

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

Second Appeal No.596 of 2011

- 1) Vinod S/o. Madhavrao Shewale,
Age 45 years,
Occupation : Business,
R/o. Deogiri Colony,
Near Police Station Kranti Chowk,
Aurangabad.
- 2) Chandrashekhar S/o Balkrushna Shewale,
Age 50 years,
Occupation: Business,
Trustee and Member of
Shri. Ghrushneshwar Mandir
Deosthan, Ellora, Aurangabad. .. **Appellants.**

Versus

- 1) Ramakant S/o. Narhar Shewale,
Age 50 years,
Occupation : Business,
R/o. Shankarsingh Naik
High Court, Balaji Nagar,
Aurangabad.
- 2) Shri. Ghrushneshwar Mandir
Devasthan Trust, Verul,
Taluka Khultabad,
District Aurangabad
Through its President. .. **Respondents.**

Shri. V.J. Dixit, Senior Advocate, instructed by Shri. L.V. Sangit, Advocate, for appellants.

Shri. Hemant Surve, Advocate, for respondent No.1.

Shri. Milind Madhu Joshi, Advocate, for respondent No.2.

CORAM: T.V. NALAWADE, J.

DATE : 17th JUNE 2016.

JUDGMENT:

1) The appeal is filed against decision of trial Court by two defendants of Regular Civil Suit No.230 of 2009 which was pending in the Court of the Civil Judge, Junior Division, Khultabad, District Aurangabad and also against the judgment and decree of Regular Civil Appeal No.103/2010 which was pending in the District Court Aurangabad. Relief of declaration and injunction is given in favour of the plaintiff and this decision is challenged. Both the sides are heard.

2) The plaintiff and two defendants are from community of Gurav and they are entitled to render *Seva*, service to Ghrushneswar Mandir Deostan situated at Verul. It is the case of the plaintiff that the branch of Shewale family has right to render *Seva* for one year in alternate and such right is given to family of Dandge which is of one year. The period of one year given to Shewale branch is further divided and out of this one year

period, six months period is given to the branch of one Balwant Shewale. Plaintiff, present two defendants and one other branch of Baburao and Vasantryao are entitled to get share in the period of remaining six months. It is the case of the plaintiff that he has right of *Seva* of the period of three months and the remaining three months period can be divided amongst remaining three branches. The branches of Baburao and Vasantryao were not party to the suit, who, according to the plaintiff, is entitled to *Seva* of at the most one month.

3) The relief of declaration was claimed by the plaintiff that he has right to continue to render *Seva* for the period of three months and it is on the basis of custom and practice.

4) The aforesaid contentions of the plaintiff are denied by the two branches of Shewale family who are defendants. It is their case that these four branches of Shewale are entitled to have equal period, of 45 days from the period of six months. It is their case that father of the plaintiff died when he was kid and as the family of the

plaintiff was in financial crisis, the other three branches had allowed the plaintiff to render *Seva* for the period of three months.

5) As per the scheme prepared by the Deostan Trust, offerings which come to Deostan are kept in a locked box known as "*Dan-Peti*" and the Trust is entitled to get 25% share in those offerings and the remaining 75% offerings are handed to Gurav, the branch of Shewale family which it is entitled to render *Seva* during that particular period. Thus, it can be said that the real interest is in the offerings, the material gains.

6) It appears that in the year 2005 the other three branches of Shewale family submitted to the Deostan Trust that as in the past the period needs to be distributed and each branch needs to be given period of 45 days. The plaintiff did not accept this proposal by contending that he had right to render *Seva* for the period of three months. This dispute was taken to the office of the Assistant Charity Commissioner by Deostan Trust. It appears that some proceeding was filed by the plaintiff also in the

office of the Assistant Charity Commissioner. The Assistant Charity Commissioner made some interim arrangement and directed to see that each branch gets 45 days till the civil Court decides the dispute. Then the plaintiff approached the Civil Court.

7) This Court, other Hon'ble Judge, admitted the appeal on 6-1-2012 by formulating following substantial questions of law.

(i) Whether the trial Court and the lower appellate Court have correctly interpreted Exh.74 as it exists and have recorded the findings correctly thereby giving declaration that respondent No.1 is entitled for three months Sevapali?

(ii) Whether both the Courts below have correctly interpreted Exh.74 and Exh.86 which were brought on record ?

8) This Court after hearing arguments and going through the record expressed that this Court will be deciding three more points by order dated 16-6-2016 as under :-

(i) Whether it was mandatory for the trial Court to frame issue of existence of custom and whether the burden to prove such custom was on the plaintiff ?

