

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/SECOND APPEAL NO. 10 of 2026****With****CIVIL APPLICATION (FOR STAY) NO. 1 of 2025****In R/SECOND APPEAL NO. 10 of 2026**

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RAMESHBHAI UMAKANT SHARMA**Versus****ASHABEN KAMLESHKUMAR MODI & ORS.**

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Appearance:**MR VIJAL P DESAI(5505) for the Appellants**

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CORAM: HONOURABLE MR. JUSTICE J. C. DOSHI**Date : 08/01/2026****ORAL ORDER**

1. This second appeal u/s 100 of the Code of Civil Procedure, 1908 (in short "the Code") arise from the concurrent findings of the learned Courts below, whereby the learned 6th Additional District Judge, Panchmahal @ Godhra vide judgment and decree dated 29.11.2025 dismissed Regular Civil Appeal No.119 of 2024 and confirmed the judgment and decree dated 29.12.2023 passed by the learned 2nd Additional Senior Civil Judge, Godhra in Regular Civil Suit No.141 of 2011, by which the suit of the respondent No.1 - plaintiff is decreed raising following questions of law as substantial questions of law.

"A) Whether the courts below erred in law in holding that the suit filed in 2011 as within limitation when the relief sought concerns a completed construction which, by plaintiff's own admission, existed for decades, thereby mandating application of Articles 58 and 65 of the Limitation Act?"



(B) Whether the courts below misapplied principles governing adverse possession by failing to consider essential elements such as open, continuous, hostile possession for statutory period despite documentary evidence produced by the appellant?

(C) Whether the suit is maintainable when the plaintiff herself admits in her plaint that the Ganesh Temple is situated on the public entrance road, not inside her private plots?

(D) Whether the suit is bad for non-joinder of the Gram Panchayat, which is the statutory owner of all public roads, thereby rendering the entire relief incompetent under Order I Rule 10 of CPC?

(E) Whether a decree granting mandatory demolition of structure is legal when no such specific prayer exists in the plaint, which is in violation of Order VII Rule 7 of CPC?

(F) Whether the findings of encroachment are perverse since both courts failed to record any finding regarding the exact extent, measurement or location of alleged encroachment?

(G) Whether reliance on the Commissioner's Report is illegal when the report is contradictory to plaintiff's own admission and is unsupported by any measurement or correlation with revenue maps?

(H) Whether the decree passed is vague, ambiguous and in-executable since it does not specify which particular structure is to be removed, nor the precise encroached portion?

(I) Whether the First Appellate Court failed to comply with Order XLI Rule 31 of CPC by not framing separate points for determination and not re-appreciating the evidence as required by law?



(J) Whether both courts committed substantial error of law by ignoring documentary evidence of long-standing possession such as ration card, electricity bills, birth certificates, and tax receipts?

(K) Whether the appellate court travelled beyond the pleadings and evidence by introducing findings such as alleged construction of idols inside plaintiff's plots? new

(L) Whether the suit is maintainable when cause of action is based only on invitation card and newspaper publication, without any proof of obstruction or encroachment?

(M) Whether a decree disturbing a long-standing (M) Whether public religious structure without joining the devotees or Panchayat violates principles of natural justice and public rights?"

2. Parties to the proceedings are referred to as per their original status before the learned trial Court for convenience.

3. Necessary facts being required to decide the second appeal in nutshell are as under:-

3.1 The plaintiff filed Regular Civil Suit before the learned trial Court for relief of prohibitory permanent injunction on the ground that she has purchased land bearing plot No.60, 61, 62, 63 of survey No.111/A/1/2 and 1/3 paiki 3 admeasuring 468 sq mtr (in short "the suit property") by executing registered sale deed on 6.11.1995. As the suit property was already been converted into NA land, on the northern side of suit property, 6 mtr road exist for egress and ingress to the suit property.



