

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CIVIL REVISION APPLICATION NO. 65 of 2022

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CHIEF PROJECT MANAGER

Versus

Firoz SAHEB DARGAH THROUGH TRUSTEE SHAIKH ONALI
ISMAILJI VISAWAARVALA

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Appearance:

MR KM PARIKH(575) for the Applicant(s) No. 1

MR. JAYNEEL PARIKH, ASST. GOVERNMENT PLEADER for the
Opponent(s) No. 2

MR ANUJ K TRIVEDI(6251) for the Opponent(s) No. 5

MR MANISH S SHAH(5859) for the Opponent(s) No. 6

MR. AUM M KOTWAL(7320) for the Opponent(s) No. 1

NOTICE SERVED BY DS for the Opponent(s) No. 3,4

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CORAM:HONOURABLE MR. JUSTICE UMESH A. TRIVEDI

Date : 05/05/2022

ORAL ORDER

[1] By way of this revision application, the applicant - original defendant No.1 in the Waqf Suit No.10 of 2018, challenged the order passed below Exhibit - 6, dated 16.09.2021, by the Gujarat State Waqf Tribunal (for short 'the Tribunal'), whereby application Exhibit-6 filed by respondent No.1 herein praying for restraining applicant, their servants, agents, Engineers etc., from damaging the suit property as also not to interfere with the entry of the Trustees, Administrators, persons or the Devotees of a particular community, which came to be allowed as also at the same time, 'the Tribunal' directed the applicant to first obtain permission under Section 91 of

the Waqf Act, 1995 (for short 'the Act') from the Waqf Board, and proceed for acquisition of a land, and thereafter carry out the further action over it.

[2] The brief facts of the case, as obtained from the plaint filed by one Shaikh Onali Ismailji (Visawadarwala) as a Trustee of "Piroj Saheb ni Dargah", ("Piroj" is corrected to be "Firoz" without any initial in the Waqf suit) against the applicant, the Collector, Chief Town Planner, Town Planner, Commissioner of Ahmedabad Municipal Corporation as also Gujarat State Waqf Board, purportedly filed under Section 83(1) of 'the Act' and under the provisions of Waqf Property Lease Rules, 2014, are as under:

[2.1] In the said suit, a prayer came to be made that a suit property situated at District Sub-District - Ahmedabad, Taluka - Maninagar, Village - Rajpur - Hirpur, bearing Survey Nos.82 & 83 falling under T.P. Scheme No.16, (which is shown to be at present Saherkotda T.P. Scheme No.16), admeasuring 1315+505 sq. mtrs land and constructed Dargah. Map of which as per the measurement taken and the said map be taken on record and same be entered with name and area thereof in the revenue record. However, during the pendency of the said Waqf suit, an application purportedly under Order VI Rule 17 of Civil Procedure Code (for short 'the Code') vide Exhibit - 23 came to be filed on 30.04.2019 for seeking amendment

in the prayer clause vide para-8, (8-1), as mentioned in the amendment application. By the said amendment, permanent injunction, as aforesaid, injuncting applicant No.1 herein from making any temporary or permanent construction and not damaging any movable or immovable property of the Waqf Trust either from inside or outside and making any hindrance to the ingress and egress over the said property. As pleaded in the suit, though not claimed that "Firoz Saheb ni Dargah" is a Waqf, that too, registered as such in any record. The respondent No.1 herein i.e. Shaikh Onali Ismailji (Visawadarwala) claims to be trustee of that Trust in the name of "Firoz Saheb ni Dargah", however, no number of said registered trust, either under the Bombay Public Trust Act or under 'the Act', is mentioned in the plaint itself as also in the application Exhibit-6. However, by showing survey number, suit property is defined along with the area admeasuring approximately 1820 sq. mtrs, falling within T.P.Scheme No.16 of Saherkotda, Ahmedabad. It is claimed in the suit that in the revenue record under 7/12 abstract, name of "Firoz Saheb ni Dargah" is reflected since years. It is further asserted in the suit that in and around the Dargah, there are four constructions and in the said Dargah there are so many devotees regularly visiting and on occasion there is a big *julus* (congregation).

