

(2015) 07 BOM CK 0142
In the Bombay High Court
Case No : CRA No. 10 of 2013

Syed Muzafaruddin and Others

APPELLANT

Vs

Syed Zeenat Bee and Others

RESPONDENT

Date of Decision : 20-07-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 10, Order 7 Rule 11
Waqf Act, 1995 — Section 83(1), 85

Citation : (2016) 2 BomCR 402 : (2015) 6 MhLj 378

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

Bench : Single Bench

Advocate : Khan M. A., for the Appellant; S.S. Kazi, Advocates for the Respondent

Final Decision : Dismissed

Judgement

T.V. Nalawade, J—The proceeding is filed to challenge the judgment and order of Wakf Suit No. 23 of 2007, which was pending before the learned Presiding Officer of Maharashtra Wakf Tribunal, Aurangabad. The suit filed by Respondent Nos. 1 to 3 for reliefs of declaration that they are Inamdars of Service Inam Lands, they are in possession of the lands and for relief of injunction to protect their possession and also for relief of injunction to prevent the defendants from alienating the suit properties in any way, is decided partly in their favour. Alternative relief was claimed of possession if the Tribunal was not convinced with the case of their possession. The relief of possession is given by the Tribunal in respect of one of the suit properties. The relief is rejected in respect of other property (Survey No. 50). The Tribunal has directed the Wakf Board to take over survey No. 50 under its supervision. Relief of injunction is refused as the plaintiffs were not found in possession of Survey No. 166/4 in respect of which the relief of possession is given. Both the sides are heard. Learned counsel for Wakf Board has supported the decision. The plaintiffs have not challenged the judgment though no relief is granted in respect of Survey No. 50.

2. Survey No. 50 admeasures 22 Acres and 26 Gunths and Survey No. 166/4 admeasures 13 Acres 15 Gunthas. Both the properties are situated at Vaijapur town, district Aurangabad. It is the case of the plaintiffs that these two suit lands and other lands like remaining portions of Survey No. 166 (remaining 6 sub divisions) and all sub divisions of Survey No. 167 are Service Inam Lands granted to their predecessor more than 100 years prior to the date of the suit. Itr is contended that the predecessors of plaintiffs and defendants were expected to render service of Moajani of Jama Masjid, Vaijapur by enjoying the income from these properties and so these are Wakf properties.

3. It is the case of the plaintiffs that they are Shikmidar and they are rendering service to Jama Masjid accordingly. They have admitted that defendants are also Shikmidars, servitors as they are also descendants of the predecessor of plaintiffs to whom the grant was given. it is the case of the plaintiffs that Anewari has been done and from the income of the suit properties they are maintaining their families.

4. Plaintiffs had given the pedigree in the suit and they had mentioned the common ancestor as Syed Meer Hasham. Syed Meer Hasham left behind 3 sons like Syed Gulam, Syed Ahmed and Syed Chand. It is contended that the defendants are some of the descendants of Syed Gulam, one Fatimabee was the descendant of Syed Ahmed and the plaintiffs are the descendants of Syed Chand.

5. One so called tenant was made formal party in the suit but on the date of the suit he was not in possession, according to the plaintiffs. It is contended that each of the three branches, who succeeded the property from Syed Meer Hasham had 5 Annas 4 Pais share in aforesaid three properties like Survey No. 50, Survey No. 166 and Survey No. 167. It appears that as Gulam Husain was the eldest, he acted as Sahab-e-Muntaqab and so for sometime Sand in respect of Service Inam was in the name of Gulam Husain. It is contended that when Anewari was done and shares were defined of Shikmidars, Syed Chand, the predecessor of plaintiffs got Survey No. 166/4. It is contended that Syed Ahmed got Survey No. 50 and his last descendant Syed Fatimabee died issueless. It is contended that as Syed Gulam got 5 Annas 4 Pais share this portion was divided amongst the descendants of Syed Gulam and they include Syed Gayasuddin (who is examined as a witness in the suit). The years in which the predecessors in title of the plaintiffs and defendant died are given in the suit. There is not much dispute over the aforesaid pedigree and the contention that Syed Meer Hasham can be treated as Muntaqab holder.

