

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CIVIL REVISION APPLICATION NO. 48 OF 2021

1. Shrimant Raje Vikramsinh
Laxmansinh Raje Jadhavrao
Age: 67 years, Occu : Agriculture
R/o. Malegaon (Bk), Tq. Baramati,
Dist. Pune.
Presently R/o. 110 Raghvendra Vihar
Mahesh Housing Society, Bibewadi,
Pune – 4311037.
2. Raheman Gulabbhai Shaikh
Age: 47 years, Occu: Labour
R/o Malegaon (Bk), Tq. Baramati,
Dist. Pune.
3. Faiyaz Ilahi Shaikh
Age : 34 years, Occu : Business,
R/o. Prabodh Nagar, Baramati,
Dist. Pune.

... Petitioners
(Orig. Plaintiffs)

Versus

1. Gulab Didali Shah Fakir
Age : Major, Occu : Mujawar,
2. Sunnabi Deedali Shah Fakir
W/o Dilawar Sayyad
Age : Major, Occu : Household
3. Qutubbi Deedali Shah Fakir
Age : Major, Occu : Household
4. Munnabi Gulab Fakir
Age : 44 years, Occu : Household
R/o Near Raje Baksar Dargah,
Malegaon (Bk), Tq. Baramati,
Dist. Pune.
5. Aysha Gulab Fakir W/o Arif Mujawar
Age : 23 years, Occu : Household,
R/o Koregaon, Tq. Koregaon,
Dist. Satara.

6. Kashmira Gulab Fakir W/o Farooqe Shaikh
Age : 21 years, Occu: Household.
7. Reshma Gulab Fakir
Age : 17 years, Occu : Education
(Under Guardianship of Deft. No.1.)
8. Shahruk Gulab Fakir,
Age: 15 years, Occu : Education
(Under Guardianship of Deft. No.1)
9. Irfan Gulab Fakir,
Age : 13 years, Occu: Education,
R/o Malegaon (Bk), Tq. Baramati,
Dist. Pune.
10. Hina Dilawar Sayyed W/o Zameer Jagirdar,
Age : 26 years, Occu: Household,
R/o Indapur, Tq. Indapur, Dist. Pune.
11. Bina Dilawar Sayyed W/o Shahid Mulani,
Age : 24 years, Occu: Household,
R/o Walabnagar, Pimpri, Dist. Pune.
12. Rizwana Dilawar Sayyed W/o Mohsin Shaikh,
Age : 22 years, Occu: Household,
R/o Koregaon, Tq. Koregaon, Dist. Satara.
13. Ramzan Dilawar Sayyed,
Age : 19 years, Occu : Education
R/o Malegaon (Bk), Tq. Baramati,
Dist. Pune.
14. Hussain Dilawar Sayyed
Age : 17 years, Occu : Education,
R/o Malegaon (Bk), Tq. Baramati,
Dist. Pune.
15. Jaitunbi Didali Shaikh Fakir,
Age : Major, Occu : Nil,
R/o Not known (absconding)
16. Ashok Nivrutti Taware,
Age : Major, Occu: Agri.,
17. Shankar Nivrutti Taware,
Age : Major, Occu: Agri.,

18. Dileep Nivrutti Taware,
Age: Major, Occu : Agri.,
Respondents No. 15 to 18
R/o. R/o Malegaon (Bk), Tq. Baramati,
Dist. Pune.
19. V.N.S. Nirman Infro
through partner
Shri Sachin Raghunath Bhosale,
Age : 32 years, Occu: Construction,
R/o Vidin, Tq. Phaltan, Dist. Satara.
20. Prakash Balasaheb Chavan
Age : 35 years, Occu : Construction,
R/o. Gultekdi Market Yard,
Height Park, Office No.37, 38
Vastushri Complex, Pune.
21. Anil Krishnarao Taware,
Age : Major, Occu: Agri.,
R/o. Sangli, Tq. Baramati,
Dist. Pune.
22. Keshav Sarojirao Jagtap,
Age : 70 years, Occu: Agri.,
23. Vishal Keshavrao Jagtap,
Age: 34 years, Occu: Agri.,
24. Ambadas Marutirao Jagtap,
Age: 45 years, Occu: Agri.,
Deft. Nos. 20 to 24
R/o Pandare, Tq. Baramati,
Dist. Pune.
25. Kalyan Maruti Pachangane,
Age: Major, Occu : Agri.,
R/o Malegaon (Bk) Colony (Sharda Nagar)
Tq. Baramati, Dist. Pune.
26. Sujata Mahadeo Dhaygude,
Age : Major, Occu: Household.
27. Mahadeo Maruti Dhaygude,
Age : Major, Occu : Agri.,

