



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

CIVIL REVISION APPLICATION NO.155 OF 2023

Dalit Vargiya Bahuudheshiva

Prasarak Mandal, Wadgaon,

Tq. & Dist. Osmanabad

Smt. Saraswatibai Lalchand Waghmare

Duly authorized through

Deepak s/o Bhanudasrao Sarvade

Age : 60 years, Occu.: Agril.,

R/o.: Lumbinighar Devi Road

Osmanabad, Tq. & Dist. Osmanabad **PETITIONER**

(Org. defendant No.1)

VERSUS

1. Dargah Hazrat Khawaja Shamshuddin,
Gazi (Rah.) Through its Mutawalli
Sarfaraz Hussaini s/o Sayyed Shah
Age : 46 years, Occu.: Business,
R/o.: Sayyad Galli, Near Raja Ki Bowli,
Osmanabad, Tq. & Dist. Osmanabad.

2. Maharashtra State Board of Wakfs
Through its Chief Executive Officer,
Panchakki, Aurangabad

.... **RESPONDENTS**

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Advocate for the Petitioner : Mr. Jayant R. Patil
Advocate for Respondent No.1 : Mr. Pramod B. Gapat
Advocate for Respondent No.2 : Mr. N. E. Deshmukh

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CORAM : SANDIPKUMAR C. MORE, J.

DATED : 03/04/2024.

ORDER :

1. The petitioner / institution has challenged the order dated 27/07/2023 passed by the learned Maharashtra State Wakf Tribunal, Aurangabad (hereinafter referred to as 'the learned tribunal') in Waqf Suit No.80 of 2020 below Exhibit-27.

2. Brief facts are as under :

Present respondent No.1 Dargah i.e. original plaintiff has filed Wakf Suit No.80 of 2020 before the learned tribunal for perpetual injunction against the petitioner / institution, which is pending for evidence. The petitioner / institution has already filed their written statement by denying all the adverse allegations made against them and prayed for dismissal of the suit. It has contended that the Collector, Osmanabad had allotted 30 X 30 Sq. meters property to it and after its measurement through competent authority i.e. DILR, Osmanabad, the same has been given in their possession by recording their name in the record of rights of the said land. Respondent No.1 / plaintiff had in fact claimed temporary injunction by filing application at Exhibit-5. However, in view of the undertaking by the petitioner / institution that they

had not made any encroachment and also would not do the same in future, it was disposed of. Thereafter, the original plaintiff – Dargah i.e. respondent No.1 filed an application below Exhibit-27 for measurement of Survey Nos. 426 & 427 by appointing a Court Commissioner. Though the said application was opposed by the present petitioner / institution, the learned tribunal vide order dated 27/07/2023 allowed the said application Exhibit-27 only to the extent of measurement of land Survey No.427. Hence, this civil revision application.

3. The learned counsel for the petitioner / institution vehemently argued that such appointment of a Court Commissioner for measurement of the land in dispute and that too for collection of evidence in injunction simplicitor suit, is not at all permissible. According to him, the District Collector had given the part of Survey No.426 to the petitioner / institution and at the time of taking possession of the same, the said land was already measured by D.I.L.R. Osmanabad. Further, according to him, respondent No.1 Dargah i.e. the original plaintiff since beginning has filed various litigations against the petitioner / institution only to harass them but failed in each and every attempt on earlier occasions.

4. The learned counsel for the petitioner / institution relied on following judgment.

A) Sanjay Kisan Thorat and others vs. Ramchandra Parsu Thorat and another, reported in [2018(2) Mh.L.J. 954].

