

Santosh

**IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO. 10 OF 2017**

MEMBERS OF THE
COMMITTEE/ ZAMAT AND
ALL PERSONS CONCERNED
AND HAVING AFFILIATION
WITH THE ABOVE
INSTITUTION COMMITTEE/
ZAMAT, through their
representative, SHRI FAROOK
HUSSAIN AGA, aged 43 years,
resident of House No. 84,
Bandarwada, Bicholim-Goa.

.... Appellant.

Versus.

1) SADGURU KRISHNA
SHETYE, son of late Krishna
Shetye, businessman, presently
residing at Margao-Goa, having
permanent address in Bicholim,
Nagazarwada, Bicholim-Goa.

2) URUS COMMITTEE/ZAMAT,
having its Office at Muslim Wada,
Bicholim-Goa.

3) PRESIDENT OF THE
COMMITTEE/ ZAMA'T
IBRAHIM KHAN, resident of
Muslim Wada, Bicholim-Goa.

4) SECRETARY OF THE
COMMITTEE/ ZAMA'L, Muslim
Wada, Bicholim-Goa.

5) HAJI
NOORUDDIN SHAH, (since
Deceased)

5(a). Hashmat Bi Peerzade, wife
of the deceased, 65 years of age,
Housewife, Indian National
R/o [H.No:1315](#), Muslim Ningapur
Khanapur .

5(b). Smt. Farhad Mohammad
Rafiq Khan, Daughter of
Noorodinsha Peerzade, widow, 50
years of age, Unemployed , Indian
National. R/o [H.No:1315](#), Muslim
Ningapur Khanapur, Belgavi

5(c). Smt. Nikhat Noordin
Peerzade, Daughter of
Noorodinsha Peerzade, major of
age, Unemployed, Indian National,
R/o [H.No:1315](#), Musli Ningapur,
Khanapur, Belgavi,

5(d) Smt Raiya Sadiq Shaikh,
Daughter of Noorodinsha Peerzade
Married to Sadiq Shaikh , 48 years
of age, Indian National,
R/o [H.No:1315](#), Muslim Ningapur
Khanapur, Belgavi,

5(e) Smt. Nahida Abdul Razak
Risalda Daughter of Noorodinsha

Peerzade, 46 years, married to Abdul Risalda, R/o Jawahar Nagar Ichalkaranj Kolhapur, Maharashtra 5(f) Smt. Fatima Abdul Majid Patel, Daughter of Noorodinsha Peerzade, 36years, married to Abdul Majid, R/o Sangrleshwar Nagar Belgavi.

5(g) Smt. Sahiba Nooroddin Peerzade, 37years of age , Divorcee, Indian national, R/o [H.No:1315](#), Muslim, Ningapur Khanapur, Belgavi

5(h) Shri Ismail Nooroddin Peerzade, 42 years of age, Son of Noorodinsha Peerzade Married to Smt. Sajiya Ismail Peerzade, R/o [H.No:1315](#), Muslim, Ningapur Khanapur, Belgavi

5(i) Shri Karimuddim Nooroddin Peerzade, 38 years, Son of Noorodinsha Peerzade married to Smt. Feerdaus Karimuddin Peerzade R/o [H.No:1315](#), Muslim Ningapur Khanapur, Belgavi

5(j) Shri Abdul Kadir Nooroddin Peerzade 34 years, Son of Noorodinsha Peerzade married to Smt. Shamin Abdul Kadir Peerzade, Indian National, R/o [H.No:1315](#), Muslim Ningapur Khanapur, Belgavi.

.....Respondents.

Mr. Rohit Bras de Sa, Advocate for the Appellant.

Mr. J.P. Mulgaonkar, Senior Advocate with Mr. Prasenjeet P.D., Advocate for Respondent No.1.

Ms. Nilima Diukar, Advocate for Respondents No.5 (a-j).

CORAM : M. S. SONAK, J.

DATE : 8 September 2022

ORAL JUDGMENT :-

1. Heard Mr. D'Sa for the Appellant, and Mr. J.P. Mulgaonkar, learned Senior Advocate who appears along with Mr. Prasenjeet P.D. for Respondent No.1 (original Plaintiff). Ms. Nilima Diukar appears for the legal representatives of the deceased Respondent No.5.

