Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 67 OF 2007

M/s. The Indian Hotels Company Limited,
A Company incorporated under the
Indian Companies Act, 1956 and having its
Registered office at Taj Mahal Hotel,
Apollo Bunder, Mumbai -39. ..... Appellant

Versus

1 Shri Antonio Floriano Fernandes
(Since deceased)

A) Shri Sebastiano Fernandes,
son of late Antonio Floriano Fernandes,
major, bachelor (Since deceased)
Through their legal representative,
a(i) Miss. Geeta V. Halarnkar,
59 years old, unmarried,
Daughter of Shri Venketesh Halarnkar,
Resident of H.No.39/3,
Queoshi Pomburpa,
Bardez Goa.

B) Shri Domnic Fernandes,
Son of late Antonio Floriano Fernandes,
Major, married, and his wife,

B1) Smt. Maria Fernandes, major, housewife,

C) Shri Gamelin Fernandes, son of late Antonio Floriano Fernandes, major, married, and his wife,

C1) Smt. Benny Soares, major, housewife,

D) Shri Michael Fernandes, son of late Antonio Floriano Fernandes, major, married, and his wife,

D1) Smt. Dorothy Fernandes, major, housewife,
All residents of Arao, Pomburpa, Bardez Goa.

E) Shri Bruno Fernandes, son of late Antonio Floriano Fernandes, major, married, occupation service, having his work place at National Institute of Oceanography, Dona Paula, Ilhas Goa, and his wife,

E1) Smt. Urusula Fernandes, major, married,
Housewife, C/o Shri Bruno Fernandes, having his Work place at National Institute of Oceanography, Dona Paula, Ilhas Goa.

F) Smt. Lamilda Fairman, daughter of late Antonio Floriano Fernandes, major, married, housewife, and her husband,

F1) Shri Ronaldo Fairman, major, married, occupation service,
Both Residents of 102, Clifton, 59, Almeida Park, Bandra (W), Mumbai.

2 Smt. Maria Rosa Fernandes,
Major, married, housewife,
Wife of Appellant No.1.
Both Indian Nationals,
R/o Arao, Pomburpa,
Bardez Goa.

3 Laximibai Jaganath Sinai Veling,
Widow of Jaganath Vamon Sinai Veling,
Landlady, (since deceased represented by her legal representatives)

3a) Purushottam Jaganath Sinai Veling,
Major, landlord,

4 Purushottam Jaganath Sinai Veling,
Major, landlord,
Both r/o Ansabhat, Mapusa Goa.

[5 Venkatesh Vamon Sinai Veling,]
Major, married (Deleted as per order dated 29.09.2008 passed in MCA No.617/08.

[6 Smt. Parvotibai Venkatesh Sinai Veling,]
Major, housewife,
Both r/o Parvati Bhuvan,
Room No.14, Ambevadi,
G.D. Ambekar Marg,
Mumbai 33.

a) Sou. Smita Vasudev Kamat,
R/o 202, "Abhinandan Niwas",
Rambhau Bhogle Marg, Ferbander,
Mumbai 400 033.

b) Shri Amod Venkatesh Veling,
R/o F/6, Thakkar Retreat, Juna Gangapur Naka, Juna Gangapur Road, Nasik-5.

c) Shri Ravindra Venkatesh Veling,
R/o 7/702, "B Wing", Sindhudurg Co-operative Housing Society, Devipada, Sant Gora Kumbhar Road, Borivali (East), Mumbai -66.

d) Shri Arun Venkatesh Veling, R/o 14, Parvatibhuwan, Ambewadi, G.D. Ambedkar Marg, Kalachowki, Mumbai 400 033.

7 Mrs Mary Dias,
Major, widow, housewife,
r/o Dando, Candolim, Goa. ……Respondents

Mr S. S. Kantak, Senior Advocate with Mr Iftikhar Agha, Mr Simoes Kher, Mr Ketan Morajkar, Ms Saicha Desai and Ms V. Fernandes, Advocates for the Appellant.
Mr S.G. Desai, Senior Advocate with Mr Tejas Rane, Advocate for Respondent Nos.1, 2, 4, 5, 6, 7.
Mr Dhaval Zaveri, Advocate for Respondent No.1(f).

