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RATTAN DEV

v.

PASAM DEVI

SEPTEMBER 13, 2002

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[R.C. LAHOTI AND BRIJESH KUMAR, J.J.]

Code of Civil Procedure, 1908:

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s.100—Second appeal—Substantial question of law—Suit for permanent injunction—Special power of attorney and other witnesses for the plaintiff examined but not the plaintiff—Suit decreed—First appellate court drew adverse inference against plaintiff for not examining himself and dismissed the suit—High Court holding that findings arrived at by first appellate court were purely findings of fact and there did not arise any substantial question of

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law—Held, first appellate court was bound to apply its mind to all evidence available on record along with the fact of non-examination of the plaintiff and then test legality of the findings of trial court—The manner in which the appeal has been disposed by first appellate court cannot be said to be satisfactory—Non-application of mind by appellate court to other material, though available, and consequent failure on its part to discharge its judicial

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obligation did raise a question of law having a substantial impact on the rights of parties, and, therefore, second appeal deserved to be heard on merits—However, since first appellate court failed in discharging its obligation—statutory and judicial, more so when it is a judgment of reversal it would meet ends of justice if first appeal itself is heard afresh—Order of High Court as also

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judgment and decree of first appellate court set aside—First appeal restored on file of first appellate court for decision afresh.

Ishwar Bhai C. Patel alias Bachu Bhai Patel v. Harihar Behera and Anr., [1999] 3 SCC 457, referred to.

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5838 of 2002.

From the Judgment and Order dated 26.4.2001 of the Himachal Pradesh High Court in R.S.A. No.174 of 2001.

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Ravi Bakshi and Varinder Kumar Sharma for the Appellant.

A.K. Nag, R.K. Bansal and Akshay Kr. Ghai for the Respondent.

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The following Order of the Court was delivered:

Leave granted

A suit for issuance of permanent preventive injunction filed by the appellant herein was decreed by the Trial Court, The defendant preferred an appeal. The First Appellate Court reversed the decree of the Trial Court and directed the suit to be dismissed. The plaintiff preferred a second appeal which has been dismissed *in limine* by the High Court forming an opinion that the findings arrived at by the First Appellate Court were purely findings of fact and no substantial question of law within the meaning of Section 100 CPC arose for consideration.

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A perusal of the judgment of the First Appellate Court shows that the plaintiff-appellant did not appear in the witness box although his special power of attorney and other witnesses were examined by the plaintiff. The First Appellate Court influenced by the non-examination of the plaintiff drew an adverse inference against him and directed the suit to be dismissed solely on the ground of non-examination of the dismissed of the plaintiff. The judgment of the First Appellate Court shows that other evidence, though available on record, did not receive the attention of the First Appellate Court at all.

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In our opinion, the First Appellate Court was bound to apply its mind to all the evidence available on record and then test the legality of the findings arrived at by the Trial Court. While doing so, the First Appellate Court could have taken the factum of the non-examination of the plaintiff also into consideration. The manner in which the appeal has been disposed of by the First Appellate Court cannot be said to be satisfactory. Non-application of mind by the Appellate Court to other material, though available, and consequent failure of the Appellate Court to discharge its judicial obligation, did raise a question of law having a substantial impact on the rights of the parties, and therefore, the second appeal deserved to be heard on merits.

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Learned counsel for the respondent has placed reliance on *Ishwar Bhai. C. Patel alias Bachu Bhai Patel v. Harihar Behera & Anr.*, [1999] 3 SCC, 457 wherein this Court has emphasised that withholding of the plaintiff himself from the witness box and thereby denying the defendant an opportunity for cross-examination of himself results into an adverse inference being drawn

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- A** against the plaintiff. That proposition of law is undoubtable. However, as we have already said, that is a fact to be kept in view and taken in to consideration by the Appellate Court while appreciating other oral and documentary evidence available on record. May be that from other evidence - oral and documentary-produced by plaintiff, or otherwise brought on record, the plaintiff has been able to discharge the onus which lay on him, and, subject to the court forming that opinion, a mere abstention of plaintiff himself from the witness box may pale into insignificance.
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- In the facts and circumstances of this case remanding the matter to High Court for re-hearing would only prolong the life of litigation. As we are satisfied of the failure on the part of the First Appellate Court in discharging its obligation-statutory and judicial, more so when it is a judgment of reversal, it would meet the ends of justice if the first appeal itself is directed to be heard afresh.
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- The appeal is allowed. The order of the High Court dismissing the appeal in limine as also the judgment and decree of the First Appellate Court are set aside, The appeal shall stand restored on the file of the First Appellate Court which shall be heard and decided afresh, consistently with the observations made hereinabove and in accordance with law.
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No order as to the costs.

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R.P.

Appeal allowed.