

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 18 OF 2024

The Bombay Xavierian Corporation	)	
Through its trustee father Anthony Toscano	)	
Age-64 Years	)	
Address : Vinayalaya, Mahakali Caves Road	)	
MIDC, P.O., Andheri (East), Mumbai – 400 093	)	Applicant

Versus

1	Sarosh Abdullah Zakeria	)	
	Age- 46 years, Occ – Business and Trustee,	)	
	Jama Masjid Nawayat Trust	)	
	Add : Nawayat Mohalla, Sopara, Tal. Vasai	)	
	District : Palghar	)	
2	Maharashtra State Board of WAKF	)	
	Through its Chief Executive Officer	)	
	Having its address at Panchakki,	)	
	Aurangabad – 431002, Maharashtra	)	Respondent

.....

- Senior Advocate, Joaquin Rais a/w. Sahil Gandhi, Dimple Vora and Riddhi Shah i/b. Makrand Gandhi, Advocates for the Applicant.
- Ms. Saima Ansari, Advocate for Respondent No.1.
- Ms. Divya Parab i/b. R. M. Momin, Advocate for Respondent No.2.

CORAM : R. M. JOSHI, J.

RESERVED ON: 13th AUGUST, 2024.

PRONOUNCED ON: 21st AUGUST, 2024.

JUDGMENT :

1. This application under Section 115 of the Code of Civil Procedure takes exception to order passed by the Chief Executive Officer (for short “**C.E.O.**”), Wakf Board in Case No. 54/261/2010 whereby direction is issued against the applicant for removing encroachment over

Survey No. 365/1, Village - Gass, Taluka – Vasai, District – Palghar, under Section 54 of the Wakf Act, 1995 (for short “**the Act**”).

2. The facts which led to filing of this application can be narrated in brief as under:

(i) Applicant claims to have purchased Survey No. 364 under registered sale deed executed in July - 2012 and pursuant to the said sale deed applicant's name was mutated in the revenue record vide Mutation Entry No. 4608. It is the contention of the applicant that the land was duly measured by T.I.L.R. on 16.04.2010 and the applicant is in possession of the land owned by it. Respondent No.1 filed proceeding before C.E.O. for removal of alleged encroachment caused by applicant, on Survey No. 365/1 which is adjoining land to the land owned by the applicant. C.E.O. passed order dated 15.01.2013 whereby it was directed for removal of encroachment caused on Survey No. 365/1, it being a Wakf property. It is specific case of the applicant that though such order was allegedly passed on 15.01.2013, however, the same was communicated to the applicant for the first time after four years i.e. in February-2017. Present application is filed by the applicant taking exception to the said order on the ground that it is passed without conducting an enquiry as contemplated by Section 54 of the Act. C.E.O. has failed to appreciate the evidence on record i.e. the measurement map drawn by T.I.L.R on 16.04.2010 and registered Sale

deed of the applicant. It is further claimed that without recording any finding of encroachment being committed by applicant and in absence of any evidence to indicate. So, order impugned came to be passed and hence the same is not sustainable.

3. Learned Senior Counsel appearing on behalf of the applicant, at the outset submits that present revision is maintainable for the reason that the order impugned is passed under unamended Section 54 of the Act which subsequently was amended in the year 2013, whereby the power of removal of encroachment from the Wakf property with C.E.O. has now been vested in the Wakf Tribunal. It is submitted that in view of the fact that the order impugned was communicated for the first time in the year 2017, the applicant is left without any remedy under the Act for challenging the said order. It is his further submission that pursuant to the amendment to Section 54, the Tribunal has become Authority for directing removal of encroachment and at the same time the provision of sub-Section 4 permitting institution of a suit against order passed by C.E.O. has been taken away. Thus, it is his submission that in this peculiar circumstances, revision is maintainable.

4. He further argued on merit to contend that in any case, C.E.O. could not have passed any order of eviction of the applicant from the Wakf property without recording a finding that encroachment has been

committed thereon. It is his submission that in absence of any measurement of the said property being carried out, it is not possible for any Authority to determine the issue of encroachment. By drawing attention of the Court, to the impugned order, it is submitted that wrongful reliance is placed by C.E.O. on the measurement map of the property belonging to the applicant, which does not show any encroachment by applicant. According to him, for the purpose of deciding the encroachment caused on Survey No. 365/1, measurement of the said property was necessary. It is, therefore, submitted that the order impugned deserves to be set aside. Without prejudice to the rights of the applicant it is submitted that applicant is not interested in keeping any dispute pending and hence appropriate direction be issued for measurement of both the properties in order to ascertain the encroachment, if any.

5. Learned counsel for the applicant relied upon the following judgments:

- (i) *Ramzan Sheikh Chand Sheikh (since deceased) Vs. Panjab s/o. Nathuji Gawande*¹
- (ii) *Niranjanabai Chandrakant Vira Vs. Pramilabai Balkrishna Zade and Anr.*²
- (iii) *State of Punjab Vs. Amar Singh Harika*³
- (iv) *Kalpraj Dharamshi and Another Vs. Kotak Investment*

1 2014 SCC OnLine Bom 3699

2 2004 SCC OnLine Bom 368

3 1966 SCC OnLine SC 48

Advisors Limited and Another⁴

6. Learned counsel for respondent No.1 has supported impugned order.

7. At the outset, this Court wishes to deal with the issue of maintainability of the revision application. For this purpose, it would be relevant to take into consideration both unamended and amended Section 54 of the Act.

