PAPER PRESENTATION ON

RECEIVING OF ADDITONAL EVIDENCE AT APPELLATE STAGE

BY

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Receiving of Additional Evidence at Appellate Stage:

Section 107 of Civil Procedure Code deals with the power of the Appellate court and the said provision provides that:

The appellate court,

(1) shall have power to determine the case finally Section 107 (a);

(2) Shall have power to remand the case Sec.107 (b);

(3) Shall have power to frame issues and refer them for trial Sec.107 (c);

(4) Shall have power to take additional evidence or to require such evidence to be taken Sec.107 (d);

(5) Shall have power to perform the same duties as may be conferred and imposed by Civil Procedure Code on the courts of original jurisdiction in respect of the suits. Section 107 (2)

However some conditions and limitations are prescribed under the Civil Procedure Code.

(2) Or.41 Rule 27 Civil Procedure Code provides grounds on which additional evidence in appellate courts can be produced. As per the said provision,

(1) parties to appeal are not entitled to produce evidence either oral or documents in appellate courts generally

(2) but if, the court from which appeal is filed has refused to admit the evidence which ought to have been admitted the party to appeal is entitled to produce additional evidence.

(3) If a party to appeal establishes that inspite of his due diligence, some evidence was not within his knowledge or he could not produce the same at the time when the decree was passed, he is entitled to produce the same in appellate court.

(4) The appellate court itself may require any document produced or witness be examined on any substantial reason.

(5) Whenever additional evidence is allowed to be produced, the appellate court shall record reason for its admission.

(3) Sec.107 (d) Civil Procedure Code empowers the appellate court to admit the evidence and Or.41 Rule 27 provides the grounds on which the additional evidence may be adduced. In the sense, Sec.107 (b) is regulated by Or.41 Rule 27 Civil Procedure Code.

(4) Hon'ble Apex Court in case reported in 2001 (7) SCC page 503 observed that:

Intention of Or.41 Rule 27 CPC is not to patch up the weak points in the case and fill up the omissions in the court below and he does not authorize ay lacunae or gap in the evidence to be filled up while upholding the dismissal of an application filed for leading oral evidence 10 years after the decree Hon'ble Apex Court observed that the court must always be cautious about allowing applications seeking to adduce additional evidence particularly in the form of oral evidence after a long time.

(5) It must also be kept in view that the appellant cannot claim as a matter of right to produce any document or to examine any witness before the appellate court and the appellate court shall exercise its discretion cautiously and sparingly and upon satisfaction that the additional evidence sought to be produced is relevant and admissible and that the applicant praying for receiving the additional evidence has satisfied all the requirements of Or.41 Rule 27 of CPC.

(6) Another general caution is where the document came into existence after the Judgment of the lower court would not be admitted in evidence. Merely because a document is not in the language of the court, it cannot be rejected. The court can require filing of certified and translated copy**(2).** It is pertinent to note that application for receiving additional evidence before 1st appellate court can be filed even if such prayer was rejected by trial court**(3)** and the appellate court rejecting the additional evidence must examine the question whether additional evidence is relevant on the controversy. It is also pertinent to note that rejection of application filed for receiving evidence by trial court does not operate as res judicata**(4).** In case of public documents, the appellate court in admitting them would not exercise same discretion as in case of other documents**.(5)**

(2) AIR 2004 Karnataka page 276 and 279
(3) 2001 All India High Court cases pages 556 and 557
(4) 2003 All India High Court cases pages 544 and 549 (MP)
(5) 2005 (1) ALT page 212 AP and 2004 (10) SCC 507

(7) Mere assertion in the application is not sufficient. The applicant shall establish that inspite of due diligence additional evidence could not be filed in trial court. [(6)] The discretion given to appellate court to receive and admit additional evidence is not arbitrary one, but it is a judicial one circumscribed by the limitations specified in Or.41 Rule 27 CPC. If additional evidence is received contrary to the principles governing such receiving of additional evidence, it is a case of improper exercise of the discretion and additional evidence so brought on record will have to be governed. [(7)]

(8) Basic principle of admission of additional evidence is that persons seeking admission of additional evidence should establish that inspite of best efforts, he could not adduce the same at first instance and secondly the party affected by the admission of additional evidence should have an opportunity to rebut additional evidence, thirdly the additional evidence is relevant for determination of the issue in question. [(8)]

(9) The appropriate stage for admission of additional evidence is at final hearing of the appeal when appellate court is in a position to scrutinize and appraise the evidence on record. [(9)]

(10) Appointment of Advocate/Commissioner can be considered as receiving of an additional evidence. [(10)]

(6) AIR 1998Orissa page 184 and 185
(7) 1976(3) SCJ page 28
(8) AIR 1987 SC 294 in Sivaji Rao Neelangekar Vs. Mahesh and AIR 1976 SC page 2403 (2414) LAO, Bangalore Vs. Nanayan Arch
(9) 2005 (2) ALD page 629 (AP) and 1998 All India High Court Cases AHC 4189) and 2001 (1) SCC page 619
(10) AIR 1969 Madras page 195

(11) It is also important to note that disposal of application for additional evidence after the disposal of appeal is also improper as the appellate court becomes fructus officio. This applies even for the trial courts as in some cases after disposal of a case, the Officers of the court in some occasions will be realizing that certain applications are pending then an attempt to dispose of those applications as a sequel to the disposal of main matter will be made. Such kind of exercise is not permissible. All the interlocutory applications which will have effect on the final determination of the case must be decided in advance and same can be dispose of along with the main matter. In no case after disposing the main matter, the interlocutory applications can be taken up and dispose of. **(11)**

(12) Where additional evidence is admitted the other side should be given opportunity to rebut it. But the same must be limited to the additional evidence and cannot be construed to give freehand to such party to lead any evidence which he could have adduced in trial court. **(12)** The State cannot be granted any greater indulgence in admission of additional evidence than a private litigant. **(13)** When additional evidence taken with assent of both parties without any objection at the time when it was taken, it is not open to either party to dispute the same at later point of time**.(14)** However, such consent does not absolve the Judge from duty of satisfying the same as to necessity of the evidence though consent may some extent cover the defect in recording of reasons.

(13) Revision lies against the order of permitting additional evidence:

(14) Method or mode of taking additional evidence is covered by Or.41 Rule 28 CPC which provides that the appellate court made either by itself or by directing the court from which appeal is filed receive evidence.

(11) 1991 Supp. (2) SCC 282
(12) AIR 1986 Orissa page 13
(13) AIT 1957 SCC 912
(14) AIR 1963 page 1526 in Venkataramaiah Vs. Siddamma

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REMANDING THE MATTER BY THE APPELLATE COURT

WHAT IS AN APPEAL

The expression 'appeal' has not been defined in the Code of Civil Procedure, but it may be defined as **"the judicial examination of the decision by a higher court of the decision of an inferior court"**. As Sir Dinshaw Mulla – Stated:

> "There is no definition of appeal in the Code of Civil Procedure, but their Lordships have no doubt that any application by a party to an appellate court, asking to set aside or reverse a decision of a subordinate court, is an appeal within the ordinary acceptation of the term. **It means removal of a cause from an inferior court to a superior court for the purpose of testing the soundness of the decision of the inferior court.** It is thus a remedy provided by law for getting the decree of the lower court set aside. **In other words, it is a complaint made to the higher court that the decree passed by the lower court is unsound and wrong. It is a right of entering a superior court and invoking its aid and interposition to redress an error of the court below".**

2. There is a fundamental distinction between the right to file a suit and the right to file an appeal. The said distinction has been appropriately explained by the Hon'ble Supreme Court in **Ganga Bai Vs Vijay Kumar** reported in **AIR 1974 SC 1126** in the following words:

> *"There is a basic distinction between the right of suit and right of appeal. There is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for*

its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law".

