

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 7732 OF 2017

Osman Khan Sadulla Khan Inamdar
& Ors.

... Petitioners

Versus

Saida @ Hajra Khajamiya Khatik
& Ors.

... Respondents

.....

Mr. R. P. Adgaonkar for the Petitioners.

Mr. S. V. Natu for Respondent Nos. 1 to 7.

Mr. R. D. Khandap for Respondent Nos. 8 & 9.

Mr. H. I. Pathan for Respondent No. 10.

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CORAM : V. K. JADHAV, J.

**Date of Reserving
the Order : 12.04.2018**

**Date of pronouncing
the Order: 03.05.2018**

ORDER :-

1. Heard finally with consent at admission stage.
2. Being aggrieved by the order dated 05.05.2017 passed below Exhibit 60 for staying the proceedings in Regular Darkhast No. 12 of 2016, filed alongwith the objection petition Exhibit 58, the original decree holders have preferred this Writ Petition.

3. Brief facts giving rise to the present Writ Petition are as follows:

a) The petitioners had instituted Waqf Suit No. 40 of 2010 for recovery of possession of the landed property bearing land Survey No. 17 ad-measuring 28 Acre 36 Gunthas and land Survey No. 18 ad-measuring 31 Acre 21 Gunthas situated at Dharur, Taluka Dharur, District Beed. According to the petitioners, the suit lands are the properties of Jama Masjid and Graveyard, Dharur, being service inam lands. The suit lands are also included in the list of wakf properties published in the Government Gazette dated 18.04.1974 according to the provisions of the Waqf Act, 1954 and the petitioners are the successors of one Rahmat Khan. The petitioners claim to be belonging to the family of the person who was appointed as a survitor of Masjid and property was granted for service of the Wakf. According to the petitioners, the original defendant nos. 1 and 2 (respondent nos. 8 and 9 herein) had filed Civil Suit being RCS No. 91 of 1980 against the Marathwada Waqf Board and others and the petitioners' father was also added as defendant no.7 therein. The said suit was decreed ex-parte. Though

defendant nos. 1 and 2/respondent nos. 8 and 9 were aware that the suit lands are dedicated for religious services of the suit wakf, they claimed possession on the basis of the lease deeds which expired long back. The said lease deeds are rendered *void ab initio* and not binding on the petitioners/plaintiffs as well as the Wakf Board. The petitioners were not aware of the judgment and decree passed in RCS No. 91 of 1980 till they obtained certified copies on 15.04.2010. On inquiry, the petitioners came to know that the Wakf Board has also initiated enquiry u/s 54 of the Waqf Act, 1995 against respondent nos. 8 and 9 for removal of encroachment from the suit lands. However, respondent nos. 8 and 9/original defendant nos. 1 and 2 had filed Regular Darkhast against the Chief Executive Officer for breach of injunction order and therefore the CEO was constrained to drop the said proceedings. It is the case of the petitioners that the respondent nos. 8 & 9 are not lawfully entitled to retain possession of the suit lands but the petitioners are entitled to possess the same. The petitioners, therefore, were constrained to institute the said Waqf Suit No. 40 of 2010.

b. The respondent nos. 8 and 9 (original defendant nos. 1 and 2 in the said Wakf Suit) have strongly resisted the suit. They have denied that the suit lands belong to the Jama Masjid, Dharur and according to them, the entry of suit property as Wakf in the Government Gazette dated 18.04.1974 is false and without any enquiry, nor the property is dedicated by any way. The suit property is not part and parcel of Muntakhab No. 1298. According to them, the said decree passed in RCS No. 91/1980 is not challenged by anybody and as such, the same has attained finality. Defendant nos. 8 & 9 used to pay rent of Rs.354/- fixed by the Tahsildar, Kaij by order dated 27.09.1984 by depositing the same in Tahsil Office and as such, their possession is legal and confirmed by the competent authority. It is also their contention that the suit property is not wakf and as such, the tribunal has no jurisdiction. Their possession is since last seventy years and it is open and adverse to all others and petitioners/plaintiffs were knowing about their adverse possession over the suit land. According to them, the petitioners are neither Inamdar nor from village Dharur and no succession has been granted in their name. In fact, the respondents/defendants 1 & 2 are serving and use to maintain

Jama Masjid in proper manner since last seventy years. Both the parties led their oral and documentary evidence to substantiate their rival contentions. The learned Presiding Officer of the Maharashtra Wakf Tribunal, by the judgment and decree dated 8/9th January, 2013, decreed the suit with costs and directed respondent nos. 8 and 9 (original defendant nos. 1 and 2) to hand over peaceful possession of the suit lands to the petitioners and Wakf Board within three months and also directed separate enquiry for determination of the mesne profits.

