

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA  
CIVIL APPELLATE JURISDICTION  
ORIGINAL SIDE**

RESERVED ON: 05.07.2024  
DELIVERED ON:31.07.2024

**CORAM:**

**THE HON'BLE MR. CHIEF JUSTICE T.S. SIVAGNAM  
AND  
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA**

**A.P.O.T NO. 177 OF 2023  
(I.A. NO. G.A./01/2023)  
(I.A. NO. G.A./02/2024)**

**M/S. HOOGHLY BUILDING & INVESTMENT COMPANY LIMITED AND  
ANOTHER  
VERSUS  
THE STATE OF WEST BENGAL AND OTHERS**

**Appearance:-**

**Mr. Utpal Bose, Ld. Sr. Adv.  
Mr. Abir Lal Chakraborty, Adv.  
Mr. Sheikh Afazuddin, Adv.  
Mrs. Sonali Ghosh Basu, Adv.**

**....for the Appellant.**

**Md. Salauddin, Adv.  
Md. Ahsanuzzaman, Adv.  
Md. Raziuddin, Adv.**

**.....for the Board of Waqf.**

**Mr. Rauf Rahim Ld. Sr. Adv.**  
**Mr. Aliasghar Rahim, Adv.**  
**Ms. Ankita Chowdhury, Adv.**  
**Mr. Ali Rahim. Adv.**  
**Mr. Tanmay Mukherjee, Adv.**  
**Ms. Manisha Das, Adv.**

**...for the Respondent No. 5**

**JUDGMENT**

***(Judgment of the Court was delivered by T.S. Sivagnanam, CJ.)***

1. We have heard Mr. Utpal Bose, Learned Senior Advocate assisted by Mr. Abir Lal Chakraborty, Mr. Sheikh Afazuddin and Mrs. Sonali Ghosh Basu, advocates appearing for the appellant and Md. Salauddin, assisted by Mr. Md. Ahsanuzzaman and Md. Raziuddin advocates appearing for the Board of Waqf and Mr. Rauf Rahim, Learned Senior Advocate assisted by Mr. Aliasghar Rahim, Ms. Ankita Chowdhury, Mr. Ali Rahim, Mr. Tanmay Mukherjee and Ms. Manisha Das, advocates appearing for the Respondent No. 5.
2. The unsuccessful writ petitioners M/s. Hooghly Building and Investment Company Limited and another are the appellants in this appeal being aggrieved by the order passed by the Learned Single Bench dated 09.06.2023 dismissing the writ petition filed by them in WPO No. 25 of 2023. The appellant sought for issuance of a writ of mandamus to quash the notices dated 17.03.2022 and 18.03.2022 issued by the Chief Executive Officer, Board of Auqaf, West Bengal under Section 54 of the Waqf Act, 1995 (hereinafter referred to as the Act) and the consequential enquiry notice issued by the Chief Executive Officer dated 18.11.2022.

3. In the show cause notice, it was stated that it has been reported by the Syed Asghar Hussain Ismail, Mutawali in respect of Nawab Zaibunnissa Begum's estate, the appellant without any authority of law occupied and thereby illegally taken possession of the Waqf property mentioned in the schedule to the notice wherein the appellants have no legal right, title and interest over the same. It was stated that in exercise of the powers conferred on the Chief Executive Officer under Section 54 of the Act, the appellant was directed to show cause with evidence in support of their claim by 25.04.2022 as to why an order requiring them to remove the encroachment should not be made, in the event of their failure to show cause on the scheduled date, the matter may be decided exparte without further reference to the appellant. The enquiry notice dated 18.11.2022 fixed date of enquiry on 29.11.2022. It is an admitted position that on receipt of the show cause notice dated 17.03.2022, the appellant through their advocate submitted a reply dated 21.04.2022 among other things contending that the proceedings initiated by the Chief Executive Officer under the provisions of the Act is without jurisdiction and the Waqf tribunal cannot entertain the dispute. The appellant further stated that the West Bengal Thika Tenancy Act, 2001 (Thika Act) is primarily for vesting of the Thika property in the state upon adjudication of right of a Thika tenant and in the subject premises, a civil suit is pending before the appropriate civil court for eviction of a tenant and more particularly, Thika proceeding is pending before the Thika controller and therefore the Waqf Board and/or the Waqf tribunal has no jurisdiction to decide the dispute. Therefore, they objected to the notice issued under Section 54 of the Act on the ground that there is no jurisdiction to issue

such notice. Though the appellant had filed their reply to the show cause notice did not participate in the enquiry but after nearly a year filed the writ petition during January 2023.