CORAM: M. S. SONAK, J.

Reserved on: 9th FEBRUARY 2024
Pronounced on: 20th FEBRUARY 2024

JUDGMENT

1. Heard Mr S.S. Kantak, learned Senior Advocate, with Mr Iftikhar Agha, Mr S. Kher, Mr K. Morajkar, Ms S. Desai and Ms V. Fernandes, learned counsel for the Appellant, Mr S.G. Desai, learned Senior Advocate with Mr T. Rane, learned counsel for Respondent Nos. 1, 2, 4, 5, 6 and 7, and Mr Dhaval Zaveri, learned counsel for Respondent No.1(f).

2. This Second Appeal is directed against the judgment and decree dated 09.01.2007 made by the Ad-hoc District Judge-2 at Panaji (First Appellate Court) allowing Regular Civil Appeal No. 149/2001 setting aside the judgment and decree dated 29.09.2001 and decreeing Regular Civil Suit No.226/2000/Jr instituted by Respondent Nos. 1 and 2 herein against the Appellant and Respondent Nos.3 to 7. In terms of the impugned judgment and decree, the sale deed dated 09.04.1985, by which the suit property was conveyed to the Appellant, was declared void to the extent of 596 square metres only. The Appellant was directed to hand over

the possession of this area of 596 square metres to Respondent Nos. 1 and 2 herein(plaintiffs) in the suit.

3. This Second Appeal was admitted by order dated 17.01.2014 on the following substantial question of law:

> *Whether there is no consideration of the merits of the case by the Appellate Court, in as much as the Appellate Court records the finding that the original plaintiffs were owners solely because of the findings rendered by the Appellate Court based on Civil Appeal No.148/2001 that they become res-judicata?*

4. To appreciate the contentions based on the Doctrine of Res Judicata, a brief reference becomes necessary to the circumstances in which the impugned judgment and decree dated 29.09.2001 came to be made in Regular Civil Appeal No.149/2001. This appeal arose from a decree dated 29.09.2001 in Regular Civil Suit No.226/2000/Jr.

5. Respondent Nos. 1 and 2 herein (plaintiffs) had earlier, i.e. on 16.05.1983, instituted Regular Civil Suit No.148/1983 against some of the Respondents herein for declaration of ownership in respect of the suit property and for perpetual injunction. For convenience of reference, this suit shall be referred to as "Suit No. I" or "First Suit".

6. During the pendency of the First Suit, the defendants in the said suit vide sale deed dated 09.04.1985 sold the suit property to the Appellant

herein. Therefore, the plaintiffs impleaded the Appellant herein as a defendant in the First Suit. However, no relief to set aside the sale deed dated 09.04.1985 was sought in the First Suit.

7. Instead, the plaintiffs instituted Regular Civil Suit No. 226/2000 (earlier registered as Suit No.131/1988) seeking a declaration that the sale deed dated 09.04.1985 was null & void and for recovery of possession and mesne profits. For convenience of reference, this suit shall be referred to as "Suit No. II" or "Second Suit". This Second Suit was filed while the First Suit was pending.

8. On 29.09.2001, the trial Court dismissed the First Suit, holding that the plaintiffs had failed to prove the issue of ownership, and in any case, the suit was barred by limitation. On the same date, i.e. 29.09.2001, the trial Court also dismissed the Second Suit instituted by the plaintiffs, thereby declining to interfere with the sale deed dated 09.04.1985.

9. The plaintiffs instituted Regular Civil Appeal No.148/2001 challenging the judgment and decree dated 29.09.2001 in the First Suit and Regular Civil Appeal No.149/2001 challenging the judgment and decree dated 29.09.2001 in the Second Suit. By separate judgments and decrees, the Regular Civil Appeal Nos.148/2001 and 149/2001 were disposed of by the First Appellate Court on 28.07.2005.

