

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 1789 OF 2017**

Ali Akbar Adamjee Peerbhoy .. Petitioner
V/s.
The District Collector Mumbai and ors. .. Respondents.

Mr. S.G. Kudle for the Petitioner.

Ms Geeta Shastri, Addl. GP for the Respondent Nos.1,2, and 4 – State.

Ms Trupti Puranik for Respondent No.3- Corporation.

Mr. R.A. Dada, Sr. Advocate a/w. Ms Rati Lodha, Ms. Alisha N. i/b Lodha Legal for Respondent Nos.5 and 6.

**CORAM: DR. MANJULA CHELLUR, C.J.
AND M.S.SONAK, J.**

DATE : 29 NOVEMBER 2017.

P.C.

1. Heard Mr. S.G Kudle, learned counsel for the petitioner. Mr.R.A. Dada, learned senior advocate along with Ms Rati Lodha appear for respondent Nos.5 and 6, Ms Geeta Shastri, learned Addl. GP for the respondent - State and Ms Trupti Puranik, learned counsel for the respondent - Corporation.

2. The petitioner, claims to be legal heir of late Adamjee Peerbhoy. Mr. Kudle on behalf of the petitioner submits that in the property which is leased out to Sir Adamji Peerbhoy Sanatorium Trust (now represented by respondent Nos.5 and 6), there is a portion bearing C.T.S. Nos. 1/36 and 37B, which is reserved as cemetery for the members of Bhora community. He submits that in

such portion, the Dargah of late Adamjee Peerbhoy is also located. He submits that respondent Nos.5 and 6 contrary to reservation in the municipal records are using the portion reserved as cemetery for commercial purposes. He submits that respondent Nos.5 and 6 are taking advantage of the fact that there is no clear survey to demarcate the areas. He, therefore, submits that appropriate directions be issued to the respondent – authorities to carry out a detailed survey and thereafter the petitioner may be granted permission to undertake the work of fencing the area reserved as cemetery. He further submits that the authorities may be directed to prepare a separate property extract for C.T.S. Nos. 1/36 and 37B record therein the names of legal heirs of Adamji Peerbhoy.

3. Mr. Dada, learned senior advocate for respondent Nos.5 and 6, submits that a portion of C.T.S. No.37 is indeed reserved as a cemetery and the Dargah of Adamjee Peerbhoy is located therein. Mr. Dada submits that this portion is maintained as it is and there is no intention to use the said portion for any commercial purposes. Mr. Dada submits that the petitioner seeks to enforce certain alleged personal claims to this portion. Mr. Dada submits that this cannot be done in a petition under Article 226 of the Constitution of India.

4. Mr. Dada further points out that the petitioner had earlier instituted Writ Petition No. 491 of 2016 and Contempt Petition No. 32 of 2017, seeking similar reliefs. The two petitions have since been disposed of by orders dated 2nd December 2016 and

15th June 2017 respectively. The petitioners seeks the same reliefs by making some minor changes in the draft of the petition, which is impermissible.

5. We have heard learned counsel for the parties and also perused the material on record.

6. The reliefs applied for in this petition, read as follows:

“(a) Rule be issued. Records and proceedings of this case be called for;

(b) This Hon'ble Court be pleased to issue the writ of certiorari order, directions or any other order and directions or appropriate writ in the nature of certiorari calling for records and proceedings in respect of the CTS No. 1/36 and CTS No. 37B of the Girgaon Division, and after perusing the said property extract of both the CTS Nos. if it reveals that graveyards are there on both the CTS Nos. then in that case to maintain the sanctity of the both graveyards this Hon'ble Court be pleased to issue further order directions or appropriate writ in the nature of mandamus directing the Respondent No. 1 herein to depute any official of the Revenue & Forest Department thereby giving further directions to the said officials to carry out the survey of CTS No. 1/36 and CTS No. 37B of Girgaon Division, thereby demarcating area of both the graveyards and also for issuing further order directions or appropriate writ in the nature of mandamus directing the Respondent No. 1 and all other concerned officials to permit the Petitioner to do the work of fencing of both the graveyards situated on CTS No. 1/36 and CTS No. 37B of Girgaon Division, Mumble at his own cost;

