

IN THE HIGH COURT OF JUDICATURE OF BOMBAY

BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO.78 OF 2019

1. M/s Commercial Developers
A partnership firm through its partner
Abbas s/o Kamruddin Kanorwala,
Age 63 years, Occu. Business,
Office at Shop No.03, Ground Floor,
51, Dockyard Road, Qamar Castle Building
Mumbai - 400 010
 2. Mohammed Kamruddin Kanorwala
Partner of M/s Commercial Developers,
Age 61 years, Occupation : Business,
Office at Shop No.03, Ground Floor,
51, Dockyard Road, Qamar Castle Building
Mumbai - 400 010
- ...APPLICANTS**
(Orig.Defts.No.5 & 6)

VERSUS

1. Asif s/o Shafi Mansuri
Age 42 years, Occu : Business,
R/o Room No.08, 3rd Floor,
Sakina Manzil, Building No.08,
Ali Umar Street,
Null Bazar Police Chowki, Mandvi,
Mumbai - 400 003
2. Ms. Najma d/o Anjum Hussain Shaikh (**Deleted**)
3. Ms. Rukhsana d/o Anjum Hussain Shaikh
Age 52 years, Occu. Household,
R/o 5th Floor, Parvej Building No.08,
Khoja Street, Duncun Road,
Bara Imam Road, Mumbai - 400 004
4. Ms. Shaibaz d/o Anjum Hussain Shaikh
Age 45 years, Occu. Household
R/o 5th Floor, Parvej Building No.08,
Khoja Street, Duncun Road,
Bara Imam Road, Mumbai - 400 004

5. Ms. Shainaz d/o Anjum Hussain Shaikh (**Deleted**)

6. Maharashtra State Board of Waqf,
through its Chief Executive Officer,
Panchakki, Aurangabad

...**RESPONDENTS**

(Respondent No.1 Orig.Plaintiff &
Respondent No.2 to 6
Orig.Defts.No.1 to 4 & 7)

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Shri Ashwinikumar Deore, Advocate for applicants
Shri V.D. Sapkal, Senior Counsel, instructed by
Shri N.E. Deshmukh, Advocate for respondent No.6

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CORAM : R. G. AVACHAT, J.

Date of reserving judgment : 9th February, 2021

Date of pronouncing judgment : 17th March, 2021

J U D G M E N T :

The challenge in this revision application is to the judgment and decree dated 6/3/2019, passed by Maharashtra State Wakf Tribunal (Tribunal) in a suit, being Wakf Suit No.101/2016. By the impugned decree, the suit filed by the respondent No.1 (plaintiff) came to be decreed in toto. It is a suit for declaration that the property in the suit is a Wakf property. A relief of declaration is also sought for to the effect that the gift deed dated 2/3/1962, executed by Anjum Hussaini Rahman in favour of his wife Sabirabi is void. A relief of further declaration to the effect that the conveyance deed dated 5/3/2011 executed by respondents No.2 to 5

(defendants No.1 to 4) in favour of the defendants No.5 and 6 (applicants herein) is void and not binding on the Wakf institution. The applicants were sought to be injuncted from developing the suit property and creating third party interest in respect thereto.

2. The applicant No.1 is a partnership firm in the business of building and construction. The applicant No.2 is the partner of the applicant firm. The respondent No.1 (plaintiff) claims to be a Muslim and as such, to have an interest to file the suit for protection of a Wrkf property (suit property). It is his case that there is a Bara Imam Dargah at Khoja Street, Mumbai. It is a Wakf institution. The Wakf institution holds various immovable properties including the suit property. Way back in September 1911, the suit property has been declared to be a Wakf property by virtue of a decree passed in the Suit, No.450/1909. Abdul Rahman Bin Ahmed was appointed as a Mujawar of the Wakf Bara Imam Dargah. Anjum Hussaini claimed to be legal heir of Abdul Rahman Ahmed. The respondents No.2 to 5 claimed to be legal heirs of Anjum Hussaini. Anjum Hussaini gifted the suit property to his wife Saberabi on 11/1/1961. The gift deed is void since the Wakf property has been gifted away under the gift deed.