3. An appeal is a continuation of a suit as observed by the Hon'ble Supreme Court in **Gadikapati Vs Subbaiah Chowdary** reported in **AIR 1957 SC 540.** A decree passed by an appellate court would be construed to be a decree passed by the appellant court for the first instance. An appeal is virtually a hearing of the matter. The appellate court possess the same powers and duties as the original court. In **Dayawati Vs Inderjit** reported in **AIR 1966 SC 1423** speaking for the Hon'ble Supreme Court, Justice Hidayatullah stated as follows:

" An appeal has been said to be 'the right of entering a superior court, and invoking its aid and interposition to redress the error of the Court below'. The only difference between a suit and an appeal is that an appeal 'only reviews and corrects the proceedings in a cause already constituted but does not create the cause".

4. In **Garikapati Vs Subbaiah Chowdary** reported in **AIR 1957 SC 540** the Hon'ble Supreme Court referring to various leading decisions on the subject laid down the following principles relating to a right of appeal:

(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intristic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a more matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is vested right and such a right to enter the superior Court accrues to the litigant and exists on and from the date the lis commences and, although it may be actually exercised when the adverse Judgment is pronounced, such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise".

5. Sections 96 to 98 and Rules 23 to 33 of Order 41 of CPC enumerate the powers of an appellate court while hearing first appeals.

6. FINAL DETERMINATION UNDER SECTION 107(1) (A) AND ORDER 41 RULE 24 ENABLE THE APPELLATE COURT TO DISPOSE OF A CASE FINALLY. Where the evidence on record is sufficient to enable the appellate court to pronounce Judgment, it may finally determine the case not withstanding the Judgment of the trial court has proceeded wholly upon some ground otherthan that on which the appellate court proceeds. The general rule is that a case should, as far as possible, be disposed of on the evidence on record and should not be remanded for fresh evidence, except in rare cases as held by the Hon'ble Supreme Court in case of **Kameswaramma Vs Subba Rao** reported in **AIR 1982 SC 789**, by drawing the final curtain on the litigation between the parties.

7. WHAT DOES REMAND MEAN:-

SECTION 107(1) (b) Rules 23 and 23-A of Order 41

Remand means send back.

One of the powers vested with an appellate court on civil side is to remand the suit for disposal according to law.

What are the provisions under Code of Civil Procedure deal with the remand of a case by appellate court.

8. Under Order 21 Rule 23 which deals with remand of case by appellate court. It reads as follows:

> *Where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its Judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.*

9. **Order 41 Rule 23-A :** Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23.

10. **Order 41 Rule 24 :** Where evidence on record sufficient, Appellate Court may determine case finally :- Where the evidence upon the record is sufficient to enable to Appellate Court to pronounce Judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the Judgment of the Court from whose decree the appeal is

preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

11. **Order 41 Rule 25:** Where Appellate Court may frame issues and refer them for trial to Court, whose decree appealed from :- Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required.

12. And such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefore within such time as may be fixed by the Appellate Court or extended by it from time to time.

13. **Order 41 Rule 26:-** Findings and evidence to be put on record objections to finding :-

(1) Such evidence and findings shall form part of the record in the suit; and either party may, within a time to be fixed by the Appellate Court, present a memorandum of objections to any findings.

(2) Determination of appeal :- After the expiration of the period so fixed for presenting such memorandum the Appellate Court shall proceed to determine the appeal.

14. **Order 41 Rule 26-A:** Order of remand to mention date of next hearing :- Where the Appellate Court remands a case under Rule 23 or Rule 23-A, or frames issues and refers them for final under Rule 25, it shall fix a date for the appearance of the parties before the Court from whose decree the appeal was

preferred for the purpose of receiving the directions of that Court as to further proceedings in the suit.

15. **Can the suit be remanded if the suit is decided by the lower court on merits ?**

If the trial court decided the suit on merits it is not opened to the Appellate Court to order a remand under Order 43 Rule 23 CPC. The trial court may act under Rules 24 and 25. Order 41 Rule 24 is a provision which cannot be made applicable to an appeal against the order on a miscellaneous application in a suit as it is applicable only to a case where suit has been disposed on preliminary point and the decision it is reversed in appeal.

16. The power of remand under Order 21 Rule 23 ought not be lightly exercised by the Appellate Court where the lower court is disposed of the suit on merits, the Appellate Court must dispose of the appeal on the merits and cannot avoid this duty. It is only in exceptional circumstances as where the Judgment of the lower court is wholly unintelligible, that remand can be made for a fresh trial.

17. The Appellate Court can remand a case not agreeing with the finding of the trial court on certain issues only two course were opened to the Appellate Court:

1. to refer finding on the said issues or

2. seek report of trial court on such issues is definite and remand of case to trial court for fresh decision on those issues were improper.

3. The conditions prescribed for the execised of power of remand under order 41 Rule 23 are mandatory but not a mere formality as held by the Hon'ble High Court reported in **AIR 1969 A.P. page 216**.

18. The distinguishing feature under order 41 Rule 23 and under order 41 Rule 23-A is that in earlier rule the matter is disposed of on preliminary point, whereas in the later rule it is decided otherwise on a preliminary point.

19. If there is sufficient material on record is available on that basis Judgment can be pronounced, then there is no necessity to remand the matter back. The Appellate Court is required first to make an endeavour to answer disputed findings and where inspite of such findings it would remand suit for fresh trial. Remand for enquiry on facts for adjudicating the case new set up is not warranted.

20. There cannot be any remand merely for purpose of affording an opportunity to a party to let in additional evidence.

21. During the pendency of an appeal additional issues were framed on the basis of amended pleadings. In such circumstances instead of remanding case, entire evidence was recorded by appellate court. Remand of case merely on the ground that either party may loose further right of appeal is not proper.

22. **Under what grounds the matter can be remanded ?**

The Appellate Courts have inherent power to remand in the following cases.

1. Where the appellate court directs an amendment of the plaint

2. The additional of fresh parties.

3. When the Appellant Court finds that the suit is bad for mis-joinder of parties and causes of action.

   In such a case the Appellant Court may remand the case and direct the lower court to return the plaint for amendment.

4. When the lower court has dismissed the suit on the ground that the suit has been brought in the name of the wrong person as plaintiff or defendant.

5. When the lower court has misunderstood the whole case.

6. When the suit has been disposed of on erroneous issue.

7. When the lower court has failed to determine material issues in the case.

8. Appeal against order passed in suit for possession decreed in favour of defendant and suit can be remanded for ascertaining correct valuation for the purpose of court fee and jurisdiction.

9. Decree of suit by first appellant court giving share to the plaintiff in property held by defendants. However, extent of share not determined in such even suit can be remanded.

10. Appellant Court can remand the suit on the ground that requisite court fee is not paid.

11. Appellant court not dealing with case point by point but mixing of several points and in such circumstances case cannot be remanded.

12. Documents admitted in evidence by trial court which are not properly signed or endorsed case can be remanded.

13. To facilitate parties to the suit to amend their pleadings.

14. Both parties leading evidence and knowing pleadings on the ground that no proper issue was framed suit cannot be remanded as parties knowing the case that was being fought.

15. In dispute regarding specific performance of contract where plaintiff sold property to third parties matter is liable to be remanded to given an opportunity to third person to prove that he is a bona fide purchaser, having no knowledge of earlier contract.