28. Anandibai Shivaji Dhayagude,
Age : Major, Occu : Household
Deft. Nos. 26 to 28
R/o Malegaon (Bk), Tq. Baramati,
Dist. Pune.
29. Sau. Surekha Sambhaji Shinde,
Age : 56 years, Occu: Service,
R/o. Shivaji Chowk, Malegaon (Bk),
Tq. Baramati, Dist. Pune.
30. Sambhaji Bajirao Shinde,
Age : 47 years, Occu: Agri.,
R/o Malegaon (Bk), Tq. Baramati,
Dist. Pune.
31. Kantilal Shankarrao Kale,
Age : 47 years, Occu : Agri.,
R/o Sharda Nagar, Malegaon (Bk),
Tq. Baramati, Dist. Pune.
32. Kishor Mahadeo Giri,
Age : 38 years, Occu : Agri.,
R/o Malegaon (Bk), Tq. Baramati,
Dist. Pune.
33. Vipul Dhansinh Korpad,
Age : 23 years, Occu : Agri.,
R/o Malegaon (Bk), Tq. Baramati,
Dist. Pune.
34. Rajendra Gajanan Kardile,
Age : 58 years, Occu: Kirana Shop,
R/o Malegaon (Bk), Tq. Baramati,
Dist. Pune.
35. Atul Vishwas Holkar,
Age : 38 years, Occu: Agri.,
R/o 11 Foot, Sadubaji Wadi,
Tq. Baramati, Dist. Pune.
36. Siddeshwar Gramin Bigarsheti
Sahakari Patsanstha Maryadit
At Pandare, Tq. Baramati,
Dist. Pune.

37. Uttam Tatyaba Nale,
Age : 38 years, Occu : Agri.,
R/o Vidni, Tq. Faltan, Dist. Satara.
38. Avinash Shankarrao Gaikwad,
Age : 38 years, Occu : Agri.,
R/o. Ambegaon, Tq. Ambegaon,
Dist. Pune.
39. Rajudas Ganpatrao Jadhav,
Age : 31 years, Occu: Business,
R/o. Gulenagar, Mohammadwadi,
Dadapsar, Dist. Pune.
40. Sheetal Sawataji Lokhande,
Age : 36 years, Occu.: Business,
R/o Pandare, Tq. Baramati,
Dist. Pune.
41. Nitin Malhari Jadhav,
Age : 36 years, Occu: Business & Agri.,
R/o Malegaon (Bk), Tq. Baramati,
Dist. Pune.
42. Maharashtra State of Wakf
Through Chief Executive Officer,
Office at Panchakki, Aurangabad. ... Respondents
(Orig. Defendants)

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Mr. P.R. Katneshwarkar, Advocate h/f Mr. U.D. Dalvi, Advocate for the Petitioners

Mr. S.V. Adwant, Advocate for Respondent Nos. 1 to 14 and 19, 20

Mr. Nikhil PRunwal, Advocate for Respondent Nos. 15 to 18 and 37 to 41

Mr. Dinesh U. Manwatkar, Advocate for Respondent Nos. 21 to 25 and 36

Mr. S.S. Randive, Advocate for Respondent Nos. 26 to 31 and 32 to 35.

Mr. Sameer Shaikh, Advocate and L.S. Shaikh, Advocate h/f Mr. N.E. Deshmukh, Advocate for Respondent No. 42

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CORAM : SHRIKANT D. KULKARNI, J.