4. The learned Single Bench by the impugned order has dismissed the writ petition and aggrieved by the same, the present appeal has been preferred. The appeal was heard on several dates and was adjourned from time to time and there was an interim order based on an undertaking given by the learned Senior Counsel for the Waqf Board that they will not proceed further pursuant to the notice impugned in the writ petition issued under Section 54 of the Act. When the appeal was heard on 31.07.2023, the court heard the submissions of the learned advocates for the parties and found that there has been prolonged litigation in the matter and the ultimate sufferer is the Waqf. It was noted that according to the settlement arrived at between the parties on and after 2003, the appellant had no right to remain in the property. The submission of the learned Senior Advocate for the appellant to the effect that the issue is as to whether the appellant would be entitled to the protection under the provisions of the Thika Act or whether the matter is covered under the Waqf Act is a question which has been directed to be decided by the trial court namely the first Civil Judge (Junior Division) at Sealdah in Title suit no. 135 of 2004 in which an application was filed by the appellants under Order 7 Rule 11 CPC wherein they have raised an issue and plaint is liable to be rejected at the threshold since Section 85 of the Waqf Act bars the jurisdiction of the civil court in respect of any suit or other proceeding regarding any dispute relating to Waqf. The second limb of argument was also noted that the issue would be whether

the suit is barred by the provisions of the Thika Act and whether it is barred by the provisions of the Specific Relief Act. The court noted that these issues have been directed to be decided by the trial court pursuant to the order passed by the learned Single Bench of this court in CO No. 1834 of 2011 dated November 20, 2014. The court also noted that the learned Single Bench while dismissing the writ petition had taken note of the decision of the Hon'ble Supreme Court in **Rashid Wali Beg Versus Farid Pindari and others**<sup>1</sup> and has held that the stage is yet to be reached since the impugned notice are at the stage for Section 54(1) of the Act where the appellant no. 1 has been called upon to show cause as to why an order for removal of the encroachment should not be made. The court further noted that the decision in **Rashid Wali Beg** (supra) also considered and dealt with all the decisions relied on by the appellant/writ petitioner.

5. Taking note of the facts and submission, this court observed that it would not have hesitated to rule on jurisdiction of the Waqf authorities to invoke the provisions of the Waqf Act however, the court is precluded from doing so in the light of the factual matrix which had been set out and more importantly, the order passed by the learned Single Bench in CO No. 1834 of 2011 dated November 20, 2014. Therefore, the court opined that the best and only course to be adopted is to relegate the parties to the civil court to place their submissions in the applications which are pending before the trial court and after a decision is taken by the trial court, the court will consider as to the contentions raised by the appellant in the appeal. As it was represented that the suit was listed on 07.08.2023, this court while

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<sup>1</sup> (2022) 4 SCC 414

keeping this appeal pending directed the learned trial judge to take up for hearing the application on 07.08.2022 and comply with the directions issued in CO No. 1834 of 2011 after hearing the parties and endeavour to dispose of the same as expeditiously as possible preferably within a period of 15 days from the date on which the arguments were concluded. There was also a direction that no adjournment shall be granted and both parties shall cooperate for expeditious disposal of the proceedings. The interim order which was granted earlier based on the undertaking given by the Waqf Board was extended till the next hearing date. In compliance with the above direction, the learned trial judge had taken up the application and passed an order on 12.02.2024. The application filed under Order 7 Rule 11 by the appellant/defendant no. 1 was held to be not maintainable and accordingly stood disposed of. In the said order, the court observed that there is no pleading or any other averment which would show or depict that the suit property is a Thika property. The court opined that mere filing of a Thika rent before the office of the controller is not enough and based upon such payment of rent, no presumption can be drawn that a property is a Thika property and that based on the said TR-7 Challan, it would not be justifiable to assume that the suit property is a Thika property and hence the court concluded that from nowhere it appears from the plaint that the suit property is a Thika property and as such the appellant/defendant no. 1 has failed to prove his contention on the said score.

6. The second point which has been dealt with by the learned trial judge was regarding whether the Waqf tribunal has jurisdiction to decide the dispute. The court noted that on a perusal of the plaint it has been

mentioned that the suit land is a Waqf property dedicated by a pious person by registered deed of Waqf dated 25.05.1885 and the Waqf is registered with the Board of Waqf, West Bengal as public religious Waqf bearing EC No.1499. On facts the court recorded that at the relevant point of time, the then Mutawali, Nawab Zaibunnissa Begum (since deceased) leased the suit property to Seth Dooly Chand for a period of 49 years commencing from 26.12.1905. The said Mutawali died leaving behind nine children who became the Joint Mutthawalis of the Waqf, executed a registered deed of lease dated 04.09.1959 in favour of the appellant/defendant no. 1 and subsequently eight out of nine Joint Mutthawali is died one after another leaving Nawab Syed who became the Mutthawali of the Waqf estate since the year 1994 and later by virtue of registered deed of lease dated 25.05.1885 appointed his son Syed Azghar Hussain Ismail, the present plaintiff as the sole Mutthawali. The court thereafter took up for consideration CO No. 1387 of 2007 and noted the legal position that in an application for rejection of plaint, the court must examine the pleadings of the plaintiff alone and it could neither consider the defence as disclosed nor could consider the documents relied upon by the defence. The court also noted that the suit was filed in the year 2004 and subsequently amendments were made to the Waqf Act, 1995.

7. Nextly the court proceeded to note Section 83 and 85 of the Waqf Act and also the decision in **Rashid Wali Beg** (supra) wherein it was held that the court cannot do violence to the express language of the statute, Section 83(1) even as it stood before the amendment, provided for the determination by the tribunal, of any dispute, the question or other matter relating to Waqf

and Waqf property and that Section 83(5) makes it clear that Waqf tribunal shall be deemed to be a civil court. The court then proceeded to hold that the plaint should be rejected on the ground that the suit property being a Waqf property, the court has no jurisdiction to proceed with the instant suit and taking note of the submission made by both parties as well as for effective adjudication of the suit and bearing in mind the interest of the parties, the court opined that merely rejecting the plaint would not end the sufferings of the parties and as such the plaint should be returned to be presented before the appropriate forum. Accordingly, the plaint was returned and the matter was referred to the Waqf Board/tribunal for effective adjudication of the suit. As noted above, the application under Order 7 Rule 11 CPC was held to be not maintainable. It is submitted by the learned Senior Advocate appearing for the appellant that the appellants have filed a revision petition before this court against the order passed by the trial court dated 12.02.2024. However, it appears that there is no interim order granted in the said revision.

