

(2006) 11 BOM CK 0097

In the Bombay High Court

Case No : Second Appeal No's. 166 of 1986 and 379 of 1998

Chandrashekhar Shankarrao Kulkarni

APPELLANT

Vs

The Rahul Shikshan Prasarak Mandal
 Chandrashekhar
Shankarrao Kulkarni and Shaikh Gulab Shaikh Imam Vs
Rahul Shikshan Parsarak Mandal

RESPONDENT

Date of Decision : 24-11-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 31, 100(5), 105, 105(1), 96
Evidence Act, 1872 — Section 68
Maharashtra Municipal Councils Nagar Panchayats and Industrial Township Act, 1965
— Section 189
Registration Act, 1908 — Section 17
Transfer of Property Act, 1882 — Section 122, 123

Citation : (2007) 3 BomCR 181

Hon'ble Judges : S.B. Deshmukh, J

Bench : Single Bench

Advocate : V.J. Dixit, instructed by, Dipali Ansingkar, for the Appellant; M.V. Deshpande, for the Respondent

Judgement

S.B. Deshmukh, J.—Second Appeal No. 166 of 1986 is directed against the judgment and decree passed by learned III Additional District Judge, Aurangabad in Regular Civil Appeal (RCA) No. 49 of 1984. The appellant was the plaintiff in Regular Civil Suit (RCS) No. 539 of 1979 filed against the respondent/ defendant, which was decreed with costs by the learned Joint Civil Judge (S.D.), Aurangabad, by his judgment and decree dated 31.1.1987. Plaintiff in RCS No. 539 of 1979 is being referred to, hereinafter, as plaintiff Chandrashekhar and defendant in the suit is hereinafter, referred to as the defendant-trust, for the sake of convenience. Thus, the second appeal No. 166 of 1986 is by the original plaintiff-Chandrashekhar.

2. Challenge in Second Appeal No. 369 of 1998 is to the judgment and decree passed in RCA No. 156 of 1996 by the learned II Additional District Judge, Aurangabad. RCS No. 174 of 1985 was filed by Rahul Shikshan Prasarak Mandal

(plaintiff-trust) against the defendants i.e. Chandrashekhar and Sk.Gulam, for declaration of ownership and recovery of possession. Said suit was decreed by the trial Court by the judgment and decree dated 21.2.1995. Defendants, in that suit, are referred to as defendant Chandrashekhar and Shaikh for convenience.

3. Second Appeal No. 166 of 1986 and Second Appeal No. 379 of 1998 are virtually between the same parties i.e. trust and Chandrashekhar. Both learned Counsel submit that Shaikh is a tenant of Chandrashekhar. Source of title or right is being claimed by trust as well as Chandrashekhar from one and the same person, namely; Sonaji Ganoji Sonavane ("Sonaji").

4. Brief facts and allegations in the appeals are listed below:

RCS NO. 539 OF 1979 (SECOND APPEAL NO. 166 OF 1986)

This suit is filed by plaintiff Chandrashekhar in September 1979. Chandrashekhar has claimed to have purchased the suit property from Sonaji under registered sale deed dated 18.1.1974, when according to him, the lay out of the area was not sanctioned. Subsequently, lay out was sanctioned. Size of the plot was changed and plaintiff perfected the title by getting a fresh sale deed executed and registered by paying additional consideration of the increased area on 11.4.1978. Suit property is entered in the name of plaintiff in the city survey record. Name of the plaintiff is also recorded in the municipal record.

The then Municipal Council, Aurangabad issued a notice to plaintiff Chandrashekhar u/s 189 for demolishing the basement. Plaintiff-Chandrashekhar filed RCS No. 442 of 1974 in the Civil Court. The Municipal Council did not file written statement. On 12.8.1979, defendant trust filed an application in RCS No. 442 of 1974 for its impleadment, which was rejected. Said order had attributed finality. According to plaintiff-Chandrashekhar, defendant-trust has no right, title and interest in relation to the suit property.

Defendant-trust on 18.9.1979 with the help of some labourers, started some excavation. This act of the defendant-trust was objected. According to plaintiff-Chandrashekhar this was an attempt on the part of defendant-trust to encroach upon the suit property. Plaintiff-Chandrashekhar therefore, sought a relief of perpetual injunction against defendant-trust. In RCS No. 539 of 1979, plaintiff-Chandrashekhar described the suit property as an open plot on which plinth admeasuring 20"x20" is constructed, bearing plot No. 30, out of sanctioned lay out 42"x77" dated 16.2.1977. Municipal No. 5-17-33/P, CTS No. 17543 and 17543/A total plot admeasures 60"x80". Boundaries are given in plaint of RCS No. 539 of 1979.

