

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

CIVIL REVN. APPLN. NO.: 26 OF 2012

Tukaram S/o Dashrath Hiwre,
Age: 70 years, Occ: Agri.,
R/o: Village Wadigodari,
Post Wadigodari, Near Ganesh
Medical Store, Taluka Ambad,
District Jalna.

... **PETITIONER**
[ORIG. DEFT. NO.1]

VERSUS

1. Sayyed Zahurul-Haqu S/o Sayyed
Asadullah Biyabani,
Age: 76 years, Occ: Agri.,
R/o: Opposite Tahsil Office, Ambad,
Taluka Ambad, District: Jalna.
2. The Chief Executive Officer,
Maharashtra State Board of Wakf,
Office at Panchakki,

... **RESPONDENTS**
[NO.1 ORIG. PLAINTIFF
NO.2 ORIG. DEFT. NO.2]

Mr. Kasliwal Ajit D., Advocate for the Petitioner.
Mr. P. V. Mandlik, Advocate h/f Mr. Amol Gandhi, Advocate for
Respondent No.1.
Mr. Y. B. Pathan, Advocate for Respondent No.2.

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CORAM:-
DATED:-

T. V. NALAWADE, J.
15th DECEMBER, 2015.

JUDGMENT:

1. The proceeding is filed against judgment and order of

Wakf Suit No.104 of 2009 which was pending before *Wakf* Tribunal, Aurangabad. The suit filed by the present respondent, Sayyed Zahurul-Haqu in respect of the property bearing Survey No.22 (Gat No.98), admeasuring 26 Acres situated at village Saundalgaon, Tahsil Ambad, District Jalna is decreed for relief of possession. It is the case of Respondent, plaintiff that this property belongs to *Dargah Peer Saheb*, it is *Wakf* Property. Both the sides are heard.

2. The aforesaid property is registered in the list of *Wakfs* published by the State Government in the year 1975. It is the case of plaintiff that he is *Mutawalli* and so he is entitled to take possession of the property. It is the case of plaintiff that his predecessor Sayyed Abdullah was *Mutawalli* and succession came to be granted in his favour on 7th December, 1988 under the provisions of *Atiyat* Act.

3. It is the case of plaintiff that, since long in the revenue record also the property is shown to be as the property of aforesaid *Dargah*. It is contended that such entries are there in *Khasra Patrak*, *Pahani Patrak*, record of consolidation and 7/12 extracts. It is the case of plaintiff that defendant Tukaram Hiwre, present appellant is in

possession of this property. His possession is illegal. It is contended that by joining hands with revenue authorities Tukaram and his predecessors had got entered their names in revenue record, behind the back of *Wakf* institution and *Mutawalli* and those entries are not correct and they are not binding on the plaintiff. The plaintiff contended that he had demanded the possession from defendant on 5th November, 2008 but the defendant flatly refused to hand over possession.

4. Defendant No.1, Tukaram contested the suit by filing written statement. Amongst other contentions, following main contentions were made by the defendant:

- (i) The plaintiff is not *Mutawalli*.
- (ii) Sayyed Abdullah Kadar Biyani (this person is said to be predecessor of plaintiff in the plaint) gave possession of the suit property for cultivation to the forefathers of defendant. This property was *Service Inam* land given to *Dargah* and on the condition of rendering services to *Dargah* the land was given in possession of forefathers of defendant on 30th February, 1928.
- (iii) The possession of the suit property was firstly with Balaji, grand father of defendant, then with Dashrath,

father of defendant and after the death of Dashrath the possession is with defendant and it is since October, 1974.

(iv) The name of predecessor of defendant was entered as protected tenant of this land in the revenue record and after the death of father even the name of defendant is entered as protected tenant.

(v) The name of grand father of defendant was entered in the revenue record since prior to 1954 and since then the defendant and his predecessors have been in continuous possession of the land and the possession was shown in *Namuna* No.9 of village, *Khasra Patrak*, *Pahani Patrak* and record of consoliation of lands.