16. In a suit for partnership accounts evidentiary value of certain exhibits not tested in the light of section 48 of partnership act it amounts to no proper disposal of issue by lower court and case can be remanded for fresh disposal.

17. Plaintiff not producing evidence to prove execution of suit documents suit decreed by court on a wrong view that defendant had admitted execution in such event suit can be remanded.

18. When while granting ad interim relief the trial court had prejudged the issue- the order was liable to be set aside and the matter be remitted back to the trial court for fresh trial.

19. Where the location of property on land is essential to reach a right decision in the suit on merits it has not been done by the lower court under such circumstances it is necessary to remit the matter to the lower court by invoking the provision of order 41 Rule 23.

20. Where in a suit for declaration of title and for the trial court decline to consider and determine the question of title its a fit case to remand the case for fresh trial with a direction to decide the question of trial.

21. Trial court to dispose of two suits by passing common Judgment in which facts and reliefs are not common. The trial court has decided issue jointly though evidence adduced by parties in both cases are different.

22. There is no order passed by the trial court for treating evidence of one case as that of in other case and parties have not agreed for common Judgment which is a fit ground for order of remand.

23. As far as resumption of additional evidence is concerned there are well defined principles which postulate that additional evidence will normally be not be permitted because it goes against the doctrine of a finality and there will be virtually no end to litigation if additional evidence is permitted a different stages particularly after one or two appellant stages and that to after long lapse of time.

24. Remands on this ground or contra indicated because of the damage that passage of time thus and on serious effects that it has not administration of justice and working of course.

25. When the defendant has chosen to remain absent while recording of evidence by trial court and conducted appeal on merits without raising issue as to recording of evidence, appellant court's order of remand passed in its own granting opportunity to place evidence is not proper.

26. Remanding the matter for producing evidence though the party having ample opportunity to do so in trial court who did not enter into the witness box and he has not given any reasoning why he has not given such evidence or to produce documents in question and such party coming out with application under Order 41 R 27 for producing original documents with a request to receive as additional evidence the appellant court cannot be said to have made out for remanding the matter.

23. **Wrong Onus of Proof**

Where the lower court has thrown the burden of proof on the wrong party the appellant court may, if necessary, remand the case for re-trial.

The failure to give a party an opportunity to produce evidence will be a ground for remand.

24. **Basing decision on inadmissible evidence**

Where the lower court's Judgment is vitiated by the admission of inadmissible evidence, the case may be remanded for retrial under the inherent power of the court.

As a general Rule, a remand cannot be ordered for trying a new plea raised for the first time in appeal.

A case may be remanded with the consent of parties though a remand may not be permissible otherwise.

Ordinarily a case should be remanded to the court from whose decree the appeal is preferred and not to other court. If the appellate court has power to transfer a case from one court to another, there is nothing illegal in remanding the case to a court to which the case have to be transferred.

Coming to the effect of order of remand which implies a reversal of the decision of the lower court. It reopens the whole case for re-trial by the lower court except in regard to matters decided by the order of remand.

When a case is remanded for re trial the whole case is reopened and the court is to proceed de novo and is entitled to take evidence again even of those witnesses who had already been examined. Order of remand is not decree hence doctrine merger is not applicable to it. Decree passed by trial court would not merge with remand order passed.

It is only in exceptional circumstances the court may exercise the power of remand dehorns the Rule 23 and 23-A.

In ordering a remand under order 41 Rule 25 CPC the appellant court should specify the issues to be tried by the lower court.

25. NATURE OF REMAND :- Where the trial court has to decide the suit on a preliminary point without recording findings on other issues and if the

appellate court reverses the decree so passed, it may send back the case to the trial court to decide other issues and determine the suit this is called remand.

26. WHAT IS SCOPE OF REMAND:- By passing an order of remand, an appellate court directs the lower court reopened and retry the case. On remand, the trial court will re-admit the suit under its original number in the register of civil suits and will proceed to determine it as per directions issued by the appellate court.

27. The appellate court has power to remand a case under order 41 Rule 23 CPC. A remand cannot be ordered lightly as observed by the Hon'ble Supreme Court in **Bhaira Chandra Vs Ranadhir Chandra** reported in **AIR 1988 SC 386**.

28. The Privi council in **Akbar Khan Vs Motai** reported in **AIR 1948 PC 36** postulated the conditions required to be satisfied for remanding the matter.

(1) The suit must have been disposed of by the trial court on a preliminary point:- Before the court can exercise the power of remand under Rule 23, it is necessary to show that the lower court has disposed of the suit on a preliminary point. A point can be said to be a preliminary point, if it is such that the decision thereon in a particular way is sufficient to dispose of the whole suit, without the necessity for a decision on the other points in the case. Such preliminary point may be one of fact or of law, but the decision thereon must have avoided the necessity for a full hearing of the suit. Thus, where the lower court dismisses the suit as being time barred; or barred by limitation; or res judicata; or as disclosing no cause of action; it does so on a preliminary point of law. On the other hand, where the lower court dismisses the suit on the ground that the plaintiff is estopped from proving his case; or that it was motivated; or that the plea raised at the hearing was different from that raised in the plaint, it does so on a preliminary point of fact.

(2) The decree under appeal must have been reversed:- No remand can be ordered by the appellate court under this rule unless the decision of the lower court on the preliminary point is reversed in appeal. Where such is not the case, the appellate court cannot order remand simply because the Judgment of the lower court is not satisfactory; or that the lower court had misconceived or misread the evidence; or bad ignored the important evidence; or had acted contrary to law; or that the materials on which the conclusion is reached are scanty; and the appellate court must decide the appeal in accordance with law.

(3) Other grounds:- Rule 23-A of Order 41, as inserted by the Amendment Act of 1976, empowers the appellate court to remand a case even when the lower court has disposed of the case otherwise than on a preliminary point and the remand is considered necessary by the appellate court in the interests of Justice. The primary object of Rule 23-A is to widen the powers of the appellate court to remand a case in the interests of justice. Even before the insertion of new Rule 23-A, it was held that an order of remand can be passed, if it is necessary to do so in the interest of justice. But it was also held that the power of remand must be regulated by the provisions of Rules 23 and 25 of Order 41 and that inherent powers under section 151 of the Code of cannot be exercised by the appellate court to order remand. The power of remand was, thus, strictly a limited power and yet in practice, may cases arose wherein remand was necessiated for some reasons other than those mentioned in Rules 23 and 25. The Law Commission (fifty-fourth report), therefore, recommended an amendment of the rule empowering the appellate court to remand a case whenever it thinks it necessary in the interests of justice. The said recommendation has been accepted and Rule 23-A has accordingly been added.

29. Coming to the effect of an order of remand it reverses decision of the lower court and reopens the case for retrial by the lower court except in regard to

the matters decided by the appellate court. An order of remand is appealable. If the party aggrieved by an order of remand does not appeal therefrom, he cannot subsequently questioned its correctness under the inherent powers of the court under section 151 of CPC.

30. Similarly, the court in which the case is remanded is also bound by it and cannot go behind the order of remand. While remanding the case, the appellate court shall fix a date for the appearance of the parties before the lower court so as to receive its directions regarding the suit or proceeding pending in the lower court (Order 41 Rule 26-A). It must, however be noted that when an appellate court remands a case setting aside findings of the lower court, only those findings can be said to have been set aside and not all the findings recorded by the trial court.