In response to this suit, defendant trust after entering into an appearance, filed written statement Exhibit 3. After denial, it is pleaded by defendant-trust that the plaintiff Chandrashekhar is not owner and possessor of plot No. 5-17-33. According to defendant-trust this property situated at Sillekhana area of Aurangabad city is owned by defendant-trust. Defendant-trust is registered in

accordance with the Bombay Public Trusts Act, 1950. One Sonaji had executed a gift of this plot No. 5/7/33 in favour of defendant-trust on 29.8.1973. Since the date of gift deed, the defendant-trust is in possession of the said plot. Gift was for the purpose of construction and running a school for poor students, managed and administered by defendant-trust. Sale deed claimed by plaintiff-Chandrashekhar dated 18.1.1974 is a false document and not binding on defendant-trust. Another sale deed claimed by plaintiff-Chandrashekhar dated 11.4.1978 is also not binding upon defendant-trust. Shri Sonaji had no title or interest to transfer the said plot either on 8.1.1974 or 11.4.1978. Entries in CTS record in favour of plaintiff-Chandrashekhar are collusive. Plaintiff-Chandrashekhar has no locus standi to file this suit against defendant-trust. The gift deed in favour of defendant-trust is registered. Suit filed by plaintiff-Chandrashekhar for declaration is bad in law. Ultimately, dismissal of RCS No. 539 of 1979 was sought by defendant-trust by its written statement dated 30.7.1981.

RCS NO.174 OF 1985 (SECOND APPEAL NO.379 OF 1998)

5. RCS No. 174 of 1985 was filed by Plaintiff-trust against defendants Chandrashekhar and Shaikh. It was a suit for declaration of ownership and recovery of possession of the suit plot i.e. plot No. 5-17-33/P admeasuring 60"x60", comprising boundaries given in the plaint.

It is alleged in this suit by plaintiff-trust that the suit plot was the property of one Sonaji, who executed a gift deed No. 1656 in favour of plaintiff-trust on 29.8.1973 and had delivered possession of this plot to plaintiff trust on 7.8.1973. Said plot is bearing CTS No. 17543/A in sheet No. 104 of the record of City Survey Office, Aurangabad. plaintiff-trust is in possession of the suit plot since 7.8.1973 and by registered gift deed dated 29.8.1973, plaintiff trust has acquired ownership of the suit property.

In the month of September 1979, plaintiff-trust brought some construction material on the suit property for construction of rooms for school. Defendant-Chandrashekhar filed RCS No. 539 of 1979 in the court of Civil Judge (S.D.), Aurangabad. Giving account of incorrect facts, Defendant-Chandrashekhar obtained temporary injunction in the said suit against the plaintiff-trust. Plaintiff-trust, being a law abiding institution, did not interfere and abide the order of temporary injunction granted against defendant-trust by the Civil Court. It was an ex-parte temporary injunction order.

Defendant-Chandrashekhar after obtaining ex-parte injunction tried to manipulate some record in the Municipal Council and other offices. defendant-Chandrashekhar also applied for a tap connection (water-tap connection) and inducted defendant No. 2 Shaikh as a tenant illegally. From RCS No. 539 of 1979, plaintiff-trust, for the first time, perceived the fabricated record by defendant Chandrashekhar with the aid of authorities of the city survey and municipal council, behind back of plaintiff-trust.

Defendant-Chandrashekhar was never in possession of the suit property. In the year 1978, some persons from neighbourhood hutment area started encroachment on the suit property. Such unknown encroachers started construction of basement in the night time on the suit plot. Plaintiff-trust perceived that the owner had executed a sale deed in favour of defendant Chandrashekhar along with the basement. Sonaji's brother or heirs have no such right, title over the suit plot for construction of basement.

The cause of action arose on 9.12.1984 in favour of plaintiff-trust, when plaintiff-trust requested defendant-Chandrashekhar and defendant No. 2 Shaikh to hand over vacant possession and not to alienate the suit property as well as their refusal for the same. Plaintiff-trust therefore, sought a relief of declaration that the plaintiff-trust is lawful and exclusive owner of the suit plot i.e. suit plot No. 5/7/33/P, admeasuring 60"x60" as described in the plaint. In continuation with this declaration and in the same clause (prayer Clause (b)), further relief sought is a decree for recovery of vacant possession of the suit plot in favour of plaintiff-trust. With this prayer, interim injunction during pendency of the suit was sought for. This suit came to be filed by plaintiff-trust on 12.2.1985.

