

Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 455 OF 2024

Kausa Jama Masjid Trust Thr. Its Chief Trustee
Haroon Qamrudin Raut .. Applicant

Versus

Smt. Fashibai Bhagirath Bhagat and Ors. .. Respondents

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- Mr. Sagheer Khan a/w Mr. Hamid Ansari, Ms. Afsha Khan, Ms. Nausheen Shaikh i/b Judicare Law Associates for Applicant.
- Mr. Pravin Tembhekar for Respondent Nos.1, 3 and 4.

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CORAM : MILIND N. JADHAV, J.

RESERVED ON : SEPTEMBER 11, 2024

PRONOUNCED ON : OCTOBER 25, 2024

JUDGMENT:

1. Revision Applicant is the original Defendant challenging the order dated 14.02.2024 passed below Exhibit 14 by the Civil Court, Thane (for short “**Trial Court**”). Respondents are the Plaintiffs Parties are referred to as Plaintiffs and Defendant for convenience. Defendant-Trust filed Application below Exhibit 14 under Order VII, Rule 11 of the Code of Civil Procedure, 1908 (for short “**CPC**”) for rejection of Plaint.

2. Respondents i.e. original Plaintiffs filed suit for declaration and injunction of easementary right of way through the adjoining land admittedly owned by Defendant-Trust.

3. Defendant- Trust claimed that easementary right available to Plaintiffs is through Suit property bearing Survey Nos. 58 and 60 of village Dawle, Taluka, District Thane, which is admittedly a Waqf property belonging to Defendant-Trust. Defendant-Trust therefore filed Application below Exhibit 14 under Order VII, Rule 11 (d) of CPC for rejection of plaint on the ground that jurisdiction of the Civil Court would stand ousted and Plaintiffs would have to approach the Waqf Tribunal.

4. Trial Court rejected the Application filed by Defendant-Trust and held that Waqf Tribunal will not have jurisdiction to adjudicate the lis between the parties and it is only the Civil Court which will have jurisdiction.

5. Hence, the present Civil Revision Application. Before I advert to the submissions made by the learned Advocates, the following facts are relevant for consideration as they are admitted facts by both parties and they go to the root of the matter.

6. On 06.01.1953, Defendant-Trust came to be registered with the Charity Commissioner under the Maharashtra Public Trusts Act, 1950 as Religious Public Trust bearing PTR No. B-9 (Thane) along with its various immovable properties including land bearing Survey Nos. 58 and 60 of village Dawle, Tq. and District Thane (for short “**Waqf**

properties”) as Waqf properties belonging to Defendant-Trust. Thereafter, on 01.01.1996, the Waqf Act, 1995 (for short “**the said Act**”) came into force.

7. On 07.03.1988, Plaintiffs by two registered Deed of Conveyance duly registered under Serial Nos. 1723 & 1724 respectively purchased the land bearing Survey Nos. 58 and 60 of village Dawle, Taluka, District Thane, the same is undisputed and taken on record. The ingress and egress to this land purchased by Plaintiffs is admittedly through the Waqf properties viz. Survey No. 58 and 60. Plaintiffs have been using the said easementary right of way openly, continuously and uninterruptedly for the last 32 years.

8. On 04.10.2019, Plaintiffs were informed by the office of the District Superintendent of Land Records, Thane (W) regarding a survey of land bearing Survey Nos. 58 and 60 as requested by the Defendant-Trust. On or about 09.02.2020, Plaintiffs observed some stones, boulders and other material on the said right of way. Plaintiffs therefore apprehended that Defendant-Trust after requesting for a survey of their land, would gradually attempt to encroach / efface upon their said easementary right of way. Hence, on 12.03.2020, Plaintiffs filed Special Civil Suit No. 188 of 2020 in the Court of Civil Judge Senior Division, Thane wherein they sought a declaratory relief to declare and proclaim their easementary right through Defendant-

Trust's property bearing Survey Nos. 58 and 60, which is admittedly a Waqf property.

9. On 20.11.2020, Defendant-Trust filed an Application under Order VII, Rule 11 (d) of CPC seeking rejection of Suit plaint on the ground that Civil Court will have no jurisdiction and Plaintiffs will have to approach the Waqf Tribunal in view of the bar under Section 83 read with Section 85 of the said Act.

10. By order dated 24.01.2024, Trial Court rejected the Application below Exh. 14 filed under Order VII, Rule 11 (d) of CPC.

