

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/SECOND APPEAL NO. 27 of 2006****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE J. C. DOSHI**

=====

Approved for Reporting	Yes	No
	Yes	

=====

PIRZADA SAIYED BAHAUDDIN B. KADRI(SINCE DECD.THRO  
HEIRS & ORS.

Versus

STATE OF GUJARAT

=====

Appearance:

MR MTM HAKIM(1190) for the Appellant(s) No.

1.1,1.2,1.3,1.4,1.5,1.6

MS. URVASHI PUROHIT, AGP for the Respondent(s) No. 1

=====

**CORAM:HONOURABLE MR. JUSTICE J. C. DOSHI****Date : 11/02/2026****JUDGMENT**

1. This Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code') questions the legality and propriety of the judgment dated 23.12.2005 passed by the Joint District Judge & Fast Track Court No.12, Vadodara in Civil Appeal No.86 of 2004, by which the learned first appellate Court reversed the judgment and decree dated 01.10.2003 passed in Regular Civil Suit No.339 of 1986 and dismissed the suit of the plaintiff.

2. For the sake of brevity, parties are referred to as per their original status before the learned trial Court.

3. The factual aspects in a nutshell are as under:-

3.1 Plaintiff - Pirzada Saiyed Bahauddin B. Kadri filed suit for declaration and permanent injunction against the State of Gujarat claiming relief to declare that notice dated 04.02.1996 issued by the Collector, Vadodara, bearing No.DEV/VASHI/328/86 as null and void, with the permanent injunction that the State Government may not restrain the plaintiff from carrying out religious and burial activities in the property of Danteshwar Hajira @*Bada Hajira* situated in land of Survey Nos.322/1 and 322/2 of Pratapnagar, Danteshwar, Vadodara (for short '**suit land**').

3.2 The plaintiff's relief was based upon the averments that plaintiff - Pirzada Saiyed Bahauddin B. Kadri is the Religious Scholar (*Dharma Guru*) at the *Gadi* of *Shijar-ae-Qadariya Ashrafia Rafiya*, which exists in Vadodara having its head place at *Khanka-ae-Qadariya*, Hajira Pratapnagar, Dudeshwar Road and as such, the land of Survey Nos.322/1 and 322/2 is in possession of the Qadariyas in capacity of being an owner.

3.3 In this suit land, the tomb of Qutbuddin Muhammad Khan and son Naurang Khan exists with the tomb of some other members. There are several disciples of the *Dharma Guru* of the Qadariya across India. According to plaintiff, initially the elder brother of the plaintiff - Saiyed Ahmedmiya Badruddin Kadri,

was administering the suit premises and tombs thereon, but one Latifuddin Kutubuddin, having personal grudge with the elder brother of the plaintiff, in connivance with the Collector, removed him from the administration of the different tombs and consequently, the State Government has taken up the administration of the tombs. Plaintiff preferred application before the Charity Commissioner under Section 22A of the Bombay Public Trusts Act unsuccessfully. The revision before the High Court of Gujarat was filed, but status of which is not known to the plaintiff.

3.4 In background of aforesaid statement made in the plaint, it is a case of the plaintiff that he inherits the *Gadi* of *Dharma Guru* and taking care of the tombs as well as offering the religious *Divabatti* and also reading the *Fatehakhani* and taking all religious care of the tombs.

3.5 Plaintiff claimed that since he is a *Dharma Guru* and inherits his status from Saiyed Qutubuddin, tomb of whom is in the premises, plaintiff and his family members have the right to decent burial in the surrounding places of the tomb of Saiyed Qutubuddin.

3.6 Plaintiff, without taking the permission of the Collector, buried his daughter in the surrounding of the tomb in the year 1984. Thus, the Collector issued a notice upon the plaintiff on 04.02.1986 and restrained the plaintiff from carrying any activity within the protected monument. Plaintiff being aggrieved by the notice issued by the Collector, filed the Regular Civil Suit with the aforesaid prayer. The suit was hotly contested

by the State Government raising multiple contentions, including the contention that the suit land area is a 'protected monument' under the Protection of Superintendent, Archaeological Survey of India and plaintiff has no personal right to enter into the suit land along with this main contention, many other legal contentions were raised.

3.7 The plaintiff filed the oral evidence and also filed various documentary evidence in the list at Exhibit-3; however, did not get exhibited the State Government's documents. The learned trial Court decreed the suit in favor of the plaintiff.

3.8 Being aggrieved, the State Government preferred the Regular Civil Appeal under Section 96 of 'the Code', whereby the learned appellate Court having referred to the document produced by the plaintiff on record at list of Exhibit-3, was pleased to allow the appeal and quashed and set aside the judgment and decree drawn by the learned trial Court in a Regular Civil Suit and consequently, dismissed the suit.

