

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.176 OF 2019

Yakub Ahemad Patel and Ors.	...Applicants
vs.	
Sukribai Bablya Baraf	...Respondent

Mr. Sandesh D.Patil a/w. Mr. Prithviraj S. Gole, for the Applicants.

CORAM : M. S. SONAK, J.

DATE : MARCH 25, 2019

ORAL JUDGMENT:

- 1] Heard Mr. Sandesh Patil, learned counsel for the applicants.
- 2] Rule. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith.
- 3] The challenge in this civil revision application is to the order dated 10th July 2018 by which the learned Trial Judge has dismissed the applicants' application under Order 7 Rule 11 of the CPC seeking for rejection of the plaint.
- 4] Mr. Sandesh Patil, learned counsel for the applicants, points out that in the cause title itself the defendants have been described

as Trustees of *Masjid Kashi*. He points out that further in paragraph 3 of the plaint, the plaintiff has pleaded that the suit land as per the revenue record is mutated in the name of *Kashi Masjid* and the defendants are shown as Trustees of the said Masjid (Mosque).

5] Mr. Sandesh Patil submits that from the aforesaid, it is very clear that the applicants have pleaded that the suit property is a '*Waqf*' as defined under section 3 (r) of the Waqf Act, 1995 (said Act). He submits that the said Act clearly bars the jurisdiction of the Civil Court. He therefore, submits that from the statement in the plaint, it is clear that the suit is barred and therefore, the plaint was required to be rejected by resort to the provisions of Order 7 Rule 11 of CPC.

6] Mr. Patil points out that the applicants have been non-suited for failure to file written statement. He submits that an application under Order 7 Rule 11 of CPC can always be taken out even before filing of the written statement and therefore, this is a case of failure to exercise jurisdiction by the learned Trial Judge. On this ground

also, he submits that the impugned order is vulnerable and is required to be set aside.

7] Upon perusing the averments in the plaint, it cannot be said that the suit is barred under the said Act on the basis of any statement in the plaint. It is well settled that at the stage of deciding of an application under Order 7 Rule 11 of CPC, the Court has to focus upon the averments in the plaint and there is no scope of adverting to the defence if any, that may be raised by the defendants.

8] In the plaint, merely because the defendants have been described as Trustees of *Kashi Masjid*, it cannot be said that the plaintiffs have pleaded that the suit property is a Waqf property. Section 3(r) of the said Act defines “*Waqf*” to mean the permanent dedication by any person, of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes the properties described in sub-clauses (i) to (vi).

9] In the plaint, there are no pleadings regards any permanent dedication by any person, of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable. There are also no pleadings so as to include the suit property in any of the clauses (i) to (iv) of section 3(r) of the said Act. Therefore, it cannot be said that on the basis of any statement in the plaint, the suit as instituted is barred under the provisions of the said Act.

10] The next contention of Mr. Patil is not very well founded. No doubt, learned Trial Judge, in the impugned order, has stated that the defendants has not filed written statement and this means that there is absence of pleading from the defendants side. Though, it is settled position in law that an application under Order 7 Rule 11 of CPC can be filed even before the defendants file any written statement, nevertheless, it is necessary to make it clear that even after the defendants filed their written statement, it is impermissible for the Trial Judge to look into the defences raised in such written statement for the purposes of deciding application under Order 7 Rule 11 of CPC. Such applications have to be decided on the basis of averments in the plaint and at this stage, it

is not open to the learned Trial Judge to look into the averments in the written statement filed by the defendants raised in the written statement.

11] For the aforesaid reasons, there is no merit in this Civil Revision Application and consequently, the same is liable to be dismissed and is hereby dismissed. There shall be no order as to costs. However, it is clarified that the observations in the impugned order or for that matter in the present order are only in the context of deciding application under Order 7 Rule 11 of CPC. Therefore, such observations need not influence the learned Trial Judge whilst deciding the suit on merits, particularly, if all defences are raised by the applicants on the basis of the provisions of the Waqf Act, 1995. Such defences will have to be decided on their own merits and in accordance with law.

(M. S. SONAK, J.)