11. Being aggrieved by the dismissal, Applicant-Trust filed the present Revision under Section 115 of CPC.

12. Mr. Khan, learned Advocate for the Applicant-Defendant-Trust would submit that the Plaint does not disclose any cause of action or grievance against the Defendant-Trust. He would submit that Defendant-Trust has never denied, disturbed or prevented Plaintiffs from using the easementary right of way through its property bearing Survey Nos. 58 and 60. He would submit that the impugned order is contrary to the provisions of Sections 83 readwith 85 of the said Act which clearly bars the jurisdiction of the Civil Court to entertain suits related to Waqf and its properties.

12.1. He would submit that the Trial Court ought to have appreciated the amended provisions of Section 83 of the said Act that empowers the Tribunal to determine all disputes or matters relating to Waqf or Waqf properties which would include eviction of a tenant, determination of rights and obligation of a lessor and lessee of such property under the said Act. He would submit that under Section 83 (5) of the said Act, the Tribunal is deemed to be a Civil Court and shall has the same powers as a Civil Court under the CPC.

12.2. In support of his submissions, he would refer to and rely upon the following decisions of the Supreme Court:-

(i) *Mumtaz Yarud Dowla Wakf Vs. Badam Balakrishna Hotel Pvt. Ltd. And Others*¹

(ii) *Lal Shah Baba Dargah Trust Vs. Magnum Developers*²

(iii) *Rashid Wali Beg Vs. Farid Pindari and Others*³

(iv) *Ramesh Gobindram Through Lrs. Vs. Sugra Humayun Mirza Wakf*⁴

(v) *Board of Wakf, West Bengal and Another Vs. Anis Fatma Begum and Another*⁵

1 2023 SCC OnLine SC 1378

2 (2015) 17 SCC 65

3 (2022) 4 SCC 414

4 (2010) 8 SCC 726

5 (2010) 14 scc 588

12.3. According to the aforesaid decisions it has been held that the Waqf Tribunal is a special Tribunal which has all powers as a Civil Court under CPC and as such it can adjudicate all issues in dispute in respect of property which is a Waqf property. He would submit that Supreme Court has held that the provisions of Section 108A of the said Act, clearly highlight the intention of Parliament that the said Act, will have an overriding effect if any law is repugnant to the said Act.

12.4. He would submit that in view of the clear and unambiguous position emanating from Sections 83 read with 85 and 108A of the said Act, the jurisdiction of the Civil Court stands outset and therefore the suit filed by Plaintiffs for the relief in respect of Waqf property is required to be filed in the Waqf Tribunal only. Hence, he would submit that the impugned order be quashed and set aside and the Plaintiffs be directed to approach Waqf Tribunal.

13. ***Per Contra***, Mr. Tembhekar, learned Advocate for Respondents- Plaintiffs would submit that, Defendant- Trust has obstructed the right of way to approach Plaintiffs' agricultural land, thereby affecting Plaintiffs' only source of income and hence Plaintiffs are aggrieved. He would submit that the right of way is used by Plaintiffs for the last 32 years since they have purchased their property by registered conveyance.

13.1. He would submit that Defendant-Trust in the 1st week of February, 2020 obstructed Plaintiffs' access leading to filing of the present suit seeking declaratory and injunctive relief to safeguard Plaintiffs' right of way. He would submit that the decision in the case of **Ramesh Gobindram Through Lrs.** (4th *supra*) cited by Defendant-Trust does not *ipso facto* ousts the jurisdiction of the Civil Court. He would submit that none of the provisions of the said Act either expressly or implicitly empower the Tribunal to adjudicate upon a declaratory relief in respect of easementary right. Hence, according to him the Civil Court will have the jurisdiction to adjudicate the dispute raised by Plaintiffs

13.2. He would submit that the present case is not covered by the bar under Section 85 of the said Act, ousting jurisdiction of the Civil Court. Hence, the Revision Application be dismissed and the impugned order be upheld.

13.3. In support of his submissions he would refer to and rely upon the judgments of ***Sau Rajani Vs. Sau Smita and Anothers***⁶ and **Rashid Wali Beg** (3rd *supra*), he would submit that the Supreme Court has held that provisions of Sections 71 and 177 of the Maharashtra Housing and Area Development Authority Act, 1976, do not bar jurisdiction of Civil Court unless there is an express bar in the statute.

6 Civil Appeal No. 5216 of 2022; arising out of SLP (C) No. 1580 of 2021

He would submit that since the present suit is neither for eviction, nor to determine the rights of lessor and lessee, nor for possession, declaration or injunction, Civil Court will have jurisdiction to try this suit. He would submit that since the suit is for declaration of easmentary right of way, it is triable by the Civil Court only. He would submit that in the case of **Rashid Wali Beg** (*3rd supra*) dispute was regarding Waqf property and therefore jurisdiction of the Civil Court was barred, whereas in the present case the dispute is not relating to a Waqf property or any right in the Waqf property, therefore the said judgment relied upon by Defendant-Trust is not applicable in the facts of this case.

