

(2014) 02 BOM CK 0039

In the Bombay High Court

Case No : Civil Revision Application No. 229 of 2012

Arjun through L.Rs. and Laxman

APPELLANT

Vs

Hindustani Momin Banarasi Jaatichhe Panch Mandali and The
Chief Executive Officer

RESPONDENT

Date of Decision : 25-02-2014

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 40
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Transfer of Property Act, 1882 — Section 116
Waqf Act, 1995 — Section 10 11 13 27 3

Citation : (2014) 3 ALLMR 366 : (2014) 6 BomCR 398 : (2014) 3 MhLj 870

Hon'ble Judges : A.I.S. Cheema, J

Bench : Single Bench

Advocate : A.R. Vaidya, for the Appellant; S.S. Kazi, Advocate for Respondent
Nos. 1/1 to 1/4, for the Respondent

Final Decision : Dismissed

Judgement

A.I.S. Cheema, J.—This revision application has been filed by the original defendants No. 1 and 2. The respondent No. 4 is original defendant No. 4. The contesting respondent No. 1 Trust is before the Court through managing trustees. The respondent No. 1-Plaintiff brought Waqf Suit No. 21/2007 before the Maharashtra Waqf Tribunal at Aurangabad, claiming recovery of possession from defendants No. 1 to 3, on the basis that these defendants are encroachers on Waqf property and possession should be given to the plaintiffs. The suit has been decreed and thus, the present revision application. Plaintiff is described as Hindustan Momin Banarasi Jaatichhe Panch, Yeola i.e. Baherchi Masjid, through its trustees as mentioned in the plaint. Plaintiff claimed to be registered under the Bombay Public Trusts Act. Suit property is Survey No. 11-A of village Yeola, admeasuring 4 Hectors 02 R. The said property belongs to plaintiff Masjid and is meant for religious, pious and charitable purpose. The suit claims that the defendants are in possession of the suit property after demise of their mother

Thakubai, against whom Civil Suit - Regular Civil Suit No. 26/1999 was filed before Civil Judge, Junior Division, Yeola and came to be withdrawn vide application dated 5.2.2007 on the ground that there is bar u/s 85 of the Waqf Act, 1995 and jurisdiction lies with the Waqf Tribunal. Suit claimed that the defendants No. 1 to 3 were in illegal possession pursuant to the lease. Suit claims that, pleadings made in Regular Civil Suit No. 26/1999 were contrary to the legal provisions as found in Section 56 of the Waqf Act and no tenancy rights get created or could be alienated. Suit claimed that the defendants were not entitled to continue their possession over the suit land of the mosque. Plaintiff claimed recovery of possession.

2. Defendants No. 1 to 3 filed written statements. Defendants claimed that the suit related to claim of possession from tenant of agricultural land and so, the Tribunal had no jurisdiction. There was no dispute arising u/s 6 or 7 of the Waqf Act so as to fall for consideration of the Tribunal. It was claimed that, the Tribunal's jurisdiction was restricted to the decision of the question as to whether the property is Waqf property or not and that when it is admitted position that the property in question is a Waqf property, then the remedy lies under the General Law and the Tribunal's jurisdiction would be inapplicable. Defendants claimed that they were in possession as lawful lessees and the possession continued since the time of their forefathers. Bhikaji, father of defendants No. 1 took the suit land on lease by registered lease on 20.12.1944 and since then the defendants were in possession as tenants. It was claimed that, embargo of Section 56 of the Waqf Act was not applicable. Defendants claimed that there were other heirs of Bhikaji and they were not joined as party and defendants claimed that the suit was hit by Order II Rule 2 of the Civil Procedure Code, 1908 (hereinafter referred to as "CPC" for short) as the applicability of Section 56 of the Waqf Act could have been raised in the earlier suit - Regular Civil Suit No. 26/1999. For such reasons, the suit was resisted.

3. The Tribunal framed issues. The parties brought on record oral and documentary evidence before the Tribunal. The Tribunal found that the managing committee of the plaintiff Masjid was in existence and managing trust was authorized to file the suit. It was found that the property concerned is service inam land of the Masjid. The Tribunal held that the defendants are encroachers who are in unauthorised possession of suit property and that the suit was maintainable. It was held that the property is Waqf property and the Tribunal has jurisdiction. The claim of defendants that they were lawfully in possession, has been rejected. In view of such findings, the suit came to be decreed.

