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VINOD KUMAR

v.

GANGADHAR

(Civil Appeal No. 9681 of 2014)

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OCTOBER 13, 2014

**[FAKKIR MOHAMED IBRAHIM KALIFULLA AND
ABHAY MANOHAR SAPRE, JJ.]**

*Code of Civil Procedure, 1908 – s.96 r/w Or.41, r.31 –
C Scope and powers of the first appellate court – Suit filed by
appellant against respondent for specific performance of
contract for purchase of house – Dismissed by trial court –
Order affirmed in first appeal by High Court – Validity – Held:
D High Court did not deal with any of the submissions urged by
the appellant and/or respondent nor it took note of the grounds
taken by the appellant in appeal nor made any attempt to
appreciate the evidence adduced by the parties with a view
to find out as to whether judgment of the trial court could be
E sustained or not – This resulted in causing prejudice to the
appellant whose valuable right to prosecute in the first appeal
on facts and law was adversely affected which, in turn,
deprived him of a hearing in the appeal in accordance with
law – Case remanded to High Court for deciding the first
appeal afresh.*

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Allowing the appeal, the Court

**HELD: The High Court did not deal with any of the
submissions urged by the appellant and/or respondent
nor it took note of the grounds taken by the appellant in
G grounds of appeal nor made any attempt to appreciate
the evidence adduced by the parties in the light of the
settled legal principles and decided case law applicable
to the issues arising in the case with a view to find out
as to whether judgment of the trial court can be sustained**

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or not and if so, how, and if not, why? Being the first appellate court, it was the duty of the High Court to have decided the first appeal keeping in view the scope and powers conferred on it under Section 96 read with Order 41 Rule 31. It was not done, thereby, resulting in causing prejudice to the appellant whose valuable right to prosecute in the first appeal on facts and law was adversely affected which, in turn, deprived him of a hearing in the appeal in accordance with law. The case is remanded to the High Court for deciding the first appeal afresh. [Paras 22, 23, 26] [1059-C-G]

Santosh Hazari vs. Purushottam Tiwari (Deceased) by L.Rs. (2001) 3 SCC 179; 2001 (1) SCR 948; *Madhukar & Ors. v. Sangram & Ors.* (2001) 4 SCC 756; 2001 (3) SCR 138; *H.K.N. Swami v. Irshad Basith* (2005) 10 SCC 243; *Jagannath v. Arulappa & Anr.* (2005) 12 SCC 303; *B.V. Nagesh & Anr. vs. H.V. Sreenivasa Murthy* (2010) 13 SCC 530 and *State Bank of India & Anr. vs. Emmsons International Ltd. & Anr.* (2011) 12 SCC 174 – relied on.

Kurian Chacko vs. Varkey Ouseph, AIR 1969 Kerala 316 – referred to.

Case Law Reference:

AIR 1969 Kerala 316	referred to	Para 12
2001 (1) SCR 948	relied on	Para 15
2001 (3) SCR 138	relied on	Para 16
(2005) 10 SCC 243	relied on	Para 17
(2005) 12 SCC 303	relied on	Para 18
(2010) 13 SCC 530	relied on	Para 19
(2011) 12 SCC 174	relied on	Para 20

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9681 of 2014.

From the Judgment & Order dated 21.03.2013 of the High Court of Madhya Pradesh Bench at Indore in First Appeal No. 173 of 1999.

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Ravindra Kumar, Manoj Saxena, Ram Krishna (for Dr. Kailash Chand) for the Appellant.

Rameshwar Prasad Goyal for the Respondent.

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The Judgment of the Court was delivered by

ABHAY MANOHAR SAPRE, J. 1. We have perused the Office Report dated 10.10.2014. It discloses that despite last opportunity granted to the respondent, he has not filed any counter affidavit till date. Today, when the matter was taken up for hearing, there was no representation for the respondent. Therefore, we proceed to decide the appeal on merits.

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2. Leave granted.

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3. This is a civil appeal filed by the plaintiff against the judgment/decreed dated 21.03.2013 passed by the single Judge of the High Court of M. P., Indore Bench in First Appeal No. 173 of 1999, which in turn arises out of the judgment and decree dated 27.02.1999 passed by the second Additional District Judge, Mandsaur in Civil Suit No. 36A/97.