Closed for Order on : 08th JULY, 2021

Order Pronounced on : 26th JULY, 2021

PER COURT:-

1. Heard finally at admission stage with consent of all parties.
2. Feeling aggrieved by the impugned order below exhibit 147 dated 09.04.2021 and order below exhibit 41 dated 17.05.2019 passed by the Maharashtra State Waqf Tribunal at Aurangabad, the revision petitioner / original plaintiffs have preferred this civil revision application by taking aid of section 83 (9) of the Waqf Act, 1995.

FACTUAL MATRIX

3. The revision petitioners / original plaintiffs have filed suit against the respondents / defendants before the Waqf Tribunal for declaration, recovery of possession and perpetual injunction in respect of suit properties. According to the revision petitioners / original plaintiffs, the suit properties are Waqf properties in view of *Sanad* given by the predecessors of plaintiff no.1. The suit properties are situated at village Malegaon, Tq. Baramati, Dist. Pune. It is the stand of revision petitioners / original plaintiffs that the suit properties were

given for maintenance and performance of services to *Dargah* Sri Pir Raje Baksar and for *Idgah* and *Kabrastan* to Gaibi Shah Fakir. Did Ali Shah was appointed as Mutawalli to look after the suit properties and perform services to *Dargah*. It is the contention of the revision petitioner / original plaintiffs that suit properties are Waqf properties.

4. According to the contesting respondents / defendants, they are the owners of the suit properties. The suit properties are their private properties. They are in possession of the suit properties and their names have been recorded in the revenue record as per procedure. It is the contention of the respondents / defendants that plaintiffs have no concern with the suit properties. The suit properties are not Waqf properties.

5. During the pendency of the suit, revision petitioner / original plaintiffs moved an application vide exhibit 147 and sought permission to lead secondary evidence in view of section 65 of the Evidence Act, 1872. The respondents / defendants contested that application by filing their say. The Waqf Tribunal after considering the application, say filed by the defendants / respondents and argument advanced on behalf of both the sides was pleased to reject the application vide exhibit 147 in view of provisions of section 65 of the Evidence Act, 1872.

6. Heard Mr. P.R. Katneshwarkar, learned counsel holding for Mr. U.D. Dalvi, learned counsel for the petitioners, Mr. S.V. Adwant, learned counsel for respondent Nos. 1 to 14 and 19, 20, Mr. Nikhil P. Runwal, learned counsel for respondent Respondent Nos. 15 to 18 and 37 to 41, Mr. Dinesh U. Manwatkar, learned counsel for respondent Nos.21 to 25 and 36, Mr. S.S. Randive, learned counsel for respondent Nos.26 to 31 and 32 to 35, Mr. Sameer Shaikh, learned counsel and Mr. L.S. Shaikh, learned counsel holding for Mr. N.E. Deshmukh, learned counsel for Respondent No.42. Perused the impugned order and other papers relied upon by both the side.

7. By way of this revision petition, the petitioners are seeking two fold reliefs.

“(A) This Hon’ble Court may be pleased to quash and set aside the impugned order below Exhibit 147 in Waqf Suit No.90/19 passed by Maharashtra State Waqf Tribunal dated 9.4.2021.

(B) This Hon’ble Court may be pleased to quash and set aside the impugned order below Exhibit 41 in Waqf Suit No.90/19 passed by Maharashtra State Waqf Tribunal dated 17.05.2019.”

