

(2007) 03 BOM CK 0025

In the Bombay High Court

Case No : Second Appeal No. 76 of 1998

Shivajirao Kovale and Others

APPELLANT

Vs

Syed Mehmood and Others

RESPONDENT

Date of Decision : 29-03-2007

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 19, 22(3), 22A, 28, 79
Civil Procedure Code, 1908 (CPC) — Section 100
Limitation Act, 1963 — Article 58, 65

Citation : (2007) 5 ALLMR 132 : (2007) 5 MhLj 641

Hon'ble Judges : V.R. Kingaonkar, J

Bench : Single Bench

Advocate : S.B. Talekar, instructed by S.V. Natu, Nos. 1, 2 and 4, for the Appellant; K.G. Navandar and M.N. Navandar, for Respondent Nos. 1 to 4, S.S. Choudhari, for Respondent No. 6, S.S. Choudhari, holding for B.N. Patil, for Respondent No. 7, A.N. Ansari, for Respondent No. 12 and M.L. Dharashive, Assistant Government Pleader for Respondent No. 13, for the Respondent

Final Decision : Dismissed

Judgement

V.R. Kingaonkar, J.—This Second Appeal has a checkered history. The dispute looms over span of more than 40 years. There is also a tinge of communal sensitivity attached to the dispute. For, the original plaintiffs claim that the suit properties are Inam lands of Dargah Niyamatullah Shah Quadri. Whereas, the contesting defendants claim the same as Inam lands of Namdeo Deosthan.

2. The dispute relates to five agricultural lands. They are:

S. No. 60 - Area 31 acres, 32 gunthas S. No. 62 - Area 35 acres, 29 gunthas S. No. 77 - Area 27 acres, 18 gunthas S. No. 78 - Area 9 acres, 19 gunthas S. No. 79/2 - Area 15 acres, 19 gunthas

All the above lands are situated at Haregaon. The place of alleged Dargah or Deosthan, whatsoever it may be, is situated in Survey No. 78.

3. Respondents No. 1 to 4 herein are original plaintiffs. The appellants are contesting defendants. The respondents No. 6 to 11 are said to be members of temple Trust and concerned with Namdeo Deosthan. Respondent No. 12 supported the plaintiffs' claim in the trial Court and is a formal party. Respondent No. 13 is also a formal party being the adjudicatory authority.

4. The respondent Nos. 1 to 4 filed suit (R.C.S. No. 505/1987) for declaration that the suit lands were the Inam lands of Dargah Niyamatullah Shah Quadri and they are Inamdars thereof. They sought recovery of possession of the suit lands for and on behalf of the said Dargah.

5. Briefly stated, their case is that they are descendants of one Syed Umar and defendant No. 12 is descendant of one Syed Ali. Said Syed Umar and Syed Ali were the lineal descendants of original Mutawali of the Dargah. The suit lands are imams granted in favour of said Dargah. In 1963, Namdeo Deosthan Trust was registered on an application filed by one Raghunath Narsingrao Karbhari. Though the suit lands were shown to be Inam properties of Namdeo Deosthan, yet the Assistant Charity Commissioner did not include them as Trust properties. In the year 1972, however, an application was filed for inclusion of the suit lands in the list of the Namdeo Deosthan properties. The proceedings were initiated u/s 22-A of the Bombay Public Trusts Act, 1950. The respondent No. 13-Assistant Charity Commissioner granted the application and ordered inclusion of the suit lands as the properties of the Namdeo Deosthan Trust. This was done at back of the plaintiffs. They came to know about the proceedings filed u/s 22-A of the Bombay Public Trusts Act, after making subsequent enquiry. The revenue authorities had taken the suit lands in possession due to a dispute regarding the rights. The possession of the suit land was, however, wrongly delivered to the contesting defendants as representatives of Namdeo Deosthan, on 19-8-1978 by the revenue authorities. The defendant Nos. 1 to 11 have no right or title, whatsoever, to continue their possession over the suit lands. Consequently, the suit for declaration and possession was laid.

6. Assertions of the contesting defendants (appellants) are that the suit lands are the properties of Namdeo Deosthan. The temple of Namdeo is situated in Survey No. 78 since immemorial time. There was no Dargah of Niyamatullah Shah in the said land nor the suit lands were granted as Inam for the said Dargah. There was rule of Nizam Government in the area of prior to the independence and, therefore, members of Muslim community got manipulated false revenue entries with the help of village Officers. There was no basis for such revenue entries, which created certain doubts regarding the original grant of the Inam.

7. The contesting defendants alleged that, subsequently, the suit lands were entered into the register of the trust after due inquiry u/s 22-A of the Bombay Public Trusts Act by the competent authority and hence, the plaintiffs cannot challenge the ownership of the Trust. They also submitted that the suit was bad for non-joinder of the State Government. They further contended that the suit was barred by limitation inasmuch as the plaintiffs were out of possession for

large number of years and in any case from the date, the suit lands were given in possession of the Namdeo Deosthan. They narrated as to how the services were being rendered to the temples of Namdeo and Eknath, which are situated in Survey No. 78. On these premises, they sought dismissal of the suit.