(vi) The defendant has been rendering services to *Dargah*.

(vii) The defendant was not party to inquiry proceeding which was started under *Atiyat Act* by plaintiff for getting succession certificate and so that order is not binding on defendant, and

(viii) That the possession of the defendant is adverse possession and the suit filed by *Mutawalli* is not within limitation. The defendant has become owner of the suit property due to law of limitation.

5. The issues were framed on the basis of aforesaid pleadings. The Tribunal has held that, on the basis of the case of defendant, it was not possible for defendant to prove that he was tenant. It is also observed that due to the nature of defences taken by defendant, it is not possible for him to prove that he has become owner due to adverse possession. The Tribunal has held that the possession of the defendant is illegal and the suit is decreed.

6. Both the sides have given evidence. The evidence of plaintiff is as per aforesaid contentions. The defendant examined many witnesses but they are on the point like the case of defendant that he has been rendering services to *Dargah* and for that he has been using the income of the suit land.

7. The record of the Tribunal and submissions made show that, it was submitted for defendant that he was not disputing that plaintiff was *Inamdar, Mutawalli* of the aforesaid institution. Further, there is succession certificate at Exhibit-58 which shows that after the death of Sayyed Abdullah Syed Kadar Biyani, the name of plaintiff was entered as *Inamdar* of in all 6 lands belonging to

aforesaid *Dargah*. Survey No.22, the suit property, is also shown in the succession certificate as *Service Inam* land. The order shows that the record like 2 *Muntaqabs* of year 1291 and 1292 Fasli were produced to prove the case. The order was made on 7th December, 1988. As the defendant has not seriously disputed that plaintiff is *Inamdar*, *Mutawalli* on the basis of *Muntaqab* this point needs no more discussion.

8. There is other record which is relevant for the present matter and it is as under:

(i) *Khasra Pahani Patrak* Exhibit-59 for the year 1954-55 of Survey No. 22. This document shows that Survey No.22 was shown as Service Inam land and it was the property of *Dargah Peer Saheb*. The *Mutawalli* of the institution was Asadullah Abdul Kadar Saheb. Dashrath, predecessor in title of defendant was shown in possession.

(ii) *Pahani Patrak* for the year 1959-60. In this document also the name of *Mutawalli*, the owner is mentioned and name of Dashrath was shown as person in possession.

(iii) 7/12 extracts for the years 1960 to 1965-66. For this period, both Dashrath and the owner were shown in crop cultivation column. The name of *Mutawalli* was Asadullah

Abdul Kadar. From the year 1966-67 to 1968-69 the name of only Dashrath was shown in crop cultivation column. From the year 1991-92 till the year 2006-07 the name of defendant was shown in the crop cultivation column.

(iv) Receipts of revenue showing that the defendant paid the revenue of the land and they are starting from the year 1968.

(v) *Lawani Patrak* of the year 1974 Exhibit-84 showing that Dasrath Hiwre, father of defendant was rendering services to *Dargah*. However, on this document there is endorsement of the authority that it was noticed that nobody was actually rendering services. Proposal was given to take over the possession and keep the land under supervision of the Government.

(vi) In the 7/12 extracts right from the year 1960 to 1998 in other rights column the name of Dashrath was shown as tenant.

(vii) In the record of 7/12 extract from the year 1988 to the year 2000 the name of Dashrath was not shown as tenant. First time the name of plaintiff, *Mutawalli* was shown in other rights column.

(viii) From the year 2000 in 7/12 extract the name of

Tukaram, defendant came to be shown as tenant in other rights column.

(ix) The receipts showing that plaintiff, *Mutawalli* paid funds in *Wakf* Fund in the year 2003 and 2010.

(x) Copy of Government Gazette dated 27th September, 1975 showing the suit property in the list of *Wakf*. This list was published as provided in *Wakf* Act, 1954. To the suit property, the provisions of this Act were applicable.