2. At the request of and with the consent of the learned Counsel for the parties, the Appeal is taken up for final disposal based on the paper book accompanying the memo of appeal.

3. This Appeal is directed against the judgments and decrees dated 21/12/2013 and 30/9/2015 made by the Trial Court and the First Appellate Court in Special Civil Suit No.44/2005/A and in Regular Civil Appeal No.76/2014.

4. Mr. D'Sa, the learned Counsel for the Appellant proposes the following substantial questions of law :

(a) Whether, the Trial Court as well as the First Appellate Court by failing to frame an issue as to the date of the structure (tomb/Darga) and giving findings in the absence of such an issue, is legally perverse and both the Decrees have to be set aside ?

(b) Whether, the suit was barred under the provisions of the Waqf Act, 1995 and the Places of Worship Act, 1991 ? and

(c) Whether, the Appellate Court by modifying the Decree in absence of any cross appeal by the Plaintiff has caused legal perversity ?

5. On the first question of law, with the assistance of the learned Counsel for the parties, I have perused the findings recorded. There are concurrent findings that the Defendants had no rights to the suit property, except an area of 124 sq. metres, along with an access of 3 metres along with the Darga for religious purposes. These findings are based on the evidence on record. There are concurrent findings and unless a case of perversity is made out, there is no question of interference in the second appeal.

6. The date of the structure would not be very relevant now

that the Trial Court had protected the Appellant when it comes to use of the area of 124 sq. metres, access to the Darga and the Darga itself. Therefore, based on the first substantial question of law, no case is made out to interfere with the impugned Decrees.

7. So far as second substantial question of law now sought to be raised in this second appeal is concerned, it must be noted that no such a plea was raised in the written statement before the Trial Court. Such a plea was sought to be raised for the first time in the written submissions filed before the First Appellate Court. The Appellant has not demonstrated that under the provisions of the two enactments the suit was barred. Such determination, in any case, would involve adjudication into the notice, as well as law. In the absence of any foundational pleadings, there is no question of the Appellant being permitted to raise such an issue in second appeal.

8. So far as the third substantial question of law is concerned, however, the Appellant is on a strong wicket. The First Appellate Court, in the absence of any challenge by way of cross appeal or cross objection, should not have deprived the Appellant of the relief granted by the Trial Court in its judgment and decree dated 21/12/2013.

9. The Trial Court, in the operative portion of its judgment and decree dated 21/12/2013 had held as follows :

“This suit stands partly decreed with costs to the effect that the defendants and any other persons acting on their behalf are permanently restrained from interfering in any manner whatsoever in the suit property except the use of land with an area of 124 sq. mts., alongwith an access of 3.00 mts., alongwith the Darga for religious purposes, without prior permission of the plaintiff.”

10. Thus, it is apparent that the Appellant was protected in so far as an area of 124 sq. metres, an access of 3 metres and the Darga use for religious purposes. If the original Plaintiff was aggrieved by this portion of the Decree, then, it was for the original Plaintiff to have questioned this portion by instituting a cross appeal or by filing a cross objection. The record, in fact, suggests that the original Plaintiff had not even seriously objected to the protection that was extended by the Trial Court to the Appellant over the said portion.

11. Therefore, the First Appellate Court, in the appeal instituted by the very Appellant, should not have deprived the Appellant of the limited relief granted by the Trial Court in the absence of any cross appeal or cross objection from the original plaintiff. To that extent, the judgment and decree made by the

First Appellate Court warrants interference.

12. Accordingly, this Appeal is partly allowed. The protection granted by the Trial Court to the Appellant over the area of 124 sq. metres, an access of 3 metres along with the Darga for religious purposes is, hereby restored. The decree of the First Appellate Court is modified accordingly. In effect, therefore, the decree of the Trial Court is restored in its entirety.

13. The Appeal is partly allowed in the above terms.

14. There shall be no order for costs.

SANTOSH
S MHAMAL

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M. S. SONAK, J.