31. WHAT IS THE DUTY OF TRIAL COURT ON REMAND OF THE SUIT:- Once an order of remand is made by a superior court, an inferior court has to decide the matter as per the directions of the superior court. In **Commissioner of Wealth Tax Vs Aluminium Corporation** reported in **1973 (3) SCC 643**, the Hon'ble High Court of Calcutta expressed 'doubts' about the competence of the Supreme Court to remand the case. When the matter reached the Supreme Court again, the Hon'ble Apex Court observed that the High Court clearly exceeded its jurisdiction in examining the 'competence ' of the Apex Court to remand the case. The Hon'ble Apex Court declared 'It would have done well to remind itself that it was bound by the orders of this court and could not entertain or express any argument or views challenging their correctness. The judicial tradition and propriety required that court not to sit on Judgment over the decision orders of this court'.

32. In conclusion, the Appellate Court should not exercise the power of remand very lightly. As far as possible it should dispose of the appeal finally unless the remand is imperative. The correctness of an order and remand if not questioned at the time when it was made by filing an appeal, nevertheless can be

challenged later on in an appeal arising out of the final Judgment and Decree as held in **Margaret Vs Indo Commercial Bank** reported in **AIR 1979 SC 102.**

33. FRAMING ISSUES and referring them for trial (Section 107 (1)(c) Rules 25 and 26 order 41 of CPC:- Where the lower court has omitted (i) to frame any issue or (ii) to try any issue or (iii) to determine any question of fact which is essential to the right decision of suit upon merits, the appellate court may frame issues and refer them for trial to the lower court and shall direct that court to take the additional evidence required. The lower court shall try such issues and shall return the evidence and the findings within the time fixed by the appellate court.

34. Such evidence and findings as recorded by the lower court form part of the record in the suit, and either party may file in the appellate court a memorandum of objections to any such finding of the lower court within a time fixed by the appellate court. The appellate court should, thereafter, hear the whole appeal and hearing should not confine to the points on which the findings were called for as observed by the Hon'ble Supreme Court in **Soundararaj Vs Devasahayam** reported in **AIR 1984 SC 133.**

35. **Distinction between Order 41 Rule 23 and 25 are as follows:**

1. Where an order of remand is made under order 41 Rule 23 the whole case goes back for decision to the lower court whereas in the case of an order under Rule 25, the case is retained on the file of Appellate Court and only issues are remitted to lower court for findings.

2. If an order of remand is made under Rule 23 the Judgment and decree of the lower court has to be set aside, but it is not necessary to set aside the Judgment and decree where the remand order is made under Rule 25.

3. An order of remand under Rule 23 is appealable but not an order under Rule 25.

4. An order of remand under Rule 23 is a final order which cannot be reconsidered by the court which passed it except on review, whereas an order under Rule 25 is according to the great majority of the cases an interlocutory order it is opened to the court to reconsider.

36. A point can be said to be a preliminary point within Rule 25, if it is such that the decision thereon in a particular way to dispose of the whole suit, without the necessity for a decision on the other points in the case.

37. A point can be said to be a preliminary point within the meaning of Rule 25 it is such that the decision thereon in a particular way is sufficient to dispose of the whole suit, without the necessity for the decision on the points in the case. A point is not a preliminary point where it relates to the merits of the case although its decision made dispense with the necessity of a decision on the other points in the case.

38. Where the court has adjudicated on all the issues involved, the disposal cannot be said to be on a preliminary point.

39. No remand can be ordered under Order 41 Rule 23 unless the decision of the lower court on the preliminary point is reversed in appeal. The condition precedent for the appellate court to pass an order of remand under Order 41 Rule 23 CPC is to arrive at a finding on the material on record that the Judgment of the trial court is erroneous and is liable to be reversed or set aside.

40. My colleague Officers, before concluding I may be permitted to once again state it is only in exceptional circumstances the court may exercise the power of remand dehorns the Rule 23 and 23-A of Order 41.

Most Honoured Sri Justice P. Naveen Rao garu, Honoured Sri Justice M.Seetharama Murti garu and other Judges, august gathering Good Morning everyone,

Today my subject is appreciation of evidence in civil suits. The word **EVIDENCE** is interpreted as means and includes in Sec.3 of the Indian Evidence Act,1872 which means and includes

Sec.3 of Indian Evidence Act, 1872:

Document: Document means any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one these means, intended to be used, or which may be used, for the purpose of recording that matter.

Evidence: Evidence means includes –

1) all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence.
2) (all documents including electronics records produced for the inspection of the court) such documents are called documentary evidence.

Proved: A fact said to be proved when, after considering the matter before, it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

Disproved: A fact is said to be disproved when, after considering the matters before it, the Court either believe that it does not exist, considers it non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not

exist.

Not proved: A fact is said not to be proved when it is neither proved nor disproved.

The word document defined under **sec. 29 of the Indian Penal Code 1860** as follows : The word "document" any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, as evidence to that matter. It is also defined u/sec. 29-A of Indian Penal Code 1860

Sec.29-A Electronic Record: The words "electronic record" shall have the meaning assigned to them is clause (t) of sub-section (1) of Section 2 of the Information Technology Act, 2000.

The word **"Civil Suits"** in Section 9 of Code of Civil Procedure 1908. The word **"Appreciation"** means valuation of evidence in accordance with the law. This is the brief introduction of topic assigned to me.

In my opinion rules in evaluation of evidence Courts shall consider and take into consideration:

1) All facts which are presented during the trial whether testimonial object or documentary
2) All facts which are judicially admitted
3) All facts which are judicially noticed
4) All facts which are presumed

So, let me go first point. Under Or.6 R.1 of Code of Civil Procedure, 1908 about pleadings in plaint and written statement. It also includes statements made by a party under Or.10 R.1 of C.P.C. This was held in ***M/s. Ganga Ram Sat Narain v. Gyan Singh AIR 1960 Pun.209.***

As per the interpretation clause of Sec.3 of the Indian Evidence Act, 1872, all the statements which court permits what it we mean, it means the court does not permit all the statements. For example u/sec. 150 of the Indian Evidence Act, 1872 provides Procedure of court in case of question being asked without reasonable grounds. U/sec. 151 of the Indian Evidence Act, 1872 provides Indecent and scandalous questions. U/sec.152 of the Indian Evidence Act, 1872 provides Questions intended to insult or annoy, such questions are not permitted by Hon'ble Court. So the statements which court permits is correct, or requires to be made before the court by witness. Certain witnesses did not make a statement as to fact in issue or relevant fact, in such cases court has every power u/sec. 165 of the Indian Evidence Act, 1872 to require the witness to make required statement. The same power is also can be exercised by Hon'ble Court Or.18 R.10 of CPC which provides any particular question and answer may be taken down **"Or.18 R.10 CPC**

> **Or.18 R.10 CPC reads thus:** Any particular question and answer may be taken down – The court may, of its own motion or on the application of any party or his pleader, take down any particular question and answer, or any objection to any question, if there appears to be any special reason for so doing.

Let me to come to Document by means of letters, figures or marks or by more than the those means intended to be used or which may be used. Let me to give example of these words.

(Space)

A lover boy wrote certain words on trees, walls and on rocks like "I love Lakshmi", "I live for Lakshmi" and " die for Lakshmi" etc.

At this juncture I am extremely sorry that I am talking especially to criminal side, the sticks, axes, bombs, bloodstain clothes etc. were produced before

the court in criminal trial. So what are they, if evidence includes oral evidence, documentary evidence and electronic records. So the material objects comes under what section of law and what section prosecution produced them and under what section, the court considered the material objects to be produced before the court is to be assessed.