Argument of learned counsel for Revision Petitioners / original plaintiffs
(Prayer Clause “B”)

8. Mr. P.R. Katneshwarkar, learned counsel for the revision petitioners / original plaintiffs vehemently submitted that the instant revision petition is filed by the petitioners / original plaintiffs by taking aid of section 83(9) of the Waqf Act, 1995. The revision petitioners / original plaintiffs have challenged the impugned order dated 09.04.2021 as well as impugned order dated 17.05.2019. Mr. Katneshwarkar, learned counsel for the revision petitioners / original plaintiffs submitted that though the Tribunal has passed the impugned order dated 17.05.2019, the revision petitioners / original plaintiffs have right to challenge the said order dated 17.05.2019 in the same revision. The challenge is within limitation. Mr. Katneshwarkar, learned counsel for the petitioners / original plaintiffs submitted that instant revision petition is not filed under section 115 of the Code of Civil Procedure, and therefore, limitation of 90 days provided under Article 131 of the Limitation Act, 1963 is not applicable. It is a revision under section 83(9) of the Waqf Act and limitation is three years as provided under Article 131 of the Limitation Act, 1963.

9. Mr. Katneshwarkar, learned counsel for the revision petitioners / original plaintiffs invited my attention to the impugned order dated 17.05.2019 and pointed out that the impugned order has been passed without giving an opportunity of being heard to the plaintiffs / revision petitioners. The impugned order is one line sentence. No reasons are recorded by the Tribunal while allowing the application below exhibit 41. The impugned order is bad in law and needs to be quashed and set aside.

Argument of learned counsel for the contesting respondents / defendants.

10. Per contra, Mr. S.V. Adwant, learned counsel for the contesting respondents / defendants submitted that the impugned order dated 17.05.2019 passed by the Tribunal is not challenged by the revision petitioners / original plaintiffs, and as such, it has reached finality. Now the revision petitioners / original plaintiffs can not challenge the impugned order dated 17.05.2019 by way of this revision. Mr. Adwant, learned counsel for the contesting respondents / defendants submitted that it is a revision under section 115 of the Code of Civil Procedure and limitation to challenge the order is 90 days as provided under Article 131 of the Limitation Act, 1963. As such, the revision petitioners / original plaintiffs can not make any

grievance about the impugned order dated 17.05.2019 after lapse of two years. He submitted that the revision petitioners / original plaintiffs have even not filed any application for condonation of delay so as to challenge the impugned order dated 17.05.2019. The impugned order is now binding on the revision petitioners.

11. Having regard to the argument advanced by the learned counsel for the respective sides, I have studied the impugned order passed in Waqf Suit No.90 of 2019 below exhibit 41 by the Waqf Tribunal dated 17.05.2019.

12. First I shall deal with the legal points raised during course of argument. Whether it is a revision under section 115 of the Code of Civil Procedure or revision under section 83(9) of the Waqf Act 1995, and secondly, whether revision is barred by Law of Limitation.

13. On going through the pleadings in revision petition, it is noticed by me that present revision petition is filed by the revision petitioners / original plaintiffs by taking aid of section 83(9) of the Waqf Act, 1995. It is not a revision under section 115 of the Code of Civil Procedure. Certainly, the provisions of Article 131 of the Limitation Act, 1963 has no application to this case. Provisions of

Article 137 of the Limitation Act, 1963 are rightly applicable to the present revision under section 83(9) of the Waqf Act, 1995. Reference can be had to the decision of this Court (Coram : A.V. Nirgude, J.) in Civil Revision Application (Stamp) No.32946 of 2012 dated 19.12.2020. The period of limitation is three years as provided under Article 137 of the Limitation Act, 1963 to challenge any order passed by the Waqf Tribunal. The present revision is certainly within limitation, wherein the challenge is also made to the impugned order dated 17.05.2019 passed by the Tribunal. I do not find any merit in the submissions made by Mr. S.V. Adwant, learned counsel for the contesting respondents / defendants regarding maintainability of this revision petition in view of Article 131 of the Limitation Act, 1995.

14. Now coming to the impugned order dated 17.05.2019. The impugned order passed in Waqf Suit No.90 of 2019 vide below exhibit 41 dated 17.05.2019 is one line order, which reads thus:

“Plaintiff is directed to produce the original as prayed for.”

