
(2014) 04 BOM CK 0261

In the Bombay High Court

Case No : Civil Rev. Appln. Nos. 66 of 2012, 84, 85 of 2009, Civil Appln. Nos. 1824 of 2009, 3927 of 2012 and W.P. No. 627 of 2009

Javed Ahmed Khatib

APPELLANT

Vs

Mohammed Arif Shafeeq Ahmed Patel

RESPONDENT

Date of Decision : 15-04-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1
Waqf Act, 1995 — Section 2, 22, 3(i), 32, 32(1)

Citation : (2015) 1 MhLj 99

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

Bench : Single Bench

Advocate : V.J. Dixit, Senior Counsel instructed by A.N. Nagargoje, Advocates for the Appellant; M.B.W. Khan, R.R. Mantri holding for Mujtaba Gulam Mustafa and A.D. Kasliwal, Advocates for the Respondent

Judgement

T.V. Nalawade, J.—CRA Nos. 66/2012, 84/2014 and 85/2012 are admitted. Notice made returnable forthwith. Both the sides agreed to argue the matters for final disposal. Writ Petition No. 625/2009 is already admitted. Heard all the sides. The dispute is in respect of management of Jumma Masjid, Patel Mohalla, Panvel, Tahsil Panvel, District Raigad. This institution is registered under Bombay Public Trust Act (hereinafter referred to as "the Trust Act" for short) and at present also registered under Wakf Act, 1995. In the office of learned Assistant Charity Commissioner, Raigad the institution is registered along with the scheme of management. Wakf Suit No. 20/2009 was filed by petitioner from CRA No. 84/2009. At Exh. 5 application for relief of temporary injunction was filed. This application is rejected by Wakf Tribunal by order dated 15-6-2009 and this order is challenged in the revision. The petitioner from CRA No. 84/2009 has filed remaining two revisions also. CRA No. 85/2009 is filed to challenge the order made on Exh. 5, the temporary injunction application in Wakf Suit No. 61/2009. This application filed by respondent No. 1 (hereinafter referred to as "the trustee" for short) is allowed by the Tribunal by the order dated 15-6-2009. CRA

No. 66/2012 is filed against the order made by Wakf Tribunal on Exh. 51 in Wakf Suit No. 61/2009. The application filed by respondent No. 1 trustee to strike off the defence of revision petitioner is allowed by the Wakf Tribunal. The Writ Petition No. 627/2009 is filed to challenge the order made by Wakf Board on 19-11-2008. By the order, the Board has directed that the construction going on in the campus of Jumma Masjid will be continued under the supervision of Divisional Wakf Officer, Konkan Region and the Officer is to execute the work with the help of villagers. A direction was given to both the sides to cooperate the Divisional Wakf Officer.

2. It appears that Wakf Suit No. 20/2009 filed by the petitioner is dismissed. Submission was made that proceeding is filed for restoration of suit. Wakf Suit No. 20/2009 and 61/2009 were in respect of the same subject-matter and similar relief was claimed by the petitioners and respondent No. 1. In view of this circumstance, giving decision in CRA No. 85/2009 would be sufficient for decision in respect of temporary relief claimed by the two contesting sides. In view of nature of relief claimed in the Writ Petition, the decision given in revision petition will be sufficient for disposal of the Writ Petition also.

3. Jumma Masjid, the institution was registered under the Trust Act on 24-6-2004 in the office of Assistant Charity Commissioner, Raigad. Though the institution was registered first time in the year 2004, the Masjid is more than two centuries old. Many agricultural lands and house properties are registered as properties of this trust. Respondent No. 1 - Mohammad Arif from the revision petition is as Chief Trustee and there were ten more other trustees.

4. It is the case of petitioners that as per the scheme submitted in the office of Assistant Charity Commissioner, it is necessary to hold election after every three years starting from 28-6-2004. It is contended that till 27-6-2007 no General Body was called and no steps were taken by the trustees for calling General Body for electing new Managing Body. It is contended that initially two interested persons gave representation to the trustees on 1-8-2007 for calling General Body and then 42 such persons gave representation on 30-8-2007. These persons were interested in General Body as new Managing Body was not elected as per the scheme. It is contended that application was given to the Chief Officer of Wakf Board on 23-6-2007 and the authority was also requested to take steps by appointing Officer to hold the election. It is the case of petitioners that as no such steps were taken, the interested persons called General Body meeting on 17-5-2008 for election of Managing Body and on 17-5-2008 new Managing Body came to be elected. It is their contention that the change report was given to Wakf Board on 20-5-2008 as required under the provisions of Wakf Act, 1995.