At this juncture let me invoke Sec.3 of the Indian Evidence Act,1872. The word "Proved". A fact is said to be proved, when after considering the matters before the court. By using the word matters Sir James Stephen widened the meaning of the word "evidence", it includes oral evidence, documentary evidence and material objects too and also other evidence. I may be permitted to explain other evidence at later stage dude to paucity of time.

Evidence Act itself and more Sec.101 of the Evidence Act does not make any distinction between criminal cases and civil suits. The simple principle in Sec.101 of the Indian Evidence Act is You went to the court, you prove your case. There is a distinction. The burden of proof u/sec. 101 of the Indian Evidence Act in criminal cases and in civil cases. In Civil cases proving the case beyond all reasonable doubts. How this concept merged from **Justice Lord Dinning** cannot be explained in short span of time. Proof beyond all reasonable doubt does not mean proof beyond the shadow of doubt, on the other hand in civil cases, the standard of proof is much lowered and traditional. The courts insist only on the preponderance of probabilities. In civil cases the court will give its verdict in favour of the party whose case appears to be more probability than the other party. This was held by **Justice Lord Dinning** in **Beter v. Beter (1950) 2 ALLER 458 at page 459**. In that judgment it was held the case may be proved by preponderance of probabilities, but there may be of course all probabilities within that standard. A "preponderance of the evidence" means your case must be only slightly more convincing than the defendants. If the court decides there is preponderance of the evidence in your favour, you have met your burden of proof and won the case. A trial begins with both sides at 50 per cent. At the end of the trial, if the court decides the weight of your evidence is 51 percent or more,

and the defendant's is 49 per cent or less, you win. The preponderance of the evidence is in your favour. This is the rule enumerated in civil suits.

I need not go into the details of oral evidence. But Section 59 of Indian Evidence Act, 1872 provides all facts except the contents of documents or electronic records may be proved by oral evidence, whereas Sec.60 Indian Evidence Act, 1872 provides oral evidence must be direct in all cases. Hearsay evidence is not admissible except it is a relevant fact u/sec.6 of the Indian Evidence Act,1872.

Interested witness or related witness

Related witnesses are not interested witnesses. Witness may be called "interested" only when he has derived some benefit from the result of a litigation in the decree in a civil case, or in seeing accused person punished – witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said to be "interested" witness. This was held in ***State of U.P. v. Kishanpal (2010) 4 SCC (crl.)182.***

A close relative, though not characterized as an interested witness, held, may be so if he has oblique and animus to somehow convict the accused. ***2009 L.M.L.J. 48 (SC).***

Evidence of interests – Credibility – Relationship not a factor to affect credibility – It is for the court to find out whether it is cogent and credible. ***2009 Crl.L.J.2805 (SC)***

In murder case – eye witnesses family members of deceased – Their evidence cannot be per re be discarded on that ground – Relationship is not a factor to affect credibility of witness.

My observation after perusing Sec.118 of the Indian Evidence Act,1872 confirm the same, because there is no bar on close relatives in giving evidence before the court.

At this juncture I would like to refer Sec. 134 of the Indian Evidence Act, 1872. Sec. 134 of of the Indian Evidence Act, 1872 lays down the principle

that the numerical strength is irrelevant. The section enshrines the well recognized maxim that evidence has to be weighed and not counted. Consequently, in a long line of pronouncement, the Indian Courts have held that if the testimony of a sole witness was found to be credible and reliable, the Court can base its judgment on the testimony without insisting on corroboration. This was held in ***Kunzu v. Tamil Nadu (2208) 2 SCC 151.***

At this juncture I may be permitted to mention that hearsay evidence is not admissible ***AIR 2011 SC 760.*** So newspaper reports hearsay evidence ***AIR 2011 SC 906,*** that of I wanted to say oral evidence.

Now let me came to documentary evidence. The civil cases are mainly based on documentary evidence. The documents are two kinds, one is Sec.74 public document and another Sec.75 of Indian Evidence Act, 1872 private document. Let me finish at this juncture certified copies of public documents may be u/sec. 76 of Indian Evidence Act, 1872 proof of public document, u/sec. 77 of Indian Evidence Act, 1872 proof of official documents, u/sec.78 Indian Evidence Act, 1872 and 79 Indian Evidence Act, 1872 shall presumption as to genuiness of certified copies may be taken u/sec. 79 of Indian Evidence Act, 1872. Once a public document produced and explaining to the court for non production of original, may be proved u/sec. 65 (e) of the Indian Evidence Act, 1872.

Let me come to proof of contents of the documents u/sec. 61 of the Indian Evidence Act. The contents of the documents may be proved by either by primary or by secondary evidence. What is the primary evidence is stated u/sec. 62 of the Indian Evidence Act,1872 and what is secondary evidence is stated u/sec.63 of the Indian Evidence Act,1872. But whereas u/sec. 64 of the Indian Evidence Act, is more important, documents must be proved by primary evidence except in cases hereinafter mentioned means the cases in which secondary evidence relating to the documents may be given u/sec.65 of the Indian Evidence Act., 1872.

At this juncture I may be permitted to refer Sec.22 of the Indian Evidence Act,1872. When oral admissions as to contents of the documents are relevant.

> Sec.22 of the Indian Evidence Act, 1872 reads thus: When oral admissions as to contents of documents are relevant – Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

At this juncture I may be permitted to refer Chapter 6 of Indian Evidence Act,1872.

All the inclusion of oral by documentary evidence. Sec.9 of Indian Evidence Act, 1872 provides the evidence of terms and contracts, grants and other dispositions of property reduced to form of document cannot be proved except by document itself or secondary evidence of its contents u/sec. 65 of the Evidence Act. Sec.92 of Indian Evidence Act, 1872 provides exclusion of evidence of oral agreement, sec.93 of Indian Evidence Act, 1872provides exclusion of evidence to explain or amend ambiguous document, Sec.94 of Indian Evidence Act, 1872 provides exclusion of evidence against application of document to existing facts, Sec. 95 of Indian Evidence Act, 1872 provides the evidence as to document unmeaning in reference to existing facts, Sec.96 provides evidence as to application of language which can apply to one only of several persons, Sec.97 of Indian Evidence Act, 1872 provides evidence as to application of language to one or two sets of facts, to neither of which the whole correctly applies, Sec. 98 of Indian Evidence Act, 1872 provides evidence as to meaning of illegible characters etc. Sec.99 of Indian Evidence Act, 1872 provides who may give evidence of agreement varying terms of document.

Let me to mention about proof of execution of documents required by law to be attested. U/sec. 68 of the Indian Evidence Act, 1872, Atleast one of the attesting witness has been called for the purpose of proving its execution. Sec. 69 of Indian Evidence Act, 1872 provides where no attesting witness is found, the hand writing of the person executed must be proved its hand handwriting of that attesting witness. Sec. 70 of Indian Evidence Act, 1872 provides admission of execution of party to attested document. Once it is admitted by party it shall be sufficient proof for the execution. Sec.71 of Indian Evidence Act, 1872 provides proof of document not required bylaw to be attested. It may be proved an unattested.

At this juncture I may be permitted to invoke Sec. 73 of Indian Evidence Act, 1872 and Sec.45 of the Indian Evidence Act, 1872

Let me to evaluate section 73 of the Indian Evidence Act, 1872.

- There is no doubt that Section 73 does authorize the Court to use its own eyes in checking the reliability of the expert on both the sides and there may be circumstances where it is clearly the right and the duty of the Court to do so.

- The science of identifying thumb impressions is an exact science and does not admit of any mistake or doubt but that is not the case with handwriting and the risk of a mistake is higher.

