

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

CRIMINAL WRIT PETITION NO. 829 OF 2009

Mohd. Khaled S/o Mohd Taher,
Age: 57 yrs, Occ. Business and Mutawalli,
R/o. Near Old Power House, M. K. Showroom,
Parbhani, Tq. & Dist. Parbhani.

... **PETITIONER**

VERSUS

- 1] The State of Maharashtra,
through Police Inspector,
Police Station Nanalpeth,
Parbhani, Dist. Parbhani.
- 2] The Superintendent of Police,
District Parbhani.
- 3] Shri. Faiyaz Baig S/o Ahmedulla Baig,
Age: 60 yrs, Occ. A.S.I. Police Station
Nanalpeth Parbhani, Tq & Dist. Parbhani,
At present R/o. Yusufiya Colony, Parbhani.
- 4] Shaikh Naseeb S/o Abdul Majeed,
Aged: 77 yrs. Occ.
R/o. Near Central Jail Road, Parbhani,
Tq. & Dist. Parbhani.
- 5] Shaikh Majeed alias Babu S/o Shaikh Naseeb,
Age: 41 yrs, Occ. –
R/o. as above.
- 6] Shaikh Mazhar S/o Shaikh Naseeb,
Age: 31 yrs, Occ. And R/o. as above.
- 7] Shaikh Mujahed S/o Shaikh Naseeb,
Age: 29 yrs, Occ. And R/o. as above.

- 8] Shaikh Anwar S/o Shaikh Naseeb,
Age: 26 yrs, Occ. & R/o. as above.
- 9] Shaikh Azhar S/o Shaikh Naseeb,
Age: 23 yrs, Occ. & R/o. as above.
- 10] Shaikh Taher S/o Shaikh Imam @ Nizam,
Age: 41 years, Occ. & R/o. as above.
- 11] Shaikh Rauf S/o Shaikh Hakan,
Age: 27 years, Occ. & R/o. as above.
- 12] Haleemabee W/o Shaikh Naseeb,
Age: 61 years, Occ. Household,
R/o. as above.
- 13] Parveen Shaikh W/o Shaikh Majeed,
Age: 36 years, Occ. Household,
R/o. as above.
- 14] Shama Shaikh W/o Shaikh Mazhar,
Age: 31 years, Occ. Household,
R/o. as above.
- 15] Arefa w/o Shaikh Mujaheed,
Age: 26 years, Occ. Household,
R/o. as above.
- 16] Salma w/o Shaikh Anwar,
Age: 21 years, Occ. Household,
R/o. as above.

... RESPONDENTS

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Mr. M. S. Choudhari, Advocate for the Petitioner.

Mr. S. W. Munde, APP for Respondent Nos.1 and 2.

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CORAM : V. K. JADHAV, J.

DATE : 08th December, 2016.

ORAL JUDGMENT:

. Being aggrieved by the order passed by the learned Chief Judicial Magistrate, Parbhani dated 9th April, 2008, below Exhibit – 1 in R.C.C. No.507 of 2006 and the judgment and order passed by the learned Additional Sessions Judge, Parbhani dated 16th July, 2009, in Criminal Revision Application No.52 of 2008 thereby confirmed the order passed by the learned Magistrate as aforesaid, the original Complainant has approached to this Court by filing the present criminal writ petition.

2 Brief facts giving rise to the present criminal writ petition are as follows:

- a. The Petitioner / original Complainant has filed a private complaint bearing R.C.C. No.507 of 2006 before the Chief Judicial Magistrate, Parbhani against the Respondents for having committed the offence punishable under Sections 448, 457, 147, 148 and 380 read with 149 of the Indian Penal Code. It has stated in the complaint that the father of Complainant is the owner and possession of land Survey No.634 situated

