(2015) 08 BOM CK 0348

In the Bombay High Court

Case No : Civil Revision Application No.128 of 2008 With Civil Application No.1825 of 2010 Civil Application No.3505 of 2013 Civil Application No.5242 of 2014 Civil Application No.9380 of 2015

Sushilabai Bacharaj Rathi, Jalna APPELLANT

Vs

Gulab Mehboob Jalna RESPONDENT

Date of Decision : 13-08-2015

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 11(1), Section 7A
Waqf Act, 1995 — Section 107

Citation : (2016) MCR 597

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

Bench : Single Bench

Advocate : Shri. A.R. Vaidya, Advocate, for the Petitioner; Shri. Shaikh Mujtaba Gulam Mustafa, Advocate, for the Respondent No. 1; Shri. S.A.G. Qureshi, Advocate, for the Respondent No. 3; served, for the Respondent No. 2

Final Decision : Disposed Off

Judgement

T.V. Nalawade, J.—The proceeding is filed against the judgment and order of Wakf Suit No.71/2006 which was pending before Wakf Tribunal Aurangabad. The suit was filed by respondent No.1, Mutawalli of Jama Masjid of Old Jalna, District Jalna for the relief of declaration and possession. The suit is decided in his favour. Original defendant No.1 has challenged the decision. Both the sides are heard.

2. The suit was filed in respect of land Survey No. 327/1 admeasuring 5 acres situated at village and Tahsil Jalna. It is the case of the plaintiff that the suit land was given as service inam land to the Inamdar for rendering services to the aforesaid Jama Masjid and also for rendering services to Dargah of Hajrat Latifullah Shah Quadri, Jalna. It is the case of the plaintiff that in the Government Gazette dated 21-6-1973 the property was shown as service inam land and it was belonging to the aforesaid religious institutions and the gazettes were published as per the provisions of the Wakf Act 1954 and Wakf Act 1995.

3. It is the case of the plaintiff that his grandfather and father were rendering service to the aforesaid Masjid and Dargah and after their death he started rendering services as Mutawalli. It is his case that he is authorised by the Wakf Board to file the suit against the defendants.

4. It is the case of the plaintiff that as per the provisions of the Wakf Act and the Atiyat Inquiry Act 1950 the suit property is not alienable but some transactions are made by third parties in respect of the suit property and the plaintiff came to know about these transactions very recently. It is contended that the suit property was purchased by defendant No.1 under sale deed 18-3-1980 and the defendant No.1 is saying that he is in possession of this property under this sale deed. It is contended that the defendant No.1 informed to Mutawalli that he has right to take water from two wells situated in land Survey No.326/A for cultivation of the suit land. It is the case of the plaintiff that Survey No.326/A is also wakf property and it is dedicated to aforesaid two institutions.

5. It is the case of the plaintiff that in the revenue record, it is mentioned that suit property is inam land but in spite of that, aforesaid transactions were made by third parties in respect of the suit property. It is contended that as the suit property is wakf property and there is provision of section 107 in Wakf Act 1995, the provisions of Limitation Act do not apply and so the suit is filed within limitation.

6. It is the case of the plaintiff that in the past he had filed a suit in Civil Court when Wakf Tribunal was not constituted. It is contended that when Wakf Tribunal came to be constituted, the suit from the civil Court was withdrawn. It is contended that the dispute between the parties is not yet decided on merits. It is contended that plaintiff had requested defendant No.1 to hand over possession of the suit property but the defendant No.1 refused to do so and such last refusal was made on 10-12- 2005. Relief of declaration is claimed that sale deed is null and void and relief of possession is also claimed.

7. Defendant No.1 filed written statement and contested the suit. She denied that the suit property is wakf property and the property was given by the donor for rendering services to mosque and Dargah. Defendant No.1 has denied that plaintiff is Mutawalli of the institution.

8. It is the case of defendant No.1 that suit property was private property of a Hindu and accordingly entries were made in the revenue record. It is contended that after confirming the ownership of suit property and after going through revenue record, defendant No.1 purchased the property. The defendant No.1 has admitted that she has purchased the property under sale deed of 1980 and she contended that he has right to take water from the well situated in land Survey No.326/A in view of the rights given to her under sale deed by defendant No.2.

9. It is the case of defendant No.1 that the suit property was inam land but the inam was abolished and then the property was sold. Defendant No.1 has denied that it was Khidmat Mash, service inam. It is contended that the defendant No.1

has been in possession for more than 25 years of the suit property as the owner.