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4. In order to appreciate the short issue involved in this appeal, it is necessary to state a few relevant facts:

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5. The appellant (plaintiff) filed a civil suit in the Court of second Additional District Judge, Mandsoore being Civil Suit no. 36A/97 against the respondent (defendant) for specific performance of the contract for purchase of house bearing no. 9, situated at Madhavganj Mandsaur (herein after referred to as "the suit house"). According to the appellant, the respondent

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was the owner of the suit house and he entered into a written agreement dated 05.01.1992 with the appellant to sell the suit house to the appellant for a total sum of Rs.1,48,000/-. It was alleged in the plaint that the appellant, in terms of the agreement, offered/tendered Rs.9,989/- to the respondent towards part payment of the sale consideration, but he declined to accept the amount and avoided to perform his part of the agreement. This led to the serving of notice by the appellant to the respondent calling upon him to perform his part of the agreement and execute the sale deed of the suit house in the appellant's favour. Since the respondent failed to ensure compliance of the legal notice, the appellant filed the aforementioned civil suit against the respondent seeking specific performance of the agreement in question. It was alleged that the appellant was ready and willing to perform his part of the agreement but it was respondent who failed to perform his part and hence this suit.

6. The respondent filed the written statement denying allegations made in the plaint. According to the respondent, there was no concluded agreement between the parties and in any event, the appellant having failed to perform his obligations, which were agreed upon in the alleged agreement, he was not entitled to seek enforcement of such agreement against the respondent in relation to the suit house.

7. Thereafter, the trial Court framed the issues. Parties then adduced evidence in support of their pleadings. The trial Court vide its judgment/decree dismissed the suit and declined to grant any relief to the appellant. Feeling aggrieved with the said judgment/decree, the appellant filed First Appeal No. 173 of 1999 under Section 96 of the Code of Civil Procedure, 1908 in the High Court of M.P. at Indore Bench.

8. The learned Single Judge, by impugned judgment, dismissed the first appeal filed by the appellant and in consequence confirmed the judgment/decree passed by the trial court, which had dismissed appellant's civil suit. It is

A against this confirmation of the dismissal of the suit by the High Court, the appellant felt aggrieved and filed this appeal.

B 9. Learned Counsel for the appellant while assailing the legality and correctness of the impugned judgment contended that the High Court without adverting to all the factual details and various grounds raised in the first appeal, disposed of the same in a cryptic manner. According to learned counsel, the High Court neither dealt with any issue nor appreciated the ocular and documentary evidence adduced by the parties nor examined the legal principles applicable to the issues arising in the case and nor rendered its findings on any contentious issues on which the appellant was non suited by the trial court though urged by the appellant in support of the appeal. Learned counsel further contended that it was the duty of the High Court being the first appellate court and exercising its appellate powers under Section 96 read with Order 41 Rule 31 *ibid* to have dealt with the submissions which were urged by the appellant after appreciating the entire evidence on facts, independent to the findings of the trial Court and should have come to its own conclusion keeping in view the legal principles governing the issues and since it was not done by the High Court, the impugned judgment is not legally sustainable. Lastly, the learned counsel urged that in case his arguments are accepted, the remand of the case to the High Court to decide the appeal on merits afresh is inevitable.

F 10. Having heard the learned counsel for the appellant and on perusal of the record of the case and on examining the issue arising in the appeal, we find force in the submission of the learned counsel for the appellant.

G 11. The powers of the first appellate court while deciding the first appeal under Section 96 read with Order 41 Rule 31 of the Code of Civil Procedure, 1908 are indeed well defined by various judicial pronouncements of this Court and are, therefore, no more *res integra*.

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12. As far back in 1969, the learned Judge – V.R. Krishna Iyer, J (as His Lordship then was the judge of Kerala High Court) while deciding the first appeal under Section 96 of the CPC in *Kurian Chacko vs. Varkey Ouseph*, AIR 1969 Kerala 316, reminded the first appellate court of its duty as to how the first appeal under Section 96 should be decided. In his distinctive style of writing and subtle power of expression, the learned judge held as under:

“1. The plaintiff, unsuccessful in two Courts, has come up here aggrieved by the dismissal of his suit which was one for declaration of title and recovery of possession. The defendant disputed the plaintiff’s title to the property as also his possession and claimed both in himself. The learned Munsif, who tried the suit, recorded findings against the plaintiff both on title and possession. But, in appeal, the learned Subordinate Judge disposed of the whole matter glibly and briefly, in a few sentences.

2. An appellate court is the final Court of fact ordinarily and therefore a litigant is entitled to a full and fair and independent consideration of the evidence at the appellate stage. Anything less than this is unjust to him and I have no doubt that in the present case the learned Subordinate Judge has fallen far short of what is expected of him as an appellate Court. Although there is furious contest between the counsel for the appellant and for the respondent, they appear to agree with me in this observation.....”

(Emphasis supplied)

13. This Court in number of cases while affirming and then reiterating the aforesaid principle has laid down the scope and powers of the first appellate court under Section 96 *ibid*.

14. We consider it apposite to refer to some of the decisions

A 15. In *Santosh Hazari vs. Purushottam Tiwari (Deceased)* by L.Rs. (2001) 3 SCC 179, this Court held (at pages 188-189) as under:

B “.....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.....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.....”

