NC: 2024:KHC-K:8229
CRP No. 200082 of 2023

IN THE HIGH COURT OF KARNATAKA,

KALABURAGI BENCH

DATED THIS THE 8TH DAY OF NOVEMBER, 2024

BEFORE

THE HON'BLE MR. JUSTICE M.G.S.KAMAL

CIVIL REVISION PETITION NO. 200082 OF 2023

(RES)

BETWEEN:

KARNATAKA STATE BOARD OF AUQAF,
"DARUL AWKAF", NO. 6,
CUNNINGHAM ROAD,
BENGALURU-560052.
BY ITS CHIEF EXECUTIVE OFFICER.

...PETITIONER

(BY SRI P. S. MALIPATIL, ADVOCATE)

AND:

Digitally signed by SACHIN
Location: HIGH COURT OF KARNATAKA

SRI SYED GHOUSE MOHIUDDIN KHADRI
S/O SRI SYED HYDER NOORULLAH KHADRI,
AGE: MAJOR, OCC: RETD. GOVT. SERVANT,
ALLEGED TO BE MUTAWALLI OF DARGAH
HAZRATH PEER PASHA KHADRI (RH),
KOPPAL-583231.
R/O. H.NO. 3-14-56/B, KARWAN SAHU,
KARWAN HYDERABAD.

...RESPONDENT

(BY SRI SACHIN M. MAHAJAN, ADVOCATE)

THIS CRP IS FILED UNDER SECTION 83(9) OF THE WAQF ACT, PRAYING TO I) PASS AN ORDER SETTING ASIDE

THE ORDER DTD. 26.09.2022 PASSED IN MISC.PET.NO.5/2022 ON THE FILE OF WAKF TRIBUNAL, KALABURAGI AT KALABURAGI AND CONSEQUENTLY ALLOW MISC.PET.NO.5/2022 AND FURTHER SET ASIDE THE JUDGMENT AND DECREE DTD. 23.12.2020 IN O.S.NO.2/2019 ON THE FILE OF THE WAKF TRIBUNAL, KALABURAGI. II) PASS AN ORDER REMANDING THE ENTIRE PROCEEDINGS TO THE WAKF TRIBUNAL, KALABURAGI WITH A DIRECTION TO PERMIT THE PETITIONER TO FILE WRITTEN STATEMENT AND TO CONTEST THE PROCEEDINGS IN OS NO.2/2019 AND TO PASS APPROPRIATE ORDERS THEREAFTER. III) PASS SUCH OTHER ORDER/ DIRECTION AS THIS HON'BLE COURT DEEMS FIT TO GRANT IN THE FACTS AND CIRCUMSTANCES OF THE CASE.

THIS PETITION, COMING ON FOR FINAL HEARING, THIS DAY, ORDER WAS MADE THEREIN AS UNDER:

CORAM: HON'BLE MR. JUSTICE M.G.S.KAMAL

ORAL ORDER

(PER: HON'BLE MR. JUSTICE M.G.S.KAMAL)

This petition is by the defendant/The Karnataka State Board of Auqaf, aggrieved by the order dated 26.09.2022 passed in Misc. Case. No.5/2022 by the Karnataka Waqf Tribunal, Kalaburagi dismissing the petition filed by the

petitioner/defendant herein under Order IX Rule 13 read with Section 151 of Code of Civil Procedure.

2. Brief Facts of the case is that:

The respondent herein had filed a suit in OS No.2/2019 before the Waqf Tribunal Kalaburagi Division seeking relief of declaration that the office of Mutawalli of Dargah Hazrat Syed Shah Noorulah Peer Pasha Khadri (RH) (Sunni) and Masjid Peer Pasha Khadri is hereditary and said office of Muthawalliship is vested in the Family of Sufi Syed Shah Hyder Walliullah Khadri (RH) (Sunni) and to declare that the plaintiff is the present hereditary of Mutawalli under Section 42 of the Waqf Act, 1995 and for further direction to carry out necessary corrections in the Gazette Notification dated 31.01.1974 and for other incidental relief.

3. That after service of summons the petitioner/defendant appeared through an Advocate by name Sri Adbdul Maqhtadir of Kalaburagi and filed a memo of appearance undertaking to file Vakalath and written-

statement on behalf of the petitioner/defendant by the next date of hearing. However, the said counsel did not file the written-statement and since remained absent, petitioner/defendant was placed ex-parte. The Tribunal has taken written-statement as not filed by its order dated 07.09.2019.

4. Thereafter, respondent/plaintiff examined himself as PW1 and marked 43 documents produced by the respondent/plaintiff as per Exs.P1 to P43 and posted the matter for final hearing on merits vide Order dated 02.12.2019. Thereafter, one Sri M.K. Khan an Advocate represented the defendant by filing the vakalathnama on 09.01.2020 and sought for time to file of necessary application to recall the order dated 07.09.2019, the matter was accordingly adjourned on 01.02.2020.

5. That due to COVID-19 Pandemic, the matter was adjourned from time to time and the application could not be filed for recalling the order dated 07.09.2019. In the meanwhile, the arguments on behalf of the plaintiff’s

were advanced and the Tribunal decreed the suit on 23.12.2020.

6. Thereafter the petitioner filed the Misc.No.5/2022 under Order IX Rule 13 read with Section 151 of Code of Civil Procedure seeking to set aside the ex-parte judgment and decree dated 23.12.2020.

7. The Tribunal by the impugned order 26.09.2022 dismissed the said Miscellaneous case with costs. Being aggrieved by the same, the petitioner filed the present petition.