4. The present revision raises grounds that the Tribunal had no jurisdiction to entertain dispute regarding lease between landlord and tenant. It is claimed that, suit is based on the ground that tenants were illegally inducted and the lease is void. In such suit, jurisdiction has been wrongly assumed. It is claimed that, the Tribunal wrongly stressed on the fact that defendant did not enter witness box when the only question that was put for adjudication was whether the lease in

favour of the predecessor-in-title of defendants, was void on account of Section 56. According to the petitioners-defendants, this was the only tenor of the evidence of plaintiff and thus, the Tribunal wrongly entertained all controversies. The Tribunal did not consider the question that Section 56 was not applicable retrospectively. The Tribunal wrongly relied on the case of Shaikh Shafiq s/o Shaikh Osman Vs. Kishan Laxman Waghmare (Civil Revision Application No. 143/2004, decided on 30.8.2004) as that matter related to only tenant holding over engrafted u/s 116 of the Transfer of Property Act, whether the same could be applied to Waqf property. Petitioners claimed that the Tribunal erred in observing that the cause of action for earlier suit - Regular Civil Suit No. 26/1999 and present suit was not the same and that bar of Order II Rule 2 of CPC did not apply. Applicability of provisions of Waqf Act were not claimed in the earlier suit and so, the subsequent suit before Tribunal was hit by Order II Rule 2 of CPC. The suit before the Waqf Tribunal was filed on 13.3.2006 while leave to withdraw earlier Regular Civil Suit No. 26/1999 was granted on 23.3.2006 and thus, the suit before the Waqf Tribunal was not maintainable. The petitioners claimed that the judgment and decree of the Tribunal should be set aside.

5. Learned counsel for the petitioners submitted that, before the suit was withdrawn from Civil Court, the Waqf Suit was already filed. According to him, the defendants were protected under Bombay Tenancy and Agricultural Lands Act as after their father, who was tenant in the suit land, their mother was tenant and then they had become tenants. According to the learned counsel, Section 56 of the Waqf Act creating limit of three years for agricultural tenancy needs to be held as prospective and there was no such restriction in 1944 when lease was created in favour of the father of defendants. It is argued that, in the earlier suit - Regular Civil Suit No. 26/1999, embargo of Section 56 was not relied on, and the suit before the Waqf Tribunal was on same cause of action. Learned counsel relied on the case of Ramesh Gobindram (dead) through Lrs. Vs. Sugra Humayun Mirza Wakf, to claim that suit for evicting tenant of Waqf property would not lie before the Tribunal. According to the learned counsel, dispute whether the tenancy is lawful can be decided by Civil Court and the present suit should have been dismissed.

6. Learned counsel for respondent (original plaintiff) submitted that, on 20.2.1944, lease was executed for five years and that period is already over. Defendants are heirs of Bhimaji. Regular Civil Suit No. 26/1999 was filed against Thakubai, the mother of defendants. It has been submitted that, when the suit was filed in 1999, there was no Waqf Board for Nasik region and Waqf Board got created on 16.8.2002 and Nasik region came under the Waqf Act. The Waqf Tribunal u/s 83 was established in June 2002 and in view of this, the suit was withdrawn keeping in view Section 85. Learned counsel for plaintiff-respondent No. 1 submitted that, it is true that Exhibit 26 was filed in Regular Civil Suit No. 26/1999 for withdrawal on 15.2.2007 and the Waqf Suit was filed on 13.3.2007 while the order got passed by the Civil Court on 22.3.2007. Still, the learned counsel submitted that, the present suit was on the basis of bar created u/s 56

of the Waqf Act and once the Tribunal got established, the suit was required to be withdrawn as Tribunal had jurisdiction. Learned counsel submitted that the suit had been brought against the mother of defendants and on death of the mother, as the defendant did not vacate, the present suit in Waqf Tribunal was filed on different cause of action against defendants as they had no right to continue in possession. Thus, according to him, Order II Rule 2 of CPC does not create bar. It has been argued that the Civil Suit was on the basis of tenancy while the present suit before the Waqf Tribunal was on the basis that the possession is illegal as it is hit by Section 56 of the Waqf Act and the defendants are trespassers. The argument of the learned counsel was that if tenancy as protected under the Waqf Act was to be in existence, during subsistence of tenancy, proceeding before Civil Court could be resorted to, but if the tenancy comes to an end or if the tenancy is void and of no effect u/s 56 of the Waqf Act, the suit against unlawful possession would be maintainable before the Waqf Tribunal. The argument is that, matter of "Gobindram" could be relied on if the tenancy is in force and suit was filed before recent amendment. The learned counsel pointed out that now there is still further amendment in the Waqf Act due to the Waqf (Amendment) Act of 2013 and now even suits relating to tenants can be determined by the Waqf Tribunal u/s 83 of the Waqf Act.