(c) This Hon'ble Court further be pleased to issue necessary directions order or appropriate writ in the nature of mandamus directing the Respondent No. 1 herein to prepare

the separate property extract of both the CTS Nos. 1/36 and 37B of Girgaon Division separately thereby recording the names of legal heirs of Sir Admajee Peerbhoy so as to get the benefits by virtue of the incorporation of the names in the said property extract of graveyards;

(d) Pending the hearing and final disposal of this Writ Petition, this Hon'ble Court be pleased to issue an order of mandatory injunction directing the Respondent Nos. 1 to 3 herein to remove the unauthorized structure if any carried out on the area of graveyards situated at CTS Nos. 1/36 and 37B of Girgaon Division, and the persons concerned be prosecuted in case if it is revealed that the said persons more particularly Respondent Nos. 5 and 6 herein have committed an offence as punishable under the provisions of Section 295A of the Indian Penal Code;

(e) Any other equitable and suitable orders be kindly passed in favour of the Petitioner only;

(f) This be petition be allowed with costs."

7. Mr. Dada, has already stated that a portion of land bearing C.T.S. No.37 is reserved as a cemetery and the Dargah of late Adamjee Peerbhoy is situated therein. He has also stated that the said area is maintained as it is and there is no proposal to put the same to any commercial use. The allegations that the portion is being put to commercial use are not made good by the petitioner. The allegations that there are graves in some additional portion is also not made good by the petitioner. On basis of mere allegations of this nature, we cannot order survey or resurvey at the behest of the petitioner in these proceedings. Further, in these proceedings,

it is not possible for us to examine disputed questions of fact raised by the petitioner.

8. Insofar as, the reliefs in terms of prayer clauses (b) and (c) of the petition are concerned, they relate to undertaking of a survey and inclusion of the names of legal heirs of late Adamjee Peerbhoy in the revenue records. The petitioner claims to be one of the legal heirs of late Adamjee Peerbhoy. This means that the petitioner seeks personal reliefs in relation to his alleged rights or claims in respect of a portion of the property leased to respondent Nos.5 and 6. In order to secure such reliefs, a petition under Article 226 or 227 of the Constitution of India is not the proper remedy. In a proceeding of this nature, we cannot investigate into disputed questions of fact, title or entitlement. That is a matter which will essentially have to be adjudicated in a suit, if instituted, before appropriate forum by the parties.

9. We also note that the petitioner had instituted Writ Petition No. 491 of 2016, seeking some what similar reliefs. This petition was disposed of by order dated 2nd December 2016. In the said order, it was made clear that the disputed question whether any obstruction is being made preventing entry of the legal representatives of the original lessee into Mosque/Dargah on the said property was expressly kept open to be decided by the appropriate authority/forum in accordance with law.

10. Thereafter, the petitioner instituted Contempt Petition No. 32 of 2017 alleging that the police, by not registering an offence under Section 295A of the IPC against respondent Nos.5 and 6, had committed contempt of the order dated 2nd December 2016 disposing of Writ Petition No. 491 of 2016. By detailed order dated 15th June 2017, the contempt petition was dismissed.

11. By making some cosmetic changes in the petition, the petitioner cannot re-agitate such issues before this Court. If the petitioner indeed has any rights or claims in his capacity as the alleged legal heir of late Adamjee Peerbhoy, it is for the petitioner to take out appropriate proceedings before the appropriate forum to establish such rights and seek reliefs. However, the proceedings under Articles 226 and 227 of the Constitution of India are not appropriate proceedings for such purpose.

12. Therefore, upon cumulative consideration of the aforesaid, we dismiss this petition. There shall however, be no order as to costs.

(CHIEF JUSTICE)

(M.S.SONAK, J.)