

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO. 78 OF 2016

- 1] Gangaram Harumal Hiranandani
Age : 50 years, Occu.: Business,
R/o Gite Hospital, Balikashram Road,
Ahmednagar
- 2] Smt. Meena Laxmikant Santani
Age : 51 years, Occu.: Business,
- 3] Smt. Meena Jairam Gabra,
Age : 49 years, Occu.: Business,
- 4] Smt. Neha Prakash Gabra,
Age : 40 years, Occu.: Business,
- 5] Smt. Vanita Deepak Gabra,
Age : 40 years, Occu.: Business,

Petitioner Nos.2 to 5, through their General
Power of Attorney holder,
Suresh Harumal Hiranandani
Age : 46 years, Occu.: Business,
R/o. Gite Hospital, Balikashram Road,
Ahmednagar

- 6] Sachin Tukaram Jadhav
Age : 36 years, Occu.: Business,
R/o. Near Dhoot Hospital, Kings gute,
Ahmednagar
- 7] Ravindra Babasaheb Pisore,
Age : 36 years, Occu.: Business,
R/o. Professors Colony Road,
Near Hotel Mathura, Behind Datta Mandir,
Ahmednagar

.. Petitioners

Vs.

- 1] Soneri Masjid,
Through its so-called Trustee/Mutavalli,
Shaikh Naseer S/o Chhannubhai
Age : 69 years, Occu.: Business,
R/o. Burudgaon Road, Ahmednagar

- 2] The Maharashtra State Board of Waqf,
Through its Chief Executive Officer,
Panchakki, Aurangabad
- 3] Shaikh Mohammad Iqbal Mohammad Hussain
Age : 55 years, Occu.: Advocate R/o. Meetha-nagar,
Kondwa-Khurd, Pune (Died and deleted)
- 4] Shaikh Altaf Mohammad Hussain,
Age : 52 years, Occu.: Agriculture,
R/o. H.No.11, (Punewale mamu ka bada)
Near Husaini Masjid, Bara Imam Kothla
Ahmednagar
- 5] Shaikh Adeel Irshad,
Age : 35 years, Occu.: Business,
- 6] Shaikh Naseem Mohammad Hussain
Age : 50 years, Occu.: Business,
- 7] Shaikh Ethesham Liyaqat,
Age : 50 years, Occu.: Business,
- 8] Shaikh Asrar Mohammad Hussain
Age : 50 years, Occu.: Business,
- 9] Shaikh Abrar Mohammad Hussain
Age : 48 years, Occu.: Business
- 10] Shaikh Fiza Liyaqat,
Age : 26 years, Occu.: Housewife
- 11] Shaikh Naseer Ahemad Shaikh Mohammad
Sulaiman, Age : 60 years, Occu.: Business
- 12] Vijay Sadashiv Wakde,
Age : 45 years, Occu.: Business
- 13] Shaikh Shakoor S/o Shaikh Aziz,
Age : 48 years, Occu.: Business,
R/o 1560, Shani Galli, Zendi gute,
Ahmednagar

Respondent nos.4 to 12 through their
General Power of Attorney holder,
Shaikh Altaf Mohammad Hussain,
Age : 52 years, Occu.: Agriculture,

R/o. H.No.11 (Punewale mamu ka bada)
Near Husaini Masjid, Bara Imam Kothla,
Ahmednagar

.. Respondents

Mr. R.R. Mantri, Advocate and Mr. B.A. Agrawal, Advocate for the
petitioners

Mr. S.S. Kazi, Advocate for respondent no.1

Mr. H.I. Pathan, Advocate for respondent no.2

Mr. A.N. Sabnis, Advocate for respondents no.4 to 12

Mr. A.S. Bajaj, Advocate h/f Mr. Y.B. Pathan, Advocate for respondent
no.13

Respondent no.3 is deleted.

CORAM : SUNIL P. DESHMUKH, J.
DATE : 18/01/2017

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. By consent, civil
revision application is heard finally.

2. Parties hereto would be referred to by their status in
wakf suit bearing no. 32 of 2015 wherein present respondent no.1 is
plaintiff and present applicants no.1 to 7 are defendants no.1 to 7.
Respondent no.2 - Wakf board is defendant no.18 and respondents
no.3 to 12 are defendants no.8 to 17.

3. Respondent no.1 i.e. plaintiff has instituted proceedings
bearing wakf suit no.32 of 2015 seeking decree of perpetual

injunction putting restraint, inter-alia, on applicants 1 to 7 i.e. defendants no.1 to 7 from alienating, creating any third party interest and from constructing industrial complex or any other building over land gut no.290 admeasuring 6 Hector, 22 Are situated at village Nimblak, Tq. and District – Ahmednagar and restraining them from putting to use suit land for industrial or commercial purpose.

4. It is being claimed by the plaintiff that suit land described under the plaint is property of Soneri Masjid - a wakf registered with the wakf board bearing registration no. MSBW/1291/2008. The wakf - Soneri Masjid had been registered as a religious trust with the office of Assistant Charity Commissioner, Pune bearing registration number B-104. It is contended that the erstwhile trustees of the then trust did not care to include all the immovable properties of the trust, perhaps, the trustees were not aware of all the trust properties.

5. Reference has been made to order of 16/10/1986 passed by Sub Divisional Officer, Ahmednagar, cancelling mutation entry bearing no. 498 in respect of suit property and directing to mutate name of Soneri Masjid trust.

6. It is averred that there is old record in respect of suit

property, particularly, land alienation register of 1886 maintained during the British regime and that the Sub Divisional Officer had concluded that gut no.290 is property of the plaintiff. As such, the suit property came to be registered as wakf property on registration of the trust as wakf with the wakf board.

7. It is alleged that defendant no.9 - Shaikh Altaf Mohammad Hussain in collusion with others executed sale deed in favour of defendants no.1 to 6 on 10/6/2008. It is averred that it is in January, 2015, the plaintiff became aware of the aforesaid illegal sale deed and, as such, proceedings pursuant to section 52 of the Wakf Act, 1995 have been initiated and are sub-judice and thus it has been referred to that relief in respect of cancellation of sale deed has not been sought.