E 16. The above view has been followed by a three-Judge Bench decision of this Court in *Madhukar & Ors. v. Sangram & Ors.*, (2001) 4 SCC 756, wherein it was reiterated that sitting as a court of first appeal, it is the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings.

F 17. In *H.K.N. Swami v. Irshad Basith*, (2005) 10 SCC 243, this Court (at p. 244) stated as under: (SCC para 3)

G “3. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to

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deal with all the issues and the evidence led by the parties before recording the finding regarding title.” A

18. Again in *Jagannath v. Arulappa & Anr.*, (2005) 12 SCC 303, while considering the scope of Section 96 of the Code of Civil Procedure, 1908, this Court (at pp. 303-04) observed as follows: (SCC para 2) B

“2. A court of first appeal can reappraise the entire evidence and come to a different conclusion.....”

19. Again in *B.V Nagesh & Anr. vs. H.V. Sreenivasa Murthy*, (2010) 13 SCC 530, this court taking note of all the earlier judgments of this court reiterated the aforementioned principle with these words: C

“3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state: D

(a) the points for determination; E

(b) the decision thereon;

(c) the reasons for the decision; and F

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The 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 G

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A issues arising along with the contentions put forth, and
 pressed by the parties for decision of the appellate court.
 Sitting as a court of first appeal, it was the duty of the High
 Court to deal with all the issues and the evidence led by
 the parties before recording its findings. The first appeal
 B is a valuable right and the parties have a right to be heard
 both on questions of law and on facts and the judgment in
 the first appeal must address itself to all the issues of law
 and fact and decide it by giving reasons in support of the
 findings. (Vide *Santosh Hazari v. Purushottam Tiwari*,
 C (2001) 3 SCC 179 at p. 188, para 15 and *Madhukar v.*
Sangram, (2001) 4 SCC 756 at p. 758, para 5.)

5. In view of the above salutary principles, on going
 through the impugned judgment, we feel that the High Court
 has failed to discharge the obligation placed on it as a first
 D appellate court. In our view, the judgment under appeal is
 cryptic and none of the relevant aspects have even been
 noticed. The appeal has been decided in an unsatisfactory
 manner. Our careful perusal of the judgment in the regular
 first appeal shows that it falls short of considerations which
 E are expected from the court of first appeal. Accordingly,
 without going into the merits of the claim of both parties,
 we set aside the impugned judgment and decree of the
 High Court and remand the regular first appeal to the High
 Court for its fresh disposal in accordance with law.”

F 20. The aforementioned cases were relied upon by this
 court while reiterating the same principle in *State Bank of India*
& Anr. vs. Emmsons International Ltd. & Anr., (2011) 12 SCC
 174.

G 21. Applying the aforesaid principle to the facts of the
 case, we find that the High Court while deciding the first appeal
 failed to keep the principle in consideration and rendered the
 impugned decision. Indeed, it is clear by mere reading of para
 4 of the impugned order quoted below:

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"After hearing learned counsel for the parties and going through the evidence, I do not find any justification to throw over board findings recorded by the trial court. After due appreciation of evidence, I do not find any merit and substance in this appeal. Same stands dismissed with costs. Counsel fee Rs.1000/-, if certified. Ordered accordingly."

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22. In our considered opinion, the High Court did not deal with any of the submissions urged by the appellant and/or respondent nor it took note of the grounds taken by the appellant in grounds of appeal nor made any attempt to appreciate the evidence adduced by the parties in the light of the settled legal principles and decided case law applicable to the issues arising in the case with a view to find out as to whether judgment of the trial court can be sustained or not and if so, how, and if not, why?

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23. Being the first appellate court, it was the duty of the High Court to have decided the first appeal keeping in view the scope and powers conferred on it under Section 96 read with Order 41 Rule 31 *ibid* mentioned above. It was unfortunately not done, thereby, resulting in causing prejudice to the appellant whose valuable right to prosecute in the first appeal on facts and law was adversely affected which, in turn, deprived him of a hearing in the appeal in accordance with law.

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24. It is for this reason, we are unable to uphold the impugned judgment of the High Court.

25. The appeal thus succeeds and is accordingly allowed. The impugned judgment is set aside.

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26. The case is remanded to the High Court for deciding the first appeal afresh, keeping in view the principle of law laid down by this Court quoted supra.

27. However, we make it clear that we have not applied our mind to the merits of the issues involved in the case and

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A hence, the High Court would decide the appeal strictly in
accordance with law on merits uninfluenced by any of our
observations, which we have refrained from making on merits.
Needless to observe, the High Court will do so after affording
an opportunity of hearing to both the parties and especially to
B the respondent because no one appeared today for him and
hence, the High Court would send the respondent a fresh notice
of the final hearing of the appeal.

28. Since the case is quite old, we request the High Court
to expedite it hearing.
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Bibhuti Bhushan Bose

Appeal allowed.