

**IN THE HIGH COURT OF BOMBAY AT GOA****SECOND APPEAL NO.81 OF 2018**

- 1 MANOHAR SHIVRAM  
KARBOTKAR GAONKAR,  
major of age,
- 2 MR. CHANDRAKANT NARAYAN  
KARBOTKAR GAONKAR,  
major of age,
- 3 SHRI NANDA NARAYAN  
KARBOTKAR GAONKAR,  
(deceased)
- 4 SHRI NAMDEO NAGESH  
KARBOTKAR GAONKAR,  
(deceased)
- 5 SHRI SAHADEO DATTU  
KARBOTKAR GAONKAR,  
major of age,
- 6 SHRI SURYAKANT DATTU  
KARBOTKAR GAONKAR,  
major of age,
- 7 SHRI TULSIDAS VASSUDEV  
KARBOTKAR GAONKAR,  
major of age,
- 8 SHRI RAMESH VAMAN  
KARBOTKAR GAONKAR,  
major of age,
- 9 SHRI PUNDALIC GANESH  
KARBOTKAR GAONKAR,  
major of age,
- 10 SHRI HARISCHANDRA RAMA  
KARBOTKAR GAONKAR,

(deceased),

11 SHRI SHASHIKANT RAMA  
KARBOTKAR GAONKAR,  
major of age,

12 SHRI VISSO KESHAV  
KARBOTKAR GAONKAR,  
major of age,

13 SHRI ANANT KESHAV  
KARBOTKAR GAONKAR,  
(deceased)

14 SHRI RANGANATH MAHADEO  
KARBOTKAR GAONKAR  
(deceased)

15 SHRI ROHIDAS MAHADEO  
KARBOTKAR GAONKAR,  
(deceased),

16 SHRI SURESH SADASHIV  
KARBOTKAR GAONKAR,  
major of age,

17 SHRI KISHOR SHANKAR  
KARBOTKAR GAONKAR,  
major of age,

18 MR. VIDYANAND SHANKAR  
KARBOTKAR GAONKAR,  
major of age,  
All r/o. Mayem, Bicholim, Goa.

... Appellants.

## VERSUS

1 SHIVA YESHWANT PARAB  
GAUNKAR,  
aged 63 years, r/o. H.No. Ardhwado,  
Mayem, Bicholim, Goa.

(deleted since deceased)

- 2 RAJESH NAMDEV PRABHU  
GAUNKAR alias PARAB  
GAUNKAR,  
aged 24 years, Indian National, r/o.  
H.No. Gaunkar Wado, Mayem,  
Bicholim, Goa.
- 3 MANAGING COMMITTEE OF  
THE TEMPLE OF SHREE MAHA  
MAYA KELBAI and its Affiliate  
Temples situated in Mayem Village,  
Bicholim through President  
Procurador having office at Mayem,  
Bicholim, Goa.
- 4 MAZANIA TEMPLES OF SHREE  
DEVI KELBAI and its Affiliate  
Temples,
- 5 ALL THE PERSONS BENEFITTED  
BY THE DECREE IN SUIT NOS.55,  
56, 60 AND 61 OF 1968 ... Respondents.

Shri Nitin Sardesai, Senior Advocate with Shri Vibhav Amonkar,  
Advocate for the Appellants.

Shri S.D. Lotlikar, Senior Advocate with Ms. S. Kenny, Advocate for  
Respondent No.2.

Shri A.D. Bhobe and Ms. A. Fernandes, Advocate for Respondent No.3.

**Coram: - DAMA SESHADRI NAIDU, J.**

**Date: - 14<sup>th</sup> January 2020**

**ORAL JUDGMENT:**

The appellants are the defendants in RCS No.54/2001. Are they the  
defendants? Answer to that question resolves the whole dispute.