8. It is alleged that defendants no.1 to 8 have managed to get the property converted for non-agricultural use, have obtained sanction to lay-out. Suit property is situated in MIDC industrial area of Ahmednagar and the defendants are bent upon to use suit land for industrial and commercial purposes. While trustees were on the suit site, in February, 2015, they found servants of the defendants there and they were creating small and big size plots. On enquiry, they were informed that a big industrial project is to come up. Electric poles had been brought for said purpose and their

installation had been underway.

9. It is further referred to that from 5 trustees, only 2 trustees were alive, namely, Shaikh Naseer and Razzaq Yasin Patel. They too had enquired with the defendants and realised that the property was intended to be put to industrial use. Defendants particularly, defendant no.1 and others had been requested to refrain from carrying on any activity over the suit land. There had been a blunt negative response from the defendants. As such, it is stated that cause of action had arisen around middle of March, 2015 and thus the suit had been instituted for perpetual injunction, as referred to hereinabove.

10. In response to the suit summons, the defendants had put in their appearance.

11. Plaintiffs have moved an application – Exhibit 36 pursuant to order VII rule 11 (a), contending that the plaint would not disclose cause of action and is liable to be rejected.

12. Around 21st August, 2015, an application for temporary injunction exhibit 37 came to be moved by the plaintiff reiterating averments in the plaint and additionally contending that activities being carried on by the defendants are without any authority or

permission from the wakf board and in order not to let deteriorate situation, defendants were sought to be restrained from carrying out any sort of construction, and that the plaintiff would suffer hardship.

13. The defendants no.1 to 7 had filed their written statement and say, denying allegations by the plaintiff, save and except those, which were expressly admitted in the same and stating that averments in the written statement shall not be construed to be admissions by the defendants for want of specific denial.

14. It has been averred that the plaintiff has instituted proceedings simpliciter for injunction without claiming any substantial declaration of cancellation or setting aside sale deed to avoid payment of stamp duty therefor and have undervalued the suit. Suit property has been self-acquired property of predecessor in title of defendants. Predecessor's sale deed is of 1948 and, as such, the suit is barred by limitation. The suit is not filed by competent person, he being neither trustee nor mutawali of Soneri Masjid and has been without proper authorisation and, as such, the suit is not maintainable.

15. The boundaries referred to in the plaint, were disputed in the written statement stating further that direction was required to

the plaintiff for giving proper description of the property. It has been contended that on the date of filing suit, the land had already been converted to non-agricultural use and there was sanctioned lay-out by the competent authority.

16. It is contended that the suit property had not been wakf property neither was recorded as such. The plaintiff's name had not appeared as owner in the record of rights in the year 2008. It had not been recorded on notified date as wakf property.

17. The wakf board could not have registered the same as wakf property and the wakf board ought to have refused registration to the plaintiff's trust. The plaintiff had registered suit land to be wakf property behind back of the defendants. The plaintiff has no concern whatsoever with suit property and the suit is liable to be dismissed for false information contained in the plaint.

18. According to averments in the written statement, before registration with the wakf board, the disputed property has not been shown as trust property when Soneri Masjid had been registered as a trust. While trust was being registered, the Deputy Charity Commissioner had made proper enquiries about the property of the trust and found that except mosque, there was no property of the trust. The trust was registered way back in 1952 and till its de-

registration the property had not been or claimed to be trust property.

19. Deputy Charity Commissioner under communication i.e. letter dated 14/2/2006 intimated the Deputy Commissioner that the disputed property is not owned by trust. Trust property - schedule-1 does not include suit property as the trust property. The plaintiff while filing suit, it is alleged that, has intentionally not filed any document about the property.

20. Soneri Masjid Trust had moved proposal for framing scheme in 1961 and it is mentioned therein the trust has no property except the Masjid. The scheme is accepted by the Charity Commissioner by order dated 18/5/1982 and it bears signature of present plaintiff. It is, thus, contended that it would not be a case wherein it can be said that trustees were not aware of suit property, is not true and correct and there is element of falsity in such a claim.

21. It is further alleged that the plaintiff has suppressed proceedings before the Divisional Commissioner, Nasik against cancellation of mutation entry no.498 by Sub Divisional Officer under order dated 16/10/1986. Cancellation of mutation entry no.498 had been subject matter of challenge at the behest of defendants no.8 to 16, in revision application bearing no.153 of 1992 and, the same had been decided on 25/09/1992 and judgment

and order of the Sub Divisional Officer dated 16/10/1986 had been set aside, restoring the names of defendants no.8 to 16 as owners, holders and occupiers of suit property. As such, it is contention on behalf of the defendants, it cannot be said that the plaintiffs were unaware of suit property not being a trust property and that it had not been owned by the Soneri Masjid. Suit property has been ancestral property of defendants no.8 to 16. It has been denied that there is old record by way of land alienation register in 1985. It is alleged that the plaintiff had created false documents and that land alienation register does not show gut no. 290 belongs to plaintiff Soneri Masjid. It is contended that it has been held the entry in alienation register is not correct. It is stated that order of deleting suit property from class-III land and converting it into class-1 is confirmed under judgment in 2013 by the revenue State minister.

22. It is contended that entry of suit property in the name of Soneri Masjid is illegal. The entry under land alienation register regarding suit property is not reliable and correct. Registration of suit property in the name of plaintiff as wakf property is without support of documents or any enquiry about the same and such entry is illegal and wrong. The record shows that the entry has been taken in the year 2008 behind the back of owners whose names were appearing in the record of rights. Sale deeds were executed in 2008 on payment of huge consideration. The plaintiff have failed to

produce any documentary evidence to show that before 2008, it had any concern with the suit property. The entry as wakf property has been false, taken behind the back of the present defendants and without notice to them. The entry is not binding on the defendants. Allegation that the sale deed being executed with collusion is denied. It is contended that sale deed has been executed and the property has been purchased after obtaining necessary permission from the competent authority. The permission has not been challenged by anybody.

23. It is contended that after sanction to lay-out, the defendants have sold plots over suit land to several persons and those purchasers are not party to the suit. Defendants have executed agreements of sale in favour of other persons and have received major part of the consideration. The persons who purchased plots from defendants are in possession of major portion of the suit property. Some of the persons have started industrial activity by carrying on construction over the properties purchased by them. The plaintiff has not mentioned about all these activities before the court while instituting the proceedings.

