

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

**CIVIL REVISION APPLICATION NO.12 OF 2019
WITH CA/13153/2022 IN CRA/12/2019**

**SYED AMJADULLAH SYED AZIZULLAH
VERSUS
SHAIKH HUSSAIN CHOTU KHAN AND OTHER**

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Advocate for Petitioner : Mr. M. G. Mustafa
Advocate for Respondent No. 3 : Mr. Y. B. Pathan

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CORAM : R.M. JOSHI, J

DATE : APRIL 11, 2023

PER COURT :

1. Heard learned Counsel for the Original Plaintiff and Counsel for Respondent No. 3. None for the Respondent Nos. 1 and 2.

2. This Revision is filed against judgment dated 06.05.2017 passed by Waqf Tribunal in Waqf Suit No. 43/2011. Applicant/Plaintiff has filed suit for recovery of possession of suit land and seeking injunction against defendants No. 1 and 2. Plaintiff has given history of the ownership of suit land and it is claimed that after death of Quasim Sahab his son Bahauddin was rendering the services to Masjid situated on suit land, which is service inam land. It is further stated that after death of Bahauddin, Vazirunnisa Begum

and her husband started cultivating suit land. She died in 1950 leaving behind plaintiff and four other children. Plaintiff claims to be eldest member of family. It is further claimed that Maharashtra Government in Gazette dated 01.11.1973, has included suit land as Waqf Property. It is claimed that his forefathers were mutawallis and managing affairs of Masjid by cultivating suit land. It is specifically averred that succession proceeding filed before Atiyat Court is pending. It is alleged that defendant nos. 1 and 2 are in illegal possession of suit land and hence, suit for recovery of the same is filed.

3. Defendant nos. 1 and 2 resisted suit and denied that plaintiff is the hereditary mutawalli of Masjid or is in possession of suit land. It is claimed that suit land was granted to their ancestors by then Hyderabad State through Muntakhab Tamil No. 1586 dated 31st Sherewar 1301. They claimed that they are serving Masjid.

4. Plaintiff led evidence by examining himself (Exh. 33) and relied on documents. Defendants failed to lead evidence. Tribunal dismissed suit which has been

challenged herein.

5. It is the contention of Counsel for the plaintiff that the Tribunal has committed error in not considering the fact that the evidence led by the plaintiff has gone unchallenged for want of cross-examination and that defendants did not lead any evidence to substantiate their case in Mutawalliship of the Waqf property in question. According to him, he has placed reliance on the entries in the revenue record, which indicate that he is the hereditary Mutawalli.

6. Since suit is filed for possession of the waqf property by alleging that the defendant nos. 1 and 2 have forcibly taken possession thereof and it is claimed that he is having hereditary Mutawalliship in respect of waqf property, burden solely rests upon the plaintiff to prove that either he is appointed as Mutawalli under the provisions of waqf act by Waqf Board or that he has hereditary Mutawalliship.

7. Section 101 of Evidence Act provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of

facts which he asserts, must prove that those facts exists. The burden lies on person to prove existence of such facts. Having regard to the nature of suit and reliefs claimed, entire burden rests on plaintiff to prove his case. Apart from examining himself, he placed reliance on the proclamation issued by the Board wherein it is proposed that the plaintiff would be appointed as Mutawalli. He however was unable to produce any document showing such appointment being made pursuant to the said proclamation. Needless to state that mere issuance of proclamation cannot be construed as appointment. With regard to the hereditary Mutawalliship, it is admitted fact that an application under the Atiyat Enquiry Act is pending. Thus, on both counts, case of plaintiff is not substantiated before Tribunal.

8. It is rightly pointed out by the Counsel for Plaintiff that the revenue entries relied upon by the defendants would not be relevant to determine right of parties in question. Thus, plaintiff on the basis of revenue entries, he cannot claim hereditary Mutawalliship. Once plaintiff fails to substantiate his

case, question of shifting of onus on defendant nos. 1 and 2 to prove their contention, does not arise. Hence, it is immaterial which the defendants led any evidence or not.

9. The aforesaid discussion clearly shows that Tribunal committed no error in dismissing the suit. Learned Counsel for the plaintiff seeks leave to file fresh proceedings after decision about the hereditary Mutawalliship pending before Waqf Board. Needless to say it is always open for any party to file suit on fresh cause of action. Hence, no separate liberty needs to be granted.

10. In view of the above, applications stands dismissed.

(R.M. JOSHI, J.)

Malani