- The Judge can use is own eyes in the comparison of signature, etc. but where the proof of handwriting is the "sheet anchor" of the prosecution, "as a matter of prudence and caution", the judge should "hesitate to base his finding" solely on his own comparison.

- "It is not a safe course (for the court) to compare disputed signature on the Will with the admitted signature.

- Courts should be slow in invoking Section 73 unless the circumstances clearly warrant that course of action.

It is hazardous for courts to rely on their own comparison without assistance of experts. ***In Thiruvengada Pillai v. Navaneethammal,*** Supreme

Court observed.

> "Such comparison by Court without the assistance of any expert has always been considered to be hazardous and risky"

- When the Court arrives at a conclusion on the basis of its own comparison, it must give the reasons for it by reference to the characteristics of finger prints as well as of handwriting. A bare finding is not enough.

Under Section 45 of Court do not solely rely upon even expert opinion as a matter of caution and prudence and it will be inadvisable for the Courts to reply on their own non-expert conclusions under Section 73

Under section 45 of the Indian Evidence Act, 187 the Courts have to form opinion on the basis of the opinion of experts and this situation of "opinions on opinions" exposes the inherent weakness of the expert opinion evidence. Expert opinion is generally considered to be unreliable not necessarily because the experts, in general, are unreliable witnesses but because all human judgment is fallible and the expert could go wrong because of some defect of observation, some error of a premise or an honest mistake of conclusion. This was held in ***Murari Lal v. Madhya Pradesh AIR 1980 SC 531.***

Sec.45A of the Indian Evidence Act,1872 provides opinion of Examiner of Electronic Evidence.

At this juncture Sec. 65 (A) of the Indian Evidence Act,1872 special proviso as to evidence relating to electronic records.

Sec.65 (B) of the Indian Evidence Act,1872 provides admissibility of electronic records may be referred.

Sec.67 (A) of the Indian Evidence Act,1872 provides proof as to electronic signature.

Sec. 73 (A) of the Indian Evidence Act,1872 provides proof as to verification of digital signature.

Sec. 47 (A) of the Indian Evidence Act,1872 provides opinion as to electronic signature when relevant.

Sec. 22 (A) of the Indian Evidence Act,1872 provides when oral admission found as to contents of electronic records are relevant.

Sec. 90 (A) of the Indian Evidence Act,1872 provides "May" presumption as to electric records five years old.

Now let me come to all facts which are judicially admitted facts.

Sec.58 of the Indian Evidence Act,1872 provides facts admitted need not be proved. On this context, I may be permitted to invoke Or.12 of Code of Civil Procedure Rules 1 to 5 provides as to admission of documents and notices thereon an forms of other admissions. Or.12 R.6 provides Judgment on admissions. But an occasion by Apex Court given under Or.12 R.6 of Code of Civil Procedure, in Case admission is not in respect of the whole properties or whole claim, such a provision cannot be resorted to. This was held in ***Uttam Singh Dugal & Company v. Union Bank of India and others AIR 2000 SC 2740.***

In Pushpa Devi Bhagat V Rajinder Singh, AIR 2006 SC 2628, the Apex Court held that in case the reply is not filed by the defendant in spite of giving opportunities, in such a case the necessary conclusion may be that the defendant has admitted the plaintiff's claim and the suit may be decreed on the basis of evidence and the employed admission made by the defendants.

Or.XII Rule 1 speaks of the admission of a case of the plaintiff by another party, if the is admitted by the defendant, suit may be decreed though the plaintiff

has to stand on his own legs. This was held in ***Dudh Nath v. Suresh Chandra, AIR 1956 SC 1509.***

III. Let me talk on point No.3 in evaluating of evidence in civil suits. U/sec. 56 of the Indian Evidence Act,1872, **Facts judicially noticeable need not be proved.** What are the facts that court must take judicial notice is provided u/sec. 57 of the Indian Evidence Act,1872. Sec.57 of the Indian Evidence Act,1872 provides only in 13 cases the court must take judicial notice, it does not mean other facts which are judicially noticed cannot be taken into consideration. ***For example:*** *Custom in Kamma community in Andhra Pradesh i.e. adoption of son in law by father-in-law and mother-in-law is judicially noticed by Supreme Court* ***AIR 2011 SC 545.***

IV. Let me come to my last stage of presentation, **Facts which are presumed.**

Sec. 4 of the Indian Evidence Act,1872 provides, May presumption, Shall Presumption, Conclusive Proof. Whereas Secs. 79 to 90A of the Indian Evidence Act,1872 provides presumptions as to documents.

Sec. 114 (A) of the Indian Evidence Act,1872 provides presumption as to absence in certain offence.

Sec. 113 (A) of the Indian Evidence Act,1872 provides presumption as to abetment of suicide by a married woman. Sec.113 (B) of the Indian Evidence Act,1872 provides presumption as to dowry death, which are irrelevant in appreciation of civil cases. However, I mentioned for the sake of knowledge. Sec.114 of the Indian Evidence Act,1872 provides "May presumption of existence of certain facts.

I forgot to mention in my presentation facts which are presented during trial whether testimonial, the word object may be relevant. How to appreciate the evidence of object in Civil Cases.

Or.XVIII R.18 of CPC the court at any stage of the suit inspect any property or thing concerning which any question may arises this rule is very useful and time saving rule. So, after inspection of thing or property a memorandum shall be made by the judge, such memorandum form part of the record of the suit.

Lastly and not leastly I invoke Or.XVIII R.12 of C.P.C. observations of the demeanour of witnesses by court in evaluation of evidence in civil suits. Under Chapter X of the Indian Evidence Act,1872 Secs. 156, 157 and 158 provides corroboration. But the above sections mostly not relevant to Civil Cases. Even if Law does not require corroboration prudence requires it. Judges are not some times inclined to act upon an uncorroborated testimony. Court normally expects corroboration of witnesses, it may not be illegal to act upon their evidence only. But it is not safe. A court may be willing to act on the evidence of a witness. But it may be of the view that the witness is an underfeit and so it may not be safe to act on that evidence alone. In such circumstances, in order to enable the court to act on that evidence it may seek corroboration from other independent evidence or circumstances. This was held in ***State v. Rajkumar (1971) 3 SCC 436.*** The circumstance may also corroborate chain of facts which may constitute a conclusive circumstance which must repeal of hypothesis. Corroborative Evidence may be direct or circumstantial. This was held in ***Rameshwar v. State AIR 1952 SC 54.***

Now let me come to evaluate the evidence of Judgments of Hon'ble High Courts and Hon'ble Supreme Court.

To my little knowledge is concerned out of Parts 22, 395 articles are in the constitution and after amendments 444 articles. There is no article which provides the binding of judgments of Hon'ble High Court on Subordinate Courts. But at this juncture, I may be permitted to mention one judgment.

(Space)

Under Article 141 of Constitution of India law declared by Supreme Court to be binding on all other courts within the territory of India.

In appreciating evidence in civil suits, generally we mention judgments of either Supreme Court or High Court how far we are correct. A precedent is judicial decision containing a principle, which forms an authoritative element termed as ***ratio decidendi***. This was held in ***State v. Bark (2009) 5 SCC 694.*** But the precedent is neither a statutory definition nor an Act of parliament . This was held in ***Home Office v. Dorset YachtCompany (1970) 2 All.E.R.290***. Each case depends on own its facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost of tickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it.