24. It is denied that any proceedings have been initiated pursuant to section 52 of the Wakf Act, 1995 before Wakf board and those are sub-judice. It is further contended that there are no

notices to the defendants in respect of those proceedings. Such proceedings, according to defendants, are not maintainable without asking any relief against the transactions. It is further contended that as on the date of the suit, the property had been converted into non-agricultural use, lay-out has been sanctioned and there is no challenge to the developments. The suit has been intended to cause harassment to the defendants. Rest of the contents about the trustees having been to the suit site in 2015, at the points of time averred in plaint, have been denied.

25. It is contended that no permission from the Wakf board or Charity Commissioner was obtained before institution of the proceedings. It is denied that the plaintiff had ever made enquiry with defendants no.1 to 7 and them having been asked to refrain from carrying out developments. The suit property is denied to be a wakf property and as such it is contended that the Wakf Tribunal has no jurisdiction to entertain, try and dispose of the suit. It is further contended that the suit is undervalued and no proper court fees has been paid. The suit without declaration is not maintainable. Its valuation is improper. The suit has been instituted on false, vexatious and illegal grounds. The plaintiff had been fully aware of the events those have occurred and suit has been instituted with a view to cause harassment to the defendants.

26. The plaintiff has not come to the court with clean hands. The suit is based on untenable and false documents. There is no *prima facie* case in favour of the plaintiff. Balance of convenience is also not in favour of the plaintiff.

27. The learned judge of the Wakf Tribunal with reference to the aforesaid pleadings of the parties germane for temporary injunction, had framed points for determination viz. whether *prima facie* case is in favour of the plaintiff, whether balance of convenience lies in its favour and as to whether irreparable loss would be caused to the plaintiff and about its entitlement to temporary injunction and answered all the points in the affirmative. All the points no.1 to 4 were decided simultaneously. So far as the point framed with respect to cause of action in the plaint which has been questioned under exhibit 36 application for rejection of plaint with reference to order VII rule 11 of the code of civil procedure being not disclosed pursuant to its clause (a), it had been held in the negative holding that the plaint does disclose cause of action.

28. The learned judge referred to various provisions of the Bombay Public Trust Act. The learned judge then considered documents refer to that Soneri Masjid was registered as public trust in 1953. The scheme in respect of the trust is framed in 1982 by the Joint Charity Commissioner. Under the scheme, movable and

immovable properties were mentioned in clauses A and B of the schedule as the trust properties and that there is reference to that properties, which remain to be registered due to inadvertence or are gifted to or to be purchased by, the trust, will also be Soneri Masjid trust properties.

29. The learned judge has specifically referred to suit property survey no.132 now gut no.290 is not mentioned as a trust property. However, it has been considered that properties which have not been registered would also be properties of the trust and, therefore, purported to observe that simply for suit property is not mentioned in schedule-I it cannot be said that suit property is not belonging to Soneri Masjid and if the plaintiff succeeds to establish the fact that due to inadvertence suit property was not registered as the property of Soneri masjid, then it could be held as property belonging to Soneri masjid.

30. The learned judge considered that land survey no.24 admeasuring 15 Acre, 28 Guntha situated at Nimblak was alienated as class III Deosthan inam land to Soneri masjid through Manager Imamkha S/o Umbarkha permanently with reference to an extract of alienation register purporting to be pursuant to the Bombay Land Revenue Code, of the year 1886. It was then considered, true copy of the extract of "tipan" of land survey of Nimblak at exhibit 85,

indicates old survey number of land survey no.132 was survey no.24 admeasuring 15 Acre 28 Guntha and that from the copy of consolidation extract of Nimbalak exhibit 86 of survey no.132 admeasuring 15 Acre 15 Guntha, there is no dispute over that survey no.132 has now been converted into gut no.290.

31. With reference to revenue record particularly, 7/12 extracts, the learned judge observed from the same which relate to periods from 1940 onwards to 1995, referred to that land survey no.132 admeasuring 15 Acre 15 Guntha is deosthan class III inam land and name of Najmunnissa Begum has been mentioned as holder of land. Further it has been observed that said Najmunnissa Begum had mortgaged survey no.132 to Dharmamalu Konkar and Sitaram Rag Tangel in 1943 and their names are mentioned in other rights column. Thereafter, the learned judge observed that said Najmunnissa Begum had dealt with survey no.132 by registered sale deed dated 25/3/1948 to Mohammed Hussain Shaikh Yusuf and as such, her name came to be deleted by mutation entry no.498 and name of Mohammad Hussain Shaikh Yusuf has been entered by mutation entry no.1116.

32. The learned judge has considered that revenue record of old survey no. 24 which is a deosthan inam land was granted to plaintiff Soneri Masjid and was given survey no. 132 and in

consolidation scheme, survey no.132 has been given gut no. 290. As such, he went on to consider original land survey no. 24 has been renumbered as survey no.132 which is now gut no. 290 and same was granted to Soneri masjid as class III deosthan inam land. The suit property was granted to masjid where muslim persons offer prayer and perform religious rites which are recognised by muslim law as pious, religious or charitable purpose and, therefore, suit property is wakf property of plaintiff Soneri masjid within the meaning of section 2(19) of Bombay Public Trusts Act and section 3(r) of the Wakf Act, 1995.

33. The learned judge went on to consider suit property had not been inadvertently mentioned in the register in clauses (A) and (B) of the schedule-I of the property of the then trust. Having regard to the events, as referred to hereinabove, he went on to consider that Najmumunissa Begum was not owner of suit property and she had no right to sell. Consequently, Mohammed Hussain Shaikh Yusuf did not get title of ownership and, therefore, legal representatives of Mohammed Hussain Shaikh Yusuf, i.e. defendants no.9 to 16 had no right to sell suit property by executing registered sale deed in favour of defendants no.1 to 7.

