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**(2014) 11 BOM CK 0123**

**In the Bombay High Court**

**Case No : Second Appeal No. 31 of 2006**

Santosh Naik and Others

APPELLANT

Vs

Sunanda Sajjan and Others

RESPONDENT

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**Date of Decision : 21-11-2014**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 31, 100

**Citation : (2015) 1 ABR 315**

**Hon'ble Judges : R.M. Borde, J**

**Bench : Single Bench**

**Advocate : Sudin Usgaonkar and Vinita Palyekar, Advocates for the Appellant;  
J.P. Mulgaonkar, Advocates for the Respondent**

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## **Judgement**

R.M. Borde, J.—The appellants/original defendants are raising challenge to the judgment and decree passed by the IInd Ad hoc Additional District Judge, Panaji in Regular Civil Appeal No. 140/2000 decided on 28/10/2005, thereby allowing the appeal presented by the respondents/original plaintiff and passing the decree in favour of the plaintiff in terms of the prayers made in the plaint. The respondents, hereinafter shall be referred to as the plaintiff. The plaintiff claims that his father Wamon Govind Shet Madkaikar purchased two plots of land namely plot Nos. 51A and 52 of the property "Bairo Alto Gomes Pereira", situated at Ribandar, Goa which is the huge property sub-divided by its owners into two plots. It is further contended by the plaintiff that on demise of his father, the property has been inherited by him and his two brothers. According to plaintiff, the property has been converted for non-agricultural purpose at chalta No. 15 and has been confirmed in his favour, whereas chalta Nos. 16 & 17 have been confirmed in favour of his brother namely Narendra and late Govind, respectively. The plaintiff claims that Hindu crematorium is situated at Ribandar village at a distance of about 100 metres from this property. The plaintiff further states that on 6/08/1991, he was informed by the engineer of the electricity department that there has been cremation of a body very close to the electric pole which has been erected in the suit property. The plaintiff upon visit got

confirmed the facts stated by the engineer and upon further inquiry, it was revealed that cremation has been done at the instance of the committee of Pandurang Mandir of Ribandar. According to the plaintiff, the defendants being the office bearers of the committee are responsible for the act and, as such, they have been impleaded as the defendants.

2. The contentions raised by the plaintiff in the suit have been controverted by the defendants by presenting the written statement. According to the defendants, there accrues no cause of action for presenting the suit and on that count, the suit is liable to be dismissed. The defendants also claim that the alleged act of cremation has not been allegedly done in the property belonging to the plaintiff, but in the adjoining plot and, as such, the plaintiff is not entitled to make any grievance. There are several grounds raised in the written statement to the contentions objecting to pleadings in plaint, however, those need not be reproduced, since it would be immaterial for disposal of the instant appeal. The trial Court framed following three issues for determination and recorded finding thereon, which read thus:

3. On consideration of the oral evidence led by the parties and upon consideration of the arguments, the trial Court was not satisfied as regards the merits of the contentions raised by the plaintiff and, as such, proceeded to dismiss the suit by judgment and decree dated 1/12/1998. The appeal was carried by the plaintiff to the first appellate Court which has been dismissed on 28/10/2005.

4. With the assistance of the learned Counsel appearing for the parties, I have gone through the judgment delivered by the first appellate Court. It is noticed that the first appellate Court did not frame and answer the points for consideration as required under Order 41, Rule 31 of Civil Procedure Code. Although, first appellate Court has reversed the finding of fact recorded by the trial Court, the appellate Court has not noted the reasons for disagreement with the findings of fact recorded by the trial Court. The first appellate Court has also not dealt with or analysed the oral evidence placed on record by the parties to the suit. If the first appellate Court does not agree with the findings recorded by the trial Court, the Appellate Court shall have to record reasons for such disagreement. The first appellate Court being last fact finding Court is also bound to consider oral and documentary evidence and record its independent finding on all the issues involved in the matter. The judgment of the first appellate Court is not in accordance with the guidelines laid down by the Supreme Court in the case of Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., , so also, it is not in conformity with the mandate laid down in the judgment of Shri Bernard B. Gomes Alias Peter G. Gomes and Others Vs. Smt. Prescilla Lopes E. Fernandes and Others, .

5. While admitting the appeal on 6/06/2006, the learned single Judge has framed following substantial question of law:

"Whether the impugned order is vitiated on account of total misreading of the oral evidence led by the appellants/defendants?"

6. On consideration of the material on record and on consideration of the judgment of the first appellate Court, I am of the view that the substantial questions of law that arise in the matter shall have to be reframed as follows:

"(a) Whether the judgment of the first appellate Court is in conformity with the law laid down by the Hon"ble Supreme Court in the case of Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., ?

(b) Whether the first appellate Court has committed material irregularity in its failure to consider and analyse the oral evidence placed on record by the parties while directing reversal of the finding of facts recorded by the trial Court.

(c) Whether the first appellate Court has erred in failing to record points for consideration as mandated by Order 41, Rule 31 of the Code of Civil Procedure and recording findings on such points while deciding the appeal."

7. It does appear that on reading the judgment of the first appellate Court, it is noticed that the appellate Court has not recorded independent reasons for disagreement with the findings recorded by the trial Court. The first appellate Court has also not reappreciated the evidence placed on record while arriving at different finding as has been suggested in the judgment of the Supreme Court in Santosh Hazare v. Purushottam Tiwari (dec.) by LR"s (supra). The first appellate Court is the last fact finding Court and is conferred with the responsibility of reappreciating the evidence placed on record and is expected to record findings on each issue involved in the matter while deciding the first appeal. In paragraph 15 of the judgment in the matter of Santosh Hazare v. Purushottam Tiwari (dec.) by LR"s (supra), the Supreme Court has 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 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 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, moreso 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. 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 questions of law unless such question of law be a substantial one."

8. The first appellate Court has also erred in failing to record points for consideration while dealing with the appeal. It is mandatorily required under Order 41, Rule 31 of the Civil Procedure Code to frame points for consideration and answer those points while dealing with the matter at appellate stage. Even otherwise, the first appellate Court is supposed to answer all the questions and the issues raised in the matter after analysing the evidence, documentary as well as oral, placed on record by the parties. In the instant matter, it is observed that neither the first appellate Court has framed point for consideration nor has discussed such points arising for consideration in the matter in the context of the oral evidence led by the parties before the trial Court. The judgment of the first appellate Court, as such, does not satisfy the test led down by the Hon'ble Supreme Court in the judgment of the *Santosh Hazare v. Purushottam Tiwari* (dec.) by LR's (supra). In this view of the matter, without going into the merits of the contentions raised by the parties, I deem it appropriate to remit the

matter back to the first appellate Court for reconsideration. It is expected of the first appellate Court to deal with the matter in accordance with the observations made in the judgment and decide the same. The appeal, as such, stands allowed. The judgment and decree passed in Regular Civil Suit No. 140/2000 passed by the IInd Additional District Judge on 20/10/2005 is quashed and set aside and the matter stands remitted back to the first appellate Court for decision in accordance with provisions of law. In the facts and circumstances of the case, there shall be no orders as to costs. The parties to appear before the first appellate Court on 8/12/2014.