8. The first aspect which needs to be considered is to under what basis and authority the appellant claimed to be in possession of the subject property. The property was leased out initially in the year 1895 for a period of 49 years and subsequently upon its expiry for a further period of 49 years in the year 1905 which came to an end in the year 1954. Though the lease came to an end, the appellants did not vacate the property. The suits were filed in Title suit nos. 21 and 31 of 1955, TS no. 21 of 1955 was filed by the mutthwali for eviction of the appellants and TS No. 38 of 1955 was filed for a decree of specific performance for enforcement of the contract or agreement



for renewal of the lease dated 26.12.1905 for a further period of 49 years from the date of the expiry of the lease in respect of the subject property. It appears that a settlement was arrived at between the parties, the brief contents of which are set out in the lease deed dated 01.09.1959 wherein it has been stated that for the benefit of the Waqf estate and to save cost, harassment and loss of income and for the advantage of the parties settlement has taken place and sanction under Section 69 of the West Bengal Waqf Act has been given by the court to such settlement in both the suits namely TS no. 21 of 1985 and TS no. 38 of 1955 in the 6<sup>th</sup> Subordinate Judges Court, Alipore and in pursuance of such settlement decrees dated 29.06.1959 have been passed by the said court and since the suit were disposed of in terms of the settlement to the effect that the lessors will execute and register in favour of the lessee at the lessee cost at a renewed lease for a further period of 49 years from the date of expiry of the old lease dated 26.12.1905 between Nawab Farukddin Begum Seth Dooly Chand and there will be no further renewal of lease after 25.12.2003 or any benefit of option for renewal after 2003.

9. The lease deed further states that notices of the tile suit have been given under Section 70 of the West Bengal Waqf Act, 1934 to the Commissioner of Waqf and sanction under Section 53 of the Act has been obtained for grant of such a lease as aforesaid by lessors to the lessee for a period of 49 years in respect of the subject property. Yet another condition was that the lessee cannot allow others in its discretion to use the godown or the dwelling house or for purpose of business without the leave or license of the lessors or without any interruption from the lessors as to the use of

the buildings provided the lessee shall pay all costs for ejecting such licencees or tenants but the lessee will not be entitled to open a liquor shop or any business of liquor or install temple in the land or any portion thereof. Thus, it is evidently clear that the appellants or their predecessors in the interests in no uncertain terms recognised and accepted the fact that the subject property is a Waqf property. Therefore, it will be too late in the day for the appellant to contend that the property is not Waqf property and the property would be governed by the provision of the Thika Act. In the factual background we would be well justified to observe that the proceedings initiated under the Thika Act is only with a view to create multiplicity of proceedings and to drag on the matter and to remain in possession of the property much after the due date that is 25.12.2003. Therefore, we find that the learned Single Bench rightly took note of the Section 54 of the Act and held that the Subsection (1) of Section 54 authorizes the Chief Executive Officer to serve a notice on the alleged encroachers if he receives a complaint on the fact of encroachment or acts on his own motion with regard to the alleged encroachment. The Chief Executive Officer is empowered to issue a notice calling upon the encroachers to show cause as to why an order requiring him/her to remove the encroachment shall not be made and also sent a copy of the notice to the concerned Mutthwali. The term "encroacher" has been defined in Section 3(e)(e) of the Waqf Act which was inserted by the Act 27 of 2013 with effect from 01.11.2013. Encroachers has been defined to mean any person or institution public or private, occupying Waqf property in whole or part without the authority of law and includes a person who tenancy, lease or license has expired or has been terminated by Mutthwali

or the Board. The appellant cannot dispute the fact that on and after 25.12.2003, the appellants have no resemblance of right to be in possession of the subject property as it has been categorically mentioned in the lease deed dated 01.09.1959 that after the said date there shall be no renewal. Therefore, the appellant would fall within the definition of encroachers as their tenancy has expired.

**10.** The definition of the word “encroacher” as inserted by 2013 amendment was also noticed by the Learned Single Judge and that after the expiry of the lease on 25.12.2003, the appellant writ petitioners did not hand over the lease property to the lessor and accordingly Section 54 would empower the Chief Executive Officer to issue show cause notice to the alleged encroachers which had been done in the present case. We also note that by virtue of Section 108A of the Waqf Act which was inserted by the Act 27 of 2013 with effect from 01.11.2013, the provision of the Waqf Act shall have overriding effect notwithstanding anything inconsistent therewith contend in any other law for the time being enforced or in any instrument having effect by virtue of any law other than the Waqf Act. By virtue of this overriding provision, the provisions of the Waqf Act shall apply notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than the Waqf Act. Therefore, the conclusion of the learned Single Bench that the Act permits the Waqf Board and its Chief Executive Officer to issue notice under Section 54 of the Act for removal of encroachment is well founded and affirmed.

