

(2014) 04 BOM CK 0002

In the Bombay High Court

Case No : Civil Rev. Appln. Nos. 170, 171 of 2012, 21 of 2013 and Civil Appln. No. 2085 of 2014

Salahuddin

APPELLANT

Vs

Kazi Mohd. Raisuddin

RESPONDENT

Date of Decision : 11-04-2014

Acts Referred:

Waqf Act, 1995 — Section 2, 3(i), 32, 32(1), 32(2)(d)

Citation : (2014) 6 MhLj 774

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

Bench : Single Bench

Advocate : P.R. Patil holding for P.G. Gunale and R.R. Mantri holding for Z.M. Pathan, Advocate for the Appellant; G.R. Sayed, R.R. Mantri holding for Z.M. Pathan, H.D. Deshmukh, P.R. Patil holding for P.G. Gunale, V.D. Salunke and Y.B. Pathan, Advocate for the Respondent

Judgement

T.V. Nalawade, J.—The revision applications are filed to challenge the judgment and order of Wakf Application Nos. 45/2011 and 47/2011, which were pending before the Wakf Tribunal, Aurangabad. The first two applications are filed to challenge the entire decision and the third application is filed to challenge decision of Tribunal only to the extent of order of remand made by the Tribunal. Heard the learned counsel for the applicants, the learned counsels for the respondents and the learned counsel for Wakf Board. The dispute is with regard to the right of management to Jama Masjid, Shevgaon, District Ahmednagar and in respect of immovable properties given as Service Inam lands for rendering services to the Masjid. There are shops in the campus of Masjid and there are agricultural lands and house properties situated at Warur and Shevgaon.

2. The petitioners from CRA No. 21/2013 and two more Muslim persons (hereinafter referred to as "the trustees" for short) had applied for registration of trust of this Masjid under the provisions of Bombay Public Trust Act (hereinafter referred to as "the Trust Act" for short) and the trust came to be registered on 28-2-1973. In the year 2002, Mohammad Sallauddin (the petitioner from CRA

Nos. 170 and 171 of 2012) filed application before the Wakf Board for registration of the aforesaid properties under Wakf Act, 1995 (hereinafter referred to as "the Wakf Act" for short). This application was opposed by the trustees and few more persons including Kazi Raisuddin. The Trustees claimed that the management was already with the trustees, the institution was registered under the Trust Act and so, the inquiry under section 36 of Wakf Act was uncalled for. Persons like Raisuddin claimed that they were also hereditary Mutawallis. Father of Mohammad Sallauddin namely Mohammad Bahauddin claimed that he was hereditary Mutawalli. The father of Sallauddin gave no objection for appointing Sallauddin as Mutawalli before the Wakf Board.

3. The Chairman of Wakf Board made order on 14-6-2006 and appointed Sallauddin as Mutawalli under section 67 of Wakf Act. This order is set aside by the Wakf Tribunal Aurangabad in proceedings filed by trustee and Raisuddin by the decision dated 31-5-2012. The Tribunal has remanded back the matter to the Wakf Board and a direction is given to see that other applications like application of Raisuddin are also considered and decided. It is observed by the Tribunal that if new Mutawalli is to be appointed, removal of the trustees is necessary and that ought to have been done after following procedure by the Board.

4. It was mainly submitted by the learned counsel Mr. P.R. Patil for the petitioners that the Tribunal ought to have decided the claim of the parties also with regard to the right of management and there was no necessity to remand the matter back to Wakf Board. It was submitted for trustees that in view of nature of relief claimed, setting aside the order made by the Wakf Board in favour of Sallauddin was sufficient and there was no need to give directions to the Board to reconsider the matter. It was submitted for the trustees that when the trustees were managing the affairs, there was no need of appointment of new Mutawalli and so, there was no need of remanding the matter.