3.2 The plaintiff having received invitation card for opening of intended construction of temple on the entrance by the defendants, the plaintiff went to the suit property, at that time, she was informed by the defendant No.6 that construction of the temple is going on and inauguration is scheduled as per the invitation card prepared by the defendant Nos.1 to 5. The plaintiff made hue and cry against illegal construction and encroachment alleged to have been made by the defendant pujari, however, the defendants did not listen the plaintiff's plea to remove illegal construction.

3.3 The plaintiff unsuccessfully approached the police authorities and ultimately filed the suit for declaration and permanent injunction against the defendants before the learned trial Court by seeking relief in terms of para 6(A) to 6(C) of the plaint and also sought mandatory relief u/s 39 of the Specific Relief Act to remove the illegal construction in terms of para 6(C) of the plaint. Consequential relief of prohibitory injunction was also sought by the plaintiff.

3.4 All the defendants were served, but none of them came forward to contest the suit proceedings except defendant No.6 claiming to be Pujari and filed written statement at Exh.33 denying facts of the plaint by raising contention that the suit is barred by law of limitation. The plaint is suffered from suppression of material facts; further, it is averred in the written statement that Ganesh temple on the spot of dispute is of ancient times and was constructed by one Lakha Vanzara during his travel in ancient time and gradually, the temple became famous amongst the disciples having religious faith



and they worship and celebrate festivals there. However, the defendant No.6 claimed that he has not made any encroachment upon the suit property, but he has been given task of offering puja to Lord Ganesh by the devotee and subsequently, he came along with his family and residing since long in a residential house attached to the Ganesh temple where he is enjoying electricity connection and other amenities. It is further stated in the written statement that the plaintiff has full knowledge that the defendant Pujari is living in the house attached to Ganesh temple and offering puja to Lord Ganesh for more than 12 years i.e. prior to institution of the suit and therefore, the defendant Pujari has perfected the title to the suit property by application of principle of adverse possession. Thus, the plaintiff has no legal plea to claim declaration, permanent injunction and mandatory injunction as sought for.

3.5 The learned trial Court after permitting both the parties to lead evidence and after framing the issues, was pleased to decree the suit in favour of the plaintiff and restraining the defendants from carrying out any further construction within the suit property and also restrained the defendants from entering into the suit property and thereby, issued permanent injunction also issued permanent injunction to remove construction carried out on the public road meant to egress and ingress for the suit property.

3.6 Except defendant Pujari, all other defendants have accepted the judgment and decree passed by the learned trial Court. They did not file any appeal against the judgment and



decree passed by the learned trial Court.

3.7 During the proceedings, defendant No.3 Chunial Dharasiyani and defendant No.5 Hismatray Sonaiya have expired and since they were formal parties, they have been deleted from the cause title.

3.8 Being aggrieved by the aforesaid judgment and decree, the defendant Pujari has filed captioned Regular Civil Appeal before the learned 6th Additional District Judge, Panchmahal @ Godhra, who vide judgment and decree dated 29.11.2025 dismissed the Regular Civil Appeal and confirmed the judgment and decree passed by the learned trial Court. The learned appellate Court further modified operative order No.4 in the judgment and decree of the learned trial Court and ordered that all the illegal construction, structure constructed on the suit property as well as on entrance to the suit property are to be removed immediately.

3.9 Being aggrieved by the aforesaid judgment and decree, the defendant Pujari is before this Court by way of filing present second appeal.

4. In order to seeking admission of the second appeal, learned advocate Mr. Vijal Desai refers to the questions of law framed in the appeal memo and submitted that the learned Courts below have committed serious and manifest error in passing the judgment and decree without hearing several other disciples of the Ganesh temple. He would further submit that since construction of Ganesh temple is not within



the suit property and therefore, the plaintiff has no right to get relief to remove such construction on the ground that it is unauthorized construction. He would further submit that admittedly, the Ganesh temple is situated on the public way for more than 12 years, the possession of which has been enjoyed by the defendant Pujari and other devotees without any hindrance or disturbance which perfected title on the principle of adverse possession.