11. As observed earlier, the lessee as in no uncertain terms accepted the fact that the property is a Waqf property, in fact while entering into the memorandum of settlement which was recorded in the two suits namely title suit no. 21 of 1959 and title suit no. 38 of 1955 notices were given under Section 70 of the Bengal Waqf, 1934 to Commissioner of Waqf and sanction under Section 53 of the said Act has been obtained for the grant of lease for a period of 49 years as contained in the lease deed dated 01.09.1959. The lessee is irrevocably bound by the terms and conditions contained therein and has no resemblance of right on and after 25.12.2003 as it has been explicitly stated in the lease deed and agreed by the lessee that there will be no further renewal of lease deed after 25.12.2003. Therefore, we are unable to persuade ourselves to agree with the submissions of the learned Senior Advocate for the appellant that there are parallel proceedings and that the proceedings initiated under the Waqf Act are without jurisdiction. Thus, it appears that the deposit of rent before the office of the controller, Tikka Tenancy, Kolkata under the TR7 Challan can in no manner improve the case of the appellant.

12. Having steered clear of the factual position that the subject property is a Waqf property, we note the decision of the Hon'ble Supreme Court in **Rashid Wali Beg** wherein the court was considering a case where a suit for permanent injunction in respect of a Waqf property was filed in a civil court and the question arose whether the such suit was maintainable. It was held that to allow the plaintiff to ignore the Waqf tribunal and to seek a decree of permanent injunction and mandatory injunction from a civil court, would be to ignore the mandate of Section 83 and Section 85 which speak of "any

dispute, the question or other matter relating to a Waqf or Waqf property”. Further it was held that to say that the tribunal (Waqf tribunal) will have jurisdiction only if the subject property is disputed to be a Waqf property and not if it is admitted to be a Waqf property, is indigestible in the teeth of Section 83(1) of the Waqf Act. That the court cannot do violence to the express language of the statute. Section 83(1) even as it stood before the amendment, provided for determination by the Waqf tribunal, of any dispute, the question or other matter relating to a Waqf and Waqf property. Further it was held that a question as to the nature of the Waqf and whether the plaintiff is a beneficiary of the Waqf, Section 83(5) makes it clear that the Waqf tribunal shall be deemed to be a civil court and shall have the same power as may be exercised by a civil court under the Code of Civil Procedure while trying a suit or executing a decree or order and this is why the Waqf tribunal will have the power to issue temporary injunctions under Order 39 Rule 1 CPC as also permanent injunction. In the said case, the trial court was directed to return the plaint to the said plaintiff for presentation to the jurisdiction of Waqf tribunal to dispose of the same.

- 13.** Further it was held that a conjoint reading of Section 6,7 and 85 of the Waqf Act would show that the bar of jurisdictional civil court contain in Section 6(5) and 7(2) is confined to Chapter 2 but the bar of jurisdiction under Section 85 is all pervasive as the words “any dispute, question or other matter relating to Waqf or Waqf property” used in the first limb of Section 85, provide a clear indication that the Waqf tribunal would have jurisdiction to adjudicate upon any dispute and answer any question relating to a Waqf or Waqf property including the two questions mentioned

in Section 6(1) and Section 7(1) of the Waqf Act. Further the court noted that the Act 27 of 2013 expanded the jurisdiction of Waqf tribunal even to cover landlord-tenant disputes and rights and obligation of lessor and lessee and the amendment Act enlarge the bar of jurisdiction to cover even revenue courts and other authorities.

14. At this juncture, it will be beneficial to refer to the decision of the Hon'ble Supreme Court in ***Sayyed Ali and Others Versus Andhra Pradesh Waqf Board Appeal (civil) 4372 of 1985 dated 28.01.1998***. In the said case, the appellants contended that once patta under the Imams Act having been granted in favour of the Mokhasadar, it was not open to the High Court to hold that the property was Waqf property. In other words, the argument was that once patta has been granted under the Inam Act, the land ceased to be a Waqf property. This argument was rejected by the Hon'ble Supreme Court by holding that a Waqf is a permanent dedication of property for purposes recognised by muslim law as pious, religious or charitable and the property having been found at Waqf would always retain its character as a Waqf. In other words, once a Waqf always a Waqf and grant of patta under the Imams Act does not in any manner nullify the earlier dedication made of the property constituting the same as Waqf. After Waqf had been created, it continues to be so for all time to come and further continues to be governed by the provisions of the Waqf Act and grant of patta under the Imam Act does not affect original character of the Waqf property. This decision would whole enure in favour of the respondent Waqf and it has to be necessarily held that the property having been declared as a Waqf property and irrevocably accepted by a lessor/appellant/writ

petitioner, the question of now contending that the property is no longer a Waqf property has to be outrightly rejected.

**15.** The learned Senior Advocate appearing for the appellant placed reliance on the decision of the Hon'ble Supreme Court in the case of ***P.V. Nidhish Versus Kerala Waqf Board in Criminal Appeal no. 309 of 2023 dated 28.04.2023***. To support his contention, that expiry of lease by efflux of time cannot be construed to mean that such lessee has become encroacher. Firstly, we note that the said decision, arose out of an appeal filed by the appellant therein aggrieved by the judgment of the High Court of Kerala rejecting their petition under Section 482 of the Criminal Procedure Code wherein they sought for a direction to quash a criminal complaint instituted against them. The appellant in the said case contended that it is fundamental principle of criminal jurisprudence that penal provisions cannot be applied with retrospective effect and the newly inserted Section 52A makes taking possession of Waqf property a punishable offence and in the said case, possession was taken in 1916 much before the enactment of the Waqf Act and the amendment and therefore the newly inserted provision (52A) would not apply to the facts of the said case. Thus, the argument of the appellant therein proceeded as to whether the said newly inserted provision was retro-active or retrospective in effect.