34. Mere recording of entries in the name of Mohammed Hussain and after his death in the name of his legal representatives

i.e. defendants no.9 to 16 in revenue record would not confer ownership on them. It is settled principle that mutation entries are made by revenue authorities for fiscal purposes and they do not confer title or legal status to claim ownership. Therefore, setting aside the judgment and order of the Sub Divisional Officer for recording name of Soneri masjid in respect of suit property by judgment and order of the Divisional Commissioner, Nasik in revision by confirming mutation entry recording name of legal representatives of Mohammed Hussain as per entry no.498 did not confer title of ownership to the legal representatives of Mohammad Hussain i.e. defendants no.9 to 16.

35. The learned judge then referred to certain citations, as were being relied on, on behalf of the plaintiff in support of the claim for seeking temporary injunction. The learned judge has also referred to citations relied on, on behalf of the defendants, however, it appears that those had not impressed the learned judge. The learned judge in paragraph no.38, has observed thus :-

“38. In the written statement and say the defendants have not disputed the fact of making construction of industrial and commercial complex and buildings on the suit property. So, the plaintiff has prima facie case and balance of convenience lies in its favour. From the application and affidavit of the plaintiff and photographs filed on record it appears that the defendants have made construction on the plots of the suit property and also carrying out further construction. So, it is necessary to grant temporary injunction restraining the defendant no.1 to 17 from carrying out further construction on the suit property. If temporary injunction is not granted

then irreparable loss will be caused to the plaintiff Waqf institution which cannot be compensated in terms of money. On the contrary no irreparable loss will be caused to the defendant No.1 to 17 if they do not carrying (sic) out further construction and in that case their further loss of money will be saved. Therefore, the plaintiff is entitled to claim temporary injunction as prayed. Hence, I answer point No.1 to 4 in the affirmative.”

He therefore granted temporary injunction against defendants no.1 to 7 from carrying on further construction over the suit property.

36. So far as rejection of plaint is concerned, the learned judge has discussed the same from paragraphs no.39 onwards. Referring to the citations relied on by the defendants, the tribunal, considered that the plaintiff has pleaded suit property to be wakf property of Soneri Masjid and particularly that the plaintiff has explained as to why no relief of setting aside sale deed is being claimed having regard to section 52 of Wakf Act, 1995 and has further referred to the averments in the plaint about the plaintiff having gone to the suit site and having noticed some activity being carried on at the behest of defendants and had filed suit for perpetual injunction and as such, has considered that it is not a case wherein it can be said that the pleadings do not disclose cause of action and rejected application exhibit 36 and allowed application exhibit 37 granting temporary injunction, restraining the defendants no.1 to 7 and 9 to 16 from carrying out further construction on suit property, described in plaint in paragraph no.1.

37. It is against this common order on Exhibits 36 and 37, defendants no.1 to 7 are before this court in revision.

38. Learned counsel Mr. R.R. Mantri appearing for defendants 1 to 7 applicants herein, vehemently submits that the impugned order is patently untenable, improper and cannot be supported on facts or even in law. He contends that the defendants and their predecessors have been in possession of suit property for almost 100 years continuously, without interruption and peacefully open to all. He submits that the suit property all along is being dealt with by the predecessors of the defendants as their absolute property without any restrictions.

39. He contends that there is no authentic record being placed before the court having nexus of Soneri masjid either as a trust or for that matter as a wakf to the suit property. He submits that a slender thread which is sought to be picked up by the tribunal is of some tipan, which according to the plaintiff is an extract of tipan register of the land in Nimblak, however, even if that is to be taken into account, the document refers to the different survey number i.e. survey no.24 admeasuring 15 Acre and 28 Guntha, whereas the property concerned had been erstwhile survey no.132 admeasuring 15 Acre and 15 Guntha and even after the

consolidation, same continues to be gut no. 290 admeasuring 15 Acre 15 Guntha. A tipan register which hardly would be a document of title.

40. He submits that at the highest survey no.24 even if taken into consideration is of Soneri Masjid, yet it cannot be adjudged that survey no.24 is gut no. 290. Apart from that, he contends that the property had been dealt with as absolute property by the holders and owners of the land for almost a century, it had been mortgaged, even tenants had been on the property and it has been sold out. Even purchasers of the property, for 50 years, have enjoyed the same by constructing house and bungalow over large area in the property.

41. He further refers to that a slight hiccup in enjoyment was created by the then trustees by taking up proceedings for mutation in their name, cancelling the mutation taken way back in 1948 after the sale by Najmunnissa to them and particularly, referred to that the plaintiff have fallaciously mentioned only the 1986 order, leaving away reference to 1993 order passed by the Commissioner. He therefore submits that plaintiff cannot be said to have come to the court with clean hands and are dis-entitled to claim relief of injunction.

42. Apart from above, around 2008, while the transaction with regard to suit land had taken place, the wakf came to surreptitiously registered showing gut no.290 to be the wakf property. Even if there is no revenue record which had been placed before the concerned authorities, it had registered the trust. He submits that under the circumstances, it is easily discernible that the suit has been instituted, having regard to that the land value having escalated and the so-called trustees are keeping an avaricious eye over the same and do not appear to be as much concerned with the objects of the wakf as they are showing concern with alleged wakf property. It is contended that the learned judge has also got swayed away and influenced by the considerations which apparently are subjective rather than objective, as ought to have been the case.

43. He submits that in any case, it is not a case for temporary injunction at all having regard to section 52 of the Transfer of Property Act. He purports to refer to citation "*Kachhi Properties, Satara Vs. Ganpatrao Shankarrao Kadam and others*" reported in 2010 (5) Mh.L.J. 903 known as "*Kachhi Properties case*" and submits that the interest of the so-called wakf property is amply protected under the provision and as such injunction would not issue against the defendants. He submits, while the learned judge has referred to that the lay-out had been prepared of the property after predecessor

of defendants in 2008 has sold out the property and with such development, industrial and other activities are going on over the same, and no relief has been claimed in respect of the developments which have occurred. Restraint is sought against the defendants who have already asserted their rights by alienations and dealing with and developing the property. In the circumstances, it cannot be said that the plaintiff is coming to the court with clean hands.

44. He further submits that, since some development is being carried out by the defendants and the Tribunal purports to put restraint on the defendants in respect of the area on which the development is under way, their investment would go waste and they would suffer in the process and would be put to irreparable loss and they are running risk in the same. He further goes on to submit that major portion of the land has already been dealt with by the purchasers. The other persons who have purchased the property have put to use the property, have not been made parties to the suit. Long silence and the documents do not show even a *prima facie* case in favour of the plaintiff. He therefore submits that balance of convenience lies in his favour. He contends that the decision by the learned judge has been improper on all counts.

