



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

1 SECOND APPEAL NO. 79 OF 1994

ANANT RAMRAO DONGRE
VERSUS
SHRI KESHAVRAJ MANDIR TRUSTS RAMGALLI, LATUR

Mr. Milind Patil h/f Mr. V. D. Gunale, Advocate for the appellant
Mr. Ameya Sabnis a/w Pranv Dhakne, Advocate for the respondent

CORAM : R. M. JOSHI, J.
DATE 22nd JANUARY, 2025

PER COURT :-

1. This second appeal is filed under Section 100 of the Code of Civil Procedure taking exception to the concurrent findings recorded by the trial Court and the first Appellate Court in favour of the original plaintiff/respondent herein.
2. Parties are referred to as 'plaintiff' and 'defendant' for the sake of convenience.
3. Original plaintiff is a temple trust duly registered under Maharashtra Public Trusts Act. In the plaint it is specifically stated that the plaintiff trust "got suit property". It is further claimed that the defendant was in permissive possession of the suit property in the capacity of *pujari* of the said temple. A written statement came to be filed by the defendant specifically denying title of the plaintiff over the

suit property and asserting his own title on the basis of the registered gift deed of the property executed in favour of his father by the owner thereof.

4. In this backdrop of pleadings evidence was led. The plaintiff examined a trustee and also led evidence of one neighbouring witness. However, plaintiff did not lead any documentary evidence before the Court. On the other hand the defendant not only examined himself but also led evidence prove registered gift deed which was executed in favour of father of defendant in the year 1939. The trial Court decreed the suit. Plaintiff was directed to be removed from the suit property. First Appellate Court confirmed the said order.

5. Learned counsel for the plaintiff submits that both Courts below committed serious error in not appreciating the pleadings of the parties and evidence led before the Trial Court. It is the contention that once the defendant has specifically denied title of the plaintiff and has claimed his own title in the suit property, it was incumbent on the part of the plaintiff to substantiate title in respect of the property to succeed in seeking decree of eviction against defendant. It is his submission that in view of Evidence Act, the initial burden would always be on the plaintiff to prove his case for seeking decree of eviction against the defendant. He drew attention of the Court to the evidence on record to indicate that

the case of the plaintiff about the ownership of the suit property can never be accepted on the basis of oral evidence. Moreover he has pointed out that even trustee himself does not claim that trust is the owner of the property. Thus, it is his submission that since both Courts below have failed to appreciate the pleadings of the parties and evidence on record, the findings recorded by them are perverse and hence to substantial question of law is involved in this appeal.

6. Learned counsel for the plaintiff made oral submission so also filed on record written synopsis. This Court has gone through the said synopsis. It is his submission that since the trust has claimed that the trust is owner of the property, and when the defendant has also claimed ownership on the basis of document, the burden would be on the defendant to prove that he is owner of the property. He also drew attention of the Court to the oral evidence of the plaintiff and more particularly evidence of neighbour who certifies that the trust is owner of the property. He drew attention of the Court to the findings recorded by the trial Court as well as first Appellate Court discarding case of the defendant has failed to prove the gift deed.

7. Following substantial question of law arises in this appeal.

. Whether the both Courts below failed to take into consideration the written statement and have wrongly cast burden on the

defendant to prove the case though there was no pleadings and evidence of the plaintiff that the plaintiff is owner of the suit property.

8. Perusal of the plaint indicates that it is the case of the plaintiff that plaintiff trust "got suit property". Then thereafter further averments are made to the effect that the defendant was in the permissive possession of the suit property. On the other hand, defendant has filed written statement specially denying the title of the plaintiff over the suit property and asserted his own title.

9. Herein this case, admittedly, in spite of the filing of the written statement by defendant denying title of plaintiff over suit property, plaintiff did not care to amend the plaint and plead the title itself or source of title in the suit property. Nor even it is stated as to how trust 'got the suit property'. In this backdrop the trial Court in view of Sections 101 and 102 of Evidence Act ought to have cast burden upon the plaintiff to prove its case. The trial Court on the contrary has considered the evidence of the defendant in order to decree the suit by holding that the defendant has failed to prove that the suit property was gifted to his father.

10. As referred herein above there is not even a plea in the plaint that the plaintiff is title holder of the suit property leave apart the source

of title. The claim of plaintiff that trust "got property" is alien to the law for the conferment of any title in plaintiff of the suit property. Even otherwise, the plaintiff's evidence is in the form of examination of the trustee and neighbouring witness to prove its title in suit property. Trustee Gopalrao in his examination-in-chief also does not even claim that the trust is the owner of the suit property. It seems that that both Courts below have accepted the evidence of second witness of plaintiff who is neighbour and solely on the basis of his oral evidence case of the plaintiff is accepted, meaning thereby it is held that plaintiff trust has ought to claim decree of eviction against defendant. The evidence led by plaintiff in no way proven its right, title and interest in the suit property.

11. As against this, the defendant has led evidence in the form of a registered gift deed executed in favour of his father by the erstwhile owner. At this stage it would be relevant to take into consideration the cross-examination of defendant conducted on behalf of the plaintiff. In the cross examination it has come on record that on the basis of the gift deed the name of the father of defendant was mutated in the record of right in respect of the suit property. There is no further cross-examination for denying of this evidence which has come on record. Apart from this there is no dispute made with regard to the fact that there was any gift deed in favour of the title of the defendant's father in

respect of the subject property. What was sought to be contended by the cross-examination is that the person who had gifted the property to the defendant's father is not owner of the property. In considered view of this Court the cross-examination is not sufficient to disbelieving case of the defendant. Moreover trial Court erred in disbelieving in this evidence solely on ground that defendant has no knowledge about other four properties referred in gift deed. This finding is perverse discard gift without holding that gift is not proved and it is not genuine document.

12. Pertinently, plaintiff neither claims the title on the basis of any document or nor claim the title on the basis of adverse possession. Needless to say that such claim of adverse possession if any made would not have been maintained against the defendant, since his ownership in the property is not admitted by plaintiff.

13. Thus, plaintiff has failed to discharge initial burden on him to prove his case and to shift onus on defendant to substantiate his defence. Section 101 of Evidence Act, requires a person who desires the Court to give judgment as to his rights on the existence of the fact must prove that those facts exist. Similarly, according to Section 102, the burden of proof in a suit lies on that person who would fail if no evidence were given at all on either side. Thus, the burden to prove the case is cast upon plaintiff and only when he gives the evidence to support a

prima facie case, onus shifts upon defendant to adduce evidence in rebuttal to meet case of plaintiff. Thus, trial Court has erred to cast burden of defendant, when even there was no evidence enough to shift onus on defendant to substantiate his defence.

14. The aforesaid the pleadings of the parties as well as the evidence on record clearly indicate the plaintiff has failed to prove his title on the suit property and in the circumstances, there was no reason or justification for the trial Court to decree the suit. In view of the above, appeal must succeed. The substantial question of law framed above is answer in affirmative.

15. Appeal stands allowed. Judgment and decree passed in R.C.S. No. 783/1988 and confirmed in R.C.A. No. 86/1990 stand set aside. R.C.S. No. 783/1988 stands dismissed with costs.

(R. M. JOSHI, J.)

ssp