

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

CIVIL REVISION APPLICATION NO.29 OF 2009 WITH
CIVIL APPLICATION NO.13384 OF 2009

1. Mohd. Moinuddin s/o Abdul Aziz,
Age 70 years, Occu. Nil,
R/o Kadrabadplot, Taluka and
District Parbhani.
 2. Mohd. Abdul Kadar s/o Mohd. Moinuddin
Age 34 years, Occu. Service,
R/o Kadrabadplot, Taluka and
District Parbhani.
- ... APPLICANTS
(Original Plaintiffs)

VERSUS

1. The Deputy Collector
(Atiyat), Parbhani,
Railway Station Road,
Near Nagar Palika, Parbhani
Taluka and District Parbhani.
 2. Maharashtra State Wakf Board,
through C.E.O., Wakf Board,
Panchakki, Aurangabad.
- ... RESPONDENTS
(Original Defendants)

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Shri H.I. Pathan, Advocate for applicants
Shri D.V. Tele, A.G.P. for respondent No.1 / State
Shri Y.B. Pathan, Advocate for respondent No.2

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CORAM: A.I.S. CHEEMA, J.

DATED: 22nd January, 2015.

Date of reserving judgment : 19/1/2015
Date of pronouncing judgment : 22/1/2015

JUDGMENT :

1. This revision application has been filed by the original
plaintiff against common order passed below Exhibits 12 and 17

on 13.3.2009, by the Waqf Tribunal in Suit No.83/2008 filed by the applicants. By the impugned order, the Maharashtra Waqf Tribunal rejected the plaint under Order VII Rule 11(d) of the Code of Civil Procedure, 1908 (C.P.C. for short) in the context of Section 89 of the Waqf Act, 1995 (hereinafter referred to as the "Waqf Act" for short).

2. The applicants – plaintiffs filed the suit for perpetual injunction to restrain defendant No.1 Deputy Collector (Atiyat), Parbhani from taking possession of the property in dispute, situate at village Karegaon, Taluka and District Parbhani. Maharashtra State Waqf Board, through Chief Executive Officer was arrayed as defendant No.2. The suit referred to the property concerned and disputes. It was pleaded that succession proceedings were pending before the Deputy Collector (Atiyat), Parbhani from 2004, but suddenly on 30.7.2007 and 12.4.2008, the Deputy Collector issued notices for taking possession of the suit land relying on internal communication of Mandal Officer to Tahsildar. The plaintiff issued notices to both defendants on 2.9.2008, calling upon them not to take further action to take possession. The suit was filed before statutory period seeking permission to present the suit as the Deputy Collector was taking course for taking over possession by issuing notice after notice. The suit claimed quashing of notice dated 12.4.2008.

3. Copy of the notice dated 12.4.2008 shows that it was issued in the context of letter dated 1.3.2008 from Chief Executive Officer, Maharashtra State Waqf Board. In the suit, respondent No.2 Waqf Board filed application Exhibits 12 and 17 raising ground that under Order VII Rule 11(d) of C.P.C. read with section 89 of the Waqf Act, the plaint deserved to be rejected as no notice under section 89 of the Waqf Act has been issued.

The plaintiffs took time, but did not file say. The Waqf Tribunal passed impugned order observing that the notice was issued on 2.9.2008 and it was served on the Waqf Tribunal on 11.9.2008 and suit came to be filed on 8.10.2008. It found that the suit was filed before two months as required by notice under Section 89 and so, passed orders rejecting the plaint.

4. Against the impugned order, present revision is filed claiming that the main prayer of the suit was against the Deputy Collector (defendant No.1), who was trying to take the possession. In any case, the whole plaint could not have been rejected as it was maintainable at least against defendant No.1. The impugned order was liable to be quashed and set aside and suit should be restored to original position.

5. Respondent No.2 has filed affidavit-in-reply opposing the revision application. It relies on Section 89 of the Waqf Act to say that, without the compliance of notice under Section 89, the suit cannot be instituted.

6. I have heard counsel for both sides. The learned counsel for the applicants – original plaintiffs submitted that, the suit was for injunction as there was urgency to protect possession which the Deputy Collector was threatening to take by sending notice after notice. The prayer of the suit was to quash the letter dated 12.4.2008 of the Deputy Collector. The letter was issued by the Deputy Collector on the basis of communication from the Chief Executive Officer of the Waqf Board. According to counsel, the Chief Executive Officer had obviously moved under Section 54 of the Waqf Act to recover possession claiming encroachment. It is argued that, the suit challenged the subsequent acts of the Deputy Collector, which were under Section 55 of the Waqf Act which were on the basis of provisions of Sections 54 and 55 as they stood before the amendments of 2013.

