

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.376 OF 2021
WITH CA/244/2022 IN CA/9497/2021 WITH CA/9497/2021 IN
SA/376/2021 WITH CA/1379/2022 IN CA/9497/2021

- 1) The President for himself and
Board of Directors of
Hutatma Pansare Education Society,
Dharmabad, Dist. Nanded.
- 2) The Secretary,
Hutatma Pansare Education Society,
Dharmabad, Dist. Nanded.

... **Appellants.**
(Orig. defendant Nos.
1 and 2)

VERSUS

- 1) Shakuntalabai d/o Jaiwantrao Ratnalikar,
@ Chaya w/o Bhaskar Bhosikar,
Died through her legal representatives :
- 1A) Satishkumar Bhaskarrao Bhosikar,
Age 55 years, occ. Service,
R/o. 301, A-3, Llita Avenue,
Street No. 11 (old street No. 10)
Himayat Nagar, Hyderabad- 500 029.
- 1B) Sangeetha Paresh Walvekar,
Age 52 years, Occ. Household,
R/o. 1-8-724/3, Besides Sri. Sai
Ved Point Lane, Vegetable Market,
Nallakunta, Hyderabad- 500 044.
- 2) Kranti d/o Jaiwantrao Ratnalikar,
@ Uma w/o Pramodrao Kakani,
Age 49 years, Occ. Household,
R/o. Gangekhed, Dist. Parbhani.
- 3) Anil s/o Jaiwantrao Ratnalikar,
Age 47 years, Occ. Service,
R/o. Dharmabad, Dist. Nanded.

- 4) The Chief Officer,
Dharmabad Municipal Council,
Dharmabad, Dist. Nanded.

... **Respondents**
(R. Nos. 1 to 3 are orig
plaintiffs. R. no. 4 orig.
defendant No. 3)

...
Advocate for the Appellants : Mr. P.R. Katneshwarkar h/f Mr. A.P.
Yenegure.

Advocate for Respondent Nos. 1A, 1B and 3 : Mr. Deelip Patil Bankar
a/w Ms. Pooja Deelip Patil, h/f Mr. Shripad Kulkarni.

Advocate for Respondent No. 2 : Mr. R. R. Kakani.

Advocate for Respondent No. 4 : Mr. Mujtaba Gulam Mustafa h/f Mr.
Mustafa Tamlurker.

CORAM : **MANGESH S. PATIL, J.**

DATE : **05.04.2022.**

JUDGMENT :

This is a second appeal by the original defendants being aggrieved and dissatisfied by the judgment and order passed by the lower appellate court thereby quashing and setting aside the judgment and order passed by the trial court dismissing the suit of the respondents/plaintiffs for possession of a portion admeasuring 3172.50 square feet from land Gat No. 631.

2. By the order dated 15.09.2021 the second appeal has been admitted on following substantial questions of law :

(i) Whether the suit was maintainable only against president and Secretary of the trust, without making the trust as well as other trustees as party ? In other words, whether the suit was suffering for non joinder of necessary parties ?

(ii) Whether the first appellate court was justified in reversing the decree passed by the learned trial judge in absence of taking note of the fact that the trust and all the

trustees are not parties to the suit ?

(iii) Whether interference is required ?

3. The facts as are necessary to bear in mind, which give rise to the aforementioned substantial questions of law may be summarized as under :

(a) The respondent Nos. 1 to 3 claiming themselves to be the exclusive owners of the land Gat No. 631 and alleging about the appellants having encroached over northern side 3172.50 square feet area of the land claimed removal of the encroachment and possession.

(b) The appellants contested the suit by claiming that their predecessor had gifted the land Gat No. 603 as also Gat No. 631 to the education society of which they are the President and the Secretary. They also put up a plea of adverse possession and also raised a ground of estoppel.

(c) The trial court dismissed the suit holding that the gift was established and though it was a deed which was not registered, it could be used for collateral purpose and concluded that the respondent Nos. 1 to 3 had no title to the property.

(d) The lower appellate court by the judgment and order under challenge reversed the decision of the trial court and decreed the suit holding that the deed that was being put forth by the appellant was an unregistered document and by virtue of section 123 of Transfer of Property Act and the bar contained under Section 49 of the Registration Act, 1908 it could not have been read in evidence. It also concluded that the purpose for which the deed was sought to be brought into existence that is to prove the gift was not a collateral purpose but the main purpose and therefore it could not have been read in evidence much less to conclude title of the appellant's society.