3.9 Being aggrieved, plaintiff is before this Court by way of this second appeal.

4. This second appeal was admitted by the coordinate Bench of this Court on the following substantial question of law:-

*"1) Whether the Appellate Court could have read, referred and relied upon the documents, which were not admitted in evidence as per Order 13, Rule 4 and Rule 5 in the trial and which did not form part of record of the suit as per Order 13, Rule 7 of the Trial Court?"*

2) *Whether the Appellate Court could have reversed and set aside the decree passed by the Trial Court only one issue, as framed during the course of trial and ought to have considered and adjudicated all the other issues which had arisen and were framed by the Trial Court?*

3) *Whether the Appellate Court could have proceeded with hearing and adjudication of the Appeal on the issues and submissions, which were neither raised before the Trial Court nor adjudicated by the Trial Court. the oral and documentary evidence and/or legal submissions on the same were not tendered by the appellant before the trial Court?*

4) *Whether in view of the entire Trial that had proceeded before the Trial Court and the Appeal pending before the Appellate Court, the Appellate Court ought to have remanded the matter for fresh Trial on the new evidence and submissions, if at all, they were required to be considered?"*

5. In the background of aforesaid aspect, learned advocate Mr. MTM Hakim appearing for the appellant - original plaintiff, mainly argued that the learned appellate Court committed serious and manifest error by relying upon unexhibited documents to allow the appeal filed by the State Government.

5.1 He would further submit that the State Government did not enter into the defense by leading evidence and yet, the documents, which belong to the State Government, have been considered to be germane by the learned appellate Court to reverse the decree, which otherwise is the well reasoned judgment and decree passed by the learned trial Court, based upon the oral and documentary evidence led by the plaintiff.

5.2 Learned advocate Mr. MTM Hakim referred to the judgment of this Court in the case of ***Sardar Sarovar Narmada Nigam Ltd. v. Rupdevsinhji Dolatsinhji Gohild-decd.***, reported in **2021 (4) GLR 3361** to contend that, until and unless there is a judicial determination regards to the admissibility of the documents, even if those documents are marked as exhibited or mere admission of those document in evidence, per-se would not constitute the documents as evidence. In line of the judgment, he would further submit that, it is obligation of the Court to decide the question of admissibility of the document being a primary or secondary evidence, before making endorsement thereon.

5.3 He would further submit that, in the present case, the appellate Court did not take pain to follow the legal obligation and decide the question of admissibility of the document.

5.4 He would further submit that even if those documents are relevant, as per the view of the learned appellate Court under Order XLI Rule 23A of 'the Code', the learned appellate Court was required to remand the matter to the learned trial Court to decide the matter afresh in accordance with law, permitting both the parties to lead the evidence.

5.5 In regards to the facts of the case, learned advocate Mr. MTM Hakim would submit that the suit land is admittedly the tomb of late Qutb-ud-din, it is known as *Bada Hajira*. Late Qutb-ud-din had several disciples. The tomb is known as '*Khanka-ae-Qadariya*' and plaintiff being the *Dharma Guru* of the

Qadariyas, the tomb belongs to them and plaintiff since inherited the family of late Khanka-ae-Qadariya, plaintiff and his family has right to be buried in the surrounding area of tomb of Qutb-ud-din, namely *Bada Hajira*, claiming that it is the customary right of the plaintiff. Therefore, even if the *Bada Hajira*, the tomb of Qutubuddin be declared as a 'protected monument' within the provision of the Ancient Monuments and Archaeological Sites and Remains (AMASR) Act, 1958 (hereinafter referred to as the 'Act of 1958'), Section 5(6) as well as Section 16 of 'the Act of 1958' recognizes the customary right and does not prevent to perform customary religious observance in the said protected monument.

5.6 Mr. Hakim, learned advocate would further submit that the place of worship is being protected from being misused, pollution or desecration by Section 16 of the 'Act of 1958'. Therefore, in view of the aforesaid legal and factual aspect, the learned appellate Court has committed serious error in reversing the judgment and decree of the learned Civil Court more particularly, referring to and relying upon the unexhibited documents.

5.7 Upon the aforesaid submission, learned advocate Mr. MTM Hakim submitted to allow this second appeal on the aforesaid substantial question of law.