[2.2] It is further asserted in the suit that suit property is not shown in either city survey, municipal corporation or even record of

Talati and even in any map and it is not available in any of the office. It is further asserted that railway yard and railway map, which is shown, because of which, the rights of the plaintiff is not found in the record as also the maps. Therefore, as asserted in the plaint, the plaintiff is having, as a proof of ownership, revenue record in the nature of 7/12 abstract as also map after measurement by DILR and copy of PTR, which is registered in the year 1952.

[2.3] It is further claimed in the Waqf suit that new railway track being laid, is passing through the property of the waqf and it causes hindrance to the person, who come to offer prayer at the Dargah, then if railway is permitted to do so it may cause even accident in future. It is further asserted in the suit that the railway authorities of their own without discussing with them prepared the map and a copy was given to the plaintiff whereby, according to the map, the Dargah and the property comes between two railway tracks. Therefore, a suit came to be filed with a prayer to bring on record the maps. It is further asserted in the suit that just adjacent to the property, there is a railway track, and therefore, it may affect their rights in the property, and therefore, a suit on the basis of maps with them, filed praying to replace in the record of all the concerned Government, semi-Government offices but it has not been done, and therefore, a suit came to be filed.

[2.4] After the aforesaid suit came to be filed, an ad-interim injunction came to be granted and notices came to be issued to the defendants in the Waqf suit. On service of the summons of the suit, railway authorities appeared and they filed their reply also. According to the reply, the suit property, as claimed by the plaintiff, is within the railway boundary and in the railway property. It is further the case of the applicant, in its written statement filed before the Tribunal that the land in question is a railway land since long time and the present project of laying down 3rd broad gauge line, is a project of Government of India and the project was commenced after obtaining proper sanctions from the competent authorities. It is further asserted in the written statement by the applicant that the said project was in the interest of the public at large and in the National Interest for the development of the Country. It is further asserted that the applicant is not executing any project work in the suit land and executing the project work only on railway land. It is further asserted in the written statement, the railway line which is being laid, is not passing through the Dargah, but only passing through the way to Dargah. It is further asserted that the applicant had number of times, called the members of plaintiff trust for negotiation to find out solution of the present issue and to find out alternate way and to provide subway but the members of plaintiff trust have not come forward to negotiate, and approached the

Tribunal, without disclosing correct facts and trying to withhold the whole project, which is in public and national interest. It is firmly asserted in para 8 of the written statement that the present project work is going nearby the suit land i.e. the railway land, without disturbing the so-called way to Dargah. Therefore, the injunction application is premature and misconceived. The said written statement appears to have been filed to the suit as also the interim injunction application.

[3] Heard Mr. K.M. Parikh, learned advocate for the applicant. According to his submission, the 3rd broad gauge railway line is being laid in a railway property itself, without disturbing the Dargah situated in the railway property. It is further submitted that even for the persons, who offer a prayer at Dargah, an access is provided while laying down the railway track. He has further submitted that as such, in the railway property, there cannot be any ownership of any other person other than the railway authorities. He has further submitted that it being religious place, in between the railway lines, which is not disturbed that doesn't mean that it is not an encroachment over the railway land. However, a due care is taken, as submitted by him, to see that laying down a railway track may not hinder the ingress and egress to the Dargah for offering the prayers, and therefore, an access is also provided for.

[3.1] He has further submitted that work in all the portion, except a small passage is over and in laying down a railway track in that small passage is being hindered by the impugned order passed by the Tribunal below Exhibit-6. Therefore, he has requested that the impugned order is required to be interfered with, quashed and set aside.