8. Learned counsel for the petitioner appearing through video conference submitted that the Tribunal erred in rejecting the application without considering the reasons and circumstances, which was explained by the petitioner for not being able to file the written-statement and lead evidence. He contends that it was due to the COVID-19 Pandemic, the respondent could not file the written-statement and prosecute the matter. He submits that the Tribunal ought to have adopted liberal approach

instead of rejecting the application. Hence, seeks for allowing the petition.

9. Learned counsel for the respondent on the other-hand justifying the order passed by the Tribunal submits that the record would indicate that the petitioner/defendant was completely aware of the pendency of the proceedings having engaged the counsel who did not bother to file either vakalathnama or the written-statement. He submits that as many as four hearings took place between 03.05.2019, 07.06.2019, 19.07.2019 and 07.09.2019 and in all these hearings, the petitioner/defendant was aware of the pendency of the proceedings. Even, after passing of the decree the respondent had made an application seeking execution/ implement of the decree. Yet the petitioner/defendant did not take any steps. Deliberate negligence on the part of the petitioner/defendant cannot be condoned. He submits that the respondent is aged about 75 years and the present petition is filed only to cause harassment and

undue hardship to the respondent/plaintiff. No grounds are made out within the provision under Order IX Rule 13 of Code of Civil Procedure. The Tribunal having adverted to all these aspect of the matter, has rightly rejected the application filed by the petitioner warranting no interference. Hence, seeks for dismissal of the petition.

10. Heard and perused the records.

11. From the facts of the case narrated above and on consideration of submissions made by learned counsel for the parties, it is clear that the petitioner herein was served with the summons in the above proceedings and was also represented by its counsel. The grounds urged are that the proceedings/trial was conducted during the COVID-19 pandemic period and that the first counsel, who was instructed to appear on behalf of the petitioner though had filed the memo of appearance, did not file either the vakalathnama or the written-statement. Similar was situation with the second counsel who though represented at the later part of the proceedings by filing the vakalath

did not file the written-statement, except making oral submission at the last stage of the hearing.

12. Taking note of the above the Tribunal while rejecting the application has observed that, since vakalath had been filed on behalf of the petitioner herein and the learned counsel for the petitioner had indeed participated in the proceedings the judgment and decree passed was therefore not ex-parte. As such petition under Order IX Rule 13 of Code of Civil Procedure was not maintainable.

13. Admittedly, no written-statement has been filed on behalf of the petitioner herein. By order dated 07.09.2019 the Tribunal has taken written-statement as not filed and has thereafter, proceeded to record the evidence of the plaintiff and has decreed the suit.

14. Order VIII Rule 10 of Code of Civil Procedure provides as under:

> ***10. Procedure when party fails to present written statement called for by Court: -*** *Where any party from whom a written statement is required under rule 1 or rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the*

Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up.

15. Thus the judgment and decree passed in the absence of written-statement is undoubtedly an ex-parte decree. In the circumstances one of the remedies available is filing application under Order IX Rule 13 of Code of Civil Procedure. [(i) ***Prakash Chander Manchanda and Another Vs. Smt. Janki Manchanda, AIR 1987 SC 42***; (ii) ***Kuvarp Industries, Bangalore Vs. State Bank of Mysore, AIR 1985 Kant 77 and*** (iii)***M/s M. Manick Peter and Others Vs. K. Surendranathan, AIR 1988 KERALA 161.***]

16. Therefore the reasoning of the Tribunal given in the impugned order regarding the maintainability of the petition under Order IX Rule 13 of Code of Civil Procedure is therefore unsustainable.

17. Not withstanding the above, facts remains that undisputedly even as evident from the order-sheet of the Trial Court, Standard Operative Procedure due to COVID-

19 pandemic was on operation. The petitioner is statutory authority required to be represented though an human agency. Hardship of the learned counsel for the petitioner in obtaining necessary instructions to file the written-statement and prosecute the matter, from the concerned officers of the petitioner- Waqf Board during the COVID-19 pandemic cannot be ignored.

18. No doubt the petitioner was represented through the counsel, but the fact remains that written-statement was not filed, evidence was not filed, the witnesses were not cross-examined. Merely because the submission was made by the counsel at the last hearing date cannot be held to be a sufficient representation and effective prosecution of the matter. Furthermore, the dispute is in respect of Waqf institution for the office of Mutawalli. It is not in respect of any private proprietary rights. This needs to be kept in mind.

19. For the aforesaid reasons and analysis of the matter, this Court is of the considered view that the

petitioner afforded with an opportunity of filing written-statement and cross-examining the petitioner witness and adducing its own evidence. However considering the pendency of the matter the respondent herein be paid cost for the delay. Accordingly, the following:

ORDER

1. The petition is allowed. The order dated 26.09.2022 passed in Misc. No.05/2022 on the file of the Karnataka Waqf Tribunal, Kalaburagi is set aside. Consequently Misc. No.05/2022 is allowed. Ex-parte decree passed in OS No.02/2019 is set aside.
2. The petitioner-The Karnataka State Board of Auquaf shall file the written-statement within 30 days from the date of receipt of certified copy of this order, without seeking any further extension of time. The Tribunal after affording sufficient opportunities to the petitioner to lead evidence dispose of the matter within outer

limit of six months from the date of receipt of certified copy of this order.

3. The parties shall co-operate for expeditious disposal of the matter. Since the parties are represented through their counsel, they shall appear before the Tribunal on 16.12.2024 without any further notice.

4. The petitioner shall pay a cost of Rs.15,000/- to the respondent. It is made clear that the Tribunal shall ensure the cost is paid only thereafter shall permit the petitioner – Waqf board to participate in the proceedings.

5. The Registry is directed to send back the Trial Court records.

Sd/-
(M.G.S.KAMAL)
JUDGE

KBM
List No.: 1 Sl No.: 66
CT:PK