6. It is the case of the plaintiffs that after the death of their predecessor in title Syed Meer, behind back of the plaintiffs, the present petitioners filed proceeding before Atiyat Court, Vaijapur and by making false contentions they represented themselves as the successors of Syed Meer and they obtained succession certificate. It is contended that the plaintiffs have also filed a proceeding for succession certificate before Atiyat Court and the said proceeding is still pending. It is contended that even in the proceeding which was filed before the Atiyat

Court present petitioners had admitted that Survey No. 166/4 was given to Syed Chand and then to Syed Meer and it was admitted that Survey No. 50 was initially given to Syed Ahmed but false contentions were made that son of Syed Chand viz. Syed Meer has not left any heir and similarly Syed Ahmed has not left any heir. It is contended that even Gayasuddin, other descendant of Syed Gulam was not mentioned in the aforesaid proceeding and one civil litigation is pending between Gayasuddin and the present petitioners. It is contended that Fatimabee, descendant of Syed Ahmed had filed a proceeding for succession certificate in respect of land Survey No. 50 before the Atiyat Court and this proceeding was contested by the predecessor of present petitioners but Fatimabee succeeded in getting succession certificate. It is contended that one civil suit was filed against Fatimabee in respect of Survey No. 50 but the suit was also dismissed and the said decision is not challenged by the present petitioners. It is contended that Survey No. 50 was in possession of one B.K. Warma as Fatimabee had given this land for cultivation to Warma and the name of Fatimabee was also entered in the record of rights of this survey number.

7. It is the case of plaintiffs that behind their back orders were obtained by present petitioners like succession certificate and possession order in respect of Survey No. 166/4 and Survey No. 50 and the possession of these two lands was obtained by the present petitioners. It is contended that by using the record, which was created by making false representation, the present petitioners, defendants are attempting to alienate the property by laying plots, by developing the property.

8. It is the case of the plaintiffs that till the year 1985 plaintiffs were cultivating land Survey No. 166/4 but then the plaintiff, who was cultivating the land, became sick and the defendants misused this circumstance.

9. It appears that in the past suits were filed in respect of aforesaid 2 suit properties by plaintiffs but the defendants, petitioners took objection under Order 7 Rule 10 and 11 of Civil Procedure Code about the jurisdiction of civil Court and this point was decided by civil Court against the plaintiffs and the complaints were returned.

10. Defendant No. 4, one of the Petitioners contested the suit by filing written statement. He denied aforesaid contentions of the plaintiffs. However, defendants admitted that the suit properties are Wakf Properties and they were given as service inam for rendering service of Moajani to Jama Masjid, Vaijapur. It is contended that plaintiffs are not servitors of Jama Masjid and they never rendered service to Jama Masjid of any kind. The defendants, however, admitted that as the lands were service inam lands, the heirs of the original Muntaqab holder get the rights in inam property by rule of succession. However, they contended that as they are service inam lands they cannot be divided as per Anewari. They contended that the aforesaid three survey numbers were never subdivided.

11. Defendants contended that Survey No. 166/4 was never conferred on Syed Chand. They further contended that the plaintiffs are not the descendants of Syed Chand. They also disputed that Survey No50 was given to Syed Ahmed and then Fatimabee got it as descendant of Syed Ahmed. The defendants, however, admitted that Syed Qudrat Ali or Syed Sirajuddin are from branch of Syed Gulam. It was not disputed that Syed Gaysuddin is also from the branch of Syed Gulam.

12. The defendants contended that the Wakf Tribunal has no jurisdiction to decide the dispute involved in the suit. They contended that Atiyat Court had given succession certificate to them and so they are entitled to hold and use the land as the Inamdars for rendering aforesaid service. They contended that when the previous plaints were returned due to want of jurisdiction by civil Court, the fresh suits were not tenable before the Wakf Tribunal. Similar written statement was filed by remaining defendants (defendant Nos. 1 to 3).

13. The Wakf Board did not file written statement. it appears that the Wakf Board is supporting the case of plaintiffs. Before this Court also the learned counsel for Wakf Board supported the decision of Wakf Tribunal.

14. As many as 21 issues were framed by Wakf Tribunal. Though so many issues were framed, the learned counsel for the present petitioners (original defendant Nos. 1 to 4) submitted that following points need to be decided for decision of the dispute.

(i) Whether Wakf Tribunal has jurisdiction to decide the dispute when Atiyat Court has given succession certificate in favour of the defendants?

(ii) Whether the contention of partition of Inam Property can be accepted when the property cannot be partitioned and whether the possession can be given to plaintiffs?

(iii) Whether the Shikmidars can get separate possession when defendants are the direct descendants of Gulam Husain, who was eldest and who was Sahab-e-Muntaqab after the death of Syed Meer Hasham.