10. In judgment and decree dated 28.07.2005 disposing of Regular Civil Appeal No. 148/2001, the First Appellate Court confirmed the trial

Court's finding that the First Suit was barred by limitation. However, the First Appellate Court reversed the trial Court's finding on ownership and held that the plaintiffs had established that they were owners in respect of the suit property. But based on the finding of limitation, Regular Civil Appeal No.148/2001 was dismissed.

11. By judgment and decree dated 28.07.2005 in Regular Civil Appeal No.149/2001, the First Appellate Court allowed the appeal by answering the issue of ownership in favour of the plaintiffs and declaring the sale deed dated 09.04.1985 as null & void.

12. The Appellant, accordingly, challenged only the judgment and decree dated 28.07.2005 in Regular Civil Appeal No.149/2001 because this was the judgment and decree that affected the Appellant's right. This appeal was allowed by this Court vide judgment and decree dated 06.07.2006. This Court set aside the judgment and decree dated 28.07.2005 in Regular Civil Appeal No.149/2001 and remanded the matter to the First Appellate Court for fresh consideration and disposal of Regular Civil Appeal No. 149/2001.

13. On remand, the First Appellate Court, vide impugned judgment and decree dated 09.01.2007, allowed the appeal and set aside the judgment and decree dated 28.07.2005 in the Second Suit. The First Appellate Court consequently set aside the sale deed dated 09.04.1985 by which the suit property was conveyed to the Appellant to the extent of 596 square

metres only. The Appellant was also directed to hand over the possession of this area of 596 square metres to the plaintiffs in the suit.

14. The impugned judgment and decree dated 09.01.2007 in Regular Civil Appeal No.149/2001 reasons that the issue of plaintiffs' title and ownership to the suit property attained finality because the Appellant failed to challenge the judgment and decree dated 28.07.2005 in Regular Civil Appeal No.148 of 2001. Accordingly, the findings of ownership and title regarding the suit property, recorded in the judgment and decree dated 28.07.2005 in Regular Civil Appeal No.148 of 2001, would operate as res judicata.

15. Mr Kantak submitted that the reasoning of the First Appellate Court constitutes an error of law because it is well settled by several decisions of the Hon'ble Supreme Court and High Courts that for a party to be entitled to institute an appeal, such party must be prejudicially or adversely affected by the decree and not merely by some finding recorded in the judgment or decree. He submitted that failure to appeal a decree by which the party was not aggrieved does not attract the doctrine of res judicata. He relied on ***Banarsi and Ors. V/s. Ram Phal***[1], ***Nana Tukaram Jaikar V/s. Sonabai Madhav Saindate and Ors.***[2], ***Pawan Kumar Gupta V/s. Rochiram Nagdeo***[3], ***Smt. Ganga Bai V/s. Vijay Kumar and Ors.***[4], ***Shri Jayant Shivram Khandeparkar V/s. Administrator of Comunidades and Ors.***[5], ***Pandurang Dhondi Chougule***

[1] (2003) 9 SCC 606
[2] 1982 Mj.L.J. 538
[3] (1999) 4 SCC 243
[4] (1974) 2 SCC 393
[5] Civil Revision Application No.62/2012

and Ors. V/s. Maruti Hari Jadhav and Ors.[6], ***Dr Subramanian Swamy V/s. State of Tamil Nadu and Ors.***[7], ***Bhanu Kumar Jain V/s. Archana Kumar and Anr.***[8], in support of his contentions.

16. Mr Kantak submitted that the First Appellate Court, after holding that the issue of ownership and title could not be agitated by applying the doctrine of res judicata, failed to consider the matter on merits and independently hold whether or not the plaintiffs had legal title and ownership, in respect of the suit property. He pointed out how, at several places, the First Appellate Court declined to go into the merits of the matter by considering itself precluded from doing so given its finding on the applicability of res judicata doctrine. He submitted that the so-called consideration was most perfunctory and clouded by the First Appellate Court's reasoning on the applicability of the doctrine of res judicata. He, therefore, submitted that the substantial question of law ought to be answered favouring the Appellant.

