

(2015) 09 BOM CK 0202

In the Bombay High Court

Case No : Civil Revision Application No. 4 of 2009

Baba Bangal Dargah & Masjid Wakf Committee and
Others

APPELLANT

Vs

Sayad Hamid Abdul Latif and Others

RESPONDENT

Date of Decision : 21-09-2015

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 72

Citation : (2015) 09 BOM CK 0202

Hon'ble Judges : T.V. Nalawade, J.

Bench : Single Bench

Advocate : A.S. Bajaj, Advocate, for the Appellant; R.S. Deshmukh, Advocate, for the Respondent

Final Decision : Allowed

Judgement

T.V. Nalawade, J.—The revision is admitted. After admission notice was made returnable forthwith. Both the sides argued for final disposal by consent.

2. Present proceeding is filed to challenge the judgment and order made by Wakf Tribunal Aurangabad in Wakf Application No. 131/2006 which was filed by present respondents under section 83(2) of the Wakf Act, 1995. Present petitioners had made application under section 36 of the Wakf Act 1995 (hereinafter referred to as "the Wakf Act") for registration of religious institution by name "Baba Bangal Dargah and Masjid" having its properties. The Wakf Board by letter No. 12/06 dated 17-4-2006 informed to the petitioners that the institution was already registered and published under Wakf Act 1995 and so there was no necessity of making fresh application. It was informed that there was no need of fresh registration under section 43 of the Wakf Act. This so called correspondence made by the Wakf Board to the present petitioners was challenged before Tribunal by presuming that it was order indicating that religious institution and its property are registered under Wakf Act. The Wakf Tribunal has set aside this so called order by observing that proper procedure

was not followed under Wakf Act. It is also observed that opportunity ought to have been given to present respondents, applicants of the proceeding filed under section 83(2) of the Wakf act to have their say.

3. It is the case of the respondents who claim to be owner of Survey No. 64 admeasuring 2.76 acres situated within the jurisdiction of Cantonment Board Ahmednagar that this property cannot be registered as property of aforesaid religious institution. It is contended that this property has come to them from their ancestors and even in revenue record their names are mentioned as holders of the property from many years. It is their case that in the year 1932 partition was effected amongst their predecessors and Survey No. 64 was also considered as the property of the family. It is contended that one of their predecessors had executed a will, vasiyat, and in that Wasiyat it was mentioned that Survey No. 64 is private property left behind by their ancestors.

4. It is the case of the present respondents that their ancestors had given portions of aforesaid landed property on lease basis to different persons. It is contended that when some of the lessees surrendered the possession they admitted ownership of the respondents and their ancestors over the aforesaid land and in litigations filed against the lessees. It was admitted that respondents are owners. It is contended that present petitioners, so called trustees of aforesaid religious institution, are also tenants in different portions of the property and they are facing eviction proceedings. It is contended that only to avoid the eviction, the proceedings are created to show that the property belongs to the Trust, religious institution.

5. It is the case of the respondents that one of their ancestors had taken loan from one Karamsing Punjabi and in execution proceeding filed by Punjabi for recovery of the said loan, objection was taken by their ancestor that the property was trust property but this objection was rejected by the Civil Court. It is contended that the Civil Court has thus decided that the property is private property of the respondents.

6. It is the case of the respondents that one of their ancestors viz. Sayyad Bandu had registered the trust under the Bombay Public Trusts Act 1950 in the year 1953 but it was only in respect of 276 square yards portion of aforesaid survey number and the Dargah was registered as Trust. It is contended by the respondents that due to incident of Panshet Dam the record of the Trust office from Pune was destroyed in the year 1963. It is contended that this circumstance was misused by Sayyad Bandu and he showed the area of the trust property as 2.76 acres when it was only 276 square yard. According to respondents, the ancestor had taken objection in the aforesaid execution proceeding filed in the year 1968 (Execution Proceeding No. 57/1968). It is the case of the respondents that when the decree holder succeeded, some property was sold in auction in the execution proceeding and the auction purchaser had then filed suit for partition and possession of portion purchased by him (Regular Civil Suit No. 131 of 1977). It is the case of the respondents, that the then

trustee, predecessor of the respondents had taken objection in Civil Court but this objection was rejected and the said decision of the Civil Court has become final. It is contended that execution petition filed on the basis of decree given in partition suit is still pending (Execution petition No. 183/1977). It is the case of the respondents that the sharers of the property had filed partition suit bearing Regular Civil Suit No. 43/1979 and in that suit present petitioners were made party as they were holding some portions as tenant. It is contended that in that suit also it is held that the aforesaid property is private property excluding 276 square feet portion.