In response to this suit, defendant Chandrashekhar has filed written statement at Exhibit 14. After denial, it is pleaded in paragraph No. 5 that in the year 1974, defendant Chandrashekhar had filed a suit against Municipal Council, Aurangabad and present plaintiff-trust had filed an application for impleadment. However, same was rejected. Thereafter, in 1979, plaintiff-trust tried to obtain possession of the plot belonging to defendant-Chandrashekhar and therefore, defendant-Chandrashekhar was constrained to file RCS No. 539 of 1979. He also obtained temporary injunction against plaintiff trust in that suit. RCS No. 539 of 1979 filed by plaintiff-Chandrashekhar against defendant- trust was decreed with costs. The contentions raised by plaintiff-trust in the suit is regarding manufacturing of record in connivance with the officers of the Municipal Council. Defendant Chandrashekhar has denied this allegation.

According to him, the record is being prepared by the officers concerned in due course of law.

The execution of gift deed by Sonaji in favour of plaintiff-trust regarding property No. 5/17/33 is denied. It is pleaded further that so called gift deed appears to be a fraud practised upon Sonaji. It is denied by defendant Chandrashekhar that gift deed was annexed with the map. Said map, according to defendant Chandrashekhar is a fabricated one. No action was taken by plaintiff-trust after alleged execution of the gift deed in favour of plaintiff-trust. Defendant No. 2 Shaikh is a tenant of defendant Chandrashekhar. Property plot No. 30 is now renumbered as 17543 and 17543/A in the city survey record. The construction of basement is of the year 1978 by unknown persons. Filing of suit by plaintiff-trust at belated stage is also without any explanation. According to defendant Chandrashekhar law of limitation comes in the way and the suit is barred by limitation. Such pleadings are raised in paragraph No. 16 of the written

statement. With these pleadings written statement was filed on 17.7.1985.

6.(A). In Second Appeal No. 166 of 1986, following is the substantial question of law, formulated by this Court on 7.10.1986. "Both the parties are claiming through the same predecessor in title. Mis-reading of property conveyed is the substantial question of law."

(B). In Second Appeal No. 379 of 1998, ground Nos. XVI and XXXII are accepted to be grounds involving substantial question of law by this Court by an order passed on 19.11.1998. Ground Nos. XVI and XXXII are reproduced herein below:

(XVI). It is to be seen that in view of the judgment passed in Regular Civil Suit No. 442/74 and in view of the pendency of the case in Regular Civil Suit No. 539 of 1979 by way of Second Appeal No. 166 of 1986, the Courts below should not have entertained the suit of the respondent for possession as the issue with regard to the possession, title and interest of the appellant No. 1 is directly concerned in Second Appeal No. 166/86. Therefore, granting decree of possession in view of the pendency of the Second appeal No. 166/86 was not at all warranted in the present facts and circumstances of the case.

(XXXII). Both the courts below have proceeded on the basis that since the gift deed is executed prior to the sale deed and the same is registered gift deed, the present plaintiff has better title over looking the background, documents on record and the various judicial proceedings as well as the city survey and revenue record.

Smt. Ansingkar, learned Advocate for appellant sought amendment to ground No. XXXII. According to her, in fact, this ground No. XXXII ought to have started with word "Whether" but through oversight said word does not appear in the ground No. XXXII and more specifically at its commencement. She, therefore, seeks amendment of this ground by adding word "Whether" at the initial stage. In absence of this amendment, this ground cannot be considered to be a ground, involving substantial question of law. According to her, it is an amendment, having technical nature and with the word "Whether" such ground stands to reason.

After hearing learned Counsel Shri Deshpande for plaintiff-trust, such amendment is permitted. Amendment is directed to be carried out forthwith, which is accordingly carried out by the learned Counsel for appellant.

7. Shri Dixit, learned Senior Advocate appearing for the appellants tendered some grounds and sought amendment to the memo of appeal. This copy is received by Shri Deshpande, learned Advocate appearing for the respondent in Second Appeal No. 379 of 1998. Said document is marked by letter "X" for identification purposes and taken on record.

8. Section 100(5) of CPC ("CPC") is relevant at this stage and it reads as under:

100.(5). The appeal shall be heard on the question so formulated and the

respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

The second appeal shall be heard on the question so formulated. Here, in this second appeal No. 379 of 1998, I have noted the above substantial questions of law formulated by this Court at the time of admission. It is further provided that respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such a question. This part of Sub-section (5) of Section 100 of C.P.C. relates to the questions already formulated by this Court at the time of admission of the appeal or any time before final hearing of the admitted second appeal. Proviso of Sub-section (5) lays down that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear for the reasons recorded, the appeal on any other substantial questions of law not formulated by it, if it is satisfied that case involves such question. Thus, even at the stage of final hearing of the admitted Second Appeal, the High Court is vested with the power and jurisdiction to hear the admitted Second Appeal on any other substantial question of law not formulated by it earlier. However, for such exercise of the jurisdiction, the High Court should be satisfied that the case involves such a substantial question. In this view of the matter, I heard Shri Dixit, learned Senior Counsel and Shri Deshpande, learned Advocate, for respective parties.

