

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 128 OF 2017

M/s. Golden Construction Promoters & Anr. ... Applicants
Vs.
Iqbal Mehmood Ansari & Ors. ... Respondents

WITH
CIVIL REVISION APPLICATION NO. 129 OF 2017

M/s. Golden Construction Promoters & Anr. ... Applicants
Vs.
Mushtaque Ahmed Shaikh Fakruddin & Ors. ... Respondents

CIVIL REVISION APPLICATION NO. 130 OF 2017

M/s. Golden Construction Promoters & Anr. ... Applicants
Vs.
Ahmed Sayyed Yunus & Ors. ... Respondents

Mr. G.S. Godbole i/b. Mr. S.N. Biradar, Advocate for the applicants in all the C.R.As.

Mr. B.S. Nayak, Advocate for respondent no.1 in CRA/128/2017.

Mr. S.G. Deshmukh with N.N. Bhosle i/b. Mr. Ramdas Shelke, Advocate for respondent nos. 29 to 31 in CRA/129/2017.

Ms. Lalita Panchakshari, Advocate for respondent nos. 1 and 2 in CRA/129/2017.

Ms. S.V. Sonawane, Advocate for respondent no. 1 in CRA/130/2017.

CORAM: MRS.MRIDULA BHATKAR, J.
DATE: 21st April, 2017.

P.C.:

These Civil Revision Applications are filed by the applicants challenging the order dated 23rd December, 2016 passed by the

District Judge/Presiding Officer, Maharashtra State Waqf Tribunal, Aurangabad in Waqf Suit No. 18 of 2012, Waqf Suit No. 120/2014 and Waqf Application No. 20/2013 thereby directing the applicants not to carry out further constructions on the suit properties of Old Survey no. 3 admeasuring 03 acres 13 guntha bearing survey nos. 847, 848, 849 and 850 and new City survey nos. 1038, 1038A, 1039, 1040, 1041 and 1042 situated at Bhawani Peth, Pune till final disposal of Waqf Suits and Waqf Application. The property having area of 4 acres situated at Bhawani Peth, Pune. A major portion of new City survey no. 1038 is occupied and reserved as Kabrastan and masjid for the use of Muslim community. The said portion is not disputed before the Court. The applicants have annexed the map approved by the City Survey Officer carving out the disputed portion (which is marked as Exhibit kk to this Application) by pink line. According to the applicants, that is the area which is declared as slum in a scheme launched under the Slum Rehabilitation Act. The applicants are the developers, who have entered into the contract of development of the said slum plot and the construction of the buildings and rehabilitation of the slum dwellers. The respondents are the persons of the community. However, by the order dated 14th February, 2017, my predecessor has given notice to the first

respondent in all the three Revision Applications, as the first respondent in all the Revision Applications, being original plaintiff, is the only contesting respondent and the parties were put to notice that subject to the time constraint and convenience of the Court, Applications will be disposed of finally. The parties have appeared through their counsel before the Court, hence the service is waived and the matters are finally heard at the stage of admission.

2. The learned counsel for the applicants gave history of the matters as follows:

Till 1954, Waqf Act was applicable only to Marathwada region. The property falls in Pune and therefore, it was not applicable. Earlier, one Mohammad Hasan Salik filed Application No. 26 of 1957 before the Assistant Charity Commissioner, Pune that the said land is inam for the community. By the judgment dated 28th May, 1957, the Assistant Charity Commissioner rejected the said claim of inam. So, Shaikh Mohammad Shaikh Anwar Shah filed Appeal which is numbered as 108 of 1964 before the Joint Charity Commissioner. The said Appeal was allowed on 20th August, 1970 and the matter was remanded again to the Assistant Charity Commissioner wherein the order of appointment of maintenance Surveyor was directed and

pursuant to which, the maintenance Surveyor was appointed to earmark the exact area of burial. The Assistant Charity Commissioner by order dated 14th June, 1971, carved out and earmarked the area of burial, which is declared as property of Waqf. The order is as follows:

“The portion of City Survey No. 1038 Nana Peth, Poona marked within yellow boundaries in the sketch Ex. 79 is the property of this trust viz. Maruk Shah's Takiya, Bhawani Peth, Pune-2.”

The said order was not further challenged and thus, as on today, it holds a field. In 1955 Waqf Act made applicable to all over Maharashtra and thereafter Waqf Suit No. 18 of 2012, Waqf Suit No. 120 of 2014 and Waqf Application No. 20 of 2013 were filed by respondent no. 1 Ahmed Sayyed Yunus before the Maharashtra State Waqf Tribunal. In the suits, they sought temporary injunction restraining the defendants nos. 1 to 4 in Waqf suit No. 18 of 2012, defendant nos. 6 to 10 in Waqf Suit No. 120 of 2014 and respondent nos. 1 to 13 in Waqf Application No. 20 of 2013 from making construction and development in the suit properties till final disposal of the suits and Application. The Application Exh. 5 in Waqf Suits and Waqf Application was allowed by order dated 23rd December, 2016 by the District Judge/Presiding officer, Maharashtra State Waqf

Tribunal, Aurangabad. Hence, these Civil Revision Applications.

