further submits that the Lower Appellate Court has relied upon the judgment of the Apex Court of in the case of Wander Ltd. and Another Vs. Antox India P. Ltd., , though the observations relied upon were in the context of disposing of a temporary injunction application. The learned counsel further submits that a First Appeal is a substantive right of the parties and it is not open to the learned Judge to summarily dispose of such appeal without advertng to every submissions or documents relied upon by the appellants. The learned counsel further pointed out that there is no scrutiny of evidence at all nor scanning of the evidence produced by both the parties by the First Appellate Court while disposing of the First Appeal. The learned counsel as such submits that on this count alone the appeal preferred by the appellants deserves to be allowed and the matter be remanded to the learned Judge to decide the appeal afresh in accordance with law.

6. On the other hand, Mr. Mulgaonkar, learned counsel appearing for the respondent has supported the impugned judgment. The learned counsel has pointed out that the learned Judge has rightly decreed the suit filed by the respondent. The learned counsel has thereafter taken me through the judgment of the Trial Court and pointed out that each and every piece of evidence has been rightly appreciated by the learned Trial Judge while passing the impugned judgment and as the Lower Appellate Court has confirmed the findings of the learned Trial Judge, the question of scrutiny of the material on record as sought

to be contended by Mr. V. Menezes, learned counsel appearing for the appellants would not arise. The learned counsel has taken me through the judgment of the Lower Appellate Court and pointed out that the Lower Appellate Court has rightly dismissed the appeal preferred by the appellants.

7. I have considered the submissions of the learned counsel appearing for the respective parties and I have also gone through the records. It is very surprising that the learned Judge in a substantive first appeal preferred by the appellants against the judgment and decree passed by the Trial Court has relied upon the judgment of the Apex Court reported in *Wander Ltd. and Another Vs. Antox India P. Ltd.*, which were matters in the context of disposal of an equitable relief of temporary injunction. It is well settled that the relief of temporary injunction or any relief of injunction is an equitable relief and in such discretionary order of the trial Court the interference by the Appellate Court is limited. This cannot be said when a substantive appeal is filed against the final judgment and decree before the First Appellate Court. The judgment of the First Appellate Court should disclose the detailed discussion regarding the material on record and the findings arrived at being supported by proper reasoning. The discussion in the judgment should not only reveal mere analysis and the findings on such analysis but should also disclose proper application of mind on consideration of the provisions of law applicable to the facts of a given case. Such exercise would reveal the application of mind by the First Appellate Court which would in turn show the manner in which the point which has been considered to arrive at its findings. It is not open to the First Appellate Court only to reproduce the submissions advanced before the Court and summarily decide the matter in controversy. If such exercise is resorted to there would be no consideration by the First Appellate Court of the detailed analysis of the material on record or recording of reasons in terms of Order 41 Rule 31 of C.P.C. On perusal of the impugned judgment, I find that though the Lower Appellate Court has re-produced the material produced by the plaintiffs nevertheless, there is no detailed analysis or scrutiny of such material to draw the conclusion that the findings arrived at by the Trial Court are to be accepted. The Lower Appellate Court appears to have been merely re-produced the findings of the Trial Court while deciding the appeal preferred by the appellants. Though the findings have been arrived at by the Lower Appellate Court that the encroachment has been established, there are no reasons to suggest the extent thereof. No doubt, the learned Trial Judge while disposing of the suit filed by the respondents has carried out a detailed discussion and scrutiny of the evidence adduced by the parties before the Trial Court. But however, though the Appellate Court has affirmed the said findings nevertheless, the material adduced by both the parties has not been duly scrutinized. No doubt, the detailed discussion is not required when the judgment of the Trial Court is affirmed nevertheless, the duty cast on the First Appellate Court to apply its mind consciously while delivering a judgment cannot be forgotten. It should be noted that the First Appellate Court is the final Court of facts and law and even a decision on question of law on the basis of the findings of fact is no longer

assailable before the High Court unless such question is a substantial question of law. The First Appeal is a valuable right of the parties and unless restricted by law, the whole case of both the parties is open for hearing both on the question of fact and law placed before the First Appellate Court. As such, the application of mind should be reflected in the judgment to ensure that all the issues which arise in the proceedings have been duly considered by the First Appellate Court by giving adequate reason. Though it is observed by the Apex Court that it is always desirable that the Appellate Court should comply with the requirements of Order 41 Rule 31 of C.P.C., nevertheless, while considering the mandate of the said statutory provisions, it is obligatory on the part of the Appellate Court to record the point for determination and proceed to analyse the evidence on record to find out the proper answer to such point for determination after analysing the oral as well as the documentary evidence on record. The Apex Court in the judgment reported in Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., thus:

15.....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 Girja Nandini Devi and Others Vs. Bijendra Narain Choudhury,). 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.....

8. Considering the ratio laid down by the Apex Court and on going through the judgment of the First Appellate Court, I find that there was no scrutiny or analyse of the evidence to ascertain as to whether the findings of the learned Trial Judge ought to have been accepted. In such circumstances, I find that the impugned judgment passed by the First Appellate Court cannot be sustained and on this short ground itself the impugned judgment deserves to be quashed and set aside. The above substantial question of law is answered accordingly. In view of the above, I pass the following:

ORDER

(i) The impugned judgment passed by the Lower Appellate Court dated

11.01.2012 in Regular Civil Appeal No. 108/2009 is quashed and set aside.

(ii) Regular Civil Appeal No. 108/2009 is restored to the file of the Lower Appellate Court.

(iii) The Lower Appellate Court is directed to dispose of the said appeal as expeditiously as possible and in any event within three months from the date of receipt of this order in the light of the observations made herein above in accordance with law.

(iv) All contentions of both the parties on merits are left open.

(v) The parties are directed to appear before the Lower Appellate Court on 26.08.2013 at 10.00 a.m.

(vi) The appeal stands disposed of accordingly.