c) Being aggrieved by the same, respondent nos. 8 and 9 herein preferred Civil Revision Application No. 48 of 2013 before this Court. By order dated 12.03.2014, this Court has dismissed C.R.A. No. 48 of 2013. Being aggrieved by the same, respondent nos. 8 and 9 herein further approached the Hon'ble Apex Court vide Petition for Special Leave to Appeal (C) 11296 of 2014. By order dated 08.03.2016, the Apex Court has dismissed the same.

d) The petitioners have accordingly initiated execution proceedings and the learned Presiding Officer of the Wakf Tribunal has transferred the execution proceedings to the Civil

Judge, Junior Division, Dharur and the same is registered as Regular Darkhast No. 12 of 2016. By order dated 08.02.2017 passed below Exhibit 19, the executing court has issued possession warrant in respect of the suit properties. Respondent nos. 1 to 7 herein have filed objection petition, claiming themselves to be the legal heirs of deceased Khajamiya Khatik who happened to be the brother of respondent nos. 8 and 9 herein. Respondent nos. 1 to 7 have raised objection Exhibit 58 that the said deceased Khajamiya Khatik was not impleaded as a party defendant to the Wakf Suit. Respondent Nos. 1 to 7/original objection petitioners prayed in the said objection application Exhibit 58 that the decree passed in Wakf Suit No. 40 of 2010 be declared as null and not executable against them and their possession be protected as per law. They also filed application Exhibit 60 praying therein that the order of possession warrant in respect of the suit lands passed below Exhibit 19 dated 08.02.2017 be stayed or suspended or called back till final decision of the objection petition Exhibit 58.

e) The petitioners herein have strongly resisted the said objection by filing say. The learned Judge of the executing court,

by order dated 05.05.2017, allowed the application Exhibit 60 and stayed the possession warrant till decision of the objection petition at Exhibit 58. Hence this Writ Petition.

4. The learned counsel for the petitioners submits that the executing court, despite specific objection as regards jurisdiction to decide the objection pertaining to the Wakf property raised by the petitioners, has failed to consider the same and passed the impugned order. The learned counsel submits that the executing court ought to have framed preliminary issue regarding jurisdiction to entertain, try and decide the objection. The learned counsel submits that the Presiding Officer of the Wakf Tribunal in the said Wakf Suit No. 40 of 2010 has recorded the finding in the affirmative to issue nos. 1 and 2 and held that the suit land Survey nos. 17 and 18 situated at Dharur, District Beed are the service inam lands of Jama Masjid and Graveyard and the petitioners/original plaintiffs are hereditary Mutawalli of the said Wakf institution. The learned Presiding Officer of the Maharashtra Wakf Tribunal has further recorded the finding to issue nos. 3 to 6 in the negative and thereby held that defendant nos. 1 and 2 (respondent nos. 8 and 9 herein) are not in lawful

possession of the suit lands, they are not rendering service to the Masjid, they are not Mutawalli of the wakf and they are not the owners by adverse possession. The said decree has attained finality as this Court has confirmed the said decree in CRA No. 48 of 2013 and the Supreme Court has also dismissed the Petition for Special Leave to Appeal (C) No. 11296/2014 preferred by respondent nos. 8 and 9 herein by order dated 08.03.2016. The learned counsel submits that respondent nos. 1 to 7/original objection petitioners are not claiming any independent right and they are claiming their rights through their deceased father who happened to be the real brother of respondent nos. 8 and 9 herein (original defendant nos. 1 and 2 in Wakf Suit No. 40 of 2010). The learned counsel submits that respondent nos. 1 to 7 have no independent standing and their case is similar to that of respondent nos. 8 and 9 herein. The learned counsel for the petitioner submits that the Wakf Tribunal has recorded the finding to the effect that the suit lands are the service inam lands of Jama Masjid and Graveyard and the petitioners are the hereditary Mutawalli of the said wakf institution. The learned counsel submits that it is not clear as to under what provision of the Code of Civil Procedure, 1908,

respondent nos. 1 to 7 have raised their objection in the pending Darkhast. The learned counsel submits that in terms of the provisions of Section 83(8) of the Waqf Act, 1995, the execution of any decision of the tribunal shall be made by the Civil Court to which such decision is sent for execution in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and in terms of Section 85 of the said Act, there is a bar of jurisdiction of civil court, revenue court or any other authority in respect of any dispute, question or other matter relating to any waqf, waqf property or other matter which is required by or under the said Act to be determined by a tribunal.

