

(2016) 07 CAL CK 0051
In the Calcutta High Court
Case No : C.O. No. 4393 of 2015

Board of Auqaf, W.B.

APPELLANT

Vs

Jb. Sk. Safik & Ors.

RESPONDENT

Date of Decision : 04-07-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 7(a), Section 7(d)
Constitution of India, 1950 — Article 227
Waqf Act, 1995 — Section 6, Section 83(1)(2)(3)

Citation : (2016) 3 ICC 850

Hon'ble Judges : Indrajit Chatterjee, J.

Bench : Single Bench

Advocate : Mr. Probal Kr. Mukherjee and Mr. Siddhartha Ruj, Advocates, for the Opposite parties; Mr. S.K. Chowdhury, Mr. M.A. Samad, Mr. Md. Tarikul Haque and Ms. Safila Khanam, Advocates, for the Opposite Parties No. 1 to 6; Mr. Joydeep Kar and Mr. Shehnez Tariq Mi

Final Decision : Dismissed

Judgement

Indrajit Chatterjee, J. - This is an application under Article 227 of the Constitution of India wherein the present petitioner, i.e. the Board of Auqaf (hereinafter called as the said Board) has assailed the order of the Waqf Tribunal, West Bengal, as passed in Suit No. 12 of 2015 wherein the learned Tribunal was pleased to reject the application of the Board as filed under Section 7(a) and 7(d) of the Code of Civil Procedure.

2. The fact relevant for the purpose of adjudication of this revisional application can be stated in brief thus; that one suit was filed by the plaintiff/opposite party No.1 to 6 before the Waqf Tribunal, West Bengal being suit No. 12 of 2015 wherein the present petitioner being the men of village Sovna, P.S ? Memari, approached the Tribunal for a declaration that the E.C No.287 and 287A are waqf properties and those are public Waqf or "Waqf-Lil-La", in nature and not "Private Waqf or Waqf-Al-Aulad", for a declaration that the defendant Nos.4, 5 and 6 to be removed forthwith from the post of joint Mutwalli who have violated the terms

of deed of waqf, that the defendant No.1 that is the Board of Auqaf be directed to cancel the resolution dated 12.08.2014 in respect of development of properties being premises No.3 of Grant Street, Kolkata ? 700 013, for a declaration to cancel the deeds of purchase in respect of "C" Schedule property any held by defendant Nos.7, 8 and 9, direction upon the defendant No.2, being the Kolkata Municipal Corporation not to sanction of any building plan in respect of premises No.3 of Grant Street, Kolkata ? 700 013, direction upon the defendant No.3 for correction of records of rights in respect of entire properties enrolled in the record of the defendant No.1 in favour of the waqf state enrolled as EC 287 and 287A etc.

3. At the time of hearing, it was submitted by Mr. Galib, learned Advocate, appearing for the petitioner that in view of Section 6 of the Waqf Act, 1995 (hereinafter called as the said Act), no provision has been made to entertain such an application to be decided like a suit. He took me to the prayer portion of the plaint (running page no.30) wherein the plaintiffs before the Tribunal prayed for a declaration that the waqf property in question is public waqf and not private waqf. Learned Advocate took me to Section 6 of the said Act to convince this Court that as per Section 6(1) the two types of questions may be decided in a suit:

i) whether a particular property specified as waqf property in the list of Auqaf is waqf property or not, or

ii) whether a waqf specified in such a list is a Shia Waqf and Sunni Waqf .

4. He further submitted that first proviso of Section 6 has prescribed a period of limitation being one year from the publication of the list of Auqaf as contemplated in Section 5 of the Act of 1995.

5. Learned Advocate further submitted that it is not a listed waqf only but it is a registered waqf having particular enrolment certificate No. 287A and 287.

6. Learned Advocate further submitted by taking me to Section 40 of the said Act to show that the Board may itself collect information regarding any property which it has reason to believe to be waqf property etc. and it is the Board who will decide the question and if a party is dissatisfied with such a decision, then such a party may apply to the Tribunal by filing one application under Section 83(2) of the Act of 1995. He further submitted that the plaintiffs before the Tribunal did not approach the Board under Section 40 of the Act of 1995 to ascertain the nature of the waqf but directly approached the Tribunal for declarations by filing one suit.

7. He also took me to Section 25 of the Act of 1995 to show that the Chief Executive Officer of the Board has the power to decide on inspection the nature of the Waqf Estate whether it is a public waqf or private waqf or waqf by user.

