

(2012) 02 CAL CK 0070
In the Calcutta High Court
Case No : C.O. 3903 of 2011

Golam Mustafa Haidari and Another

APPELLANT

Vs

Sayeed Shekh and Another

RESPONDENT

Date of Decision : 15-02-2012

Acts Referred:

Constitution of India, 1950 — Article 227
Limitation Act, 1963 — Section 10, 11, 12, 13, 14
Waqf Act, 1995 — Section 110, 110(1), 17(1), 2(1), 26
West Bengal Land Reforms Act, 1955 — Section 8
West Bengal Wakf Rules, 2001 — Rule 26

Citation : (2012) 2 CALLT 258

Hon'ble Judges : Dipankar Datta, J

Bench : Single Bench

Advocate : Sahidulla Munshi, for the Appellant; Sumit Kr. Ray, Advocate, Ms. Ankita Roy, Advocate for the opposite party no. 1 and Mr. Jawed Yusuf, Advocate for the opposite party no. 2, for the Respondent

Judgement

Hon"ble Justice Dipankar Datta

1. The Board of Wakfs, the opposite party no.2, adopted a certain a resolution dated February 10, 2010. It was confirmed in its subsequent meeting dated February 25, 2010. According to the petitioners, they had no knowledge of such resolutions till June 11, 2010. An application for certified copy of the resolutions dated February 10, 2010 and February 25, 2010 was made on June 14, 2010. The certified copies of the resolutions were furnished to the petitioners on June 22, 2010.

2. The petitioners felt aggrieved by the said resolutions and wished to challenge the same before the Tribunal constituted u/s 83(1) of the Wakf Act, 1995 (hereafter the Act). They, accordingly, applied before the Tribunal under sub-section (2) of Section 83 thereof. Sub-section (2) prescribes that an application thereunder is to be made within the time specified in the Act or where no such time has been specified, within such time as may be prescribed. "Prescribed" in

terms of Section 2(l) of the Act, except in Chapter III thereof, would mean prescribed by rules made by the State Government. The West Bengal Wakf Rules, 2001, framed by the State Government in terms of Section 190 of the Act provides in Rule 26 as follows :

26. Time limit for moving an application before the Tribunal against any order made under any provision of the Act or any rules made thereunder - Any mutawalli or other person interested in a wakf or aggrieved by an order made under the Act or the rules made thereunder, may make an application under sub-section (2) of section 83 to the tribunal for the determination of any dispute, question or other matter relating to the wakf, within 30 days of such order unless otherwise expressly specified in the Act or the rules made thereunder.

3. Since 30 days had lapsed even from the date of the confirming resolution dated February 25, 2010, the petitioners filed an application u/s 95 of the Act before the Tribunal seeking condonation of delay in presentation of the application u/s 83(2) thereof. Section 95 of the Act confers power on the appellate authority to entertain an appeal after expiry of the specified period, provided it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the period so specified.

4. The Presiding Officer of the Tribunal considered the application u/s 95 of the Act filed by the petitioners and by order dated November 8, 2011 rejected it on the ground that the period of 30 days for preferring an application u/s 83(2) of the Act has to be counted from the date of the order and not from the date of derivation of knowledge of such order. He was further of the view that Section 95 of the Act would have application in respect of appeals that may be preferred under the Act and not to applications, which may be filed before the Tribunal u/s 83(2).

5. The order dated November 8, 2011 is the subject matter of challenge in the present revisional application under Article 227 of the Constitution.

6. Mr. Munshi, learned advocate appearing for the petitioners, contended that even though Section 95 of the Act may not have application in the present case so as to confer jurisdiction on the Presiding Officer to entertain the application u/s 83(2) of the Act upon condonation of delay in its presentation, Section 29(2) of the Limitation Act ought to have been considered for the purpose of a decision as to whether the delay could be condoned applying Section 5 thereof or not. According to him, the Act is a special law on the subject of wakf and it does not expressly exclude the application of Section 5 of the Limitation Act to applications filed u/s 83(2) of the Act and, therefore, an order ought to have followed allowing the petitioners to correct the caption of the application seeking condonation of delay by describing it as one filed u/s 5 of the Limitation Act.