7. At the time of arguments, the learned counsel for both sides did not dispute that the earlier suit-Regular Civil Suit No. 26/1999 was filed against Thakubai on 4.2.1999 and that the Waqf Tribunal came to be established in June 2000 while Waqf Board as regards jurisdiction of Nasik got established in August 2002. Thakubai died on 6.9.2006. Record shows that the plaintiffs filed application for withdrawal on 15.2.2007 and before the order dated 22.3.2007 was passed, the Waqf Suit was already filed on 13.3.2007.

8. Judgment of the Waqf Tribunal shows that, before the Tribunal, no dispute was raised regarding the fact that the Masjid was registered under Bombay Public Trusts Act, 1950. Exhibit 42 shows that when the Waqf Act became applicable, the Masjid was registered also u/s 43 of the Waqf Act, 1995. In the revenue record, the land was recorded in the name of the Hindustani Banarasi Jaatichhe Panch, Yeola. The Tribunal held that, the Mutawalli has statutory right to institute suit in interest of the Waqf. Tribunal, with reference to the pleadings of the defendants that all heirs of Thakubai were not joined as party, found that the defendants have not led evidence as to which of the heirs of deceased Thakubai had been left out. The Tribunal observed that the defendants don't dispute the fact that the property is of the Masjid and is a Waqf. The registered lease dated 20.12.1944 (Exhibit 16) was for period of five years and expired on 19.12.1949. The Tribunal observed that, there was nothing to show that the lease was extended by any subsequent deed. Rather it was found that the remarks of Revenue Officer on 7/12 extract (Exhibits 59 and 62) show that since the land belongs to Trust, the tenant had no right to purchase under the Statute, was recorded. The Tribunal further discussed the evidence that, on the death of Bhima, in 2005-2006 the name of Thakubai was recorded in cultivation column

(Exhibit 59), but in 2008-2009 names of defendants were not recorded even in cultivation column. Tribunal held that the tenancy of the land of religious trust was not heritable. The Tribunal found that, even assuming that the tenancy devolved on Thakubai and so the suit was filed against her regarding tenancy right, the same would not devolve on the defendants on her death. The Tribunal observed that, it was not the case of defendant that after the death of their mother the trustees accepted any rent from them. It was thus held that the tenancy was not heritable and defendant cannot claim hereditary rights.

9. The Tribunal observed in para 28 that no act in contravention of the period described in Section 56 is valid. The Tribunal found that the cause of action in both the suits was not similar and bar under Order II Rule 2 of the CPC did not apply. The Tribunal found that the present suit was not based on relationship of landlord and tenant but it was based on the ground that the possession was unlawful. For such reasons, the suit came to be decreed.

10. The present proceeding is Civil Revision Application u/s 83(9) of the Waqf Act. As per the proviso to subsection (9) of Section 83, what is required to be seen is whether the judgment and order concerned is correct, legal and proper. With this object, if the admitted facts are kept in view, it is clear that the defendants are claiming rights only through their parents. Their father Bhimaji was inducted as tenant only for five years on 20.12.1944 and the period expired on 19.12.1949. There is nothing to show that on any subsequent occasion the plaintiff has accepted lease amount from the present defendants. After the Waqf Act, 1995 came into force, Section 56 has placed restriction on the power to grant lease of Waqf property. Section 56 of the Waqf Act (before the recent Waqf (Amendment) Act, 2013) read as under:

56. Restriction on power to grant lease of wakf property:-

(1) A lease or sub-lease for any period exceeding three years of any immovable property which is wakf property shall, notwithstanding anything contained in the deed or instrument of wakf or in any other law for the time being in force, be void and of no effect.

(2) A lease or sub-lease for a period exceeding one year and not exceeding three years of immovable property which is wakf property shall, notwithstanding anything contained in the deed or instrument of wakf or in any other law for the time being in force, be void and of no effect unless it is made with the previous sanction of the Board.

(3) The Board shall, in granting sanction for lease or sub-lease or renewal thereof under this section, review the terms and conditions on which the lease or sub-lease is proposed to be granted or renewed and make its approval subject to the revision of such terms and conditions in such manner as it may direct.

