Santoshkumar S/O Swamidas Agrawal (Now ... vs Ashwin S/O Wardhaman Golechha on 13 April, 2018

Author: Manish Pitale

Bench: Manish Pitale

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

Second Appeal No.10 of 2018
with
Second Appeal No. 119 of 2018
...

Second Appeal No.10 of 2018

1. Santoshkumar s/o Swamidas
Agrawal (Now deceased)

2. Smt. Veena wd/o Santoshkumar
Agrawal, aged about 71 years,
Occupation: Housewife,
Resident of Plot No.508,
Ramdaspeth, Nagpur - 440 010,

through Power of Attorney Holder
Tarun s/o Chaturbhuj Bhartia,
Plot No.508, Ramdaspeth,
Nagpur -10. .. APPELLANTS

.. Versus ..

Ashwin s/o Wardhaman Golechha,
Aged about 51 years, Partner of
M/s Oswal Builders and Developers,
Resident of Flat No.501, situated
on the top floor of the building
known as Mangalam Apartment,
Plot No.905, Khare Town,
Dharampeth, Nagpur 550 010. .. RESPONDENTS

Mr. R.M. Sharma, Advocate for Appellants.
Mr. M.P. Khajanchi, Advocate for Respondent

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Second Appeal No.119 of 2018

1. Santoshkumar s/o Swamidas
   Agrawal (Now deceased)

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Mr. M.P. Khajanchi, Advocate for Respondent

....

CORAM : MANISH PITALE, J.
DATE OF RESERVING JUDGMENT : MARCH 08, 2018.
DATE OF PRONOUNCHING JUDGMENT : APRIL 13,2018

JUDGMENT

1. By these two appeals, the appellants are challenging 3 SA10&119-18.odt common judgment and order dated 01/01/2018 passed by the Court of Ad-hoc District Judge-4, Nagpur (appellate court) whereby appeals filed by the respondent have been allowed, consequently, the suit filed by the appellants has been dismissed and the counter claim of the respondent has been allowed.

2. The facts in brief leading to the filing of these two appeals are as follows:

> The appellants herein filed Summary Civil Suit No. 45 of 2014, before the Court of Civil Judge Senior Division, Nagpur (trial court) for recovery of Rs. 74,37,500/- against the respondent. It was the case of the appellants that they had entered into agreements dated 06/06/1997 with M/s Oswal Developers and Builders, a partnership firm, of which the respondent was a partner, in order to purchase flat nos. 201 and 202, in building known as block A, on plot number 1/A, Hindustan Housing Company Ltd., Wardha Road, Nagpur (the suit property). The appellants further contended that they had paid entire consideration for the said suit property to the respondent. According to them, since the respondent failed to complete construction of the aforesaid flats, he agreed to refund the entire amount paid by the appellants and for that 4 SA10&119-18.odt purpose, a memorandum of understanding dated on 01/01/2011 was executed, which was written in the handwriting of the respondent. It was claimed by the appellants that since both of them were not in a position to sign the memorandum of understanding due to old age, their son-in-law Tarun Bharatia had signed the same on their behalf. As per the said memorandum of understanding, the respondent had agreed to refund an amount of Rs. 50,00,000/- (Rupees Fifty Lakhs only) to the appellants, for which purpose the respondent handed over four cheques, which added up to the said amount. Since the said cheques were post dated, each bearing the date 30/03/2011, the respondent gave a further cheque of Rs.

1,87,500/- to the appellants towards interest for the period between 01/01/2011 to 31/03/2011. The appellants further contended in the suit that they approached the respondent through their son-in-law for refund of the said amount along with interest, but the respondent kept on asking for time. Ultimately, the appellants were constrained to file suit for recovery on 24/03/2014, since limitation period for the same was expiring. On this basis, the appellants prayed for grant of decree against the respondent for recovery of amount of Rs. 74,37,500/- along with interest at the rate of 15% per annum from the date of filing of the suit.

5 SA10&119-18.odt

3. The respondent appeared before the trial court and denied that he was liable to pay the aforesaid amount as paid by the appellants. The respondent contended that the aforesaid flats in question were constructed and that they were in possession of the appellants, which they had used for accommodation of their guests for some duration and for some periods of time, they had given the

flats on rent. It was contended that although there was specific stipulation in the agreements dated 06/06/1997 that execution of necessary documents for conferring absolute title on the appellants in pursuance of the said agreements would be after decision in Special Civil Suit No. 763 of 1996 (a litigation pending between the respondent and the owner of the land on which the building was situated wherein the aforesaid flats were located), with a further stipulation that only if the respondent failed to get a decree of specific performance in the said suit, he would be liable to refund double the amount to the appellants, despite the fact that the aforesaid suit was still pending, the respondent had agreed to refund amount to the appellants on purely humanitarian considerations. It was contended that even under the aforesaid memorandum of understanding dated 01.01.2011, the respondent was liable to refund the amount 6 SA10&119-18.odt specified therein, only upon the appellants executing legally valid documents showing that the appellants had given up their rights in respect of the suit property. In the absence of any such legally valid documents executed by the appellants signifying cancellation of the agreements dated 06/06/1997, the appellants were not justified in filing the suit for recovery. The respondent claimed that the very fact that the appellants did not encash the aforesaid cheques demonstrated that the mutual rights and obligations between the parties had not crystallized and that recovery sought to be made by the appellants on the basis of aforesaid memorandum of understanding was not justified. Along with written statement, the respondent also filed a counter claim praying for a declaration that the agreements dated 06/06/1997 subsisted and that the appellants were bound to await the disposal of aforesaid Special Civil Suit No. 763 of 1996.

