

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

C.O. 3763 of 2018

**Anis Fatma Begum
Vs
Debasish Ghosh & Ors.**

For the Petitioner	:	Md. Nauroz Rahber Mr. Adnan Ahmed
For the Opposite Party No.1	:	Mr. K.K. Pathak Mr. Souvik Majhi
For the Board of Auqaf	:	Mr. Sk. Md. Galib Mr. Abu Siddiquie Mallick
Heard on	:	15.05.2024
Judgment on	:	21.05.2024

Ajoy Kumar Mukherjee, J.

1. This application has been directed against order dated 25th July, 2018 passed by learned Waqf Tribunal, West Bengal in Suit No. 33 of 2015, whereby learned Tribunal has allowed defendants' application filed under order VII rule 11 of the Code of Civil Procedure, seeking rejection of plaint.

2. Petitioner/plaintiff's case is that the suit property is a Waqf property duly registered with the Board of Waqf, West Bengal under E.C. No. 4637 and is known as "Amjed Ali Waqf Estate". Father of defendant no.1 was a monthly tenant in respect of the land measuring about 7 cottah 14

chittacks with partial structure standing therein, which is a part and parcel of the aforesaid waqf estate. After the death of his father opposite party herein/defendant no.1 occupied the said premises.

3. Petitioner's further case is that defendant no.1 in violation of the waqf laws has made major additional alternation, changing the nature and character of the waqf estate and has converted the waqf property for his own unlawful commercial use and it is further alleged that defendant has sublet a major portion of the waqf estate in favour of unauthorized occupants.

4. The petitioner herein accordingly served a notice dated 01.12.2014 upon the opposite party herein/defendant no.1, terminating the tenancy w.e.f. 31st January, 2015 and demanded khas possession of the suit property from the opposite party/defendant no.1. Despite service of notice the defendant failed to act in terms of notice and for which petitioner herein filed aforesaid suit for eviction being Suit No.33 of 2015. The defendants/opposite party herein entered appearance in the suit and filed written statement. During pendency of the suit the defendant no.1/opposite party herein filed an Application under order VII rule 11 of the Code contending that the suit is not maintainable as the suit is barred under section 3AA of the West Bengal Premises Tenancy Act, 1997 (in short Act of 1997) and also in view of the provisions mentioned under section 6 and 7 read with section 83 of the Waqf Act 1995 (in short Act of 1995). The petitioner herein filed written objection against the said application. The learned Tribunal below by the order impugned allowed defendants aforesaid prayer, holding therein that the plaint is rejected being not maintainable.

5. Mr. Rahber learned counsel appearing on behalf of the petitioner submits that it is not in dispute that the suit property is a waqf property but learned Tribunal below failed to consider that section 83 (1) of the Act 1995 is amended by Waqf Amendment Act 2013, which provides that any dispute, question or other matter relating thereto, including eviction of a tenant are maintainable only before Waqf Tribunal. He further submits that under section 85 of the said Act as amended by Waqf Amendment Act 2013, the present dispute relating to eviction of tenant from the Waqf property is barred before any Civil Court including Revenue Court or before any other authority.

6. Petitioner in this context also referred Article 251 of the Constitution of India which provides that if any inconsistency arose between law made by the parliament and law made by the legislature of the state, the law made by the parliament shall prevail and law made by the legislature of the state shall to the extent of the repugnancy shall be inoperative. He further submits that on conjoint reading of section 3 with section 44 of the Act of 1997, it appears that the said Act does not create an express bar for entertainment of the suit relating to Waqf Property.

7. He further argued that the learned Tribunal failed to consider the object behind establishing a Waqf Tribunal under a special enactment. The obvious purpose of constituting such a Tribunal is that a lot of suits relating to Waqf are being filed in the courts in India and they are occupying a lot of time of all the courts in the country, which resulted in increase in pendency of cases in the courts and hence a special Tribunal has been constituted for deciding such matters.