9. In view of the voluminous record available which was not challenged and the rival pleadings the Court can presume following things:

(i) Defendant is not denying that the suit property belongs to *Dargah Peer Saheb*.

(ii) The defendant is also not denying that predecessor in title of plaintiff was *Mutawalli* and plaintiff is *Mutawall* of this *Dargah*.

(iii) Defendant is contending that he came in possession of the suit property as *Mutawalli* gave possession to him. So, his possession is under *Mutawalli* and his possession is not independent possession as against *Dargah*.

10. Defendant came with various defences. First, he tried to contend that he has become tenant and he also tried to contend that the possession was given to him for cultivation and the income was to be used for rendering services to *Dargah* i.e. he was working under *Mutawalli*. A *Mutawalli* can never become a tenant of the land of the religious institution. His possession is like a trustee and so it can be said that the defendant was admitting that his possession is just like the trustee. Section 10 of Indian Limitation Act is relevant in this regard.

11. A submission was made by learned counsel for the Petitioner that matter ought to have been referred to Tenancy Court for deciding the dispute with regard to tenancy rights. It appears that similar submission was made before Tribunal and even prayer was made to frame preliminary issue on this point. This issue was taken up to High Court but defendant failed to take a decision that there is need of framing such specific issue and referring the issue to tenancy Court. It is already observed that he could not have become tenant. Further, in Hyderabad Tenancy Act (hereinafter referred to as Tenancy Act) there

is specific provision, section 102-A showing that Tenancy Act is not applicable to the properties of present nature. Even if the Tenancy Act is considered, it can be said that there is no record whatsoever with the defendant to show that he was inducted as a tenant by *Mutawalli*. There is not a single document to show that defendant paid rent, *Khand* to *Mutawalli*. There is no record like amount collected by the defendant and amounts spent on the aforesaid institution. Though, some witnesses are examined and some record is produced to show that the persons of the village used to spend money to sacrifice an animal at the time of *Urs* function, this record cannot be considered as record of accounts maintained by the defendant as manager. He never paid any amount in *Wakf* fund. Only because he was in possession, he has been in possession and the entries of aforesaid nature are there, it cannot be inferred that his possession is that of a tenant under the Tenancy Act. In that regard, the definition of "*Protected tenant*" can be considered. The record starts from the year 1954 but for possession purpose, and the entry of "tenant" was made in the year 1960. There is no record of inquiry in that regard. The endorsement made in

Lawani Patrak show that nobody was paying attention to *Dargah* and that there is probability that the *Mutawalli* was also not paying attention and due to those circumstances such entry was made firstly in favour of Dashrath and then in favour of defendant. In absence of any order in that regard under the Act, it is not possible to believe that the land was given to predecessor in title of defendant to create relationship of landlord-tenant. Further, Wakf Act, 1954 came in force in the same year and the first entry as tenant was of year 1960 and so in view of the bar of section 102A of the Tenancy Act it was not possible to make such inquiry and make the entry.

12. In the present proceeding, first time the learned counsel for the defendant advanced argument that due to law of limitation the defendant has become owner. In view of the aforesaid discussion and submissions made before Tribunal this stand cannot be considered and decision cannot be given as the scope of the present proceeding is limited. Further, it can be said that in view of the aforesaid nature of defence taken by the defendant, it was not possible for him to show that his possession had become

adverse. Learned counsel for petitioner made another submission that if defendant is an encroacher then the procedure under section 54 of *Wakf* Act ought to have been followed and as that kind of procedure has not been followed, the Tribunal does not get jurisdiction to decide the suit. This proposition is also not acceptable and the law developed on this point is being quoted at proper place. The aforesaid discussion shows that there was virtually nothing with defendant to defend the suit.