10. It is the case of the defendant No.1 that the suit property was owned by Smt. Umdabegum and one Tuljasing was the protected tenant of this land. It is contended that one Udaram Belaram, a migrant from Pakistan got the suit land from RCC Mumbai. It is contended that on 8-7-1965 one Radhesham purchased entire survey No.327 admeasuring 25 acres 21 gunthas from Udaram Belaram and that was done after getting permission of revenue authority. It is contended that one Baburao then purchased Survey No.327 from Radhesham under sale deed on 26-7-1968 and from him defendant No.2, Gulabchand purchased Survey No.327 under registered sale deed dated 18-4-1975. It is contended that the suit property is the part and parcel of land Survey No.327 and so the defendant No.1 has become owner of the suit property.

11. Plaintiff and defendant No.1 gave evidence before the Tribunal. The Tribunal has held that Survey No.327 was service inam land and it was given by the donor for rendering services to the mosque and Dargah under Muntakhab of the year 1296 Fasli (1887 AD). The Tribunal has held that the Masjid and Dargah, institution was registered as wakf on 26-9-1960 though it was in existence from prior to that date and Survey Nos.326 and 327 were notified as properties belonging to these institutions. The Tribunal has observed that there were Government Gazettes dated 27-10-1966 and 21-6-1973 declaring that the properties belong to Masjid and Dargah. The Tribunal has held that the entry of Inam as Astanik Inam was continued in revenue record even after many years of implementation of Inam Abolition Act. This circumstance shows that there was no abolition of Inam.

12. The Tribunal has held that defendant No.1 failed to prove that it was madadmash and there is aforesaid record. The Tribunal has held that defendant No.1 has failed to prove that inam was abolished. The Tribunal has held that the record of allotment of Survey No.327 to the Udaram as Nirvasit is not produced and the entry made in Khalsa record about such allotment is doubtful. The Tribunal has held that there is no record of giving permission by revenue authority for transfer of the land by Udaram. By making aforesaid observations and giving the finding accordingly the Tribunal held that sale deeds made in respect of the suit properties are null and void and it is held that these transactions and the record if any created under the Administration of Evacuee Property Act, 1950 has not changed the nature of the property which is a wakf.

13. In the pleadings, in Written Statement, there is inconsistency and different stands are taken by defendant No.1. In the present proceeding, learned counsel for the defendant No.1 submitted that when there is pleadings that RCC Mumbai had given the land to Udaram Belaram, this needs to be taken as the main defence of defendant No.1. Learned counsel submitted that in view of the provisions of the Administration of Evacuee Property Act, 1950 (hereinafter referred to as "Evacuee Property Act"), it is not open to the plaintiff to contend that the suit property is wakf property. Learned counsel submitted that the

provisions of the Limitation Act need to be considered and as the orders of authority were not challenged within limitation, the suit is not within limitation. Learned counsel further submitted that for the person like Udaram or the present petitioner, defendant No.1, it was not necessary to challenge the entry made in the register of wakf as they are not Muslims, they are Hindus. Some record is produced along with Misc. Application which is in respect of some orders made under the Evacuee Property Act. As most of the aforesaid submissions made by the learned counsel for defendant No.1, petitioner, are on law point, this Court is considering those submissions and also the record produced in the present proceeding.

14. Copy of Muntakhab is produced on the record by defendant No.1 herself. There is no dispute about existence of such Muntakhab and the contents of this Muntakhab are already interpreted in one proceeding by this Court and on the basis of that interpretation said matter was decided in favour of the Jama Masjid. These circumstances also need to be considered while considering the rival contentions.

15. Copy of Muntakhab of year 1284 Fasli (1875 AD) is on the record. This document shows that 50 Biga land of Kasba Jalna, Tahsil Jalna along with other lands was given for rendering service to Dargah and Mouzzani. In the same Muntakhab there is mention that there was prior dedication of 50 biga land from Kasba Jalna for the same purpose. Thus there was around 100 biga land from Kasba Jalnapur given under Muntakhab and it was for the aforesaid purposes.The condition of the grant is described as "Madad Mash, service Dargah and Mouzzani".