within the Municipal Limits, Parbhani. There is one Dargah of late Sher Ali Baba in the said land and the said Dargah was constructed by the forefathers of the Complainant. After a span of time, the Dargah has been allotted to the Wakf board. However, the forefathers of the Petitioner / Complainant are serving as Mutawalli of said Dargah. Since many devotees visit the said Dargah for prayer, the Petitioner's father had erected one structure and kept his office in the aforesaid structure having tin shade on the area admeasuring 20 x 20 feet and the same is existing since long. Name of the father of Complainant was also recorded in the Government Gazette of the Wakf Board as Mutawalli in respect of said Dargah. However, due to the old age the father of the Petitioner / Complainant was unable to render services as Mutawalli of the said Dargah and thus he had executed power of attorney in favour of the Petitioner / Complainant for rendering services as Mutawalli of said Dargah. Respondent / Accused No.1 is serving

as A.S.I at Police Station Nanalpeth, Parbhani, and he is distant relative of Accused Nos.2 to 14. Respondents / Accused Nos.2 to 14 are the beggars, begging in front of said Dargah and sometime take shelter in the open premises of said Dargah. It has alleged in the complaint that in the night of 16th September, 2006, the son of Petitioner / Complainant by name Masood was in the office and at that time, Accused entered in Dargah premises with an intent to commit theft in furtherance of their common intention also to destruct the property of the office by way of forming an unlawful assembly. They have taken alongwith them cash amount of Rs.15,000/- from the office table as well as destroyed the total tin shade structure of the office and driven out said Masood from the premises. It has further alleged in the complaint that all the Accused persons brought six cycle rickshaws and taken the material in those cycle rickshaws. Even some material like iron logs and tins are kept at police station by Accused No.1. In the

same night, at about 04:00 a.m., the Petitioner / Complainant had been to Police Station Nanalpeth to lodge the complaint, however, his complaint was not accepted. Thus, the Petitioner / Complainant had approached the Court by filing the complaint as aforesaid.

- b. Initially the learned Magistrate has directed investigation as provided under Section 202 of the Code of Criminal Procedure. The concerned P.S. has submitted the report in the negative and after hearing the counsel representing the Petitioner / Complainant, the learned Chief Judicial Magistrate, Parbhani by impugned order dated 9th April, 2008 dismissed the complaint.
- c. Being aggrieved by the same, the Petitioner / Complainant preferred Criminal Revision Application No.52 of 2008 before the Sessions Court, Parbhani and the learned Additional Sessions Judge, Parbhani by judgment and order dated 16th July, 2009,

dismissed the said revision application by confirming the order passed by the learned Magistrate. Hence, this criminal writ petition.

3 The learned counsel for the Petitioner / original Complainant submits that the Government Gazette recorded the name of the father of Complainant as a Mutawalli to the Dargah of Sher Ali Baba and as such, the father of Petitioner is a Wakif of said Dargah. Respondent No.4 and his brothers were rendering services as sweepers to said Dargah and they also used to collect charity from the devotees of said Dargah. However, Respondent No.4 / Accused attempted to mutate his name in respect of said property and wanted to evict his own brothers also. Thus, Respondent No.4 / original Accused Shaikh Naseeb had instituted Regular Civil Suit No.106 of 1999 before the Civil Judge Junior Division, Parbhani for recovery of possession of property against one Shaikh Hanif and the said suit came to be dismissed by the judgment and order dated 20th December, 2006 by the 2nd Joint Civil Judge Junior Division, Parbhani with a specific observations in paragraph No.22 of the judgment that DW-3 Mohd. Khaled Ansari (present Complainant), who is son of

Mohd. Taher, Mutawalli of Sher Ali Baba Dargah, is declared as Mutawalli and that present Respondent No.4 (Plaintiff in the said suit) failed to prove that he is the Mutawalli of said Dargah. It is also held that present Respondent No.4 has no right and title over the said property of Dargah to seek possession thereof.