15. On perusing the impugned order dated 17.05.2019 as well as copy of the application, it would be clear that the Tribunal has not called the say of plaintiffs before passing the impugned order. Moreover, the impugned order dated 17.05.2019 does not indicate

that opportunity of being heard was given to the plaintiffs before passing the impugned order by the Tribunal. No reasons are recorded by the Tribunal while passing the impugned order on 17.05.2019. The reasons are necessary while passing any order. If the impugned order dated 17.05.2019 is studied by legal parameters, it does not stand on the legal platform. The application seeking directions to produce document was filed on 17.05.2019. Say of plaintiffs was not called as evident from the copy at application and order passed thereon vide exhibit 41. The application was filed on 17.05.2019, and on the same day, it came to be allowed without given any opportunity to the plaintiffs. Speaking order or reasoned order is considered as the third limb of natural justice. When the adjudicating bodies give reasons in support of their decisions, the decisions are treated as a reasoned decision. It is also called speaking order. The rule of natural justice requires that every judicial or quasi judicial authority must pass a reasoned order reflecting application of mind. The basic principle of natural justice seems to have not been followed by the Tribunal while passing the impugned order. As such, the impugned order passed by the Tribunal dated 17.05.2019 in Waqf Suit No. 90 of 2019 needs to be quashed and set aside.

16. Now coming to prayer clause “A” made by the revision petitioners / original plaintiffs, which relates to impugned order below exhibit 147 passed in Waqf Suit No. 90 of 2019 by the Maharashtra State Waqf Tribunal dated 09.04.2021.

Argument of learned counsel for the revision petitioners/ original plaintiffs
(Prayer Clause “A”)

17. Mr. Katneshwarkar, learned counsel for the revision petitioners vehemently submitted that main controversy in this revision is in respect two documents viz. *Sanad* dated 12.03.1951 and *Sanad* dated 15.11.1952. He submitted that original *Sanads* are with defendant nos. 1 to 14 since they are beneficiaries of *Sanads*. They are in possession of original documents. The revision petitioners / original plaintiffs have called upon the defendants to produce original documents before the Tribunal. The respondents have flatly denied the very existence of those *Sanads*. In that background, it is necessary to bring on record the documents in order to adjudicate the claim of the parties. The revision petitioners / original plaintiffs have filed an application under section 65 of the Evidence Act, 1872 vide exhibit 147 before the Tribunal and sought permission to lead secondary evidence. However, the Tribunal has turn down the prayer of revision petitioners / original plaintiffs. The grounds assigned by the Tribunal

while rejecting the application are neither sound nor tenable in the eyes of law. According to Mr. Katneshwarkar, learned counsel for the revision petitioners, the revision petitioners / original plaintiffs have received certified copy of the *Sanad* of the year 1952 from Tahsil office at Baramat and accordingly the same is placed on record, which indicates existence of original *Sanad*. He submitted that there is no other way to bring on record the documents. The copies of *Sanads* are important documents to decide the controversy between the parties. It is necessary to grant permission to lead secondary evidence in respect of copies of two *Sanads*. Mr. Katneshwarkar, learned counsel for the revision petitioner / original plaintiffs has placed his reliance on the following citation in support of his argument.

(i) *Dhanpat Vs. Sheo Ram (Deceased) through L.Rs. And others* reported in *AIR 2020 SC 2666 / (2020) 16 SCC 209*.

Argument of learned counsel for Respondents / original defendants

18. Mr. S.V. Adwant, learned counsel for respondent nos. 1 to 14 and 19, 20 supported the impugned order passed by the Tribunal. He submitted that the impugned order passed by the Tribunal is well reasoned. The tribunal has rightly rejected the prayer for permission to lead secondary evidence. No case was made out by the revision

petitioners / original plaintiffs to lead secondary evidence in view of provisions of sections 65 and 66 of the Evidence Act, 1872. According to Mr. Adwant, learned counsel for the contesting respondents, translated copies of *Sanads* are placed on record by the revision petitioners / original plaintiffs along with affidavit. It indicates that original must be with the revision petitioners / original plaintiffs. The so called certified copy dated 20.05.2019 of *Sanad* obtained by the revision petitioners / original plaintiffs from the Tahsil office, Baramati is not a certified copy as projected by the revision petitioners / original plaintiffs. He invited my attention to the letter issued by the Tahasildar dated 07.06.2019, wherein position is clarified. It is made clear by the Tahasildar, Baramati that copy of the *Sanad* issued to the revision petitioners / original plaintiffs from Tahsil office, Baramati on 20.05.2019 is not a certified copy, but it is a copy issued by the Tahsil office on the basis of photo copy and that cannot be treated as certified copy. By taking help of the above said material, Mr.Adwant, learned council for the contesting respondents / defendant submitted that on such a photo copy, permission cannot be granted to the revision petitioners / original plaintiffs to lead secondary evidence.

