

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

SECOND APPEAL NO. 199/2021

(Hazarat Baba Bahbuttullah Shah Wali (dead) & ors. Vs. The Education Society Chanda and anr.)

Office Notes, Office Memoranda of Coram,
 appearances, Court's orders of directions
 and Registrar's orders

Court's or Judge's orders

Mr. S.O. Ahmed, Advocate for appellants.
 Mr. S.P. Bhandarkar, Advocate for respondent Nos. 1 & 2.

CORAM: ROHIT W. JOSHI, J.

DATED : 09/05/2025.

Heard.

2. Second appeal is admitted on the following substantial question of law:-

A. "Whether the suit was liable to be dismissed for non-compliance of Order 7 Rule 3 of the Code of Civil Procedure?"

3. Mr. S.P. Bhandarkar, learned counsel for respondents/plaintiffs contends that the suit was filed seeking injunction restraining defendants/appellants from creating obstruction and construction of the compound wall by the plaintiff over the suit property. He contends that the land is held by the respondents/plaintiffs as a lessee from Nazul Department and the construction of compound wall is being made under the instructions of Collector, Chandrapur. He states that the construction is almost

complete and therefore, the cause in the suit has become infructuous. Apart from this, he has drawn my attention to the plaint in Regular Civil Suit (State) No. 292/2022. Referring to the plaint averments, it is contended that after the appeal is allowed and the present second appeal is filed, the appellant has filed another civil suit, in which the same cause is being agitated. He contends that the appellants have lost the right to contest the present appeal in view of subsequent civil suit filed by appellant No. 1 and its trustees. Keeping both the objections open, the second appeal is admitted.

CIVIL APPLICATION (CAS) NO.407/2025

Application for adducing additional evidence will be considered at the stage of final hearing of the appeal.

CIVIL APPLICATION (CAS) NO. 615/2021

1. Heard.
2. By the present application, the appellants seek stay to the effect, operation and execution of judgment and decree dated 26.02.2020 passed by learned District Judge-4, Chandrapur in Regular Civil Appeal No. 146/2008. Learned counsel for appellants has contended that the respondents/plaintiffs are making construction of compound wall in view of the impugned decree. It is contended that the respondents/ plaintiffs have not obtained prior permission from the competent authority in terms of the decree passed by learned First Appellate Court. Apart from this, it is contended that since the property leased to

the Respondents/plaintiffs is not demarcated, order of injunction should be granted restraining defendants from making construction of compound wall.

3. It is undisputed that after filing of present appeal, the appellant No.1 and its trustees have filed Regular Civil Suit (State) No. 292/2022, in which the prayer is incorporated to restrain the present respondents from making any construction over the suit property. The nature of controversy in both the matters is same and the suit property involved is the same i.e. Plot No.4.

4. In this suit, an application for grant of temporary injunction was filed along with another application for status quo directing the respondents not to disturb the religious functions of Dargah. The said application is rejected vide order dated 10.03.2023. Learned counsel for appellants fairly states that thereafter the application for grant of temporary injunction is not pressed.

5. The respondent who is the original plaintiff in the present matter had filed the suit seeking perpetual injunction against the appellant No.1 and its Trustees for restraining them from creating any obstruction or interference in construction of compound wall surrounding the suit property i.e. land admeasuring 94365 sq.ft. in Plot No.4. The suit was opposed by the appellant No.1 and its Trustees on the ground that construction of compound wall was being made beyond the suit property which was leased by the Government to the respondent. It was stated that

identification of boundaries after due measurement of Plot No.4 was necessary. This defence which is raised in the present matter is the principal ground for seeking substantive relief in the subsequent suit i.e. RCS (State) No.292/2022. It is stated in the subsequent suit that measurement and survey of entire Plot No.4 should be conducted and the respondent should be restrained from making any construction on the ground that complete survey and measurement of Plot No.4 is necessary. Thus, the defence in the present matter is the ground for seeking relief in the subsequent suit filed by the appellant No.1 and its Trustees. In that view of the matter, it will not be appropriate to grant relief sought in the present application since application for status quo in the subsequent suit is rejected and application for temporary injunction is also not pressed.

6. It will be pertinent to mention that the present appeal was listed for the first time on 21/09/2021 when objection pertaining to limitation was overruled. Thereafter, listed on 05/01/2023 and thereafter on 17/02/2025. The appeal is filed on 03/07/2020 and the present application is filed on 07/08/2020. The subsequent suit is filed in the year 2022 in which the application for status quo is rejected on 10/03/2023 and as stated above, subsequently Exh.5 is also not pressed. In that view of the matter, the appellants are not entitled to seek the relief sought in the present appeal since they have taken a chance before the Civil Court by filing a fresh civil suit.

7. It is also pertinent to mention here that, in Regular Civil Suit (State) No 292/2022, a categorical statement is made that the appellant No.1 is only utilizing part of Plot No.4 as a care-taker, which implies that the appellant No.1 is not claiming any independent right over Plot No. 4, although it is claimed that user as care taker is for a period of around 50 years. In that view of the matter, admittedly there is no vested right in the appellants with respect to Plot No. 4.

8. Controversy with respect to construction of the compound wall was also subject matter of Writ Petition No. 3646/2021 which is disposed of vide order dated 11/12/2023 in view of statement in the affidavit of Executive Engineer, PWD No.1, Chandrapur stating that it has constructed a compound wall along with drainage and that construction activity was complete, except entrance gate portion. It is informed that another writ petition is filed by the respondents in relation to the construction of compound wall and the said petition is yet to be listed before this Court.

9. Learned counsel for respondents has drawn attention to the communication dated 05/06/2020 issued by lessor to the respondents directing that appropriate steps should be taken to protect the suit property and guard against encroachment. It appears from letter 10/06/2020 issued by office of Collector to the Executive Engineer, PWD No.1, Chandrapur that instructions were issued to

complete the work of drainage and compound as also installation of main entrance expeditiously. Likewise, it also appears from affidavit dated 30/11/2023 filed by the Executive Engineer in Writ Petition No.3646/2021 that except for installation of entrance gate, other work was already over. Since work over the portion of entrance gate only is remaining, prima facie dispute with respect to measurement does not arise since the compound is already constructed by Public Works Department and the location of entrance gate is obviously now identified. It needs to be stated that prima facie permission for construction also will not be required, in view of Section 44 of MRTP Act since the construction of major portion of compound was completed by State Government and although the land is leased to the respondent, it is owned by the State Government.

10. Having regard to totality of circumstances, I am inclined to reject the application, subject to the condition that construction of the compound wall shall not cause damage to or result in demolition of any portion of the structure of the Dargah of the appellants.

(ROHIT W. JOSHI, J.)