6. As against the aforesaid submission, to demonstrate that the question of law formulated by the coordinate Bench of this Court does not fall within the term 'substantial question of

law', learned AGP Ms. Urvashi Purohit referred to the Record and Proceedings of the suit and submitted that the learned appellate Court has not taken into consideration any new document or the document, which was not within the knowledge of the plaintiff. All the documents, which plaintiff filed before the learned trial Court in a list of Exhibit-3 and list of Exhibit-55, are taken into consideration by the learned appellate Court.

6.1 She would further submit that, the plaintiff, who knows that he had no case, purposefully did not get exhibited the various documents he has produced during the trial. The copy of those documents were produced by the appellant State in the appeal and those have been relied by the learned appellate Court. Therefore, the learned appellate Court has not done any wrong in relying upon the documents, which even otherwise are the documents of the plaintiff.

6.2 Learned AGP would further submit that the documents, which are relied upon by the learned appellate Court to reverse the judgment passed by the learned trial Court, are in fact, not the documents or are not falling within the definition of 'evidence' and in the nature of private documents, rather those documents are public documents, evidentiary value of which are unquestionable and are relevant to decide the issue in fray.

6.3 She would further submit that all the documents, which are referred by the plaintiff and by the learned appellate Court, are revenue entries and various orders passed either by the Collector or by the then Maharaja of the Baroda State or the orders passed by the Archaeological Survey of India. Therefore,

those documents did not require to be passed through the admissibility test. Those documents by itself are the evidence. It is rather an obligation of the Court to read those documents, even if those documents are not exhibited.

6.4 Learned AGP would further submit that, the facts coming from all these documents are referred by the plaintiff in his pleading. Therefore, now it does not lie in the tongue of the plaintiff - appellant that learned appellate Court has committed error in reading those documents.

6.5 Learned AGP would further submit that, *Bada Hajira*, the tomb of Qutubuddin, who was the Tutor of Prince Salim from the Mughal Dynasty, was buried on the suit land along with his son and some family members. Even before independence, the then Maharaja of the Baroda State declared *Bada Hajira* as a 'protected monument'. Later on, the Union of India having considered the national importance of the *Bada Hajira*, continued to recognize the *Bada Hajira* as a 'protected monument' under the 'Act of 1958'. All this can be seen from the Notifications placed by the plaintiff himself on the record of the suit and having been led by the learned appellate Court, there is no illegality, much less substantial illegality, committed by the learned appellate Court in reversing the decree passed by the learned trial Court.

6.6 Further, learned AGP refers to Section 19 of the 'Act of 1958' and submits that digging for more than one foot of soil from the surface in a protected monument is not permissible and in the present case, plaintiff intends to dig a tomb, which could

not have been done in one foot.

6.7 Lastly, learned AGP submitted that during the pendency of the suit, the wife of the plaintiff expired, plaintiff asked for the permission to bury his wife in the suit land. The Director of the Archaeological Survey of India denied the permission to bury the wife of the plaintiff. The issue was carried to challenge before this Court by filing the Special Civil Application No.13033 of 2000, the coordinate Bench of this Court dismissed the revision in limine.

6.8 In view of above, she submitted that the issue is already decided by this Court in the Special Civil Application. Hence, now nothing remains in his second appeal and learned AGP fervently submitted to dismiss this second appeal on the argument that she has successfully demonstrated that none of the questions framed by this Court are 'substantial question of law'.

7. Having heard learned advocates for both the sides and considering the impugned judgment and decree passed by the learned trial Court as well as the learned appellate Court and Record and Proceedings of the case, let first examine the ambit and scope of the second appeal.

7.1 The Supreme Court in the case of ***Jaichand (Dead) through Lrs and Ors. v. Sahnulal and Anr.***, reported in **2024 SCC OnLine SC 3864**, has observed as under:-

*“28. It is thus clear that under Section 100 CPC, the High*

*Court cannot interfere with the findings of fact arrived at by the first Appellate Court which is the final Court of facts except in such cases where such findings were erroneous being contrary to the mandatory provisions of law, or its settled position on the basis of the pronouncement made by the Apex Court or based upon inadmissible evidence or without evidence.”*

7.2 Yet in another case, the Hon’ble Supreme Court in ***Gurbachan Singh (Dead) through Legal Representatives v. Gurcharan Singh (Dead) through Legal Representatives and Others***, reported in **(2023) 20 SCC 104**, expounded the scope of second appeal as under:-