5. Respondent No. 1 - Mohammad Arif, the trustee filed objection to the aforesaid change report. From 23-10-2008 onwards the Wakf Board made correspondence with the petitioners and it was informed that the change report was not approved and so, the petitioners were not entitled to call General Body. Board then directed the present petitioners to see that they do not collect the

rent. The direction was given to return the rent already collected. Then complaint application was received by the Board, that the petitioners had started making the construction inside the Masjid illegally. On 11-1-2008 Board sent the letter to stop the construction. Then on 19-11-2008 a letter which is challenged in the Writ Petition was given by the Wakf Board.

6. It is the case of Chief Trustee - Mohammad Arif that no new Managing Committee has come in existence. On the basis of record and the scheme, the Tribunal has held that no new body has come in existence. The Tribunal has allowed the Managing Body registered in the year 2004 to function and the petitioners are prevented from functioning as trustees.

7. The record produced in these proceedings shows that Wakf Board has issued certificate of registration under section 36 of Wakf Act, 1995 dated 17-4-2008. The submissions made in these proceedings by the learned counsel appointed by the Board show that Board is supporting the Body registered in the year 2004. On the basis of submissions made in these proceedings, it can be said that both the Bodies have made allegations against each other in respect of management. It is the allegation of the Body of 2004 that the petitioners want to grab the property of wakf and steps are already taken by their leader by filing proceeding with the authorities for deleting the name of the wakf, Masjid from title column of the record. In view of the nature of relief claimed by both the sides, this Court holds that it is not necessary to consider such allegations in the present proceedings. The Board has the power to take appropriate steps and action against the concerned.

8. Alternate argument was advanced by learned Senior Counsel Shri. Dixit for the petitioners that by holding elections entire dispute can be resolved. It was submitted that as per the scheme, the term of the previous body, body of 2004, is already over and even if the term of the present petitioners is considered, that term will be over in the month of May, 2014.

9. The submissions made and the record show that the Masjid was in existence for more than two centuries on the date of its registration under the Trust Act. The submissions made show that the Masjid was used by Muslim community of that region for all those years and it was not treated as me property of any particular person. The submissions made show that both the sides want to use the scheme which was submitted in the office of Assistant Charity Commissioner in the year 2004. Institution, Masjid which has been used as such for more than 200 years needs to be treated as religious and pious wakf. In the year 2004, Wakf Act, 1995 was applicable to Raigad district also. The Wakf Act, 1954 was applicable only to the districts from Marathwada region and prior to 1995 wakfs of other regions were registered under the provisions of Trust Act. It appears that the person concerned registered the institution under the Trust Act as they were under impression that it needs to be registered under the Trust Act. It is already observed that Masjid was more than 200 years old and it needs to be treated as wakf for the purpose of Wakf Act, 1995. Section 2 of this Act shows

that the provisions of this Act shall apply to all wakfs created before or after commencement of the Act. Thus, there cannot be dispute over the application of Wakf Act, 1995 to the wakf involved in the present matter.

10. The submissions made by both the sides show that there is no dispute over the nature of wakf, Masjid and properties of Masjid. In view of these circumstances, no more discussion is required on this point. The dispute is with regard to the management and so, the definition of "mutwalli" given in section 3(i) of the Wakf Act needs to be considered. The provision reads as under:--

"(i) "mutawalli" means any person appointed, either verbally or under any deed or instrument by which a wakf has been created, or by a competent authority, to be a mutawalli of a wakf and includes any person who is mutawalli of a wakf by virtue of any custom or who is a naib-mutawalli, Khadim, Mujawar, sajjadanashin, amin or other person appointed by a mutawalli to perform the duties of a mutawalli and save as otherwise provided in this Act, any person, committee or corporation for the time being managing or administering any wakf or wakf property:--

"Provided that no member of a committee or corporation shall be deemed to be a mutawalli unless such member is an Office bearer of such committee or corporation;"

In view of the definition of "mutwalli", the Managing Committee like Trust/Body falls under the definition and the office bearer like Chief Trustee needs to be treated as "mutwalli".