8. The parties went to trial over certain issues framed by the trial Court. The trial Court found favour with the contesting defendants (appellants) and dismissed the suit. Feeling aggrieved, the original plaintiffs preferred appeal (R.C.A. No. 434 of 1992). The first Appellate Court reversed all the material findings of the trial Court and came to the conclusion that the suit lands are Inams of Dargah Niyamatullah Shah, Haregaon (Tq. Ausa). The first Appellate Court held that the suit was within limitation. The first Appellate Court came to the conclusion that the plaintiffs were entitled to the relief of declaration as well as for recovery of possession. The appeal was, therefore, allowed and the decree of the trial Court was reversed. Hence, this second appeal at instance of the contesting defendants.

9. While admitting this appeal, this Court formulated substantial questions of law. Those questions with modification and addition of another substantial question of law involved in the second appeal may be stated in the following way:

(i) Whether in the facts and circumstances of the present case, the Civil Court had no jurisdiction to entertain the suit in view of provisions of Section 2-A(I)(i) of the Hyderabad Abolition of Inams and Cash Grants Act, 1954 particularly when the plaintiffs claimed themselves to be Inamdars of the suit lands?

(ii) Whether in the facts and circumstances of the present case, the suit was barred in view of Section 80 of the Bombay Public Trusts Act inasmuch as by order dated 29-1-1973 in the proceedings u/s 22-A of the Bombay Public Trusts Act, the suit lands were included as the properties of the Namdeo Deosthan Trust by the competent authority under the said Act?

(iii) Whether in the facts and circumstances of the present case, the suit was barred by limitation inasmuch as it was not filed within period of three years after the attachment of properties by the Deputy Collector and release thereof in 1978 in possession of Namdeo Deosthan?

(iv) Whether in the facts and circumstances of the present case, the first Appellate Court committed patent error while appreciating the evidence on record and rendered perverse findings that the suit lands are Inams of Niyamatullah Shah Dargah?

10. Mr. Talekar, learned Counsel appearing for the appellants would submit that the inquiry regarding nature of the Inam could not have been made by the Civil Court. He contended that there is jurisdictional error committed by both the Courts in view of specific provision contained in Section 2-A of the Hyderabad Abolition of Inams and Cash Grants Act, 1954. He argued that the decision of the competent authority u/s 2-A(4) would be final. The learned Counsel further contended that there is no iota of evidence to reach conclusion that the Inam

was granted in favour of the plaintiffs for rendering services to the Dargah. He further argued that the plaintiffs failed to make out any case to show that the suit lands were granted in favour Niyamatullah Shah Dargah for religious purposes because, no "Muntakhab" or "Wasika", as required under the provisions of Hyderabad Atiyat Inquiries Act, 1952 was placed on record. He argued that without the plaintiffs' clear assertion of the nature of Inam and source of title, the first Appellate Court could not have held that they are the Inamdars and suit lands are Inam lands of Niyamatullah Shah Dargah. He argued that judgments of both the Courts below would be rendered non-est, as the Civil Court has no jurisdiction to try the suit and inquire into the questions" regarding the Inam or identify the successor in interest of the Inamdar. He pointed out that u/s 2-A(1)(i) the question whether any land is Inam can be decided only by an Officer authorised by the Government and not by the Civil Court. Mr. Talekar further submitted that no inquiry could have been undertaken by the Civil Court in view of ouster of the jurisdiction under the said Act.

11. Mr. Talekar, seeks to rely on Pushpagiri Math Vs. Kopparaju Veerabhadra Rao, , Vithu Hira Mahar (More) @ Vithu Pandu Sonawane, since deceased by his heirs and Others Vs. State of Maharashtra and Others, and Most. Rev. P.M.A. Metropolitan and others, etc. etc. Vs. Moran Mar Marthoma and another etc. etc., .

12. So far as question of jurisdiction is concerned, there cannot be any duality of opinion that such a question goes to the root of the matter and that the plea of absence of jurisdiction can be raised at any stage. The Apex Court in Most Rev. P.M.A. Metropolitan and Ors. (supra) held that the jurisdiction of Courts would depend either on statute or on common law. The plea regarding absence of jurisdiction can be raised and entertained at any stage when there is total ouster of jurisdiction of the Civil Court.

13. Mr. Navandar, learned Counsel appearing for the original plaintiffs, would submit that the plaintiffs never claimed personal rights as such but came out with a case that the suit lands are Inams of Niyamatullah Shah Dargah. They vaguely claimed themselves to be Inamdars because their forefathers used to look after the suit lands and also used to manage the affairs of the Dargah. Mr. Navandar would submit that the provisions of the Hyderabad Abolition of Inams and Cash Grants Act, 1954 are not applicable to the present fact situation. He contended that an inquiry was held by the competent authority under the provisions of Hyderabad Atiyat Inquires Act, 1952, and the plaintiffs were held as successors of the original Mutawali of the Dargah viz., Nizamoddin. That order of the Atiyat Court was upheld by the Appellate Authority and hence, has attained finality. Mr. Navandar, would submit that it is not open to go into the question of jurisdiction when the plaintiffs did not claim the suit lands as Madadmash Inams (Service Inams).