16. The contents of the grant and the revenue record and the existence of aforesaid religious institutions show that the purpose behind the aforesaid grant was to render services to the religious institutions like Dargah and for Mouzzani. Though there is mention like it was ''madad mash'', the fact remains that the grants were for rendering services to religious institutions. When there is dedication for rendering service of religious institution such dedication needs to be presumed as permanent dedication for religious purpose and so the property was given as wakf. In Civil Revision Application No.200/2004, which was between Gulam and Abdul, this Court has interpreted aforesaid Muntakhab in the same way. The other property mentioned in it was involved in the said proceeding.

17. Under the provisions of the Inam Abolition Act, the personal Inam, Madad mash could have been abolished but not the service inam. Further, there is no record to show that some proceeding was started by the lady to whom the grant was given or by the other Inamdar under the said Act or notice of that proceeding was given to Inamdars. On the other hand, the religious institution had taken steps to see that Survey No.327 was shown as property of mosque in the year 1960. There is such record available.

18. There is copy of Maharashtra State Government Gazette dated 27-10-1960

and it shows that the committee of aforesaid Jama Masjid had applied for registration of Survey No.327 as wakf property of Masjid. In the Gazette, objections were called by issuing notification and that was in respect of both survey numbers viz Survey Nos.326 and 327. Though objections were called nobody including Udaram had taken objection. In the revenue record, Tuljasing was shown as protected tenant but if the property was service inam, consequences of the Hyderabad Tenancy and Agriculture Lands Act cannot be considered. Defendant No.1 is relying on one entry made in one register of Inam Abolition Act. In remarks column, column No.19, there is remark as "stayed". It can be said that at present there is some record with defendant No.1, which is now produced, and it shows that to Udaram allotment of Survey Nos.326 and 327 was made under the Evacuee Property Act. However, there is remark as mentioned above in the record.

19. There is copy of State Government Gazette dated 21-6-1973 and it shows that Survey No.327 was shown as property of Jama Masjid and grave yard. Thus in the year 1960 and subsequent to that year, the property was shown as property of Jama Masjid, Wakf and nobody had taken steps to object to that entry. In view of these circumstances, it can be said that defendant No.1 wants to rely only on the provisions of Evacuee Property Act and the orders made under said Act. The provisions of the Evacuee Property Act can be considered but for that one needs to keep in mind that there is very old Muntakhab showing that the suit property was a wakf from prior to 1960 and steps were taken to see that it was registered as a property of mosque and even in Government Gazettes of 1960 and 1973 the property was notified as a wakf. These entries were made on the basis of Muntakhab. The entries in the revenue record and the wakf register were made on the basis of Muntakhab and so they have relevance.

20. In the present proceeding certified copies of orders made under the Evacuee Property Act are produced and they show that on 30-10-1956 Survey Nos.324 to 327 of village Jalna were declared as evacuee property and they were vested in the custodian from that date. Learned counsel for the petitioner took this Court through some provisions of Evacuee Interest (Separation) Act 1951 and submitted that it was composite interest and decision from that angle was also taken.

21. The record produced before the Wakf Tribunal and in the present proceeding show that panchanama was drawn to show that possession of Survey No.327 was taken on 16-4-1957 under the provisions of the Evacuee Property Act. There is record created under the provisions of the Hyderabad Tenancy and Agricultural Land Act also and it shows that one Tuljasing was declared as protected tenant under the provision of Section 38-E of this Act and Survey Nos.324 to 327 were with him. The record shows that on 19-11-1956 first instalment of purchase price was paid to Umdabegum, Inamdar, before the tenancy Court. Then there is correspondence made by the Collector under the Evacuee Property Act with tenancy Court dated 13-9-1958. The correspondence was made to the effect that

Udaram Belaram was allotted this property under Evacuee Property Act. There are copies of applications made by Udaram complaining that Tuljasing was in possession of 56 acres 24 gunthas land illegally (comprising of Survey Nos.324 to 327) but he cannot be treated as protected tenant as the property was of evacuee.

22. Due to aforesaid record it can be said that declaration was made under Evacuee Property Act on 30- 10-1956 and the suit property was probably allotted to Udaram. Udaram had filed proceeding on 14-4-1959 before the Collector to get possession of 24 acres of land. Though there is no record about the result of that proceeding, it can be said that Udaram had got possession under Evacuee Property Act of Survey No.327.