8. Thus, Mr. Galib contended that in view of the argument so long made the prayer (a) cannot be considered by the learned Tribunal by way of filing one suit

as it is beyond the scope of Section 6 of the Act of 1995.

9. Learned Advocate also took me to the prayer (b) of the plaint wherein the plaintiffs had prayed for removal of the Mutwali and he submitted that such prayer cannot be entertained by the Tribunal as it is not covered under Section 6 of the Act of 1995. He took me to Section 64 of the said Act to show that the removal of Mutwali is within the domain of the Board and if any Mutwali is dissatisfied with the decision of the Board, he may approach the Board by filing one appeal. He further submitted that such appeal must be filed with one month from the order of removal as contemplated under Section 64(4) of the said Act of 1995.

10. Learned Advocate also took me to the prayer (c) of the plaint, which is as regards cancellation of a resolution passed by the Board dated 12/08/2014 for the development of the property. On this point, he contended that this can be challenged by way of filing of an application under Section 83(2) of the Act and not by a suit.

11. He further took me to the relevant rules framed under the Act of 1995 to convince this court that as per rule 26 as framed in 2001, the period of limitation is one month from the date of such order which has, however, been illustrated by this court from the date of knowledge also.

12. He also took me to the prayer (d) of the plaint which is as regards cancellation of deed and for restoration of the land and it is submitted that it is covered under Section 52 of the Act and the power lies with the Board and thereafter with the District Collector and if anyone is dissatisfied with the order of the Collector, then he may approach the Tribunal in the form of an appeal within a period of 30 days from the date of service of the order.

13. As regards prayer (e), i.e., as regards the prohibitory order not to grant sanction to the building plan, it is the contention of the learned Advocate that the same cannot be the subject matter of the suit as it will be beyond the scope of Section 6 of the Act of 1995.

14. As regards prayer (f), i.e., the correction of records of right, it is the submission of the learned Advocate that it is for the Land Reforms Authority to decide the matter and the Tribunal has no scope to enter into the jurisdiction.

15. As regards prayer (g), it is submitted by the learned Advocate that the power to appoint one Mutwali lies with the Board under Section 32(8) of the Act as regards permanent appointment and as regards temporary appointment, it is covered under Section 63 of the Act of 1995. Thus, on this prayer also, it is the submission of the learned Advocate that such prayer cannot be considered by the Tribunal by filing a suit which is beyond the purview of Section 6. He further submitted that the legislature in its wisdom prescribed separate and distinct proceeding to be taken up either by the Board or by the Tribunal and the Tribunal cannot be permitted to gallop out of it and the structure as framed in the said

Act of 1995 must be maintained by the Tribunal.

16. It is further submitted by the learned Advocate that no notice under Section 80 of the Code of Civil Procedure was given either to the B.L. & L.R.O. or to the Calcutta Municipal Corporation before the filing of the suit or no leave under Section 80(2) was also sought for.

17. He further submitted that in view of the decision of the Apex Court as reported in AIR 2014 SC 2064 (Faseela M. v. Munnerul Islam Madrasa Committee & Anr.), the jurisdiction of the civil court has not been totally ousted. He further submitted that in that decision, the Apex Court relied upon the decision as reported in (2010) 8 SCC 726 (Ramesh Govindram v. Sugra Humayun Mirza Wakf) and another decision as reported in AIR 2014 SC 758 (Bhanwar Lal & Another v. Rajasthan Board of Muslim Wakf & Ors.). He further contended that even if there is a bar under Section 85 of the Act of 1995, it cannot be said that it is a total bar to take away the jurisdiction of the civil court.

18. Learned Advocate also took me to Section 68(6) of the said Act to show that the legislature in its wisdom did not debar one aggrieved party from approaching the civil court as against the order made under that section.

19. It is submitted by Mr. Kar, learned Senior Advocate, appearing on behalf of the opposite party nos. 9, 10 and 11 that the stand of these opposite parties is same like that the Board, i.e., the present petitioner before this court. The main line of argument of Mr. Kar is that in the Act of 1995, the authorities have been determined by the legislature and the authorities must act accordingly. He also challenged the notice given under Section 89 of the said Act to say that as per that notice, the cause of action was regarding the removal of the Mutwali and causing of nuisance over the waqf properties by this Mutwali. He further submitted that the present petitioner cannot claim as such and the present petitioner cannot be covered under Section 3(k)(i) of the said Act. He further submitted that in respect of the property of Grand Street, there is no question of performance of any rites. However, the income being fetched from the property may be diverted to maintain the mosque etc. located at Village-Sovna, P.S. Memari, District-Burdwan. He also argued that the plaintiff practically travelled beyond Section 3(k)(i) and their right can only be restricted up to the performance of religious rite over the waqf property and not beyond that.