4. During the pendency of the aforesaid suit, the appellants executed a power of attorney in favour of their aforesaid son-in-law Tarun Bharatia granting him authority to sign pleadings, affidavits, documents and to depose on their behalf in the aforesaid suit for recovery filed by them against the respondent. The said power of attorney holder appeared 7 SA10&119-18.odt before the court as witness for the plaintiffs (appellants) in the recovery suit and filed his affidavit in evidence. He was cross- examined on behalf of the respondent. In order to support his contentions, the respondent himself appeared as the first witness for the defendant and other witnesses appeared on his behalf. In his cross-examination, the respondent admitted that the memorandum of understanding did bear his signature and that the contents thereof were correct. He further admitted that till date he had not sent any notice requesting the appellants to produce legally valid documents as claimed by him and further that even on the date of his cross-examination he was ready to pay the amounts stated in the aforementioned cheques.

5. On 25/07/2016, the trial court passed its judgment and order decreeing the suit of the appellants and dismissing the counter claim of the respondent. The trial court directed the respondent to pay Rs. 74,37,500/- to the appellants with 15% interest per annum from the date of institution of the suit till realisation of the amount. The trial court found that the suit was not barred by limitation, that the appellants were not bound to await decision of Special Civil Suit No. 763 of 1996, that the appellants had proved that the memorandum of understanding resulted in cancellation of agreements dated 8 SA10&119-18.odt 06/06/1997 and that the respondent was bound to honour the stipulations of the aforesaid memorandum of understanding. The trial court rejected the contention of the respondent that the appellants were not entitled to relief on the basis of the said memorandum of understanding till legally valid documents, as claimed by him, were not executed,

because the only legally valid document required to be executed under the said memorandum of understanding was a document authorizing the son-in-law of the appellants to sign on behalf of the appellants for documents that would have to be executed in furtherance of the said memorandum of understanding. According to the trial court, execution of power of attorney dated 07/10/2015 by the appellants in favour of their son-in- law satisfied the said requirement and that therefore the appellants were entitled to relief. The trial court found that when the respondent himself had given crucial admissions in the witness box, there was no reason why the appellants could be deprived of relief and accordingly the trial court decreed the suit.

6. Aggrieved by the same, the respondent filed two appeals before the appellate court, one against the decree granted in favour of the appellants in their suit and the second 9 SA10&119-18.odt against rejection of his counterclaim. By the impugned common judgment and order, the appellate court has allowed both the appeals, thereby dismissing the suit of the appellants and allowing the counterclaim filed by the respondent. The appellate court drew adverse inference against the appellants because they completely denied existence of the aforesaid agreements dated 06/06/1997 in their written statement filed in response to the counter claim of the respondent, while at the same time relying on those very agreements in the suit for recovery filed by them. The court held that the power of attorney dated 07/10/2015 placed on record by the appellants was of no use, because it was executed after the memorandum of understanding was signed by the son-in-law of the appellants and there was no ratification by the appellants of the aforesaid act done by their son-in-law. On this basis, the appellate court found that the son-in-law of the appellants was not authorised to sign the memorandum of understanding and that the said document, therefore, did not lead to cancellation of agreements dated 06/06/1997. On this basis, the appellate court found that the appellants were not entitled to relief under the memorandum of understanding during pendency of Special Civil Suit No. 763 of 1996, as per specific stipulation in the said agreements. The appellate court held that since the aforesaid 10 SA10&119-18.odt suit was still pending, no relief could have been granted in favour of the appellants. On this basis, the appellate court dismissed the suit and allowed the counter claim of the appellant.

7. Aggrieved by the impugned common judgment and order, the appellants have filed these two appeals before this court. Initially, on 10/01/2018, this Court issued notice by framing a substantial question of law. Thereafter, on 27/02/2018, further substantial questions of law were framed and thereafter, on 08/03/2018, another substantial question of law was framed and the counsel for the parties were exhaustively heard on all the aforesaid 6 substantial questions of law, which are as follows:

"(1) Whether the first appellate Court was legally justified in reversing the judgment of the trial Court without coming to close quarters of the findings recorded by the trial Court?

(2) Whether the present case is covered by the law laid down by the Hon'ble Supreme Court in the case of Santosh Hazari vs. Purushottam Tiwari deceased by L.Rs., reported at (2001) 3 SCC 179, on the question regarding the manner in which the appellate Court is to reverse the findings of the trial Court?

(3) Whether in the present case, the appellate Court has substantially complied with the provision of Order 41 Rule 31 of the 11 SA10&119-18.odt Code of Civil Procedure?

(4) Whether, due to alleged failure on the part of appellate Court while rendering the findings against the appellants, perversity is manifest because the findings of the trial Court have not been referred to by the appellate Court while rendering its judgment?

(5) Whether the findings rendered by the appellate Court in the impugned judgment and order, arrived at on the basis of the independent assessment of evidence and material on record, without specific reference to the findings of the trial Court would be rendered perverse only on that ground?