17. Mr Kantak, without prejudice, submitted that once the First Appellate Court making its judgment and decree dated 28.07.2005 in Regular Civil Appeal No.148 of 2001 concluded the First Suit, warranted dismissal on the ground of bar of limitation, the First Appellate Court, taking up Regular Civil Appeal No.148 of 2001 had no jurisdiction to give any finding on the issue of ownership and title of the plaintiffs. Such findings were nullities and could

[6] AIR 1966 SC 153
[7] (2014) 5 SCC 75
[8] (2005) 1 SCC 787

never operate as res judicata. He relied on ***T. Kaliamurthi and Anr. V/s. Five Gori Thaikal Wakf & Ors.***[9] to support this contention.

18. Mr Desai and Mr Zaveri submitted that the perusal of the impugned judgment and decree made by the First Appellate Court would show that the First Appellate Court had not only considered the matter from the perspective of the doctrine of res judicata but also on merits. They pointed out how the First Appellate Court had considered the evidence on the issue of plaintiffs' title and ownership of the suit property. Accordingly, they submitted that the substantial question of law as framed does not arise or, in any case, ought to be answered favouring the Respondents and against the Appellant.

19. Mr Desai and Mr Zaveri submitted that the issue of title and ownership attained finality in the judgment and decree dated 28.07.2005 in Regular Civil Appeal No.148 of 2001. The Appellants did not challenge this judgment and decree or the crucial finding that the plaintiffs were the owners or title holders in respect of the suit property. They submitted that it was no longer open to the Appellant to seek to agitate this issue in Regular Civil Appeal No.149 of 2001, given the principle of res judicata, which clearly applied in this case. Mr Desai and Mr Zaveri relied on ***Sheodan Singh V/s. Daryao Kunwar***[10]***, Devidas Ganpati Kale and Ors. V/s. Munirbi Mahebub Karanje and Ors.***[11] ***and Ratansingh V/s. Vijaysingh and Ors.***[12] to submit that the principle of res

[9] (2008) 9 SCC 306
[10] AIR 1966 SC 1332
[11] 2023 SCC OnLine Bom 1319
[12] 2001 (1) SCC 469

judicata was undoubtedly attracted and correctly applied by the First Appellate Court in this matter.

20. Mr Desai and Mr Zaveri submitted that under Section 100 of CPC, Respondents are entitled to argue that the substantial question of law as framed does not even arise for determination at the stage of the final hearing of the appeal. They relied on ***Sir Chunilal V. Mehta and Sons Ltd. V/s. The Century Spinning and Manufacturing Co. Ltd.***[13] to explain what constitutes a substantial question of law and submitted that the question as framed does not amount to any substantial question of law.

21. For the above reasons, Mr Desai and Mr Zaveri submitted that this Second appeal may be dismissed.

22. The rival contentions now fall for determination.

23. In this second appeal, considering the substantial question of law framed on 17.01.2014, the first issue to be determined is whether the judgment and decree in Regular Civil Appeal No.148/2001 operate as res judicata on the issue of plaintiffs' title and ownership to the suit property in Regular Civil Appeal No.149/2001. If it is held that the principle of res judicata did not apply in the peculiar facts and circumstances of the present case, then the second issue which arises for determination is whether the First Appellate Court had considered the appeal on merits with regard to the issue of plaintiffs' title and ownership to the suit property.

[13] AIR 1962 SC 1314

24. Admittedly, in the Regular Civil Appeal No.148/2001, which arose from the decree in the First Suit, the First Appellate Court upheld the finding recorded by the trial Court that the suit was barred by limitation. The First Appellate Court did reverse the trial Court on the issue of plaintiffs' title and ownership of the suit property. However, the First Appellate Court dismissed the Regular Civil Appeal No.148/2001.