On examination of this memo of additional grounds, allegedly involving the substantial questions of law, in my view, no such ground can be accepted to be a ground involving substantial question of law. Argument of learned Counsel for the appellant can be noted in reference to ground No. I, which can briefly be referred to as ground regarding bar of limitation. He has referred to the judgment of the trial court. In paragraph No. 3, the trial Court has noted the contention advanced on behalf of defendant Chandrashekhar that the suit filed by plaintiff trust is not within limitation and is barred by limitation.

On perusal of the judgment of the trial Court in RCS No. 174 of 1985, it appears that the issue regarding limitation was not framed. It also is not the case of defendant-Chandrashekhar that any application seeking re-cast of the issues was filed and turned down. From the memo of appeal in the first appellate Court i.e. RCA No. 156 of 1995 it appears that no such ground was raised before the first appellate court. Shri Deshpande, learned Advocate admits that there is no discussion regarding such bar of limitation by the first appellate court also in RCA No. 156 of 1996. Needless to say that no such point for determination under Order XLI Rule 31 of Code was framed by the first appellate Court. Shri Dixit, learned Senior Advocate has relied upon the judgment of the Apex Court in the matter of Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., Shri Dixit,

learned Senior Advocate relied upon paragraph Nos.9 and 10 of this judgment.

The question of limitation is a mixed question of law and facts. Party is required to lay foundation in its pleadings if issue is not settled by the Court, at the first instance, party raising such plea is expected to seek recast of the issue. If such application is turned down by the court, at the first instance and decree is passed against such party, that ground can be raised before the first appellate court seeking invocation of the power of the first appellate court u/s 105 of Code. In that contingency, interim orders passed by the trial Court, can be re-agitated before the first appellate court. Beneficial reference can be made to Section 105(1) of the Code, which reads as under:

105. Other orders. -(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2)...

Thus if such application is altogether not filed in the trial Court for recast of the concerned issues, still party concerned can raise such a ground in the appeal filed before the first appellate court. The first appellate court u/s 96 of the Code is empowered to decide the questions of fact as well as question of law. It can be said that the first appellate court in fact is the last fact finding Court. However, for this purpose, the party concerned has to refer to such a ground raised before the first appellate court in memo of appeal and also to argue before the first appellate Court. In the present case, on examination of the judgments, record and proceedings, it is manifest that no application seeking recast of the issue was filed. No such ground in RCA No. 156 of 1995 was raised. In this view of the matter resorting to Sub-section (5) of Section 100 of the Code, in my view, ground as agitated by Shri Dixit, learned Senior Advocate, regarding bar of limitation cannot be accepted to be a substantial question of law, involved in this Second Appeal No. 379 of 1998.

9. Now, coming to Second Appeal No. 166 of 1986, I have to consider the only one substantial question of law formulated by this Court at the time of admission as noted above. plaintiff Chandrashekhar in this second appeal has described the suit property in plaint of RCS No. 539 of 1979. This description of the property finds in title claim. According to plaintiff- Chandrashekhar open plot, on which plinth admeasuring 20"x20" was constructed, bears plot No. 30, out of sanctioned lay out No. 42, dated 16.2.1977. Its municipal Number is 5-17-33/P and CTS No. 17543 and 17543/A. According to plaintiff- Chandrashekhar this plot admeasures 60"x80", with boundaries given in the plaint. The plaintiff has placed on record two sale deeds. First sale deed is dated 18.1.1974. In this sale deed, number of the property is given as 5-17-33. Area of the property is given as 60"x40". It is also mentioned that basement of four rooms is constructed in this

plot. The consideration of the property mentioned in the sale deed is Rs. 4,000/-. This document is executed by Sonaji in favour of plaintiff- Chandrashekhar. In this sale deed Exhibit 62, length of the suit property towards North-South is 60 feet and East-West is 40 feet. Towards boundaries, it is mentioned that towards East 30 feet road, towards West Shri Chhatrapati Shivaji Griha Nirman Sanstha's premises bearing Municipal No. 5-17-63, towards South property bearing No. 5/17-33 i.e. open plot and towards North road of the Municipal Council. It is to be noted that these boundaries are not being tallied with the description of the property given in the plaint of RCS No. 539 of 1979. In this sale deed Exhibit 62, delivery of possession of the property described in the sale deed is mentioned to have been given in favour of plaintiff-Chandrashekhar. In this sale deed Exhibit 62, reference of map showing the location of the suit property is also mentioned and copy of said map is also available along with sale deed Exhibit 62.