*“7. The parameters of an appeal under Section 100, CPC passing muster are well established. The section itself dictates that such an appeal shall only be maintainable when the case involves a substantial question of law or that the appellate decree has been passed ex parte. the latter, obviously is not the case. This court has, in a multitude of decisions, expounded on what may be termed as a substantial question of law to satisfy the requirements of section 100.*

xxx xxx xxx

14. *The principles of law cited herein may be undoubtedly good law, but, however, in the considered view of this court, they do not hold in the case put forward by the Appellant. A perusal of the witness statements of DW-3 as duly recorded by the High Court, (the court also relies on the cross-examination portions of DW-4 although the same do not form part of the record before this court.) shows that father of the Appellant had indeed partitioned the property during his lifetime. In such situation selling a part of his share in an undivided property, is a question that does not arise. Reliance on Shyam Sunder (supra) does not support the case of the Appellant as there is nothing*

*on record to reflect any effort having been made by him to substitute himself in place of the Respondents in buying the 4 marlas of land from Faqir Singh in order to keep a stranger, namely Gurcharan Singh from entering into family-owned property. Had the Appellant made any such effort and the same would be reflected from record, then it could have been argued that he has a right to exclude the Respondents.*

*15. As already noted above, another ground of objection taken by the Appellant is the fact of the impugned judgement entering into a reappraisal of evidence. While it is true that ordinarily, in second appeal, the court must not disturb facts established by the lower court or the first appellate court. However, it is also equally well recognised that this rule is not an absolute one or in other words, it is not a rule set in stone.”*

8. Taking abreast the aforesaid exposition of the law in regards to the second appeal, if we address the rival arguments canvassed by the learned advocates appearing for both the sides, it seems that learned advocate Mr. MTM Hakim was mainly aggrieved by the reading of certain papers/documents, which are not exhibited.

9. As against that submission, learned AGP submits that these documents are not the new documents, they are the documents which are filed by the plaintiff himself at the list of Exhibit-3 and Exhibit-55, which collectively have been placed by the State Government in the appeal with the list at Exhibit-3.

10. Plaintiff also claims himself as *Dharma Guru* of the Qadariyas and further claims that he is in family or descendant of late Qutubuddin, whose tomb is laid in the suit premises and

therefore, he has the right to bury his family members there in the suit land, nearby or in surrounding of Qutubuddin's tomb.

11. During the argument, learned advocate Mr. MTM Hakim submits that plaintiff had a customary right to bury plaintiff and his family members. I am at loss to read such in a pleading. The plaint lacks the necessary averments that how the plaintiff became the *Dharma Guru*, who has appointed him as a *Dharma Guru* and how he is carrying the activity as a *Dharma Guru* in the tomb or as *Dharma Guru* of the *Shijar-ae-Qadariya Ashrafia Rafiya*. Thus submission to that effect is wholly found hollow and substance-less.

12. Learned advocate Mr. MTM Hakim argued that the learned appellate Court has read the documents, which were not exhibited. If we examine this argument, what appears that the learned appellate Court has referred only those documents, which were placed by the plaintiff along with his plaint at Exhibit-3 and Exhibit-55. These are plaintiff's own documents upon which he presented his suit. Plaintiff cannot turn blind from those documents, regardless they are exhibited or not. Nonetheless, these are not the private documents. These are the public documents. They are either revenue entries or the order of the Superintending Archaeologist, Archaeological Survey of India or *Farmaan* issued by the Former Maharaja of the Baroda State. These are unquestionable documents. Apt to note that even plaintiff did not cast any doubt upon those documents.

13. The Notification No.1 of 1938 issued by his Highness, the Gaikwad of Baroda State, through the Department of

Archaeology under the provision of the Ancient Monument Protection Act, 1904, which at relevant time was made applicable to Baroda State, extended the protection to the *Bada Hajira*, which was at the relevant time in name of 'Hajira at Danteshwar village'. This is a Notification dated 03.05.1938 in the hand and seal of his Highness, the Gaikwad of Baroda State. This Notification has been acknowledged by the Department of Archaeology on independence in the year 1951 and it is clarified that since his Highness, the Gaikwad of Baroda State, notified the *Bada Hajira* as a 'protected monument', no new Notification is required.

14. The revenue entries also refer that the tomb *Bada Hajira* is standing in name of the State Government through Mamlatdar. Even it is not the case of the plaintiff that he is the owner and occupier of land of Survey Nos.322/1 and 322/2. Plaintiff pleaded that his elder brother - Saiyed Ahmedmiya Badruddin Kadri was taking care of the *Bada Hajira* and was offering the religious observance. Plaintiff, at no point of time, claimed any exclusive right over the *Bada Hajira*. Nonetheless, he failed to prove and establish existence of any such right in his favour. It is admitted position that the Collector, by its order, removed the elder brother of the plaintiff from doing any activity, including the alleged religious offerings and appointed one Latifuddin Kutubuddin by his order. This order has not been challenged either by the plaintiff or by his elder brother or at least plaint, pleading and evidence, all are silent on this issue.