14. A bare reading of Section 1(2)(i) of the Hyderabad Abolition of Inams and Cash Grants 1954 would make it manifest that the said Act does not govern the

Inams held by or for the benefit of a religious institution. If it is found, on basis of the available facts and evidence, that the suit lands were Inam lands of the religious institution, viz., Niyamatullah Shah Dargah then, the provisions of Section 2(a1)(i) would not come into play. The definition given u/s 2 of the said Act would make it clear that an "Inam" would mean land held under the gift made by the Nizam or by any Jahagirdar, holder of a Samsthan or other competent grantor and continued or confirmed by virtue of a Muntakhab or other title deed, with or without the condition of service and whether or not coupled with the remission of the whole or part of the land revenue thereon and entered as such in the village records. Thus, for the purpose of such Inam covered under Sub-section (c) of Section 2, the source of grant shall be a Muntakhab or other title deed. The said provision would be attracted only when the provisions of Hyderabad Abolition of Inams and Cash Grants Act, 1954 are held applicable.

15. The plaintiffs' case is that the suit lands were held by their ancestor for the benefit of the Niyamatullah Shah Dargah. Obviously, the provisions of Section 2(a1) of the said Act are not attracted in view of such specific pleadings of the plaintiffs. It is well settled that the jurisdiction of Court is determined on basis of the pleadings set out in the plaint and not in view of defences raised by the defendants. In case of Pushpagiri Math (supra) it was held that the land was granted to the Inamdar in order to render service to the Math. Since it was held as service Inam land, the Apex Court held that the pre-existing right of interest held by the Inamdar stood extinguished and, therefore, conferment of Royatwari Patta u/s 7 read with Section 3 of the Andhra Pradesh Inams Abolition and Conversion into Rayatwari Act, 1956 became conclusive. It is in the aforesaid fact situation that the Apex Court came to the conclusion that jurisdiction of the Civil Court declaring title of the Inam land was excluded by implication. In case of Vithu Him Mahar (More)(supra), a Single Bench of this Court was required to deal with the provisions of Bombay Inferior Village Watans Act. The questions involved in the said case are quite different from those which have been raised in the present case. In that case, the Court was required to consider question of res judicata. There cannot be any two opinions about interpretation of provision of Section 2(a) of the Hyderabad Abolition of Inams and Cash Grants Act, 1954 and there is no difficulty to reach a finding that jurisdiction of Civil Court is impliedly barred when the relevant questions are required to be determined by the competent Officer appointed by the Government under provisions of the said Act. Still, however, when the plaintiffs have clearly stated in the plaint that the suit lands are Inams of Niyamatullah Shah Dargah then, the provisions of the Hyderabad Abolition of Inams and Cash Grants Act, 1954 are not applicable at all. The plaintiffs have not claimed any title in themselves. Hence, I do not find any substance in the objection regarding ouster of the jurisdiction of Civil Court. The competent Officer appointed by the State Government could not have decided as to whether the suit lands were held by the religious institution, viz., Niyamatullah Shah Dargah. The objection regarding jurisdiction of Civil Court is, therefore, untenable and stands rejected.

16. Core issue involved is whether the suit lands are Inam granted for Niyamatullah Shah Dargah. The parties have adduced oral and documentary evidence in support of the rival contentions. There is voluminous documentary evidence on record. The plaintiffs rely on entries of Shetwar Patrak and Wasoolbaqi register (Exh. 107 and Exh.109). The entries appearing from Assal Shetwar Patrak of 1342 Fasli (1932 A.D.) would indicate that the suit lands are granted to Niyamatullah Shah Dargah. The entries in the Wasoolbaqi register of 1325 Fasli (1915 A.D.) go to show that name of Niyamatullah Shah Dargah was entered as holder of the suit lands. There are various entries appearing from the old revenue record, which purport to show that the suit lands were the lands of the Niyamatullah Shah Dargah. The entries in Classer register (C-21) would show that in 1951, Survey No, 78 was shown as the property of Dargah. The copy of Shetwar Patrak, Namuna No. 60 (C-22) would show that Syed Ali was recorded as "Khatedar" (Holder) in respect of the suit lands except Survey No. 78 of which Khatedar was shown as Dargah. These entries were recorded in 1943 A.D. So also, the entries in the Shetwar Patrak - Jamabandi would show that the suit lands were Inami Judi and the name of Khatedar was Niyamatullah Shah Dargah.