**16.** In the background of those facts the court in the paragraph 22 of the judgment observed that in its view, expiry of leases or other arrangements, by efflux of time or their valid termination in the past cannot be construed to mean that such lessee became encroachers nor would passed tenants whose possession is disputed and eviction proceedings pending against

them before the court, fit the description under Section 3(e)(e). It was further observed that the consequences of such an interpretation would be startling even before an adjudication of the validity of termination of lease for instance, tenants holding over would be expose to prosecution. Thus, we are convinced to hold that the decision in **P.V. Nidish** is clearly distinguishable on facts and can have no application to the case on hand. Furthermore, we note that in earlier decision of the Hon'ble Supreme Court in **Rashid Wali Beg** has not been noted and the said decision would apply to the facts of the case on hand as regards the jurisdiction of the tribunal under the provision of the Waqf Act in the light of the overriding provision given in Section 108A of the Act.

- 17.** In another collateral proceedings, pertaining to a complaint lodged against mutation of the property at Premises No. 1, Chitpur, Ghat Road, received by the Municipal Commissioner, Kolkata Municipal Corporation at the instance of the Board of Waqf, West Bengal initiated proceedings, notice was issued to the first appellant company, its advocates, the mutthawali of the Waqf estate its constituted attorney the Chief Executive Officer, Board of Waqf, Kolkata and the Controller of the Kolkata Tika Tenancy Land and Land Reforms Department. All the parties were heard and by order dated 09.09.2015, it was held that the property at 1, Chitpur, Ghat Road, is Waqf property and the Chief Manager (Revenue/North, Kolkata Municipal Corporation) was directed to take steps to record the premises in the name of Board of Waqf, West Bengal immediately namely Nawab Zaibunessa Begum Waqf Estate, E.C No. 1499 (the respondent herein) Thus, the first appellant having being party to the said adjudication done by the Kolkata



Municipal Corporation with regard to the mutation of the property clearly shows that the property has been held to be a Waqf property by the municipal authorities as well.

**18.** The learned advocate appearing for the Waqf Board had placed an enquiry report dated 15.06.2023 drawn by the Chief Executive Officer, Board of Waqf, West Bengal, which is pursuant to an enquiry conducted under Section 54 of the Act in the presence of the Mutthwali as well as in the presence of the learned advocate representing the first appellant. The report states that the ground floor and first floor of the premises is occupied by different establishment dealing in different merchandise and has listed as many as 12 such persons who have been treated as encroachers and the area which is in their occupation and the nature of occupation is also been set out and it has been stated that all the 12 encroachers are paying rents to the second appellant L.K Mohta and one person namely Sukumar Dey is not paying rent to anybody. The enquiry report concludes that all the encroachers are occupying the Waqf property illegally and a proceeding was drawn under Section 54 of the Waqf Act. Thus, it is clear that the appellants have not only breached the specific time limit fixed in the lease deed that there will be no extension of lease on an after 25.12.2003 but they have also breached one of the covenants which says that lessee shall not allow others in its discretion to use the premises without the leave or license of the lessor as it appears that no such permission has been obtained. The enquiry report drawn under Section 54 of the Act makes it evidently clear that the appellant more particularly the second appellant has unauthorisedly permitted the third parties to enter and occupy the premises and also

collecting the rent from these parties. Thus, it is established that the appellants are enriching themselves by squatting on the Waqf property much after the expiry of the lease period.

**19. In *Board of Waqf, West Bengal and another Versus Anis Fatma***

***Begum and Another 2010 14 SCC 588 in WPA 508 of 2022*** the Hon'ble Supreme Court considered the scope of Section 83 of the Waqf Act which deals with constitution of tribunal etc. and it was held that all matters pertaining to Waqf should be filed in the first instance before the Waqf tribunal constituted under Section 83 and should not be entertained by the civil court or by High Courts straightway under Article 226 of the Constitution of India. It was held that the Waqf Act, 1995 is a recent parliamentary statute which has constituted a special tribunal for deciding disputes relating to Waqf; the obvious purpose of constituting such a tribunal was that a lot of cases relating to Waqf were being filed in the courts in India and they were occupying a lot of time of all the courts in the country which resulted in the increase in the pendency of cases in courts and hence a special tribunal has been constituted for deciding such matters.

**20.** It was further held that the Waqf tribunal can decide all disputes questions or other matters relating to Waqf or Waqf property as the words "any disputes, question or other matters relating to a Waqf or Waqf property" are of very wide connotation. Further it was held that any dispute, question or matter whatsoever and in whatever manner which arises relating to a Waqf or Waqf property can be decided by the Waqf tribunal. Further under Section 83(5) of the Waqf Act, the tribunal has all powers

under the civil court under the Code of Civil Procedure and hence it has also powers under Order 39 Rule 1, 2 and 2A of the Code of Civil Procedure.