5. It appears that against the trustees, there are allegations that they gave properties of Masjid on lease for the consideration of nominal amount for the period of 99 years and they are not acting in the interest of wakf. On the other hand, there are allegations against Mohammad Sallauddin and his father that by getting appointment as Mutawalli, they want to grab the properties of the wakf. It appears that a suit was filed by father of Sallauddin in which Sallauddin gave consent to delete few properties of wakf from the list. The record of such litigation is available. In view of nature of dispute involved in the present matter and the scope of the present proceedings, there is no need to discuss such other record. It is not disputed that the Wakf Act, 1954 (old Wakf Act) was not applicable to Ahmednagar district, where the Masjid and other properties of Masjid are situated. It is not disputed that the trustees had registered the institution first time under the Trust Act on 28-2-1973 and since then they are managing the affairs of the trust. The record like copy of application made under section 50-A of Trust Act by Mohammad Bahauddin, father of Sallauddin, is available. It shows that Bahauddin had requested the Assistant Charity

Commissioner, Ahmednagar to modify the scheme of trust and to appoint him as the trustee. Along with him, there was one more person as applicant. They had claimed that they are visiting to Masjid to offer Namaz as devotees and so, they were interested in the trust. There was no claim made by Bahauddin that he was hereditary Mutawalli. This application of Bahauddin dated 8-4-1993 was dismissed on 25-4-1999 for want of prosecution. This record shows that in the year 1993, Bahauddin had admitted that the trustees were managing the institution.

6. The attention of this Court was drawn to so called Audit Reports submitted by Sallauddin before Tribunal. The Audit Reports are in respect of period starting from the date of appointment order. They show that some expenditure is made on account of legal expenses to contest the litigation. No expenditure was made for maintenance purpose. This circumstance shows that Sallauddin could not take over the management, though there was the order of appointment. On the other hand, there is the record with the trustees to show that they were managing the affairs, they were appointing the religious persons whose presence is necessary in Masjid. They were also spending on the staff, for cleaning the structure. The Tribunal has also held that the trustees are infact managing the institution.

7. It appears that in the past trustees had disputed the jurisdiction of Wakf Board and the application of Wakf Act was also disputed. However, during arguments in these proceedings, the learned counsel for trustees submitted that now the trustees are not disputing that the Wakf Act is applicable. It was submitted that subsequently, the trustees had moved application also for registration of the institution under Wakf Act. The wakf was created by Muslim Rulers few hundred years back and from the nature, it can be said that its purpose is religious and pious. Only because the Wakf Act, 1954 was not applicable to the places where the wakf is situated, it was registered under the Trust Act. The wakf is now, however, registered under the Wakf Act also. In this regard, the provision of section 2 of the Wakf Act needs to be kept in mind and it runs as under:--

"2. Application of the Act.--Save as otherwise expressly provided under this Act, this Act shall apply to all Auqafs whether created before, or after the commencement of this Act."

8. The provision of section 43 of Wakf Act runs as under:--

"43. Auqafs registered before the commencement of this Act deemed to be registered. -- Notwithstanding anything contained in this Chapter, where any wakf has been registered before the commencement of this Act, under any law for the time being in force, it shall not be necessary to register the wakf under the provisions of this Act and any such registration made before such commencement shall be deemed to be a registration made under this Act."

9. In view of this provision, the institution involved in the matter had deem registration under the Wakf Act. Further, there was the power with the Board under sections 36, 40 and 41 to see that the Wakf is registered under the Wakf

Act. Thus, there was no scope to anybody to deny the application of the Wakf Act.

10. Section 32 of Wakf Act deals with the general powers and functions of Wakf Board. The explanation to section 32(1) is as under:--

"Explanation.--For the removal of doubts, it is hereby declared that in this sub-section, "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."

This provision shows that the scheme prepared under the Trust Act remains in existence, operates, even after the application of Wakf Act.

11. The provisions of section 32(2)(d), 32(2)(g) and section 69 of Wakf Act show that Wakf Board has the power to settle the scheme for management of the wakf and also the power to appoint and remove the Mutawalli. However, this power needs to be exercised in accordance with the provisions of the Act.

12. The definition of "Mutawalli" is given in section 3(i) of the Wakf Act and it runs 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."

The aforesaid definition shows that the Board of trustees, the Committee fall under the definition of "mutawalli" and the office bearer of such Committee needs to be treated as "mutwalli". When infact somebody like such office bearer of the trust is managing the institution, he cannot be removed unless proper procedure laid down under the Act is followed. That can be seen in section 32(2) (g) of Wakf Act which reads as under:--

"(2) Without prejudice to the generality of the foregoing power, the functions of the Board shall be--

(a)

(g) to appoint and remove mutwallis in accordance with the provisions of this Act."