17. The entries "Inami Judi" as appearing from the old revenue record (Shetwar Patrak) would give an important clue. The expression "Inami Judi" would mean grant to which the amount fixed by and payable to Government by Inamdar out of the land revenue assessed on Inam land. This expression is defined in Section 2(k)(l). The definition runs as follows:

Section 2(k)(1) "Judi" or "quit-rent" means the amount fixed by the payable to Government by Inamdar out of the land revenue assessed on Inam land.

Obviously, Judi Inam would mean that the amount payable was fixed and it was out of the land revenue assessment, payable to the Government. These old revenue entries cannot be lightly brushed aside.

18. At this juncture, it may be mentioned that in Vatticherukuru Village Panchayat v. Nori Venkatrama Deekshithulu and Ors. 1991 Suppl (2) SCC 228, the Apex Court held that entries in Inams Fher register and survey and settlement records have great evidentiary value. It is further held that construction of such entries is a question of law. The nature of grant can be determined on the strength of such old revenue entries and particularly when the origin of the grant is rendered in obscurity. It is further held by the Apex Court that decision of the revenue Court on the question of grant of Royatwari Patta u/ s 3 read with Section 7 of the A.P. (Andra Area) Inams (Abolition and Conversion into Rayatwari) Act, 1956 is final and the Civil Court's jurisdiction to retry the issue again is barred.

19. Mr. Talekar, learned Counsel for the appellants, would submit that the trial Court duly considered the necessary evidence in proper perspective. He contended that report of the Court Commissioner (Exh. 147) and the surrounding circumstances go to prove that there is Namdeo temple and Eknath temple at

the place, where the plaintiffs claimed existence of Dargah. He argued that a well reasoned Judgment of the trial Court ought not to have been disturbed by the first Appellate Court. He contended that in the absence of any Muntakhab or Vasika, there was no justification, whatsoever, to grant succession in respect of the plaintiffs while the civil litigation was already pending. He urged to discard the findings of the Atiyat Court in relation of nature of the Inam.

20. Before I proceed to consider the above contentions of Mr. Talekar, let it be noted that the suit lands were not recorded as the trust properties of Namdeo Deosthan, when the trust was registered for the first time in 1963. It appears that the application was given by one Raghunath Narsingrao Karbhari for registration of the trust. Copy of the order passed by the respondent No. 3 Assistant Charity Commissioner (Exh. 111) would show that the suit lands were claimed as properties of the Namdeo Deosthan along with other properties, as mentioned in the application. The Assistant Charity Commissioner then noticed that four of the suit lands, viz., Survey Nos. 60, 62, 77 and 79 were the disputed lands. He came to the conclusion that those lands were not entered in the revenue record in name of the Namdeo Deosthan Trust. The Assistant Charity Commissioner also noticed that proceedings were going on in revenue Court about those properties. At the relevant time, the Assistant Charity Commissioner rendered clear finding that the Namdeo Deosthan trust failed to prove its ownership in respect of the said four suit lands. Liberty was given, however, to approach the authority u/s 22-A for inclusion of those lands, if later on there was proof available to show that they were held by the Namdeo Deosthan trust. Subsequently, an application was again moved by Gopalrao Kulkarni (Patwari) vide change report No. 5/1972 and then, the above four lands were directed to be entered into the property register of the Namdeo Deosthan trust. It appears that the lands were taken under Government supervision at the relevant time. The Assistant Charity Commissioner held that there was no evidence to show that the lands belonged to Dargah, except oral statement of objector - Abdul Ali.

21. Mr. Talekar, learned Counsel for the appellants contended that the findings of the Assistant Charity Commissioner became final qua the parties. He would submit that such findings cannot be challenged in Civil Court in view of Section 80 of the Bombay Public Trusts Act. He argued that the issue is settled and finally decided by the Assistant Charity Commissioner and hence, it is not open for challenge it before the Civil Court. He contended that the plaintiffs could not file the suit for reopening of the issue regarding the ownership of the said lands, which are registered as trust properties of Namdeo Deosthan.

22. In *Keki Pestonji Jamadar v. Rodabai Khodadad Merwan Irani* 1972 Mh.LJ. 427, the Full Bench of this Court held that Sections 79 and 80 of the Bombay Public Trusts Act, do not cover question "whether the author of the trust was lawful owner of the property of which he had created the trust or had otherwise authority to create the trust. The Civil Court has jurisdiction to decide the question in respect of the title of third party. It is clearly held that the Bombay

Public Trusts Act is not a self-contained Code to provide remedy to third parties, whose titles would be concluded by the decisions u/s 19. The Full Bench observed:

Having considered the matter in all aspects presented before us, we are of the opinion that the respondents are right in their contention. The purpose of the Act, the procedure prescribed for enquiries u/s 19, the absence of any remedy under the Act to those who were not parties to inquiries u/s 19 but whose anterior or superior title would be concluded by the decision in that inquiry and the general scheme of the Act, all tend to show that questions to title of the trust property are outside the scope of inquiry u/s 19.