8. Mr. Rahber further argued that section 6 and 7 of the Act of 1995 is not a bar for entertaining eviction suit. Simply because there is specific mention in section 6 and 7 of the Act of 1995 regarding the aspect whether a particular property is a Waqf Property or whether a person is entitled to be a Mutwali of the Wakf, Whether a Wakf is a Shia Waqf or Sunni Waqf, it cannot take away the effect of section 83 and 85 of the Act, rather the jurisdiction to entertain all types of suits with regard to property, which is declared as Waqf Property is conferred on the Tribunal by Section 83 of the Act of 1995.

9. Mr. Rahabar further submits that the Waqf Act is a complete code in itself in so far it relates to determination of any dispute, question or other matters relating to Waqf and Waqf property, including eviction of tenant and it provides the procedure to be followed for the purpose of taking possession of the Waqf property, its use, occupation, maintenance and recovery of possession. The Act of 1995 provides for expeditious disposal and the legislative intent is to vest all power to the Waqf Tribunal. The Tribunal below rejected the plaint on the ground that the suit for eviction of tenant is maintainable only before the civil court established under section 9 of the Code and not before the Waqf Tribunal, constituted under section 83(1) of the Act 1995. Such observation of the Tribunal below is erroneous in view of the provision under section 44 of the Act of 1997 as the jurisdiction of the civil court is barred, so far it relates to eviction of tenant. Therefore, relegating the plaintiff to civil court to seek relief for eviction will make the petitioner sufferer.

10. In this context the petitioner has relied upon the following judgments:-

- (i) ***Board of Wakf, West Bengal and another Vs. Anis Fatma Begum and another*** reported in (2010) 14 SCC 588,
- (ii) ***Haryana Wakf Board Vs. Mahesh Kumar*** reported in (2014) 16 SCC 45,
- (iii) ***Kiran Devi Vs. Bihar State Sunni Wakf Board and others*** reported in (2021) 15 SCC 15,
- (iv) ***Faseela M Vs. Munnerul Islam Madrasa Committee and another*** reported in AIR 2014 SC 2064.
- (v) ***Rashid Wali Beg Vs. Farid Pindari & Ors.*** reported in (2022) 4 SCC 414.
- (vi) ***Mumtaz Yarud Powla Wakf Vs. M/s Badam Balakrishna Hotel Pvt. Ltd.*** reported in 2023 6 MLJ 277 (SC).

11. Mr. Pathak learned Counsel appearing on behalf of the opposite party no.1 submits that he petitioner heavily relied upon the judgment of the Apex Court in ***Rashid Wali Beg Vs. Farid Pindari and others.*** reported in (2020) 4 SCC 414 and ***Mumtaz Yarud Dowla wakf Vs. Badam Balkrishna Hotel Pvt. Ltd.*** reported in 2023 SSC Online SC 1378, but in the said judgments, Apex Court was considering the point of jurisdiction on the given facts and circumstances of the case. The factual matrix of the present case is different from aforesaid case and the tenancy law was not under consideration before the Apex Court, while said judgments were passed. He further contended that it was not an issue before the Supreme Court that in the matter of eviction of a tenant, which one will be the forum

whether the Waqf Tribunal or the forum prescribed in the relevant tenancy law.

12. Mr. Pathak in this context further contended that the Act of 1997 is a special statute and it is enacted by the State Legislature under Article 246 (2) read with item no. 18 and 65 of the List-II of the seventh Schedule of the Constitution and it was enforced with the assent of the President of India. So, dispute between the land lord and tenant within the limits of Kolkata Municipal Corporation and the municipal areas, the forum of law always would be civil court having jurisdiction over the suit property. Article 246 (2) confers exclusive jurisdiction to legislate laws to the States on subjects mentioned in the List-II of the seventh schedule of the Constitution. The Premises Tenancy Act being the subject of the state should prevail over other laws so far as the dispute between land lord and tenant as prescribed in the tenancy law and the tenant cannot be robbed of the protections granted to a tenant under the said Act.