7. It is the case of the respondents that the Civil Court has already decided that the portion admeasuring only 276 square feet belongs to the Trust. It is contended that the initial entry made about 2.76 acres is now deleted from the record of Trust office. It is contended that this decision of the Civil Court was taken to High Court and in Second Appeal 829 of 2005 order of status quo was made by the High Court (In Civil Application No. 5382/2005). It is contended that even when there was such order of the High Court, the present petitioners, so called trustee, started proceeding before the Wakf Board of aforesaid nature and that was only with intention to avoid the eviction orders. It is contended that in that proceeding the Board had not issued notice to them and no opportunity of having their say was given to them. It is contended that inquiry ought to have been made under section 4 of the Wakf Act and as there was no such inquiry, registration under section 36 of the Wakf Act is illegal and it is not binding on them.

8. In the present proceeding, learned counsels for both the sides were allowed to produce some record like photographs of the structures which are present on Survey No. 64 and also record in respect of cash grant given to the predecessor-in-title of present respondents. Record of this nature was already before the Wakf Tribunal though detail orders made of continuation of grants were not available. Both the learned counsels argued exhaustively and they produced notes of arguments also.

9. There is record of Cantonment Board, the revenue record showing that on this land there are structures like Dargah and Masjid and there is Mussalman grave yard also. Present respondents, who claim that it is private property are not disputing that there are structures of Dargah and Masjid on this land. The aforesaid contentions show that present respondents are not disputing that their ancestor Sayyad Bandu Imam had registered the religious trust under the aforesaid Trust Act in the year 1953. They have dispute only in respect of area occupied and owned by the trust. They have contended that the Dargah is covering space of 276 square feet but they are not saying anything about the area covered by Masjid.

10. The record, which is not disputed, shows that the ancestors of present respondents had registered the trust under name Baba Bangal Dargah and the record of the trust shows that initially there was name of Sayyad Bandu Ismail

and then name of Sayyad Imam Ismail was entered as sole trustee. The contentions show that Sayyad Bandu had registered the entire area as property belonging to the Trust. The record of the Trust office shows that sole trustee was hereditary in nature and the document like "Sanad" was produced by the trustee for registration. History mentioned in Government Gazette and the record of grants made available which is of British regime, shows that the structure of Dargah was in existence from prior to the construction of the Ahmednagar Fort (from prior to AD 1495). This record shows that Dargah had inam property from Ashti Tahsil. The cash grant record is as old as 1853 AD. The purpose of the grant is given in annexure of the grant and they show that it was for maintenance of the structure of Dargah and Masjid. This old record shows that the Sanad was of the period of Alamgir (Badshah Aurangjeb). The annexure further shows that in the year 1253 Fasli (1844 AD) application was moved for continuation of cash grant by the ancestors of present respondents and they had informed that, Sanad was issued to them in which there was cash grant also but it was lost due to fire. They had produced a document like letter given to Kazi by Nawab Kavi Jang which was in respect of maintenance of the religious structures. Thus, there is record to show that even in the year 1843 both these religious structures, Dargah and Masjid, were present on Survey No. 64 and the ancestors of present respondents were Inamdars. Though some record was there before Wakf Tribunal, the Tribunal did not touch this record of grant. As per this record, till 1843 AD, one Imamsha Fakir was looking after the maintenance of the religious structure and he was receiving cash grant. He died in or about the year 1843 AD and after his death Saidash and Balasha, and also Abas Ali applied for continuation of cash grant as successors of aforesaid Imamsha Fakir. Initially grant was of Rs. 2/- and it was for maintenance of both Masjid and Dargah. While claiming continuation of cash grant, the ancestors of respondents had given undertaking to take care of these two structures and the undertaking was to the effect that two persons who were to receive grant equally were to take care for 15 days each in a month.