The respondents No.2 to 5 conveyed the suit property to the applicant No.1 firm vide execution of a registered conveyance deed dated 5/3/2011. The respondent No.1 claimed to have been visiting the Bara Imam Dargah. The aforesaid transaction came to his knowledge a few days before institution of the suit.

3. The Tribunal, relying on the compromise decree passed in the Suit No.450/1909, held that since the suit property is a Wakf property, the transaction in respect thereof in the nature of the gift executed by Anjum Hussaini in favour of his wife Saberabi and subsequent conveyance deed executed by respondents No.2 to 5 in favour of the applicant firm are void and non est.

4. Mr. Ashwinikumar Deore, learned counsel for the applicants would submit that the compromise decree passed in Suit No.450/1909 could not be said to be an order passed in a suit under Section 92 of the Code of Civil Procedure (CPC). A fraud had been played upon the Court in obtaining the decree in Suit No.450/1909. A decree obtained by fraud is a nullity. The defence of nullity could be set up at any time in any proceedings. It is not necessary to specifically plead a

case for fraud. The learned counsel would further submit that, there is no iota of evidence to show that the parties to the said suit have ever acted in accordance with the consent terms. Learned counsel would further submit that, the Wakf Suit No.101/2016 was barred by limitation. It was filed with an ulterior motive. The learned counsel has relied on a few authorities to substantiate his contentions.

5. Mr. V.D. Sapkal, learned Senior Counsel appearing for the respondent No.1 would, on the other hand, submit that the applicant firm has not made a whisper as regards the compromise decree passed in Suit No.450/1909 in its written statement. For want of pleadings, the applicant firm could not be heard to say that the decree therein had been obtained by practicing fraud. According to learned Senior Counsel, there was clinching and reliable evidence in proof of the property in the suit to be a Wakf property. The transfer of the suit property, therefore, was void. Learned Senior Counsel supported the impugned judgment and decree.

6. Section 3(r) of the Wakf Act, 1995 defines the term 'Wakf' to mean, permanent dedication by any person of any movable or immovable property for any purpose

recognized by Muslim Law as pious, religious or charitable and includes

By virtue of Section 43 of the Wakf Act, in spite of anything contained in Chapter V, where any Wakf has been registered before commencement of the Wakf Act, 1995 under any law for the time being in force, it shall not be necessary to register the Wakf under the provisions of Wakf Act and any such registration made before such commencement shall be deemed to be a registration made under Wakf Act, 1995.

7. The Tribunal, relying mainly on the consent decree passed in Suit No.450/1909, has decreed the suit. The applicants, in their written statement, did not make any whisper as regards validity of the said decree. It is only in the oral submission sans pleadings and evidence as well, the consent decree has been attacked on many a grounds. According to learned counsel for the applicants, the suit property was first time declared to have been dedicated for religious or charitable purpose under the terms of the consent decree. Close reading of the relevant documents on record would, however, prove otherwise. It has thus become necessary to go to the averments in the plaint of the Suit

No.450/1909 and the relevant terms of the consent decree. Needless to mention, in the days the suit was filed, such suits were governed by Section 92 of the CPC. It was a suit instituted by two persons (plaintiffs). The relevant averments in the said suit are reproduced below :-

“1. There is situate a Dakhni Moholla in Bombay an ancient Dargah known as the Bara Imam Dargah, which was built 100 years ago. The first Mujawar of the said premises was one Sheikh Hoosein. After his death his son Shaikh Haji became Mujawar and after the death of Shaikh Haji his son Sheikh Malang was the Mujawar.