Unamended Section 54

54. Removal of encroachment from wakf property.—

(1) Whenever the Chief Executive Officer considers whether on receiving any complaint or on his own motion that there has been an encroachment on any land, building, space or other property which is wakf property and, which has been registered as such under this Act, he shall cause to be served upon the encroacher a notice specifying the particulars of the encroachment and calling upon him to show cause before a date to be specified in such notice, as to why an order requiring him to remove the encroachment before the date so specified should not be made and shall also send a copy of such notice to the concerned mutawalli.

(2) The notice referred to in sub-section (1) shall be served in such manner as may be prescribed.

(3) If, after considering the objections, received during the period specified in the notice, and after conducting an inquiry in such manner as may be prescribed, the Chief Executive Officer is satisfied that the property in question is wakf property and that there has been an encroachment on any such wakf property, he may, by an order, require the encroacher to remove such encroachment and deliver possession of the land, building, space or other property encroached upon to the mutawalli of the wakf.

(4) Nothing contained in sub-Section (3) shall prevent any

4 (2021) 10 SCC 401

person aggrieved by the order made by the Chief Executive Officer under that sub-section from instituting a suit in a Tribunal to establish that he has right, title or interest in the land, building, space or other property.

Provided that no such suit shall be instituted by a person who has been let into possession of the land, building, space or other property as a lessee, license or mortgagee by the mutawalli of the wakf or by any other person authorised by him in this behalf.

Amended Section 54

In Section 54 of the principal Act :-

a) in sub-section (3), for the words "he may, by an order, require the encroacher to remove", the words "he may, make an application to the Tribunal for grant of order of eviction for removing shall be substituted; (b) for sub-section (4), the following sub-sections shall be substituted;

"(4) The Tribunal, upon receipt of such application from the Chief Executive Officer, for reasons to be recorded therein. make an order of eviction directing that the waqf property shall be vacated by all persons who may be in occupation thereof or any part thereof, and cause a copy of the order to be affixed on the outer door or some other conspicuous part of the waqf property:

Provided that the Tribunal may before making an order of eviction, give an opportunity of being heard to the person against whom the application for eviction has been made by the Chief Executive Officer.

(5) If any person refuses or fails to comply with the order of eviction within forty-five days from the date of affixture of the order under sub-section (2), the Chief Executive Officer or any other person duly authorised by him in this behalf may evict that person from and take possession of, the waqf property."

8. There is no dispute about the fact that the order impugned passed by C.E.O. was in exercise of powers under Section 54 as it stood prior to the Amendment Act of 2013. Further, undeniably though the order impugned came to be passed on 15.01.2013, however the same was communicated to the applicant only in the year 2017. The amendment to

Section 54 of the Act from year 2013 further indicates that for removal of encroachment from Wakf property an application is to be made to the Tribunal for grant of order of eviction. Most importantly, unamended sub-Section 4 provided for institution of a suit in a Tribunal by any person being aggrieved by order of C.E.O. Post amendment however such provision of filing of institution of suit is removed from the statute as against this, and the Tribunal itself is entrusted with the power to decide the encroachment on Wakf property upon receipt of an application from C.E.O. Obviously, after amendment there is no remedy left of filing suit in Tribunal against order of C.E.O. Thus, in the year 2017, applicant had no remedy of filing a suit in the Tribunal against order passed by C.E.O. Applicant is practically left remediless, and considering peculiar facts involved in this case, present Revision Application deserves to be entertained. Moreover, this application is pending before this Court since year 2017, and hence this Court does not find it appropriate to call upon applicant to adopt any other remedy against impugned order.

9. As far as merits of the impugned order is concerned, it is clear from the said order that the respondent No.1 did not produce any evidence in order to indicate encroachment caused by the applicant on Survey No. 365/1. C.E.O. has relied upon sale deed of the applicant and it is observed in the order that both properties are adjoining to each other and since the

applicant herein has raised objection with regard to the limitation, it was presumed that there is encroachment caused by the applicant over Survey No. 365/1. Such finding is wholly impermissible in law. The law on the point of removal of encroachment is fairly settle to say that for the purpose of deciding the issue of encroachment, there has to be measurement of the properties, which are involved in the case. Admittedly, no joint measurement was carried out in order to ascertain that any encroachment has been caused by the applicant over the Wakf property as claimed. Having regard to these facts, the order impugned cannot sustain.

10. Unamended Section 54 provided power to the C.E.O. to consider whether there has been any encroachment on the land which is a Wakf property and hence it is needless to say that, an enquiry is contemplated to be undertaken by C.E.O. to come to the conclusion about encroachment. It can only be done on the basis of admissible evidence and not on surmises and conjectures. Issuance of direction for removal of encroachment, has drastic consequence of removal of any person from property, as such, unless there is evidence to hold so and findings are recorded in this regard order passed of removal of encroachment can not be sustained. In the circumstances, it is a fit case wherein interference is required to be caused to the impugned order. As a result of which impugned order is set aside.

11. Though learned Senior Counsel appearing on behalf of the applicant has sought direction for joint measurement of the suit property, this Court refrains itself for passing such order for the simple reason is that, if any party disputes such measurement, such dispute cannot be adjudicated upon by this Court. However, considering the peculiar facts of this case, liberty is granted to the parties to move appropriate forum for seeking such relief, if they so desire.

12. Application stands allowed in above terms.

(R. M. JOSHI, J.)

SONALI
SATISH
KILAJE

Digitally signed
by SONALI
SATISH KILAJE
Date:
2024.08.22
17:23:14
+0700