The ratio of any decision must be understood in the background of the facts of that case, it has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it. This was held ***in Ambalal v. State AIR 1987 SC 1073 and also State v. AGM Management Service Limited (2006) 5 SCCC 520.*** It is observed in ***Financial Corporation v. Jagdamba Oil Mills (2002) 3 SCC 496, qi$ 1987 SC 834*** , the apex court has explained what is precedent and its use in a given judgment stating that Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read. In the context in which they appear judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for

judges to embark upon lengthy discussions but the discussions is meant to explain and not a define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes, their words are not to be interpreted as statutes. In ***London Mac Dermot Dock Co. Ltd. V. Horton 1951 AC 737 at page 761. Lord Mac Dermot observed.*** **"** The matter cannot, of course, be settled merely by treating the ***ipsissima*** verba of Willes, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not detract from the great weight to be given to the language actually used by that mot distinguished Judge."

Appreciation of evidence in Appeal Suits and Miscellaneous Appeals

by

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Prefatory

Adjudication of civil disputes and enforcement of the rights of the parties to the disputes in terms of adjudication are matters provided for under the Code of Civil Procedure i.e., the procedure established by law,[1] it embodies the principles of natural justice. Thus adherence to the procedure established by Code of Civil Procedure (CPC) makes the adjudicative process fair, both in appearance as well as in substance, by bringing it in conformity with the principles of natural justice. CPC is a comprehensive legislation containing, more or less, detailed procedure to be followed from the stage of initiation of judicial proceedings till the final disposal of the case and enforcement of the rights of the parties in terms of the decision.[2]

Appreciation of evidence in Appeal Suits

Appreciation of evidence is the most important function of a judge while deciding the cases. A civil case commences with the institution of plaint and the rebuttal of the claim of the plaintiff by the defendant by filing a written statement. The questions in controversy are settled by the court by framing issues which have to be decided by the court.[3] Once the trial court

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1 . Nitin Gunwant Shah vs Indian Bank, (2012) 8 SCC 305

2 . P.Puneeth, Civil Procedure, XLVIII Annual Survey of Indian Law (2012), 101

3 . Hon'ble Sri Justice J.Eshwara Prasad, Appreciation of Eividence in civil case-presumption- burden of proof, Volume V of Reference Material of Andhra Pradesh Judicial Academy, Secundrabad

pronounces the judgment the problems and predicaments of litigant public begin by questioning the legality or soundness of the judgment, thereby the litigant public march towards the appellate courts by preferring appeal.

Thrust of the Article

The objective of this article is to survey the law relating to the canons/cardinal principles of appreciation of evidence by the appellate courts in appeal suits and miscellaneous appeals studded with judicial dictums of the constitutional courts. The article is doctrinal in orientation, and due to broad spectrum of the topic, no normative projections are made on the conceptual thoughts or legal prose. Further, consequent to colossal reach and range of the topic, thrust is made towards the first appellate Court being the final Court of facts in so far as disposal of Appeal suits in a lion share generally than the Civil Miscellaneous Appeals, as they have to be dealt mutatis mutandis, and conscious of provision under Order 43, Rule 2 C.P.C.

Power base of Appellate Court - Posit

When an appeal is filed an appellate court can do one of the three things, i.e.,

1. It may reverse the decree or order under appeal,
2. It may modify the decree or order; or
3. It may merely dismiss the appeal and thus confirm the decree or order passed by the trial court without any modification whatsoever.

Constitutional Edicts

Day in and out the trial courts pronounce myriad judgments, equally the matters carried to the appellate courts seeking reverse of a finding of fact of law recorded by the trial Court, then the question arose as to how the appellate Court shall conduct itself while appreciating the

evidence recorded by the lower court and pronounce judgment thereon. The apex court in *Mudhusudan Das Vs Narayanibai and Ors*[4] categorised the three requisites normally to be present before an appellate Court can reverse a finding of a fact recorded by a trial court. Viz

1. It applied its mind to reasons given by the trial court,
2. It had no advantage of seeing and hearing the witnesses, and
3. It records cogent and convincing reasons for disagreement with trial court.

As early as in year 1950 the Supreme Court exquisitely dealt the instant matter by observing that,

> "the question for our consideration is undoubtedly one of fact, the decision of which depends upon the appreciation of the oral evidence adduced in the case. In such cases, the appellate court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and of observing the manner in which they deposed in Court. 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. 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 the 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."[5] (emphasis added)

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4 . AIR 1983 SC 114

5 . Sarju Pershad Vs Jwaleshwari Pratap, AIR 1951 SC 120= 1950 SCR 78

The Supreme Court having considered a number of English and Indian decisions in laying down the subtle principle on the point regarding the powers of the first appellate court in appreciation of evidence and interference with finding of fact recorded by the trial court in *Radha Prasad Vs Gajadhar Singh*[6] and held that,

> "the position in law, in our opinion, is that when an appeal lies on facts it is the right and the duty of the Appeal Court to consider what its decision on the question of facts should be; but in coming to its own decision it should bear in mind that it is looking at the printed record and has not the opportunity of seeing the witnesses and that it should not lightly reject the Trial Judge's conclusion that the evidence of a particular witness should be believed or should not be believed particularly when such conclusion is based on the observation of the demeanour of the witness in Court. But, this does not mean that merely because an appeal court has not heard or seen the witness it will in no case reverse the findings of a Trial Judge even on the question of credibility, if such question depends on a fair consideration of matters on record. When it appears to the Appeal Court that important considerations bearing on the question of credibility have not been taken into account or properly weighed by the Trial Judge and such considerations including the question of probability of the story given by the witnesses clearly indicate that the view taken by the Trial Judge is wrong, the Appeal Court should have no hesitation in reversing the findings of the Trial Judge on such questions. Where the question is not of credibility based entirely on the demeanour of witnesses observed in Court but a question of inference of one fact from proved primary facts the Court of Appeal is in as good a position as the Trial Judge and is free to reverse the findings if it thinks that the inference made by the Trial Judge is not justified."

The Supreme Court referred to the general principle in appreciating the evidence vis-a-vis the power of appellate Court while deciding the appeal in *Madhusudan Das Vs Smt. Narayanibai and Ors*,[7] and observed that,

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6 . AIR 1960 SC 115

7 . AIR 1983 SC 114

"at this stage, it would be right to refer to the general principle that, in an appeal against a trial court decree, when the appellate court considers an issue turning on oral evidence it must bear in mind that, it does not enjoy the advantage which the trial court had in having the witnesses before it and of observing the manner in which they gave their testimony. When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the appellate court should permit the findings of fact rendered by the trial court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the trial court or there is a sufficient balance of improbability to displace its opinion as to where the credibility lies. The principle is one of practice and governs the weight to be given to a finding of fact by the trial court. There is, of course, no doubt that 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 a misreading of the evidence or on conjectures and surmises the appellate court is entitled to interfere with the finding of fact." (emphasis added)

Appellate Court – Seisin of case

An appeal is a continuation of suit.[8] In this case after referring to various decisions on the point the Supreme Court held that once a decree passed by a court of original jurisdiction has been appealed against, the matter becomes *subjudice* and the appellate court is seisin of the whole case. A court of appeal shall have the same powers and shall perform as nearly as may be the same duties as conferred and imposed on the court of original jurisdiction. The hearing of appeal is thus rehearing of the suit or original proceeding.

Thereby for the appellate court too, the same canons of the appreciation of evidence applies as that of the trial Court.

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8 . Dilip Vs Mohd. AzizulHaq, (2000) 3 SCC 607

Ordinarily, however the appellate court should not interfere with findings of facts recorded by the trial court particularly when the decision hinges upon credibility of witnesses[9].