Following the above ratio, a Single Bench of this Court in *Sitalsing Asaram Naik and Others Vs. Narbadabai Shukla and Others*, , held that jurisdiction of the Civil Court is not barred to determine the issue regarding title to the property held by the Assistant Charity Commissioner as the trust property. It is further held that the Bombay Public Trusts Act is not a self contained Code and, therefore, such separate suit regarding claim for the property is maintainable. In view of this legal position, contentions of Mr. Talekar about non-availability of jurisdiction to the Civil Court cannot be accepted.

23. Reverting to the core issue referred to above, it may be stated that the plaintiffs examined PW-2 Pandurangrao in order to prove the translation of old documents, which are in "Modi" and "Urdu" scripts. His version purports to show that the revision extract of 1325 Fasli (1915 A.D.) go to show that the suit lands were recorded as properties of Niyamatullah Shah Dargah. He translated the Shetwar Patrak and the old record from Modi and Urdu scripts to Marathi. He corroborated the translated copies (Exh. 198 and Exh. 199). He admitted that he was unable to give opinion as to whether it was original record. It is only on basis of such stray admission that the trial Court discarded the said old translated documents. As a matter of fact, the Shetwar book or the revision register are the records maintained in the regular course of official business. The entries in such records are not signed at each page. The official procedure is to give remark at the commencement of the relevant register and another remark at the end of the same regarding the pages contained in the register. Moreover, it was none of the business of PW-2 Pandurangrao to give opinion as to whether the record was original or it was a duplicate record. The record was called from Tahsil Office for the purpose of verification of the entries. There appears no serious infirmity in the finding of the first Appellate Court that such old revenue record could be considered and looked into.

24. The version of PW-1 - Syed Mehmood would show that deceased Umarsab was his great grandfather. He states that the Atiyat Court had granted succession rights in his favour. He submitted application in 1989 for the grant of succession certificate. He states that his father, i.e. Nizamoddin died in 1969 but, as he was residing at Mumbai, there was delay in filing the succession proceedings. It appears that since about 1970 till 1985, he was not residing at Haregaon. The

plaintiff No. 4 also used to reside at Mumbai from the time of her marriage. The plaintiff Nos. 2 and 3 reside at Latur since about 25 years. It appears that the plaintiffs were negligent and never took care to exercise their rights regarding the suit lands and, therefore, the lands were taken over by the Government. It appears that the suit lands were being auctioned by the Government for purpose of cultivation from 1970 onwards till 1978. It appears that somewhere in 1978, the suit lands were delivered to Namdeo Deosthan trust, as they were delivered to Namdeo Deosthan trust, as they were registered as the properties of said trust in 1973.

25. Cross-examination of PW-1 Syed Mehmood would show that he expressed ignorance regarding existence of deities and the temples in Survey No. 78. He admits that there is a small well near, the Namdeo temple. He also admits that there are two Tulshi-Vrandavans" in front of the said building. He further admits that there is a celler underneath Eknath temple. There is evidence appearing from the report of Court Commissioner that the structure standing at the place depicts two flowers and a bird. There are some traces of evidence to show that deities have been installed within the premises. Still, however, there are also traces of evidence to show that originally, the structure was of Dargah. There are four small towers (Minars) in existence. There is a dome atop like usually constructed above a Tomb. The old record of the D.I.L.R. office does not show that the temple existed at that place because, the structure is not shown in the map of D.I.L.R. with a symbol having flag above it. That is the usual sign used to indicate existence of temple, when the maps are prepared by the D.I.L.R. office.

26. The question really is not whether the structure standing in Survey No. 78 is that of a Dargah or it is of temple. This is only an incidental issue. It need not be reiterated that the main issue is as to whether the suit lands are the Inam lands of Niyamatullah Shah Dargah. It has come on record that the plaintiffs were not attending the services of Dargah since long. The structure was totally neglected by them because, they were not residing at Haregaon. The suit lands were taken over by the Government. It is quite probable, therefore, that in the absence of the plaintiffs, certain improvements were made by the defendants in order to convert the structure, so as show existence of a temple.

27. Copy of the Judgment rendered by the Deputy Collector (Atiyat) in file No. 1989/Inam-WS-55 is relied upon by the plaintiffs. It appears from copy of the said Judgment (Exh.110) that the Deputy Collector (Atiyat) conducted necessary enquiry in accordance with Section 7 of the Hyderabad Atiyat Inquiries Act, 1952, and held that the suit lands are granted as Inam lands for service of Niyamatullah Shah Dargah. The Atiyat Court held that deceased Nizamoddin was Mutawali of the Dargah. It appears that succession was sanctioned after death of Faridsab. The recitals of the Judgment (Exh. 110) would show that before conducting the enquiry, a notice was published in Government gazette on 28-3-1991, calling for objections. Nobody objected and as such the application of present plaintiff No. 1 and defendant No. 12 was granted. The learned Deputy

Collector came to the conclusion that the suit lands are Inam lands granted for Niyamatullah Shah Dargah. This finding was subsequently challenged for and on behalf of Namdeo Deosthan before the Collector, Latur. It appears from copy of the order rendered by the Collector (Exh-133/4) that the appeal was dismissed. The Collector, as an Appellate Authority, confirmed the finding of the Deputy Collector (Atiyat) regarding nature of the Inam lands. Still, however, the Collector only stayed change of the record by granting mutation entries in favour of the plaintiff No. 1 and defendant No. 12 because, the civil litigation was going on. So far as question of succession is concerned, the decision of the Deputy Collector (Atiyat) cannot be questioned at all.

