

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

...

905 CIVIL REVISION APPLICATION NO. 155 OF 2015

GAFFAR KHAN ASLAM KHAN PATHAN AND OTHERS

VERSUS

**THE CHIEF EXECUTIVE OFFICER OF MAHARASHTRA STATE BOARD
OF WAKFS AND ANOTHER**

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Advocate for Applicant : Mr. A. D. Kasliwal

Advocate for Respondents : Mr. S. S.Kazi,

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CORAM : S. V. GANGAPURWALA, J.

DATE : 29th September, 2015

PER COURT :

1. The present revision is filed against the order rejecting application Exh. 152 in Wakf Suit No.130/2009 filed by the present applicant, wherein the applicant prayed to discard the evidence/documents, which according to the applicant are not pleaded.

2. Mr. Kasliwal, learned counsel for the applicant, submits that the respondents cannot be allowed to adduce evidence in respect of the facts which are not pleaded in the plaint. According to the learned counsel, this fundamental aspect has not been considered by the tribunal while rejecting the application. The learned counsel further submits that

the tribunal has to decide the said objection then and there. According to the learned counsel, the tribunal failed to exercise the jurisdiction vested in it.

3. Mr. Kazi, the learned counsel submits that the evidence is not required to be pleaded. The facts pleaded can be proved by way of evidence. Even otherwise, the wakf tribunal, in the impugned order, has observed that whether there is variance in the pleadings and proof is required to be considered at the time of final hearing of the suit, after completion of evidence of the parties.

4. I have considered the submissions canvassed by the respective parties.

5. The objection of the applicant is that evidence which is led and not pleaded is to be discarded. The tribunal, vide the impugned order, has not concluded as to whether the evidence led is part of pleading, whether the said evidence is to be discarded or accepted. The said point has been kept open to be decided at the time of final hearing of the suit. The

court, in the impugned order has observed as under:

"Whether there is variance in the pleadings and proof is required to be considered at the time of final hearing of the suit after completion of evidence of the parties. At this stage, it can not be said that particular document is required to be discarded as the same is not pleaded in the plaint. Therefore, I do not find substance in both the applications and same are liable to be rejected."

6. Perusal of the aforesaid order itself manifests that no error has been committed by the wakf tribunal while passing the impugned order. The said recourse adopted is perfectly justifiable, more particularly in view of the judgment of full bench of this Court in case of **Hemendra Rasiklal Ghia Vs. Subodh Mody** reported in 2008 (6) All MR 352.

7. In light of the fact that the said objection as is raised under section 152 is to be considered at the final trial of the suit, I am not inclined to entertain the present revision.

8. Mr.Kasliwal, the learned counsel for the

applicant, at this stage submits that the applicant had sought time to file the revision and in the meantime, no cross order has been passed against the applicant. The applicant be allowed to cross examine the translator DW-2. Mr. Kazi, the learned counsel opposes the said request and submits that the applicant, on his own volition, failed to cross examine the said witness.

9. Considering the fact that the applicant had sought to exhaust the remedy of revision, I am inclined to grant opportunity to the applicant to cross examine DW-2. The tribunal shall permit the applicant to cross examine DW-2 on the next date before it.

10. Civil Revision Application is accordingly disposed of. No costs.

(S. V. GANGAPURWALA, J.)

JPC