5. On the contrary, the learned counsel for respondent No.1 Dargah i.e. the original plaintiff supported the order and contended that the learned tribunal has rightly relied on the judgment of this court in the case of **Govardhan s/o Nayaran Gaikwad vs. M/s. Sai Baba Estates in Writ Petition No.7594 of 2020 decided on 21/02/2022.** According to him, a Court Commissioner for measurement of the suit land can be appointed even in the suit for simplicitor injunction. He pointed out that while disposing the application Exhibit-5 vide order dated 13/10/2022, the learned tribunal had also expressed its opinion that in case the plaintiff - Dargah measures the land Survey No. 427 through a surveyor of D.I.L.R. and after such measurement any encroachment is found, then the plaintiff is at liberty to take appropriate steps in accordance with the law so advised. Thus, according to the learned counsel for respondent No.1 / plaintiff – Dargah, the present petition needs to be dismissed.

6. The learned counsel for respondent No.1 relied on following judgment.

A) *Kolhapuri Bandu Lakade vs. Yallappa Chinappa Lakade, Dead, Through Pooja Y. Lakade and others, reported in 2011(3)Bom.C.R. 807.*

7. Heard rival submissions. Also perused the documents on record.

8. Admittedly, the present dispute between the parties is having long chequered history. It appears that the part of Survey No.426, admeasuring 30 X 30 sq. meters, has been given in possession to the petitioner / institution by the Collector, Osmanabad vide order dated 18/03/1991 i.e. long back. The said order filed on record clearly indicates that at the time of allotting the said land to the petitioner / institution, the D.I.L.R., Osmanabad had carried out the measurement and by fixing boundaries, the said portion was given to the petitioner / institution. Since the relatives of the present Mutawalli of present respondent No.1- Dargah, were trying to obstruct the possession of the petitioner / institution over the said land. The petitioner / institution was compelled to file RCS No.330 of 2005 for declaration of its ownership over the said

portion in Survey No.426 and for getting permanent injunction against them. It is extremely important to note that the said suit was decided by the 2nd Joint Civil Judge (Junior Division), Osmanabad on 06/10/2009 observing that the petitioner / institution succeeded in establishing the identification and location of the said 9 R land in City Survey No.426 alongwith its ownership over the same. Accordingly, the learned 2nd Joint Civil Judge (Junior Division), Osmanabad also restrained the relatives of present Mutawalli of respondent No.1 Dargah from disturbing possession of the petitioner / institution. The copy of judgment is also filed on record by the petitioner / institution – Dargah, which indicates that prior to the said suit also the then Mutawalli of respondent No.1 – Dargah, had filed RCS No.87 of 2004 against the petitioner / institution for not to interfere their possession over Survey No. 427. The said civil suit was dismissed by the then Presiding Officer and the appeal filed by the then Mutawalli of respondent No.1 – Dargah, was also got dismissed in default vide order of the District Judge, Osmanabad. Thus, it appears that there is no dispute about the identification and location of the property of the petitioner / institution in Survey No.426 and the competent civil court has declared them owner of the same by restraining the relatives of present Mutawalli of respondent No.1-

Dargah. Not only this, but the suit filed by the then Mutawalli against the petitioner / institution for not to interfere their possession over Survey No.427, was also dismissed. As such, this appears to be a third round of litigation between the parties.

9. It is not disputed that the property of respondent No.1-Dargah is situated adjacent to Survey No.426. Further, it is not in dispute that the petitioner / institution had given undertaking at the time of hearing of application Exhibit-5 for temporary injunction that they would not make any encroachment over part of Survey No.427 i.e. the property of respondent No.1 – Dargah. Now the main controversy in the present matter appears to be ‘whether a Court Commissioner can be appointed in the injunction simplicitor suit as it amounts to collection of evidence’. Admittedly, the case relied by the petitioner / institution before the learned tribunal of **Dyandeo Vithal Salke and others vs. Dagdu Kadar Inamdar, reported in 2017 (3) Mh.L.J. 314**, this court has held that such Court Commissioner from the office of T.I.L.R. cannot be appointed in the suit for simplicitor injunction and it would amount to collection of evidence. However, after going through the impugned order, it is evident that the learned tribunal has relied on the judgment of this court in the case of **Govardhan s/o Naryan**