13. In this context Mr. Pathak referring ***Major Bahadur Singh Vs. Union of India***, reported in **(2006) 1 SCC 368** contended that court should not place reliance on decisions without discussing as to how factual situation fits in with the fact situation on the decision on which reliance is placed. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusion in two cases. The cases relied by the petitioner did not deal with the issue whether the dispute between a landlord and tenant otherwise governed by the Tenancy Act will be within the jurisdiction of Waqf Tribunal or before the Civil Court as prescribed in Tenancy law. He further contended that in the case of ***Bijay Modi and***

others 2022 (1) CHN 40, the question to be decided before this court was whether the waqf Tribunal has jurisdiction to decide whether the suit property is a Thika property or not and the court held that Waqf Tribunal has no jurisdiction to decide issues vested in the Thika Controller. Similarly, in the case of **Dr. Suhas H. Pophale Vs. Oriental Insurance company limited and its estate officer**, reported in **2014 (4) SCC 657** the issue was whether the tenant is entitled to get protection of the Rent Legislation or is subjected to the mischief of Public Premises Eviction of Unauthorized Occupants Act, 1971 and it was held in that case that right of protected tenant accruing to the tenant before the premises becoming public premises, cannot be destroyed by giving any retrospective application to the provisions of the said Act.

14. Mr. Pathak thus urged that in the instant case it clearly transpires from the record that the defendant/opposite party is entitled to the protection of the Act of 1997. Section 83 (1) of the Waqf Act empowers the Tribunal to entertain eviction of tenant but whether the same is in exclusion of the tenants who comes within the domain of the rent/ tenancy legislation or not, was neither an issue before Apex Court, nor decided by the court. He further submitted that the Act of 1997 is a beneficial legislation enacted for the protection of the tenant and came into force with the assent of President of India and it is a special statute and as such the contention of the petitioner herein that the waqf Tribunal has only the power to deal with the dispute between landlord and tenant in connection with a waqf property is not maintainable in law. Accordingly the Tribunal below has rightly decided

the issue, which does not call for any interference by this court, invoking jurisdictions under article 227 of the Constitution of India.

15. I have considered submissions made by both the parties.

16. It is true that dichotomy created earlier in view of some judgments of the Supreme Court between the properties which were admitted to be waqf properties and the properties which are disputed to be so in view of language used in section 6(1) and section 7(1) read with section 83 of the Act of 1985. In ***Ramesh Govindram Vs. Sugra Humayun Mirza wakf*** reported in **(2010) 8 SCC 726**. Supreme Court reached to a conclusion that the Waqf Tribunal would not have jurisdiction to adjudicate upon a dispute concerning properties which are admittedly waqf properties and following said judgment subsequent thereafter in some of the decisions courts took the view that if a properties is admitted to be waqf property by both the parties, the Waqf Tribunal would not have jurisdiction to adjudicate upon dispute concerning the said property. Accordingly the view prevailing to most of the courts was that the waqf Tribunal would have jurisdiction to determine the question whether a property is a waqf property or not but when the property is admittedly a waqf property the other questions relating to such property, does not attract the jurisdiction of Waqf Tribunal.

17. In the above backdrop section 83(1) of the Waqf Act 1995 was amended in the year of 2013 which conferred jurisdiction upon the Waqf Tribunal to entertain any dispute, question or other matters relating to Waqf or Waqf property including “eviction of a tenant”. The amended section 83 sub-section (1) & (2) now reads as follows:-

“83. Constitution of Tribunal, 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 define the local limits and jurisdiction of such Tribunals. (emphasis added)*

(2) *Any mutawalli person interested in a waqf or any other person 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.” (emphasis added).*

18. It is not in dispute in the present context that suit property is a Waqf property and registered with the Board of Waqf, West Bengal. On a bare reading of the plaint, it also discloses that the tenancy was terminated by issuing eviction notice and the suit was filed for eviction of tenant and recovery of khas possession from the waqf property, recovery of damages and also for declaration.

