REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6124 OF 2011

NARAYAN SITARAMJI BADWAIK (DEAD) THROUGH LRS. **... APPELLANTS**

VERSUS

BISARAM AND OTHERS **... RESPONDENTS**

J U D G M E N T

N.V. RAMANA, J.

1. When the matter came up last time, on 03.02.2021, this Court passed the following order:

> "In spite of service, no one has appeared on behalf of the respondents.
>
> Heard learned counsel for the appellants.
>
> Taking into consideration the non-appearance of the counsel for the respondents and to know the exact position of the disputed property as well as whether any compromise has taken place between the parties, we grant two weeks to the counsel for the appellants to do the needful.
>
> List the matter immediately after two weeks."

Even today, when the matter was called out, nobody appeared for the respondents in spite of service of notice.

3. Heard the learned counsel appearing for the appellants.

4. In response to our earlier query, it is represented by the learned counsel for the appellants that no settlement has taken place between the parties, and according to her the parties intend to continue with the litigation.

5. Taking into account the long pendency of the present appeal before this Court, and the fact that, despite service of notice, the respondents have not entered appearance from the very beginning as *per* the Office Reports, we are of the opinion that we should dispose of the matter with the assistance of the counsel for the appellants.

6. The facts of the case necessary for the disposal of the present appeal are as follows: the Narayan Sitaramji Badwaik (since deceased and now represented through his legal representatives and who shall hereinafter for the sake of convenience be referred to as the appellant) had filed a suit for possession of the property in dispute, on the basis of a sale deed dated 26.09.1978, for Rs. 10,000 from some of the respondents. On the other hand, the respondents contend that no such sale took place, and in fact, the document executed was only collateral for a loan extended by the appellant to respondents. The appellant sought possession of the property on 05.09.1987, and subsequently instituted the present suit on 07.03.1989. The Trial Court, after looking into the evidence placed on record, dismissed the suit of the appellant *vide* judgment dated 21.09.1995. On appeal, the District Judge reversed the findings of the Trial Court and decreed the suit in favour of the

appellant *vide* judgment dated 05.08.1997. Aggrieved by the judgment of the First Appellate Court, some of the respondents filed a second appeal before the High Court wherein the High Court upheld the findings of the Trial Court and allowed the second appeal *vide* the impugned judgment, thereby dismissing the suit of the appellant.

7. We have carefully perused the impugned judgment by the High Court with the assistance of the counsel for the appellant.

8. The High Court, *vide* the impugned judgment, noted that the First Appellate Court had considered irrelevant material and had erred in appreciating the legal issue involved. The High Court held as follows:

> "8. I may mention that it is neither party's case that the transaction is void or voidable. It is defendants' simple case that although they had executed a sale-deed, it was nominal and was not to be acted upon as sale-deed was executed as a collateral security. One does not understand why the learned joint District Judge considered the question as to whether the transaction between the plaintiff and the defendants is void or voidable. The contract becomes void when it is opposed to public policy and voidable when it is brought about by fraud, undue influence, coercion or fraud. **As stated earlier, it is neither party's case that the document was brought about by fraud, undue influence, coercion or misrepresentation. There was, therefore, no question of considering this aspect at all. It seems that the learned District Judge instead of considering the provisions of Section 91 and 92 of the Evidence Act, considered a totally irrelevant aspect...**"

(***emphasis supplied***)

9. However, after highlighting the legal infirmities of the judgment of the First Appellate Court, and answering the substantial question of law framed in favour of the respondents, it appears that the High Court did not note that the First Appellate Court, due to its erroneous approach, had failed to consider the evidence in the correct light. In such a circumstance, it would have been appropriate for the High Court to remand the matter to the First Appellate Court to determine the factual issues in light of the legal point as decided by it, or should have itself taken a decision on the facts under Section 103 of the Civil Procedure Code.

10. It is a settled position of law that a second appeal, under Section 100 of the Code of Civil Procedure, lies only on a substantial question of law [refer ***Santosh Hazari v. Purushottam Tiwari (deceased) by LRs*****, (2001) 3 SCC 179**]. However, this does not mean that the High Court cannot, in any circumstance, decide findings of fact or interfere with those arrived at by the Courts below in a second appeal. In fact, Section 103 of the Code of Civil Procedure explicitly provides for circumstances under which the High Court may do so. Section 103 of the Code of Civil Procedure is as follows:

> **Section 103. Power of High Court to Determine Issue of Fact**
>
> In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,-

(a) which has not been determined by the lower Appellate Court or both by the Court of first instance and the lower Appellate Court, or

(b) which has been wrongly determined by such Court or Courts by reason of a decision on such question of law as is referred to in section 100.