Plaintiff has also placed on record another sale deed of the suit property dated 11.4.1978 -Exhibit 64. This sale deed is also having map annexed with it. This sale deed is executed by four persons in favour of plaintiff Chandrashekhar, namely; Sonaji Ganu Sonawane, Kukadaji Naguji, Kaduba Bhagaji and Honaji Gaikwad. The consideration of this sale deed is mentioned as Rs. 5,400/-. The property alleged to have been conveyed under this sale deed is described as S.No.79, Municipal No. 5/17/23 and out of it plot admeasuring 4880 sq.ft. It is also mentioned in this sale deed that the property conveyed under this sale deed is plot No. 30 (4880 sq.ft.), out of this area 2400 sq.ft was previously sold on 6.12.1975 for consideration of Rs. 4,000/-. It is also mentioned in the sale deed that since the Municipal Council has approved the lay out and the area of the plot is increased, therefore, this sale deed for the increased area to the extent of 2480 sq.ft. is sold out for the amount of Rs. 5,400/-. Boundaries given in the second sale deed as mentioned therein seems to be East-West length 80 feet, South North width 60 feet and 62 feet, towards East, road of Aurangabad Municipal Council 40 feet wide, towards West, 20 feet road, towards South plot No. 28 and 29 and towards North, 50 feet road. Further, it is mentioned in this sale deed that possession of this property conveyed under the second sale deed Exhibit 64 was given to plaintiff-Chandrashekhar on 22.4.1977. Reference of an agreement of sale / isar pavati dated 22.4.1977 and payment of earnest money of Rs. 1500/- at that time is also made in this second sale deed. This sale deed is also having annexed a map. Boundaries given in the sale deed Exhibit 64 are tallying with the boundaries given in the plaint of RCS No. 539 of 1979.

10. It is apropos to refer to the document of gift, claimed to have been executed by Sonaji in favour of defendant-trust. This document of gift is at Exhibit 72.

11. This Exhibit 72 is the original gift deed produced in RCS No. 174 of 1985 on behalf of trust. Along with this gift deed, copy of map is also there. However, copy of the gift deed produced in RCS No. 539 of 1979 (Second Appeal No. 166 of 1986) is the zerox copy. This is at Exhibit 41, however, bears the verification by the Presiding officer. From the original gift deed Exhibit 72, it appears that the

property conveyed is described as open plot Municipal No. 5017-33/P, East West length 18.28 Meters (60 feet) and South-North width 18.28 Meters (60 feet). The boundaries given are towards East-Government Road, towards West - House of Shri Kazi and Shri Shamrao, towards South part of the property of executant Sonaji out of the same number i.e. 5/7/73 and towards North - a Government road. From the oral as well as documentary evidence on record, it is clear that the property conveyed under the gift deed is 60 feet x 60 feet which comes to 3600 sq.ft. It is also claim of the plaintiff that by two different sale deeds, one Exhibit 62 and another Exhibit 64, plaintiff has acquired title to the suit property. In the first sale deed, area purchased by plaintiff-Chandrashekhar is was 60"x40" which comes to 2400 sq.ft. and in the second sale deed Exhibit 64, area purchased by plaintiff-Chandrashekhar si 60"x80" which comes to 4800 sq.ft.

Second sale deed Exhibit 64 of 1978, refers the property claimed to have been purchased by plaintiff- Chandrashekhar by earlier sale deed of 1974 Exhibit 62. From the oral as well as documentary evidence, it is clear that the boundaries of the property described in the gift deed Exhibit 72 in favour of the trust and second sale deed Exhibit 64 of the year 1978, in favour of plaintiff-Chandrashekhar, boundaries towards North as well as towards East are tallying. In the gift deed Exhibit 72, Southern side boundary is mentioned as remaining property of Sonaji, predecessor in title. In the sale deed Exhibit 64, boundary of Southern side is plot Nos.28 and 29. In the oral as well as documentary evidence and in pleadings, plaintiff- Chandrashekhar has no where clarified as to who was/ is the owner of the plot No. 28 and plot No. 29 at the relevant time. Towards Western side of the property conveyed under gift deed Exhibit 72, it is mentioned that the houses of Kazi and Shamrao are situated. Towards Western side of the sale deed Exhibit 64 of 1978, refers the location of road. In the cross examination DW 1 Sheela (RCS No. 539 of 1979) states that in between the houses of Kazi and Shamrao and the gifted property, road situates. plaintiff Chandrashekhar has alleged in his suit that the lay out was sanctioned by the Municipal Council, Aurangabad some where in the year 1977. Thus, it can be said that three boundaries of gift deed, namely; towards Western side, Northern side and Eastern side are tallying with the boundaries given in the second sale deed in favour of plaintiff Chandrashekhar Exhibit 64 of 1978. Regarding boundaries towards South side of gifted property and property described in second sale deed Exhibit 64, in favour of Chandrashekhar of the year 1978 also there is no ambiguity. Therefore, it appears that plaintiff-Chandrashekhar is claiming more property i.e. 60"x80" which comes to about 4800 sq.ft. However, in the second sale deed Exhibit 64 of 1978 area conveyed is mentioned to the tune of 4880 sq.ft. This second sale deed itself does not tally with the area mentioned therein the sale deed. Be that as it may. The property under gift deed, therefore, seems to have been purchased by plaintiff-Chandrashekhar by subsequent two sale deeds Exhibits 62 and 74 i.e. of the years 1974 and 1978. It is to be recalled at this stage that the date of gift deed in favour of trust is 29.8.1973. In other words, the document conveying title to the trust (Exhibit 72) is earlier in point of