(ii) Whether the nature of declaration claimed by the plaintiff was not proper and the Courts below have committed error in holding that the declaration that plaintiff is entitled to continue to use his right of 3 months 'Pali' can be given when the other side had denied the right itself ?

(iii) Whether in view of the nature of relief claimed by the plaintiff and which could have been given in the suit, other parties viz. Baburao and Vasantrao, one branch was necessary party to the suit and for non joinder of necessary party, the suit itself was bad and the Courts below committed error in deciding this point ?

9) This Court has carefully gone through the pleadings in the plaint and the pleadings in the written statement. Only in the relief clause the plaintiff contended that he is entitled to declaration on the basis of custom/practice. When anybody claims any right on the basis of custom, the exact custom needs to be stated in the pleadings. Due to this, the other side gets opportunity. The Court also gets opportunity to frame issues on the basis of such pleadings and the reasons or objects behind the custom can also be ascertained. This was not done. On the other hand it was the case of the defendants that some

temporary arrangement was made and in view of that temporary arrangement the period of three months was given to the plaintiff. Thus it was the case of the defendants that there was some arrangement but the right was of temporary nature. The plaintiff is relying on document at Exhibit 74 which was purportedly submitted to the Deosthan Trust by one of the four branches. In that document the distribution of the period was shown. Only one person, who according to the plaintiff had submitted the proposal, had signed on that document. The evidence in the cross examination of the plaintiff shows that the arrangement even of distribution of the period was made on the basis of the agreement and the agreements are reached in the meetings of the families.

10) In view of the aforesaid circumstances it was necessary for the Courts below to consider the case of the plaintiff of custom. There was no pleading of the nature of arrangement made by the parties and the relief was claimed on the basis of custom. These two things are entirely different. If there was agreement it will be necessary for the plaintiff to establish that all the

branches of Shewale family who are entitled for the share in the period of six months had agreed to it and it was the permanent arrangement for some reason which ought to have been pleaded and only after that the case of the plaintiff could have been considered.

11) So far as nature of relief is concerned, it can be said that the Courts below were under misconception. The Courts below have observed that the plaintiff was claiming declaration that he has right to continue to enjoy the period of three months and that way declaration can be claimed and needs to be given. The right of the plaintiff itself of three months *Seva* period is in dispute and there is cloud on it and in view of this circumstance it was necessary for the plaintiff to claim relief of declaration that he is entitled to enjoy the right of *Seva* for three months period from the aforesaid six months period. Thus, the relief claimed was not proper and the relief given cannot remain there due to aforesaid circumstances.

12) The aforesaid circumstances lead to one more point viz. the point of want of necessary parties. If there was agreement and the plaintiff was claiming right of aforesaid nature, it is necessary for the Court to presume that the other three branches will be affected. The other three branches are necessary parties in such a suit and the suit could not have been decreed in absence of one of the branches. This circumstance is not properly considered by the Courts below and this circumstance also goes to the root of the matter.

13) In view of the aforesaid circumstances this Court could have simply allowed the appeal and could have dismissed the suit. However, in view of existence of document like Exhibit 74 and for enabling the parties to take the decision of the civil Court on their rights this Court holds that the judgments and the decrees of the Courts below need to be set aside and the matter needs to be remanded back. In view of the aforesaid circumstances plaintiff can be allowed to amend the pleadings to see that the suit becomes tenable, all the necessary parties are joined in the suit and the base in respect of right claimed

is mentioned in the plaint. If the pleadings in the plaint are amended, there will be right to the defendants to have consequential amendment of the pleadings of the written statement. On that basis and in view of the aforesaid discussion, the trial Court will have to recast the issues. Both the sides are eager to have expeditious disposal of the matter.

14) Some interim arrangement is already made and each party is rendering *Seva* for the period of 45 days. This arrangement needs to be continued till the decision of the suit by the trial Court. It appears that already arrangement is made to see that the offerings in respect of the disputed period are separated and account is maintained in respect of the offerings. That is to be continued and for separation of those offering care is to be taken to see that both the parties remain present at the time of separation and creation of the account.

15) In view of the aforesaid discussion, all the aforesaid points are answered accordingly against the plaintiff and following order is made :--

16) The appeal is allowed. The judgments and decrees of the Courts below are hereby set aside. The matter is remand back to the trial Court for fresh trial.

17) The parties to appear before the trial Court on 1st July 2016. Record and proceeding be sent back forthwith. The concerned Court can be asked to send special messenger for collecting the record. The temporary arrangement already made is to continue till decision of the suit. Amendment in the pleadings, as already observed is to be allowed.

Sd/-
(T.V. NALAWADE, J.)

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