4.1 Learned advocate Mr. Desai would further submit that the suit is hopelessly time barred by law of limitation. Article 58 and 65 of the Limitation Act have not been considered in its true legal perspective by the learned Courts below and thereby, have committed serious error.

4.2 Learned advocate Mr. Desai would further submit that the principle governing doctrine of adverse possession has not been properly applied. The defendant Pujari was enjoying title of the suit property upon application of hostile possession for the statutory period, which is duly supported by documentary evidence produced by the defendant Pujari and yet, the learned Courts below have dismissed the claim of the adverse possession set by the defendant Pujari and thereby, the learned Courts below have committed serious error in passing the impugned judgment and decree.

4.3 It is further submitted by learned advocate Mr. Desai that the Court commissioner has not carried out any measurement to fix what area is illegal and which area, the construction is carried out illegally and therefore, it is



submitted that the judgment and decree passed by the learned Courts below in form of mandatory injunction to remove unauthorized construction are vague and inexecutable, moreover, it is in violation, basic principle that no relief can be granted, which are not pleaded in the suit.

4.4 Upon above submissions, learned advocate Mr. Desai prays to admit this second appeal by formulating aforesaid questions of law as substantial questions of law or any other questions, which this Court deems fit and proper.

5. Section 100 of the Code reads as under:-

“(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(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.]”

6. Perusal of provisions of law indicates that the High Court in order to admit second appeal is required to be satisfied that substantial questions of law is involved in the case and having so satisfied has to formulate that question. Existence of a substantial question of law is sine-qua-non for the exercise of jurisdiction under the provisions of section 100 of the Code. The second appeal does not lie on the ground of erroneous findings of facts based on appreciation of the relevant evidence. [See: **Union of India v. Ibrahim Uddin, (2012) 8 SCC 148**].

7. Recently, the Hon’ble Apex Court in case of **Gurbachan Singh (Dead) Through Lrs Versus Gurcharan Singh (Dead) Through Lrs And Others, 2023 (20) SCC 104**, explaining parameters of an appeal u/s 100 of the Code, in para 7, 14 and 15 held 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.

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 reappreciation 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. The scope of Second Appeal has been encompassed by the Supreme Court in the case of **Nazir Mohamed v. J. Kamala & Ors.**, reported in **AIR 2020 SC 4321**. The relevant para 37 thereof reads as under:-

"37. The principles relating to Section 100 CPC relevant for this case may be summarised thus :

(i) An inference of fact from the recitals or contents of a document is a question of fact, but the legal effect of the terms of a document is a question of law. Construction of a document, involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a



document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue.

(iii) A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the Court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iv) The general rule is, that High Court will not interfere with the concurrent findings of the Courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. A decision based on no evidence, does not refer only to cases where there is a total dearth of evidence, but also refers to case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

9. Keeping in mind the aforesaid ratio, at the outset, if we refer the status of the defendant No.6 in the suit, it shows that he joined as Pujari of the temple in the suit. During the



course of argument, a specific question is put to learned advocate Mr. Desai that as to whether the defendant No.6 being Pujari holds any proprietary right over the suit property or the land upon which the temple is constructed, learned advocate Mr. Desai answered that the defendant Pujari since was a disciple of Lord Ganesha and has been appointed as pujari by devotees and that he is performing puja of Lord Ganesh for more than 12 years, he has proprietary right over suit property as well as Ganesh temple. However, such submission has no legs to stand. Thus, it is established that status of the defendant Pujari is no more than Pujari. In this second appeal, the defendant No.6 being Pujari, instead of claiming any right in regards to his offering puja to Lord Ganesh, attempted to get proprietary right. He also seeks that his title may be perfected on the principle of adverse possession. The question also arose that whether the defendant Pujari can be said to be owner or occupier.