(6) Whether the appellate Court while reversing the findings of the trial Court, rendered perverse findings based on erroneous appreciation of the evidence and material on record?"

8. Admit on the aforesaid substantial questions of law.

Heard finally with the consent of parties.

9. Mr R.K. Sharma, learned counsel appearing on behalf of the appellants submitted that the appellate court had committed a grave error in exercise of its first appellate jurisdiction by reversing findings of the trial court without coming into close quarters with the reasoning assigned by the trial court. In fact, according to him, the appellate court did not even refer to discussion and findings of the trial court and proceeded to appreciate the evidence as if it was the court of

12 SA10&119-18.odt first instance while rendering findings against the appellants. This had resulted in perverse findings being rendered by the appellate court. It is further contended that when the respondent himself had given crucial admissions in his evidence regarding his liability under the aforesaid memorandum of understanding, there was no reason for the appellate court to have reversed the decree granted by the trial court. It was pointed out that the finding on the issue of limitation rendered by the appellate court was wholly erroneous because the period of limitation in the present case started from 30/03/2011 i.e. the date on the post dated cheques given by the respondent in pursuance of the memorandum of understanding, notwithstanding the fact that the said cheques were not actually deposited by the appellants. It was contended that the power of attorney holder, son-in-law of the appellants, was entitled to depose in support of the claims of the appellants, as he was a signatory to the memorandum of understanding and thereafter the power of attorney was executed in his favour by the appellants. The learned counsel appearing on behalf of the appellants relied upon judgments of the Hon'ble Supreme Court in the case of Santosh Hazari Vs. Purushottam Tiwari (2001) 3 SCC 179, Jiwanlal Achariya Vs. Rameshwarlal Agarwalla AIR 1967 SC 1118, 13 SA10&119-18.odt judgments of this court in Shri Sunny and another Vs. Smt. Sarika (judgment dated 23/11/2012 in Second Appeal No. 78 of 2004) and Dilip Vs. Deepak (judgment dated 31/01/2018 in Second appeal No. 190 of 2017).

10. Per contra, Mr M.P. Khajanchi, learned counsel appearing on behalf of the respondent submitted that the impugned common judgment and order passed by the appellate court was fully justified and that it did not deserve any interference by this court. It was contended that the impugned judgment and order could not be found fault with on the ground that it did not come into close quarters with the findings recorded by the trial court, because there was substantial compliance with Order 41 Rule 31 of the Code of Civil Procedure, 1908 (CPC). The learned counsel invited attention of this court to the observation in para 31 of the impugned judgment and order where the appellate court observed that it had carefully gone through the observations made by the trial court and that the points on which the trial court had delivered judgment had been dealt with in the impugned judgment and order. It was further stated by the appellate court that the appreciation of evidence and application of legal principles was not correctly done by the 14 SA10&119-18.odt trial court. On this basis, the learned counsel appearing on behalf of the respondent submitted that the reliance placed on behalf of the appellants on the judgment of the Hon'ble Supreme Court in the case of Santosh Hazari Vs. Purushottam Tiwari (supra) was wholly misplaced. It was contended that when the appellate court had considered all the evidence in detail and it had substantially complied with the requirements of Order 41 Rule 31 of the CPC, it could not be said that any error had been committed by the appellate court. The learned counsel further submitted that in the present case the son-in-law of the appellants had no authority to sign and execute the memorandum of understanding dated 01/01/2011 and that the power of attorney executed subsequently by the appellants in favour of their son-in-law was of no use. It was pointed out that even in the said power of attorney, the action of the son-in-law of the appellants in executing and signing the memorandum of understanding was not ratified. It was further submitted that even on the basis of the said power of attorney the son-in-law of the appellants could not have deposed for acts done by the appellants, of which only the appellants had personal knowledge. On the question of limitation, it was submitted that since the appellants claimed relief on the basis of memorandum of understanding dated 01/01/2011, the 15 SA10&119-18.odt period of limitation started on the said date and the suit filed by them on 24/03/2014, was clearly barred by limitation. On this basis, it was claimed that the appeals deserved to be dismissed. In support of his contentions, the learned counsel appearing on behalf of the respondent relied upon judgments of the Hon'ble Supreme Court in the case of H.Siddiqui Vs. A. Ramalingam (2011) 4 SCC 240, G. Amalorpavam Vs. R.C. Diocese (2006) 3 SCC 224, Janki Vs. Indusind Bank (2005) 2 SCC 217 and judgment of this court in the case of Vatsalabai Vs. Madhaorao 2005 (1) Mh.L.J. 980.