**21.** In the light of the above reasons, and also in the light of the decision in the **Anis Fatma Begum** we find that the conclusion arrived at by the learned Single Bench that the appellant writ petitioners are not entitled to relief is well founded. Further it is relevant to note Section 51 of the Waqf Act which deals with of alienation of Waqf property without sanction of the Board to be void. Sub Section (1) of Section 51 which was substituted by Act 27 of 2013 with effect from 01.11.2013 commences with a non obstante clause and states that notwithstanding anything contained in Waqf any lease of any immovable property which is Waqf property, shall be void unless such lease is affected with the prior sanction of the Board. In the earlier part of this judgment, we had noted that prior to the execution of the lease date dated 01.09.1959, the settlement which was arrived at between the parties proposing the extension of the lease till 25.12.2003 was placed before the Board and prior sanction was obtained under Section 69 of the Bengal Waqf Act and it is only thereafter the terms of settlement were recorded and decree were drawn on 29.06.1959. These conclusively establish that the property is a Waqf property and as has been held once a Waqf it is always a Waqf and as on date without the prior sanction of the Waqf Board the Mutthwali can never enter into lease of the Waqf property. The consequence of the same would be that any documentation which has been entered into between the appellants and the encroachers in the property by way of written or oral understanding or by any other means are wholly unauthorised under law and are void ab initio.

- 22.** In the light of the above discussion, the appellant has not made out any case for interfering with the order passed by the learned Single Bench. Accordingly, the appeal fails and the same stands dismissed.
- 23.** The interim order which was granted earlier is vacated and the stay petition in GA/1/2023 and GA/2/2024 are dismissed.

(T.S. SIVAGNAM, CJ.)

(P.A- SACHIN)

**Hiranmay Bhattacharyya, J:-**

- 24.** I had the privilege of reading the draft judgment prepared by the Hon'ble Chief Justice and I fully agree with the conclusions arrived at in the said judgment. However, I wish to pen a few words to supplement the observations made therein.
- 25.** The appellant approached the Writ Court praying for setting aside the Show Cause Notice dated March 17, 2022 and the Enquiry Notice under Section 54 of the Waqf Act, 1995, (for short "the 1995 Act") both issued by the Chief Executive Officer, Board of Auqaf, W.B (for short "CEO").
- 26.** Before the learned Single Judge, the appellant questioned the jurisdiction of the CEO to issue notice under Section 54 of the 1995 Act on the ground of pendency of a suit for eviction before the Civil Court at Sealdah at the instance of the Mutawali/5<sup>th</sup> Respondent herein and a proceeding before the Thika Controller for declaration of Thika at the instance of the appellant.

- 27.** The learned Single Judge held that the impugned notices are within the statutory mandate in Section 54 and 3(ee) of the 1995 Act and refused to interfere with such notices.
- 28.** The Wakf in question was created sometimes in the year 1895. The Mutawallis executed a registered deed of lease dated 1.9.59 in favour of Hooghly and Ganges Hydraulic Press Company Limited in respect of a plot of 4 bighas of land and a contiguous plot of 3 cottahs 14 chittacks and 21 square feet of land for a period of 49 years which belongs to the wakf. In the year 1973, the lease was assigned to the appellant no. 1. The said lease expired on 25.12.2003. The Indenture provided that there will be no further renewal of the lease after 25.12.2003. The appellant did not deliver possession of the demised land after expiry of the lease.
- 29.** The Mutawali of the Wakf Estate filed a T.S. No 135 of 2004 before the learned Civil Judge (Junior Division) 1<sup>st</sup> Court Sealdah for eviction of the appellant. The appellant filed an application under Order 7 Rule 11 of the Code of Civil Procedure praying for rejection of plaint *inter alia* on the ground that the suit is barred under Section 85 of the 1995 Act. The Mutawali/plaintiff therein moved an application under Order 7 Rule 10 of the Code of Civil Procedure praying for return of plaint.
- 30.** During the pendency of this appeal, the learned Civil Judge by an order dated 12.02.24 allowed the application under Order 7 rule 10 of the Code and directed return of the plaint.
- 31.** Mr. Bose would contend that challenging the aforesaid order dated 12.02.24, an application under Article 227 of the Constitution of India has been filed and the same is pending before the learned Single Judge. He

submitted that this Court has to consider the effect of pendency of the Civil Revision application and the proceeding before the Kolkata Thika Controller on the issue involved in this appeal. He reiterated his submission made before the learned Single Judge by contending that the CEO could not have exercised jurisdiction to issue the impugned notices during the pendency of Civil as well as thika proceedings.

**32.** The lease deed was executed on 1<sup>st</sup> September, 1959 i.e., when the Calcutta Thika Tenancy Act, 1949 (for short “the 1949 Act”) was in operation. The said lease was subsisting when the Calcutta Thika and other Tenancies and Lands (Acquisition and Regulation) Act 1981 (for short “the 1981 Act”) came into force. Thereafter, the West Bengal Thika Tenancy (Acquisition and Regulation) Act, 2001 (for short “the 2001 Act”) was enacted. The lease expired after the 2001 Act came into operation.