13. The provision of section 63 of Wakf Act reads as under:--

"63. Power to appoint mutawallis in certain cases.--When there is a vacancy in

the office of the mutawalli of a wakf and there is no one to be appointed under the terms of the deed of the wakf, or where the right of any person to act as mutawalli is disputed, the Board may appoint any person to act as mutawalli for such period and on such conditions as it may think fit."

This provision shows that the power can be used by the Wakf Board when there is dispute or also when there is vacancy. If Wakf Board wants to make appointment under this section, the period needs to be mentioned and that is mandatory in nature. In the present case, the trustees were managing the institution and so, it cannot be said that there was vacancy. Sallauddin and his father were not disputing that the trustees were infact managing the institution and so, it cannot be disputed that there was dispute of nature mentioned in section 63 of the Wakf Act. In such circumstances, unless previous mutawalli is removed, no new mutawalli can be appointed.

14. Section 64 of Wakf Act gives grounds for removal of mutawalli and it also shows that the procedure for that needs to be followed. Mutawalli needs to be heard before making order of removal against him. Section 64(3) of Wakf Act runs as under:--

"(3) No action shall be taken by the Board under sub-section (1), unless it has held an inquiry into the matter in a prescribed manner and the decision has been taken by a majority of not less than two-thirds of the members of the Board.

The order made under this section is appealable under section 64(4) of the Wakf Act. After such removal, the procedure as given under section 64(7) needs to be followed by Wakf Board and it runs as under:--

"(7) Where a mutawalli has been removed from his office under sub-section (1), the Board may, by order, direct the mutawalli to deliver possession of the wakf property to the Board or any officer duly authorised in this behalf or to any person or committee appointed to act as the mutawalli of the wakf property."

In the present case, there is no record to show that the possession of wakf was handed over to Sallauddin.

15. The provision of section 32(2)(d) of the Act shows that Board can settle schemes of management for wakf after giving opportunity of being heard to affected parties. When such scheme is settled, the persons aggrieved can file suit under section 32(3) of Wakf Act before Tribunal. The provision of section 69 of Wakf Act shows that when no scheme is in existence and new scheme is to be prepared, the procedure given in section 69 needs to be followed. Such new scheme can provide for removal of mutawalli including the hereditary mutawalli. The decision taken under section 69 of Wakf Act can be challenged by filing appeal before Tribunal. Thus, there is the power with the Board to frame new scheme or to modify the old scheme and different remedies are provided for persons aggrieved.

16. The facts and circumstances of the present matter show that the Board got

jurisdiction due to the existence of previous scheme registered under the Trust Act. In view of these circumstances and the provisions already mentioned, it was necessary for the Board to consider the previous scheme and also keep in mind that there were trustees under the previous scheme, who were actually managing the institution. If Board wanted to remove the previous trustees or wanted to frame new scheme, the procedure as already mentioned ought to have been followed. The facts and circumstances of the present matter show that no order with regard to the previous scheme was made by Board. The show cause notice was issued to the trustees under section 36 of Wakf Act, the purpose of which is registration. The order was made under section 36 read with section 43 of Wakf Act by the Board. Thus, the Board was not considering framing of new scheme or removal of mutawalli appointed under previous scheme.

17. The learned counsel for Wakf Board submitted that Wakf Board has no grievance against the judgment and order of Tribunal and it is ready to follow the procedure. In the applications, the order made by Wakf Board was challenged and the Tribunal has set aside the order made by Wakf Board in favour of Sallauddin. In view of discussion already made, it needs to be observed that the previous mutawalli was not removed and the order made of appointment of Sallauddin is set aside. It can be said that there was no need to make order of remand and it was up to the Board to follow the necessary procedure in view of the observations made by the Tribunal. However, the parties cannot have any grievance only due to some mention in operative order that the matter is remanded back. That has not made any difference in view of the power of Wakf Board. There is no force in the submission made for the petitioners that the Tribunal ought to have decided the rival claims. The aforesaid provisions need to be kept in mind by the Board. It is up to the Board to take some decision in view of existence of scheme. In view of nature of challenge, the nature of proceedings and aforesaid circumstances, this Court has no hesitation to observe that it was not possible for the Tribunal to consider the rival claims and to make the appointment of mutawalli.