13. The learned counsel for the petitioner placed reliance on many reported cases. He submitted that there is presumptive value to the entries made in revenue record and for that he placed reliance on the case reported as ***AIR 1974 S.C. 1178 [Shikharchand Jain V/s Digamber Jain Praband Karini Sabha and others]***. It is true that such record has presumptive value unless contrary is shown. This Court has already observed that the record is sufficient to infer that defendant and his predecessors were in possession but from the record inference cannot be drawn that their possession was of a tenant. In the same case, the Apex Court has laid down that the burden of

proving adverse possession is heavy on one who alleges that his possession was adverse and he became owner.

14. In the case reported as **2014 (5) ALL.MR. 971 (S.C.) [Fassela M. V/s Munnerul Islam Madrasa Committee & Anr.]** the Apex Court held that the suit for eviction of tenant can lie in Civil Court and in view of the provisions of Wakf Act the Tribunal has no jurisdiction. It was house property. Present property is an agricultural land and there is provision like Section 102-A of Tenant Act creating bar to the claim of tenancy. In such cases, the special enactment also need to be considered. Thus, the observations made by the Apex Court are of no use to the defendant, petitioner. The dispute from present matter is covered under *Wakf* Act, 1995.

15. A case reported as **1997 (4) ALL MR 303 [basharatulla son of Syed Asraf Mohiuddin V/s The State of Maharashtra & Ors.] - [Bombay High Court, Aurangabad Bench]** was cited. On the basis of this case, the learned counsel for the Petitioner, defendant submitted that the benefit of Government Circulars dated 9th August, 1955 and 3rd November, 1970 can be given to defendant

as they were issued to give protection to persons like present defendant. This Court has carefully gone through the observations made by the Division Bench of this Court. The observations are not to that effect. In that matter, the land was taken over by the Government for supervision and it was leased out on yearly basis. The claim was made by *Inamdar, Mutawalli* that he was entitled to get *Lawani* amount pertaining to the years 1964-70. Then one Arjun had claimed that he was tenant and he was entitled to protection. The Division Bench considered the provision of section 102-A of Tenancy Act and held that in view of this provision such service *Inam* lands are exempted from consideration of Tenancy Act. The Division Bench further held that the aforesaid circulars were issued for giving benefit for that current year only. It was a matter pending before Sub Division Officer, the Revenue Authority to consider the aforesaid point. Thus, the Division Bench has not observed that under the two circulars the possession of person claiming tenancy rights in respect of *Wakf* property needs to be protected forever. Thus, the reported case is of no use to the defendant.

16. Reliance was placed on a case reported as **1976 BCI (O) 55 [Nagnathappa Tatya Halge V/s Shrinivas badrinarayan Mundada and another] - [Bombay High Court]**. In this case, the point involved was altogether different. It was a case in which there was a dispute about occupancy rights. There was a claim of *Inamdar* that he was entitled to get occupancy rights and there was a claim of sub-tenant that he was entitled to get occupancy rights. This Court held that for the purpose of *Inam Abolition Act* it is necessary to ascertain as to who was lawfully in possession on the material date viz. 1st July, 1960. On that basis, the matter was decided. Thus, point involved was altogether different.

17. The learned counsel for the Petitioner then placed reliance on a case reported as **2008 (5) ALL. MR 462 (SC) [T. Kaliamurthi & Anr. V/s Five Gori Thaikal Wakf & Ors.]**. This case is on the point of limitation. One transaction like sale deed was made in favour of a party in possession and *Wakf* institution had filed suit for possession against that person. The said person had claimed that it was a private property of one Syed Kasim

Saheb and after the death of Syed Kasim the property was sold to him by his legal representatives under sale deed and so the suit was barred by limitation under section 134-B of the Limitation Act, 1908 [hereinafter referred to as the Limitation Act]. The question before the Court was about the application of the provisions of the Limitation Act, 1963 and subsequent Acts. The period for getting back the property lost by *Wakf* institution was fixed in the past and that period was then changed first time in the Amendment of 1984 and then in *Wakf* Act of 1995 (Section 107) a provision was made that Limitation Act is not applicable to *Wakf* properties. Before coming into force of the subsequent limitation Act the limitation period had expired. In view of that fact and the provisions of Limitation Act which was in existence in the past, the Apex Court held that the right itself had extinguished in view of section 27 of the Limitation Act, 1963 and it was held that said right cannot be reviewed by Section 107 of the *Wakf* Act, 1995. Thus, many other points like Limitation Act, challenging the sale deed etc. were involved. Present matter is altogether of different nature and so this case is of no help to the defendant. In view of Section 10 of Limitation Act the

person like defendant, who has claimed that he was holding the property for trust, cannot use the provisions of Limitation Act.