7. Learned counsel for the Waqf Board (respondent No.2) did not dispute that the action of the Deputy Collector was

in consequence of the Chief Executive Officer invoking Section 54 of the Waqf Act as it stood before the amendment of 2013. He submitted that, the Deputy Collector was acting in furtherance of provisions of Section 55 of the Waqf Act. However, according to him, if the plaintiff filed suit against the Waqf Board, notice under Section 89 was compulsory and there had to be notice of period of two months and the suit filed before lapse of two months was liable to be rejected and according to him, the suit was rightly rejected by the Waqf Tribunal. Reliance is placed on the case of Syed Abdul Razzak Aminuddin & anr. Vs. Maharashtra State Board of Wakfs & ors., reported in 2009 (5) ALL MR 818. It is argued that, after the impugned order, the plaintiff has filed yet another Suit No.99/2009 for declaration.

8. When the matter was argued on 16.1.2015, it was deferred to consider the implications of Rule 50(3) of the Maharashtra Waqf Rules, 2003. On the adjourned date of 19.1.2015, learned counsel for respondent No.2 submitted that, Rule 50(3) permits the person aggrieved, by order of Chief Executive Officer under Section 54(3), to institute suit in Tribunal within 60 days from the date of the said order. According to him, in the present matter, there was no difficulty as the suit was filed against the Deputy Collector and the Board and so, the counsel reiterated that, Section 89 was required to be complied with.

9. If the judgment in the matter of "Syed Abdul Razzak" (supra) relied on by the counsel for respondent No.2 Waqf Board is perused, the observations in para 15 of the judgment show that, in that matter the dispute related to resolution dated 28.4.2005 passed in the meeting of Maharashtra State Board of Waqfs and thus, it was found that the resolution was of the Board and not resolution passed by the Chief Executive Officer. Accordingly, it was held that, notice under section 89 of the Waqf Act was mandatory and required to be complied to institute suit against the Board in respect of the said acts.

10. In the present matter, the facts are different. Here it is not in dispute that the Deputy Collector was proceeding as per section 55 in view of communication from the Chief Executive Officer under Section 54(3), (as it then stood). The basic act complained of is the act of the Chief Executive Officer. The suit was essentially to restrain the Deputy Collector from proceeding further with taking of possession. Even if reference was to be made to Section 89 of the Waqf Act. Section 89 of the Waqf Act reads as under :

"89. Notice of suits by parties against Board.--
No suit shall be instituted against the Board in respect of any act purporting to be done by it in pursuance of this Act or of any rules made thereunder, until the expiration of two months next after notice in writing has been delivered to, or left at,

the office of the Board, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.”

(emphasis supplied)

11. Careful reading of the Section makes it clear that if the suit is in respect of any act purporting to be done by Waqf Board in pursuance of the Act or Rules made thereunder, notice as mentioned would be mandatory. Here, however, the act challenged before the Tribunal was of defendant No.1 Deputy Collector in pursuance of the communication from Chief Executive Officer. Under Section 54 of the Waqf Act, exclusive powers are exercised by the Chief Executive Officer and not by the Waqf Board. In the matter of M/s Nirmal Associates Vs. Maharashtra Wakf Board (Civil Revision Application No.11/2010) vide judgment passed today by this Court, I have found that under the Waqf Act, the Chief Executive Officer and Waqf Board operate in separate spheres under the various provisions.

12. Section 92 of the Waqf Act makes legislative intent and desire clear that in matters relating to Waqf or Waqf property, it would be desirable that Waqf Board should be party. Thus, even if the Waqf Board through Chief Executive Officer had been arrayed as defendant by plaintiff, the suit was not “in respect of any act purporting to be done” by the Waqf Board.

The act questioned was of the Chief Executive Officer which defendant No.1 was trying to implement.

13. For the above reasons, I do not find that the impugned order is correct, legal or proper. The same cannot be maintained.

14. The revision application is allowed with costs. The impugned order dated 13.3.2009, passed by the Maharashtra Waqf Tribunal below exhibits 12 and 17 in Suit No.83/2008 is quashed and set aside. The suit is restored to its original number. The same be further tried in accordance with law.

15. In view of disposal of Civil Revision Application, Civil Application No.13384/2009 does not survive and same stands disposed of.

(A.I.S. CHEEMA, J.)