15. That takes me to the second limb of the argument that plaintiff has religious and customary right to bury his family

members, as he is lineal descendant of Late Qutb-ud-din and such custom continued since long.

16. Plaintiff, except pleading bare words in this regard, did not lead any evidence to establish custom that he is a lineal descendant of Late Qutb-ud-din. Even the pedigree, which he placed on record did not match with his claim. Plaintiff pleaded that there are several disciples of Late Qutb-ud-din *Shijar-ae-Qadariya Ashrafia Rafiya* Tomb, but did not lead any evidence, much less authentic evidence to establish that he is a *Dharma Guru* and is a lineal descendant of Late Qutb-ud-din and custom exists that the family members of the plaintiff would be buried in the surrounding area of tomb of *Shijar-ae-Qadariya Ashrafia Rafiya*. Plaintiff, who can easily secure the evidence of his elder brother - Saiyed Ahmedmiya Badruddin Kadri, who was taking care of the tomb, according to plaint, did not lead his evidence to establish the so-called custom, right or any such established procedure, permitting him to bury him and his family member.

17. Plaintiff's suit is rather like ignoramus story.

18. Lastly, the judgment of this Court in Special Civil Application No.13003 of 2020 put the issue to an end. The plaintiff for his wife, who was suffering from a fatal disease, claimed that her last burial had to take place at the area surrounding the 'protected monument', namely Tomb of Qutubuddin, could not succeed in getting any relief from this Court, meaning thereby that this Court did not accept any contention of the plaintiff.

19. As discussed hereinabove, the submission of the appellant - plaintiff that learned appellate Court committed serious error in reading the unexhibited documents is concerned, such submission does not lie as those documents are the documents of the plaintiff produced before the trial Court. Though they are not exhibited, but plaintiff cannot rescind from such documents which he has placed in support of his plaint and cannot avoid any repercussion of effective evidence coming out from those documents, since essentially those were the documents of the plaintiff.

20. What further could be observed that, Order XLI Rule 27(1)(b) of 'the Code' permits the appellate Court to examine any document or any witness if appellate Court finds it required to enable it to pronounce the judgment or for any other substantial cause. Order XLI Rule 27(1)(b) reads as under:-

**“ORDER XLI - APPEALS FROM ORIGINAL DECREES**

**27. Production of additional evidence in Appellate Court.**—(1) *The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if —*

*(a)...*

*(aa) ...*

*(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.”*

21. Thus, the argument that the appellate Court cannot refer any document, without being exhibited, found non-suited on the aforesaid premises. The learned appellate Court found the various documents are essential and requisite for pronouncement of the judgment.

22. One more aspect needed to be observed that the plaintiff has filed the suit only against the State of Gujarat. Admittedly, the *Bada Hajira*, i.e. the tomb of Late Qutubuddin, is a 'protected monument', within the 'Act of 1958' duly governed by the Archaeological Survey of India. The notice dated 04.02.1986 being challenged by the plaintiff in the suit clearly states that Archaeological Survey of India has taken a objection for activity of the plaintiff to bury his daughter in the surrounding area of tomb of Late Qutubuddin at *Bada Hajira*. This fact itself discloses that the plaintiff was well aware that the Archaeological Survey of India is the necessary party in the suit and in absence of it, no claim in regards to the surrounding area of the *Bada Hajira*, the tomb of Late Qutubuddin, can be made. Plaintiff filed the suit, but without joining the Archaeological Survey of India as a party and perhaps it demonstrates the bold intention on the part of the plaintiff to assume the possession of protected monument. Section 5(6) or Section 16 of the 'Act of 1958', though recognizes the rights to offer worship or religious offerings, Section 19 restricts the enjoyment of the proprietary right in the protected area. Proviso to Section 19 recognizes the right to cultivate and prohibits digging of prohibited area for not more than one foot from the soil in the surface. The plaintiff intends to dig the surface of the soil for more than one foot for

the burial and for making a *Mazar* thereof. The right, even if exists, is clearly barred under Section 19 of the 'Act of 1958'.

23. In view of above, according to this Court, learned AGP Ms. Urvashi Purohit has successfully demonstrated within the circumference of Section 100(5) of 'the Code' that the question of law framed by the coordinate Bench reproduced hereinabove are not the substantial questions of law.

24. In the premises of the foregoing reasons, this Second Appeal *sans* merit and it is accordingly dismissed.

25. Interim-relief, if any, stands discontinued. Record and Proceedings, if any, be sent back to the concerned Court forthwith.

**(J.C. DOSHI, J.)**

*Raj*