25. Therefore, the issue is whether the Appellant herein was bound to appeal the judgment and decree in Regular Civil Appeal No.148/2001, even though the conclusion in such judgment and decree favoured the Appellant, though one of the findings therein may have gone against the Appellant. The further point which arises for determination is whether the failure on the part of the Appellant in appealing against the judgment and decree in Regular Civil Appeal No.148/2001 attracts the principle of res judicata in the circumstances of this case.

26. In *Banarsi and others Vs Ram phal* (supra), the Hon'ble Supreme Court has held that it was settled by a long catena of decisions that to be entitled to file an appeal, the person must be one aggrieved by the decree. Unless a person is prejudicially or adversely affected by the decree, he is not entitled to file an appeal. The Hon'ble Supreme Court held that no appeal lies against a mere finding because both Sections 96 and 100 of the CPC provide for an appeal against decree and not against judgment. A party who has fully succeeded in the suit can and needs to neither prefer an appeal nor take any cross-objection, though certain findings may be against him. Appeal and cross-objection - both are filed against a decree, not against the judgment

and certainly not against any finding recorded in a judgment. The Court held that this was the well-settled position of law under the unamended CPC.

27. The Hon'ble Supreme Court at Para 10 further held that the CPC Amendment of 1976 has not materially or substantially altered the law except for a marginal difference, i.e. insertion made in the Order 41 Rule 22 (1) of CPC enables a party to file a cross objection against a finding. This means that Respondent may defend himself without filing any cross-objection to the extent to which the decree is in his favour; however, if he proposes to attack any part of the decree, he may take cross-objection.

28. In *Nana Tukaram Jaikar* (supra), one of the findings was that the deed in question was a deed of sale with a condition of repurchase was a finding adverse to the defendant in the suit. However, the suit itself was dismissed on some other grounds despite this finding. This Court, therefore, held that the defendant had no opportunity to appeal against the finding. The finding in the suit cannot then be said to be finally decided against the defendant and cannot operate as res judicata against the defendant. This Court referred to the decision in ***Bai Nathi v. Narshi Dullabh***[14], where this Court said: - "*We think that the finding of the Court in the previous suit was not final, inasmuch as…….. there could be no appeal against it, because the decree was in favour of the party against whom the finding was recorded".*

[14] ILR 44 Bom. 321

29. In *Pawan Kumar Gupta* (supra), the Hon'ble Supreme Court held that the sound legal position is this: If dismissal of the prior suit were on a ground affecting the maintainability of the suit, any finding in the judgment adverse to the defendant would not operate as res judicata in a subsequent suit. But if the dismissal of the suit was on account of extinguishment of the cause of action or any other similar cause, a decision made in the suit on a vital issue involved therein would operate as res judicata in a subsequent suit between the same parties. It is for the defendant in such a suit to choose whether the judgment should be appealed against or not. If he does not choose to file the appeal, he cannot thereby avert the bar of res judicata in the subsequent suit. In the present case, the suit was dismissed on the grounds of limitation. Therefore, any finding in the judgment adverse to the defendant would not operate as a res judicata in a subsequent suit.

30. In *Ganga Bai Vs Vijay Kumar*[15], the Hon'ble Supreme Court, after analysing the provisions in the C.P.C., held that an appeal lies only against a decree. No appeal can lie against a mere finding because the Code does not provide for any such appeal. Accordingly, the appeal filed by the defendant being directed against a mere finding given by the trial Court was not maintainable.

31. Thus, from the provisions of the CPC as interpreted by the Hon'ble Supreme Court and this Court, it is clear that it was not open to the Appellant herein to appeal judgment and decree in the Regular Civil Appeal No.148/2001 merely because one of the findings therein was adverse to the

[15] (1974) 2 SCC 393

interest of the Appellant. Regular Civil Appeal No.148/2001 was dismissed, and the decree of dismissal was drawn therein. As against such a decree, the Appellant could not have instituted an appeal because he could not have been said to have been aggrieved by the decree dismissing the appeal of the opposite party. Therefore, it cannot be said that the finding on the issue of title and ownership to the suit property attained finality for want of any appeal by the Appellant against the same. The Appellant could not have filed an appeal against a mere finding. Therefore, the reasoning of the Appellate Court about the applicability of the principle of res judicata is not correct and the same warrants interference.

