

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 4763 OF 2018

Abubakar Abdul Karim Kazi and anr. .. Petitioners
vs.
Shaukat Mohammadkhan Momin and ors. .. Respondents

Mr. Owais A. Pechkar for the Petitioners.
Mr. A.B. Tajane for Respondent Nos.1 to 9.

CORAM : M. S. SONAK, J.
DATE : 11 APRIL 2019.

P.C. :-

1] Heard Mr. Owais Pechkar for the petitioners and
Mr.A.B.Tajane for respondent Nos.1 to 9.

2] The challenge in this petition is to the order dated 3rd
March 2018 by which learned Trial Judge has held that it
has jurisdiction to entertain, try and decide the suit.

3] This order was made on application at Exhibit-1 taken
out by the petitioners.

4] The petitioners' application at Exhibit-1 is not at all
quite clear. However, since the objection was that the suit is
barred under the provisions of section 85 of the Wakf Act,
1995, it is necessary to proceed that the application at

Exhibit-1 was an application seeking rejection of the plaint on the ground that the suit is barred by law, i.e., Wakf Act.

5] Learned Trial Judge, it appears, has also treated the application at Exhibit-1 in the same plight.

6] Learned Trial Judge has observed that in order to decide this application, only averments in the plaint will have to be taken into consideration and there is no question of looking to the defence of the defendants, i.e., the petitioners. Learned Trial Judge has reasoned that there is no statement in the plaint that the suit properties were/are Wakf properties or that any Wakf has created. On this basis, learned Trial Judge has rejected the application at Exhibit-1.

7] Mr. Owais Pechkar, learned counsel for the petitioners, however points out that there is registered document by which Wakf was created. He points out that there are registered documents which suggest that the property which is the subject matter of the suit is Wakf property. He submits that all this material was required to be considered by

learned Trial Judge and since this has not been considered, the impugned order warrants interference.

8] Since, the application at Exhibit-1 is required to be considered as an application seeking rejection of the plaint, there is no question of any reference to the defence of the petitioners. The contention that the suit property is a Wakf property or that there are registered documents to establish this fact are all matters of defence. In order to exercise powers under Order 7 Rule 11 (d) of CPC, a defendant has to make out a case that the suit, appears from the statement in the plaint, to be barred by any law. As pointed out by learned Trial Judge, there is no statement in the plaint, on the basis of which, it can be said that the suit is barred. In the plaint, there are no statements that the suit property is a Wakf property or that any Wakf was at all created. Therefore, on the basis of defence of the petitioners, powers under Order 7 Rule 11 (d) of the CPC cannot be exercised.

9] Thus construed, there is no jurisdictional error in the view taken by learned Trial Judge. The impugned order,

however, cannot be construed as conclusive on the issue of jurisdiction. It will still be open to the petitioners to raise the issue of jurisdiction by filing a written statement. Learned counsel for the petitioners states that the written statement has already been filed and even an issue of jurisdiction has been framed. In such a situation, the issue of jurisdiction will have to be framed as one of the issues in the suit and the same will have to be decided along with all other issues which arise in the suit. At this stage, obviously, the defence of the petitioners will have to be taken into consideration.

10] Further, it is necessary to note that this writ petition was itself not maintainable since, the petitioners had remedy of instituting a revision application under section 115 of CPC. In any case, since there is no jurisdictional error in the impugned order, this writ petition is dismissed with liberty as aforesaid. It is made clear that the observations in the impugned order or for that matter the present order need not influence learned Trial Judge whilst deciding the suit including, the issue of jurisdiction on its own merits and in accordance with law.

(M. S. SONAK, J.)