[4] Mr. Manish S. Shah, learned advocate representing the Gujarat State Waqf Board, submitted that there is no preliminary survey of *Auqaf*, as mentioned in Section 4 of 'the Act' with regard to list of Waqf properties is yet prepared, and therefore, they had to register the waqf relying on the entries made in the Public Trust Register maintained under the Bombay Public Trust Act. As such, according to his submission, for a registration of waqf, no application for such registration is made by any of the persons, so far as plaintiff before the Tribunal is concerned. He has further submitted that every record in respect of the waqf register, record is lying with the Office of the Charity Commissioner, and therefore, he has submitted that based on what material or on what basis, name of waqf to be *Mazar-e-qutbi*, Ahmedabad, mentioned in the waqf register, cannot be explained. It is further submitted there is no waqf registered in the name of "Firoz Saheb ni Dargah" in their record.

[4.1] For the assistance of the Court, he has furnished certain

documents with the copy supplied to advocates appearing for the parties, in respect of the Trustee, the plaintiff and certain orders passed by the Board, Tribunal, etc. against / in favour of him. However, based on those documents, he has nothing to add in the issue involved in this controversy raised before this Court. Therefore, he has submitted that an order in accordance with law may be passed, determining this revision application.

[5] Mr. Aum Kotwal, learned advocate, who represents respondent No. 1, initially heard for a pretty long time, spreading over 3 days, though intermittently and he attempted to assist the Court with the available record with him and referring to the affidavit-in-reply to this revision application filed by Shaikh Onali Ismailji (Visawadarwala), producing relevant documents, including the rojkam of a waqf suit as also the entries of waqf register and PTR, maintained under Bombay Public Trust Act, in respect of Dawaat Property Trust (*Qutbi Mazar*), which is registered under B/3/Ahmedabad, submitted that the "Firoz Saheb ni Dargah" is a property of a waqf named *Mazar-e-qutbi*, which is a waqf registered under 'the Act'. Therefore, it is submitted that the applicant is not entitled to cause hinderance by laying railway track near or over the property of waqf, and therefore, order passed by the Tribunal is perfectly justified, requires no interference, that too, at the instance of the present applicant.

[5.1] He has further submitted that whether a waqf property, mentioned in the waqf register, can be disputed to be a waqf property or not and drawing attention of the Court to the various provisions, it is submitted that it is only the Waqf Board, who can examine the issue and make necessary entries in the waqf register and it is not open to challenge, once such entries are made.

[5.2] However, after matter continued to be heard, Mr. Percy Kavina, Senior Advocate, learned Counsel assisted by Mr. Aum Kotwal, appeared and submitted that the plaintiff - Shaikh Onali Ismailji (Visawadarwala) is a manager of the *Qutbi Mazar* Trust, who has filed the suit and which is in no way, improper for him to file the same. It is further submitted that either waqf or a trust, cannot sue or to be sued in its name but it is only by the Trustees or against the Trustees, a suit can be preferred. Drawing attention of the Court to Order XXXI, more particularly, Rule 1 of 'the Code', it is submitted that it is the trustee, executor or administrator, shall represent the person so interested, to file a suit, as trust itself cannot sue in its name. Therefore, the frame of the suit is in no way, objectionable, when he is a manager of the *Mazar-e-qutbi* Trust. According to his submission, frame of his suit cannot be said to be improper.

[5.3] Next, it is contended, drawing attention of the Court to Section 3 (k) of 'the Act', that a person interested in a waqf, who has

right to offer prayer or to perform any religious right in a mosque, can also bring the suit in respect of waqf property. According to his submission, even person interested can also raise an issue and it cannot be characterized as lack of jurisdiction by the Tribunal where plaintiff in his capacity as a manager of a trust filed the suit. Drawing attention of the Court to the different provisions of 'the Act', it is further submitted that for determining an issue whether the property is a waqf property or not, jurisdiction of Civil Court is barred and it is only the authorities, mentioned under 'the Act', has jurisdiction to determine the said issue. It is further submitted that any dispute with regard to property being waqf property, has to be decided either by the Tribunal or by the Gujarat State Waqf Board. It is further submitted that under 'the Act' the decision rendered by the Tribunal is final. Therefore, it is submitted that once that decision rendered by the Tribunal is final, it shall not be lightly interfered with, more particularly, when at an interim stage, an order is passed based on material available with it in respect of a waqf property as an issue of ownership to the suit property, may incidentally arise which requires leading of evidence before the Tribunal, and therefore, it is submitted that this Court should not interfere with the present revision application.