23. Even if the aforesaid record is considered and accepted in favour of Udaram and also in favour of the present petitioner, the decision of the present matter cannot change. Provision of section 11 of the Evacuee Property Act shows that the suit property could not have been allotted to Udaram to give him ownership of the property. Provision of section 11(1) of Evacuee Property Act runs as under :-

"11. Special provisions with respect to certain trust properties. - (1) Where any evacuee property which has vested in the Custodian is property in trust for a public purpose of a religious or charitable nature, it shall be lawful for Central Government, notwithstanding anything contained in the instrument of trust or any law for the time being in force, to appoint, by general or special order, new trustees in place of the evacuee trustees and the property shall remain vested in the Custodian only until such time as the new trustees are so appointed; and pending the appointment of such new trustees, the trust property and the income thereof shall be applied by the Custodian for fulfilling, as far as possible, the purpose of the trust." 24. The aforesaid provision is sufficient to show that Udaram could not have become owner even if there was allotment of suit property in his favour. For making allotment under Evacuee Property Act, it was necessary to have finding that suit property was not wakf property. There was no jurisdiction with the authority created under the Evacuee Property Act to give finding on this disputed point. Thus, even if there was the order of allotment of suit property in favour of Udaram that order was void. At the cost of repetition it needs to be mentioned that there was the record like entries made in revenue record and the Muntakhab which must have been mentioned in the register maintained for that purpose. If such record was there with the Government, order could not have been made under the Evacuee Property Act to give ownership to Udaram. As learned counsel for the petitioner has referred to the provisions of Evacuee Interests (Separation) Act, 1951, the provisions of this Act also can be seen. The object behind this Act was altogether different. When religious institution was the owner of the property, rights of Inamdar to take income for rendering services to the religious institutions could not have been separated under this Act. Thus, it was not possible to give declaration in respect of the suit property under the Evacuee Property Act.

25. Wakf Act 1954 was applicable to the suit property. Provision of Section 6 of this Act with explanation which was added in the year 1969, shows that person like Udaram was covered by this provision. The dispute was with regard to nature of property and it could have been raised by Udaram or his successors after publishing the aforesaid notice in official gazette in the year 1960. It needs to be observed here that Udaram could not have got anything in view of the record which is available in respect of the suit property.

26. In view of the aforesaid provisions of law and the record produced by the petitioner it can be said that Udaram got the possession from the authority created under the Evacuee Property Act and his possession was permissive in nature. The authority created under the Evacuee Property Act was the custodian and it was acting as a trustee of the Masjid for some time as the property under Evacuee Property Act. Thus, the authority had no power to make allotment of the suit property to Udaram. Thus, Udaram never got right of ownership in the suit property though he got possession from the authority. In view of these circumstances, there was no question of passing of ownership rights by Udaram to anybody. Thus, the title of the true owner, religious institution, Masjid, did not extinguish due to the order made by the authority under the Evacuee Property Act or due to sale deeds made subsequent to that order by Udaram or others.

27. The provision of section 7-A of the Evacuee Property Act runs as under :

"7A. Property not to be declared evacuee property on or after 7th May, 1954. - Notwithstanding anything contained in this Act, no property shall be declared to be evacuee property on or after the 7th day of May, 1954: Provided that nothing contained in this section shall apply to -

(a) any property in respect of which proceedings are pending on the 7th day of May, 1954 for declaring such property to be evacuee property; and

(b) the property of any person who, on account of the setting up of the Dominions of India and Pakistan or on account of civil disturbances or the fear of such disturbances had left on or after the 1st day of March, 1947, any place now forming part of India, and who on the 7th day of May, 1954, was resident of Pakistan;

Provided further that no notice under section 7 for declaring any property to be evacuee property with reference to clause (b) of the preceding proviso shall be issued after the expiry of six months from the commencement of the Administration of Evacuee Property (Amendment) Act, 1954 (42 of 1954).

Explanation I.- A person shall be deemed to have been resident in Pakistan on the 7th day of May, 1954, within the meaning of clause (b) of the first proviso, if he was ordinarily residing in Pakistan before that date, notwithstanding that he was temporarily absent from Pakistan on that date.

Explanation II.- A person who had left India for Pakistan before the 7th day of May, 1954, on the authority of a passport or any other valid travel document issued by any competent authority in India, and who was temporarily residing in Pakistan on that date, shall not be deemed to have been resident of Pakistan on that date within the meaning of clause (b) of the first proviso.