2. For the narrative purpose, I will treat the appellants as the defendants. And I stress, it is only for the narrative purpose. The respondents 1 & 2 are the plaintiffs in RCS No.54/2001. They have filed the suit, seeking the following reliefs:

- “a) This Hon'ble Court may please declare the judgment, order and decree passed in the suit nos.56/68, 55/68, 60/68 and 61/68 be declared as null and void and illegal; alternatively/and
- b) This Hon'ble Court may declare that the judgment, order and decree passed in the Regular Civil Suit Nos.56/68, 55/68, 60/68 and 61/68 are not binding on the plaintiffs and their families and on the true original and real Mahajans of the Temple who were not parties to the suits;
- c) the defendant nos.1 and 2 be restrained permanently from allowing the persons other than the real Mahajans i.e. other than the groups of Sinai (Shenvi) Mayenkars and Porob Gaonkars, in the election of Managing Committee and from enrolling the plaintiffs in the above suits viz. Reg. Civil Suit Nos.55/68, 56/68, 60/68 and 61/68 or their heirs in the Catalogue/bye laws;
- d) Cost be awarded to the plaintiffs;
- e) Such other reliefs this Hon'ble Court think fit and proper in the circumstances.”

3. In that suit, the first defendant is the Managing Committee of the Temple of Shree Maha Maya Kelbai; the second defendant the Mazania Temple of Shree Devi Kelbai; and the third defendant “all the persons benefitted by the decree (impugned) in Suit Nos.55, 56, 60 and 61 of 1968.” The plaintiffs served notice on the third defendant, initially, by publication, supposedly under Order 8 Rule 1 of CPC. Later, they served the notice by affixture in the Temple premises. But none represented the third defendant. So the Trial Court set them ex parte and proceeded with

the suit. It has declared the judgment and decree passed in Regular Civil Suit Nos.55, 56, 60, and 61 of 1968 as null and void. Besides that, the trial Court has also declared that the judgment and decree do not bind the plaintiffs and their families and the Temple's "true original and real mahajans" who were not parties to those four suits. Having lost in the First Appeal, the appellants have filed this Second Appeal. But to put the Second Appeal in perspective, we should begin at the beginning; that is, we should first trace the origins of the earlier litigation in 1968.

**First Round of Litigation:**

4. Fifty-one plaintiffs filed Civil Suit No.55/1968. They claimed that they were the Mahajans, pleading not only for themselves but also for those other Mahajans who have not yet been brought on the rolls of the Temple register as Mahajans. So they sought the trial Court's leave, under Order 1 Rule 8 of CPC, to prosecute the case not only on their behalf but also on behalf of the other unnamed Mahajans. The Court granted the leave.

5. The plaintiffs filed the suit against the Temple and its Administrative Committee, the first and the second defendant respectively. The Trial Court decreed the suit on 23<sup>rd</sup> April 1984. In fact, three other batches of persons, said to be Mahajans yet to come on the rolls of the Temple register, have filed identical suits. They are Regular Civil Suit Nos.55, 56, and 60 of 1968. Having tried all of them together, the trial Court rendered a common judgment. But we will focus on the

developments in Civil Suit No.55/1968, and that will suffice.

6. Both the defendants, that is the Temple and the Administrative Committee, filed First Appeal No.96/1984 before the District Judge, Panaji, who dismissed it through judgment, dated 24.01.1986. Further aggrieved, the Temple and its Committee filed Second Appeal No.26/1986 before this Court. The Second Appeal, too, met the same fate. Undeterred, they filed SLP but again without any success. All concerned thought it was final, but it is not.

7. In the course of time, the appellants filed EP No.3/1990 to have the decree executed; they wanted the Temple authorities to enter their names on the rolls of Temple Register. But the appellants faced objection from the Temple on the Mamlatdar's jurisdiction in the Execution. The learned Mamlatdar, through his order, dated 13.08.2009, ruled that he had no jurisdiction to execute the Civil Court's decree. Then, under Devasthan's regulations, the appellants filed Appeal No.11/2010.