11. A bare perusal of this section clearly indicates that it provides for the High Court to decide an issue of fact, provided there is sufficient evidence on record before it, in two circumstances. *First*, when an issue necessary for the disposal of the appeal has not been determined by the lower Appellate Court or by both the Courts below. And *second*, when an issue of fact has been wrongly determined by the Court(s) below by virtue of the decision on the question of law under Section 100 of the Code of Civil Procedure. This Court, in the case of ***Municipal Committee, Hoshiarpur v. Punjab State Electricity Board*, (2010) 13 SCC 216**, held as follows:

"**26.** Thus, it is evident that Section 103 CPC is not an exception to Section 100 CPC nor is it meant to supplant it, rather it is to serve the same purpose. Even while pressing Section 103 CPC in service, the High Court has to record a finding that it had to exercise such power, because it found that finding(s) of fact recorded by the court(s) below stood vitiated because of perversity. More so, such power can be exercised only in exceptional circumstances and with circumspection, where the core question involved in the case has not been decided by the court(s) below.

27. There is no prohibition on entertaining a second appeal even on a question of fact provided the court is satisfied that the findings

of fact recorded by the courts below stood vitiated by non-consideration of relevant evidence or by showing an erroneous approach to the matter i.e. that the findings of fact are found to be perverse. But the High Court cannot interfere with the concurrent findings of fact in a routine and casual manner by substituting its subjective satisfaction in place of that of the lower courts. (Vide *Jagdish Singh* v. *Natthu Singh* [(1992) 1 SCC 647]; *Karnataka Board of Wakf* v. *Anjuman-E-Ismail Madris-Un-Niswan* [(1999) 6 SCC 343] and *Dinesh Kumar* v. *Yusuf Ali* [(2010) 12 SCC 740].)

28. If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eye of the law. If the findings of the Court are based on no evidence or evidence which is thoroughly unreliable or evidence that suffers from the vice of procedural irregularity or the findings are such that no reasonable person would have arrived at those findings, then the findings may be said to be perverse. Further if the findings are either ipse dixit of the Court or based on conjecture and surmises, the judgment suffers from the additional infirmity of non-application of mind and thus, stands vitiated. (Vide *Bharatha Matha* v. *R. Vijaya Renganathan* [(2010) 11 SCC 483]"

(***emphasis supplied***)

12. With respect to the present case, it is clear from the observations passed by the High Court in the impugned judgment that the First Appellate Court approached the matter incorrectly. As

such, the High Court ought to have either remanded the matter, or exercised its powers under Section 103, Code of Civil Procedure and decided the issues of fact. Instead, after negativing the observations and holding of the First Appellate Court, the High Court mechanically upheld the decision rendered by the Trial Court in the following terms:

> "11. This decision makes it clear that a party has a right to show that the document was not intended to be acted upon and what is written in it is of no consequence. The Learned judge of the trial court has rightly held that the defendants had actually shown that the sale-deeds were nominal and they were not to be acted upon and therefore, the plaintiff was not entitled to possession. The Learned District Judge fell in error in setting aside the finding of the trial court that the sale-deed in favour of the plaintiff was a nominal on the ground that the defendant ought to have got the sale-deeds set aside. The Learned Civil Judge has rightly considered the evidence and has held the sale-deed to be nominal and having been executed by way of collateral security. The finding of the Learned District Judge that the suit was not maintainable unless sale-deed was got set aside by defendants, therefore, was not proper. The substantial question of law is answered accordingly. The appeal is, therefore, allowed and judgment and decree passed by the first appellate court is set aside and that of the trial court restored."

13. A perusal of the above clearly indicates that the High Court decided the appeal without any assessment of the evidence on record, in a single paragraph. In the circumstances highlighted, we are of the opinion that this was not appropriate.

14. In view of the above, we are of the considered view that the impugned order of the High Court is liable to be set aside, and the matter be remanded.

15. We, accordingly set aside the order of the High Court and remand the matter to the said Court for fresh consideration of the appeal, on facts and law, if necessary. We also leave it open to the High Court to modify the question of law framed, or frame additional questions of law after giving an opportunity to the parties. It is clarified that we have not made any observations as to the merits of the case, or the correctness of holding of the High Court on the legal issue.

16. Taking into consideration the long pendency of the litigation, we request the High Court to dispose of the matter within a period of six months from the date of communication of this order.

17. The Appeal is disposed of in the afore-stated terms.

.....J
(N.V. RAMANA)

.....J
(SURYA KANT)

.....J
(ANIRUDDHA BOSE)

NEW DELHI;
FEBRUARY 17, 2021.