11. Section 40 of the Wakf Act, 1995 gives powers and functions of Wakf Board. It shows that Board can give directions to the trustees for registration of such property as wakf under Wakf Act, 1995. Section 36 of this Act shows that when the property falls under the definition of "wakf, it shall be registered at the Board. Thus, it was responsibility of the trustees to register wakf under Wakf Act as that Act was applicable in the year 2004.

12. In section 32 of Wakf Act, the general powers and functions of Wakf Board are mentioned. The provision of section 32(1) and particularly the explanation is as under:--

"Explanation.--For the removal of doubts, it is hereby declared that in this subsection, "wakf" includes a wakf in relation to which any scheme has been made by any Court of law, whether before or after the commencement of this Act."

The aforesaid explanation shows that when the scheme like in the present case is in existence, Wakf Board cannot ignore such scheme. The provisions of section 32(2)(d) and section 69 of Wakf Act show that Board can settle the scheme if it is necessary to do so in the interest of wakf. However, when the scheme is already in existence and somebody under the scheme is claiming to be mutawalli, the Board cannot record the change on the basis of report given under section 42 of Wakf Act unless and until it is satisfied that the change has taken

place as per the procedure given in the scheme. In the present case, objection is there of respondent No. 1 - trustee to the report submitted by the petitioners. It can be said that before taking any decision by the Board, the petitioners preferred to approach the Tribunal.

13. In view of provisions of section 83(5) of Wakf Act, 1995 the Tribunal has power of the Civil Court. When in a suit, application is filed for relief of temporary injunction, the party claiming temporary injunction is expected to satisfy the conditions laid down in the Order 39, Rule 1 of the Civil Procedure Code. While considering such application, the Court is expected to apply tests like (i) prima facie case, (ii) balance of convenience and (iii) irreparable loss that will be caused, if injunction is refused. In view of this position of law, it was necessary for the present petitioners to make out prima facie case, to show that the balance of convenience is in their favour and they were also expected to show that irreparable loss will be caused to them if injunction is not granted in their favour. Similarly, the trustees were required to make out their case for getting the relief of temporary injunction. To ascertain, as to whether either side has prima facie case, it was necessary for the Tribunal to go through the provisions of the scheme. It appears that the Tribunal has done that exercise.

14. It is the case of the petitioners that the term of the office of trustees was over and so they had requested to Chief Trustee to call General Body for election of new Managing Body. Clause 10 of the scheme provides for the term of the trustees and election. The term is three years. Clause 10 (A) shows that unless and until new trustees are elected, previous trustees are to function. Clause 10 (A), 10 (C) and 10 (D) show that one month prior to expiry of three years term of the previous Body, the new trustees are required to be elected in General Body. The Clause shows that the General Body needs to be called by the Chief Trustee. Clause 11 (A) shows that unless new Chief Trustee is elected after one year term of Chief Trustee the previous Chief Trustee is to function. Clause 20 (A) shows that it is the Chief Trustee who is to call at least 2 General Bodies every year. Clause 29 shows that if in General Body, the new Body is not elected, Election Committee needs to be constituted by General Body. This Committee is to consist of the Chief Trustee, two trustees elected by the General Body for such Committee and two members of Observer Committee which needs to be constituted under the Scheme itself. Such Committee needs to hold election after following the procedure laid down in the other clauses.

15. Clause 3 (A) shows that there is procedure to create voters list. Only one person from each family can contest the election for the post of trustee as provided in clause 10(h). Clause 20(Y)(1) and (2) give procedure for intimation, notice of General Body and notice of 15 days is mandatory. As the petitioners wanted to see that the new Managing Body is elected, this procedure was required to be followed. Even if it is presumed that they wanted to call special General Body by using other clauses and which enable 1/4 members to call Body, it was necessary for the petitioners to show that there were particular numbers

of members, 1/4 members had called the Body and procedure was followed. In any case, when there is the dispute, it is always desirable to approach the authority like Wakf Board in such a case.

