

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION

SECOND APPEAL No.57 OF 1994

Ashok Rangnath Gurav

... Appellant

V/s.

Uttareshwar Mahadeo Gurav & Ors.

... Respondents

Mr. Vinayak Gadekar i/b. P. B. Shah for the Appellant

CORAM: K.K. TATED, J.

DATED : AUGUST 25, 2015

JUDGMENT :

1. Heard the learned counsel for the Appellant. None for the Respondent.
2. This appeal is preferred by the Plaintiff challenging the decree dated 26/08/1993 passed by the learned V Additional District Judge, Solapur in Civil Appeal No.355/1991 reversing the decree dated 16/10/1991 passed by the Civil Judge, Junior Division, Karmala in Regular Civil Suit No. 154/1987 and dismissed the suit.
3. For the sake of convenience, the parties will be referred to as per their nomenclature in the suit i.e. the Appellant as Plaintiff and Respondent as Defendant.
4. The Plaintiff filed Regular Civil Suit No. 154/1987 in the court of Civil Judge, Junior Division, Karmala, Dist. Solapur for perpetual injunction restraining the Respondents/Defendants from obstructing

the Plaintiff from performing worship (pooja) of Uttareshwar Devasthan and for begging (*bhikshuki*) as a priest of the said Devasthan at village Kem, Tq. Karmala, Dist. Solapur.

5. The plaintiff's contention was that in the temple of Lord Uttareshwar at village Kem, the Defendant Nos.1 to 5 had half share of performing worship, whereas, Gangubai Krishna Gurav had half share of performing worship. On 07/04/1984 Gangubai executed a Will Deed in favour of the Plaintiff and gave her right to worship. The said Will Deed was duly registered. Thereafter, Gangubai died on 07/05/1984. Since then, the Plaintiff was enjoying his right of worship in the said temple to the extent of his half share. The Defendant Nos.1 to 4 had obstructed the Plaintiff's right and therefore, the Plaintiff filed the suit for injunction and declaration of his right. That suit was decreed by the learned Civil Judge, Junior Division, Karmala on 16/10/1991 and restrained the Defendant Nos.1 to 4 by permanent injunction from obstructing the Plaintiffs from performing worship and begging in respect of the Lord Uttareshwar Devasthan to the extent of his half share.

6. Being aggrieved by the said decree passed by the Trial Court, Defendant Nos.1 to 3 preferred Civil Appeal No.355/1991 in the court of District Judge, Solapur at Solapur, which was allowed by the learned V Additional District Judge, Solapur on 26/08/1993 and the judgment and decree of the Trial Court was set aside, dismissing the suit with cost.

7. Being aggrieved by the said decree passed by the Appellate

Court, the Plaintiff preferred the present appeal.

8. This appeal is admitted by this court on 31/01/1994, when this court passed the following order:

“Heard counsel for the Appellant.

The first appellate court has held that the suit filed by the Appellant was not maintainable for want of sanction of Charity Commissioner as well as on the ground that the right to worship etc. was not a civil right. Both these questions are substantial questions of law. Admitted”

9. The learned counsel for the Plaintiff submits that the judgment and decree passed by the Appellate Court dated 26/08/1993 is against justice, equity and good conscience and same is liable to be set aside. He submits that the Appellate Court failed to appreciate that the right to worship is a civil right (customary right) and therefore the suit filed by the Plaintiff was maintainable. He further submits that the Appellate Court ought to have held that there was no bar under section 9 of the Code of Civil Procedure, 1908 in agitating the right to worship which is a civil/customary right, in a civil court and ought to have dismissed the appeal and ought to have upheld the the Judgment and Decree passed by the Trial Court. He further submits that the Appellate Court erred in holding that prior consent of the Charity Commissioner under section 50 of the Bombay Public Trust Act 1950 (said Act) was necessary and as no consent or permission was obtained from the Charity Commissioner, the suit was not maintainable. He further submits that the Appellate Court failed to consider that though the Uttareshwar Deveasthan was joined as a party Defendant No.6 in the suit, no relief whatsoever was claimed against the Devasthan and the said Devasthan was joined only as a formal party and therefore, there

was no question of obtaining any permission or consent for institution of the suit from Charity Commissioner for their civil rights.