11. Substantial question of law nos. 1 to 5 framed above concern the manner in which the first appellate appellate Court exercised its jurisdiction in the present case while passing the impugned judgment and order. It has been vehemently argued on behalf of the appellants that the appellate Court has committed a grave error in failing to refer to the findings rendered by the trial Court on various aspects of the present case. Analysing evidence and material on record and rendering findings thereon, without reference to the findings given by the trial Court, has rendered exercise of jurisdiction by the appellate Court erroneous, demonstrating that its findings are perverse. Reliance has been placed on the judgment of the 16 SA10&119-18.odt Hon'ble Supreme Court in the case of Santosh Hazari .vs. Purushottam Tiwari (supra) in support of the aforesaid contention and it has been contended that as per the position of law clarified in the aforesaid judgment, since the appellate Court in the instant case failed to come into close quarters with the reasoning assigned by

the trial Court and arrived at different findings by assigning reasons of its own, the impugned judgment and order of the appellate Court was rendered unsustainable. The learned counsel appearing on behalf of the appellants has placed reliance on the following portion of the aforesaid judgment of the Hon'ble Supreme Court:-

> "15. A perusal of the judgment of the trial Court shows that it has extensively dealt with the oral and documentary evidence adduced by the parties for deciding the issues on which the parties went to trial. It also found that in support of his plea of adverse possession on the disputed land, the defendant did not produce any documentary evidence while the oral evidence adduced by the defendant was conflicting in nature and hence unworthy of reliance. The first appellate Court has, in a very cryptic manner, reversed the finding on question of possession and dispossession as alleged by the plaintiff as also on the question of adverse possession as pleaded by the defendant. 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

17 SA10&119-18.odt 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 Girijanandini Devi Vs. Bijendra Narain Choudhary, AIR 1967 SC 1124). 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 (See Madhusudan Das Vs. Narayani Bai AIR 1983 SC 114. 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 Judges notice or there is a 18 SA10&119-18.odt sufficient balance of improbability to displace his opinion as to where the credibility lie, the appellate Court should not interfere with the finding of the trial Judge on a question of fact. (See Sarju Pershad Ramdeo Sahu Vs. Jwaleshwari Pratap Narain Singh , AIR 1951 SC

120). 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."

12. In this context Order 41 Rule 31 of the CPC assumes significance, as it provides for the manner in which the appellate Court shall write its judgment. The aforesaid provision reads as follows:-

> "31. Contents, date and signature of judgment- The judgment of the Appellate Court shall be in writing and shall state-
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> 19 SA10&119-18.odt
>
> (a) the points for determination;
>
> (b) the decision thereon;
>
> (c) the reasons for the decision; and
>
> (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled;

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein."

13. In the context of the aforesaid provision, the Hon'ble Supreme Court in the case of H. Siddiqui .vs. A. Ramalingam (supra), has held as follows:-

> "Order 41, Rule 31 CPC
>
> 21. The said provisions provide guidelines for the appellate court as to how the court has to proceed and decide the case. The provisions should be read in such a way as to require that the various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the appellate court that the court has properly appreciated the facts/evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance with the said provisions if the appellate court's judgment is based on the

independent assessment of the relevant evidence on all important aspect of the matter and the findings of the appellate court are well founded and quite convincing. It is mandatory for the appellate court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final court of fact, the first appellate court must not record mere general expression of concurrence with the trial court judgment 20 SA10&119-18.odt rather it must give reasons for its decision on each point independently to that of the trial court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory provisions. (Vide: Sukhpal Singh v. Kalyan Singh , AIR 1963 SC 146; Girijanandini Devi v. Bijendra Narain Choudhary, AIR 1967 SC 1124; G. Amalorpavam v. R.C. Diocese of Madurai , (2006) 3 SCC 224; Shiv Kumar Sharma v. Santosh Kumari, (2007) 8 SCC 600;

and Gannmani Anasuya v. Parvatini Amarendra Chowdhary , AIR 2007 SC 2380)."

14. The Hon'ble Supreme Court has further held in the case of G. Amalorpavam.vs. R.C. Diocese of Madurai (supra), as to what could be said to be substantial compliance with the provisions of Order 41 Rule 31 of the CPC as follows:-

"9. The question whether in a particular case there has been a substantial compliance with the provisions of Order 41 Rule 31 CPC has to be determined on the nature of the judgment delivered in each case. Non-compliance with the provisions may not vitiate the judgment and make it wholly void, and may be ignored if there has been substantial compliance with it and the second appellate Court is in a position to ascertain the findings of the lower appellate Court. It is no doubt desirable that the appellate court should comply with all the requirements of Order 41 Rule 31 CPC. But if it is possible to make out from the judgment that there is substantial compliance with the said requirements and that justice has not thereby suffered, that would be sufficient. Where the appellate court has considered the entire evidence on record and discussed the same in 21 SA10&119-18.odt detail, come to any conclusion and its findings are supported by reasons even though the point has not been framed by the appellate Court there is substantial compliance with the provisions of Order 41 Rule 31 CPC and the judgment is not in any manner vitiated by the absence of a point of determination. Where there is an honest endeavour on the part of the lower appellate court to consider the controversy between the parties and there is proper appraisement of the respective cases and weighing and balancing of the evidence, facts and the other considerations appearing on both sides is clearly manifest by the perusal of the judgment of the lower appellate court, it would be a valid judgment even though it does not contain the points for determination. The object of the Rule in making it incumbent upon the appellate court to frame points for determination and to cite reasons for the decision is to focus attention of the Court on the rival contentions which arise for determination and also to provide litigant parties

> opportunity in understanding the ground upon which the decision is founded with a view to enable them to know the basis of the decision and if so considered appropriate and so advised to avail the remedy of Second Appeal conferred by Section 100 CPC."