time. Right, title and interest of quondam owner Sonaji in the property, subject matter of the gift deed Exhibit 72, is admitted by plaintiff Chandrashekhar.

This right, title and interest in the gifted property described in Exhibit 72, which is the suit property in RCS No. 174 of 1985 has been transferred by Sonaji in favour of plaintiff-trust by the gift deed. In this gift deed, delivery of possession of the gifted property on 7.8.1973 is referred to. This is also mentioned in the plaint of RCS No. 174 of 1985. Owner Sonaji was alive till 15.8.1978. It is not a case of plaintiff Chandrashekhar that deceased Sonaji during his life time denied the execution of the gift deed, in favour of plaintiff-trust.

12. A reference to Section 122 of the Transfer of Property Act, 1882 ("TP Act"), at this stage, is relevant. Said provision reads as under:

122."Gift" defined. -- "Gift" is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

Acceptance when to be made. - Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void.

Thus, the gift is the transfer of certain existed movable or immovable property made voluntarily and without consideration by one person called donor to another person called donee and accepted by or on behalf of donee. Acceptance of the property under gift can be express or implied. Such acceptance can be a matter of documentary evidence and/or delivery of possession of the property under the conveyance deed. Such acceptance can be a matter of oral evidence. Such acceptance in some cases, can be a matter of conduct impliedly accepting the gift. Here, in this case, executant Sonaji and/or his legal heirs are not disputing the acceptance of such gift deed of the property described in Exhibit 72. Thus, the gift in this case, regarding property described in Exhibit 72, seems to have been accepted by the trust on 7.8.1973. This gift deed came into existence and is registered on 29.8.1973.

Under Section 123 of the TP Act, the mode of transfer under gift deed, regarding immovable property subject matter of the gift deed is provided. Section 123 reads as under:

123. Transfer how effected. --For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of movable property, the transfer must be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

Gift of immovable property can be made and such transfer must be effected by an instrument signed by or on behalf of the donor and attested by at least two witnesses. It is also provided that for the purpose of making gift of movable property, such transfer may be effected either by a registered instrument signed as provided u/s 123 or by a delivery. In other words, regarding movable property there can be a gift either by registered instrument regarding such movable property or by delivery of the property itself. Section 123 mandates the registration of instrument of gift in relation to immovable property, apart from provisions laid down u/s 17 of the Indian Registration Act, 1908.

At this stage, the provisions laid down u/s 68 of the Indian Evidence Act, 1872 ("Evidence Act") also can be noticed. Section 68 of the Evidence Act reads as under:

68. Proof of execution of document required by law to be attested. -- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the India Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

It is apropos to refer to the judgment of the Apex Court in the matter of Surendra Kumar Vs. Nathulal and Another, . Section 123 of the TP Act and Section 68 of the Evidence Act have been considered by the Apex Court in this case. The provision laid down u/s 68 of the Evidence Act is considered by the Apex Court and the Apex Court has considered and interpreted the proviso to Section 68 of the Evidence Act, in the following words;

... In the present case, the donor Chand Bai has specifically admitted execution of the deed of gift in favour of the appellant. Therefore, the lower appellate Court was in error in holding that the deed of gift has not been duly proved since one of the attestors has not been examined as witness.

13. Now, turning to the facts of the present case, gift deed Exhibit 72, in these two second appeals, is not denied by executant deceased Sonaji, during his life time and/or by his legal heirs after his death. Apart from this aspect on behalf of plaintiff- trust two witnesses, namely; PW 1 Sheela and PW 2 Indumati have been examined. They have duly proved the fact of gift of suit property by deceased Sonaji to the trust and execution of the gift deed Exhibit 72. In this background, the submissions of learned Senior Advocate Shri Dixit in relation to evidence of PW 1 Sheela, PW 2 Indumati is very difficult to accept. The first appellate court has justifiably recorded a finding that the gift deed in question Exhibit 72 is duly proved Having regard to the stance taken by plaintiff-

