

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

Second Appeal No. 0631 of 2017

District : Latur

Veer Hanuman Mandir,
A registered Public Charitable
Trust, Through its President,
Shri Dwarkadas Hiralal Soni,
Age 61 years,
Occupation Business,
R/o. Prakash Nagar, Latur.

.. Appellant
(Original
plaintiff)

versus

1. Mahaling s/o. Ramling Swami,
Age 68 years,
Occupation Nil,
R/o. Near Lokmat Office,
M.I.D.C., Latur.

2. Tanaji s/o. Devidas Salunke,
Age 57 years,
Occupation Service,
R/o. Prakash Nagar, Latur.

.. Respondents
(Original
defendants)

.....

Mr. M.L. Dharashive, Advocate, for the appellant.

Mr. S.R. Choukidar, Advocate, for respondent no.01.

Respondent no.02 served through paper publication.

.....

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 29TH MARCH 2019

ORAL ORDER :

01. Present appeal has been filed by original plaintiff challenging the judgment and decree passed in Regular Civil Appeal No. 148 of 2011 by learned District Judge-3, Latur, dated 18-04-2017, whereby his appeal came to be dismissed. In the said appeal, he had challenged the judgment and decree passed in Regular Civil Suit No. 590 of 2007 by 7th Joint Civil Judge (Junior Division), Latur, dated 20-06-2011.

02. The present appellant - plaintiff had filed suit for perpetual injunction. The subject matter of the suit was Survey Nos.52 and 53, to the extent of east-west 44 feet and north-south 12 feet from village Khadgaon, Taluka & District Latur. It is stated that the defendant is not the member of the plaintiff - Trust nor the defendant is in any way interested in the Trust property. There is Veer Hanuman temple in plot Survey No.52, area admeasuring 27 feet east-west and 10 feet north-south. Land Survey No.53 was situated adjacent to Survey No.52. That land was originally owned by Shaikh Suleman Chaudhary. He sold the said land to one Dattaprasad Badrinarayan Somani on 08-12-1997. Dattaprasad expired leaving behind his father and brother. Father and brother gifted Survey No.53 by registered document dated 18-10-2005 to the plaintiff - Trust. Mutation entry to that effect bearing mutation no.2225 was entered. According to the plaintiff,

thereafter the suit property was entered into the Public Trust Registration office, Latur. Plaintiff constructed Mahadev temple on the plot of Survey no.53 by installing statue of Nandi and Mahadev Pind in tin shed. It is stated that the defendants are obstructing plaintiff from carrying out day-to-day activities of the temple by committing criminal trespass. Hence, the suit.

03. Defendant no.01 resisted the claim of the plaintiff - Trust by filing written statement. It is stated that he is the owner and possessor of Survey no.53 as well as the temple of Lord Mahadev. According to him, Dattaprasad Somani had gifted area admeasuring east-west 10 feet and south-north 06 feet from Survey no.53 having boundaries towards eastern side adjacent to the Maruti temple, by gift deed (Dan Patra) dated 07-10-2000. It is stated that it was a notarized document. It is denied that he is causing any obstruction to the plaintiff - Trust.

04. Taking into consideration rival contentions, issues came to be framed. Parties have led oral as well as documentary evidence. Taking into consideration the evidence on record, learned trial Court has partly decreed the suit. The defendants or anybody claiming through them were restrained by perpetual injunction from interfering with the possession of the plaintiff over Survey no.52 and

templt of Veer Hanuman. It can be, therefore, said that though it is not clearly worded, learned trial Court had rejected the claim of the plaintiff over Survey no.53 and, therefore, plaintiff approached the appellate Court in Regular Civil Appeal No.148 of 2011 which was dismissed by learned District Judge-3, Latur, on 18-04-2017. Hence, the second appeal.

05. Heard learned Advocate Mr. M.L. Dharashive for the appellant and learned Advocate Mr. S.R. Choukidar for respondent no.01. None present for respondent no.02.

06. The first and foremost point that is required to be considered is, when there is concurrent finding of fact, whether second appeal can be entertained. In order to admit or take second appeal into consideration under Section 100 of the Code of Civil Procedure, 1908, appellant will have to make out a case that there is substantial question of law involved in this case.

07. Learned Advocate appearing for the appellant submitted that both the Courts below have not considered evidence and law involved in the matter in proper perspective. There was no dispute as regards ownership and possession of the plaintiff over Survey no.52. However, as regards Survey no.53, plaintiff claimed ownership on the basis of registered gift

deed dated 18-10-2005 executed by father and brother of Dattaprasad Somani, whereas defendant no.01 was claiming ownership on the basis of a notarized document. Therefore, it ought to have been held by both the Courts below that the plaintiff has proved its title over Survey no.53 and also possession over the same.

08. Per contra, learned Advocate appearing for respondent no.01 supported the reasons given by both the Courts below and submitted that when the plaintiff has failed to prove the ownership, the Trust was not entitled to get injunction in respect of Survey no.53.

09. First and the foremost fact that is to be seen in this matter is that, when the plaintiff was claiming ownership on the basis of the registered gift deed and the said fact was denied by the defendant, the document ought to have been produced on record. Here, the plaintiff has not produced that document on record but only extract of Index-2 has been produced which is by nature a secondary evidence. There was no explanation given by the plaintiff as to why the Trust is unable to produce the document. Secondly, the plaintiff had produced the extract of Index-I of Public Trust at Exhibit 84. However, there is no mention of Survey no.53 as a Trust property in PTR extract which is kept with the

Joint Charity Commissioner's office. Therefore, by two ways, the plaintiff could have brought on record the evidence that Survey No.53 is a Trust property. Both these documents have not been produced and there is no explanation for the same.

10. The third piece of evidence which could have been produced is that after 2005 i.e. the alleged gift deed, plaintiff constructed Mahadev temple. Then it ought to have been shown that whether permission from Joint Charity Commissioner / Assistant Charity Commissioner to construct the temple was obtained or not and whether permission from the local authority to construct the same was obtained or not. It appears that in a tin sheet structure by installing two statues or idol, it is stated that the plaintiff has constructed the temple. If it is so, then plaintiff could have also produced minutes of the Trust permitting the Trust to have construction / incur expenditure for the construction of the temple. Thus, from various ways, it could have been brought on record by the plaintiff that the Trust is the owner of the said disputed portion and the temple.

11. When the ownership of the plaintiff was challenged, the second question is whether suit for injunction only would lie and when there is cloud over the ownership, there ought to have been prayer

for declaration. In view of the decision in *Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by L.Rs. & others* [AIR 2008 SC 2033], where there is a cloud raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Further, it is observed that "*Where there are necessary pleadings regarding title and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the Court may decide the issue regarding title, even in a suit for injunction.*" Thus, taking into consideration the concurrent findings by both the Courts below, that the plaintiff has failed to prove ownership over Survey no.53, it can be said that suit has been rightly partly decreed to the extent of Survey no.52 only.

12. Now, at this stage, learned Advocate appearing for the appellant prayed for remand of the matter stating that though plaintiff claimed ownership on the basis of gift deed, it was not produced; but plaintiff is ready to produce it and lead evidence taking into consideration the fact that as compared to the defendant's case, the plaintiff has a strong case. Such prayer cannot be allowed in second appeal. There was an opportunity for the appellant at the stage of first appeal even to produce those documents with a reason for not

producing it earlier.

13. Hence, both the Courts below have not committed any error in respect of appreciation of evidence or the law applicable. Therefore, no substantial question of law is arising. In the result, the second appeal is disposed of as '**not admitted**'.

(Smt. Vibha Kankanwadi)
JUDGE

.....