[6] Mr. Anuj K. Trivedi, learned advocate for the Municipal Corporation - respondent No.5, submitted that since the suit

property falls within the ownership of railway administration, it is not forming part of a town planning scheme, and therefore, claim made in the suit that it is a part of Town Planning Scheme No.16 of Saherkotada, is baseless. As such, for the issue involved in the suit is not touching upon any TP Scheme, but when it is claimed to be part of TP Scheme No.16, the learned advocate for the Corporation was called upon to verify and produce for perusal the map of TP Scheme No.16 of Saherkotda. However, as mentioned hereinabove, it is not forming part of TP Scheme, being property of a railway administration.

[7] Having heard the learned advocates for the appearing parties and perusing the material available on record, one thing is certain that the suit property claimed to be the waqf property, is within the railway yard and is surrounded by the railway property. The frame of the suit titled as '*Firoz Saheb ni Dargah na Trustee*' Shaikh Onali Ismailji (Visawadarwala), claiming that Dargah to be a waqf, without mentioning any registration number of that very waqf, without producing any documents supporting the assertion that he is the Trustee of that waqf. The plaintiff produced documents showing *Mazar-e-qutbi* to be a waqf and reference of that "Firoz Saheb ni Dargah" as property of that waqf known as *Mazar-e-qutbi*. However, by the suit, a show is being made that "Firoz Saheb ni Dargah" itself is a waqf where the plaintiff is Trustee, when confronted with the

said position, the learned Senior Counsel came out with the explanation that he is a Manager of the Trust, and therefore, there is nothing wrong in the frame of the suit. If a suit is filed by a waqf known as *Mazar-e-qutbi* through its trustee/s, claiming to be suit property of its own, such suit should have been filed by the Trustee and not by the manager, as claimed in the arguments. The suit property vests in the trustees and not in anybody else, and therefore, no one can file a suit except the trustee or can be sued, without trustee being joined either as a respondent against it or as a plaintiff in the suit. Not only, no waqf register number in the name of "Firoz Saheb ni Dargah" is mentioned in the plaint nor in any amendment application to the plaint made by the plaintiff, it is claimed that the documents produced along with the plaint reflects the number to be B/189/A, which is referred in the impugned order at Exhibit-6. However, it appears that the said waqf registration number is not mentioned by anyone either in the argument before the Tribunal and as said earlier, not reflected in the plaint itself. In the very first line of the impugned order, plaintiff is stated to be registered before the Board at B/189/ Ahmedabad. If the title of the suit would have been seen by the Tribunal, it is not the waqf which is registered at B/189, is before it. Not only that, Shaikh Onali Ismailji (Visawadarwala), claims to be Trustee of "Firoz Saheb ni Dargah". When confronted with the said status, a wicket gate is sought to be opened by the

learned Counsel to suggest that he is a manager of the Waqf, and therefore, he can file the suit, which is again not correct. Along with the plaint, nothing is produced to show that either he is a Trustee of “Firoz Saheb ni Dargah” or a Manager of it, being a waqf itself as claimed in the suit. In the whole plaint, *Mazar-e-qutbi* being the waqf and the “Firoz Saheb ni Dargah” being the waqf property is not mentioned by the plaintiff. So many things can be concluded for the same but with a view not to prejudice the case of anyone and also leaving it open for the parties to lead evidence before the Tribunal or have a recourse to any other provisions of any other law, suffices it to say that suit filed by the Shaikh Onali Ismailji (Visawadarwala), in his capacity as Trustee of “Firoz Saheb ni Dargah”, claiming to be a waqf, is based on no material. Therefore, contention that plaintiff in his capacity as a manager of trust filed the suit, if plaint is examined, it is misconceived.