15. Section 99 of the CPC provides that no decree shall be reversed or modified for error or irregularity not affecting merits or jurisdiction. It has been held by this Court in the case of Vatsalabai .vs. Madhaorao (supra) in the context of Section 99 as follows:-

> "18. Upon examination of the submissions referred to above and discussion of judgments relied upon by appellants, I have come to a 22 SA10&119-18.odt conclusion that the appellate Court's judgment cannot be regarded to be fallible on account of failure to formulate and address upon all the issues. As referred to in this judgment, the question being examined at the time of reversal of the decree, would always be whether such reversal being done on account of any technicality. It shall be useful to refer Section 99, Civil Procedure Code which is quoted below for reference :
>
> "99. No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction:- No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder or non- joinder of parties or causes of action of any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court: Provided that nothing in this Section shall apply to non-joinder of a necessary party."

It is, thus, obvious that a judgment of 1st appellate Court as well is not liable to be set aside on account of any error or defect or irregularity in any suit or appellate proceedings or judgment "not affecting the merits of the case or the jurisdiction of the Court." Section 99, Civil Procedure Code has been interpreted by various High Courts from Privy Council and the Hon'ble Supreme Court, as well. The construction thereof is impelled for avoiding unnecessary cost and inconvenience to the litigant as well as avoiding the situation of setting aside the judgment on account of technicality when the judgment and decree otherwise does not affect the merits of the case. It shall be useful to simply refer to the judgment on this point and shall not be necessary to discuss each one in detail. It shall suffice only to refer to 23 SA10&119-18.odt certain precedents on Section 99, Civil Procedure Code namely :-

> (i) AIR 1937 Privy Council 233, Muhammad Husain Khan and Ors. v. Babu Kishva Nandan Sahai, (ii) AIR 1954 SC 340, Kiran Singh and Ors. v. Chaman Paswan and Ors., (iii) AIR 1965 SC 1812, R.S. Maddanappa v. Chandramma and Anr., (iv) 1969 Mh.L.J.(SC) 367= AIR 1969 SC 225, Chaturbhuj Pande and Ors. v.

Collector and (v) AIR 1979 Kerla 1 (FB), George v. Thekkekkara Vereed."

16. It has been contended on behalf of the appellants that the manner in which the appellate Court in the instant case reversed the findings of the trial Court, demonstrated that no reference was made

to the findings rendered by the trial Court, thereby vitiating exercise of appellate jurisdiction and that on this ground alone, the impugned judgment and order deserved to be set aside and that the matter deserved to be remanded to the appellate Court for fresh consideration. In order to test the aforesaid contention, it would be necessary to examine whether the appellate Court complied with the provisions of Order 41 Rule 31 of the CPC, which lays down the manner in which the appellate Court shall write its judgment. The position of law as has been elucidated by the Hon'ble Supreme Court in the above quoted judgments, shows that if the appellate Court has appreciated the evidence and material on record and it has independently assessed the same on all 24 SA10&119-18.odt important aspects of the matter, then it has to be held that there has been substantial compliance with Order 41 Rule 31 of the CPC. In fact, it has been held that it would be sufficient compliance with the said provision if the second appellate Court is in a position to ascertain the findings of the lower appellate Court. In its judgment in the case of Santosh Hazari .vs. Purushottam Tiwari (supra), the Hon'ble Supreme Court has laid down the twin requirements to be followed by the appellate Court to the effect that the findings of the trial Court must weigh with the appellate Court and that while reversing findings of facts, 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. The said requirements have been laid down in the context of a factual situation where in the said case before the Hon'ble Supreme Court, the judgment of the trial Court was extensive in dealing with the oral and documentary evidence on record, but, the first appellate Court had in a very cryptic manner reversed findings of facts. It was in that context that the Hon'ble Supreme Court deliberated upon the manner in which the appellate Court was required to exercise its jurisdiction. Thereafter, the Hon'ble Supreme Court sent the matter back to the High Court for deciding the second appeal 25 SA10&119-18.odt on a substantial question of law specifically framed.

17. In the present case, a perusal of the impugned judgment and order of the appellate Court shows that there is detailed assessment of the evidence and material on record and findings of facts have been rendered by the appellate Court by threadbare analysis of the relevant material. All the aspects on findings of facts dealt with by the trial Court have been considered and findings have been rendered by the appellate Court. The appellate Court in the impugned judgment and order has also specifically stated that it has carefully gone through the observations made by the trial Court in its judgment and that the points on which the trial Court has delivered its judgment have been well dealt with while passing the impugned judgment and oder. A perusal of the impugned judgment and order shows that there is compliance with the requirements of Order 41 Rule 31 of the CPC, because the impugned judgment and order is based on independent assessment of the relevant evidence on all important aspects of the matter. Therefore, it cannot be said that the appellate Court in the instant case, while reversing the judgment of the trial Court, has not come into close quarters with the reasoning assigned by the trial Court or the findings rendered by it. It 26 SA10&119-18.odt cannot be said that the appellate Court had in a very cryptic manner reversed the findings of facts rendered by the trial Court or that it was completely oblivious of such findings while passing the impugned judgment and order.

18. Therefore, reliance placed by the learned counsel appearing on behalf of the appellants on the judgment of the Hon'ble Supreme Court in the case of Santosh Hazari .vs. Purushottam Tiwari (supra), is misplaced. Likewise reliance placed on judgment of this Court in the case of Dilip .vs.