8. In that appeal, for the first time, the Temple informed the appellate authority that in a suit filed by certain third parties, the decree the appellants sought to execute had been set aside. Thus, the appellants, for the first time, came to know about another suit and its fallout, nullifying the decree they got and sustained up to the Hon'ble Supreme Court. At any rate, in the light of that development, the appellate authority closed the appeal.

**The Second Round of Litigation:**

9. Now, we may refer to the suit through which the respondent 1 and 2 have successfully got the appellants' decree nullified. The first and the second respondents filed Regular Civil Suit No.54/2001 before Civil Judge, Senior Division, Bicholim. They arrayed three defendants: the Managing Committee of the Temple of Shree Maha Maya Kelbai; the Mazania Temple of Shree Devi Kelbai; and “all the persons benefitted by the decree (impugned) in Suit Nos.55, 56, 60 and 61 of 1968.”

10. The respondents 1 and 2, as the plaintiffs, sought the reliefs which also have been extracted above. They wanted the trial Court to declare the judgment and decree in Regular Civil Suit Nos.56/68, 55/68, 60/68 and 61/68 declared as void and illegal. In the alternative, they wanted the trial Court to declare those judgments and decrees as not binding on “the plaintiffs and their families, and on the true original and real Mahajans of the Temple who were not parties to the suits.” Besides, the respondents 1 and 2 wanted the trial Court to restrain the Temple and its Managing Committee “from allowing the persons other than the real Mahajans, i.e. other than the groups of Sinai (Shenvi) Mayenkars and Porob Gaonkars, in the election of Managing Committee, and from enrolling the plaintiffs in the above suits: Civil Suit Nos.55/68, 56/68, 60/68 and 61/68 or their heirs in the Catalogue/bye laws.”

11. Once the notice was “served” by way of publication and affixture, none represented the non-descript third defendant. Therefore, the trial Court decreed the suit only in the presence of the Temple and its

Committee.

12. We have already noted that the appellants came to know about the judgment and decree in Regular Civil Suit No.54/2001, based on the defence the Temple introduced in the execution proceedings which led to Appeal No.11/2010. Then, the appellants filed Regular Civil Appeal No.41/2015. Though it was filed in 2010, it was registered in 2015. They filed that appeal with two interlocutory applications: delay condonation and leave to appeal.

13. The Appellate Court condoned the delay but refused to grant the leave. In fact, it has felt that the appellants required no leave because they have already been parties to the suit. Then, the appellants filed Writ Petition No.253/2015 before this Court. They contended that the third defendant in the suit does not represent them, nor does it answer the description of the plaintiffs in the earlier suits. So, the appellate Court's finding that they have already been parties to the suit is erroneous. On the other hand, the respondents 1 and 2, the plaintiffs in Regular Civil Suit No.54/2001, filed WP No.526/2015, questioning the Appellate Court's condoning the delay.

14. Through a common judgment, dated 29/06/2016, this Court, first, dismissed the respondent's Writ Petition No.526/2015; second, it left for the Appellate Court to decide whether the appellants were actually parties to the suit. Thus, when the matter was remanded, the First Appellate Court eventually dismissed the appeal on the merits. Aggrieved,

the appellants have filed this Second Appeal. During its admission, this Court framed the following substantial questions of law:

“(a) Whether the learned District Court has erred in recording its satisfaction and to the compliance of the provisions of Order 1 Rule 8 thereby totally misreading and misinterpreting the scope and purport of Order 1 Rule 8 of Code of Civil Procedure?

(b) Whether the learned District Court erred in concluding that the Appellants were parties to the Regular Civil Suit No.54/2001/A on the basis of the description contained in the said suit?”