**33.** The writ petitioners never claimed that they were thika tenants under the 1949 Act. They also did not file their return in prescribed Form during the period 1981 Act was in operation claiming that they are thika tenants nor did they claim that the interest of landlord in the demised land vested under the 1981 Act. It is not in dispute that the appellant paid rent for the land to the landlord/lessor till the expiry of the lease. Long after the expiry of lease by efflux of time, the appellants claim to have initiated a proceeding under the 2001 Act by filing a return in Form A before the Kolkata Thika Controller under a covering letter dated 11.12.2012.

**34.** The 1949 Act neither provided for acquisition of thika tenancy nor vesting of such thika tenancy with the State. Section 5 of the 1981 Act provides that lands comprised in thika tenancies, khas lands etc along with

the interests of landlords shall vest in the State free from all encumbrances with retrospective effect from 18.1.1982.

- 35.** Section 4 of the 2001 Act also provides that with effect from 18.1.1982, the lands comprised in thika tenancies and other lands along with the interest of landlords shall be deemed to have vested in the State, free from all encumbrances.
- 36.** The appellants claim that the demised land is a thika land and such land along with the interest of landlords vested in the State with effect from 18.1.1982 and in support thereof Form A and TR Form 7 have been placed before this Court.
- 37.** The appellant claims to have deposited adhoc rent for the period from 18.1.1982 to 31.12.2013 on 9.10.2013 through TR Form 7. The appellant further claims to have deposited interest for the aforesaid period on 9.10.2013 through TR Form 7.
- 38.** It is well settled that mere submission of return in Form-A does not prove that the appellant was accepted as a thika tenant. Mere approval of challan in TR Form No. 7 does not also create any right in favour of the appellant as a thika tenant as it would be evident from the endorsement made at the top of TR Form No. 7 that such deposit was "At depositor's own risk". The documents submitted by the appellant in support of its claim as a thika tenant are not sufficient for this Court to be satisfied even prima facie that the appellant is a thika tenant in respect of the property in question.
- 39.** The appellant claims to have constructed kutchha and pucca structure after the grant of lease of vacant land by the landlord in 1959 as would be evident from the declaration made in Form-A. It has been further stated in

the said form that various godowns measuring about 76,933 square feet are situated on the said property.

- 40.** Before applying for permission from the Controller for raising pucca construction on thika tenanted land, the applicant has to satisfy that he is a thika tenant. It is now judicially settled that if some pucca construction is raised by a tenant in the demised land, he cannot be regarded as thika tenant simply because of the fact that he raised pucca construction on the land with or without the permission of the Controller. No document has been placed before this Court to show that the pucca constructions were made by the thika tenant.
- 41.** The lease deed was executed when the Calcutta Thika Tenancy Act, 1949 was in operation. The said lease deed was for a period of 49 years. Since the lease was granted for a period of more than 12 years i.e., for 49 years, the lessee thereunder cannot be regarded as thika tenant within the meaning of “thika tenant” as defined in Section 2(5) of the 1949 Act as it squarely falls within the exclusion clause.
- 42.** However, during the subsistence of the said lease the Calcutta Thika and Other Tenancies and Land (Acquisition and Regulation) Act, 1981 came into force. Since the tenancy continued till 25.12.2003 it cannot be disputed that the lessee thereunder had the liability to pay rent for the demised land to their landlord during the lifetime of the 1981 Act. However, in order to satisfy the test of a “thika tenant” the lessee also has to satisfy the other requirement that there has been erection and/or acquisition by purchase or gift, any structure on such land by the tenant for residential, manufacturing or business purpose. The expression “structure” used in



section 3(8) of the 1981 Act has been judicially interpreted by the Full Bench of this Court in the case **Lakshmimoni Das vs. State of West Bengal** reported at **AIR 1987 Cal 326** to mean “kutcha” structure and/or temporary structure. No document has been produced before this Court to show even prima facie that the appellants have satisfied the twin tests namely that the appellant is liable to pay rent and has erected or acquired by purchase or gift a “kutcha” structure in order to fall within the definition of thika tenant either under the 1981 Act or under 2001 Act as it stood prior to the amendment in the year 2010.

**43.** At this stage it would be relevant to point out that the definition of “thika tenant” under Section 2(14) of the 2001 Act as it stood prior to its amendment by Amendment Act of 2010 also used the expression “any structure”. Interpretation given in **Lakshmimoni Das** (supra) to the expression “any structure” also applies to the 2001 Act prior to its amendment.

**44.** The appellant also cannot take advantage of the expression “pucca structure” which was incorporated in the definition of “thika tenant” in Section 2(14) of the 2001 Act by the Amendment Act of 2010. The effect of such amendment was given prospectively with effect from 1<sup>st</sup> November, 2010 and not from the date when the 2001 Act came into operation i.e., from 18<sup>th</sup> July, 1982. Therefore, the mere existence of pucca structure on the land as on 1<sup>st</sup> November, 2010 cannot come to the aid of the appellant, as on 1<sup>st</sup> November, 2010 there was no subsisting lease requiring the lessee to pay rent to their landlords in respect of the land comprising the said premises.