Shun Circuitry of litigation

The appellate court shall exercise its power to determine a case finally. Where the evidence on record is sufficient to enable the appellate court to pronounce the judgment, it may finally determine the case notwithstanding that the judgment of the trial court has preceded wholly upon some ground other than that on which the appellate court proceeds. The general rule is that a case should, as far as possible be disposed of on the evidence on record and should not be remanded for fresh evidence except in a rare cases, by drawing a final curtain on the litigation between the parties.[10]

From the above dictum it is clear that it is imperative on the part of the appellate court to decide the case basing the evidence on record. It shall give quietus to the matter. The evidence has to be appreciated in such a way that the findings shall generate a net result through which there can be finality to the matter, otherwise any amount of deviation would tend to circuitry of litigation.

Fragmentary decisions are most inconvenient and tend to delay the administration of justice.[11] In the sense if piecemeal adjudication of dispute rendered by the trial court without appreciating the evidence on hand properly, the result thereto defeat the very administration of justice.

Appreciation of evidence as a whole - Application of mind

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9 . *T.D.Gopalan Vs H.R.& C.E, Madras, AIR 1972 SC 1716 (1719)*

10 . Sant Narayan Vs RamaKrishna Mission, AIR 1974 SC 2241

11 . Nanhelal Vs Uma Rao Singh AIR 1931 PC 33

It is the duty of appellate Court to decide an appeal in accordance with law after considering the evidence as a whole. The judgment of the appellate court must clearly show that it has applied its judicial mind to the evidence as a whole.[12]

The Supreme Court recently in *ONGC Ltd Vs Western Geco International Ltd*[13] cautioned that non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind, and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence, that, it can be described as fundamental policy of Indian law.

Not to interfere with decree for technical errors

Section 99 of the Code enacts that a decree which is otherwise correct on merits and is within the jurisdiction of the court should not be upset merely for technical and material defects. The underlying object of section 99 is to prevent technicalities from overcoming the ends of justice, and from operating as a means of circuitry of litigation.[14]

In the above case the Supreme Court observed that when a case has been tried by a court on merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it has resulted in failure of justice.

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12 . State of T.N. Vs S. Kumaraswamy AIR 1977 SC 2026

13 . (2014) 9 SCC 263, Para 38

14 . See Kiran Singh Vs Chaman Paswan, AIR 1954 SC 340 (342)

Easier task but careful approach

In *Santosh Hajari Vs Purushottam Tiwari*[15] the Supreme Court observed that the task of the 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.

In a juxta position to the above, the Supreme Court sound a note of caution in *Girijanandini Devi Vs Bijendra Narayan Chaudhary*[16], that 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.

The High Court of AP succinctly held in *Kondamuri Anasuyamma v Dist. Judge, W.G. Dist at Eluru and Others*,[17] that where the original court, which has got the opportunity of observing the demeanour of witnesses, came to a finding, the appellate court cannot brush aside that finding merely because there are some discrepancies. If the evidence is considered on appreciation and when it is accepted by the original court, the appellate court cannot interfere with a particular finding when it is supported by documentary evidence.

On the contrary, where the appraisal of oral evidence by the trial court did not depend upon demeanour of the witnesses examined before it,

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15 . (2001) 3 SCC 179

16 . AIR 1967 SC 1124

17 . AIR 1991 AP 47 (49)

the appellate court would have power to reappraise the evidence on record and could upset the finding recorded by the trial court if it suffered from any mistake of law or fact.[18]

Perceptive functions of the trial judge

The Supreme Court in *Chinthamani Ammal vs Nandagopal Gounder And Anr,*[19] has recognised the well known limitation on the powers of the appellate court to re-appreciate the evidence, by holding that, thus the area in which the question lies in the present case is the area of the perceptive functions of the trial Judge where the possibility of errors of inference does not play a significant role. The question whether the statement of the witnesses in regard to what was amenable to perception by sensual experience as to what they saw and heard is acceptable or not is the area in which the well known limitation on the powers of the appellate court to re-appreciate the evidence falls. The appellate court, if it seeks to reverse those findings of fact, must give cogent reasons to demonstrate how the trial court fell into an obvious error.

In a recent decision rendered by the apex court in *Hardevinder Singh Vs Paramjit Singh,*[20] the Supreme Court reiterating the general rule observed that, there is no prohibition in law for the appellate court to re-appreciate the evidence where compelling and substantial reasons exist. The findings can also be reversed in case convincing material has been unnecessarily and unjustifiably stood eliminated from consideration. However the evidence is to be viewed collectively. The statement of a witness must be read as a whole as reliance on a mere line in a statement of

18 . 1987 All L J 752=(1987) 13 All L R 60

19 . AIR 2007 SC (Supp) 593=2007 (5) ALT 65

20 . (2013) 9 SCC 261

witness is not permissible. The judgment of the court can be tested on the touchstone of dispassionate judicial scrutiny based on a complete and comprehensive appreciation of all views of the case, as well as on the quality and credibility of the evidence brought on record.

Assessment of the evidence

The High Court of Madras in *Ramakrishna Gounder Vs Kannappa Mudaliar,*[21] elaborately dealt on the powers of appellate court vis-a-vis appreciation of evidence by summating that, "there is a mandate in the code of civil procedure to the first appellate court to advert to the evidence placed in the case and it must come to its own independent conclusion on a consideration of such evidence. It must not forget that as a final court of fact, it is duty bound to give an independent and comprehensive consideration and assessment of the evidence and to come to its own conclusion one way or the other. There is no excuse to skip over this obligation; merely on the ground that first appellate court affirms the judgment of the first court. The duty cast upon the first appellate court is an undoubted one and it must review the recorded evidence and draw its own conclusions and inferences. It should independently enter into all questions including appreciation of the evidence in the case, and give reasons of its own for its ultimate decision. The object of these mandates are obvious.

> Firstly, it will enable the party affected by the decision of the first appellate court to know and understand the reasons or grounds for such decision, so that, if there is a necessity felt to go by way of a second appeal, the party will be in a position to formulate his opinion in this regard over such reasons or grounds.
>
> Secondly, this court when a second appeal comes before it, must be facilitated to find out as to whether the first appellate court has properly appreciated the case and has proceeded to decide it,

21 . (1986) 99 LW (JS) 55

independently applying its mind to it and considering the totality of the material evidence placed in the case.

Not to use intemperate language

In the march of disposal of appeals the appellate courts fall prey to extravagant criticism while appreciating the evidence by questioning the bonafides of the witnesses and began use unduly strong intemperate language. The Supreme Court in *Ishwari Prasad Mishra Vs Mohd. Isa*[22] cautioned the Courts not to use intemperate language in recording judicial conclusions by the appellate courts. Further added that the same approach should be followed in the matter of criticism of witnesses examined in the case.

Conclusion

On conglomeration of above peroration, what emerges clear is that, the first appellate court while disposing the appeals shall take note of above cardinal principles in theoretical potential, so also practical relevance. Despite all this, the Supreme Court laid an emphasis on the guided principle that, procedural law exist to subserve the interest of substantial justice but not to supplant it. The Supreme Court in *Lakshmibai Vs. Bhagwantbuva*[23] held that,

> "when substantial justice and technical considerations are pitted against each other the cause of substantial justice deserves

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22 . AIR 1963 SC 1728

23 . (2013) 4 SCC 97

to be preferred and the courts may in a larger interests of administration of justice may excuse or overlook a mere irregularity or a trivial breach of law for doing real and substantial justice to the parties and pass orders which will serve the interest of justice best.”

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