7. In support of his submissions, Mr. Munshi placed reliance on the decision of the Supreme Court reported in *Mukri Gopalan Vs. Cheppilat Puthanpurayil Aboobacker*, and the decision of a learned single Judge of this Court reported in

2007(1) CLJ (Cal) 373 : Mumtaz Ahmed Shamsi v. Board of Wakfs, West Bengal and ors.

8. He, accordingly, prayed for an order to set aside the impugned order and for a direction on the Presiding Officer to reconsider whether the petitioners had set up sufficient cause for condonation of delay or not for entertaining the time barred application.

9. Mr. Ray, learned advocate appearing for the opposite party no.1, contended that the Act is a complete code in itself and since applicability of provisions of the Limitation Act by necessary implication have been excluded in relation to applications that could be filed u/s 83(2) of the Act, the petitioners are not entitled to have their time barred application entertained on condonation of delay. He further supported the order impugned by submitting that the Presiding Officer was right in holding that the petitioners could not have taken the aid of Section 95 of the Act, on facts and in the circumstances. Referring to Section 95 of the Act, it is submitted by him that it allows condonation of delay in filing an appeal that could be preferred in terms of provisions contained in the Act but similar such provision not having been made in the Act in respect of applications that could be filed u/s 83(2) thereof, which are time barred, neither Section 5 of the Limitation Act nor Section 5 principles are applicable by necessary implication, although there is no exclusion by express reference. On the question of non-applicability of the provisions of the Limitation Act to the facts at hand, he relied on the decision of the Supreme Court reported in Prof. Sumer Chand Vs. Union of India (UOI) and Others, ., and the Bench decision of this Court reported in 2010(1) CHN 143 : Rafik alias Rafique v. Magma Leasing Ltd. and anr. He thus prayed for dismissal of the revisional application.

10. Mr. Yusuf, learned advocate for the opposite party no.2, supported Mr. Ray and submitted that the Presiding Officer was not in error in dismissing the application for condonation of delay filed by the petitioners.

11. However, replying to a query of the Court, he fairly submitted that the Chief Executive Officer being the ex-officio Secretary of the Board of Wakfs and functioning under its administrative control, he is under an obligation to communicate the orders passed by the Board from time to time to the party or parties who might be affected thereby.

12. I have examined the order impugned, heard the learned advocates for the parties and considered the decisions cited at the bar by them.

13. The only point that calls for an answer is, whether the Tribunal could entertain a time barred application u/s 83(2) of the Act upon condonation of delay in its presentation.

14. The Supreme Court in its decision reported in Hukumdev Narain Yadav Vs. Lalit Narain Mishra, has held the view that "even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an

express reference, it would nonetheless be open to the court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation".

15. Bearing in mind the above principle, it would be my endeavour to ascertain whether the nature of the subject matter and the scheme of the Act exclude the operation of Sections 4 to 24 of the Limitation Act by necessary implication.

16. It would be useful as well as necessary to note few provisions of the Act, to the extent the same are relevant, for a decision on the issue arising before me. The same read as follows:

7. Power of Tribunal to determine disputes regarding wakfs.-(1) If, after the commencement of this Act, any question arises, whether a particular property specified as wakf property in a list of wakfs is wakf property or not, or whether a wakf specified in such list is a Shia wakf or a Sunni wakf, the Board or the mutawalli of the wakf, or any person interested therein, may apply to the Tribunal having jurisdiction in relation to such property, for the decision of the question and the decision of the Tribunal thereon shall be final :

Provided that-

(a) in the case of the list of wakfs relating to any part of the State and published after the commencement of this Act no such application shall be entertained after the expiry of one year from the date of publication of the list of wakfs; and

(b) in the case of the list of wakfs relating to any part of the State and published at any time within a period of one year immediately preceding the commencement of this Act, such an application may be entertained by Tribunal within the period of one year from such commencement:

Provided further that where any such question has been heard and finally decided by a civil court in a suit instituted before such commencement, the Tribunal shall not re-open such question.