45. He submits that so far as suit is concerned, the same is

obviously barred by law of limitation. He submits that the first alienation has taken place by the original holder/owner in 1948 and even prior to that in 1943, the property has been mortgaged and no action had been taken on behalf of the plaintiff since then. As such, he submits that present suit simpliciter for injunction, in the circumstances, is obviously barred by law of limitation having regard to the provisions of the erstwhile Limitation Act of 1908 and even of the Act, repealing it in 1963. He submits that as referred to in exhibit 36, the plaint would not be said to disclose any cause of action for seeking injunction having regard to averments in the plaint.

46. Mr. Mantri purports to rely on the judgment of the Supreme Court in the case of *T. Kaliamurthi and anr. Vs. Five Gori Thaikkal Wakf and others* reported in (2008) 9 S.C.C. 306, wherein it appears that in the facts and circumstances of that case, the Apex court has observed that section 107 of the Wakf Act, 1995 is not retrospective and the provision is not applicable to the proceedings. According to him, rights of plaintiff, if any, stand extinguished and rights created in favour of the predecessors of the defendants have been crystallised and as such no action against them in law would lie particularly for the reliefs as have been claimed in the suit.

47. According to him, the suit is bad on several other

grounds as referred to in their defence in written statement. He thus seeks indulgence of this court to allow exhibit 36 application and dismiss exhibit 37 application.

48. Learned counsel Mr. Ameya Sabnis for respondents no.4 to 12 fully endorses the submissions of the learned counsel Mr. Mantri and additionally submits that omitting to claim proper relief and claiming other reliefs, would be a case wherein order VII, rule 11 of code of civil procedure would be required to be invoked and requests to exercise the powers pursuant to the same. For said purpose, he purports to place reliance on a citation - *N.V. Srinivasa Murthy and others Vs. Mariyamma (dead) by proposed LRs. and others* reported in (2005) 5 S.C.C. 548. Having regard to the contents of the plaint and facts therein, the Supreme Court appears to have adjudged that the cause of action for the plaintiff arose on 25/3/1987 and had considered that the suit had been filed simpliciter for injunction in 1990 and while the same had been pending, present suit had been instituted on 26/8/1996, surreptitiously claiming declaration of sale deed of 5/5/1953 to be not real sale deeds but to be loan transactions. It was considered plaint had been clearly drafted to get over bar of limitation and from the averments of the plaint, the suit had been barred by law within the meaning of clause (d). On perusal of said judgment, it appears that it is in the facts of said case, the Supreme Court had made the observations. Learned

counsel for respondents no.4 to 12 as such supports the request under civil revision application.

49. Countering aforesaid submissions on behalf of the plaintiffs – present respondents no.4 to 12, Mr. S.S. Kazi with equal vehemence, submits that the present proceedings are revision against an interim order passed by the Wakf Tribunal. Powers under revision are discretionary, to be exercised if only the impugned order warrants the same. He submits that it is well known that the injunctions are discretionary and preventive reliefs. He therefore submits that the discretion which has been exercised by the learned judge of the wakf tribunal taking stock of the situation in this case would not be amenable to interference. He submits that it cannot be conclusively said that the plaintiff has no *prima facie* case at all. He submits that there is record available indicating that the plaintiff has strong nexus to suit property. The persons manning the trust till the registration of the same as wakf under Wakf Act, 1995, had been unaware of existence of the property of Soneri masjid bearing survey no.24 being converted into survey no.132 and now bearing gut no.290 on consolidation. He submits that it is under these circumstances, there had been no specific reference made in the scheme since the trustees were not aware about the property. It has been referred to in the scheme that several properties which inadvertently have not been included as properties of the trust are

to be considered as trust properties. In such a case, according to him, while now there is available record which shows strong bonding of suit property to Soneri Masjid, the learned judge of the tribunal has properly considered that the plaintiff has *prima facie* case in its favour. He refers to document in "*modi*" which is an extract of tipan register of village Nimblak which, according to his instructions, is stated to contain that survey no.24 admeasuring 15 Acre and 28 Guntha is converted into survey no.132. It is being submitted that this gives an indication of the fact that survey no.24 is survey no.132. He further submits that the very *tipan* refers to Soneri Masjid at the bottom of the same. He therefore submits that it is discernible that survey no.132 being the property of Soneri Masjid, however, the same has slipped notice by the trustees while the trust was registered and when it has been realised, the same has been incorporated and included as wakf property while registering the wakf. He submits that the Wakf Tribunal has given a very deep consideration to this aspect and has thus restrained the defendants from causing development and construction over the suit property.

50. Mr. Kazi, learned advocate goes on to submit that even if it is considered that the property had been referring to name of Najmunnissa Begum all along, the revenue record continues to show that, it is class III *Deosthan Inam* which indeed shows nexus to the purpose for which the property had been assigned to the holder. It

indeed shows it was not absolutely vested in the holder at all. Therefore, the dealings which have been contented to have been entered into in 1943 or for that matter in 1948 would hardly affect the status of the property as *Inam* land and title of the *Deosthan*, in the present case Soneri Masjid, would not be affected and much less obscured by the events. He submits that a contention had been advanced on behalf of the applicants that the *Tipen* which had been referred to by the Wakf Tribunal, does not have nexus with the suit property, for, the discrepancy occurring in the area; while the *Tipen* refers to area of 15 Acre 28 *Guntha*, survey No.132 refers to 15 Acre 15 *Guntha*. He submits that as on the date, position emerges, *Tipen* refers to conversion of survey No.24 into survey No.132, it had admittedly been subsequently converted into gut No.290. Thus, the onus at the stage at which the application had been preferred by the plaintiff stands sufficiently discharged making out *prima facie* case. He submits that it is not a case at all that erstwhile trustees were absolutely unaware of there being other trust properties, however, them being not certain about the same, they have carefully incorporated in the scheme a sentence referring to that such other properties which have been inadvertently missed out from making reference to be included in clauses "A" and "B" would be trust properties. He submits that while the trustees also appear to have made a bid to cause deletion of mutation in favour of

predecessor of defendants, may be that their said attempt did not bear fruits at the end in revision, yet, the position emerges that Soneri Masjid has been staking claim to said property. In the circumstances, having regard to the same, while the trust was being registered as a wakf, care had been taken to refer to said property and as such, it has been registered as a wakf property while wakf registration had taken place after enforcement of Wakf Act, 1995. He submits that once it has been registered as wakf property under the Wakf Act, it is wakf property and so long as it is not proved that it is not a wakf property, its state deserves preservation as it is. He submits that on the saying of the defendants, in their response to the suit and the application for temporary injunction, the defendants have made it clear that they are going ahead with the activity of construction. He submits that progress in the construction would be harmful and detrimental to the interest of the wakf and its property. Thus, while the suit is pending, the property would be required to be preserved without letting any further deterioration.