16. To show that aforesaid procedure was followed, it was necessary for the petitioners to produce relevant record. It was also necessary to file the affidavits of the concerned. No such record is available with the petitioners. There are few documents like copy of minutes of meeting of General Body. These documents show that minutes were signed on 17-5-2008. The minutes show that five ad hoc committee members were elected and it was decided to constitute the new Board of trustees on or before 31-5-2008. These minutes do not show that new Body was elected. Copy of report given under section 42 of the Wakf Act shows that the change report was submitted on 20-5-2008 and it was informed that in General Body of 17-5-2008 new Body was elected unanimously. The report submitted is not consistent with the aforesaid minutes and it is also not consistent with the aforesaid clauses of the scheme.

17. From the aforesaid clauses of the scheme, it can be said that it was not possible for the petitioners to make out prima facie case. The aforesaid clauses and the defence taken by respondent No. 1 - Mohammad Arif show that prima facie case was in favour of the body registered in the year 2004. On the basis of record and the submissions, observations need to be made that it was an attempt of petitioners to take over the management illegally. Due to this reason, relief could not have been granted to the present petitioners and it could not have been refused to the Body registered in the year 2004. Thus, on the basis of the record and the scheme, there appears no reason to interfere in the orders made by the Tribunal in the suits on Exh. 5.

18. In the Writ petition, this Court has made order to prevent the Wakf Board from making any order in respect of aforesaid Masjid. The aforesaid facts and circumstances show that respondent No. 1 - Mohammad Arif, trustee was avoiding to hold the elections. Submissions made show that only due to the order made by this Court, elections could not be held subsequently. When there are such circumstances, it becomes the duty of the Wakf Board to intervene and see that elections are held as per the scheme. This Court holds that some directions in the writ petition needs to be given in that regard.

19. The learned counsel for petitioners submitted that taking note of change report by the authority like Board is not condition precedent to come in effect the change. This proposition in ordinary course cannot be disputed. On this point, reliance was placed on the case reported as Clarence Brandenburg Vs. State of Ohio, 395 U.S. 444 (1969) . Such observations are made by this Court in the reported case. On this point, another case reported as Clarence Brandenburg Vs. State of Ohio, 395 U.S. 444 (1969) was cited. The facts of this reported case were different and the points involved was changing Rules and Regulations. One more case reported as Clarence Brandenburg Vs. State of Ohio, 395 U.S. 444 (1969) was cited. The facts of this reported case show that there was no dispute

over the procedure required to be followed for election of the Board of trustees. There was a dispute over the delay caused in giving change report. The delay needs to be ignored was the observation of this Court for consideration of the change.

20. This Court has already made some observations with regard to the procedure which needs to be followed for the election of the Board of trustees. Unless such procedure was followed, there was no question of change in the Board of trustees. Thus, the proposition made in the first case cited *supra* of Chembur Trombay Education Society is of no help to the petitioners in the present case.

21. Another point was argued by the learned Senior Counsel of the petitioners and that was of jurisdiction. It is already observed that certificate of registration is issued by Wakf Board to the institution. It is the side of the petitioners which had approached Wakf Board for filing change report. It can be said that on the basis of information supplied by the petitioners the certificate of registration was issued by the Board. The registration is not challenged. In any case, under the provisions of sections 36, 40, 41 and 43 the Board has the power to compel the registration in the cases like present one. It is already observed that the Masjid was in existence for more than two centuries and it needs to be presumed that the wakf was formed for religious and pious purpose. In view of these circumstances, it does not lie in the mouth of the petitioners that the Wakf Board or Tribunal has no jurisdiction. They came before the Tribunal by filing suit claiming themselves to be trustees of the institution. Thus, there is no force in this contention also.

