
(2015) 07 BOM CK 0050

In the Bombay High Court

Case No : Civil Revision Application Nos. 183 of 2010 and 63 of 2011

Sayyed Kamaluddin Rafai and Others

APPELLANT

Vs

Sayed Rashida Begum and Others

RESPONDENT

Date of Decision : 02-07-2015

Acts Referred:

Waqf Act, 1995 — Section 36, 40, 46, 89

Citation : (2015) 07 BOM CK 0050

Hon'ble Judges : M.T. Joshi, J

Bench : Single Bench

Advocate : V.J. Dixit, Senior Advocate and V.S. Badakh, for the Appellant; S.S. Kazi, Advocates for the Respondent

Final Decision : Disposed off

Judgement

M.T. Joshi, J—Heard both sides.

2. Aggrieved by the rejection of the Wakf Application No. 21 of 2010 by the Wakf Tribunal, challenging the registration of the wakf by respondent No. 3- Maharashtra State Board of Wakf (for short "Wakf Board") under section 46 of the Wakf Act, 1955, the present Revision Application No. 63 of 2011 is filed.

During the application before the Tribunal, the revision petitioner also filed Wakf Suit No. 48 of 2010 challenging the same registration of the Wakf. The Tribunal rejected the plaint on 30-9-2010, holding that statutory notice as required by section 89 of the Wakf Act was not issued to the Board prior to the filing of the Suit. This order is challenged in Civil Revision Application No. 183 of 2010. However, no arguments were advanced by either side in this revision as the Tribunal has later on gone into the merit of the same facts in Application No. 21 of 2010 out of which Civil Revision Application No. 183 of 2010 has arisen.

3. Dargah Hazrat Bismillah Shah (R.A.) near C.S.T. railway station, Mumbai is registered as wakf by respondent No. 3 - Wakf Board after making public enquiry about the same. The contention of the present petitioners would show that in-

fact, the common predecessor of the private parties in the present dispute had litigated the issue, as to whether the said premises are charitable property or a private property in the High Court of Judicature at Bombay in its Ordinary Original Civil Jurisdiction vide Suit No. 167 of 1903. Vide the decree dated 10/9/1908, it was held that the Dargah and other properties were not wakf properties but ordinary private properties. It was found that the tomb lying therein were of ordinary citizen. The Receiver was therefore appointed to manage the affairs. The Receiver was ultimately discharged on 23/3/2007 by the High Court as per the consent terms arrived at between the parties therein.

4. The present dispute arose because of the filing of the application under section 36 of the Wakf Act, 1955 by the present respondent No. 1 Sayed Rashida Begum and respondent No. 2 - Sayyed Mohsin with the respondent No. 3 - Wakf Board for registration of the same as a Wakf. The record shows that objections from general public were called by the respondent No. 3. Thereupon, Advocate for the present petitioners sent objections alongwith copy of the judgment and order of the High Court as detailed supra. It appears that the present petitioners however did not participate in the further proceedings. Therefore, it was lastly directed by respondent No. 3 on 18/5/2012 that notices to the concerned be issued by Registered Post for final hearing. According to the petitioners, however, they did not receive the notice and on 1/6/2010, the respondent No. 3 marked their absence and it was directed that the wakf be registered.

5. Aggrieved by the said order, the application was preferred before the Wakf Tribunal. The Wakf Tribunal took into consideration the fact that at the time the private suit was filed between the predecessor of the parties, no law governing the wakf property was in existence and later on to manage the wakf, codified law i.e. Mussalman Wakf Validating Act, 1913 or Musalman Wakf Act, 1923 came into existence. The learned Presiding Officer and the Tribunal took into consideration the very objections sent by the petitioners through the Advocate, which showed that now the Masjid has also been built in the premises and the report of the District Wakf Officer called by respondent No. 3 shows that Pesh Imam and Moazzal are appointed in the Masjid. Not only this, the consent terms between the applicants on the basis of which Receiver came to be discharged, also shows that Masjid is annexed to the Dargah. Therefore, relying on the established law and finding that the property is being used for Masjid, the learned Presiding Officer held that it was a Wakf by user and, therefore, the application of the present petitioners came to be dismissed.