**Submissions:**

**Appellants:**

15. Shri Nitin Sardesai, the learned Senior Counsel, instructed by Shri Vibhav Amonkar, the learned counsel on record, has advanced his arguments on two counts. First, he has submitted that the respondents in their suit have never made the appellants parties. He has also submitted that the trial Court ought not to have permitted the plaintiffs to describe all the plaintiffs compendiously as “those affected by the decree in the Civil Suit No.54/2001.” He has also submitted that though this Court wanted the appellate Court to frame an issue on whether the appellants were indeed defendants in the suit, the Appellate Court, instead has decided a non-issue: Have the defendants in the suit been properly served notice?

16. To elaborate on his submissions, Shri Sardesai has also contended that if at all, for whatever reason, the respondents 1 and 2, as the plaintiffs, have felt that the judgments and decrees the appellants and

others secured could not bind them, they could have sought a declaration only to that effect. But they wanted the whole decree nullified. According to him, the trial Court, too, if it desired on the merits, could have confined the relief to the respondents 1 & 2. In this context, Shri Sardesai has pointed out that the other defendants, that is the Temple and its Committee, have suffered the decree and could not succeed in getting it set aside, though they went up to the Supreme Court. Now, collaterally, through this contrivance called a third-party suit, it succeeded. It is an abuse of process, he stresses.

17. In the end, the learned Senior Counsel has submitted that even on the merits, the trial Court has simply concluded that as the appellants have not filed any written statement, there is no occasion for the trial Court to rule on the merits.

18. About what are said to be the legal infirmities in the first appellate Court's judgment, Shri Sardesai has submitted that the appellate Court has proceeded under a wrong premise and discussed only non-issues, leaving aside the essential ones. After taking me through the judgment, the learned Senior Counsel has submitted that the judgment contains no reasons.

### **Respondents:**

19. Shri S.D. Lotlikar, the learned Senior Counsel, instructed by Ms. S. Kenny, the learned counsel on record, has submitted that the judgment must remain unassailable. According to him, the appellants have been

shown as the defendants. Once this proposition is accepted, then it must be concluded that the notice has been duly served on those defendants. For their failure to appear before the Court, the plaintiffs in the suit cannot be blamed. In the alternative, he has submitted that if they are not parties to the suit, the judgment the plaintiffs secured will not bind them. Therefore, they can as well ignore it. The appellants are seeking the leave to question the judgment which, in their own assertion, does not bind them. According to Shri Lotlikar, both the substantial questions of law go together; if one is answered, the other does not survive.

20. At any rate, the learned Senior Counsel has submitted that if there is any misdescription in the name of the third defendant that will not affect the merits of the case because the appellants as the defendants have been fully aware of the proceedings. Therefore, having not diligently defended their interests in the suit, they have belatedly come before the Appellate Court and raised all untenable pleas, which according to the learned Senior Counsel, the appellate Court has rightly rejected. Thus, he has urged this Court to determine the second appeal.

21. Shri A.D. Bhobe, the learned counsel for the third respondent, has submitted that his defence is clearly reflected in para 3 of the written statement filed before the trial Court. According to him, without taking sides, it has clearly averred before the trial Court that the suit ought to be dismissed.

22. Heard Shri Nitin Sardesai, the learned Senior Counsel for the

appellants, Shri S.D. Lotlikar, the learned Senior Counsel for the second respondent, and Shri A.D. Bhobe, the learned counsel for the third respondent.

**Discussion:**

23. Before I address the issue on the merits, I note that both the respondents 1 and 2, who are the plaintiffs in RCS No.54/2001, have been served with a notice in this appeal. But only the second respondent has entered an appearance. Only for him has Shri Nitin Sardesai advanced arguments. On the other hand, the third and the fourth respondents are the Managing Committee of the Temple and Mazania Temple of Shree Devi Kelbai and its affiliate temples. Shri Bhobe appears for the Managing Committee of the Temple. Technically speaking, no notice seems to have been served on the fourth respondent. But, first, it has remained ex parte in the first appeal; second, the Managing Committee effectively represents the Temple; third, the Temple as an entity has already suffered a decree, which remained undisputed even at the highest level. In fact, the fifth respondent is “all the persons benefited by the decree in suit no.55,56,60 & 61 of 1968”—a formally shown nonentity which the appellants disown.