20. On behalf of the added opposite party, i.e., a developer in respect of the Grand Street property, Mr. Mukherjee, learned Senior Advocate, submits that the suit itself as framed is not maintainable before the Tribunal in view of the bar of Section 6 of the said Act.

21. He further submitted that the Tribunal did not decide all the issues raised in the application filed by the Board under Order 7, Rule 11 of the Code of Civil Procedure, and that the notice is defective as it did not disclose the full cause of action. He further submitted that for inaction in respect of the application under Section 32 of the Act on the part of the Board, available remedy is by filing of

one application before the Tribunal.

22. On behalf of the opposite party nos.1 to 6, who are the plaintiffs before the Tribunal it is submitted by Mr. Chaudhury that it cannot be said that the petitioner can approach the civil Court by passing the Waqf Tribunal (and if the petitioners are not permitted to get their grievance redressed.) He submitted that the right of the plaintiffs granted under Section 34 of the Specific Relief Act cannot take out and here the only forum is the Tribunal. He submitted by taking me to Section 83(1) of the Act of 1995 to say that the said Section is in Chapter VIII under the heading "judicial proceeding". He further submitted that Section 6 & 7 of the said Act is in Chapter 2 of the said Act under the heading "Survey of Auqafs". He submitted that the main argument of the Board advanced before this court was regarding this chapter 2. He took me to Section 83(1) of the Act to substantiate his contention that the Tribunal has every authority to determine any dispute, question or other matters relating to waqf or waqf property even eviction of a tenant etc. within the local limits and jurisdiction of such Tribunal. He also took me to Section 84 of the Act to submit that it is the duty of the Tribunal to determine any dispute, question or other matter relating to a waqf or waqf property and to do the same expeditiously. Whenever an application is made to any tribunal for determination of any dispute, question or other matters relating to a waqf or waqf property it shall hold its proceeding as expeditiously as possible etc.

23. He further contended that in the present scenario before this Court the Developers, Board and the Mutwallies are in "hand and glove" and how can it be said that the present plaintiffs will approach the Board against its own decision. Will it sit on appeal against its own decision. He relied upon the decision of the Apex Court as reported in (2011) 1 WBLR SC 308 : (2010) 14 SCC 588 Board of Waqf, West Bengal & Anr. v. Anis Fatma Begum & Anr., wherein the Apex Court held in clear terms in a similarly placed situation that all matters pertaining to waqf should be filed in the first instance before the Waqf Tribunal constituted under Section 83 of the Act of 1995 and should not be entertained by the Civil Court or by the High Court. He further submitted that in that decision the Apex Court further held illustrating Section 83(1) and 84 of the Act of 1995 that the Waqf Tribunal can decide all disputed question or other matters relating to a waqf or waqf property. The Apex Court further held that words so used "any dispute, question or other matters relating to a waqf or waqf property" are in our opinion are words of very wide connotation. The Apex Court further held that Section 83(1) and 84 of the Act do not confine the jurisdiction of the Waqf Tribunal to the determination of the correctness or otherwise of an order passed under the Act. Learned counsel referred to paragraphs 14, 15, 16 and 17 of the said decision to contend before this Court that the argument made by the Board cannot be a right approach to decide this matter.

24. He further submitted that the decision of the Apex Court in Faseela M (supra) is distinguishable from the present case as in that suit the tenancy right was in

question. He further submitted that in view of the amendment made in the said Act even the Tribunal has jurisdiction to decide the tenancy dispute if the property is a waqf property. He further submitted that it is the admitted position that the property is one enrolled waqf property and it is the claim of the present opposite parties that it is a public waqf and not a private waqf for the benefit of any member of the family of the waqifi. He referred to Law the Waqfs, Second Edition, by S.A. Kadar, to convince this Court vis-a-vis the plaint that in fact the present waqf is not Waqf-alal-aulad when the deeds of waqf will be placed it will appear that no interest was created by the author of the waqf property to give any benefit in favour of the family, children and descendants of such settler.

It is relevant to quote here Section 3(k)(i) "any person who has a right to offer prayer or to perform any religious rite in a mosque, idgah, imambara, dargah, khanqah, peerkhana and karbala, maqbara, graveyard or any other religious institution connected with the waqf or to participate in any religious or charitable institution under the waqf."

