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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO.164/2017

Rafiuddin Qutbuddin Farooqui &
two others.

...Applicants..
(Org.deft.nos.3 to 5)

Versus

Syed Mushtaq Ahmed s/o Syed Ashfaq
Ahmed & two others.

...Respondents..
(No.1 Org.plaintiff
Nos.2 & 3 org.defts.1 & 2)

.....

Shri S.B. Khan, Advocate for applicants.
Shri S.A.P. Quadri, Advocate for respondent no.1.
Respondent nos.2 & 3 served.

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CORAM: M.S. SONAK, J.

DATE: 06.02.2018

ORDER :

- 1] Heard learned counsel appearing for the parties.
- 2] The challenge in this revision application is to the order dated 1.9.2017 by which the Wakf Tribunal has dismissed the applicants' application for re-framing of issues and for framing of certain additional issues.
- 3] The applicants have proposed following issues:-

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"A] Whether the plaintiff proves that he is an Inamdar in possession of lands Survey Nos.8,9,84,.85 and 99 i.e. Gut Nos.11,12,331,332 and 347 admeasuring 89 Acres 20 Gunthas situated at village Ravangaon Tq.Udgir ?

B] Whether the defendant nos.3 to 5 prove that the so called rights of the plaintiff have been extinguished ?

C] Whether the plaintiff is entitled to claim the declarations as prayed in prayer clause (B) of the plaint ?"

4] Insofar as the first and second issues, as proposed, it is seen that the same stand covered in issue no.1 already framed by the Tribunal. Issue nos.1 and 2 already framed by the Tribunal read as follows:-

"1] Whether the plaintiff proves that he is the Mutawalli, Imam, Khatib and Inamdar of the Jama Masjid and Idgah, Udgir as alleged ?

2] Whether the plaintiff proves that he is managing the affairs of the Jama Masjid and Idgah, Udgir and rendering religious services of Imamat, Khitabat etc. as alleged ?"

5] Therefore, there is no necessity to frame or re-frame issue nos.1 & 2 as proposed by the applicants. The contention that a party cannot claim to be Mutawalli and

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Inamdar at one and the same time, is a contention which can always be argued. However, there is no necessity for amending the issue nos.1 & 2 as already framed by the Tribunal.

6] Insofar as issue no.[C] proposed by the applicants, the Tribunal has rejected the framing of such additional issue by observing that at one stage, the defendants have denied the right of Khitabat, Imamat and Mutawalliship of the plaintiff and at the same time, they are praying for framing of an issue of extinguishing of right of the plaintiff, which is contrary to the pleadings. This reasoning of the Tribunal cannot be said to be correct. As a defendant, it is permissible for a party to plead that he denies the right of the plaintiff. However, such a defendant can further plead that assuming that any such right existed in the plaintiff, such right now stands extinguished. There is no bar to such nature of pleadings on behalf of the defendant. The defendant can always raise defences, which are in the alternate. Therefore, there was no reason not to frame the third additional issue, as proposed by the applicants, particularly since the applicants have taken the burden

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upon themselves to prove such an issue. Since this is a defence, it is only appropriate that the person, who is raising this nature of defence, takes burden upon himself to prove such a defence.

7] Accordingly, the Tribunal is directed to frame the following issue in addition to the issues already framed by it :-

“Whether the defendant nos.3 to 5 prove that the so called rights of the plaintiff have been extinguished ?

8] The impugned order is modified only to the aforesaid extent. The revision application is, therefore, partly allowed. There shall be no order as to costs.

9] It is made clear that nothing in the impugned order or for that matter in the present order, shall be construed as any observation on the merits of the matter, which is to be decided on the basis of pleadings and the evidence, which the parties will produce in the course of proceedings before the Tribunal. Therefore, all contentions of all the parties on merits of the matter are kept open for adjudication by the Tribunal.

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10] Learned counsel for the respondent no.1 – plaintiff submits that affidavit in lieu of examination-in-chief has already been filed and hence he may be permitted to file additional affidavit in view of framing of new issue.

11] Since the affidavit in lieu of examination-in-chief has already been filed on behalf of the plaintiff, the plaintiff, if he so desires, shall be permitted to file additional affidavit in lieu of examination-in-chief in the light of the issue, now directed to be framed.

12] All concerned to act on the basis of authenticated copy of this order.

(M.S. SONAK, J.)