24. In the suit filed by the appellants in 1968, there were 51 plaintiffs. They sought the trial Court's leave to sue in a representative capacity. They secured the leave. Later, perhaps by efflux of time, many changes have taken place. Therefore, now, of those 51 plaintiffs, only 18 are the appellants here.

25. Indeed, the facts are not in dispute. We need to address two questions:

- (a) Have the appellants been properly arrayed as the defendants in RCS No.54 of 2001?
- (b) Has the impugned Judgment addressed on the merits the question this Court wanted it to decide: that is question (a)?

26. At the very beginning of the judgment, the first appellate Court has observed that the plaintiffs in Civil Suit No.54/2001/A took the trial Court's leave to sue the defendant no.3 in their representative capacity. But the record reveals otherwise. The plaintiffs applied under Order I Rule 8 CPC, on 06<sup>th</sup> September 2001, seeking the trial Court's leave to file the suit in the representative form. Then, on the very next day, the trial Court granted the permission. To be specific, the plaintiffs sought no leave under Order 1, Rule 8 CPC to have the third defendant sued in its representative capacity. For this reason, this Court, in its judgment dated 29.06.2016, WP Nos.253 & 526/2015, required the first appellate Court to decide the question "whether the petitioners in the Writ Petition No.253/2015 were parties to the Regular Civil Suit No.54/2001/A". Indeed, the first appellate Court has framed the following points:

"Whether the appellants were represented in RCS No.54/2001/A? and whether the impugned judgment is erroneous and needs interference."

27. I reckon the first appellate Court may have meant the first point to be read as whether the appellants were parties to the Regular Civil Suit

No.54/2001/A. Their getting represented in a suit to which they were not parties may not make any sense, otherwise.

28. The entire judgment, to me, does not address the first question. To begin with, besides condoning the delay, the First Appellate Court felt that the appellants required no leave to file the appeal. It was on the premise that the third defendant in the suit effectively described them, and they must be treated as parties to the suit. Aggrieved, the appellants have filed WP No.253/2015 and wanted this Court to rule on that point. In other words, the appellants have consistently maintained that the third respondent with a strange appellation has never covered the appellants, who were the plaintiffs in the suit of 1968. And the 1968-suit contained the plaintiffs' individual names, though they may have sued in the representative capacity.

29. Here, in the suit filed by the respondents 1 & 2, they have never sought the trial Court's leave for having the third defendant in the representative capacity. They wanted the decree in a particular suit declared, among other things, void. So it is essential that the parties that secured the decree must have been the defendants in the next suit. They must have been arrayed as were shown in the first suit. In fact, the appellants then were 51. All of them sued together. True, they have also successfully secured the trial Court's leave to sue in a representative capacity. But that does not enable the plaintiffs in the next suit seeking the nullification of the decree to ignore all the plaintiffs and sue them with a

zany appellation: “all the persons benefitted by the decree (impugned) in Suit Nos.55, 56, 60 and 61 of 1968.” Unheard of.

30. If at all the plaintiffs in the next suit felt that there were too many parties to the previous suit, I doubt whether they could have picked and chosen a few as their adversaries in the next suit. Assuming it to be possible, then the plaintiffs in the next suit must have arrayed some of those persons *eo nomine* and, then, could have sought the Court’s leave under Order 1, Rule 8 of CPC to ensure that the limited number of defendants brought on record represented not only those left out but also those outside, at large. Here, neither happened. Not even one party was shown *eo nomine* as the defendant, nor has the plaintiffs in RCS No.54 of 2001 applied under Order 1, Rule 8 of CPC.

31. I, therefore, conclude that the appellants have never been parties to the respondents in Regular Civil Suit No.54/2001. Once that has been held in the appellants' favour, the question whether they are being served notice becomes otiose. But, unfortunately, the first appellate Court has spent all its energy on deciding whether they have been properly served.