19. The revision petitioners / original plaintiffs have not complied with the requirements of section 65 of the Evidence Act, 1872 to grant permission to lead secondary evidence. According to Mr. Adwant, the application filed by the revision petitioners / original plaintiffs seeking permission to lead secondary evidence is meritless and the Tribunal has rightly rejected the same. There is no error on the part of Waqf Tribunal while rejecting the application and the impugned order needs to be confirmed. Mr. Adwant, learned counsel for the contesting respondents / defendants has placed his reliance on the following citation in support of his argument.

(i) ***Jagmail Singh and another Vs. Karamjit Singh and others*** reported in ***(2020) 5 SCC 178***

20. Mr. Nikhil P. Runwal, Mr. Dinesh U. Manwatkar and Mr. S.S. Randive, learned counsel appearing for the respective respondents echoed the argument advanced by Mr. S.V. Adwant, learned counsel for the contesting respondents / defendants.

21. Mr. L.S. Shaikh, learned counsel holding for Mr. N.E. Deshmukh, learned counsel for respondent No.42 argued on legal position to lead secondary evidence in view of section 65 of the Evidence Act, 1872 coupled with factual aspect.

22. Having regard to the arguments advanced by the learned counsel for both the sides at length, I have carefully studied the provisions sections 65 and 66 of the Evidence Act, 1872.

23. It is trite that facts have to be proved by primary evidence and secondary evidence is only an exception to the rule for which foundational facts have to be established to account for the existence of the primary evidence. Where original documents are not produced without a plausible reason and factual foundation for laying secondary evidence not established, it is not permissible for the Court to allow a party to adduce secondary evidence. I have carefully examined the copy of the plaint and copy of the written statement in Waqf Suit No.90 of 2019, copy of an application given by the revision petitioners / original plaintiffs vide exhibit 147 and say filed by the respective respondents. I have also perused the stock of documents and papers relied upon by both the sides in the background of submissions made at bar.

24. The dispute is encompassed with two documents.

(i) *Sanad* dated 12.03.1951, and

(ii) *Sanad* dated 15.11.1952.

25. It is evident from the copies of documents on record that Waqf Suit No.90 of 2019 came to be instituted before the Waqf Tribunal at Aurangabad. There were various litigations between the parties. Mr. Gulab Disali Shah Fakir and three others had filed Regular Civil Suit No.151 of 2012 in the Court of Civil Judge, Senior Division at Baramati. The proceedings of Regular Civil Suit No.360 of 1985 was initiated by Nivrutti Eknath Tavare against Qutubbi Deedali Shah Fakir and four others in respect of same subject matter. There was revenue proceedings between the parties. Last one was Waqf No./fresh enquiry /SR/19/2017 before the Tahsildar, Baramati cum Assistant Survey Commissioner (Waqf). The above said revenue proceedings was initiated by the Tahsildar, Baramati in view of Government Resolutions and in view of directions given by District Collector, Pune.

26. On going through the judgment and order passed by the Tahsildar, Baramti in the above referred Waqf enquiry matter, there is reference of *Inam /grant / Sanad* . The above said revenue proceedings came to be initiated at the instance of revision petitioner No.2 Raheman Gulabbhai Shaikh and others on behalf of Muslim community in the representative capacity. There is reference of *Sanad*.