2. The said Mujawar Sheikh Malang on the 27th day of December 1896 made a will by which he directed that Abdool Latif, Hafiz Rahim Oola, Bomanji Cooverji Doctor, Cowasj Pestonji and Mahab Ubshah should be the executors thereof and that they should manage the said Dargah until his grandson one Abdool Rehman Malang Mujawar the defendant herein attained 21 years of age and when he should be the Mujawar to manage the said Durgah.

3. The said Shaikh Malang died on or about 18th of July 1897 and thereafter his said executors managed the Durgah until December 1901 when they applied to this Hon'ble Court to appoint new trustees whereupon by an Order of this Hon'ble Court dated the 6th of November 1901 Khan Saheb Goolam Hoosein Rogay, Karimshah Valad Hoosein Miya Haji Ebrahim Hasan and Mahomedally Ebrahim were appointed trustees of the Bara Imam Durgah in place of the executors aforesaid.

4. Sometime after the said order was made the

minor grandson the 3rd defendant who was to be the Mujawar when he attained 21 by his next friend one Makdoom took out a Judges Summons to have the appointment of the said new trustees revoked and set aside and to have all the proceedings taken and orders made therein cancelled. By an order made on the 1st day of December 1902 the said summons was dismissed and the said next friend Mukdum was ordered to pay certain costs of the old and new trustees and that in the event of their being unable to recover the said costs or any part thereof from the said Makdoom they should be at liberty to recover the same out of the trust estate. The Trustees thereafter on the 4th day of February 1904 obtained from the Hon'ble Mr. Justice Russell an order whereby they or any three of them were given liberty to mortgage the immovable property which is a public charitable and religious property and which is described in the Schedule hereto annexed and marked A for such sum not exceeding Rs.5000 for the payment of their own costs, as also the costs of the old trustees under the Judge's Order dated 1st day of December 1902.

5. The Plaintiffs submit that the said Malang bin Sheikh Haji had no power to dispose of the said public charitable and religious property by will and submit that the said testator had no power to appoint trustees of the said Durgah by his will and that such appointment and the appointment of trustees in their place by the order of the 6th of November 1901 was and is void and of no legal effect and should be set aside.

6. Out of the said four new trustees appointed by the said Order dated 6th November 1901 the said Haji Ebrahim Hassun died in or about 1906 and the said Karim Sha Valad Hoosen Shah died in or about 1907 and the said Khan Saheb Goolam Hoosein having become blind has not been taking any part in the management of the trust estate.

7. The members of the Mahomedan Community were very much dissatisfied at the order for mortgaging the trust premises for the purpose of raising the money to pay the costs aforesaid. Such order the plaintiffs submit is contrary to Mahomedan Law and was obtained ex-parte without notice to the members of the Mahomedan community, interested in the said trust premises and if carried into effect will virtually amount to the complete destruction of the trust and charity altogether.

8. Purporting to act in pursuance of the said order dated the 4th day of February 1904 the said Mahomedally Ebrahim and one Cassum Haji Haji Ibrahim the 1st defendant herein who is not a trustee arranged with the 2nd defendant Cowasji Motabhoy Batliwala to mortgage the said property to him for Rs.5000 and received a sum of Rs.500 as earnest money. The mortgage having subsequently fallen through the 2nd defendant Cowasji Motabhoy Batliwala filed a suit against said Mahommedali Ebrahim and 2nd defendant in the Bombay Court of Small Causes being suit No/ 2629 of 1907 to recover from them the said earnest money, interest ad costs and wherein a consent decree was obtained against said Mahommedalli Ebrahim and the 1st defendant for Rs.850/-. The plaintiffs believe that the said decree was obtained collusively. The said consent decree was transferred to this Hon'ble Court for execution at the instance of the said 2nd defendant and the said charitable property has been attached and the Sheriff of Bombay has fixed the sale of the same to take place on Tuesday the 15th day of June 1909. The plaintiffs submit that unless the sale is stayed by an order and injunction of this Hon'ble Court the property will be put to sale by the Sheriff on that day whereby the said religious and public charity will be greatly damaged if not irritrivaly ruined, and the feelings of the Mahomedan community will be outraged by the public auction sale of the Durgah of a saint held in

high veneration by them. The Durgah is considered the chief seat for Fateha prayers during the Mohorrum holidays. Said Mahommedalli Ebrahim took no steps to prevent the sale in order to enable him to pay to himself the costs above mentioned out of the sale proceeds. The plaintiff submits that in so acting the 1st defendant has committed a grave breach of trust.”