28. Mr. Talekar, learned Counsel for the appellants argued that no finding could have been rendered by the Deputy Collector (Atiyat) when the civil suit was pending. He further argued that the Deputy Collector (Atiyat) has not referred to any Muntakhab or Wasika to say that deceased Faridsab was the Mutawali of Dargah and, therefore, the conclusion drawn by the said authority is without basis. I find it difficult to countenance the contention of Mr. Talekar. The provisions of Section 9 of Hyderabad Atiyat Inquiries Rules, 1952 may be considered in this behalf. Rule 9-A would permit the Deputy Collector (Atiyat) to consider the Tahsil record to reach such conclusion. Rule 9-A(2) may be reproduced for ready reference:

Rule 9-A(1) x x x (2)(a) For continuing or confirming grants other than those mentioned in Sub-rule (1) above, the Atiyat Court may not call for any evidence regarding possession or, in the case of cash grants, enjoyment, in the following cases:

(b) Whether the claimant proves from the village or Tahsil records that he was holding the grant other than cash grant as grantee that he was in actual enjoyment of the grant for a period of two years immediately preceding 15-8-1949, or in the case of cash grants, 2 years immediately preceding their Abolition of Cash Grants Act, 1952;

(c) Where the grant other than the cash grant was on 15-8-1949 under Government supervision or, the enjoyment thereof remained under suspension, the claimant proves from the village or Tahsil records that he was holding the said grant or, in the case of cash grants, was in actual enjoyment thereof for a period of 2 years prior to the date on which the grant was taken under Government supervision or in the case of cash grants from the date on which such enjoyment was suspended.

The above provision could be used by the Dy. Collector to verify the nature of grant on basis of revenue record.

29. Now, I shall consider the evidence adduced by the defendants. There is evidence of DW-1 - Shivaji in support of the contention that Namdeo temple and Eknath temple are situated in Survey No. 78. He claims to be President of the Namdeo Deosthan Trust. He states that since about 40 to 50 years, he has seen

the existence of deities and the temples at the same place. He narrated how the religious functions are held for each year and services are offered to the Namdeo Deosthan. He denied existence of Niyamatullah Shah Dargah at Haregaon. He admits that some members of the Muslim community had declared that they would take possession of the suit lands and hence, he and Raghunath Karbhari gave oral information to the Tahsildar, which resulted into taking over of the suit lands by the Tahsildar under Government supervision. He denied that taking disadvantage of the absence of the plaintiffs, the deities were installed in the structure of the Dargah. The oral evidence of DW-2 - Vishwanath, DW-3 Babruwan, DW-4 Tukaram and DW-5 - Kisan is rather insignificant. They are not inhabitants of village Haregaon. They gave general statements about existence of the temples in the structure and the rituals followed by the Namdeo Deosthan.

30. DW-6 - Madhukar is a Photographer. He corroborated the photographs (Exh. 173 to Exh.175). The version of DW-7 - Shivraj reveals that he translated the entries of "Tipan Book" of 1303 Fasli (1893 A.D.). He corroborated the translations (Exh.215/1 to Exh.215/4). His cross-examination reveals that names of Syed Ali alias Syed Hyder, Syed Fazal Ali, Syed Ali Syed Urshad have been mentioned in the "Modi" script in column Nos. 3 and 5 of Exhibit 194 i.e. the copy of Revision Jamabandi of 1325 Fasli (1925 A.D.) which is relied upon by the plaintiffs.

31. Though the defendants seek to rely upon the entries in Shetwar register, yet it is difficult to give much importance to such entries. The reason is not far to seek. It appears that when the application was given for registration of Namdeo Deosthan, then the said record was not produced before the Assistant Charity Commissioner in 1963 as well as in 1973. The defendants relied upon an order (Exh. 201/2), rendered by the revenue Commissioner in which, it is observed that the suit lands are recorded in the revenue record, as attached to the Namdeo Deosthan being service Inam lands. In fact, there is no old record to show as to who had granted the Inam in favour of Namdeo Deosthan. The defendants also rely upon entries in the Classer register (Exh. 220), which indicate name of Namdeo Deosthan as Khatedar of the suit lands bearing Survey Nos. 60, 62, 77 and 79/2. The authenticity of this Classer register is doubtful. The copy (Exh. 220) is not a certified copy as such.