11. The disputed property is situated in Cantonment area and the record maintained by the Cantonment Board is available. This revenue record shows that area of survey No. 64 is 2.76 acre and this property is described as grave yard, Baba Bangal tomb and Mohammedan grave yard. Thus there was one public, Mussalman grave yard and there was one more grave yard in this land. However, mention of Masjid is not there but the parties are admitting that such structure is there. Names of holders are mentioned and they are seven in number. The names include Sayed Ismail and this person had entered his own name on the trust record in the year 1953 as the trustee of the aforesaid trust. The remarks column of this record shows that it is inam land granted for aforesaid purpose (for grave yard, for Baba Bangal tomb and for Mohammedan grave yard).

12. The remark further shows that Cantonment Board had in the past given permission to use some portion as timber yard but such use was objectionable

and so suggestion was given to revoke that permission. The decision of the Wakf Tribunal shows that the Tribunal has given much importance to the word used as "private" at three places in the record of Cantonment Board but the mention of religious structure and the name given to the place are ignored by the Tribunal. The mention that this property is Inam land as per revenue record is also not touched by the Wakf Tribunal.

13. From the aforesaid record it can be said that the old record is there to show that till 1843 AD one Imamsha Fakir was granted cash grant and he was looking after the maintenance of both the Dargah and Masjid. It was on the basis of Sanad. As per the Government record, the entire portion of land is described in the name of religious institution and it is shown as Inam property. Though possession is shown of the successors of Imamsha Fakir this possession can be called as the possession of Inamdars and so only due to mention like they are holders of the property it cannot be said that it was their private property. In such a case the burden is heavy on the person claiming private ownership to prove that the property belongs to them and it has come to them from their ancestors as private property of ancestors. On the contrary, the record which is being discussed subsequently shows that the respondents have no record about ownership and they are creating some record to show that the record like Sanad etc. was destroyed and their ancestors were claiming that it was their private property. As the aforesaid record is very old, having mention of Sanad given by Alamgir Badshah for cash grant which was continued by British Rulers, burden was heavy on the respondents to prove that it was private property of their ancestors. When the property is having religious structure like Masjid and Dargah the burden becomes more heavy on the claimants to prove that the open space belongs to them. This burden is heavy due to concept of Wakf under Mohammedan law.

14. For Ahmednagar District the provisions of the Bombay Public Trusts Act were applicable till the year 1995, till Wakf Act 1995 became applicable in this area. It is already observed that in the year 1953 itself Dargah and Masjid were registered under the Trust Act. The ancestors of respondents, Sayed Imam Ismail and of Sayed Bandu Imam had entered the entire area of the land as the property of the Trust.

15. It appears that in the year 1974 present respondents filed application (Application No. 21/1974) before the Charity Commissioner to challenge the registration made in the year 1953. That proceeding came to be dismissed. Respondents then filed application No. 15/1975 before the Assistant Charity Commissioner and prayed for de-registration of the Trust. The record shows that it was their contention that under some misconception that it was necessary to register the institution, application was made by their ancestors and the Trust was registered and now they wanted to de-register it. In these proceedings nothing was mentioned about the area covered by the Trust. The record of these two proceedings and the subsequent record shows that Sayed Imam Ismail had

joined hands with the present respondents for getting such decision. Application No. 15/1975 was rejected by the Assistant Charity Commissioner on 8-1-1976.

16. In the year 1985 one of the Inamdars filed application No. 4/1985 against the then trustee of this religious institution. In this proceeding he first time requested to correct the area of the trust property to make it 276 square feet. Record of this proceeding shows that two certified copies of Schedule I issued by the Trust office were produced before the Assistant Charity Commissioner. In one copy the area was shown as 276 square feet and in the other copy the area was shown as 2.76 acres. It is necessary to mention specifically that this proceeding bearing No. 4/1985 was filed by one Sayyed Abdul Gafar Sayed Imam. His father was the sole trustee from the year 1953 of this religious trust and he had supplied information about the area to the Trust office. His father had admitted in the proceedings filed for execution by aforesaid Punjabi that the entire property, the area of 2.76 acres, was owned by the Trust. The Assistant Charity Commissioner considered all these circumstances and also the record of the Cantonment Board. The record shows that the Assistant Charity Commissioner made an attempt to collect copy of Sanad as Sayyed Abdul Gafar Sayed Imam successor of Sayed Ismail was not producing the Sanad but the Assistant Charity Commissioner could not get copy of Sanad. Till that time, the scheme was also sanctioned which was submitted by the persons who were controlling the Trust. On the basis of this record finding was given by the Assistant Charity Commissioner that entire area admeasuring 2.76 acres belongs to the Trust. This decision was given on 11-11-1991 and this decision was not challenged further.