The prayer clause in the suit reads thus :

“1. That a Scheme may be prepared for the due administration of the said charitable trust.

2. That it may be declared that the appointment of the 1st defendant as a trustee is invalid and improper and that the said order may be set aside and cancelled.

3. That the order for payment of costs out of the charitable property aforesaid and for mortgaging the said property may be declared to be invalid null and void and may be set aside and cancelled.

4. That fresh trustees may be appointed of the said charitable property.

5. That until the hearing and final disposal of this suit the sale of the said properties advertised for the 15th June 1909 be ordered to be stayed and that the defendants be restrained by an injunction and order of this Hon’ble Court from selling or disposing of the said properties.”

8. Admittedly, the property in this suit was a subject matter of the Suit No.450/1909. The suit was decreed in

terms of the compromise entered into between the parties to the said suit.

9. The averments in the plaint would undoubtedly indicate that Shaikh Malang was the Mujawar of the Dargah – Bara Imam. He was not the owner of the suit property. He necessarily did not have a right to execute a Will in respect of the suit property. Although there is no direct evidence indicating who was the owner of the suit property and who in fact did dedicate the same to charitable purpose, it is crystal clear that the suit property had long been permanently dedicated for religious or charitable purpose recognized by the Muslim Law. It would be nothing short of a case of a lost grant. Neither the applicants nor their predecessors-in-title could prove that the suit property originally belonged to the defendants No.2 to 5 or their predecessors-in-title. The terms of consent decree are as under :

“That ... the Court by and with such consent doth declare that the Bara Imam Dargah mentioned in the plaint herein and the properties attached thereto which are described in the schedule hereto annexed and marked A and admeasuring four hundred and forty eight square yards are thereabouts are dedicated to charity and this Court by and with such consent doth further declare that the said first defendant Cassum Ebraheem was a trustee de son

to tor, came to be removed from the trusteeship. Three persons came to be appointed as trustees of the said Dargah. The defendant No.3 Abdul Rahman Bin Ahemad (through whom the applicants claim title to the suit property) was appointed as a Mujawar of the said Dargah for life subject to removal for misconduct. The office of Mujawar was made hereditary. A lineal male descendants of the defendant No.3 was to become Mujawar as his successor. There is also provision made in the consent decree as regards who is to be appointed as Mujawar in absence of a lineal male descendant. The Mujawar was authorised to receive for himself all the offerings of cooked food and sherlut and flowers. All other offerings in the nature of gold, silver and money were to go to the Trust – Dargah. Mujawar (defendant No.3) in the said suit) was given a right of residence in some portion of the suit premises.”

10. It is reiterated that, the averments in the plaint and the terms of the consent decree go long way to hold the property in the suit to be a Wakf property.

11. The aforesaid consent decree has been assailed by the applicants on many a grounds. According to learned counsel for the applicants, the consent decree is not a decree passed by the Court. The moment the suit was compromised, the Court lost jurisdiction to pass a decree therein. According to learned counsel, a decree passed without jurisdiction is non est. According to him, the terms of the decree go beyond the reliefs which could be asked for by the plaintiff and granted by

the Court in a suit under Section 92 of the CPC.

It would, therefore, be apposite to reproduce the relevant provisions of Section 92 of the Civil Procedure Code.