32. The recitals of application (Exh. 223/1) filed by one Shripati Bapurao Sathe, for the first time, on 4-4-1963 may be considered. The entries in the said application filed before the Assistant Charity Commissioner, against the respective columns, would show that documentary evidence was not available regarding origin or creation of the trust i.e. Namdeo Deosthan. It was stated that there were no documents found in support of the claim regarding the Inam lands claimed for Namdeo Deosthan. Obviously, when the application was given in 1963 then, the defendants did not produce any old record regarding grant of the suit lands as Inams for the Namdeo Deosthan. It appears that after about 10 years, in 1973, the lands were included in the trust register as a result of enquiry

u/s 22-A of the Bombay Public Trusts Act.

33. The enquiry u/s 22-A of the Bombay Public Trusts Act is rather limited to the subject matter related to any particular concerning the public trust, which was not the subject-matter of the inquiry u/s 19 or Sub-section (3) of Section 22 or Section 28. The subsequent inquiry u/s 22-A would mean any information or detail as to the trust, which was not considered in the previous enquiry. The inquiry u/s 22-A could not have been undertaken when the suit lands were initially regarded as not the properties of Namdeo Deosthan.

34. There is ample evidence on record to prove the fact that the suit lands were Inams granted for Niyamatullah Shah Dargah. The entries in Classer register, Shetwar Patrak, Wasool Baki register and the map of D.I.L.R. produced on record would indicate that the suit lands were "Judi Inam" of the said Dargah. The plaintiffs' case is, therefore, more probable and acceptable as compared to that of the defendants. The findings of the first Appellate Court cannot be therefore, regarded as "perverse". This Court cannot totally reappraise the evidence unless there is element of perversity found in the appreciation of the evidence by the first Appellate Court. The only material error committed by the first Appellate Court, however, is that the plaintiffs are declared as Inamdars. In fact, they are only successors of the Mutawali. They and defendant No. 12 are entitled to manage the suit properties as Mutawalis. They being only the Managers, cannot be regarded as Inamdars or title holders. They do not have any independent right in respect of the suit lands.

35. So far as the question of limitation is concerned, learned Counsel Mr. Talekar would submit that the suit ought to have been filed within period of three years for the purpose of declaration and possession at least from the date of delivery of possession of the suit lands in favour of the contesting defendants. He pointed out that the suit lands were delivered in possession of the contesting defendants in 1978. He would submit that plaintiffs' suit filed on 21-11-1987 is governed by Article 58 of the Limitation Act and hence, it is barred. He relied on *Agyarani Dua Vs. Vidyagauri J. Tripathi and another*, . In the given case, the suit was for declaration that the agreement for sale dated 24-11-1984 stood abdicated or, in the alternative was void/violable for want of consideration and hence, was not binding on the rights of the plaintiff. The plaintiff had also sought recovery of possession as an incidental relief. A Single Bench of this Court held that Article 65 had no application in the facts and circumstances of the given case. It was held that the prayer for possession was consequential relief to the declaration and the suit was barred in view of Article 58 of the Limitation Act. The fact situation in the present case is quite different from that of the above referred case. In the present case, the declaratory relief sought by the plaintiffs is to the effect that the suit lands are Inams of Niyamatullah Shah Dargah and hence, they are entitled to recover possession, which the defendants have received from the revenue authorities in 1978.

36. Significantly, the defendants were not put in possession by the plaintiffs.

They were given possession of the suit lands by the revenue authority because, in 1973, the suit lands were registered as trust properties of the Namdeo Deosthan. Once it is found that such basis of the claim is unacceptable then, it follows that the plaintiffs would be entitled for restoration of the suit lands. The plaintiffs' suit cannot be regarded as one governed by Article 58. It is based on rights as Mutawalis of the said Dargah. On behalf of the respondents, Mr. Navandar seeks to rely on *Devidas Krishna Salunke Vs. Tanubai Ghogare*, and *Pravin Kamdar Vs. State of Maharashtra and others*, . It is held by a Single Bench of this Court in *Devidas Krishna Salunke (supra)* that where the plaintiff's claim for possession was not based on ground of dispossession but, on basis of title, it would be governed by Article 65 of the Limitation Act. In *Pravin Jethalal Kamdar (supra)*, a Division Bench of this Court held that where the suit for possession, the period of limitation will be 12 years as per Article 65. It was argued by learned Counsel Mr. Talekar that the relief of declaration was sought and, therefore, Article 58 would be applicable. He also argued that the plaintiffs' suit is not maintainable because, no declaratory relief was sought regarding the orders of the defendant No. 12 - Assistant Charity Commissioner. This argument is unacceptable inasmuch as the plaintiffs were unconcerned with the registration of the Namdeo Deosthan trust. They are not bound by the order passed in the said proceedings to which they were not parties.