25. As per Section 5 of the Act "publication of list of auqafs is to be made in the official gazette. This Section is in the chapter II "Survey of Auqafs."

Section 6(1) of the said Act has enshrined that if any question arises as to whether a particular property is waqf property in the list of auqafs is waqf property or not or whether a waqf is specified in list a Shia waqf or Sunni waqf. The board or the mutawalli of the waqf or any person aggrieved may institute a suit in a tribunal to decide the matter. The proviso of Section 6 has prescribed a period of limitation for one year from the date of publication. This Section is also in Chapter II.

26. Section 25 of the Act relates to the duties and powers of the Chief Executive Officer to investigate the nature and extent of auqafs and waqf property etc. Section 32 of the Act relates to the powers and functions of the board. Both these sections are in Chapter IV, that is, as regards the Establishment of Boards and their Functions. Section 40 of the Act relates to the decision of the boards as regards waqf property which will solve the dispute whether a particular property is waqf property or not or whether a waqf is a Sunni waqf and Shia waqf. This Section 40 is in Chapter V as regards registration of Auqafs.

27. Section 52 relates to recovery of waqf property transferred in contravention of Section 51. It is in Chapter VI which relates to Maintenance of Accounts of Auqafs. Section 63 relates to power of the board to appoint mutawallis in certain cases. It is also in the Chapter VI. Section 64 has prescribed the provision for removal of mutawalli and the power has been granted to the Board in the same chapter. Section 64(4) has given such mutawalli a power to file an appeal before the Tribunal within one month from the date of receipt of the order.

28. Section 68 is in the same Chapter VI which has cast a duty on the mutawalli to deliver possession of records and as per provision of Section 68(6) the Civil Court is competent to hear the matter, if any, suit is filed by the aggrieved party.

Section 70 relates to inquiry administration of waqf, it is a power vested to the Board. It is also in Chapter VI.

29. It is better to quote the entire Sections 83 (1) and (2) which runs thus: (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 or 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; (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 relation to the waqf. As prescribed in Section 84 the Tribunal is the authority to determine in dispute question or other matter relating to a waqf or waqf property.

30. In reply, it was submitted by Mr. Galib that there is no provision to file a suit except as contemplated in Section 6 of the Act. This argument is also adopted by the learned Advocate appearing on behalf of the opposite party Nos.9, 10 and 11 and the learned Advocate appearing on behalf of the added opposite parties. The only question to be decided by this Court as to whether the learned Tribunal rightly rejected the application under Order 7, Rule 11 of the Code of Civil Procedure.

31. It is needless to say that in deciding one application under that Rule the Court or the Tribunal must concentrate itself to the plaint and no other document can be looked into. It is true that the learned Tribunal did not consider some of the arguments advanced by the board that is whether the suit is bad for non-service of notice under Section 80 of the Civil Procedure Code or that the notice issued under Section 89 of the said Act did not disclose the full cause of action.

32. It is true that in this case B.L. & L.R.O and the Kolkata Municipal Corporation are the parties and as such notice ought to have been issued under Section 80 of the C.P.C or leave would have been taken by the petitioner under Section 80(2) of the C.P.C. This matter may, however, be cured by filing a petition praying for leave under Section 80(2) of the said Code. The Tribunal may dispose of the petition considering the facts and circumstances of this case. This court is at one with the learned lawyer appearing on behalf of the petitioner that the prayer which is appearing in running Page No.31 and internal Page No.13 of the plaint as regards the correction of record of rights in respect of the entire property is within the domain of the Land Reforms Department and this direction cannot be given to the said defendant No.3 being the Block Land and Land Reforms Officer, Memari.

33. As regards the notice under Section 89 of the Act this court is of the opinion on scrutiny of the said notice that the gist of the plaint was mentioned in the said

notice and as such the said notice dated 03.12.2014 (running Page No. 45) cannot be held to be defective. It was argued by Mr. Galib that in view of different provisions of the Act the legislature contemplated three types of litigations to meet up the grievance of the aggrieved party that is by way of filing a suit, appeal and application before the Tribunal. He contended that the only scope to file a suit is under Section 6 of the Act.