4. I have heard the learned advocates of both the sides in *extenso*.

5. Though no specific issue was raised, sought to be framed either before the trial court or the lower appellate court, the aforementioned questions of law have been raised in this second appeal for the first time. Going by the decision of the Supreme Court in the matter of **Narayanan Rajendran And Anr vs Lekshmy Sarojini And Ors; (2009) 5 SCC 264**, the provision of Section 100 of the Code of Civil Procedure requires this court only to answer the substantial questions of law formulated at the time of admission of the second appeal and it is not expected to undertake a full fledged scrutiny of the entire decisions rendered by the courts below. Consequently, it would be apt first of all to deal with and decide these substantial questions of law.

6. As is cursorily mentioned herein above, in fact no specific stand regarding non joinder of the Trust to which the property was allegedly gifted was ever raised before any of the two courts below and none was sought to be decided. Still, even if it is to be taken into consideration now, the questions as have been formulated would presuppose that the respondent Nos. 1 to 3 have been admitting title of the Trust to the disputed piece of land which according to them is an encroached portion. They do not admit that the Trust is the owner of the encroached portion rather it is their stand that they are the owners of the land Gat No. 631 of which that portion is a part and parcel.

7. Besides, for whatever reason, the appellants have nowhere brought on record any extract of the public trust register which is maintained under the Maharashtra Public Trust Act to demonstrate that the land Gat No. 631 has been recorded as the property of the Trust. On my oral query with learned advocate Mr. Katneshwarkar he fairly conceded that this property has not been shown in the Public Trust Register as the property of the Trust. If this is the state of affairs, when the property Gat No. 631 of which the encroached portion is a part and parcel is not recorded in the Public Trust Register, one need not delve much but conclude that the Trust can not be said to be a party which is interested in the dispute.

8. In view of such state of affairs, in fact no further discussion needs to be there and this would suffice to reply both these substantial questions in the negative.

9. Though it would be superfluous, even if some discussion is to be made in respect of the merits of the matter, admittedly, the claim being put forth by the appellant is based on an unregistered gift deed. Going by the provision of Section 123 of the Transfer of Property Act read with section 49 of the Registration Act, no person can be entitled to establish any right or title on the basis of such an unregistered gift deed. Irrespective of whether it would be morally correct for the respondent Nos. 1 to 3 to now take a stand which would be inconsistent with the wish of their predecessor, the rule of law must prevail. The lower appellate court has considered these provisions in correct perspective while refusing to concur with the erroneous and illegal observations of the trial court allowing this unregistered gift deed to be read in evidence by observing that it could be used for collateral purpose. *Ex facie*, it had grossly erred in treating the claim being put forth by the appellants as the one based on some collateral purpose. It is the main purpose which was being sought to be established by proving the gift deed. In the absence of which, their claim to the title to the disputed portion is simply to be discarded as has been rightly done by the lower appellate court.

10. Some arguments are advanced by the learned advocate Mr. Katneshwarkar on the point of limitation as also the plea of adverse possession, both such pleas go hand in hand. Going by the nature of the suit, the respondent Nos. 1 to 3 have been claiming possession of the encroached portion based on title. *Ex facie*, the suit was governed by Article 65 of the Limitation Act, 1963 which provides for a period of limitation of 12 years and the period begins to run only if the defendant takes and establishes a plea of adverse possession. Once having propounded a gift deed the plea of adverse possession was certainly inconsistent and seems to

have been waived in the mid way by electing to stuck to right created by the gift deed. Therefore, the submission of learned advocate Mr. Katneshwarkar that the suit was also barred by limitation is not legally tenable.

11. The second appeal is dismissed.

12. Pending civil applications are disposed of.

13. After pronouncement of the judgment, the learned advocate Mr. Yenegure for the appellants submits that the appellants have been granted interim protection which is in operation till date and the same may be continued for a reasonable period to approach the Supreme Court.

14. The learned advocate for the respondent Nos. 1 and 2 strongly opposes the request.

15. Considering the nature of the dispute, the interim relief to continue for a period of four weeks.

(MANGESH S. PATIL, J.)

mkd/-