51. He places reliance on a Supreme Court judgment in the case of *Maharwal Khewaji Trust (Regd) Faridkot V/s Baldev Dass* reported in *AIR 2005 SC 104*, wherein, according to him, it has been considered that unless and until a case of irreparable loss or damage is made out by a party to the suit, the court should not permit the nature of

the property to be changed, which also includes alienation or transfer of property, which may lead to loss or damage to the party who may ultimately succeed and may further lead to multiplicity of proceedings. It is further observed in that case that the party concerned had not been able to make out any case of irreparable loss, save that the legal proceedings are likely to take long time, the court, under the circumstances, considered in the facts and circumstances of that case, the appellate and high courts were not justified in permitting respondent to change nature of property by putting construction and by permitting alienation. He refers to observations in paragraph No.10 thereof, in this respect. The Supreme Court has considered that since facts of the case did not make out extraordinary ground for permitting the respondent to put up construction and alienate the same, it had been considered that the high court and the appellate court had erred in passing the impugned orders. Said judgment shows that it was in the circumstances of that case, the order came to be passed, making the observations as are appearing.

52. Supporting learned advocate Mr. S. S. Kazi, Mr. Anil Bajaj, learned advocate appearing for defendant No.3 respondent - caveator contends that he is an interested person in the wakf and that he is added as party-defendant to the suit. He, at the outset, submits that reliance being placed on behalf of the applicant on

Kachhi Properties' case (supra) may not be appropriate in the face of situation, as recently, a division bench of this court has given a ruling in the case of *Prakash Gobindram Ahuja Vs. Ganesh Pandharinath Dhonde and others* reported in 2016(6) Bom.C.R. 262, on the reference, upon division of opinions of the courts. He refers to the core questions which were referred, being I, II, III, IV and V and their answers, as contained in paragraph No.177 of the judgment, reading thus:-

“177. In view of the above-said discussion, we answer the questions placed before us for reference as follows:

Question No.(I) : Does Section 52 of the Transfer of Property Act provide adequate protection to the parties from transfers pendente lite since such transferees are not required to be, or entitled as of right to be, impleaded as parties to the suit and cannot resist execution proceedings in view of provisions of Order XXI Rule 100 of the Code as amended by this Court ?

Answer : Section 52 of TP Act does not provide adequate protection to the parties from transfers pendent lite. The question does lay down a correct proposition of law that, transferees pendent lite are not required to be or entitled as of right to be impleaded as parties to the suit, and they cannot resist execution proceedings in view of provisions of Order XXI Rule 100 of the Code, as amended by this Court.

Question No.(II) : Would plaintiffs' registering notices of their suits under Section 18 of the Indian Registration Act (though such registration may not be compulsory) not secure for plaintiffs more than what an injunction could secure since transferees, who purchase property, pendente lite in spite of such registration would be deemed to have notice of pendency of the lis and could not claim to be transferees without notice ? And, would such registration not be preferable to clamping an injunction on adversary ?

Answer : Mere registration of notices of pending suit cannot secure for plaintiffs more than or even equivalent to what an injunction could secure, as the consequences of alienation in

breach of interim injunction render such alienation illegal and expose the party to the consequences provided under Order XXXIX Rule 2A and Rule 11 CPC, in addition to the punishment for contempt of Court. Hence, such registration of notices of pending suit, though desirable as an additional safeguard, cannot be preferable or substituted to clamping an order of injunction on adversary.

Question No.(III) : Since a plaintiff seeking a temporary injunction is required to show that he would suffer irreparably if temporary injunction is not issued, would it be inappropriate to expect such plaintiff to show that the provisions of Section 52 of the Transfer of Property Act do not afford adequate protection before an injunction to restrain transfer pendente lite is issued ?

Answer : Though it may not be inappropriate for the Court to expect the plaintiff to show that the provisions of Section 52 of TP Act do not afford adequate protection, it cannot laid down as a blanket proposition of law that in each and every case, plaintiff is expected to show it as a condition precedent for grant of injunction order.

Question No.(IV) : Would it be appropriate, in cases of claims for temporary injunction to restrain transfers pendente lite, to consider imposition of conditions short of granting injunction, which should protect the plaintiff's interest, like, seeking an undertaking that no equities would be claimed on account of sale or development of properties; effecting sales only after putting transferees to notice that their rights would be subject to the pending suit, or requiring the party to inform the Court promptly of creation of every such interest ?

Answer : Though depending on the facts of the case, the Court can consider imposition of conditions, like, seeking an undertaking that no equities would be claimed on account of sale or development of property; effecting sale only after putting transferees to notice that their rights would be subject to pending suit or requiring the parties to inform the Court promptly of creation of such interest, those conditions can be in addition to or independent of the order of injunction, but cannot be in place of or short of granting injunction.

Question No.(V) : Whether the observation in para (13) of the judgment in Vasant Tatoba Hargude and others V. Dikkaya Muttaya Pujari (AIR 1980 Bombay 341) that in the event of there being conflict, the decision of later Bench would bind

only lays down that judgment later in point of time as explaining the earlier judgment would bind ?

Answer : In the light of the decisions of the Hon'ble Supreme Court in the case of State of U.P. And Ors. Vs. Ajay Kumar Sharma and Anr. (supra) and New India Assurance Co. Ltd. Vs. Hilli Multipurpose Cold Storage Pvt. Ltd. (supra), we answer this question to the effect that, in case of conflict between the decisions of Co-ordinate Benches, it is not the later but the earlier one in point of time, which should be followed and applied by the Subordinate Courts to the facts and circumstances of a case before it, unless, of-course, earlier decision is considered and explained in the later decision."