10. The learned counsel for the Plaintiff submits that the Appellate Court failed to appreciate that the said Gangubai, during her life time exercised her right to worship at the said Devasthan. He further submits that the Appellate Court failed to appreciate the fact that P.W. 2 Abhimanyu Baburao Bichitkar, in his deposition before the Trial Court, categorically admitted that the husband of Gangubai viz. Krishna Gurav had a half share of worship in respect of the said Devasthan. The said deposition remained unchallenged by the Defendants.

11. The learned counsel for the Plaintiff submits that the Appellate Court erred in coming to the conclusion that the suit as filed by the Plaintiff for civil rights was not maintainable on the ground that the Plaintiff filed the said suit without obtaining any permission as required under section 50 of the said Act from the Charity Commissioner and also under section 9 of the Code of Civil Procedure, 1908. Hence, the judgment and decree passed by the Appellate Court in Civil Appeal No.355/1991 be set aside restoring the judgment and decree passed by the Civil Judge, Junior Division, Karmala dated 16/10/1991 in Regular Civil Suit No. 154/1987.

12. Heard the learned counsel for the Appellant Plaintiff. I have gone through the copy of the plaint, written statement, deposition of the parties and other documents on record and record & proceedings called by this court from the Trial Court.

13. In the present proceedings , the Plaintiff filed Regular Civil Suit No. 154/1987 in the court of Civil Judge, Junior Division, Karmala for perpetual injunction to protect his rights in respect of performing worship (pooja) of Lord Uttareshwar Devasthan and for begging (Bhikshukhi) as a priest of the said Devasthan at village Kem, Tq. Karmala, Dist. Solapur, on the basis of a Will Deed dated 07/04/1984 executed by Gangubai. The Trial Court framed following issues for determination:

1)	Does Plaintiff prove that Gangubai had executed Will Deed on 07/04/1984 in his favour ?	Yes
2)	Does he prove alleged obstruction ?	Yes
3)	Is he entitled for relief claimed ?	Yes
4)	What order and decree ?	The suit is decreed without costs.

14. The Trial Court, considering the evidence on record, decreed the suit restraining the Respondent Nos.1 to 4 from obstructing the Plaintiff from performing pooja and bhikshuki in respect of Lord Uttareshwar Devasthan to the extent of his half right, whereas the lower Appellate Court, in an appeal preferred by Defendant Nos.1 to 3 framed following points for determination and allowed the appeal by setting aside the decree passed by the Trial Court.

1)	Whether the dispute described in the plaint can be said to be of a civil nature and this court has jurisdiction to try the suit ?	No
----	---	----

2)	Whether the suit is maintainable for want of sanction from Charity Commissioner under Public Charitable Trust Act ?	No
3)	Whether the respondent proves that Gangubai had any interest in the alleged suit matter ?	No
4)	Whether Respondent further proves that Gangubai had executed the Will dated 07/04/1984 ?	Yes
5)	Whether Respondent No.1 had any right in the alleged suit matter ?	No
6)	Whether Respondent proves obstruction ?	No
7)	Whether Respondent is entitled for relief claimed ?	No
8)	What order ?	As per final order

15. The lower Appellate Court held that the suit as it is filed by the Plaintiff was not maintainable in view of section 9 of the Code of Civil Procedure, 1908 and also for want of permission from the Office of Charity Commissioner under section 50 of the said Act. Section 9 of the Code of Civil Procedure, 1908 reads thus:

“9. Courts to try all civil suits unless barred :

The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Explanation I - A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

Explanation II - For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.”

