

IN THE HIGH COURT OF JUDICATURE OF BOMBAY

BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO. 103 OF 2010

1. Maharashtra State Board of Wakfs
through its Chief Executive Officer

2. The Chief Executive Officer
Maharashtra State Board of Wakfs

Address of both : Panchakki Aurangabad
Aurangabad 431 001.

Applicants

Versus

1. Vidyanand s/o Venkatram Peddi
age 42 years, occ. Business

2. Vinodkumar s/o Venkatram Peddi
age 40 years, occ. Business

3. Vinekanand s/o Venkatram Peddi
age 37 years, occ. Business

4. Smt. Suvarna wd/o Venkatram Peddi
age 55 years, occ. Household

All r/o Osmanpura, Aurangabad.

Respondents

Mr. N. E. Deshmukh, Advocate for appellants.

Mr. V. D. Hon, Senior Counsel instructed by Mr. Ajinkya Deshmukh,
Advocate for respondents.

CORAM : R. M. JOSHI, J.

RESERVED ON : 3rd APRIL, 2023.

PRONOUNCED ON : 20th APRIL, 2023.

JUDGMENT :

1. This application is filed under Section 115 of the Code of Civil Procedure taking exception to the judgment and order dated 3rd May, 2010 passed by the Wakf Tribunal in Application No. 65/2009. The parties are referred to as 'the board' and 'lessees'.

2. Facts leading to the present application can be narrated in brief as under :-

Application was filed by the lessees under section 83(2) of the Wakf Act challenging the order dated 17th February, 2005 passed by the Wakf Board in Enquiry No. 483/2005 whereby the lessees were directed to handover possession of the lease wakf property bearing CTS No. 16038 admeasuirng 2843.3 sq. mtrs. situated at Shahnoorwadi, Aurangabad. It is the case of the lessees that the suit property was and is under the control and supervision of the Wakf Board who had given the same on lease under registered lease deeds dated 13th September, 1996 and 25th September, 1996. It is also contended that the Wakf Board has given no objection for entering the name of the lessees in Property Card so also no objection certificate was issued for carrying out construction over the

suit property. The said lease was for a period of 51 years from 1996 with lease rent of Rs. 2,500/- per month. It is claimed by the lessees that the lease rent is paid by them regularly. They also claim to have obtained licence under the Shops act for conducting the business of general store and municipal taxes and electricity charges are being paid regularly.

3. The Wakf Board issued notice on 2nd November, 2003, under Section 54 of the Wakf Act, 1995, directing them to handover possession of the property to the Wakf board within seven days. The said notice was replied on 16th December, 2003. The Wakf Board, by passing order dated 17th February, 2005, called upon lessees to handover possession of the suit property within fifteen days. Being aggrieved by the same, a suit was filed bearing No 10/2005 before the Wakf Tribunal. The order passed therein was challenged before High Court in Civil Revision Application No. 92/2005 and after leave was granted, the present proceeding i.e. Application No. 65/2009 came to be filed before the Tribunal. The lessees thus challenge the order passed by the Wakf Tribunal being illegal and bad in law on the ground that the lessees cannot be termed as encroachers in order to invoke Section 54 of the Wakf Act against them.

4. The Wakf Board filed written statement denying the contentions of the lessees. It is claimed that the lessees have no right over the suit property and that the lease deed could not have been for the period for more than three years and therefore, the lessees have become encroachers in the wakf property. On these, amongst other contentions, order passed on 17th May, 2005 is sought to be justified.

5. Learned Tribunal by passing the impugned order has allowed the application and set aside the order passed by the Wakf Tribunal. It was held that by virtue of registered lease deed, the lessees are in possession of suit property and therefore, they cannot be called as encroacher for invoking Section 54 of the Act.

6. Learned counsel for the Wakf Board states that the Tribunal has committed serious error in not taking into consideration provisions of Wakf Act and in particular, Section 56 of the Wakf Act which provides that a lease deed for a period exceeding 30 years of any immovable wakf property is void. It is thus contended that the lease deeds dated 13th September, 1996 and 25th September, 1996 are

declared as void by virtue of statutory provisions and therefore, the lessees are deemed to be encroacher in view of Section 3(ee) of the act. He submits that the Tribunal has not considered the said aspect and has wrongly proceeded on the premise that the applicants/lessees are not encroacher on the suit property. In support of his contentions, he placed reliance on following cases :-

- i) Abdul Hamid Shaikh Safdar vs. Darushifa Masjid Farmanpura & another in Criminal Revision Application No. 116/2008.
- ii) Abdul Qayyum s/o Abdul Hamid Khan and others vs. Additional Collector and others, 2012(5) Bom.C.R. 5.
- iii) Shinde Enterprises vs. Arastu Taimi Trust and another 2005 DGLS (A.P.) 17.
- iv) Ishtaque Ali Sayyad Ali Vs. Maharashtra State Wakf Board and another, 2015(3) Bom.C.R. 633
- v) Janab Pir Sultashah Sadar Bhandari Mutawalli vs. Shamshadbi Adam Shaikh and another 2016(3) Bom.C.R. 454.
- vi) Nutan Kumar and others vs. II Additional District Judge & others, 1994 AIR (Alld.) 298
- vii) Maria Margarida Sequeria Fernandes & others vs. Erasmo Jack de Sequeria (Dead) through LRs, 2012(4) Bom.C.R. 75 (Supreme Court)

7. Learned counsel for the lessees, on the other hand, submitted that the definition of encroacher under Section 3(ee) of the

Act is incorporated by Amendment Act No. 27/2013 and it has no application to proceedings initiated prior to 2013. Similarly, it is also pointed out that Section 56 has been amended in the year 2013 itself and thus, these provisions cannot be applied retrospectively to the lease deed already executed. According to him, Section 54 of the Act will come into play only in the cases where any person has encroached upon any land or property belonging to the Wakf. Since it is not the case of encroachment, the question of invoking the said provision does not arise and the order passed by the Wakf Board directing removal of lessees from the suit property is rightly set aside by the Tribunal.