37. Mr. Talekar, learned Counsel for the appellants would submit that attraction of bar of limitation is a substantial question of law involved in this appeal. He seeks to rely on *Syed Abdul Wahab (Dead) by L.Rs. v. Ayisha Beevi (dead) through L.R. and Anr.* (2005) 10 SCC 455. There is no difficulty in holding that bar of limitation has to be considered as a substantive question of law, if it is demonstrated that the suit is governed by Article 58. Still, however, in the fact situation of the present case, the suit is basically for restoration of possession. The plaintiffs claim better rights. The defendants were included as a trust properties after 1973 and when the attachment of the lands was declassified, then the suit filed by the Marathwada Wakf Board was withdrawn. Nowhere any finding was reached by the Civil Court that the suit lands were Inams lands of Namdeo Deosthan. Obviously, the main relief was for restoration of possession. The declaratory relief and the relief for restoration of possession are interdependent and intertwined. Even if the declaration was not sought for yet, on basis of better rights, the plaintiffs were entitled to seek restoration of possession. Hence, it cannot be said that the suit is barred by limitation.

38. Mr. Talekar, learned Counsel for the appellants contended that the first Appellate Court misread the evidence and hence, interference in the findings of the first Appellate Court is necessary. He referred to *Rohini Prasad and Ors. v. Kasturchand and Anr.* (2003) 3 SCC 668. The Apex Court held that where misreading of evidence by Appellate Court would lead to miscarriage of justice or finding of the appellate Court is based on no evidence and thus perverse, the High Court would be justified in interfering in the second appeal. Reliance is also placed on *Yadarao Dajiba Shrawane (dead) by Lrs. Vs. Nanilal Harakchand Shah*

(dead) and Others, . In the given case, the Apex Court held that when the Judgment of the final Court of fact is based on misinterpretation of documentary evidence or consideration of inadmissible evidence or ignoring material evidence, the High Court in second appeal is entitled to interfere with the Judgment. Further reliance is placed on State of Rajasthan v. Harphool Singh (Dead) through his L.Rs. 2002(5) SCC 652. The Apex Court held that where findings of the first Appellate Courts are based on surmises and conjecture or are based on evidence, which is not legally acceptable, then such Judgment cannot have impunity from interference at the hands of the Appellate Authority. Mr. Talekar also seeks to rely on Manicka Poosali (Dead) by LRs. and Others Vs. Anjalai Ammal and Another, . The Apex Court has held that the High Court cannot go into the question, which had not been raised by the respondents either in their pleadings or in the evidence or in the memorandum of grounds of second appeal. It is observed, "Jurisdiction of the High Court u/s 100, CPC is limited to a substantial question of law framed at the time of admission of the appeal or at a subsequent stage if the High Court is satisfied that such a question of law arises from the facts found by the Courts below. The High Court could not go into the question regarding the due execution and the validity of the settlement deed or the genuineness of the Will which had not been challenged by the respondents either in their pleadings or in their evidence or in the memorandum of ground of second appeal". He also referred to Padmanath Goswami v. Banamali Das alias Banoram Das (2004) 13 SCC 651 and Mallappa v. Neelavva and Anr. 2005 (12) SCC 325 . These authorities relate to the scope of Section 100 of Civil Procedure Code. Reliance is also placed on Sabitri Chatterjee Vs. Debi Das Roy, . All these citations need not be discussed in detail. For, already substantial questions of law involved in the matter are formulated and the appeal is considered on the basis of the settled parameters. It may be mentioned that likewise Mr. Talekar, some authorities were referred to by learned Counsel Mr. Navandar appearing for the respondents. They are Navneethammal v. Arujna Chetty AIR 1996 SC 3521 , Dnyanoba Bhaurao Shemade Vs. Maroti Bhaurao Marnor, , Mathakala Krishnaiah v. V. Rajagopal 2005 (5) All MR (SC) 1 , Ramchandra Pandurang Sonar (Deceased by L.R's.) and other Vs. Murlidhar Ramchandra Sonar and others, and Shyam Sunder Dutta v. Baikunktha Nath Banerjee (dead) by LRs. and Ors. 1995 AIR SCW 966. It is not necessary to elaborately reproduce ratio of each of the above case inasmuch as these authorities pertain to limitations in respect of the powers of the High Court to deal with the second appeal.

39. For the foregoing reasons, I am of the opinion that the Civil Court had the jurisdiction to decide the suit. I hold that that suit is not barred by the limitation. Moreover, it is not barred u/s 80 of the Bombay Public Trusts Act. The first Appellate Court has not committed any perversity while deciding the relevant issues. The findings on the substantial questions of law referred in paragraph No. 8 above, are recorded as below:

(i) No, the Civil Court has jurisdiction.

(ii) No

(iii) No

(iv) No

40. In keeping with these findings, it must be said that there is no substance in the instant appeal. Appeal must fail and is, therefore, dismissed with costs. The final order passed by the first Appellate Court is, however, modified and instead of declaration that the plaintiffs are "Inamdars" it is made clear that they are descendents of "Mutawali".