Section 50 of the said Act reads thus:

“50. Suit by or against or relating to public trusts or trustees or others : In any case,

i) where it is alleged that there is a breach of a public trust, negligence, misapplication or misconduct on the part of a trustee or trustees,

(ii) where a direction or decree is required to recover the possession of or to follow a property belonging or alleged to be belonging to a public trust or the proceeds thereof or for an account of such property or proceeds from a trustee, ex-trustee, alienee, trespasser or any other person including a person holding adversely to the public trust but not a tenant or licensee,

(iii) where the direction of the Court is deemed necessary for the administration of any public trust, or

(iv) for any declaration or injunction in favour of or against a public trust or trustee or trustees or beneficiary thereof.

the Charity Commissioner after making such enquiry as he thinks necessary, or two or more persons having an interest in case the suit is under subclauses (i) to (iii), or one or more such persons in case the suit is under sub clause (iv) having obtained the consent in writing of the Charity Commissioner as provided in section 51 may institute a suit whether contentious or not in the Court within the local limits of whose jurisdiction the whole or part of the subject matter of the trust is situate, to obtain a decree for any of the following reliefs :

(a) an order for the recovery of the possession of such property or proceeds thereof;

(b) the removal of any trustee or manager;

(c) the appointment of a new trustee or manager;

(d) vesting any property in a trustee;

- (e) a direction for taking accounts and making certain enquiries;
- (f) an order directing the trustees or others to pay to the trust the loss caused to the same by their breach of trust, negligence, misapplication, misconduct or willful default;
- (g) a declaration as to what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;
- (h) a direction to apply the trust property or its income *cy pres* on the lines of section 56 if this relief is claimed along with any other relief mentioned in this section;
- (i) a direction authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged or in any manner alienated on such terms and conditions as the court may deem necessary;
- (j) the settlement of scheme, or variation or alteration in a scheme already settled,
- (k) an order for amalgamation of two or more trusts by framing a common scheme for the same;
- (l) an order for winding up of any trust and applying the funds for other charitable purposes;
- (m) an order for handing over of one trust to the trustees of some other trust and deregistering such trust;
- (n) an order exonerating the trustees from technical breaches, etc;
- (o) an order varying , altering, amending or superseding any instrument of trust;
- (p) declaring or denying any right in favour of or against, a

public trust or trustee or trustees or beneficiary thereof an issuing injunctions in appropriate cases; or

(q) granting any other relief as the nature of the case may require which would be a condition precedent to or consequential to any of the aforesaid reliefs or is necessary in the interest of the trust:

Provided that no suit claiming any of the reliefs specified in this section shall be instituted in respect of any public trust, except in conformity with the provisions thereof;

Provided further that, the Charity Commissioner may instead of instituting a suit make an application to the Court for a variation or alteration in a scheme already settled :

Provided also that, the provisions of this section and other consequential provisions shall apply to all public trusts, whether registered or not or exempted from the provisions of this Act under sub section (4) of section 1.”

16. Bare reading of section 9 of the Code of Civil Procedure, 1908 shows that the suit as it is filed by the Plaintiff for civil right, is undoubtedly maintainable. The Plaintiff has filed the suit for his civil rights to do *Pooja and Archana* in the said temple. It is not barred by any law.

17. Even as per section 50 and 51 of the said Act, the suit as it is filed by the Plaintiff without any permission from the Charity Commissioner was maintainable, because the Plaintiff was seeking to enforce his private and personal right. The suit filed by the Plaintiff was for his civil rights to do *pooja and archana*. The two questions of law framed by this court at the time of admission of this appeal squarely covered by the Apex Court judgment in the matter of *Vinayaka Dev, Idagunji and*

Ors. Vs. Shivaram and Ors. (2005) 6 SCC 641, wherein it is held that the suit for declaration that the plaintiff had hereditary right to perform pooja and consequential relief of injunction restraining the Defendants from interfering with right is maintainable in law. The Apex Court further held that if suit is filed pertaining to personal / private right of performing pooja, then provisions of section 50 of the said Act do not attract. As the substantial questions of law involved in the appeal are squarely covered by the aforesaid judgment of the Apex Court, both the substantial questions of law are answered in the negative.

18. Hence, following order is passed:

- a. Second Appeal is allowed.
- b. Judgment and decree dated 26/08/1993 passed by the learned 5th Additional District Judge, Solapur in Civil Appeal No.355/1991 is set aside.
- c. Judgment and decree dated 16/10/1991 passed by the Trial Court in Regular Civil Suit No. 154/1987 is restored.

(K.K. TATED, J.)