[7.1] Since, the suit property falls within railway boundary and laying of a 3rd broad gauge railway track, which is a National project, being hindered by the present suit, when an access to the Dargah by one and all provided while laying down even a track even if the “Firoz Saheb ni Dargah” itself is presumed to be a waqf, cannot have any objection as from Dargah no railway track is being laid. What is claimed is that it hinders the access to the Dargah and it comes within two railway tracks if it is permitted to be laid down. It is not

the case of the plaintiff in the suit itself that the railway track is being laid from the Dargah or a property of a Dargah, and therefore, relief granted by the Tribunal, *prima-facie*, appears to be uncalled for, restraining National Level project of laying down a 3rd broad gauge railway track, that too, from both the ends project is already over except few meters because of this litigation. Over and above that, further directions directing the applicant to seek sanction of the Board under Section 91 of 'the Act' and carry out the land acquisition process as if it is concluded that railway track is being laid in the property of a Dargah before even leading of any evidence before it, is not required at all.

[7.2] As such, in the railway property, there cannot be ownership of any person other than railways. Merely because Dargah situated in a railway land and not disturbed or removed because of religious sentiments attached with it of its devotees and followers, that does not mean the surrounding land to the Dargah becomes property of it, when it is situated within the railway property.

[7.3] The contention referring Section 3(k) of "the Act", definition of "Person interested in a waqf" is wide enough to include the plaintiff - Shaikh Onali Ismailji (Visawadarwala) to file the present suit, is again misconceived. Here, in the present case, the suit is filed claiming right to property, based on map and village form

No. 7/12 abstract, reflecting the name of Dargah as an occupier, as it is a waqf. However, as concluded herein above, "Firoz Saheb ni Dargah" is not a waqf registered with the Waqf Board nor Shaikh Onali Ismailji (Visawadarwala) is Trustee of the said waqf. Even if he is presumed to be follower of the said Dargah, as a devotee, he may satisfy the definition of 'person interested in a waqf' but he has no right to file such suit to assert the proprietary rights to the property itself, that too, even on behalf of "Firoz Saheb ni Dargah", a waqf, which is not registered at all, based on entry in 7/12 abstract which is not conferring any title to the property.

[7.4] However, with a view to protect the interest of one and all, if at all, plaintiff in the present form of a suit is successful in establishing his right based on material and leading on evidence, his interest can be well taken care of, directing the railway authorities to acquire the same and pay the compensation in accordance with law. One more reason for quashing and setting aside the impugned order passed by the Tribunal is that the said order dated 16.09.2021 is passed by the Tribunal "*Coram non judice*", and therefore it had no jurisdiction to pass such order, as Tribunal consisted of three members provided under sub-section (4) of Section 83 of 'the Act', and therefore, any effective order/s touching to the rights of the parties could not have been passed by the Tribunal, that too, a "*coram non judice*".

[8] In view thereof, the present revision application stands disposed of. The impugned order dated 16.09.2021 passed below Exhibit-6 in Waqf Suit No.10 of 2018 passed by 'the Tribunal' is hereby quashed and set aside.

[9] At this stage, Mr. Aum M. Kotwal, learned advocate representing the original plaintiff requests for stay of the present order. However, considering the reasons recorded, as aforesaid, more particularly, order impugned passed by the Tribunal "*coram non judice*", the request is hereby refused, so as not to hinder National railway project laying down 3rd broad gauge railway line.

सत्यमेव जयते (UMESH A. TRIVEDI, J.)

Lalji Desai

THE HIGH COURT
OF GUJARAT

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