11. It is clear that, tenancy could be made, but it has to be as per what is provided in this Section. It is apparent that, a lease for period exceeding what is

prescribed, has been declared to be void and of no effect notwithstanding anything contained in the deed or instrument of the Waqf or in any other law for the time being in force. When the Waqf Act, 1995 came into force and Section 56 became applicable, it declared such leases beyond the period prescribed to be void and of no effect. Consequently, any existing lease, in violation of Section 56 will have to be treated as void and of no effect. The present suit on the basis that the possession of defendants is unlawful, was perfectly maintainable. If the lease is valid and not hit by Section 56 and is still in force, and the period as per Section 56 is not over, Civil Suit could be maintained till recent Amendment of 2013. This Court, in the case of Shaikh Shafiq Vs. Kisan Laxman (Civil Revision Application No. 143/2004), in para 11 of the unreported judgment, observed as under:

11. The intention of the legislature, therefore, is to put restrictions on the Board for grant of lease or sublease. This section has also employed the phraseology, "notwithstanding anything contained in the deed or instrument of Wakf and or any other law for the time being in force". It is provided that, even one cannot resort to provision laid down in the instrument of Wakf itself, or no one can resort to the provision of any other law and claim and protection. In my view, the non-obstante clause is important and the same is inserted with the intention to preserve and protect the wakf property. The contention of the learned counsel for the petitioner regarding Section 116 of Transfer of Property Act, cannot be isolatedly considered and accepted. The provision laid down u/s 56 of the Act of 1995, has to be considered while assessing the rights u/s 116 of the Transfer of Property Act. In other words, Section 116 of the Transfer of Property Act, is not having overriding effect in relation to Section 56 of the Wakf Act, 1995. The provision laid down u/s 56 of the Wakf Act being a special legislation, it shall prevail and will have to be taken into consideration. In this view of the matter, in my considered view, there is no substance in the contention raised on behalf of the petitioner that the petitioner is the tenant holding over and entitled to retain possession so long as rent is being regularly paid.

12. Respondent No. 1- plaintiff Trust is a registered Trust. The suit property is Waqf property. Certain provisions of the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred to as the Act of 1948 for short) do not apply to such Trust, in view of Section 88-B. Relevant part of Section 88(B)(1) reads as under:

88B. Exemption of certain provisions to land of local authorities, universities and trusts.--

(1) Nothing in foregoing provisions except sections 3, 4B, 8, 9, 9A, 9B, 9C, 10 10A, 11, 13 and 27 and the provisions of Chapters VI and VIII in so far as the provisions of the said Chapters are applicable to any of the matters referred to in the sections mentioned above shall apply,

(a).....

(b) to lands which are the property of a trust for an educational purpose, a hospital, Panjarapole, Gaushala or an institution for public religious worship;

Provided that, --

(i) such trust is or is deemed to be registered under the Bombay Public Trusts Act, 1950 and

(ii) the entire income of such lands is appropriated for the purposes of such trust;

13. Section 40 of the above Act of 1948 provides that, where a tenant (other than a permanent tenant) dies, the landlord shall be deemed to have continued the tenancy on the same terms and conditions on which such tenant was holding it at the time of his death, to such heir or heirs of the deceased tenant as may be willing to continue the tenancy. Section 40 is part of Chapter III of the Act of 1948 and thus, keeping in view above Section 88-B, these provisions do not apply to tenancy of a Trust which is also a Waqf as the institution is for public religious worship. Such tenancy cannot thus be inherited. In this regard, reliance can be placed on the case of Shriram Mandir Sansthan alias Shri Ram Sansthan Pusda Vs. Vatsalabai and Others, , where similar provisions of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 were interpreted and it was held that, there is implied exclusion of operation of general law of succession and inheritance in respect of such tenancy. Thus, the petitioners cannot claim that they have inherited the tenancy rights. The suit on the basis of defendants being encroachers of Waqf property was rightly entertained by the Waqf Tribunal.

14. There is substance in the argument of learned counsel for respondent-plaintiff that the Tribunal has rightly found that the suit was not hit by Order II Rule 2 of the CPC as the earlier suit was against the mother of present defendants on the basis of tenancy and the present suit is based on different cause of action where it is claimed that, on the death of the mother, the plaintiff requested the defendants to hand over possession, but the same was not done and thus, the possession was unlawful in view of the provisions of the Waqf Act. Having carefully gone through the impugned judgment and order, I find that, there is no substance in the revision petition. The judgment of the Tribunal is correct, legal and proper. The Civil Revision Application is dismissed with costs.