22. Submission was made by the learned Senior Counsel of the petitioners that in view of the decision given by the Division Bench of this Court in Writ Petition No. 2906/2004 with connected matters Clarence Brandenburg Vs. State of Ohio, 395 U.S. 444 (1969) (Original side of this Court), the dispute needs to be taken before the Charity Commissioner. This Court has carefully gone through the facts of this case and the observations made by the Division Bench. The facts were altogether different. The list of wakfs published by the Wakf Board and the incorporation of Wakf Board were challenged. Petitioners therein had registered their institutions under the provisions of Trust Act. There was grievance that the survey was not properly conducted for ascertaining the nature of properties. The Court considered the challenge to incorporation of the Wakf Board itself. The Notification dated 4-1-2002 of incorporation of Wakf Board was set aside by the Division Bench. Under that notification, the State Government had appointed four members of the Wakf Board. The Division Bench held that the survey of the properties was not completed as provided in the Act prior to the date of notification. This matter was decided on 22-9-2011. The observations are also made by the Division Bench that the decision was not on the validity of the orders made by the Wakf Board. Therefore, it was observed that the validity was to be decided by the forum before which the validity is under challenge. This decision is challenged in Supreme Court. The interim order made by the Apex

Court is reported as 2012 (5) Mh.L.J. 555, Marathwada Wakf Board v. Shaikh Yusuf. At paragraph No. 28 of this case, the Apex Court has discussed the difference between the wakf and other properties registered as trust. It is held that in case of wakf, Charity Commissioner under Trust Act cannot have jurisdiction. Supreme Court made order to see that the properties which fall under the definition of "wakf in those matters are protected and they are not allowed to be alienated under the orders of Charity Commissioner. Thus, the facts were altogether different.

23. Present matters are of different nature. Submissions were made by the learned counsel for the Wakf Board that the Board which delegated the powers to Chief Officer was consisting of seven members and it was not the Board mentioned by the Division Bench in aforesaid case. The order made by the Chief Officer under such delegated power is challenged in the Writ Petition. This Court has already observed that suits are filed before the Tribunal and the Tribunal can give decision in respect of the dispute involved. The interim orders made by the Tribunal are challenged in the civil revision and the revisions can be disposed of without reference to the aforesaid points and the decision of the revisions would be sufficient for disposal of the Writ Petition. In this regard, section 22 of the Wakf Act also needs to be kept in mind and it runs as under:--

"22. Vacancies, etc., not to invalidate proceedings of the Board.--No act or proceeding of the Board shall be invalid by reason only of the existence of any vacancy amongst its members or any defect in the constitution thereof."

24. In view of provisions of section 22 and the observations made by the Division Bench in the case referred above, this Court holds that there was nothing wrong in making order by the Chief Officer by which the Divisional Officer was directed to continue the construction with the help of villagers and with the cooperation of both the sides involved in the dispute. Revision Application No. 66/2012 is filed to challenge the order of Tribunal by which the defence of the revision petitioners is struck off. The Chief Officer had already directed the petitioners to stop collecting the rent. Order was also made to deposit the rent collected by the petitioners with the authority. It appears that even after making of order of injunction by the Tribunal, the petitioners continued to collect the rent from some persons. In view of this circumstance and the other circumstances which are already discussed and which are against the petitioners, this Court sees no reason to interfere in the order made by the Tribunal by which the Court has struck off the defence of the petitioners in the suit. The submissions made show that the petitioners now want election as per the scheme. In view of these circumstances and if elections are held, all the matters pending before the Tribunal can be disposed of, there is no need to interfere in the last order of Tribunal. Thus, no merits are found in the three revision applications filed by the petitioners. For giving some directions to the Wakf Board, the Writ Petition needs to be partly allowed. In the result, the following order.

ORDER

- (i) All the three civil revision applications stand dismissed.
- (ii) Writ Petition is partly allowed.
- (iii) In Writ Petition, the relief claimed in respect of order made by Chief Officer is refused, but in view of the submissions made for the petitioners, the Wakf Board is hereby directed to see that the elections of the institution are held. The Divisional Wakf Officer of the region where the institution is situated is to conduct the elections after following the procedure laid down as per the scheme submitted in the year 2004 in the office of the Assistant Charity Commissioner.
- (iv) Elections are to be completed within three months from today.
- (v) Rule is made absolute in these terms in the Writ Petition.
- (vi) Other civil applications stand dismissed.
- (vii) Contempt petition will be heard separately and it is to be listed separately only after circulation obtained by the concerned.