

Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL (ST) NO.11436 OF 2017

WITH

CIVIL APPLICATION NO.1690 OF 2017

WITH

FIRST APPEAL (ST) NO.11441 OF 2017

WITH

CIVIL APPLICATION NO.1691 OF 2017

Shivanna Sangappa Birajdar ...Appellant

Versus

Somshekhar Sangappa Birajdar & Ors ...Respondents

FIRST APPEAL (ST) NO.9418 OF 2017

WITH

CIVIL APPLICATION NO.1689 OF 2017

Kedar Shivanna Birajdar & Ors ...Appellants

Versus

Somshekhar Sangappa Birajdar & Ors ...Respondents

FIRST APPEAL (ST) NO.10949 OF 2017

WITH

CIVIL APPLICATION NO.1688 OF 2017

Mahesh Shivanna Birajdar & Ors ...Appellants

Versus

Somshekhar Sangappa Birajdar & Ors ...Respondents

Mr Surel S Shah, *for the Appellants in FAST 11436/2017, FAST 11441/2017 and for the Applicant in CAF No.1690/2017 & CAF No.1691/2017.*

Mr Niranjan P Shimpi, *for the Appellants in FAST No.9418/2017 and for the Applicant in CAF No.1689/2017.*

Mr AM Kulkarni, *with Akshay Kulkarni, for the Appellants in FAST No.10949/2017 and for the Applicant in CAF No.1688/2017*

Mr Ambaji R Rayani, *with Mr K Vakeel, for Respondent No.1 in All First Appeals.*

Ms Ashwini Takalkar, *AGP for the State/Respondents Nos.25 & 26 in FAST No.11436/2017 & for Respondent No.3 in FAST No.11441/2017.*

CORAM: G.S. PATEL, J

DATED: 7th July 2017

PC:-

1. I have heard the parties for sometime and considered the judgment under Appeal dated 14th March 2017. I have also seen a detailed list of dates and the relevant portions of a compilation.

2. It is not necessary in my view, although this is a First Appeal, to hear the matter at length. The reason is the observations in paragraphs 29 to 31 of the impugned judgment.

29) The applicant claims that he was the only Sansthpak (Founder) of the Trust. For registration of the Trust, 7 members are required and while registering the present Trust, 7 members applied for registration of Trust and applicant Shivannappa Sangappa Birajdar is one of it. He was called as Sansthapak along with other six members. So the applicant and other six members are Sansthapak of the Trust and all these persons have equal

right. Each of them have right to accept the member of the Trust.

30) It was submitted that the learned ACC did not appreciate the evidence properly and held that the applicant has submitted receipt books, membership register as well as proceeding which were filed before lower authority. That has not been proved by examining the witness. It was submitted that as per Section 80 of Evidence Act, the evidence in one proceeding which is proved can straight way be accepted in the other proceedings. I do not accept above contentions. Section 80 of the Evidence Act reads as under.

80. Presumption as to documents produced as record of evidence:-

Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any office authorised by law to take such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by Judge or Magistrate or by any such officer as aforesaid, the Court shall presume:-

that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true and that such evidence, statement or confession was duly taken.

31) The Presumption is to the statement given by the witness and it is recorded by the Court. Such statement can be accepted as evidence and not documents. For proving those documents, those documents must have been referred in the evidence. Its contents must be proved

in the proceeding. That has not been proved. The learned JCC has rightly appreciated this fact and therefore I do not find any irregularity or illegality regarding the observations made by the JCC in the above context."

3. The effect of these paragraphs is that the entire body of documentary evidence that was placed before the Assistant Charity Commissioner ("ACC") and then before the Joint Charity Commissioner ("JCC") was simply brushed aside and ignored. A single sentence in paragraph 30 purported to dispose of all the documentary evidence in a most summary and unsatisfactory fashion. The reasoning based on Section 80 of the Evidence Act is without any supporting authority or precedent, and it does not seem that parties have given an adequate opportunity of addressing the Trial Court on whether this approach was correct or not.