53. He, therefore, submits that section 52 of the Transfer of Property Act has been considered to be not an adequate protection to the interest of the parties to the suit. In the circumstances, the legal position clearly emerges that section 52 of the Transfer of Property Act cannot be considered to put any fetters or curbs on the exercise of discretion by the court while it comes to granting injunction.

54. Mr. Bajaj endorses all and every argument advanced by Mr. Kazi contending that nexus between wakf and the suit property is undeniable and additionally submits that even if it is considered that the land is being enjoyed as personal *Inam*, the same stands abolished with enforcement of Maharashtra Personal *Inam* Abolition Act. This submission has, of course, been advanced without admission of that the *Inam* had been personal *Inam* of the person holding the land.

55. He submits that the endorsement in the revenue record showing that it was *Deosthan* class III *Inam* cannot be denied by the defendants. In the circumstances, purported dealings with by Najmunnissa Begum and others subsequently, can hardly be said to be legal, legitimate and having any efficacy. He endorses Mr. Kazi's argument that the suit property, as it would emerge from the record, has strong bonding to Soneri Masjid and that has been amply borne out from the endorsement in the revenue record about the land being *Deosthan* class III *Inam*. He also particularly refers to the *Tipen* as has been referred to by Mr. Kazi and submits that it is not the case as is sought to be contended on behalf of the applicants that Soneri Masjid cannot stake claim to suit property. There is an old and authentic record of a period before hundred years showing that survey No.24 is converted into survey No.132. The discrepancy in the area is not such which would be able to dislodge the claim of Soneri Masjid to suit property.

56. He submits that apart from the rights being claimed to the property on behalf of the applicants, the reliance being placed on the restoration of the mutation in favour of the successors of purchasers under the order of revenue commissioner, would not be said to support cause of the defendants, for, perusal of the very same order would evince that although the Additional

Commissioner, Nashik has set aside the order of the lower authority restoring mutation entry No.498, it had been directed that Sub Divisional Officer should, pursuant to section 10 of the Watan Act, determine nature of Grant / *Inam* and to decide on as to legality of the dealings with by the parties and the same has not been done as yet. He, therefore, submits that it is not a case for the defendants wherein they would be able to stake an absolute claim to suit property. He, therefore, urges to consider that the *status quo* of the state of affairs in respect of the suit property be maintained as had been ordered by the Wakf Tribunal.

57. Mr. H. I. Pathan, learned advocate appearing for the Wakf Board contends that since the property has been registered as wakf property and is being sought to be retrieved by the wakf, the matter being *subjudice*, it is desirable that no further deterioration in respect of the suit property shall take place until final decision is reached by the Wakf Tribunal, as had been directed under the impugned order.

58. Having heard learned advocates for the parties as aforesaid, so far as application Exhibit-36 pursuant to Order VII, Rule 11 of the Civil Procedure Code is concerned, it would be apt to consider that what would be germane, while such an application is being dealt with, are the averments in plaint, without adding to or subtracting anything from the same.

59. While the emphasis appears to be on that the plaint would not disclose cause of action, averments in the plaint, as observed hereinbefore earlier at the initial part of this order, would vividly show that the cause of action is stated to have arisen for the reliefs claimed under the suit, latest in March, 2015. It does not appear therefrom that it can be said the plaint does not spell out cause of action for the reliefs claimed. Cause of action is bundle of facts. Cause is stated to have arisen on various occasions referred to upto March, 2015.

60. Reliance is being placed by Mr. Mantri on a decision referred to above in the case of "*T. Kalliamurthi and anr. Vs. Five Gori Thaikkal Wakf and others*" (*supra*), it appears to be a case in which there had been a full-fledged trial, two appeals and then the Supreme Court verdict. Ground of limitation there, appears to be agitated, as an issue arising in the matter, letting opportunity to the parties concerned to lead evidence and have hearing on it. Averments in the plaint in wakf suit no. 32 of 2015 would not evince that a bar is being incurred on the ground of limitation at least at the stage at which the matter stands for consideration. Thus, as far as this aspect is concerned, it does not appear that the plaint is liable to be thrown out on the ground as is being now sought to be agitated. Over and above this, Exhibit-36, as it is appearing, does not object

to the maintainability of the plaint on the ground of limitation.

61. Notice pursuant to section 80 of the Public Trusts Act, while matter is being prosecuted for wakf property, may not be a matter for consideration at threshold.

62. Mr. Sabnis, learned advocate supporting Mr. Mantri, had submitted that while there are alienations which have taken place since 1948 up to 2008 and onwards up to the date of the suit and those being not questioned nor any declaration with reference to the same, has been asked for, the suit would not be said to be maintainable and as such, bar is created to its entertainment and disposal. This being contended so, one will have to have regard to the plaint averments that such a relief is not being claimed and there is other proceeding in respect of suit land particularly for possession pursuant to section 52 of the Wakf Act, 1995 and that is being prosecuted and pending and thus claiming of such a relief has been kept aside.

63. In the circumstances, it does not appear to be a case, which at this stage can be said to be covered by clauses under rule 11 of order VII of code of civil procedure.

64. As such, challenge to order passed with respect to Exhibit-36 does not appear to be tenable and the same stands rejected.

65. From the events as those have occurred, it appears in 1927, one Najmunnisa Begum was given in gift landed property bearing survey no. 132 admeasuring 15 acres, 15 guntha by her husband. She had been enjoying said property-the suit property as its absolute owner. Najmunnisa had rented out the property and had also mortgaged the same and ultimately in 1948 had sold it absolutely to Mohammad Hussain and a mutation entry bearing no. 498 about the same had taken place. Since then Mohammad Hussain started enjoying suit property as its absolute owner and after him, his descendants.

66. A trust came to be registered in the name of Soneri Masjid around 1952 showing survey no.664 to be trust property. There was no reference to suit property having anything to do with the trust. The situation continued for quite a long time.