5. The learned counsel for respondent nos. 1 to 7 submits that since the substantive application filed below Exhibit 58 is pending for adjudication, the present petition challenging the interim order passed below Exhibit 60 is not tenable. The learned counsel submits that the suit property is a service inam land of Jama Masjid, Dharur and by Muntakhab No. 1298 it was granted in favour of one Chand s/o Rasul Khan Inamar. After the death the original inamdar, the virasat was granted in favour of one Karim Khan. Said Karim Khan died on 17.02.1964 leaving

behind three sons Osman Khan, Ab. Hamid Khan and Gulam Moh. Khan. After the death of Karim Khan, the virasat was sanctioned in favour of his sons and their names were mutated by Mutation Entry No. 2370. Since 1932, the suit land was in possession and cultivation of the family of Jainuddin Shamshoddin who happened to be the grandfather of respondent nos. 1 to 7. After his death, the suit property was in possession and cultivation of his sons namely Mahmood Jainuddin, Jilani Jainuddin (respondent nos. 8 & 9 herein) and Khajamiya Jainuddin (father of respondent nos. 1 to 7). Accordingly, Mutation Entry No. 2683 came to be sanctioned on 18.10.1981, mutating the names of these three sons of deceased Jainuddin. These three sons of Jainuddin filed Regular Civil Suit No. 91 of 1980 seeking decree of perpetual injunction against the Wakf Board and the Revenue Officers, restraining them from interfering in the peaceful possession of Khajamiya Jainuddin i.e. the father of respondent nos. 1 to 7. The said suit was contested by all the parties and the learned Civil Judge, Senior Division, Ambajogai, by judgment and decree dated 31.01.1991, decreed the suit. The trial court in the said suit has held that the plaintiffs including father of respondent nos. 1 to 7 is in possession of

the suit property and thereby restrained the defendants from interfering with their peaceful possession over the suit property.

6. The learned counsel for respondent nos. 1 to 7 further submits that the father of these respondents is having 5 Ane & 4 Pai share in the suit property having right of cultivation. The forefathers of the respondents are continuously in possession and cultivation of the suit property. Deceased Khajamiya Jainuddin was in possession and cultivation of his share and consistently his name was reflected in the record of rights till his death in the year 2000. After his death, respondent nos. 1 to 7/objection petitioners are in possession of the suit property and the same can be seen for the record of rights of the suit property.

7. The learned counsel further submits that the petitioners are well aware of all these facts. However, they have not impleaded respondent nos. 1 to 7 as party defendants to Wakf Suit No. 40 of 2010 and subsequent proceedings. While passing the impugned order dated 05.05.2017 below application Exhibit 60, the executing court has observed that the objection petitioners have made out a *prima facie* case which requires a

detail hearing and therefore, pending hearing of the objection petition Exhibit 58, the interim order is passed which is challenged in this Writ Petition. The learned counsel submits that considering the nature of the impugned order, being interim order pending hearing and decision of the substantive objection petition Exhibit 58, no interference is called for.

8. The learned counsel for respondent nos. 1 to 7, in order to substantiate his contentions, placed reliance on the following cases:

1. **Jai Narain Ram Lundia vs Kedar Nath Khetan**, reported in AIR 1956 SC 359,
2. **Maganahalli Basappa vs Doddamani Basavarajappa**, reported in (1985) ILR (Karnataka) 2420,
3. **Bipan Lal vs Dass**, reported in AIR 1962 Himachal Pradesh 14 and
4. **Punjab Wakf Board vs Tarlochan Singh & Anr.** (Civil Revision No. 7360 of 2012) with connected matters, decided by the High Court of Punjab and Haryana at Chandigarh on 14.01.2015.

9. I have also heard learned counsel for respondent nos. 8 and 9 and the learned counsel appearing for respondent no. 10.

10. I have carefully considered the submissions advanced by learned counsel for the respective parties. With their able assistance, I have perused the pleadings, grounds taken in the petition, the annexures thereto and the affidavit in reply filed by the concerned respondents. In view of the above submissions, it would be appropriate to reproduce Sections 83 and 85 of the Waqf Act, 1995.

83. Constitution of Tribunals, etc.-

(1) The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a waqf or waqf property, eviction of a tenant or determination of rights and obligations of the lessor and the lessee of such property, under this Act and define the local limits and jurisdiction of such Tribunals;

(2) Any *mutawalli*, person interested in a waqf or any other person aggrieved by an order made under this Act, or rules made thereunder, may make an application within the time specified in this Act or where no such time has been specified, within such time as may be prescribed, to the Tribunal for the determination of any dispute, question or other matter relating to the waqf.

(3) Where any application made under sub-section (1) relates to any waqf property which falls within the territorial limits of the jurisdiction of two or more Tribunals, such application may be made to the Tribunal within the local limits of whose jurisdiction the *mutawalli* or any one of the *mutawallis* of the waqf actually and voluntarily resides, carries on business or personally works for gain, and, where any such application is made to the Tribunal aforesaid, the other Tribunal or Tribunals having jurisdiction shall not entertain any application for the determination of such dispute, question or other matter;

Provided that the State Government may, if it is of opinion that it is expedient in the interest of the waqf or any other person interested in the waqf or the waqf property to transfer such application to any other Tribunal having jurisdiction for the determination of the dispute, question or other matter relating to such waqf or waqf property, transfer such application to any other Tribunal having jurisdiction, and, on such transfer, the Tribunal to which the application is so transferred shall deal with the application from the stage which was reached before the Tribunal from which the application has been so transferred, except where the Tribunal is of opinion that it is necessary in the interests of justice to deal with the application afresh.