“92. Public Charities :- (1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the leave of the Court, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree –

- (a) removing any trustee;
- (b) appointing a new trustee;
- (c) vesting any property in a trustee;
- (cc) directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possession to the person entitled to the possession of such property;
- (d) directing accounts and inquiries;
- (e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust.

.....”

12. The averments in the plaint in Suit No.450/1909 and the terms of the consent decree undoubtedly indicate that it was a suit instituted under Section 92 of the CPC and the Court endorsed the terms of the decree which were within the prayers made in the suit. It was a suit for removal of certain trustees, appointment of new trustees and settlement of the scheme. The said relief has been granted by the Court by approving the consent terms. It, therefore, cannot be said that the Court by endorsing the terms of the compromise, travelled beyond its jurisdiction its jurisdiction under Section 92 of the CPC.

13. The applicants have placed reliance on the following judgments of the Apex Court :-

- (1) Swami Paramatmanand Saraswati and Anr. V. Ramji Tripathi and Anr [(1975) 1 SCR 790]
- (2) Vidyodaya Trust V. Mohan Prasad R. and Ors.
[AIR 2008 SC 1633]

There can be no dispute over the proposition of law made in the aforesaid decisions. The gist of the

observations made in the aforesaid authorities is :-

“10. A suit under Section 92 is a suit of a special nature which presupposes the existence of a public Trust of a religious or charitable character. Such a suit can proceed only on the allegation that there was a breach of such trust or that the direction of the court is necessary for the administration of the trust and the plaintiff must pray for one or more of the reliefs that are mentioned in the section. It is, therefore, clear that if the allegation of breach of trust is not substantiated or that the plaintiff had not made out a case for any direction by the court for proper administration of the trust, the very foundation of a suit under the section would fail; and even if all the other ingredients of a suit under Section 92 are made out, if it is clear that the plaintiffs are not suing to vindicate the right of the public but are seeking a declaration of their individual or personal rights or the individual or personal rights of any other person or persons in whom they are interested, then the suit would be outside the scope of Section 92. . . . A suit whose primary object or purpose is to remedy the infringement of an individual right or to vindicate a private right does not fall under the section. It is not every suit claiming the reliefs specified in the section that can be brought under the section but only the suits which, besides claiming any of the reliefs, are brought by individuals as representatives of the public for vindication of public rights, and in deciding whether a suit falls within Section 92 the Court must go beyond the reliefs and have regard to the capacity in which the plaintiffs are suing and to the purpose for which the suit was brought. This is the reason why trustees of public trust of a religious nature are precluded from suing under the section to vindicate their individual or personal rights.”

The applicants would not be benefited by the aforementioned authorities since the facts of the Suit No.450/1909 would undoubtedly indicate that the affairs of the Trust – Bara Imam Dargah were not being managed properly. A Mujawar of the Trust – Shaikh Malang executed a Will of the property belonging to the Trust to independent persons. The plaintiffs in the suit did not have personal interest in the subject matter of the suit. The terms of the consent decree would indicate that the plaintiffs therein were not appointed as trustees or Mujawar or Mutawalli of the said Trust. Therefore, there was no question of them espousing their personal interest by filing the said suit. The consent terms were well within the relief which could have been granted by the Court under Section 92 of the CPC in a contested suit.

14. It is true that, the compromise decree is not treated as a decision by the Court. It is the acceptance by the Court of something to which the parties are agreed. [**AIR 1967 SC 591 – Pulavarthi Venkata Subha Rao and Ors. V. Valluri Jagannadha Rao and Ors. Civil Appeal No.17 of 1959 Supreme Court of India**].

Although a consent decree does not operate as res judicata, such decree would hold the field unless and until the same is set aside in any proceeding. A decree passed by consent of parties would operate as an estoppel and parties to the compromise decree and persons through them would be bound by the terms of the decree, it would operate as an estoppel of record.