3. The learned counsel Mr. Godbole for the applicants has submitted that the applicants are the developers who have entered into an agreement for development on account of Slum Rehabilitation Scheme under the Act. He submitted that the applicants have executed registered sale deed. He submitted that slum rehabilitation notification declaring the suit area as slum was issued on 23rd February, 1984. He also relied on the notification dated 12th April, 1984. He pointed out the specifications of the area in City survey Nos. 1038 Part, 1041, 1039 and 1040 of Bhawani Peth. He submitted that slum clearance order was issued under section 11 of Slum Rehabilitation Act on 6th August, 2005. He further submitted that commencement certificate was issued in 2005. As on today, the applicants have constructed three buildings and 60 tenements are constructed and occupied by slum dwellers. The learned counsel further submitted that the learned District Judge/Presiding officer, Maharashtra State Waqf Tribunal did not consider the notification issued by the State of Maharashtra under Slum Rehabilitation Act. He further argued that the impugned notification is not challenged in these Applications. He further submitted that the order passed by the

Assistant Charity Commissioner on 14th June, 1971 in Application No. 26 of 1957 has attained finality and by that order, the Charity Commissioner has restricted the area of 63R for kabrastan and therefore, filing of these suits again for the same cause amounts to resjudicata, as this issue is already decided by the Assistant Charity Commissioner. He further submitted that the order of learned District Judge/Presiding officer, Maharashtra State Waqf Tribunal dated 23rd December, 2016 be set aside.

4. The learned counsel for respondent no. 1 in all the Civil Revision Applications while opposing the Applications have submitted that it is a Waqf land and no construction can be done on it. The learned submitted that a sanad is given by Peshwas in favour of muslim community for the purpose of burial ground. The said property belongs to Waqf and that land cannot be used for any other purpose than for the object it is given. It is further argued that the applicants are the builders/developers and they have illegally occupied the said land and constructed the buildings. They have no right to occupy the land owned by the trust.

5. Perused the impugned order passed by the learned District Judge/Presiding officer, Maharashtra State Waqf Tribunal, so also the

earlier order dated 14th June, 1971 of Assistant Charity Commissioner. It appears that similar issue of declaration of the area of kabrastan was before the Assistant Charity Commissioner in Application No. 86 of 1957 and the Charity Commissioner after considering the claims and the counter claims has marked the area of 63R and reserved for kabrastan. There is no doubt that the land for kabrastan is to be preserved without any obstruction and the objections of the community about the sanctity of their graveyard are to be honoured. The area which is ear-marked by the order of Assistant Charity Commissioner dated 14th June, 1971 *prima facie* appears to be final. Thus, no construction can be made and the area of 63R which is ear-marked by the City Survey Officer cannot be encroached upon. In this case, it appears that City survey no. 1038 was occupied by the slum dwellers and therefore, the Government has declared the said area as slum so also the area of City Survey No. 1041. The area of City Survey No. 1039 and 1040 are also declared as slum by notification dated 23rd February, 1984 and the Government has implemented the Slum Rehabilitation Scheme by issuing necessary orders under section 11 of the Slum Rehabilitation Act so also the commencement certificate. The applicants are constructing the building under the scheme. The respondents have

not challenged the notification of declaring the said area as slum. Therefore, the construction carried out by the applicants cannot be said, at this stage, as unauthorized as far as the construction is as per the approved plan under the said scheme of Slum Rehabilitation Act. As on today, three buildings are standing on the said plot and four wings are under construction. Under such circumstances, it cannot be said at this interim stage that balance of convenience lies in favour of the respondents/original plaintiffs. Moreover, 60 tenements are constructed and third party rights are also created in the tenements, as some people have paid the money and occupied the said tenements. Under such circumstances, the balance of convenience lies in favour of the plaintiffs. It appears from the order that this aspect is not considered by the learned District Judge.

6. In the notifications in MGG dated 23rd February, 1984 and 12th April, 1984, the area from the following Survey nos. is declared as slum -

From City Survey No. 1038 (part) is 2601.4 sq. mtrs.
From City Survey no. 1041 is 63.8 sq. mtrs.
From City Survey nos. 1039 and 1040 area is 284.93 sq. mtrs.

Thus, the total declared slum area comes to 2950.13 sq. mtrs. It is

made clear that the applicants shall not construct more than the area which is approved for construction by the Government under Slum Rehabilitation Scheme. They shall not encroach upon the portion of area which is already declared as kabrastan and should confine his construction within the said area as per the approved plan.

7. It appears that in the order of Assistant Charity Commissioner the area for kabrastan has carved out. At interim stage, I am not going into the merits of other issues, which are raised in the suit.

8. With this, I set aside the order of learned District Judge/Presiding officer, Maharashtra State Waqf Tribunal dated 23rd December, 2016 and allow the Civil Revision Applications.

(MRIDULA BHATKAR, J.)