19. The impugned order pertains to an application filed by the defendant under order VII rule 11 of the Code of Civil Procedure contending that the aforesaid suit for declaration and eviction of tenant and or recovery of khas possession is barred before waqf Tribunal in view of section 6 read with section 7 of the Act of 1995. Needless to say that if on an entire meaningful reading of the plaint, it is found that the suit is manifestly vexatious and meritless in the sense of not disclosing any right to sue, the court should exercise power. Since the power conferred on the court to terminate civil action at the threshold is drastic, the conditions enumerated under order VII, Rule II have to be strictly adhered to. The averments of the plaintiff have to be read as a whole to find out whether the averments disclose a cause of action or whether the suit is barred by law. The question as to whether the suit is barred by any law would always depend upon facts and circumstance

of each case. The averments made in written statement as well as contentions of defendant are wholly immaterial while considering such prayer. (See *Madanuri Sri Rama Chandra Murthy Vs. Syed Jalal* reported in **(2017) 13 SCC 174**). Now let me consider the present issue in the light of aforesaid touch stone.

20. The preamble of the Act of 1995 states that this is an act to provide for the better administration of waqf and for matters connected therewith or incidental thereto. One of the important object of enacting the aforesaid Act of 1995 is for setting up of Waqf Tribunals to consider questions and disputes pertaining to waqf. Accordingly the Act was amended time to time to give effect to section 84 of the Act which authorises Tribunal to hold proceedings expeditiously. In such view of the matter, section 83(5) of the Act of 1985 provides that the Waqf Tribunals 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 an order.

21. Moreover section 108 of the Act of 1995 was also amended w.e.f. 1st November, 2013 which provides that the provisions of the Waqf Act shall have overriding effect 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 this Act.

22. Section 85 of the Act bars the jurisdiction of civil court in respect of any dispute, any question or other matter relating to any waqf, waqf property or other matter which is required by or under the Act to be determined by the Tribunal. By the amendment Act of 2013, in section 85,

the words “civil court” has been substituted significantly by the words “Civil Court, Revenue Court and any other authority”.

23. Now since this is basically a suit for eviction of a tenant and recovery of possession from a waqf property, if section 3 and section 44 of the West Bengal Premises Tenancy Act 1997 read conjointly it appears that section 3(aa) states that nothing contend in the Act of 1997 shall apply to any premises being a waqf property exclusively for Waqf Lillah, (other than Waqf-ul-Aulad) and section 44 of the said Act bars the jurisdiction of civil courts in respect of certain matters save as otherwise expressly provided in the Act.

24. Section 3r of the Act of 1995 defines what is meant by “waqf” and “Waqf-ul-Aulad”. According to the definition “Waqf-ul-Aulad” is a waqf dedicated for any purpose recognised by Muslim law as pious religious or charitable provided when the line of succession fails, the income of waqf shall be spent for education, development welfare and for such other purposes as recognized by Muslim Law.

25. Furthermore section 3(ee) of the Act of 1995 also incorporated by the Amendment Act of 2013 which defines the term “encroacher”. According to such defination any person or institution public or private occupying waqf property in whole or part, without the authority of law and includes a person whose **tenancy**, lease or license has expired or has been terminated by Mutwali or the Board. Here according to the plaint case the tenancy of the defendant has been terminated by notice and accordingly the issue pertains to “encroachment” which also comes under the jurisdiction of Waqf Tribunal in view of Section 83(1) of the Act of 1985 which authorises

Tribunal to decide any dispute question or other matter relating to waqf or waqf property and from that score also Tribunal has the jurisdiction to deal with the present dispute.

26. However the Tribunal below while rejected the plaint by allowing defendants' application under order VII rule 11(d), heavily relied upon **Sk Abdul Mutalib @ Sk Saifur Islam Vs. Abu Nasim Siddiquie** reported in **2016 (3) CLJ Cal and CO No. 4620 of 2016 (Syed Masoon Ali Vs. Abu Naim Siddique & another)** but the ratio laid down in those judgments have no longer any application in the facts and circumstances in the instant suit in as much as those judgments were based upon the judgments of the Apex Court in **Faseela M. Vs. Munnerul Islam Madrasa Committee and another** reported in **AIR 2014 SC 2064** and **Ramesh Gobindram (supra)**, which pertains to a case filed prior to the amendment of section 83 of the Act of 1995 and which subsequently declared by the Supreme Court as not a good law in **Rashid Wali Beg Vs. Farid Pindari and others**, reported in **(2022) 4 SCC 414** and it has been clearly decided in para 54.19 of that judgment that eviction of a tenant or determination of the rights and obligations of lessor and lessee of waqf property, remedy lies before the Waqf Tribunal. In the said judgment Supreme Court has dealt with as many as 14 judgments decided earlier on the point of jurisdiction of the waqf Tribunal in contrast of civil court and resolved the dichotomy created due to conflicting judgments on the issue of jurisdiction of Waqf Tribunal.