10. The Hon'ble Apex Court in case of **State Of Madhya Pradesh Versus Pujari Utthan Avam Kalyan Samiti, 2021 (10) SCC 222**, observed that temple land owned by deity pujari is neither owner or occupier or can be treated as Bhumiswami. In para 20, the Hon'ble Apex Court reads as under:-

"20. On the other hand, there are some judgments taking different view within the High Court including the one reported as Sadashiv Giri & Ors. v. Commissioner, Ujjain & Ors., 1985 RN 317 wherein an argument was raised that the temple is in possession of land. However, the Court held that how could the temple have such possession, therefore, it

was the Pujari who had been conferred the right to upkeep and perform puja by the then Jagirdars. The Pujaris were the Inamdars of the land in question and thus became Bhumiswami when the Code came into force on 02.10.1959. The said judgment is clearly erroneous as the presiding deity of the temple is the owner of the land attached to the temple. The Pujari is only to perform puja and to maintain the properties of the deity. In fact, the Constitution Bench in a judgment reported as M. Siddiq (Dead) Through Legal Representatives v. Mahant Suresh Das and Others, (2020) 1 SCC 1 held as under:

"511. A pujari is merely a servant or appointee of a shebait and gains no independent right as a shebait despite having conducted ceremonies over a period of time. All the evidence relied upon to support the claim of late Baba Abhiram Das is restricted to his having performed puja at the disputed premises and does not confer any shebaiti rights."

11. Thus, the pujari is merely a servant or appointee of a shebait and gains no independent right.

12. In view of above proposition, the defendant Pujari has no right to file second appeal challenging order directing removal of the unauthorized construction in form of temple. This finding has also relevancy to the argument that the defendant pujari has matured the title on the principle of adverse possession. This Court noticed growing tendency of claiming title on the basis of adverse possession by the litigant to avoid dispossession. However, in order to claim adverse possession, the litigant requires to plead and prove classic requirement being *nec vi, nec clan* and *nec precario* as held by the Hon'ble Apex Court in **Chatti Konati Rao Versus**



Palle Venkata Subba Rao, 2010 (14) SCC 316. In this judgment, the Hon'ble Apex Court held that person, who claims adverse possession is required to show; (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.

13. In **Kishundeo Rout Versus Govind Rao, 2025 INSC 956**, the Hon'ble Apex Court said that adverse possession cannot be decreed if not pleaded and it requires foundational facts established prior to filing of the suit. In order to claim maturity of title on the principle of adverse possession, the plaintiff to prove continuous and open possession and necessary for establishing title by adverse possession.

14. As held herein above, the defendant was just 'pujari', he has no proprietary right over the suit property, he is not holding any possession being notorious possession adverse to the title of the owner. He is not Bhumiswami, he is just servant of deity. A servant thus, has no right to claim that his possession over the suit property is on behalf of his master and matured into title on principle of adverse possession. Noticeable that on this issue, wherein the alleged trustee of the temple did not come forward to claim any proprietary title upon the land on which the temple is constructed. It is the



defendant pujari, who is claiming that construction is legal and valid and the suit is barred by law of limitation or he has perfected title on principle of adverse possession.

15. The learned trial Court fixed the issue as under:-

“1. Whether the plaintiff proves that he is the lawful possessor of the claimed property?

2. Whether the plaintiff proves that the defendant has entered the private plot no. 60,61, 62,63 of Res. No. 111/A/1/2 plus 1/3 of 3 within the limits of Vavdi Buzurg village, totaling 468 sq.m., despite the defendants not having the right to enter, and has built an authorized Ganesh temple on the public road on the entrance road of plot no. 60 to 63?

3. Whether the defendant proves that the plaintiff's claim is barred by the statute of limitations?

4. Whether the defendant No. 6 proves that the owner of the premises having been in possession of the claim premises for more than 12 years has become the occupier?

5. Whether the defendant proves that the plaintiff's claim is liable to be dismissed on the ground of non-joinder of necessary parties?