Deepak (Second Appeal No.190 of 2017) supra is also misplaced because, in the said judgment, this Court has specifically recorded that other than stating that the suit was not decided in the proper perspective, the appellate Court had not stated anything else while reversing the findings of the trial Court. Such is not the case in the present set of facts, which show that the impugned judgment and order sufficiently complies with the provision of Order 41 Rule 31 of the CPC. Hence, the contention raised on behalf of the appellants that the findings of the appellate Court in the impugned judgment and order have been rendered perverse due to failure on the part of the said Court to come into close quarters of the reasoning assigned by the trial Court, is unsustainable. The 27 SA10&119-18.odt impugned judgment and order cannot be said to be based on erroneous exercise of jurisdiction by the appellate Court as there has been substantial compliance with Order 41 Rule 31 of the CPC. Accordingly, substantial question of law Nos. 1 to 5 framed by this Court are answered against the appellants and in favour of the respondent.

19. Now, the question that remains to be addressed and decided is, as to whether the findings rendered by the appellate Court in the impugned judgment and order, while reversing the findings of the trial Court, can be said to be perverse, on account of being based on erroneous appreciation of the evidence and material on record. For the said purpose, relevant documents need to be referred and it needs to be examined as to whether the appellate Court, being the final Court of facts, has properly appreciated the evidence and material on record to arrive at its findings.

20. In the present case, the claims of the parties revolve around existence and interpretation of agreements dated 06.06.1997 and memorandum of understanding dated 01.01.2011. While the agreements dated 06.06.1997 (Exhs. 102 and 103) were executed between the appellants and 28 SA10&119-18.odt partnership firm M/s Oswal Builders and Developers, the memorandum of understanding dated 01.01.2011 was said to have been executed between son-in-law of the appellants i.e. Tarun Bhartia on their behalf and respondent Ashwin Golechha, as partner of the aforesaid firm, but in his personal capacity. It is an admitted position that when the aforesaid memorandum of understanding dated 01.01.2011 was signed by the aforesaid parties , Tarun Bhartia, son-in-law of the appellants, did not have any written authority or power of attorney executed in his favour by the appellants. There is also no subsequent document executed by the appellants in favour of the said Tarun Bhartia ratifying the aforesaid memorandum of understanding dated 01.01.2011 signed by him on their behalf. Thus, the date on which the memorandum of understanding was signed by the said Tarun Bhartia on behalf of the appellants, other than the mere statement in the said document that he was signing the document because the appellants were not in a position to sign the said document, there is no document of authority in his favour.

21. Subsequently, the appellants have filed suit for recovery of amount against the respondent on the strength of the said memorandum of understanding dated 01.01.2011. It 29 SA10&119-18.odt is after filing of the said suit that on 07.10.2015, the appellants have executed power of attorney in favour of their son-in-law Tarun Bhartia. A perusal of this document also shows that the said Tarun Bhartia has been authorised to act on behalf of the appellants only in connection with the aforesaid suit filed by them. Even in this document, there is no reference to the memorandum of understanding dated 01.01.2011 and there is no ratification of the signing and execution of the said document by the said

Tarun Bhartia on behalf of the appellants.

22. In the suit, the appellants did not appear as witnesses in support of their contentions and only the said Tarun Bhartia, as their power of attorney holder, has been examined before the trial Court. He has deposed in respect of the said memorandum of understanding dated 01.01.2011, which is the very basis of the reliefs sought by the appellants and he has claimed in his deposition that the appellants are entitled to recover all amounts in terms of the said memorandum of understanding. But, in his cross-examination, the said Tarun Bhartia has made statements which show that he has no personal knowledge about the transactions between the appellants and the aforesaid firm, of which the respondent is a partner and about agreements dated 06.06.1997 executed by 30 SA10&119-18.odt the appellants in respect of purchase of the aforesaid flats. Thus, two facts emerged from the said material on record, firstly, there was no power of attorney executed in favour of the said Tarun Bhartia when the memorandum of understanding dated 01.01.2011 was signed and secondly, that he has not deposed as a witness on the basis of his personal knowledge about vital facts pertaining to the claims made by the appellants in the suit. In the judgment of the Hon'ble Supreme Court, relied upon by the counsel appearing on behalf of the respondent, in the case of Janki Vashdeo Bhojwani .vs. Indusind Bank Ltd. (supra) in the context of the extent to which a power of attorney can act on behalf of the principal, it has been held as follows:-

> "13. Order 3, Rules 1 and 2 CPC, empowers the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order 3, Rules 1 and 2 CPC, confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some "acts" in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined."

31 SA10&119-18.odt

23. The aforesaid position of law clearly shows that said Tarun Bhartia could not have deposed in place of the appellants for acts done by them. The material on record also shows that in fact, in respect of the memorandum of understanding dated 01.01.2011, he had no power of attorney or written authority to sign the same on behalf of the appellants. There is no material placed on record on behalf of the appellants to show that there was any subsequent ratification of signing of the said memorandum of understanding by the said Tarun Bhartia on their behalf. The power of attorney dated 07.10.2015 placed on record is of no use, because it does not even refer to the said memorandum of understanding and it only authorised the said Tarun Bhartia to act on behalf of the appellants in respect of the suit for recovery filed by them against the respondent. Thus, the evidence of Tarun Bhartia in respect of the memorandum of understanding was of no avail. The appellate Court correctly appreciated the material on record to render findings against the appellants in this regard.