32. As rightly pointed out by all the parties, there has been no discussion on the merits. Instead, the appellate Court has felt that as the third defendant has not filed its written statement, there was no occasion for the trial Court to decide the issue on the merits. It brooks no contradiction that the absence of defence is no licence for the plaintiff to

secure a decree for mere asking. The plaintiff must still discharge his or her burden to the trial Court's satisfaction.

33. In *Ramesh Chand Ardarwatiya v. Anil Panjwani*<sup>1</sup>, the Supreme Court has held that even if the suit proceeds ex parte and even if there is no written statement unless Order VIII Rule 10 of CPC applies, the Court can insist on the plaintiff to prove his case to its satisfaction. In this context, *Ramesh Chand Ardarwatiya* notes that “in the absence of denial of plaintiff averments, the burden of proof on the plaintiff is not very heavy. A prima facie proof of the relevant facts constituting the cause of action would suffice and the Court would grant the plaintiff such relief as to which he may in law be found entitled.” In other words, the trial Court would scrutinize the available pleadings and documents, consider the evidence adduced, and would do well to frame the 'point for determination' and proceed to construct the ex parte judgment dealing with the points at issue one by one. “Merely because the defendant is absent, the Court shall not admit evidence the admissibility whereof is excluded by law nor permit its decision being influenced by irrelevant or inadmissible evidence.”

34. In *Ramesh Chand Ardarwatiya*, the appellant has argued that in ex parte proceedings, the trial Court has an additional obligation cast on it to act with caution and watchfulness so the plaintiff, in the absence of any

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AIR 2003 SC 2508

opponent, does not succeed in achieving what he is not entitled to or which he does not deserve. And in no case should he succeed in overreaching the Court. This proposition, it seems, *Ramesh Chand Ardarwatiya* accepts.

35. In *Balraj Taneja v. Sunil Madan*<sup>2</sup>, the Supreme Court has observed that even if the defendant has not filed the written statement, the court is bound to apply its mind to the merits of the plaintiff's claim. In fact, the courts have consistently held that it may be lawful for the court to enter a judgment against the defendant for his failure to file the written statement, but merely because it is lawful, the court should not abdicate its function of finding out whether the plaintiff has made out a case.

36. Besides that, another development intrigues me. The respondents 1 and 2 have also claimed that they too are Mahajans. The 51 plaintiffs in Civil Suit No.55/1968 and all those plaintiffs in Civil Suit No.56, 60 and 61 of 1968, according to these respondents, do not effectively represent their interest. That said, these respondents as the plaintiffs in RCS No.54 of 2001 have never alleged that the plaintiffs in the first batch of suits have colluded with the defendants—that is, the Temple and its Committee. On the contrary, the matters were keenly contested and were taken up to the Supreme Court. Nor have these

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1999 AIR SC 3381

respondents asserted that there are people beyond the Temple and its Committee that get affected by those suits. Instead, they only stressed that they are fellow Mahajans and the plaintiffs in all the earlier suits have not sufficiently represented their interest.

37. Then, the obvious recourse for the respondents in the suit must have been a declaration that the judgment does not bind them. Strangely they wanted the nullification of the entire decree against all concerned. And that was granted. In the bargain, the Temple and its committee too collaterally got rid of the decree they have failed to dislodge despite their journey up to the Apex Court. Literally, the trial Court did what even the Supreme Court had refused to do.

38. I reckon the trial Court has decreed the suits without application of mind. Then, when that judgment was challenged, the first appellate Court, again, has spent its energy on non-issues, missed the point, and dismissed the appeal.

39. In the above facts and circumstances, I hold that the appellants have never been parties to the Regular Civil Suit No.54/2001. As a result, I also declare that the judgment they have secured remains unaffected against all including the respondents 3 and 4—that is, the Managing Committee and the Temple.

No order on costs.

**DAMA SESHADRI NAIDU, J.**

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