17. It appears that present respondents and other relatives of the Inamdar had filed Regular Civil Suit No. 43/19789 for the relief of declaration that Survey No. 64 admeasuring 2.76 acres is their private property. Further they had prayed for declaration that registration of this property made as the Trust property was illegal. The suit was contested by the present committee, petitioners. The suit was decided in favour of the present respondents. Regular Civil Appeal No. 24/1995 was filed by the present petitioners to challenge the decision of the Civil Court. The Regular Civil Appeal was allowed and the decision of the trial Court was set aside. The decision of the first appellate Court was challenged in Second Appeal No. 829 of 2005 by the present respondents but the second appeal came to be dismissed. This Court held in that second appeal that the Civil Court had no jurisdiction to decide the dispute of such kind.

18. The record shows that Application No. 153 of 1982 was filed by the present petitioners trustees for framing scheme in respect of this Trust. By an order dated 19-3-1984 the scheme was prepared and approved by the Assistant Charity Commissioner and the disputed property was shown as Trust property. This order of framing of the scheme was challenged by Sayyad Gafar Sayyad Imam and Sayed Kader Sajed Imam by filing Application No. 48 of 1984 under section 72 of the Bombay Public Trust Act in District Court. This proceeding was dismissed by District Court by order dated 28-12-1989. First Appeal No.

267/1990 filed by the present respondent against the said decision of District Court was there till 2005 and then withdrawal purshis was filed for respondents on 22-6-2005.

19. The aforesaid record is in respect of nature of property viz. whether it was private property of the ancestors of the present respondents or it is wakf property. Record is also in respect of litigation which was in respect of the nature of the property and also about the area of the trust property (Survey No. 64). Unfortunately the Tribunal has not considered this record in proper perspective and very casual approach was adopted due to which the Tribunal has committed grave error.

20. The respondents were relying only on the aforesaid so called private record, record of vasiyat and record of partition. The record of the Cantonment Board, revenue record, was not at all supporting the case of the respondents. The so called vasiyat was shown to be made by the ancestors of Sayyad Ismail who had worked as sole trustee in the year 1953 and onwards. In the record of partition which is record of registered partition deed, there were the ancestors of both the respondents and Sayyad Ismail.

21. At the outset it needs to mention that the so called vasiyat and the record of partition are private documents and so more weight needs to be given to revenue record. This record was never used by the respondents and even by the successors of Sayyad Ismail either in the aforesaid litigation or for entering the names of the successors in the revenue record. In view of the contents of the so called vasiyat dated 1-10-1927 and its date strong probability is there that this document was falsely created to suit the purpose and to do away with some important admissions given in the partition document dated 14-10-1932. When the vasiyat is shown to be created in the year 1927, record of partition was created and registered in 1932. There is no mention of so called vasiyat in the partition document and on the contrary there is specific admission of the parties to the partition that the disputed property was with the family as inam property. In the so called vasiyat, the testator Sayyad Ismail Sayyad Hasan Alisha has mentioned that though they were called as Inamdars, they were not Inamdars and the disputed property having construction of Dargah was not inam property. This document, however, shows that these persons were not having record of ownership in respect of the disputed property and it is mentioned in the so called vasiyat that the record was destroyed in fire. The instances of creation of false record in this area are many. This Court has no hesitation to observe that action for commission of crime of creation of false vasiyat and for using false record in Tribunal which is having powers of Civil Court can be taken in this regard. These important circumstances are not at all touched by the Tribunal. In any case, due to non compliance of requirements of valid vasiyat, no reliance could have been placed on this document.