27. In **Mumtaz yarud Powla waqf Vs. M/s Badam Balkrishna Hotel Pvt. Ltd.** reported in **2023 SCC Online SC 1378**, the Supreme Court had gone one step further and held in para 32 as follows:-

“On a proper analysis of the said decision, we have no hesitation in holding that the Waqf Tribunal has got sufficient jurisdiction to try every suit pertaining to either a Waqf or a Waqf property, notwithstanding the nature of relief concerned, except as mandated under the statute.”

28. Mr. Pathak heavily relied upon the judgment of **Ramesh Govindram Case (supra)** but a three judges bench of the Apex Court in **Kiran Devi Vs. Bihar State Sunni waqf Board and others** reported in **(2021) 15 SCC 15** has held that ratio laid down in Ramesh Govindram cannot be used as a magic wand to toss the proceedings relating to a Waqf property from one to another. Accordingly I do not find any substance in the submission of Mr. Pathak that since Act of 1997 is special statute and enacted by the state legislature, so every dispute between land lord and tenant within the limits of Kolkata Municipal Corporation and municipal areas, the forum of law is the civil courts, having jurisdiction over the suit property. His argument that the tenant cannot be robbed of the protection granted to a tenant under the act of 1997, has now become obsolete in view of the amendment made in section 83(1) of the Act of 1995. It is no more *res integra* that the present dispute relating to recovery of possession from a tenant/encroacher is maintainable before the waqf Tribunal in view of section 83 (1) of the Act

29. Moreover the present suit before the Tribunal is not a suit for eviction simpliciter, but a suit coupled with prayer for declaration of suit property as waqf property and also for recovery of damages and as such the suit not only covered under section 6(1) but also covered under newly inserted provision under section 7(6) of the amendment act of 2013. By section 7(6) of the Amendment Act of 1995 the Tribunal is also now conferred with the power to assess damages and to recover it as arrears of land revenue through collector.

30. In this context Mr. Galib, learned counsel appearing on behalf of the Board of waqf rightly pointed out that the plaintiff cannot be asked to approach first to the Tribunal to get the property declared as waqf property, then after such declaration, to approach before the Civil Court for eviction of the tenant and thereafter to ask plaintiff to go again to the Tribunal for the recovery of the damages.

31. Waqf Tribunal is constituted 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 obligation of the lessor and lessee and after the Amendment of 2013, there cannot be any doubt that the Waqf Tribunal has jurisdiction to entertain all such matters as provided under the amended section 83 of the Act and in view of the judgment passed by Apex Court in *Mumtaz yarud Dowla waqf case (supra)* Tribunal has jurisdiction to try every suit pertaining to either a waqf or waqf property irrespective to the nature of relief claimed unless barred by the statute. In fact when there is a special forum created for speedy adjudication of the disputes relating to waqf properties, entertaining those dispute by the civil courts, despite ouster of jurisdiction, under section 85 of the Act, leads to multiplicity of litigation, leading to failure of the object of establishing the special Tribunals

32. In view of aforesaid discussion it is clear, when by the Amendment Act of 2013, the parliament inserted the words “eviction of tenant” in section 83(1) then the intention of the legislature is manifestedly clear that the legislature intended to confer such power to the Waqf Tribunal and in such view of the matter the rejection of the plaint by the court below in the

instant proceeding on the ground that the suit is barred by law, is perverse and contrary to the provisions of the waqf Act and as such the order impugned dated 25.07.2018 passed in suit no. 33 of 2015 by the waqf Tribunal West Bengal is hereby set aside.

33. CO 3763 of 2018 is allowed. The Tribunal is directed to make every endeavour for expeditious disposal of the suit following the spirit laid down in section 84 of the Act of 1995.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis on compliance of all usual formalities.

(AJAY KUMAR MUKHERJEE, J.)