

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO. 37 OF 2011

Shaikh Aftab Ahmed S/o Shaikh
Aklakh Ahmed

Age : 46 Years, Occ: Business,
R/o. Delhi Gate, Aurangabad.

Through its GPA

Dr. Shaih Afzal Ahmed S/o. Aklakh
Ahmed,

Age : 45 Years, Occ: Medical
Practitioner, R/o. Delhi Gate,
Aurangabad.

...Applicant
(Org. Defendant No. 1)

Versus

1. Mazahar Khan S/o. Sher Khan,
Age : 55 Years, Occ: Business,
R/o. Delhi Gate, Aurangabad.
2. Kadar Khan S/o. Sher Khan,
Age : 65 Years, Occ: Business,
R/o. Azam Colony, Roshangate,
Aurangabad.
3. Osman Khan S/o Kadar Khan,
Age : 30 Years, Occ: Business,
R/o. As above.
4. Municipal Corporation,
Aurangabad.
5. The Chief Executive Officer,
Maharashtra State Board of
Wakf, Panchakki, Aurangabad.

...Respondents

Mr. M. H. Shaikh, Advocate for the Applicant.

Mr. A. S. Kulkarni, Advocate h/f Mr. A. A. Khan, for
Respondent Nos. 1 and 2.

Mr. N. E. Deshmukh, Advocate for Respondent No. 5.

CORAM : R.M. JOSHI, J.

RESERVED ON : 31st March, 2023
PRONOUNCED ON : 18th April, 2023

JUDGMENT

1. This Revision is filed under Section 115 of the Code of Civil Procedure (for short 'CPC') challenging order dated 14th January, 2011 passed by the Waqf Tribunal in Waqf Suit No. 54/2010. Parties are referred to by their nomenclature in the suit.

2. Plaintiffs filed suit for declaration that land Survey No. 1 admeasuring 2 R is Waqf Masjid and Graveyard and open area admeasuring 200X100 Sq. ft. is Waqf Property and consequential injunction. It is the case of the Plaintiffs that suit property is waqf property duly registered under the Waqf Act. It is their claim that Syed Shaikh was Mutawalli of the Waqf Property and gave the suit land on lease to Sher Khan for the period of 99 years and he was in possession thereof. Plaintiff claims themselves to be grandsons of Sher Khan. They further claim that they are running a motor garage in the suit property bearing CTS No. 11594. It is alleged that the Defendant No. 1 behind their back has got suit property mutated his name in

the city survey record and also obtained permission for construction on the basis of false documents. It is further alleged that the defendant no. 1 is obstructing possession of the plaintiffs over the suit property and also trying to encroach upon it. With these averments, prayers are made to declare that Survey No. 1 admeasuring 2R is Waqf Masjid and Graveyard and hence, Waqf Property. A declaration is also sought that CTS No. 11594 is waqf property. An order of permanent injunction is asked for restraining defendant no. 1 from encroaching upon suit property and carrying out construction therein. During the pendency of the suit, an application under Order XXXIX, Rule 1 of CPC was filed seeking interim relief against defendant no. 1 not to encroach upon suit property.

3. The defendant no. 1 filed written statement denying the contentions of the plaintiffs and had specifically stated that Survey No. 1 has not been referred to in the Government Gazette and also in city survey record as Waqf property. He relied upon the report of the Tehsildar dated 28.03.1999 and also fact about the allotment of 2A land to Sham Co-operative

Housing Society on 07.05.1969. According to him, the land is converted as non-agriculture land on the basis of lay out sanctioned in the year 1969. It is further claimed that plot no. 8 was allotted to Mr. R. D. Kulkarni and his membership was subsequently transferred in favour of Mohammed Hyder on 19.04.1987. It is also stated that the plaintiffs have concealed the previous proceeding between the parties i.e., R.C.A. No. 901 of 2005 and Special Civil Suit No. 304 of 2006, which is pending before learned C.J.S.D, Aurangabad. It is contended that there is an order of injunction in Spl.C.S. No. 304 of 2006 against the predecessor of the Plaintiffs restraining him from interfering into the possession of the defendant no. 1's predecessor in respect of the suit property and ignoring this fact the Tribunal by passing impugned order allowed application Exh. 5 and confirmed ad-interim relief, which cannot sustain.