18. The learned counsel for the plaintiff placed reliance on some reported cases. In the case reported as **1999 (1) Mah.L.J. 321 [Shriram Mandir Sansthan @ Shri Ram Sansthan Pusda V/s Vatsalabai and others]** some provisions of Bombay Tenancy Act were considered by Supreme Court and it was held that when the property belongs to religious trust, like present one, the tenancy right is not inheritable. The learned counsel for plaintiff submitted that even if it is presumed that Dashrat was tenant, in view of the position of law laid down by Supreme Court the defendant did not inherit the rights of tenancy and so due to that reason also there is no such defence available to defendant. This Court holds that it is not necessary to go into detail on this point. The Act applicable for this region is Hyderabad Tenancy Act, 1950. Further, in Tenancy Act applicable to this area there is specific provision like section 102-A. There was no question of considering such defence of the defendant.

19. The learned counsel for plaintiff placed reliance on the case reported as **2010 (14) SCC 588 [Board of Wakf, West Bengal V/s Anis Fatma Begum & Anr.]**.

He submitted that even when there is no order made by authority under Wakf Act suit can be filed before Wakf Tribunal. He took this Court through the observations made by the Apex Court in para 16 and they are as under:-

“16. We may further clarify that the party can approach the Wakf Tribunal, even if no order has been passed under the Act, against which he/ she is aggrieved. it may be mentioned that Section 83 (1) and 84 of the Act do not confine the jurisdiction of the Wakf Tribunal to the determination of the correctness or otherwise of an order passed under the Act. No doubt Section 83 (2) refers to the orders passed under the Act, but, in our opinion, Sections 83 (1) and 84 of the Act are independent provisions, and they do not require an order to be passed under the Act before invoking the jurisdiction of the Wakf Tribunal. Hence, it cannot be said that a party can approach the Wakf Tribunal only against an order passed under the Act. In our opinion, even if no order has been passed under the Act, the party can approach the Wakf Tribunal for the determination of any dispute, question or other matters relating to a Wakf or Wakf property, as the plain language of

Sections 83 (1) and 84 indicates.”

20. There cannot be any dispute over this proposition. Further, in the present matter, the property is shown in the list of *Wakfs* and it is a suit for possession against the encroacher. The provision of section 54 of the *Wakf* Act can be used against encroacher but that is enabling provision and that does not take away the jurisdiction of Tribunal.

21. The learned counsel for the plaintiff placed reliance on one case decided by this Court like ***C.R.A. No.127 of 2014 [Ishtaque Ali Sayyad Ali V/s Maharashtra State Wakf Board and another]*** decided on 17th February, 2015. In this case, the effect of amendment made to Section 83 of *Wakf* Act, 1995 is discussed by this Court. Due to this amendment made in the year 2013 Tribunal can decide matters of eviction of tenant also. The present matter was decided prior to coming into force the Act of 2013. In view of this circumstance, this decision cannot be referred in the present matter.

22. The discussion made above shows that the Tribunal has considered the rival cases and entire material made

available to it. The decision cannot be called as perverse. This Court holds that it is not possible to interfere in the decision of the Tribunal.

23. In the result, Revision stands dismissed.

24. Learned counsel for the Petitioner requested for continuation of interim relief as he wants to challenge the decision of this Court. Interim relief granted earlier is continued in the same terms for six weeks.

[T. V. NALAWADE, J.]

Dated:15/12/2015.
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