15. For deciding aforesaid points, this Court has perused the evidence, both oral and documentary, given before the Wakf Tribunal by the two sides. On preponderance of probabilities, following things are established:

(i) The succession was granted to the predecessor of plaintiffs and defendants long back, after the death Syed Meer Hasham, the common ancestor of the parties. There is revenue record to show that in the year 1359 Fasli (1950 A.D.) succession was sanctioned in favour of the three branches, left behind by Syed Meer Hashm and each branch was given share to the extent of 5 Annas 4 Paise.

(ii) There is a record to show that even the plaintiffs had challenged the succession granted in favour of Fatimabee but Fatimabee succeeded and it is declared that she is given Survey No. 50. Atiyat Court has given declaration in

her favour and civil Court has also given decision in her favour in respect of Survey No. 50.

(iii) In the proceeding filed before Atiyat Court the present petitioners, defendants had admitted that Survey No. 166/4 had gone to the share of Syed Chand, the predecessor of the plaintiffs and they had admitted that Survey No. 50 had gone to the share of Syed Ahmed, the predecessor of Fatimabee. They had, however, made false contentions that no heir was left in the branch of Syed Ahmed and they were the successors of Syed Chand and then of Syed Meer. Under Personal Law of the parties, present petitioners could not have succeeded to this property as they are from different branch.

(iv) The evidence of Gayasuddin, who is from the branch of present petitioners, shows that he is supporting the case of plaintiffs though he has admitted that after the decision of Atiyat Court the plaintiffs got possession of the suit properties. He himself got separate survey numbers after sub divisions of survey numbers. His evidence shows that Qudrat Ali, another sharer from the branch of present petitioners, got separate possession of sub divisions like Survey No. 166/2, 166/3, 166/7. Record to that effect is produced.

(v) A litigation was pending between Syed Gayasuddin and the present petitioners, the sharers of the same branch and in that proceeding properties like Survey No. 166/4 and 50 were not involved as the properties of their branch. From these circumstances it can be said that present petitioners had no grievance about the contention that these properties had not gone to the branch of Syed Gulam Husain, the predecessor of present petitioners.

16. The petitioners are relying on so called order made by the then King in the year 1335 Fasli (1926 A.D.) to show that the person entitled to work as Mutawalli has a right to keep 1/3rd share of the income, 1/3rd share needs to be utilised for rendering services to Masjid and 1/3rd income can be distributed amongst Shikmidars. On the basis of this order, it was submitted that the plaintiffs can get only the share in the income of the properties and they cannot get separate possession and enjoyment of suit properties. When the parties themselves had gone for the division of the properties and aforesaid shares were created for three different branches of the common ancestor Syed Meer Hasham, it is not open to the present petitioners to say that the plaintiffs are not entitled to separate possession of Survey No. 166/4.

17. There is no record whatsoever with the present petitioners, defendants to show that they had maintained accounts of the income of all the Wakf properties which were given for rendering service to the mosque and they had given the shares from the income to Shikmidars.

18. The present petitioners, defendants, have produced some record of electricity bills and the receipts in respect of the payment made towards Wakf fund but this record was created after starting of the dispute. The Wakf Tribunal has rightly held that not much weight can be given to such record. In any case, in the

present proceeding the right of rendering service to Masjid as Mutawalli is not directly involved. it is up to the Wakf Board to look into the matter and see that the income from the aforesaid properties is utilised for rendering service to the mosque.

19. The present petitioners, defendants are not disputing that the plaintiffs are Shikmidars. The petitioners are contending that they are Mutawalli as per the custom. The undisputed pedigree shows that present petitioners cannot be called as the Eldest descendants from their branch. Thus, the petitioners, defendants also need to be called as Shikmidars and so they cannot claim the right to possess all the properties given as Wakf.

20. There is a revenue record to show that in the crop cultivation column, the name of the defendants, present petitioners came to be entered only after getting the orders from Atiyat Court. It can be said that initially the names of the descendants of Syed Meer Hasham were entered in the column of owners, persons enjoying the property but after coming into force of Wakf Act the name of Jama Masjid came to be entered and the names of the descendants of Syed Meer Hasham came to be entered in other rights column. From those entries it cannot be said that any particular descendant of Syed Meer Hashm was given priority as Mutawalli.