22. Copy of partition document is on the record and it shows that partition was effected amongst themselves by following three parties (1) Sayyad Ismail

Sayyad Hasan Alisha Inamdar, (2) Sayyad Imam Bandu Bhai Inamdar Mussalman and (3) Sayyad Fatemohammad Bandu Bhai Inamdar, Mussalman. Party No. 2 and 3 were real brothers and party No. 1 was their uncle. The disputed property is described as property Baba Bangali situated in Cantonment area (at the relevant time this area was under British Rule) and it is also shown as ancestral inam property. Property number of this property given in cantonment board record was not known but its size was mentioned as 430 ft x. 365 ft. Thus, the property was shown as Inam land. In this document, partition of other family properties was also shown to be made. The disputed property was given to the share of Sayyad Ismail Sayyad Hasan Alisha. There is further mention that even at that time this property was free from Government tax, revenue. This document was registered and the respondents were relying on this document before the Tribunal. From the aforesaid contents of the document, it is very easy to infer that the Tribunal did not even read this document sincerely. From the contents of this document only one inference is possible that the disputed property was held by the ancestors of respondents as inam property. The other record in respect of purpose of the inam is also discussed. It is already observed that the ancestors of the respondents and the respondents were not producing the Sanad but in the past they had admitted that such Sanad was issued in their favour by the then Ruler in respect of cash grant.

23. The respondents have also relied on copy of lease agreement which was between Sayyad Ismail and Dosanji Bohari which is shown to be executed in 1928 AD. Under this document, some portion of the disputed property was given by way of lease to Dosanji who is shown as executor of the document. It was informed to Dosanji that it was the ancestral property of lessor but this document also does not show that it was mentioned that it was a private property of Sayyad Ismail. Admittedly the property had come from the ancestors but it was inam property. The record of cantonment board already discussed shows that the lessor was required to obtain permission of cantonment board for giving property on lease basis for timber yard of Dosanji. The record of the cantonment board further shows that in view of nature of property such permission could not have been given by cantonment board and recommendation was made to withdraw that permission. It can be said that afterwards Dosanji surrendered the possession. Thus, on the basis of record of lease, no inference can be drawn that it was private property of Sayyad Ismail. These circumstances are not at all considered by the Tribunal.

24. Copy of application filed to object the attachment and sale of the disputed property in Execution Petition No. 58 of 1967 is produced by respondents. This document shows that successor of aforesaid Sayyad Ismail Inamdar had taken loan from one Punjabi and Punjabi, decree holder, had sought attachment and sale of the disputed property for recovery of the loan amount in the execution proceeding. The application was filed by Sayyad Imam Sayyad Ismail in the so called capacity of trustee and he had contended that the entire property was of trust and so it was not liable for attachment. Thus, there was the admission of

the successors of the person to whose share the disputed property had come, that it was a trust property. It appears that at that time also some record was produced to show that Dargah was situated on the piece of land admeasuring 270 square feet and due to production of such document the executing Court held that the remaining property can be attached for recovery of the decretal amount. Appeal was filed against this order of the executing Court (Appeal No. 131/1977) and then Second Appeal No. 283/1981 was filed but these proceedings were dismissed. The conduct of the Inamdars of using different certified copies at different times of Schedule I of the trust record is already mentioned. It is a fact that till today the person who is holding sale certificate could not get possession. There is clear probability that all these complications are crated by the Inamdars to grab the property. It is already observed that successors of original Inamdar and present respondents had attempted to obtain collusive decision from the Assistant Charity Commissioner that it is a private property but they had failed.

25. Some other record of litigation between successors of Inamdar and some lessees is produced. The aforesaid record shows that as Inamdars and successors of original Inamdars were in control and so they had given some portion of the property to different persons on lease basis. Inamdars were in possession but due to circumstance that they could give some portion on lease basis inference is not possible that it was their private property. Even Inamdars, Mutawallis could have given the property on lease basis. It appears that some of the present applicants, trustees are also tenants in some portions of the disputed property. When matters are filed for eviction or recovery of rent, the Court is expected to consider only the relationship of landlord and tenant and the conditions of the tenancy. Point of ownership is never involved in such matters.