Explanation III.- A person who had left Pakistan for India on or after the 18th day of July, 1948, and who was in India on the 7th day of May, 1954, shall, unless he came to India under a valid permit for permanent return or for permanent resettlement, issued sunder the Influx from Pakistan (Control) Act, 1949 (23 of 1949), be deemed to have been resident in Pakistan on the 7th day of May, 1954, within the meaning of clause (b) of the first proviso."

The declaration if any in respect of the suit property under Evacuee Property Act was made on 30-10-1956 i.e. after the prescribed date which was 7-5-1954. In view of aforesaid provision the declaration made in the present matter on 30-10-1956 was void. Even if it is presumed that the proceeding was already started, and the Government had taken possession of the suit property and the Government was custodian of the property then it was holding it for the real owner, the mosque and Dargah. Thus from other angle also the authority under the Evacuee Property Act could not have made such order.

28. The learned counsel for the petitioner placed reliance on a case reported as 1988 Mah LR 764 (Narayan v. Trimbakrao). This Court has observed that when suit is based on title, the only defence open to the defendant is of adverse possession. There cannot be any dispute over this proposition. On the other hand learned counsel for the respondent has placed reliance on a case reported as AIR 2014 SC 937 (Union of India v. Vasai Cooperative Housing Society Ltd.). In this case the Apex Court has made it clear that in a suit for ejectment based on title it is incumbent on the part of the court to first record a finding on the claim of title to the suit land the onus to prove title is on the plaintiff. There cannot any dispute over this proposition also. Learned counsel for defendant No.1 placed reliance on one case reported as AIR 2007 Bombay 454 (Joe Shera Rauf v. Umesh Durgashankar Shroff) and submitted that in view of the orders of the authorities made under the provisions of Evacuee Property Act there is bar of jurisdiction to suit like present one. There is no dispute over this proposition in the case but the principles of res judicata need to be considered for making the ratio applicable. This Court has already observed that under the Evacuee Property Act no order in favour of Udaram could have been made and so that order needs to be treated as void ab initio. There was no question of using res judicata in favour of Udaram or present petitioner.

29. Learned counsel for the petitioner placed reliance on a case reported as 2008 (5) All MR 462 (SC) (T.Kalimurty v. Five Gori Thaikal Wakf) In this case the Apex Court has held that provisions of Limitation Act 1963 are prospective and if the period of limitation had already expired in view of the provisions of the old Act, it needs to be presumed that the proceeding filed subsequently was time barred.

There cannot be dispute over this proposition also. In the present case there is no need to use provision of section 107 of the Wakf Act. Reasons for the same are already discussed.

30. Learned counsel for the petitioner placed reliance on another case reported as AIR 1951 SC 459 (Collector of Bombay v. Bombay Municipal Corporation). Facts of the reported case were altogether different. Dispute was also between different persons and in that context the provisions were discussed. In that case the owner had migrated to Pakistan. In the present matter the owner of the suit land is religious institution, mosque and it was still in India. There is specific provision under the Evacuee Property Act to take care of the property of such religious institution. So the observations made by the Apex Court in this reported case are of no use to the present petitioner.

31. The entry in the revenue record of the suit property shows that even at present the property is shown as inam land. Thus, on one hand, there is no record to show that permission was obtained by Udaram to sell property under any Act, and, on the other hand, there is still entry in the revenue record that it is inam land. Due to this entry, it needs to be presumed that Udaram and the purchasers knew that the property is dedicated to Masjid and it is wakf. In view of this circumstance it was necessary for the persons concerned to take steps if they wanted to assert some right against the religious institution. The facts of the present case show that defendant No.1 sold the suit property to third party even when she had lost the matter before the Tribunal. This Court had made some orders like status quo and in spite of existence of such orders the property was transferred. Thus it needs to be presumed that the property is wakf and everybody knew it and they took the risk. In view of these circumstances, this Court did not allow the new purchasers to argue by stepping in the shoes of defendant No.1. There is record to show that purchaser knew that there was such order made by this Court. In any case, in the proceeding like revision there was no scope to the new purchaser to make submission independently. Separate proceeding is filed for contempt, and that can be dealt with separately after decision of the present matter. In view of the aforesaid discussion, this Court sees no reason to interfere in the decision given by the Tribunal.

32. In the result the revision stands dismissed. All civil applications are disposed of. Separate circulation can be taken by the concerned in respect of the contempt petition.