8. Before considering the legal provisions applicable herein, it is necessary to record certain undisputed facts. By registered lease deeds dated 13th September, 1996 and 25th September, 1996, the lessees were inducted in the suit property by Wakf Board. The said lease was for a period of 51 years. The Wakf Board has issued no objection to the lessees to carry out construction on the premises. There is further no dispute about the fact that the lessees are carrying business on the suit property and have obtained licence under the Shop Act from the Municipal Corporation. The lease rent

was also paid regularly till the time it was accepted by the Wakf Board.

9. Section 54 of the Wakf Act provides that the Chief Officer on receiving any complaint or on his own motion finds that there has been encroachment on any property belonging to Wakf, he shall cause a notice to the encroacher specifying the particulars of encroachment and calling upon him to show cause before the specified day in such notice as to why order of removal from the Wakf property should not be made. In order to invoke such provisions, it is essential that the person against whom such notice is issued has encroached upon the Wakf property and is an encroacher. Here in this case, the lessees, by no stretch of imagination, can be called as encroacher as they have entered the suit property with consent of the Wakf Board. In this regard, it would also be relevant to take note of the definition of 'Encroacher' incorporated in Act, by virtue of amendment in the year 2013. The said definition of 'Encroacher' reads thus :-

3(ee) "encroacher" means any person or institution, public or private, occupying wakf property, in whole

or part, without the authority of law and includes a person whose tenancy, lease or licence has expired or has been terminated by mutawalli or the Board.

10. Definition of encroacher means and includes a person whose tenancy, lease or licence is expired or has been terminated by Mutawali or the Board. In the instant case, admittedly, the lease period is for 51 years from the year 1996. Thus, the period of lease has not expired nor the lease has been terminated by Mutawali or the Board. In this case, since the Board is the lessor, it is absolutely necessary to terminate the lease in order to call lessees/applicants as encroacher with aid of the said definition. Lessees herein do not fit into the said definition and in absence of them being encroacher, the question of invocation of Section 54 of the Wakf Act would not arise.

11. The Wakf Board is seeking to take shelter of Section 56 of the Act which is amended in the year 2013 and provides that any lease for a period over 30 years is illegal and void. In this regard, however, it is material to take note that there is a proviso to section 56(1) which states that a lease for a period upto 30 years will be made for commercial activities with the approval of State Government for such period and purpose as may be specified under the rules.

Section 56 of the Act does not preclude lease of any property upto the period of 30 years. Here in this case, the suit property is used for the purpose of commercial activities in view of conducting of business by the lessees therein on the basis of licence under Shop Act issued by the Municipal Corporation. Thus, even the amended provision of Section 56 which has come into effect from 2013 also does not preclude lease for the period of 30 years. This aspect was not considered by the Board while passing order under Section 54 of the Act for removal of lessees from the suit property.

12. This Court would like to consider judgments cited by Board to support its claim. In case of Abdul Hamid Shaikh (supra), issue before this Court was as to whether a person can inherit tenancy and it is held by relying upon the judgment of the Hon'ble Apex Court that tenancy would not be heritable and therefore, the applicant therein had no right to continue in possession of the said property as tenant. Similarly, in the case of Shinde Enterprises (supra) the Andhra Pradesh High Court was dealing with the application filed by plaintiff for seeking possession from defendant No. 1 for holding over illegal use and occupation of the property and another proceeding wherein a direction was sought to the defendants

to execute a registered lease deed for 31 years with necessary promise in favour of plaintiff in respect of the schedule property. In the facts of the said case, it was held that the approval at the best could be taken as approval for a period of 3 years since there was a direction sought to register a lease deed for a period of 31 years. In case of Janab Pir Sultashah Sadar Bhandari Mutawalli (supra), the issue before the Court was as to whether the transfer of Mirasi rights in favour of plaintiff is permissible under the document of conveyance executed in favour of plaintiff by Mirasi. In instant case, the issue is neither about inheritance of the tenancy nor any direction is sought for execution of lease deed after obtaining consent of the Government. Thus, judgments cited supra are not applicable to present case. In view of the fact that there is no complete embargo on execution of lease for commercial activity for 30 years, it is not open for the Board to initiate any action against the lessees prior to expiry of such period. Moreover, since while passing order of eviction of lessees this aspect is not taken into consideration, hence said order cannot sustain.

13. Within limited jurisdiction exercised by this Court under Section 115 r/w Order 47 of the Code of Civil Procedure and taking

into consideration aforesaid facts, no error seems to have been committed by the Tribunal in passing the impugned order whereby order dated 17th February, 2005 passed by the Chief Executive Officer of the Wakf Board is set aside. In the result, application stands dismissed with costs.

14. Pending civil application, if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge

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