32. In the written synopsis filed on behalf of the first and second Respondents, reliance is placed *inter alia* on *Ratansingh* (supra) and *Devidas Kale* (supra). With respect, such reliance is entirely misplaced and neither of the two decisions run counter to the decisions relied upon by Mr Kantak on the issue of res judicata.

33. Besides, *Ratansingh* (supra) should not even have been cited because in the subsequent three Judge Bench decision in ***Shyam Sundar Sarma Vs Pannalal Jaiswal and others***[16]**,** the Hon'ble Supreme Court has held that *Ratansingh* (supra) could not be accepted as laying down a correct law.

34. In the written synopsis, an incorrect Para from *Devidas Kale* (supra) is quoted as if to suggest that the Division Bench of this Court in *Devidas Kale* (supra) has followed *Ratansingh* (supra). However, Para 27 of the *Devidas*

[16] (2005) 1 SCC 436

Kale (supra) clearly holds that the law laid down by the two Judges Bench of the Hon'ble Supreme Court in the case of *Ratansingh* (supra) that if an application for condonation of delay in filing the appeal is dismissed, the judgment of the Appellate Court does not amount to a decree is specifically negatived in *Shyam Sundar Sarma* (supra).

35. However, Mr Desai and Mr Zaveri submitted that the First Appellate Court has considered the appeal on merits and held that the plaintiffs were indeed owners of the suit property. For this, they rely on the discussions from Para 29 of the impugned judgment and decree and the paras that follow this Para.

36. On perusal of the impugned judgment and decree dated 09.01.2007 in Regular Civil Appeal No.149/2001 shows that in the appeal instituted by the original plaintiffs, no ground about res judicata appears to have been raised in the memo of appeal. These grounds have been transcribed in Para 11 of the impugned judgment and decree. Similarly, in the points for determination formulated by the First Appellate Court at Para 14, there is no reference to the point about findings in the Regular Civil Appeal No.148/2001 operating as res judicata even though the said first appeal was dismissed by upholding the finding that the suit was barred by limitation.

37. The First Appellate Court framed only the following three points for determination in Para 14 of the impugned judgment and order.

(a) Whether the plaintiffs are owners in possession of suit property?

(b) Whether the suit is bad for non-joinder of necessary parties?

(c) Whether the impugned decree calls for any interference?

38. In Para 25 of the impugned judgment and decree, the First Appellate Court, after holding that the decision on the issue of plaintiffs' title having become final will operate as res judicata in the appeal "*and therefore, this Court now is barred from trying this issue in this appeal*". Similarly, in Para 27 of the impugned judgment and order, the First Appellate Court observed that "*the contention of Ms Karpe, learned advocate for defendant No.5 that the findings on the said issue in the earlier suit are erroneous, not based on facts on record and are given without application of mind, therefore, cannot be considered in this appeal.*"

39. Further, in Para 29 of the impugned judgment and decree, the First Appellate Court has observed that "*since the Court has already given findings and pronounced the judgment on the said issues, the parties are bound by it unless the same are set aside*". In Para 29 of the impugned judgment and decree, the First Appellate Court further observed that "*In the result pronouncement of the judgment in the previous suit on the rights of the parties was between the same parties in respect of the same subject matter will be binding on the parties in this suit and will operate as res judicata. Once the Court comes to this conclusion, this Court will have to hold that the plaintiffs are owners of suit property and that they were in possession of the same till they were dispossessed by the defendant no.5 in 1985*".

40. After the above observations, it is true that the First Appellate Court has discussed the evidence produced by both parties. However, from the discussion, it is evident that its findings on res judicata impacted the appreciation of oral and documentary evidence on record. In Paras 42 and 44, the First Appellate Court has merely stated that the trial Court has erred in various aspects. However, there is no discussion on why the trial Court had erred on the various points that the First Appellate Court states it has.