In the above referred judgment and order passed by the Tahsildar, Baramati, there is also reference of *Sanad / Inam*. Some of the respondents were also parties to that revenue proceedings, wherein they had also referred about *Inam*. In the proceedings of Regular Civil Suit No. 151 of 2012, respondent No.1 Gulab Disali Shah Fakir had contended that the suit properties were given to his forefather Mr. Dedalishah Hidayatalishah Fakir for the worship and maintenance of the deity *Pir Raje Baksar Deosthan*. The effect of the grant / *Inam* was given to the village revenue record. Both the parties are well aware about the importance of *Sanads*, which are main source of title.

27. According to the revision petitioners / original plaintiffs, original documents i.e. *Sanads* are in the possession of contesting respondents. Whereas, it is the stand of the contesting respondents that original documents / *Sanads* are not in their possession. In order to bring on record the original documents (*Sanads*), the plaintiffs had issued a legal notice through their Advocate and called upon the defendants / respondents to produce the original documents (*Sandas*) before the Tribunal. The notice came to be duly served on the defendants / respondents. They had filed their reply through their Advocate and denied that alleged *Sanads* are in their possession. The revision petitioners / original plaintiffs have photo copies of *Sanads*,

which are placed on record. The originals are not in their possessions. The contesting respondents / defendants are certainly beneficiaries of *Sanads* as evident from their pleadings. If *Sandas* / grant was executed in favour of forefather of contesting respondents, certainly original must be with them. They are real beneficiaries of *Sanads*. They have denied that they are in possession of original documents (*Sanads*). No legal option was available before the revision petitioners except to move an application for permission to lead secondary evidence in view of section 65 of the Evidence Act, 1872. The revision petitioners had given notice to the contesting respondents in view of section 66 of the Evidence Act and complied with that mandatory provision.

28. The question comes how the copies of *Sandas*, which are on record are to be admitted in the evidence, when attempt to bring on record originals is failed in spite of giving notice under section 66 of the Evidence Act. If the original documents / *Sanads* are available with the plaintiffs, certainly there was no reason for them to withheld the same. On the other hand, it would have been beneficial for them to prove their case. The revenue entries seem to have taken place on the basis of original documents i.e. *Sanads* / grant. When photo copies of *Sanads* are on record, original *Sanads* must be in existence, but

not forthcoming on record. No legal remedies available with the revision petitioners, when their earlier attempts are failed to bring on record original documents.

29. The case of the revision petitioners / original plaintiffs is covered by section 65 (a) and (c) of the Evidence Act.

30. In case of *Dhapat Vs. Sheo Ram (Deceased) Through Legal representative and others* (supra), it is held by the Hon'ble Supreme Court that a party to the lis may choose to file application which is required to be considered by trial Court. However, if any party to the suit has laid the foundation of leading of secondary evidence, either in the plaint or in evidence, then, secondary evidence cannot be ousted from consideration only because application for permission to lead secondary evidence was not filed. Here in the case at hand, the revision petitioners / original plaintiffs had moved an application for permission to lead secondary evidence with foundation in the plaint regarding original documents *Sanads*, which are the source of title as Waqf properties. The application to lead secondary evidence can not be rejected when it has foundation of leading secondary evidence in the plaint.

31. In case of *Jagmil Singh and another vs. Karamjit Singh and others* (supra), it is held by the Hon'ble Supreme Court as under:

“Under the Evidence Act, 1872 facts have to be established by primary evidence and secondary evidence is only an exception to the rule for which foundational facts have to be established to account for the existence of the primary evidence. Section 65 makes it clear that secondary evidence may be given with regard to existence, condition or the contents of a document when the original is shown or appears to be in possession or power against whom the document is sought to be produced, or of any person out of reach of, or not subject to, the process of the court, or of any person legally bound to produce it, and when, after notice mentioned in Section 66 such person does not produce it. For secondary evidence to be admitted foundational evidence has to be given being the reasons as to why the original evidence has not been furnished. Where original documents are not produced without a plausible reason and factual foundation for laying secondary evidence not established it is not permissible for the court to allow a party to adduce secondary evidence. Merely the admission in the evidence and making exhibit of a document does not prove it automatically unless the same has been proved in accordance with the law.”