(4) Every Tribunal shall consist of -

(a) one person, who shall be a member of the State Judicial Service holding a rank, not below that of a District, Sessions or Civil Judge, Class I, who shall be the Chairman;

(b) one person, who shall be an officer from the State Civil Services equivalent in rank to that of the Additional District Magistrate, Member;

(c) one person having knowledge of Muslim law and jurisprudence, Member;

and the appointment of every such person shall be made either by name or by designation.

(4-A) The terms and conditions of appointment including the salaries and allowances payable to the Chairman and other members other than persons appointed as *ex officio* members shall be such as may be prescribed.

(5) The Tribunal shall be deemed to be a Civil Court and shall have the same powers as may be exercised by a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, or executing a decree or order.

(6) Notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), the Tribunal shall follow such procedure as may be prescribed.

(7) The decision of the Tribunal shall be final and binding upon the parties to the application and it shall have the force of a decree made by a Civil Court.

(8) The execution of any decision of the Tribunal shall be made by the Civil Court to which such decision is sent for execution in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

(9) No appeal shall lie against any decision or order whether interim or otherwise, given or made by the Tribunal;

Provided that a High Court may, on its own motion or on the application of the Board or any person aggrieved, call for and examine the records relating to any dispute, question or other matter which has been determined by the Tribunal for the purpose of satisfying itself as to the correctness, legality or propriety of such determination and may confirm, reverse or modify such determination or pass such other order as it may think fit.

84.

85. Bar of jurisdiction of Civil Court, revenue Court and any other authority.-

No suit or other legal proceedings shall lie in any Civil Court, revenue Court and any other authority in respect of any dispute, question or other matter relating to any waqf, waqf property or other matter which is required by or under this Act to be determined by a Tribunal.

11. In terms of the provisions of Section 83, the decision of the tribunal shall be final and binding upon the parties to the application and it shall have force of a decree made by the Civil Court and in terms of Sub-section (8) of Section 83, the execution of any decision of the tribunal shall be made by the Civil Court to which such decision is sent for execution in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

12. In terms of the provisions of Section 39(3) of the CPC, a court shall be deemed to be a court of competent jurisdiction if, at the time of making the application for the transfer of decree to it, such court would have jurisdiction to try the suit in which such decree was passed. Thus, the question arises as to whether the provisions of Section 39 of CPC apply, when the matter comes to a court for execution not as a part of its ordinary jurisdiction but by reason of special jurisdiction. In terms of the provisions of Section 85 of the Waqf Act, 1995, there is a bar of jurisdiction of civil court, revenue court or any other authority in respect of any dispute, question or other matter related to any waqf, waqf property or other matter which is required by or under the Waqf Act, 1995 to be determined by a tribunal. The petitioners have raised specific ground as to jurisdiction of the executing court to entertain the objection petition filed by respondent nos. 1 to 7 herein in the pending Darkhast. It is thus incumbent upon the executing court to frame a preliminary issue about the jurisdiction to entertain the objection petition preferred by respondent nos. 1 to 7 in the pending Darkhast. In terms of the provisions of Section 85 of the Waqf Act, 1995, the

executing court shall proceed to determine, at the hearing of such application, the issue as to the jurisdiction before granting any interim relief. The learned Judge of the executing court has however granted the interim relief staying the issuance of possession warrant in terms of the decree passed in the Waqf Suit No. 40 of 2010 which has attained finality, without framing a preliminary issue as to the jurisdiction to entertain such objection petition preferred by respondent nos. 1 to 7 in the pending Darkhast. Thus, the Writ Petition deserves to be allowed with certain direction to the executing Court. Hence the following order:

ORDER

- I. The Writ Petition is hereby partly allowed. No costs.
- II. The impugned order dated 05.05.2017 passed by the executing Court below Exhibit 60 in Regular Darkhast No. 12 of 2016 is hereby quashed and set aside.
- III. The executing court shall frame the preliminary issue of jurisdiction to entertain the objections raised by respondent nos. 1 to 7 herein vide objection petition Exhibit 58 in pending Regular

Darkhast No. 12 of 2016 and decide the said issue as expeditiously as possible, preferably within a period of three months from the date of this order.

IV. The executing court shall also decide afresh the application Exhibit 19 filed by the petitioners in R.D. No.12 of 2016 for issuance of possession warrant simultaneously with the said preliminary issue.

V. The Writ Petition is accordingly disposed of.

(V. K. JADHAV, J.)

vre/