6. Is the plaintiff entitled to the relief sought in para-6 of the plaint?

7. What is an order and decree?”

16. Issue Nos.1 and 2 answered in “affirmative” and rest of the issues are answered in “negative” and accordingly, the learned trial Court has drawn the decree in favour of the plaintiff.



17. The learned appellate Court framed following point of determination:-

“(I) Whether the learned trial Court was correct in holding that, defendant No.6 has encroached upon the suit property?”

“(II) Whether the Ld. Trial Court was correct in holding that, the defendant No.6 remained unsuccessful to prove that, title to the suit property is perfected in his favor by adverse possession?”

“(III) Whether the Ld. Trial Court was correct in holding that, the plaintiff's suit is not hit by non-joinder of necessary parties as well as not barred by law of limitation?”

“(IV) Whether the impugned Judgment & decree passed by the Ld. Trial Court in Regular Civil Suit No.141/2011 on dtd.29-12-2023 is required to be interfered with?”

“(V) What order?”

18. The first three points of determination are answered in “affirmative”, fourth in “partly affirmative” and thereby, the learned appellate Court has passed final order confirming the judgment and decree passed by the learned trial Court.

19. It is unequivocally proved that the construction carried out in the form of temple is on public road approaching to the suit property is completely illegal and unauthorized.

20. The Hon’ble Apex Court in case of **Kaniz Ahmed Versus Sabuddin, 2025 INSC 610**, held that the Courts



must adopt a strict approach while dealing with cases of illegal construction. Para 7 thereof, reads as under:-

*“7. Thus, the Courts must adopt a strict approach while dealing with cases of illegal construction and should not readily engage themselves in judicial regularisation of buildings erected without requisite permissions of the competent authority. The need for maintaining such a firm stance emanates not only from inviolable duty cast upon the Courts to uphold the rule of law, rather such judicial restraint gains more force in order to facilitate the well-being of all concerned. The law ought not to come to rescue of those who flout its rigours as allowing the same might result in flourishing the culture of impunity. Put otherwise, if the law were to protect the ones who endeavour to disregard it, the same would lead to undermine the deterrent effect of laws, which is the cornerstone of a just and orderly society.[See: **Ashok Malhotra v. Municipal Corporation of Delhi, W.P. (c) No. 10233 of 2024** (Delhi High Court)].”*

21. The Hon’ble Apex Court in case of Union of India Vs. State of Gujarat and others, (2011) 14 SCC 62, as an interim measure, directed that no unauthorized construction shall be carried out or permitted in the name of temple, church, mosque, gurudwara etc. on public streets, public parks or other public places etc. In respect of unauthorized construction of religious nature which has already been taken place, the State Governments shall be directed to review the same on case-to-case basis and take appropriate steps as expeditiously as possible.

22. Looking to the aforeasaid aspects, according to this



Court, the defendant pujari has failed to make out any case to entertain second appeal. The appellant fails to establish involvement of any question of law much less substantial question of law. Challenge in this second appeal is made to the concurrent findings arrived at by the learned Courts below. This Court normally in second appeal should not interfere with the concurrent findings arrived at by the learned Courts below except in cases where it is established that the learned Courts below have taken a view which is contrary to settled provisions of law or has totally misread the evidence or perused the judgment on case of no evidence

23. In the aforesaid circumstances, the appeal fails to bring any substantial question of law. It is found to be 'third trial' on facts and 'one more dice in the gamble', as held by the Apex Court in the case of **Gurdev Kaur & Ors. v. Kaki & Ors.**, reported in **(2007) 1 SCC 546** of the Supreme Court, wherein it is observed that:-

"The legislative intention was very clear that legislature never wanted second appeal to become 'third trial on facts' or 'one more dice in the gamble'."

24. In the result, present second appeal fails and stands dismissed, at admission stage.

25. Consequently, CA does not survive and stands disposed of accordingly.

(J. C. DOSHI,J)

SHEKHAR P. BARVE