32. Having regard to the legal position made clear by the Supreme Court as referred in two citations above, if the facts of the case on hand are examined, it is very much clear that the revision petitioners / original plaintiffs have laid foundation for leading secondary evidence in the plaint. Secondly, it is shown by the revision petitioners / original plaintiffs that they had issued prior notice to the contesting respondents / defendants to produce original documents, but contesting respondents / defendants have denied that they are in possession of original documents. The copies of original documents are placed on record by the revision petitioners / original plaintiffs. The only legal remedy available with the revision petitioners / original plaintiffs is to lead secondary evidence in respect of two *Sanads* which are crucial and important to determine the claims of both the sides.

33. The Waqf Tribunal has not considered this aspect. The Waqf Tribunal has given much stress that photo copy of *Sanads* are produced by the revision petitioners / original plaintiffs along with list of documents and they are notarized documents. Having notarized, the notary has seen the original. One supporting affidavit was filed on behalf of the plaintiffs, which was verified before the

notary and on that basis, the Tribunal has concluded that original must be with the plaintiffs. The observations made by the tribunal in para No.11 of its order are *ex facie* incorrect. In fact, the copy of *Sanad* placed on record by the revision petitioners / original plaintiffs along with list at exhibit 4 is a copy of *Sanad* (सनदेची प्रत) dated 15.11.1952. Another document is the copy of *Sanad* dated 12.03.1951. The contesting respondents / original defendants are beneficiaries of said documents / *Sanads*. The original documents must be with them, but they are not ready to produce in spite of notice given by the revision petitioners / original plaintiffs, and as such, present scenario exists.

34. There is a copy of general power of attorney executed by Shri Gulab Disali Shah Fakir and two others in favour of revision petitioner no.1 Vikramsinh Laxmansinh Raje Jadhavrao. On going through the same, it is in respect of same suit properties. It is mentioned about *Inam* given to the forefather of contesting respondents dated 15.11.1952. One Qutubbi wife of Deedali Shah Fakir has given statement before the Taluka Executive Magistrate at Baramati regarding her general power of attorney on 04.08.1983, wherein reference had to suit properties as *Deosthan* properties.

35. In the above factual scenario, the Waqf Tribunal ought to have granted permission to the revision petitioners / original plaintiffs to lead secondary evidence in view of section 65 of the Evidence Act, 1872, whey they have complied with legal requirements.

36. Another reason assigned by the Waqf Tribunal for rejecting the application under section 65 of the Evidence Act, 1872, is earlier order passed by the Waqf Tribunal on 17.05.2019, whereby Tribunal had directed to the plaintiffs to produce the original. That impugned order dated 17.05.2019 passed by the Waqf Tribunal is set aside by me in earlier part of this judgment. Certainly, that ground now not remained. The Tribunal has not properly considered the legal position of section 65 of the Evidence Act, 1872 as well as ratio laid down in case of *Jagmil Singh and another vs. Karamjit Singh and others* (supra) and arrived at incorrect conclusion.

37. In view of the above, I found merit in the revision. The revision needs to be allowed by quashing and setting aside both the impugned orders passed by the Waqf Tribunal. Hence, the following order:

ORDER

- (i) The revision application is hereby allowed.
- (ii) The impugned orders below exhibit 41 dated 17.05.2019 and below exhibit 147 dated 09.04.2021 in Waqf Suit No. 90 of 2019 passed by the Maharashtra State Waqf Tribunal are hereby quashed and set aside.
- (iii) The revision petitioners / original plaintiffs are permitted to lead secondary evidence in respect of original documents / *Sanad* dated 12.03.1951 and 15.11.1952 in view of section 65 of the Evidence Act, 1872.
- (iv) The Tribunal while admitting secondary evidence and marking exhibit mark to the documents shall make it sure that the same are proved in accordance with law.
- (v) The civil revision application stands disposed of.
- (vi) No order as to the costs.

(**SHRIKANT D. KULKARNI**)
JUDGE

S.P Rane