4. Learned Counsel for the Plaintiffs has placed on record typed copy of the ad-interim order passed by the Tribunal wherein interim injunction was issued against defendant no. 1 restraining him from

interfering in the plaintiff's possession or carrying out construction or development activity on the suit property. This order came to be confirmed by the impugned order passed below Exh. 5.

5. Learned Counsel for the Defendant No. 1 submitted that the Tribunal has committed serious error in passing the impugned order which is contrary to the orders passed in Spl.C.S. No. 304 of 2006 wherein the possession of the defendant no. 1's predecessor was accepted and that injunction order was passed against the predecessor of Plaintiff restraining them from interfering the possession over the suit property. He further submitted that there is no *prima facie* material on record to hold that the suit property is a waqf property. He drew attention of this Court to the Government Gazette wherein there is no mention of the Survey No. 1 or CTS No. 11594 to be waqf property. Thus, according to him, the suit filed by the Plaintiff is an abuse of process of law and therefore, the impugned order deserves interference.

6. Learned Counsel for the Plaintiff states that entry no. 634 clearly indicates that the Masjid and

Graveyard are the waqf property, which falls within the land admeasuring 200X100 sq.ft. According to him, Tribunal was perfectly justified in holding suit property to be Waqf Property on the basis of description of the property. It is stated that whether a property is a Waqf Property, the said issue can only be decided by Waqf Tribunal and the jurisdiction of the Civil Court in this regard is barred, in view of provisions of Section 83 to 85 of the Waqf Act. He also stated that being person interested as defined in Section 3(k) of the Act plaintiffs are within their right to file suit in respect of waqf property. To support his submissions, reliance is placed on following judgments: Rashid Wali Beg Vs. Farid Pindari and Others, 2021 SCC OnLine SC 1003 (Right of Waqf Tribunal to decide any dispute, question or other matters relating to Waqf and Waqf property) & Gopinath Ganpatrao Pensalewar Vs. State of Maharashtra and Anr, 2006 (6) Bom.C.R. 6.

7. At the outset, this Court needs to record certain unusual facts noticed which are apparent from the material placed before this Court. The suit is

filed by the Plaintiff with the averments that the suit properties are waqf property. It is also claimed that they are in possession of the CTS No. 11594 and defendant no. 1 is obstructing their possession and business of motor garage. With these averments, suit is filed for seeking declaration that the suit properties are waqf property and injunction was also sought restraining the defendant no. 1 from encroaching upon the same and carrying out any constructions. Most shockingly, though no prayer was made in suit as well as Interim relief application, an order came to be passed restraining defendant no. 1 from interfering in the Plaintiffs possession over the suit property. Relief was never sought in the plaint or in the application under Order XXXIX, Rule 1 CPC was not only granted at ad-interim stage but Tribunal even while passing impugned order below Exh. 5 confirmed said ad-interim relief without taking into consideration the fact that there is no prayer made by the plaintiff to restrain defendant no. 1 from interfering into his possession over the suit property.

8. Be it by inadvertence or otherwise, it is clearly an abuse of law by the Plaintiffs of the provisions of the Waqf Act which are misused for serving their vested interest in the suit property. It was specifically pleaded by the defendant no. 1 about the suit being Spl.C.S. No. 304/2006 filed against the predecessor of the plaintiffs wherein injunction was granted by the C.J.S.D, which suit now is decreed by said Court. In view of interim injunction issued in said suit, there is a reason to believe that order to circumvent said order, present suit came to be filed under the guise of protecting waqf property and injunction is obtained by suppression of facts and misrepresentation from Tribunal.