13.4. He would further submit that Defendant-Trust has mislead the Court by stating that there is a delay of 7 days whereas the actual delay is of 16 days and no sufficient reason for the said delay is given, hence the Revision Application be dismissed on the ground of delay also.

14. In the present case, it is seen that proceedings pertain to challenge rejecting application under Order VII, Rule 11 of the CPC. For the submissions made across the bar by the Advocates, it would be worthwhile to consider the averments made in the plaint. The plaint is annexed at Exh. B page No. 37. Principal relief in the plaint seeks declaration that since Plaintiffs are uninterruptedly enjoying the

easementary right of way for the last 32 years on the part of Defendant-Trust's property, the Defendant-Trust is not entitled to obstruct the same and Plaintiffs are therefore lawfully entitled to enjoy their access for ingress and egress.

15. In the given case, cause of action leading to seeking such relief is therefore important as averred in the Suit plaint. Even according to Plaintiffs, Survey Nos. 58 and 60 belong to Defendant - Trust which is a religious Waqf Institution. In paragraph No.2 of the plaint, Plaintiffs have stated that Defendant - Trust owns and possesses huge tracts and areas of land and properties which are delineated therein. Survey Nos. 58 and 60 of village Dawle, Thane, are part thereof. It is Plaintiffs' case that the Survey Nos. 58 and 60 are adjoining and touching the Plaintiffs' land described as said land bearing Survey No. 216 (pt.) and admeasuring 1.25 Acres. This admitted position is undisputed by either parties. Another significant undisputed position is that access to Plaintiffs' said land is through Defendant - Trust's Survey Nos. 58 and 60. This access is described as a *kacchha* mud road of approximately 9.14 mts. wide and 116.74 mts. long through Survey Nos. 58 and 60. Apart from this access, Survey Nos. 58 and 60 are large tracts of Waqf land.

16. Concern and cause of action in the Suit plaint pertains to this access only. Paragraph Nos. 5,6 and 7 describe this access road / right

of way available by virtue of Plaintiffs' registered title deeds in respect of Survey No. 216 (pt) and for the last 32 years, there is no disturbance to this access road/ right of way. In the Suit plaint it is stated that in October 2019, Plaintiffs were informed by the DSLR, Thane that Defendant- Trust has filed an Application for survey of their properties which include Survey Nos. 58 and 60. In that regard, DSLR issued a notice dated 30.01.2020 to Plaintiffs calling for objections, because Plaintiffs' land bearing Survey No. 216 (pt) is adjacent to Defendant- Trust's lands and before carrying out survey objections from adjoining land holders are called for under the Maharashtra Land Revenue Code, 1966. Plaintiffs have further averred that they were informed by the DSLR office that survey will be carried out after hearing their objections. In paragraph No. 13, the aforesaid case is pleaded by Plaintiffs and nothing more.

17. On the basis of the above averments in paragraph No. 15, Plaintiffs have pleaded that for last about a one month or so before filing of the Suit on 09.03.2020, they found presence of stones, boulders and other materials on the access road / right of way and according to them because of the survey to be carried out they apprehend that Defendant- Trust is gradually and systematically attempting to efface / encroach upon the existence and use of the access road which is Plaintiffs' right of way. In this case the only cause

of action is pleaded in paragraph No.15 resultantly giving rise to the filing of the Suit proceedings. Though it is true that in such a challenge under Order VII, Rule 11 of the CPC maintained by the Defendant- Trust, the Suit plaint will only have to be read, but in the present case if the pleadings filed by the Defendant- Trust are seen then it is clear that Defendant- Trust is not claiming any objection to the use of the access / right of way used by Plaintiffs through its properties / land bearing Survey Nos. 58 and 60. Suit as filed is purely based on apprehension. It is categorically stated in the paragraph No. 15 of the Suit plaint that Defendant - Trust is attempting to efface, encroach and obliterate the access / right of way, when no such step is taken by the Defendant - Trust. Contrary to what is stated in the plaint, Plaintiffs have taken a significantly altered position in their Affidavit-in-reply dated 03.07.2024 in the present CRA. In paragraph No. 1(vii), Plaintiffs have stated that Defendant- Trust have started fencing and closing the access and right of way by using force and hence Plaintiffs were constrained to file the Suit on 09.03.2020.

18. Such is not the pleading for expressing cause of action in the Suit plaint. The Plaintiffs' case therefore is clearly based on apprehension. Plaintiffs themselves accept the fact that the access road / right of way is on Survey Nos. 58 and 60 which is Defendant- Trust's

property and is a Waqf property under Section 5 of the said Act as declared in the list of properties belonging to Defendant- Trust.