- 45.** That apart the claim that the demised lands are comprised in thika tenancies and also that the interests of landlord vested to the State has been made for the first time at a point of time when there was no subsisting contract that the appellants would be liable to pay rent for the land to another person.
- 46.** For all the above reasons, the mere fact that the application at the instance of the appellant for declaration that they are thika tenants is pending before the Kolkata Thika Controller, the same cannot detain this Court to decide the issue involved in this appeal.
- 47.** Section 54 of the 1995 Act states that whenever the CEO considers whether on receiving any complaint or on his own motion that there has been an encroachment on any land, building, space or other property which is waqf property and which has been registered as such under the 1995 Act, he shall cause to be served upon the encroacher a notice specifying the particulars of the encroachment and calling upon him to show-cause before the date to be specified in such notice as to why an order requiring him to remove the encroachment before the dates so specified should not be made and shall also send a copy of such notice to the concerned Mutuwali.
- 48.** Sub-Section 3 of Section 54 states that if, after considering the objections, received during the period specified in the notice, and after conducting an enquiry in such manner as may be prescribed, the CEO is satisfied that the property in question is waqf property and that there has been an encroachment on any such waqf property, he may make an application to the Tribunal for grant of order of eviction for removing such

encroachment and deliver possession of the land, building, space or other property encroached upon to the Mutuwali of the waqf.

**49.** In the case on hand, the CEO issued a show-cause notice dated 17<sup>th</sup> March, 2022 under Section 54 of the 1995 Act wherein it has been stated that it has been reported by the Mutuwali of the waqf estate that the appellant has without any authority of law occupied and thereby illegally taken possession of the waqf property wherein the appellant has no legal right, title and interest over the same. An enquiry notice under Section 54 of the waqf Act dated 18<sup>th</sup> November, 2022 was issued to the appellant stating that there shall be an enquiry into the matter of encroachment of the waqf property on the date mentioned in the said notice.

**50.** The lease expired on 25.12.2003. The appellant being the lessee under such lease did not deliver possession of the demised land to the lessor upon expiry of the lease by efflux of time. The occupation of the appellant in the premises in question, according to Mutawali, is without the authority of law.

**51.** The learned Senior Counsel representing the Mutawali/ 5<sup>th</sup> respondent referred to the definition of “encroacher” in Section 3(ee) of the 1995 Act wherein “encroacher” has been defined to mean any person or institution, public or private occupying waqf property, in whole or part, without the authority of law and includes the person whose tenancy lease or license has expired or has been terminated by Mutawali or the Board.

**52.** The appellant is in possession of the demised premises even after expiry of the lease. The CEO is vested with the power to issue show cause notice under Section 54(1) of the 1995 Act and after considering the objections as well as conducting an enquiry and upon being satisfied that

the property in question is waqf property and that there has been an encroachment on any such waqf property, the CEO can invoke its power to make an application to the Tribunal for grant of an order of eviction for removing such encroachment and deliver possession of the land, building, space or other property encroached upon to the Mutwalli to the Waqf by invoking its power under Section 54(3) of the 1995 Act.

**53.** After taking into consideration the fact that the property is admittedly a wakf property, the lease has expired and the appellant has failed to deliver possession of the demised land to the lessor upon expiry of the lease and after noting the definition of “encroacher” under Section 3(ee) of the 1995 Act, it cannot be said that the CEO acted without jurisdiction by issuing the impugned notices.

**54.** After going through the Scheme of the 1995 Act more particularly Section 54 thereof, this Court holds that irrespective of the fate of the Civil Revision application challenging the order dated 12.02.2024 directing return of plaint, CEO is authorised under the 1995 Act to invoke its powers under Section 54(3) and make an application before the Tribunal.

**55.** The suit for eviction being title suit no. 135 of 2004 was filed by the Mutawali at a point of time when Section 83(1) stood as under-

*“(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 wakf or wakf property under this Act and define the local limits and jurisdiction under this Act of each of such Tribunals”.*

**56.** Section 83(1) was substituted by Act 27 of 2013 with effect from 01.11.2013 and after substitution Section 83(1) reads as hereunder –

*“(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 Tribunals.”*

**57.** Upon going through the provision of Section 83(1) before and after its substitution by the Act 27 of 2013 it is evident that eviction of a tenant or determination of rights an obligation of the lessor and lessee of waqf property falls within the jurisdiction of the Waqf Tribunal.

**58.** The Hon'ble Supreme Court in **Rashid Wali Beg** (supra) held that Section 83 has two limbs, the first concerning the determination of any dispute, question or other matter relating to an waqf and the second, concerning the determination of any dispute, question or other matter relating to the waqf property. After Amendment Act 27 of 2013, even the eviction of a tenant or determination of the rights, an obligation of the lessor and lessee in such property came within the purview of the Tribunal.

**59.** Section 85 of the 1995 Act states that no suit or other proceedings 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 any other matter which is required by or under the 1995 Act to be determined by a Tribunal.

**60.** At this stage, it would be relevant to point out that before the Civil Court, the appellants herein prayed for rejection of plaint on the ground that the suit is barred under the provisions of the 1995 Act. Even if the Civil revision application is allowed, the effect would be that the plaint shall be rejected. That by itself would not oust the jurisdiction of the CEO of the Board to proceed in accordance with Section 54 of the 1995. To the mind of this Court, pendency of the civil revision application has no bearing on the issue involved in this appeal.

**61.** The appellant herein approached the Writ Court challenging the issuance of the show cause notice and the enquiry notices both issued under Section 54 of the 1995 Act. To the mind of this Court, CEO was vested with the power to issue such notices. This Court, therefore, holds that the learned Single Judge was right in refusing to interfere with such notices.

**(HIRANMAY BHATTACHARYYA, J.)**

(P.A- SANCHITA)