34. I have already said that Section 6 is under Chapter II of Survey of Auqafs and Section 6(1) runs thus "If any question arises whether a particular property specified as waqf property in the list of auqfs is waqf property or not or whether a waqf specified in such list is a Shia waqf or Sunni waqf, the Board or the mutawalli of the waqf or any person aggrieved may institute a suit in a Tribunal for the decision of the question and the decision of the Tribunal in respect of such matter shall be final:

Provided that no such suit shall be entertained by the Tribunal after the expiry of one year from the date of the publication of the list of Auqafs:

Provided further that no suit shall be instituted before the Tribunal in respect of such properties notified in a second or subsequent survey pursuant to the provisions contained in Sub-Section (6) of Section 4."

35. Thus, according to me the scope of the suit as contemplated under Section 6 of the Act is restricted to listed waqf property in the list of auqafs and to settle the dispute as to whether such property is a Shia Waqf or Sunni Waqf. I like to reiterate that this property in question is one enrolled property and not listed property and as such that cannot be within the scope of Section 6 of the Act.

36. The theory of Mr. Galib that separate distinct cases like appeal or application ought to have been filed by the petitioner will lead the petitioner to nowhere and the Tribunal will be flooded with such litigations on minor issues without deciding the main issue involved.

37. The decision of the Apex Court in Anis Fatma Begum and Anr. (supra) the court held in Paragraph 14 thus, "Thus, the WaKf Tribunal can decide all disputes, questions or other matters relating to a Wakf or Wakf property. The words any dispute, question or other matters relating to a Wakf or Wakf property are in our opinion, words of very wide connotation. Any dispute, question or other matters whatsoever and in whatever manner which arises relating to a Wakf or Wakf property can be decided by the Wakf Tribunal. The word "Wakf" has been defined in Section 3(r) of the Wakf Act, 1995 and hence once the property is found to be a Wakf property as defined in Section 3(r), then any dispute, question or other matter relating to it should be agitated before the Wakf Tribunal."

38. In Paragraph 16 the court proceeded to say further, "In our opinion, Sections 83(1) and 84 of the Act are independent provisions, and they do not require an order to be passed under the Act before invoking the jurisdiction of the Wakf Tribunal. Hence, it cannot be said that a party can approach the Wakf Tribunal

only against an order passed under the Act. In our opinion, even if no order has been passed under the Act, the party can approach the Wakf Tribunal for the determination of any dispute, question or other matters relating to a Wakf or Wakf property, as the plain language of Section 83(1) and 84 indicates.

39. In Paragraph 17 of the said judgment the Apex Court further held "We may clarify that under the proviso to Section 83(9) of the Wakf Act, 1995 a party aggrieved by the decision of the Tribunal can approach the High Court which can call for the records for satisfying itself as to the correctness, legality or propriety of the decision of the Tribunal. This provision make it clear that the intention of Parliament is that the party who wishes to raise any dispute or matter relating to a Wakf or Wakf property should first approach the Tribunal before approaching the High Court."

40. Thus, in view of the observations of the Apex Court as noted above this court is of the opinion that the suit ought to have been filed only before the Tribunal and not before any Civil Court.

41. The decision of the Apex Court in Faseela M. (supra) that the Civil Court has jurisdiction to entertain one application for eviction from waqf property cannot now be held to be a good law in view of the amendment of Section 83(1) wherein eviction of a tenant etc. came within the jurisdiction of the Tribunal. I agree with Mr. Chowdhury that in view of Sections 83(1), 83(2), 84 and 85 the Tribunal is the only authority to entertain such a suit. The Tribunal is the only authority to take proper action against the highhandedness of the Board. I cannot forget that in this case the Board, the added opposite parties and the opposite party nos.9, 10 & 11 are sailing in the same boat.

42. Thus, in view of the decision of Anis Fatma Begum (supra) and in view of the sections just referred to above this court is satisfied that the Tribunal is the only authority to entertain such a suit. One cause of action may be barred by law, that is as regards correction of record of rights but other cause of action is very much maintainable before the learned Tribunal. Thus, the application under Article 227 of the Constitution of India being devoid of any merit is dismissed on contest. The impugned order passed by the learned Tribunal is hereby affirmed.

There will be no order as to costs.

Office is directed to communicate this order to the learned Tribunal to proceed with the litigations as per law.

Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis.

Later:-

Delivered the judgment in open court, the impugned order passed by the learned Tribunal has been affirmed and the revisional application stands dismissed.

Prayer is made orally by Mr. T.S. Meena, learned Advocate appearing on behalf of

the opposite party Nos.9, 10 and 11 that the operation of the order be stayed for a month as his clients want to move the upper court as against this order.

Prayer for stay stands rejected.