26. The aforesaid private record on which the respondents are placing reliance shows that Survey No. 64 had come to the share of Sayyad Ismail Sayyad Hasan Ali Shah Inamdar. The successors of this Inamdar had registered the disputed property as a trust and had worked as sole trustee for some time. In the partition document he had admitted that it was Inam property. Thus, on the basis of this record of partition it cannot be said that the disputed property had come to the present respondents. Thus the present respondents have apparently no locus standi to challenge the registration and also to challenge the aforesaid correspondence made with present trustee by the Wakf Board. Further, the present respondents and successors of the person to whom the property had come in partition were parties to the previous proceeding in which it is decided that the entire area belongs to the Trust. These important circumstances are not at all considered by the Wakf Tribunal. Wakf Tribunal has the original jurisdiction and so it was necessary for the Wakf Tribunal to make a detail inquiry on the basis of this record and to ascertain as to whether anything was left for it for deciding. The decisions mentioned above are binding on the parties and those issues could not have been reopened by the Tribunal.

27. The aforesaid discussion shows that the disputed property was in possession of ancestor of respondents as Inamdar and in view of the purpose for which it was given, rendering service to the mosque and Dargah, it was a service inam and so the wakf property. The record is also there to show that there is a Muslim grave yard on this property though some portion was also used as only the grave yard. The ancestors of the respondents were also receiving cash grant from the then Rulers and then from the British Rulers and then from the present Government. In spite of such record they stopped rendering service and the intention behind it was only to grab the disputed property. The record is sufficient to infer that it was permanent dedication made more than few hundred years ago for religious purpose and the ancestors of the respondents were expected to act as Mutawallis and they fall under the definition of Mutawalli given in section 3(i) of the Wakf Act. In view of nature of the Inam, there was no question of abolition of the inam and it was never abolished. Even at present in the cantonment board record the property is shown as inam land. The ancestors of the respondents and the respondents have created some false record and they have acted against the interests of the wakf, but things have not changed and the nature of the property is not changed. It is settled law that once a wakf always a wakf. Even the decision of the aforesaid nature of the Courts given in the execution proceedings cannot change the character of wakf. Reliance is placed on the case reported as Chhedi Lal Misra (Dead) through LRs. Vs. Civil Judge, Lucknow and Others, .

28. The provision of section 36 of the Wakf Act 1995 makes it clear that Mutawalli needs to give application for registration of such wakf. Board has also power to start proceeding for registration under section 40 of the Act. When the Wakf Board takes steps it is expected to give notice to the trustees if the trust was already registered under different Act in the present case the respondents were not working as Mutawallis, they were avoiding to render services and so managing committee was appointed and present applicant, managing committee was working as trustees. Thus if at all the Wakf Board wanted to register this trust under the Wakf act, notice ought to have been given to the present applicant, trustee and there was no right to the present respondent in any case of such notice. Further under section 43 of the Wakf Act the wakf which was already registered under the Bombay Public Trust Act could have been treated as registered due to deemed registration under this provision. Thus there was no question of starting fresh inquiry in the present matter or giving hearing to the present respondent. In view of all these circumstances, the Board simply informed to present trustees that there was no need of such inquiry and the trust was already registered with Wakf Board. It appears that present respondents used this correspondence as an opportunity to again create dispute and due to casual approach of the Wakf Tribunal they succeeded in obtaining some observations in their favour.

29. Learned counsel for the applicants placed reliance on a case reported as Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others, . In this case the

Apex Court has laid down that entry of the name of occupant as "Khatedar", in revenue record, is not relevant if there is evidence to show that the property belongs to the Dargah, religious institution. It is further laid down that in such a case it can be said that person in possession was in fiduciary position of a manager of Dargah and he was in possession in that capacity. There cannot be dispute over this proposition. Thus, the ancestors of present respondents were in possession but their possession was as manager and they could not have claimed ownership of the disputed property.

30. This Court has no hesitation to observe that the decision given by the Tribunal is not correct, legal and proper. In the result, the petition is allowed. The decision of the Wakf Tribunal is hereby set aside. The application filed by the present respondents before the Tribunal stands dismissed.