Gaikwad (supra), wherein this court was of the opinion that when there was a dispute about identity of the property, a Court Commissioner for measurement of the suit land, can be appointed even in the suit for simplicitor injunction. However, in the present matter, there is no question of identification of the property. The competent Civil Court has already declared the petitioner / institution as owner of their land, admeasuring 30 X 30 Sq. meters from Survey No.426. Further, at the time of allotment of the said portion to the petitioner, it was measured through D.I.L.R., Osmanabad and a map was also prepared. The said map is filed on record. It indicates that property of the petitioner / institution was ascertained and identified by fixing boundaries and since then it is in possession of the same.

10. It is extremely important to note that earlier attempt of relatives of the present Mutawalli of respondent No.1- Dargah to seek injunction against the petitioner / institution by filing RCS No.87 of 2004 for similar relief of perpetual injunction, was rejected by the concerned civil court and thereafter, the petitioner / institution was declared owner of their land in Survey No.426 and then the management of respondent No.1 – Dargah was also restrained from obstructing possession of the petitioner /

institution over its property in Survey No.426. Thus, it appears that when the present suit is not for identification of the property, no Court Commissioner can be appointed to measure the suit land i.e. Survey No.427. It would definitely amount to collection of evidence as per the observation of this court in the case of **Sanjay Kisan Thorat and others** (supra). This court in the aforesaid case has made following observations :

“12. When the respondents are coming before the Court with a specific case of the existence of their house, bio-gas, toilet, open space, agricultural land, two water chambers, pipeline, trees of Mango and Coconut etc., the burden lies upon them to prove the said existence and their location. They cannot, under the pretext of appointment of T.I.L.R. as a ‘Court Commissioner’, when the measurement of the lands is already done at their instance only and the boundaries are also fixed, seek appointment of ‘Court Commissioner’ to bring on record the factual position at the site, so as to help them in proving their case for interim injunction. The trial Court has not considered this settled position of law and therefore, the impugned order passed by the trial Court needs to be quashed and set aside.

13. The Writ Petition is, accordingly, allowed. The impugned order passed by the trial court is quashed and set aside.”

11. It is significant to note that the plaintiff – Dargah has not filed any suit for possession of the alleged encroachment at the hands of the petitioner / institution. It is only contended in the suit that the petitioner / institution is trying to encroach upon their land Survey No.427. Even if the land Survey No.427 is measured and in case any encroachment at the hands of the petitioner / institution is found, then also the plaintiff- Dargah will have to claim possession of such encroachment. This has to be done independently and for that purpose the help of court cannot be taken for collecting evidence. The plaintiff – Dargah may get measured their land independently but merely relying on the observation of the learned tribunal in the order dated 13/10/2022, they cannot obtain relief of measurement of Survey No.427 through a surveyor of D.I.L.R. under direction of the court. The learned counsel for the respondent No.1- Dargah heavily relied on the judgment of this court in case of **Kolhapuri Bandu Lakade** (supra), wherein it is observed that when there a dispute in respect of boundaries between the parties in suit for declaration and possession of the property, direct investigation by a Court Commissioner under

Order-26 Rule 9 of CPC is necessary for the just decision of the case. However, in the present suit, there is no prayer for possession of the property. This is merely a suit for injunction and therefore, for collecting the evidence in respect of alleged encroachment, which is still uncertain, a Court Commissioner cannot be appointed. Therefore, the order of the learned Tribunal appears illegal, perverse and needs to be set aside.

12. In view of the same, the civil revision application is hereby allowed and the impugned order dated 27/07/2023 passed by the learned tribunal i.e. Maharashtra State Wakf Tribunal, Aurangabad in Wakf Suit No.80 of 2020 below Exhibit-27 is quashed and set aside. The revision application is accordingly disposed of.

(SANDIPKUMAR C. MORE, J.)