Chandrashekhar in his RCS No. 379 of 1979 and his written statement in RCS No. 174 of 1985. The alleged variance regarding handing over possession of gifted property to plaintiff-trust on 7.8.1973 and/or 29.8.1973, loses its importance. Delivery of possession was never challenged or denied by deceased Sonaji. The first appellate court has referred extensively to description of the property given in two sale deeds in favour of plaintiff- Chandrashekhar, one Exhibit 62 and another Exhibit 64 and gift deed Exhibit 72 in favour of plaintiff-trust and has recorded a finding that the property conveyed under Exhibit 72 gift deed is legally transferred and conveyed under that gift deed by its quondam owner to plaintiff-trust and no right, title or interest remained with erstwhile owner Sonaji to be transferred subsequently in the years 1974 and 1978 as claimed by plaintiff- Chandrashekhar. In this view of the matter, the contention of Shri Dixit, learned Senior Advocate that the gift deed Exhibit 72 is not properly proved cannot be accepted.

Here one more aspect is to be referred regarding map annexed with the gift deed. Shri Dixit submits that such map was not annexed with the original gift deed. With the assistance of learned Senior Advocate Shri Dixit, I could find list Exhibit 23 in RCS No. 174 of 1985. This list is under the signature of learned Counsel appearing for the plaintiff- trust. Exhibit 23 refers to the description of the document filed as original gift deed of the suit plot along with map. Date of said document is 29.8.1973. Two other documents are also mentioned in the said list, but we are not presently concerned with the said documents. The list is filed on 7.4.1986. There is no objection raised on behalf of plaintiff- Chandrashekhar on this list Exhibit 23. In view of this Exhibit 23 and filing of gift deed Exhibit 72, coupled with the copy of map, the only plausible inference is regarding filing of the gift deed along with map. Thus, the submission of learned Senior Counsel Shri Dixit cannot be accepted that the gift deed only was filed on record and map thereof was not on record. Apart from this, what I find from the gift deed is that the property conveyed under this gift deed is clearly described in this deed dated 29.8.1973. The number of property is given. Length and breadth of the property East-West and North-South is mentioned in the document. Four boundaries of the property are also mentioned in this gift deed. Sufficient identification of the property conveyed under this gift deed is given in this gift deed. It is true that in the gift deed, it is mentioned that the property under the gift is shown by red line in the map annexed with the gift deed. Since the property is identifiable from the description of document of gift deed, absence of map annexed with the gift deed, cannot render the document Exhibit 72 as incomplete document. The transfer of immovable property u/s 123 of the TP Act is by a registered instrument. What is contemplated is the registered instrument, referring the names of donor and donee, description of the property, subject matter of the gift and acceptance of the donee and registration of such an instrument. All the requirements of Section 123 of the TP Act have been complied with and therefore, Exhibit 72 - gift deed, in my view, is a complete document in itself, excluding the map. The maps which are annexed with the deed of conveyance are

facilitating the description of the property. Unless specifically mentioned, there is no transfer of immovable property by such annexure or maps.

As noted above, ground No. XVI is considered to be a ground involving substantial question of law. This ground refers to the filing of RCS No. 442 of 1974. From the submission of Shri Dixit, learned Senior Advocate, it appears that the Aurangabad Municipal Council had given notice u/s 189 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 ("Act of 1965") to plaintiff-Chandrashekhar somewhere in 1974 and he, therefore, was required to file RCS No. 442 of 1974 against municipal council. It is to be recalled that in the year 1974, alleged first sale deed was in existence in favour of plaintiff-Chandrashekhar. It was for the property admeasuring 60"x40", which comes to 2400 sq.ft. At that time, according to Shri Dixit, Senior Advocate, an application was filed on behalf of the trust for impleadment and it was rejected. This RCS No. 442 of 1974, according to learned Counsel for the appellant was decreed. According to defendant-Chandrashekhar he was constrained to file a suit against the Municipal Council only because of notice u/s 189 of the Act of 1965. If the application filed by the defendant trust is rejected, in my view, there cannot be any hindrance and bar for defendant- trust. Filing of an application for impleadment and rejection thereof in RCS No. 442 of 1974 cannot be an impediment for the plaintiff- trust to file RCS No. 174 of 1985. RCS No. 539 of 1979 filed by Chandrashekhar and pendency of Second Appeal No. 166 of 1986 out of RCS No. 539 of 1979, according to Shri Dixit, Senior Advocate, is also an impediment. RCS No. 539 of 1979 was filed by Defendant-Chandrashekhar seeking perpetual injunction regarding the property described in the suit.