24. The trial Court has granted relief to the appellants primarily on interpretation of the aforesaid memorandum of understanding dated 01.01.2011 and upon the admissions 32 SA10&119-18.odt given by the respondent in his evidence before the trial Court. A perusal of the evidence of respondent shows that he has admitted his signature on the memorandum of understanding dated 01.01.2011 and he has also conceded to the fact that the contents thereof are correct. He has also admitted that four cheques for an amount of Rs.50,00,000/- were issued in respect of the liability accepted in the said memorandum of understanding. On this basis, the trial Court has concluded that the respondent could not deny liability of payment of the said amount and that the appellants deserved a decree in their favour.

25. The stand taken by the respondent is that even if the memorandum of understanding dated 01.01.2011 was to be proceeded with, it was subject to execution of legal documents as contemplated by both the parties. It was contended that the appellants would be entitled to the aforesaid amount indicated in the memorandum of understanding upon legally valid documents executed by the appellants cancelling the agreements dated 06.06.1997 and proper authority granted to the said Tarun Bhartia on behalf of the appellants to take necessary steps. On the other hand, the appellants have claimed that the memorandum of understanding dated 33 SA10&119-18.odt 01.01.2011 amounted to cancellation of the aforesaid agreements dated 06.06.1997 and that the only legally valid document contemplated under the aforesaid memorandum of understanding was an authorisation in favour of the said Tarun Bhartia to do acts in terms of the said memorandum of understanding. According to the appellants, execution of the subsequent power of attorney dated 07.10.2015 in favour of Tarun Bhartia was sufficient compliance with such requirement and that the respondent was liable to make payment of amounts as agreed by him in the said memorandum of understanding, particularly in the light of admissions given by him in his evidence before the trial Court.

26. While the trial Court has emphasised on the contents of the said memorandum of understanding, being in favour of the appellants for recovery of the said amount, as also the admissions given by the respondent in his deposition before the trial Court, the appellate Court has found that the memorandum of understanding itself could not be said to be a valid document and mere admissions given by the respondent in respect thereof, would not lead to grant of relief in favour of the appellants. In this context, it is relevant that the memorandum of understanding dated 01.01.2011 seeks to 34 SA10&119-18.odt cancel or dilute the agreements dated 06.06.1997 executed between the appellants and the aforesaid partnership firm. Once it is found that the memorandum of understanding is not signed or executed by the appellants and Tarun Bhartia has signed the same without any valid authorisation, it is not possible to accept that the agreements dated 06.06.1997 would stand cancelled or diluted on the strength of the said memorandum of understanding. Another crucial aspect is that while the agreements dated 06.06.1997 have been executed between the appellants and the partnership firm, the memorandum of understanding has been signed by the respondent in his personal capacity as stated in the said document. This aspect has been completely ignored by the trial Court while granting decree in favour of the appellants, while it has been taken note of by the appellate Court while reversing the findings of the trial Court.

27. A perusal of the agreements dated 06.06.1997 shows that in both the agreements, clauses 7, 11 and 12 refer to Special Civil Suit No.763 of 1996, pending between the partnership firm and the owner of the land on which the building consisting of the flats in question stood constructed. It is stated in the said clauses that execution of necessary 35 SA10&119-18.odt documents for conferring absolute title in the appellants in pursuance of the aforesaid agreements dated 06.06.1997 would be undertaken after decision in the aforesaid Special Civil Suit No. 763 of 1996. It is further stipulated that if the partnership firm fails to get a decree in its favour against the owner of the land, it would return double the amount paid by the appellants in respect of the said flats to the appellants. It is significant that while in their suit for recovery of amounts filed against the respondent, the appellants have based their claim on the memorandum of understanding dated 01.01.2011 and the agreements dated 06.06.1997, while opposing the counter claim filed by the respondent, they have emphatically denied execution and existence of the aforesaid agreements dated 06.06.1997. The trial Court has completely lost sight of this fact, while the appellate Court has taken this into consideration to draw adverse inference against the appellants. It is difficult to understand as to how the appellants could claim relief of recovery of amount from the respondent when they denied the very existence of agreements dated 06.06.1997. The whole dispute between the parties is in respect of the said agreements executed for purchase of the aforesaid flats by the appellants and the very foundation of the grievance and consequent reliefs claimed by the appellants is based on the 36 SA10&119-18.odt said agreements pertaining to purchase of the flats.