67. There has been, in 1986, an attempt to stake claim to suit property on behalf of Soneri Masjid Trust. Though initially in the proceedings an order came to be passed cancelling entry no. 498, under the subsequent order of the Divisional Commissioner, Nasik, the

mutation entry no.498 stood restored in 1993. The attempt appears to have been abandoned there as no further proceedings are shown to have been taken up.

68. It appears that under order dated 17/10/2007, gut no. 290 ceased to be a deosthan class III land and accordingly, such an endorsement had been directed to be taken in the relevant revenue record. It appears that it had been got verified before passing the order, as to whether the land can be related to any deosthan, and it was not found to be so. It was also examined whether it is a trust property and correspondence in that respect had been made. It appears that under the same it had been reported to be not a trust property. It has been stated by the defendants that the cessation of property to be class III deosthan land has also been confirmed under the order dated 12/11/2013 of the State. It is not the case that these orders have been objected to.

69. On 10/6/2008, descendants of Mohammad Hussain executed conveyance of suit property in favour of present applicants no.1 to 6 who have purchased it with an intention to develop the same.

70. It has been averred by the applicants that suit land has been purchased from the descendants of Mohammad Hussain with due permission from competent authority. The applicants have caused

developments over the same. They had prepared a lay out in respect of suit property. The lay out has been duly sanctioned by the concerned authority. Pursuant to sanctioned lay out, land plots have been dealt with by the applicants. Purchasers from them have further developed the land plots from suit land. Constructions have come up on said lands and activities are being carried on over the same industrial, commercial and/or otherwise.

71. Soneri Masjid trust appears to have been registered in 2008 as Wakf showing suit land to be wakf property. As such, it appears that in 2008, two contemporaneous events have occurred. The property came to be shown as wakf and also the descendants of Mohammad Hussain have sold the same to applicants no. 1 to 7.

72. For a span close to 100 years, the property is being treated and enjoyed by different persons as their absolute property without there being even a semblance of objection or resistance by any one. Soneri Masjid tried to stake claim in 1986 and after 1993 abandoned the same. Suit property has been sought to be considered as property of Soneri Masjid at the registration of Soneri Masjid trust as a wakf in 2008. Thereafter series of activities have been taking place in and over suit property and have been allowed to be proceeded with.

73. Till 2015, no action had been taken by Soneri Masjid Wakf. Defendants No.1 to 5 after purchase caused lay out and sanction to the same, dealt with the property according to the lay out and have sold the same to several persons. Said several persons have put property to further use industrial or otherwise and have caused development over the same. Development of balance of suit property by defendants No.1 to 5 appears to be underway. Persons to whom properties have been sold or have been transacted with by defendants No.1 to 5 have not been arrayed as defendants in the suit.

74. It is discernible, it is in the present proceedings the document, namely, the extract of alienation register in respect of survey no. 24 admeasuring 15 acre 28 guntha as a class III Devasthan and showing alienee's name Soneri Masjid has been relied on on behalf of the plaintiff - Soneni Masjid, and the extract from *tipan* register of village Nimblak has surfaced which is in *modi* script and according to the plaintiff, shows conversion of survey no. 24 into survey no. 132.

75. Perusal of the impugned order gives an impression that the two documents, viz; the extract of alienation register and the extract of *tipan* of village Nimblak have heavily weighed with the wakf tribunal while deciding the application for injunction coupled with endorsement appearing in the revenue record about survey no. 132 being class III

Devasthan which appears to have drifted to conclude that the suit property cannot be considered to be owned by Najmunnisa Begum and that she had no right to deal with the same and suit property is a wakf property.

76. The tribunal appears to have rather overlooked, during the span of time at least from 1927 to 2015 till the suit had been filed there had been two Limitation Acts, one of 1908 and other of 1963. It may not be out of place to refer to that till 1995 at least under the operation of said enactments, Najmunnisa Begum and purchasers of said property from her had continued to assert right as absolute owners.

77. Section 107 of the of the Wakf Act declares that Limitation Act would not have operation in the cases of possession of wakf properties, however, during the course of submissions, learned counsel has referred to a supreme court decision in the case of *T. Kaliamurthi and anr. Vs. Five Gori Thaikkal Wakf and others* (supra), submitting that said provision does not have retrospective operation.

78. The suit property admeasures 15 acre 15 guntha whereas survey number 24 appears to be 15 acre 28 guntha. Discrepancy occurred in respect of the areas of the two properties is not accounted for. Additionally, there appear to have been orders passed by the

authorities removing the suit land as Class III Devasthan which has been referred to earlier. Said orders do not appear to have been hitherto disturbed.

79. Apart from aforesaid, the Tribunal has rather overlooked the facet when it comes to discretionary relief, the plaintiff in this particular case does not appear to have approached with clean hands, while it vividly appears that the plaintiff had been party to the proceedings initiated in 1986. As a matter of fact, it was the plaintiff, who had initiated the same and had yet kept the ultimate outcome back while instituting present proceedings.

80. In the circumstances, it does not appear to be a case wherein it can be said that the plaintiff has been able to make out a case for interim injunction as has been sought. It does not appear to be a case wherein it can be said that balance of convenience is in its favour and has been able to raise a clear *prima facie* case for consideration and much less, having regard to the observations referred to hereinbefore about keeping back relevant and vital information and seeking a relief. It is difficult to consider that the circumstances are sufficient enough to let stall the developments taking place over the suit property in midway. It would not be inappropriate to set aside order passed by Wakf Tribunal, clamping of temporary injunction over further construction by the defendants

is concerned. Defendants would be carrying out activity at their peril and would not be able to claim equities.

81. As such, civil revision application is partly allowed. Prayer clause (B) relating to order on Exhibit – 36 stands rejected. Prayer clause (C) relating to impugned order on Exhibit – 37 stands granted. Rule is as such partially made absolute as stated above.

82. Learned advocate Mr. Kazi refers to that issues have been framed and the suit has reached the stage of evidence. If that be so, the suit be proceeded with expeditiously and be disposed of within a period of six months.

83. At this stage, Mr. Kazi, learned advocate requests to stay operation of this judgment in order to enable him to pose challenge to the same before the Apex Court. In view of the same, operation of this order stands stayed for a period of twelve weeks from today.

[SUNIL P. DESHMUKH]
JUDGE

arp/