13. Incorporation.- (1) With effect from such date as the State Government may, by notification in the Official Gazette, appoint in this behalf, there shall be established a Board of Wakfs under such name as may be specified in the notification.

(2) Notwithstanding anything contained in sub-section (1), if the Shia wakfs in any State constitute in number more than fifteen per cent of all the wakfs in the State or if the income of the properties of the Shia wakfs in the State constitutes more than fifteen per cent of the total income of properties of all the wakfs in the State, the State Government may, by notification in the Official Gazette, establish a Board of Wakfs each for Sunni wakfs and for Shia wakfs under such names as may be specified in the notification.

(3) The Board shall be a body corporate having perpetual succession and a common seal with power to acquire and hold property and to transfer any such property subject to such conditions and restrictions as may be prescribed and shall by the said name sue and be sued.

14. Composition of Board.- (1) The Board for a State and the Union territory of Delhi shall consist of-

(a) a Chairperson;

(b) one and not more than two members, as the State Government may think fit, to be elected from each of the electoral colleges consisting of-

(i) Muslim Members of Parliament from the State or, as the case may be, the Union territory of Delhi,

(ii) Muslim Members of the State Legislature,

(iii) Muslim Members of the Bar Council of the State, and

(iv) mutawallis of the wakfs having an annual income of rupees one lakh and above;

(c) one and not more than two members to be nominated by the State Government representing eminent Muslim organisations;

(d) one and not more than two members to be nominated by the State Government, each from recognised scholars in Islamic Theology;

(e) an officer of the State Government not below the rank of Deputy Secretary.

17. Meetings of the Board.- (1) The Board shall meet for the transaction of business at such time and places as may be provided by regulations.

(2) The Chairperson, or in his absence, any member chosen by the members from amongst themselves shall preside at a meeting of the Board.

(3) Subject to the provisions of this Act, all questions which come before any meeting of the Board shall be decided by a majority of votes of the members present, and in the case of equality of votes, the Chairperson or, in his absence, any other person presiding shall have a second or casting vote.

23. Appointment of Chief Executive Officer and his term of office and other conditions of service.- (1) There shall be a Chief Executive Officer of the Board who shall be a Muslim and shall be appointed by the State Government, in consultation with the Board, by notification in the Official Gazette.

(2) The term of office and other conditions of service of the Chief Executive Officer shall be such as may be prescribed.

(3) The Chief Executive Officer shall be ex officio Secretary of the Board and shall

be under the administrative control of the Board.

26. Powers of Chief Executive Officer in respect of orders or resolutions of Board.- Where the Chief Executive Officer considers that an order or resolution passed by the Board-

(a) has not been passed in accordance with the law; or

(b) is in excess of or is an abuse of the powers conferred on the Board by or under this Act or by any other law; or

(c) if implemented, is likely to-

(i) cause financial loss to the Board or to the concerned wakf or to the wakfs generally; or

(ii) lead to a riot or breach of peace; or

(iii) cause danger to human life, health or safety; or

(d) is not beneficial to the Board or to any wakf or to wakfs generally, he may, before implementing such order or resolution place the matter before the Board for its reconsideration and, if such order or resolution is not confirmed by a majority of vote of the members present and voting after such reconsideration, refer the matter to the State

Government along with his objections to the order or resolution, and the decision of the State Government thereon shall be final.

83. Constitution of Tribunals, 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 wakf or wakf property under this Act and define the local limits and jurisdiction under this Act of each of such Tribunals.

(2) Any mutawalli person interested in a wakf 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 wakf.

95. Power of appellate authority to entertain appeal after expiry of specified period.- Where, under this Act any period has been specified for the filing of any appeal, the appellate authority may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the period so specified, entertain the appeal after the expiry of the said period.

110. Powers to make regulations by the Board.- (1) The Board may, with the previous sanction of the State Government, make regulations not inconsistent with this Act or the rules made thereunder, for carrying out its functions under this Act.