28. In this factual position and the material on record, it becomes evident that the claim raised on behalf of the appellants that they were senior citizens being harassed by the respondent does not come through as a genuine claim. It appears that the appellants entered into the aforesaid agreements dated 06.06.1997 in order to purchase the flats as a purely commercial transaction and that they were conscious about the specific clauses in the said agreements requiring them to await decision in the pending Special Civil Suit No. 763 of 1996 between the firm and the owner of the land on which the said flats were constructed. If they desired to seek recovery of the amounts that they had paid in terms of the said agreements, they could very well have executed documents cancelling the said agreements and they could have sought recovery in the manner reflected in the terms incorporated in the memorandum of understand. Nothing prevented the appellants to have come forward to execute the memorandum of understanding themselves or to have executed valid power of attorney in favour of Tarun Bhartia for execution of such memorandum of understanding and for execution of further documents including documents for 37 SA10&119-18.odt cancellation of the agreements dated 06.06.1997, so that they could recover amounts paid in respect of the flats in question and not be forced to wait for final decision in the aforesaid Special Civil Suit No. 763 of 1996. Having failed to do so and having even denied the very existence of agreements dated 06.06.1997, the very foundation of relief claimed by them in their suit for recovery filed against the respondent was taken away. This aspect was not appreciated in the correct perspective by the trial Court, while the appellate Court has considered the entire evidence and material on record and on an assessment of the same, it has arrived at findings of facts against the appellants while reversing the decree granted in their favour by the trial Court. The findings rendered by the Appellate Court cannot be said to be perverse.

29. Once it is found that the findings arrived at by the appellate Court are not perverse and they cannot be interfered with, no fault can be found with the counter claim of the respondent being partly allowed. In fact, all that the appellate Court has held while partly allowing the counter claim is that the appellants will have to await disposal of Civil Suit No. 763 of 1996, for seeking specific performance of agreements dated 06.06.1997, only if the parties do not choose to legally cancel 38 SA10&119-18.odt such agreements earlier in time. This sufficiently takes care of the interest of the appellants.

30.. On the question of limitation, the crucial aspect is as to when could it be said that the cause of action for the appellants was triggered. The appellants have claimed relief on the basis of aforesaid memorandum of understanding dated 01.01.2011 while they have also claimed that since the respondent had issued post dated cheques dated 30.03.2011, the period of limitation started from the date affixed on the said chqeues. If the dates affixed on the said cheques are taken into consideration, the suit for recovery filed by the appellants on 24.03.2014 is within three years and, therefore, within limitation. But, if the date of the memorandum of understanding i.e. 01.01.2011 is taken into consideration, the suit filed on 24.03.2014 is clearly beyond the period of limitation of three years.

31. In this context, the learned counsel appearing on behalf of the appellants has relied upon judgment of the Hon'ble Supreme Court in the case of Jiwanlal Achariya .vs. Rameshwarlal Agarwalla (supra). In the said case, it was held that the period of limitation would start from the date 39 SA10&119-18.odt affixed on a post dated cheque and not the date on which such post dated cheque was physically handed over at an earlier point of time. The Hon'ble Supreme Court held that the period of limitation would start from the date affixed on the post dated cheque because that would be the date on which the cheque could have been presented and honoured. It was also recorded that in the said case before the Hon'ble Supreme Court the cheque was honoured and, therefore, it ought to be held that the payment was made on the date affixed on the cheque. In the present case, although the post dated cheques bearing date 30.03.2011 were handed over to the appellants, it is an admitted fact that they were never encashed. The said cheques were never presented by the appellants for being honoured. In other words, the relief of recovery of amounts claimed by the appellants was based on the memorandum of understanding dated 01.01.2011 and not on the post dated cheques, as they were never presented by the appellants. In fact non-presentation of the said post dated cheques also demonstrates that even the appellants proceeded on the basis that something more was required than mere signing of the memorandum of understanding by the said Tarun Bhartia for the appellants to be entitled to recover all amounts from the respondent.

40 SA10&119-18.odt

32. The actions of the appellants, as are evident from the evidence and material on record, show that the cause of action could not be said to have arisen for them from the date affixed on the post dated cheques. The entire basis of relief claimed by the appellants was the memorandum of understanding dated 01.01.2011 and therefore, cause of action for them was triggered from the date of the said document. Non- presentation of the post dated cheques by the appellants in the present case

assumes significance and it is a distinguishing feature from the facts of the case in which the aforesaid judgment was rendered by the Hon'ble Supreme Court in the case of Jiwanlal Achariya .vs. Rameshwarlal Agarwalla (supra). Therefore, the inevitable conclusion is that the suit filed by the appellants on 24.03.2014 was beyond the period of limitation of three years from the date of memorandum of understanding. On this aspect also, the appellate Court has taken into consideration the material on record in the correct perspective to hold that the suit filed by the appellants was barred by limitation.

33. The analysis of the impugned judgment and order of the appellate Court shows that there has been detailed 41 SA10&119-18.odt assessment of documents and material on record and findings of facts have been rendered by the appellate Court which cannot be said to be perverse. The appellate Court being the last Court on facts, its findings on facts would ordinarily not be interfered by the second appellate Court unless it is shown that there are glaring errors in appreciation of the evidence and material on record rendering the findings perverse or that the findings have been arrived at in a cryptic manner. In the present case, as stated above, the assessment of evidence and material on record by the appellate Court is sufficiently detailed and it cannot be said that errors have been committed by the appellate Court while reversing the findings of the trial Court. Therefore, the substantial question of law No.6 framed by this Court is also answered in favour of the respondent and against the appellants.

34. Accordingly, these appeals are dismissed and the impugned judgment and order passed by the appellate Court is confirmed. There shall be no order as to costs.

(Manish Pitale, J.) halwai/p.s.