18. Learned counsel Shri P.R. Patil for petitioners placed reliance on some reported cases. In the case reported as Kata Arogyaiah and Others Vs. Chippa Pentamma and Others, , the provisions of Tenancy and Agricultural Lands Act, 1950 were considered and some observations were made in that context. Copy of order dated 9th April 2012 made by this Court in CRA No. 80/2012, Mohammad Sallauddin s/o. Bahauddin Kazi vs. Maharashtra State Board of Wakfs and others is produced. It was submitted on the basis of some observations that Wakf Tribunal is not appellate forum. This Court has already mentioned some provisions of Wakf Act showing that if order is made under section 69 of Wakf Act, the order can be challenged by filing appeal before the Tribunal. Thus, in view of nature of order made by Wakf Board, it needs to be ascertained as to whether appeal needs to be filed, application needs to be filed or suit needs to be filed.

19. Reliance was placed on Maharashtra State Board of Wakfs Vs. Shaikh Yusuf Bhai Chawla and Others, . In this case, the Apex Court was considering the challenge made to the decision given by the Division Bench. The dispute was with regard to the list of wakfs and incorporation of wakfs. The Apex Court has made interim order and the object behind the interim order is to protect the wakf and to prevent the parties from alienating the property by taking permission of Charity Commissioner under the Trust Act. In this case, the Apex Court has discussed the difference between the wakf and the trust created for charitable purpose. As nobody can dispute the nature of institution of the present case and it is wakf, the observations are of no help. The relevant provisions are already discussed. Reliance was placed on the case reported as Hanifsha Baba Darga E. Darbar Vs. Salimkhan Karimkhan and Others, . In this case, observations are made that Charity Commissioner has no jurisdiction when the property involved is a wakf and the provisions of the Trust Act cannot be made applicable to the wakf. It is observed that if such orders are made under the Trust Act, they need to be set aside. There cannot be any dispute over this proposition.

20. Reliance was placed on the case reported as Sardarkhan Rajadarkhan Vs. Charity Commissioner and others, . The facts show that suit was filed for framing proper scheme for management of public trust, of Dargah. The scheme was framed by Court under the provisions of the Trust Act and mutawalli was kept intact. High Court modified the scheme and deleted the name of mutawalli and his lineal descendants on the ground that they had not rendered proper accounts. The Apex Court observed that the procedure was not followed and the right of hereditary mutawalli ought to have been considered. It cannot be disputed that hereditary mutawalli can be removed, if there are grounds mentioned in section 64 of Wakf Act, but for that procedure is required to be followed. If scheme is prepared under section 69, in ordinary course, mutawalli needs to be included in the Managing Committee and if the scheme provides for removal of hereditary mutawalli, it needs to provide for appointment of a person in hereditary succession of mutawalli so removed as one of the members of the Committee. There cannot be any dispute about the observations made by the Apex Court in view of the aforesaid provisions. The facts of the present case are altogether different. In the present case, Sallauddin needs to establish that he is hereditary mutawalli. In the case reported as Mohd. Minhajuddin Qureshi through his LRs. Noor-Ul-Habib Qureshi and Others Vs. State of Maharashtra and Others, , it is observed that mutawalli cannot be removed without following procedure laid down in that regard. There cannot be any dispute over this proposition.

21. A copy of judgment delivered in Land Reference Case No. 64/1983 by Civil Judge, Senior Division, Ahmednagar is produced by the learned counsel for Mohammad Sallauddin. An attempt was made to show that the learned counsel, who argued for trustees, had decided the matter as Civil Judge, Senior Division and it was filed by the trustees in respect of the some property of the same trust. The decision shows that compensation was awarded to trust. This

circumstance can be considered as a matter of propriety against the learned counsel, who argued the matter for trustees. However, it can be said that there was an attempt on the part of Sallauddin to create prejudice by showing this decision.

22. No merits are found in the first two proceedings. The third proceeding was not filed within limitation.

23. In the result, all the three proceedings with connected civil applications stand dismissed. The learned counsel Mr. P.R. Patil requested for stay. No such stay can be granted. As per the record, infact Sallauddin is not managing the trust. In view of his conduct also, no interim relief can be given to him. The prayer for stay is rejected.