6. Number of submissions were advanced before me. While Mr. V.J. Dixit, learned senior counsel instructed by Mr. V.S. Badakh for the petitioners vehemently submitted that judgment of the High Court would show that the property is private, Mr. Kazi, learned counsel for respondent No. 1 submits that the decision in a private litigation would not be binding on the public at large and more particularly when the law regarding the wakf was not crystallized. He further submitted that the very admitted fact of Masjid being constructed and regular

prayers and congregation being held, show that it was a wakf property. Therefore, relying on the ratio of "Abdul Rahim Khan and others v. Fakir Mohammad Shah and anr." [1946] ILR Nag 518 , he submitted that no fault can be found with the reasoning of the Wakf Tribunal.

7. Upon hearing both the sides, it is clear that the respondent Nos. 1 and 2 filed application under section 36 of the Wakf Act, 1955. Though they are descendant of Syed Ismuddin, whose wife Zoolekhabibi had filed suit in the High Court, that in-fact the property was being managed by the Receiver and thereafter by the applicants. It may be that since the applicants had in view of the consent terms got the Receiver discharged, the applicants may not be aware of the same, however, the decision in the Suit cannot be said to have been unknown to them.

8. In that view of the matter, respondent No. 3-Wakf Board could not have issued proper notices to the present petitioners and issued the public notices. The order of the respondent No. 3 does not show that it has taken into consideration the effect of the decision in Suit No. 167 of 1903. The report of the Regional Wakf Officer is relevant only to the existence of Masjid in the premises and not the entire property wherein the dargah is situated.

9. Mr. Dixit, learned senior counsel submitted that Masjid is constructed and the prayers are held in limited and definite area of the property and, therefore, the petitioners have no objection for registration of the wakf to that extent. He however submitted that declaration of the entire area as the wakf property is against law.

10. Taking into consideration all these facts, in my view, it is necessary for the respondent No. 3-Wakf Board to collect all the material in order to find out as to whether Dargah as well as the Masjid forms a single wakf and as to whether the entire area is the wakf property or private property as decided by the High Court on its Original Side in Suit No. 167 of 1903. It should be remembered that the suit was between the private parties, wherein, in between those private litigants, it was held that the property was a private property. The learned Presiding Officer of the Wakf Tribunal has aptly pointed out that the decision of the Privy Council regarding the concept of "Wakf-Alal-Aulad" had caused a public cry which ultimately led to the legislature taking up the matter and enacting laws regarding the wakf.

11. In that view of the matter, the findings on facts are required in the present proceedings.

12. The issue regarding limitation of filing application under section 36 of the Wakf Act would be limited only to a person filing the application. The Board, however, is unfettered by the provisions of section 40 of the Wakf Act. It can also make suo-motu enquiry wherein it comes to its knowledge that certain wakf property is being treated as individual property. In the circumstances, no sooner an application under section 36 of the Wakf Act is filed, the Board being a quasi judicial authority, can also make suo-motu enquiry. In the result, the following

order:-

13. Civil Revision Application No. 63 of 2010 is allowed as regards the specified area of the dargah only. It is hereby declared that the order of the respondent No. 3 as well as the Wakf Tribunal shall be applicable to the area as detailed by the report of the Regional Wakf confined to the mosque.

14. The matter is remanded back to the respondent No. 3 - Board to the extent of findings of fact as to whether the rest of the property wherein the Dargah is situated is a wakf or not.

15. All the parties are directed to appear before respondent No. 3 on 20/08/2015. Respondent No. 3 is directed to conduct enquiry afresh to the limited extent of the property as detailed supra and to pass a reasoned order.

16. The Civil Revision Application No. 183 of 2010 is dismissed.

17. Both the Civil Revision Applications are accordingly disposed of without any order as to costs.