41. This was a case of reversal. Therefore, the evidence on record had to be reassessed, and the judgement and decree of the trial Court had to be evaluated. Only after coming into close quarters with the reasoning of the Trial Court and concluding that the Trial Court had erred in law and/or its findings were contrary to the weight of evidence on record that the Trial Court's judgment and decree be reversed. The First Appellate Court, having held that it was bound by the finding in Regular Civil Appeal No 148/2001, failed to apply these principles when considering Regular Civil Appeal No 149/2001 on merits.

42. In the case of *Santosh Hazari Vs Purushottam Tiwari*[17], the Hon'ble Supreme Court has explained that 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 open for rehearing on questions of fact and law. The judgment of the Appellate Court must, therefore, reflect its conscious application of mind and record findings

[17] (2001) 3 SCC 179

supported by reasons on all the issues arising along with the contentions put forth and pressed by the parties for the decision of the Appellate Court.

43. In *Santosh Hazari* (supra), the Hon'ble Supreme Court explained that 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, the decision of which is under appeal, would ordinarily suffice. However, 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.

44. The Hon'ble Supreme Court held that 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.

45. The Hon'ble Supreme Court explained that 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. 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.

46. The Hon'ble Supreme Court reminded the First Appellate Courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. As before, the First Appellate Court continues to be a final Court of facts; pure findings of fact remain immune from challenge before the High Court in the 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 a 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 is a substantial one.

47. As noted above, no proper points for determination were framed by the First Appellate Court. The point about res judicata was not even framed by the First Appellate Court, though the impugned judgment and decree placed great emphasis on the principle of res judicata. Based upon this principle, the First Appellate Court has expressed its inability to revisit the issue of plaintiffs' title to the suit property because, according to the First Appellate Court, the finding on this issue in Regular Civil Appeal No. 148/2001 operated as res judicata.

48. The discussion which follows the reversal of the findings recorded by the trial Court is without coming into close quarters with the reasoning of the trial Court. Merely stating that the trial Court has decided the matter erroneously is not sufficient. The First Appellate Court is required to re-evaluate and re-assess the oral and documentary evidence on record before concluding that the trial Court has erroneously decided the matter. The consideration which is not consistent with the law laid down in *Santosh Hazari* (supra) or consideration which is not consistent with the obligation cast on the First Appellate Court can hardly be regarded as consideration of appeal on merits. Besides, in this case, due to the finding on res judicata, the First Appellate Court genuinely felt bound by the findings recorded in Regular Civil Appeal No.148/2001 and felt that it was completely precluded from re-visiting or re-assessing this issue.

49. For all the above reasons, the substantial question of law as framed will have to be answered favouring the Appellant. As a result, the impugned judgment and decree dated 09.01.2007 will have to be set aside, and the

matter will have to be remanded to the First Appellate Court for disposal of Regular Civil Appeal No. 149/2001 on merits but without once again adverting to the issue of res judicata. The issue of plaintiffs' title to the suit property will have to be examined and evaluated by the First Appellate Court based upon the oral and documentary evidence led by the parties and the law on the subject.

50. However, it is clarified that the First Appellate Court should not regard itself as bound by the findings in judgment and decree in Regular Civil Appeal No.148/2001 by applying the principle of res judicata. The First Appellate Court will have to independently assess and evaluate the oral and documentary evidence on record, evaluate the trial Court's reasoning by coming into its close quarters, and determine whether the plaintiffs established their title and possession of the suit property.

51. The parties are directed to appear before the First Appellate Court on 18th March 2024 at 10.00 am and file a copy of this judgment and order. Based upon the same, the First Appellate Court must dispose of Regular Civil Appeal No.149/2001, keeping in mind the observations and findings in this judgment and order. After ensuring that all parties are duly served, the First Appellate Court must endeavour to dispose of the Appeal within six months.

52. The appeal is allowed in the above terms. However, there shall be no order for costs.

M. S. SONAK, J.