19. None of the pleadings of Defendant- Trust state that Defendant- Trust is attempting to take over the access road / right of way, the only objection by Defendant- Trust is that because the access road / right of way is on Survey Nos. 58 and 60, which is a Waqf property. The bar of Sections 83 readwith 85 of the said Act will apply for ouster of jurisdiction of the Civil Court and nothing more, with respect to the cause of action it is not the Defendant- Trust's case that it is attempting to take over, fence or alter the existence of the right of way leading to Plaintiffs' property bearing Survey No. 216 (pt). Once Defendant- Trust does not object to easementary right of way and access of Plaintiffs to their land through Survey Nos. 58 and 60, there is no cause of action for Plaintiffs to file the suit seeking declaration and permanent injunction. From reading of the Suit plaint it appears that Plaintiffs are objecting to the Application for survey made by the Defendant- Trust and in that view of the matter the cause of action stated in the Suit plaint cannot be countenanced.

20. It is therefore concluded that in so far as the cause of action as emanating from the pleadings in paragraph Nos. 13 and 15 of the Suit plaint is concerned, the same is merely based on apprehension. Once it is Defendant-Trust's case that in so far as the access road / right of

way is concerned since it stands on Waqf properties, it is incumbent and mandatory upon the Statutory Officer conducting the survey under the Maharashtra Land Revenue Code, 1966 to issue notice to the adjoining land holders and once such notices are issued, objections if any, are required to be raised in accordance with law within the prescribed period of limitation before the Competent Authority and the same will have to be considered. Merely because the Defendant-Trust has sought for survey of its immovable properties which are contained in the list issued under Section 5 of the said Act, Plaintiffs who are adjacent / adjoining holders cannot raise objection by filing the Suit plaint. As delineated herein above, Plaintiffs have taken diametrically opposite stand while filing the Suit plaint as can be seen from the averments made in paragraph No. 15 of the Suit plaint as opposed to the Affidavit-in-reply filed by Plaintiffs dated 03.07.2024 and more specifically in paragraph No. 1(vii) thereof. It is the Plaintiffs' case that Defendant-Trust has started fencing and closing the access right of way by using force. This pleading is absent while filing the Suit plaint. Even if the same is correct, parties will have to follow the due process of law.

21. One of the submissions made by Mr. Khan across the bar is that Plaintiffs' property described in paragraph No. 1 of the Suit plaint admeasuring 3.75 Acres and having nomenclature as Survey No. 189

is also having a direct access on the main road. Be that as it may, this is not a case where the parties namely Plaintiffs can go to the Court by filing an innocuous Suit plaint on the basis of apprehension without having any cause of action. In that view of the matter, apart from the fact that the suit property is admittedly a Waqf property according to the Plaintiffs, the cause of action is also absent. Hence the Suit is clearly not maintainable as filed by Plaintiffs. There is no objection to the use of right of way / access by the Defendant. There is no objection to the use of right of way / access by the Defendant.

22. The present Suit is clearly not maintainable and hence no purpose would be served if the present Suit is allowed to continue on the record and file of the Court. Needless to state that if the Plaintiffs' right of access to Plaintiffs' property is disturbed / obstructed in any manner whatsoever as stated by Plaintiffs in its Affidavit-in-reply dated 03.07.2024, it shall be open to the Plaintiffs to approach the appropriate forum and seek appropriate relief considering the stand of Defendant-Trust that Survey Nos. 58 and 60 are Waqf properties which are admitted by Plaintiffs.

23. Further in so far as the Defendant- Trust's right in the suit property i.e. access road is concerned, the same shall be governed by the rights of the parties therein and if the Defendant-Trust desires to alter their possession, it can only be done by following the due

process of law by putting the Plaintiffs to notice. All contentions of parties are expressly kept open in the event if the parties are required to approach the appropriate forum with respect to their substantive right either in the said land described in paragraph No. 1 of the Suit plaint or the suit property i.e. the access road / right of way through Survey Nos. 58 and 60 described in paragraph No. 2 of the Suit plaint.

24. In view of the above, impugned order is quashed and set aside. Application below Exh. 14 filed under Order VII, Rule 11 of the CPC for rejection of Plaint stands allowed. Special Civil Suit No. 188/2020 is dismissed. All contentions of parties are kept open. Refund of Court fee is permitted as per rules.

25. Copy of this order shall be placed before learned Trial Court for information.

26. Civil Revision Application is disposed.

Amberkar

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[MILIND N. JADHAV, J.]