21. The original plaintiffs have not challenged the decision of Wakf Tribunal which is given in respect of Survey No. 50. In any case, the evidence on the record shows that Survey No. 50 had gone to the share of the branch of Syed Ahmed of which Fatimabee was the descendant and who died issueless. As there is no successor left in this branch, all other Shikmidars need to be considered if this property is to be given to the remaining Shikmidars. That is the point which needs to be decided by Wakf Board. It appears that, as the petitioners cannot claim themselves as the only successors of Fatimabee they cannot keep the possession of Survey No. 50. Thus, the Tribunal has rightly directed the Wakf Board to take over the possession of Survey No. 50 and manage that property.

22. After considering the factual aspects, let us see the position of law. The learned counsel for the petitioners submitted that the Wakf Tribunal has no power to decide the dispute of present nature. He submitted that when Atiyat Court has decided the matter in favour of present petitioners, in view of the provisions of Atiyat Act the Wakf Tribunal ought not to have given such decision. In this regard, the relevant provisions of Atiyat Act and also the provisions of Wakf Act, 1995 need to be seen.

23. Section 7 of Atiyat Act runs as under:

"7. Succession :

Subject to the provisions of this Act, succession to Atiyat grants shall, after the commencement of this Act, be regulated by the personal law applicable to the last holder."

This provision shows that succession to Atiyat grants are regulated by Personal Law of the parties and for that rights of the last holder need to be considered.

24. This Court has considered the undisputed pedigree and the rights of the last holder. The provision of section 12 of Atiyat Act runs, as under:

"12. Decision of Civil Courts to prevail on questions of succession, legitimacy, etc :

1) In so far as question of succession, legitimacy, divorce or other questions of personal law are concerned, the final decision of a Civil Court shall be given effect to by the Atiyat Court established under this Act on the decision being brought to its notice by the party concerned or otherwise irrespective of whether the decision of the Atiyat Court was given before or after the decision of the Civil Court.

2) If in the course of any inquiry as to claims to succession, any dispute arises involving questions of succession, legitimacy, divorce or other questions of personal law, the Atiyat Court shall direct the parties to get the dispute decided in the competent Civil Court. On the production of the final decision of Civil Court, the Atiyat Court shall give effect to such decision.

This provision has made it clear that the decision of Civil Court will prevail on the questions of succession. This Court has already made discussion about the decision of civil Court given in favour of Fatimabee.

25. Section 85 of Wakf Act, 1995 runs, as under:

"85. Bar of jurisdiction of Civil Court, revenue Court and any other authority. -No suit or other legal proceeding shall lie in any Civil Court, Revenue Court and any other authority in respect of any dispute, question or other matter relating to any Waqf, Waqf property or other matter which is required by or under this Act to be determined by a Tribunal.

Section 83(1), (2), (5), (7) and (8) run, as under:

"83. Constitution of Tribunals, etc. -

(1) The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a waqf or waqf property, eviction of a tenant or determination of rights and obligations of the lessor and the lessee of such property, under this Act and define the local limits and jurisdiction of such Tribunal;

(2) Any Mutawalli, person interested in a waqf or any other persons aggrieved by an order made under this Act, or rules made thereunder, may make an application within the time specified in this Act or where no such time has been specified, within such time as may be prescribed, to the Tribunal for the determination of any dispute, question or other matter relating to the waqf.

(3)...

(4)...

(5) The Tribunal shall be deemed to be a Civil Court and shall have the same powers as may be exercised by a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, or executing a decree or order.

(6)...

(7) The decision of the Tribunal shall be final and binding upon the parties to the application and it shall have the force of a decree made by a Civil Court.

(8) The execution of any decision of the Tribunal shall be made by the Civil Court to which such decision is sent for execution in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908)."

26. Aforesaid provisions show that the powers of Civil Court are vested with the Wakf Tribunal. The provisions also show that the suit of the present nature, the suit filed for declaration of rights by Shikmidars and for enforcement of their rights can be entertained by Wakf Tribunal and the decision of Wakf Tribunal needs to be treated as the decision of civil Court.

27. The Wakf Tribunal has relied on the decision given by Apex Court in the case reported as "Board of Waqfs West Bengal V/s Anees Fatima Begum" 2010 All SCR 2690. This Court has already referred the relevant provisions of both the Acts. This Court has no hesitation to hold that the Tribunal has not committed any error in deciding the suit in aforesaid way. Thus, all the points on which the decision of the Tribunal was challenged are decided accordingly. No need is felt to interfere in the decision of the learned Tribunal.

28. In the result, the application stands dismissed.