9. No doubt, Section 3(k) of the act defines "person interested" and the definition is wide enough to cover any person who professes 'Islam' who can file the suit or proceeding in respect of waqf property but having regard to the object of Waqf Act to protect Waqf property, the moot question arises as to whether even such person can be permitted to abuse provision of Waqf Act, in order to protect his own vested interest. It

would, therefore, be duty of Tribunal to ascertain first as to whether the suit or proceeding is aimed at protection of property of Waqf or to sub-serve plaintiff interest. It is only after such satisfaction Tribunal shall proceed to entertain proceeding filed by individual, who is neither representing Waqf Board or Mutawalli.

10. In order to file any suit under the provisions of Waqf Act, the suit property must be a waqf property. *Prima facie* consideration of material on record shows that neither CTS No. 11594 nor Survey No. 1 has been included in the Government Gazette in the list of Waqf Property. It was, therefore, not open for the Tribunal to hold in absence of any material on record that the suit properties are waqf property. Perusal of Section 83 and 85 of Waqf Act, no doubt empowers Tribunal to decide the issue relating to waqf or waqf property but shall not have jurisdiction to deal with the property which is not waqf property notified in Government Gazette. Tribunal cannot assume inherent jurisdiction as the powers exercisable by Tribunal are well defined in the Act. A suit cannot be maintained in respect of property which is not a Waqf property. Section 6 of

Act, enables the Tribunal to decide issue where a property specified as Waqf property in the list of aquafs is waqf property or not and as per provisions of Section 7, decision of question by Tribunal is final. Section 83 also states about Tribunal constituted under Act, to determine any dispute, question or other matter relating to a Waqf or Waqf property. The scheme of Waqf Act therefore suggests that where a property is included in list of aquafs, Tribunal shall have exclusive authority to decide any issue pertaining to the same. Tribunal, however, cannot assume any jurisdiction to entertain a dispute in respect of property which is not in the list of aquafs.

11. In the instant case, defendant no. 1 has specifically claimed that suit property is not waqf property. The documentary evidence placed on record by the plaintiffs does not show that Survey No. 1 or CTS No. 11594 are in the list of aquafs. The jurisdiction given by Tribunal to hold that suit property is waqf property on the ground of description of the land admeasuring 200X100 sq.ft is also not acceptable because suit properties mentioned in plaint and

reliefs sought are different than this land. The suit property is stated to be Survey No. 1 and CTS No. 11594 and there is not evidence to show that they are in the list of aquafs but still injunction is granted in respect of those properties. Tribunal, therefore, proceeds to assume jurisdiction in respect of said properties and grants injunction against defendant, which clearly is transgression of jurisdiction of Tribunal while passing impugned order.

12. This Court cannot resist to observe that the Tribunal with predetermined mind has passed impugned order. Perusal of impugned order shows that it starts with general criticism against bureaucrats and politician. Tribunal also makes observations against Sham Co-operative Housing Society Ltd and its members and castigates them in utter disregard to principle of *Audi Alteram Partem*. In fact for the purpose of deciding the prayer for injunction the paramount consideration for the Tribunal ought to have been to see as to whether the plaintiff *prima facie* has established his title and possession over the suit property. Most surprisingly, in order Tribunal even does not consider this to be an

issue and instead of considering case made out by plaintiffs, erroneously proceeds to cast burden on defendant no. 1 to show that he has title and possession over the suit property. Tribunal has ignored the fact that there was an order passed by competent Court of law restraining predecessor of the plaintiffs herein from interfering into possession of the predecessor of the defendant no. 1 in respect of CTS No. 11594.

13. The impugned order being passed in total disregard to principles of natural justice and in ignorance of the facts and judicial order on record and being based on the surmises and conjectures cannot sustain. The impugned order is set aside with cost. Consequently, application Exh. 5 in Waqf Suit No. 54/2010 stands dismissed with costs.

(R.M. JOSHI, J.)

Malani