15. Learned counsel for the applicants would submit that, the said decree had been obtained by practicing fraud on the Court. There can be no two view over the proposition that a decree obtained by playing a fraud is non est. It, however, needs to be mentioned that a case of fraud has to be specifically pleaded and proved. At the cost of repetition, it is stated that, the decree passed in Suit No.450/1909 has not been taken exception to with any of the averments in the written statement. The learned counsel for the applicants would submit that, for creation of a Wakf, there has to be dedication of movable or immovable property for religious or charitable purpose.

16. In case of Wakf-alal-Aulad, the property is

dedicated for any purpose recognized by Muslim Law as religious or charitable, provided when the line of succession fails, the income of Wakf shall be spent for education, development and welfare and such other purpose as recognised by law. It does not mean that the income from the property dedicated has to be used for personal benefit of successor of a Wakif. Such a case has neither been pleaded nor proved on the basis of the consent decree.

17. So far as question of limitation for filing the suit, it is to be stated that, the plaintiff professes Islam. He claimed to have been visiting the Dargah for a few years next before institution of the suit. It is in June 2016 that he heard murmur in the vicinity that respondents No.2 to 5 have executed conveyance deed in respect of the suit property in favour of the applicant firm. He, therefore, visited the concerned offices and collected documents in June 2016 and filed the suit in August 2017. To these averments in the plaint, there is no specific denial in the written statement. The suit is for declaration and perpetual injunction. It is not a suit for possession of a Wakf property. There is, therefore, no question of the suit to be governed by Section 107 of the Wakf Act, 1995.

The facts indicate that the suit property was dedicated 100 years before 1909 for charitable and religious purpose. It is a case of lost grant. Who was the owner of the said property is not known. The Mujawar of the Dargah – Shaikh Malang had executed a Will in respect of the Dargah property (suit property). The defendant No.3, in the Suit No.450/1909 was a Mujawar of the Bara Imam Dargah. The person by name Anjum Hussaini Abdul Rahman, son of (defendant No.3), in fact simply became a Mujawar. He, however, turned around of his position as a Mujawar and gifted the suit property to his wife Saberabi under gift deed dated 2/3/1962. Since he was not the owner of the property gifted to his wife, Saberabi did not get any right, title and interest in the suit property. Consequently, the respondents No.2 to 5, daughters of late Saberabi could not pass on any title of the suit property in favour of the applicants under the conveyance deed dated 5/3/2011. As such, both these documents were void ab initio. It is true that, there existed Ground plus five storey building. It was occupied by tenants. The rent was being paid to Saberabi. Since the building became dilapidated, the tenants therein came to be shifted to transit camp. A Scheme for redevelopment of the said

building was approved by MHADA. The construction up to the plinth level of the proposed building was complete. The applicant firm might have paid a valuable consideration. There is no question of predecessors-in-title of the applicant perfecting title by adverse possession. There are no pleadings to that effect in the written statement. It has been held by Apex Court in case of **Chhedi Lal Misra (Dead through L.Rs. Vs. Civil Judge, Lucknow & ors., 2007 (4) ALL MR 768**, that once a Wakf is created, it continues to retain such character which cannot be extinguished by any act of Mutawalli or anyone claiming through him. Once a Wakf is created, the Wakf stands divested of his title to the properties which after the creation of the Wakf vests in the almighty.

18. In case of **Jeet Mohammad Vs. Jatinder Kaur and anr., AIR 2009 H.P. 44**, it has been held that, any person who professes Islam is a person interested in management of Wakf. He can raise dispute before the Wakf Tribunal that such property is being frittered away or being sold against intention of creator of Wakf.

19. For the aforesaid reasons, and on reading of the impugned judgment passed by the Tribunal, I do not find the

Tribunal to have exercised the jurisdiction not vested in it by law or to have acted in exercise of its jurisdiction illegally. As such, no case is made out for interference with the impugned judgment and decree. In the result, the Civil Revision Application fails. The same is dismissed. Interim relief stands vacated.

**(R. G. AVACHAT)
JUDGE**

fmp/-