Description of the property given in RCS No. 539 of 1979 is the description of the property in second sale deed in favour of Chandrashekhar alleged to have been executed by Sonaji in the year 1978. As per the allegations in RCS No. 539 of 1979, suit property is subject matter of two sale deeds Exhibits 62 and 64. It was a simple suit for perpetual injunction. The plaintiff-trust in this second appeal No. 379 of 1998 has sought a relief of declaration with recovery of possession. The nature of relief sought in RCS No. 174 of 1985 is substantive to that of relief sought in RCS No. 539 of 1979. It is the contention of trust - plaintiff in RCS No. 174 of 1985, that plaintiff Chandrashekhar in RCS No. 539 of 1979 had obtained ex-parte injunction and trust was being prohibited by the temporary injunction order passed by the Civil Court gave a cause of action for trust for seeking adjudication of right regarding its ownership to the property described in gift deed Exhibit 72. The issues required to be framed and answered in simple suit for perpetual injunction and a suit for ownership with possession are different in nature and character. It is true that in a simple suit for perpetual injunction, Court concerned is required to consider the ownership/ title of plaintiff and/or legal right and possession referable to some lawful right. But in the case of suit of ownership and possession, adjudication is having different nature. In the present case, considering the description of the property given by plaintiff-Chandrashekhar in RCS No. 539 of 1979, two sale deeds in favour of plaintiff-

Chandrashekhar Exhibits 62 and 64, description of the property available under the gift deed Exhibit 72 and description of the property given in RCS No. 174 of 1985 coupled with the fact that injunction was granted by the Civil Court in RCS No. 539 of 1979, in my view, the plaintiff-trust justifiably had filed RCS No. 442 of 1974 which has to be an end to the dispute between the parties regarding the property subject matter of said suit. By no stretch of imagination, it can be accepted that pendency of Second Appeal No. 166 of 1986 arising out of RCS No. 539 of 1979 is an impediment in filing of RCS No. 174 of 1985 by plaintiff-trust. Rejection of the application of the plaintiff- trust in RCS No. 174 of 1985 has very less importance, considering the provisions laid down u/s 189 of the Act of 1965. In this view of the matter, Shri Deshpande, learned Counsel is justified in his submission that ground No. XVI cannot be a ground involving substantial question of law.

14. This takes me to another ground in Second Appeal No. 379 of 1998 at Sr. No. XXXII. As noted above, in a simple suit for perpetual injunction, it is not necessary for the Civil Court, every time, to decide the title of the plaintiff and/or a person seeking decree for perpetual injunction. It is sufficient if the person seeking perpetual injunction proves his possession over the suit property on the date of the filing of the suit referable to some lawful right. In that case such decree for perpetual injunction can be granted. In this view of the matter, pendency of Second Appeal No. 166 of 1986, arising out of the simple suit for perpetual injunction filed by Chandrashekhar cannot be said to be any hindrance in the way of plaintiff-trust in filing RCS No. 174 of 1985. For these reasons and the reasons noted in foregoing paragraphs of this judgment, in my view, ground No. XXXII also cannot be held to be involving the substantial question of law.

15. The first appellate Court in its judgment has recorded a finding that the property conveyed under the gift deed Exhibit 72 cannot be subsequently passed over by owner Sonaji in the year 1974 and 1978 in favour of defendant Chandrashekhar.

In this view of the matter, these two grounds cannot be held to be substantial questions of law arising in this second appeal.

The first appellate court has justifiably referred to the subsequent happenings of the execution of sale deed of 1978 (second sale deed) in favour of defendant-Chandrashekhar. Recording of name of Chandrashekhar in the record maintained by municipal council, city survey etc. is the consequence of the registered sale deed Exhibits 62 and 64. Because of these subsequent documents, no title can be said to have been acquired by Chandrshekhar independently. This aspect is considered by the first appellate court dealing with all these documents, either from Municipal Council Aurangabad and/or city survey or other Government departments.

In this view of the matter, the judgment and decree passed by first appellate court in Regular Civil Appeal No. 156 of 1996 needs to be confirmed.

16. In the result, Second Appeal No. 166 of 1986 and Second Appeal No. 379 of 1998 stand dismissed.

Looking to the facts and circumstances of the present case, there shall, however, be no order as to costs.

17. At this stage, Smt. Apsingekar, learned Advocate appearing for the appellants seeks suspension of this judgment and order to approach the Apex Court for twelve weeks.

Request granted. Execution of present judgment and order is stayed for twelve weeks, subject to condition that appellants Chandrashekhar Shankarrao Kulkarni and Shaikh Gulab Shaikh Imam shall file an undertaking in this Court, within a period of one week from today, that they shall not create third party interest in relation to the suit property and shall not part with the possession of the suit property.

It is made clear that in case of failure on the part of the appellants in Second Appeal No. 379 of 1998, regarding filing of undertaking, stay granted by this Court for twelve weeks, shall stand vacated automatically without back reference to the Court.