4. The dispute pertains to the validity of membership of the Trust. Of necessity, this involves an examination of various documents including payment receipts, membership forms, membership registers, change reports and so on. This material was not only before the ACC but also before the JCC in revision. The JCC himself considered the oral evidence and also what is described as bulky documentary evidence in a decidedly unsatisfactory way. In paragraph 12, the Joint Charity Commissioner himself also held that this documentary evidence was "not legally proved". In the context of original receipt books, proceeding books and membership register, it was said that these were not referred to by any witness. It does not seem to have been considered whether these documents, or the facts of which they spoke, were in fact in controversy, whether they were covered by any of the exceptions to Section 32 of

the Evidence Act, and other possibilities. The evidence was dealt with by saying that “most of the bulky documentary evidence placed on record cannot be considered.”

5. I do not pretend to understand what, if anything, this is supposed to mean when one is essentially dealing with matters of oral and documentary proof. On the other hand, the Joint Charity Commissioner was able to take into account “clear admissions”. It is settled law that an opportunity must always be given to a party to explain an admission that is sought to be held against him.

6. The entire approach is most unsatisfactory. For instance in regards to receipts issued by the Secretary of the Trust in favour of some Respondents towards payment of life membership, it is held that those receipts are not proved. But those Respondents claimed that payments had been made. If the Trust showed payments were received, and received from those members and in those amounts, then surely the question of formal proof of the receipts was hardly dispositive of the case and there could not have been a requirement of rebutting the receipts. On the question of payment into the trust account of some amount, the question might arise if this is a donation or a membership fee or an entrance fee. The receipt is only evidence of a payment made; but that payment is made into the trust account and therefore the fact of that payment having been made is not proved or disproved only by the receipt. If there is no dispute about the payment being made, then, and to that extent, formal proof of the payment is unnecessary. If there is a dispute about the nature of the payment, then different considerations may arise. Again, if it is not in dispute that the amount was received by the

trust as a membership fee and has been so shown in its accounts, then that is a factor to be considered as well. Further, the issue of the implications of a suggestion put in cross-examination about membership was not considered.

7. The JCC adopted this approach to document after document that was before the ACC. Whatever the JCC may have done, it was incumbent on the District Judge to adopt to follow a more cautious and studied approach. It was that Court's task to see whether the JCC had correctly or incorrectly appreciated the evidence before the ACC. For this, the District Judge necessarily had to look at the evidence itself. It had to look statements of the parties, and to look at, if not each document, then at least each class of documents separately. The Court did nothing of the kind. As far as I can tell, the District Judge merely adopted the approach and findings of the JCC and then seems to have left it to the High Court in First Appeal to do what needed to be done. I decline the invitation to do the District Court's work for it.

8. The impugned order is set aside. The matter is remanded in its entirety to the District Judge, Solapur. All the Civil Miscellaneous Applications before him will be decided afresh uninfluenced by the order of 14th March 2017.

9. None of the parties will file any further material before the District Judge except in the form of brief written submissions or notes of arguments and compilations of authorities. The District Judge will set a date for the filing of those written submissions and compilations. The compilations must not contain any additional

material. All compilations and written submissions must be properly indexed, paginated and stitched or bound. The District Judge is not to accept any loose documents tendered across the Bar. The written submission and compilation will be clearly marked to indicate on whose behalf they are filed, and they are to form part of the record. This will enable a correct appreciation of the rival arguments. The District Judge will consider all the arguments noted to the extent necessary. The case law cited must be fully discussed. As to the oral and documentary evidence, if any of it is to be excluded or held to be inadmissible, the piece of evidence in question must be clearly identified or, at a minimum, if a document is one of several forming a distinct class, that class of documents must be separately identified. Sweeping statements purporting to deal with all the evidence or “much of the bulky evidence”, the “bulk of the evidence” and so on will not do.

10. The District Judge is requested to dispose of all these matters at his earliest convenience and preferably by 10th November 2017. Till then the ad-interim order previously granted and continued by the order of 30th June 2017 will continue.

11. The First Appeals are disposed of in these terms. No costs.

12. In view of disposal of the First Appeals, the Civil Applications do not survive and are disposed of accordingly.

(G. S. PATEL, J.)