4 The learned counsel further submits that there is non-compliance of provisions of Section 200 of the Code of Criminal Procedure. The learned Chief Judicial Magistrate was bound to record the statement of Petitioner / Complainant and his witnesses. However, without complying the said provisions, the learned Chief Judicial Magistrate has dismissed the complaint. Consequently, in absence of any oral evidence in the form of statement of Complainant and his witnesses, the learned Magistrate has observed that there is no evidence as to when the Petitioner / Complainant established his office in the premises of said Dargah and whether any permission of Nagar Parishad or Wakf Board is taken for the same. The learned counsel submits that even the Revisional Court has also not applied his mind and observed that though opportunity has been given to the Complainant, the Petitioner / Complainant has only advanced the

argument. The same is contrary to the record. The learned Chief Judicial Magistrate in his impugned order has nowhere observed that though such opportunity was given to the Petitioner / Complainant without availing that remedy, the Petitioner / Complainant has only advanced arguments. The learned counsel submits that the Petitioner is ready to examine himself and ready to examine the witnesses to substantiate the allegations made in the complaint in compliance with the provisions of Section 200 of the Code of Criminal Procedure and the matter may be remanded by setting aside the orders passed by the Courts below.

5 None present for the Respondents / original Accused though hearing of the writ petition adjourned on that count alone.

6 On perusal of complaint, it appears that the Petitioner / Complainant has made serious allegations about his dispossession from the Dargah premises. The Petitioner / Complainant has also alleged that even though his father was Mutawalli and he had a power of attorney issued by his father, Respondents / Accused in furtherance of their common intention not only destroyed the office having tin shade erected by the Complainant in the premises of the

aforesaid Dargah, but also committed the theft of cash amount of Rs.15,000/-.

7 It is a part of record that the learned Chief Judicial Magistrate has not complied with the provisions of Section 200 of the Code of Criminal Procedure. In terms of Section 200 of the Code of Criminal Procedure, a Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate. The learned Magistrate though found to have postponed to issue process by directing an investigation to be made by the police officer, after submission of the police report by the concerned P.S., dismissed the complaint only by extending an opportunity to the Petitioner / Complainant to advance the arguments. It is a part of record that father of the Complainant is the Mutawalli of said Dargah and that the Petitioner / Complainant on the basis of power of attorney executed in his favour by his father, erected office having tin shade on the area of 20 x 20 feet in the premises of said Dargah for which the permission of Nagar Palika is

not required. It appears that the learned Chief Judicial Magistrate has not examined the Complainant and his witnesses as contemplated under the provisions of Section 200 of the Code of Criminal Procedure. Consequently, the learned Chief Judicial Magistrate has observed many unwanted things in the impugned order. Furthermore, it appears that the learned Chief Judicial Magistrate has also considered the probable defence of the Respondents / Accused. The learned Additional Sessions Judge has observed contrary to the record that the Petitioner / Complainant instead of availing the opportunity of leading additional evidence, advanced the argument before the Chief Judicial Magistrate, through his counsel.

8 In view of the above, this Court left with no alternative but to remand the matter to the Chief Judicial Magistrate, Parbhani with a direction to pass an appropriate order on the complaint filed by the Petitioner after complying with the provisions of Section 200 of the Code of Criminal Procedure. Hence, the following order:

ORDER

- I. The criminal writ petition is hereby partly allowed.

- II. The order passed by the Chief Judicial Magistrate, Parbhani dated 9th April, 2008, below Exhibit – 1 in R.C.C. No.507 of 2006 and the judgment and order passed by the learned Additional Sessions Judge, Parbhani dated 16th July, 2009 in Criminal Revision Application No.52 of 2008, are hereby quashed and set aside.
- III. Complaint bearing R.C.C. No.507 of 2006, is hereby restored to its original position with the following directions:
 - a. The learned Chief Judicial Magistrate, Parbhani shall pass an appropriate order on the complaint after complying with the provisions of Section 200 of the Code of Criminal Procedure.
 - b. The Petitioner / Complainant shall appear before the Chief Judicial Magistrate, Parbhani on 9th January, 2017.

- IV. The criminal writ petition is accordingly disposed of.
- V. Rule is made absolute in the above terms.

[V. K. JADHAV, J.]

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