

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION [ST] NO.20686 OF 2018**

Pramila Sumansingh Thakur	]	Petitioner
Vs.		
Ali Akbar Zamani (deleted)	]	
Sayed Jalal Jalali & Ors.	]	Respondents
		
Ms. Pramila S. Thakur, for Petitioner.		

CORAM : R.G. KETKAR, J.

DATE : 27TH JULY, 2018.

P.C:

Heard Ms. Pramila Thakur, petitioner in person at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 7th April, 2018 passed by the learned Judge, Court Room No.26 of the Court of Small Causes at Mumbai below Exhibit 65 in R.A.E & R Suit No.1076/1636 of 2006 as also the judgment and order dated 11th July, 2018 passed by the Appellate Bench of the Court of Small Causes at Mumbai in Revision Application No.291 of 2018. By these orders, the Courts below dismissed the application filed by the petitioner, hereinafter referred to as 'defendant' under Order-VII, Rule-11 (d) of the Code of Civil Procedure, 1908 (for short 'C.P.C') for rejection of the plaint.

3. In support of this Petition, Ms. Thakur submitted that the respondents, hereinafter referred to as 'plaintiffs' have instituted the present suit in the year 2006 in the Court of Small Causes at Mumbai, inter alia, praying for eviction of the defendant and recovery of possession of a portion of

land together with structure standing thereon known as “Chatriwala Chawl” situate at 40, Nesbit Road, Mazgaon, bearing C.S. No.378 of Mazgaon Division, Mumbai admeasuring about 634 square yards equivalent to 531.30 square meters and more particularly described in Schedule Exhibit 'B' annexed to the plaint. During pendency of the suit, one Kazim Jalal Mirab filed Application No.54/276 of 2012 before the Maharashtra State Board of Wakfs (for short “Wakf Board”) under section 54 of the Wakf Act, 1995 (for short 'Wakf Act'), *inter alia*, praying for issuing direction against respondent No.1, who is the present defendant to remove herself and deliver possession of the property being assessed by Collectors old No.40, New No.16271, Old Survey No.646, New Survey No.3583, C.S. 378, admeasuring total area 12090 square yards out of which encroached property 530 square meters of constructed chawl situate inside the four boundaries of the wakf property situate at Nesbit Road, Mazgaon, Mumbai, more particularly described in paragraph 1 of that application.

4. Ms. Thakur submitted that as for the identical reliefs, application is made before the Wakf Board, present suit is rendered infructuous. In support of this proposition, she relied on the decision of the Apex Court in **Shipping Corporation of India Ltd. Vs. Machado Brothers, AIR 2004 SC 2093**. She submitted that the plaintiffs filed application dated 15th January, 2016 for adding Mr. Ali Agha Namazi as plaintiff No.4 on the ground that he was appointed as trustee of the plaintiffs' Trust and the same application was allowed on 20th December, 2016. Plaintiff No.4 herein had filed an affidavit on 5th June, 2013 on behalf of the plaintiffs' Trust before the Wakf Board in the application No.54/276 of 2012 in respect of the suit property raising similar and identical reliefs prayed in the present suit. The defendant, therefore, filed application in the present suit for taking on record affidavit of Ali Agha Namazi which was allowed and marked as Exhibit 62/C. In paragraph 5 of that

affidavit, plaintiff No.4 specifically asserted that the suit property is a Wakf property and, therefore, jurisdiction in respect of Wakf property lies with Wakf Board. In paragraph 8, it was further asserted that the present suit filed in the Small Causes Court by the trustees is filed under legal mis-conception and authority and jurisdiction to decide controversy between the parties lies with Wakf Board and Wakf Tribunal only. She submitted that averments made in the affidavit of plaintiff No.4 dated 5th June, 2013 clearly comes within the purview of amended section 83 (1) of the Wakf Act. As the plaintiffs invoked section 54 of the Wakf Act by filing proceedings before the Wakf Board, the suit filed by the plaintiffs in the Small Causes Court is barred by law and is not maintainable. It also does not survive in view of section 54 of the Wakf Act by filing proceedings before the Wakf Board. In view of this position, she submitted that the Courts below were not justified in rejecting the application filed by the defendant under Order-VII, Rule-11 (d). Hence, Petition requires consideration.

5. I have considered the submissions advanced by Ms. Thakur. I have also perused the material on record. It is evident that before filing of application Exhibit 65, the defendant has filed application Exhibit 46 under Order-VII, Rule-11 of the C.P.C. By order dated 5th September, 2015, the learned trial Judge rejected that application. A perusal of that application and in particular paragraph 6 thereof, shows that reference was made to the application filed by one Kazim Jalal Mirab on 12th September, 2012 under section 54 of the Wakf Act for eviction of the defendant therein. In paragraph 7, it was specifically asserted that prayers made in the proceedings before Wakf Board, cause of action and the reliefs sought are one and the same that are pending before the Small Causes Court. The plaintiffs have thus instituted two separate proceedings before the separate forums for same cause of action, reliefs which are bad in law which is not permissible. In paragraph 8, reference

was made to the affidavit made by Ali Agha Namazi stating therein that only Wakf Act has power to entertain and try the matters relating to Wakf properties. On the basis of this assertion, it was contended that the Civil Court does not have jurisdiction to decide the suit and plaint is liable to be rejected under Order-VII, Rule-11 of C.P.C. By order dated 5th September, 2015, the learned trial Judge rejected the application Exhibit 46. Aggrieved by that decision, the defendant preferred Revision Application No.274 of 2015. By order dated 22nd July, 2016, the Appellate Court rejected the Revision Application. While rejecting that application, the Appellate Court referred to the decision of the Apex Court in the case of **Faseela M. Vs. Munnerul Islam Madrasa Committee & Anr., 2014 (5) SCALE 531.**

6. The defendant thereafter has filed present application Exhibit 65 once again under Order-VII, Rule-11 (d) for rejection of the plaint. I have already referred to assertions made in the application. By order dated 7th April, 2018, the learned trial Judge rejected the application. Being aggrieved by that decision, the defendant preferred Revision Application No.291 of 2018 which was rejected by the Appellate Court subject to imposition of costs of Rs. 3,000/- on 11th July, 2018.

7. Ms. Thakur relied on the decision of the Apex Court in the case of **Shipping Corporation of India Ltd.** (supra). In that case, the appellant had appointed the respondent as his steamship agent. By notice dated 23rd February, 1995, the appellant terminated the said contract. Respondent challenged termination by filing Civil Suit. Subsequent termination notice was issued on 23rd August, 2001. In that context, the Apex Court noted that first suit O.S. No.4212 of 1995 was based on original termination notice and since that termination notice ceased to exist on 23rd August, 2001, interlocutory order will not survive after the original proceedings came to an end. The Apex

Court held that the Courts below erred in continuing an infructuous suit just to keep the interlocutory order alive. In my opinion, the said decision is not applicable to the facts of the present case. The Courts below after considering the provisions of Wakf Board, Sections 6,7 and 83 thereof as also the provisions of Order-VII, Rule-11 and decision of the Apex Court in the case of **Faseela M.** (supra), came to the conclusion that jurisdiction of the Small Causes Court is not ousted.

8. In view thereof, I do not find that any case is made out for interfering with the impugned orders. Hence, Petition fails and the same is dismissed.

[R.G. KETKAR, J.]