(2) In particular, and without prejudice to the generality of the foregoing powers, such regulations may provide for all or any of the following matters, namely :-

(a) the time and places of the meetings of the Board under sub-section (1) of Section 17;

(b) the procedure and conduct of business at the meetings of the Board;

(c) the constitution and functions of the committees and the Board and the procedure for transaction of business at the meetings of such committees;

17. Perusal of Section 7(1) of the Act reveals that its proviso limits the period within which an application before the Tribunal in relation to the matters specified therein may be presented. Whether Section 5 of the Limitation Act or its principles would apply in respect of a time barred application u/s 7(1) of the Wakf Act need not detain me, since it is not an issue here.

18. Next, I propose to turn to the provisions contained in Sections 13, 14, 17, 23, and 26 of the Act extracted (supra).

19. It has been ascertained from Mr. Yusuf that regulations for conduct of business of the Board [as referred to in Section 17(1) read with Section 2(m) and Section 110 of the Act] and providing for time and places of the meetings of the Board under sub-section (1) of Section 17 have not yet received the sanction of the State Government as required by Section 110(1) of the Act.

20. In the absence of regulations regulating the meetings of the Board, a member of the general public is not likely to know for certain when and where the Board has met or is meeting next. The possibility of the Board adopting a resolution that might affect a particular person in his absence cannot be ruled out. Such resolution, upon confirmation in a subsequent meeting, could become implementable to the detriment and prejudice of such person. Assuming that such person learns of the resolution at the time of its implementation after the period prescribed in Rule 26 of the Rules has expired and an application u/s 83(2) of the Act is filed immediately thereafter, should the Tribunal be held to be denuded of the power to condone the delay and to entertain the application? In my view, the Tribunal must be held to have the power to condone the delay on application of Section 5 of the Limitation Act since the Act does not appear to have excluded the applicability of provisions contained in Sections 4 to 24 of the Limitation Act to proceedings that might be initiated in terms thereof by necessary implication.

21. The Act, to my mind, contains certain strange provisions. The Board is a body corporate consisting of several members of repute. The Chief Executive Officer is the ex-officio Secretary of the Board. Insofar as the State of West Bengal is concerned, the Chief Executive Officer must be appointed by the State Government in consultation with the Board and he is required to have twin

qualifications, viz. (i) he shall be a Muslim; and (ii) he must be an officer of the State Government in the West Bengal Civil Services (Executive) cadre having rendered at least 10 years of service. These being the requirements for appointment of a Chief Executive Officer of the Board in West Bengal, and such officer being under the administrative control of the Board, he is empowered to examine any order or resolution of the Board to ascertain whether any of clauses (a) to (d) of Section 26 of the Act would be attracted or not; and, if prima facie satisfied, he may place the matter before the Board for its reconsideration.

22. To legislate is the duty of the legislators; the Court's duty is to interpret the legislation. It is true that legislation can be struck down as ultra virus but I do not propose to proceed an inch to examine the propriety and validity of such a provision, since nobody has raised any challenge in regard thereto. Suffice it to note that the Chief Executive Officer has the power to place any order or resolution of the Board before it for its re-consideration on he being satisfied that either of clauses (a) to (d) of Section 26 is attracted and, therefore, re-consideration is a necessity. The logic behind such legislation is not comprehensible. Be that as it may, one may not know whether the Chief Executive Officer upon perusal of any order or resolution of the Board has, in fact, decided to place the matter for re-consideration of the Board or not and if placed, the decision that the Board has taken thereon pursuant to such reconsideration. The initial resolution may not have affected a person, while the decision on re-consideration could affect him. The orders or resolutions of the Board, it has been further ascertained, are not communicated to the person to be affected thereby. If the scheme of the Act is to be construed in a manner to exclude operation or applicability of Section 5 of the Limitation Act or its principles, that would result in the remedy of the aggrieved person being lost for all times to come. Certainly, this could not have been intention of the legislature.

23. Let me consider another situation. If it were held that Section 5 of the Limitation Act or its principles were not available to be applied, that might give rise to disastrous results including breeding of corruption. Any unscrupulous person having necessary resources, who may have obtained an order in his favour from the Board behind the back of the person who would be affected thereby, may be successful by utilizing his resources in keeping the order in wraps without the same being communicated to the affected person and in the process ensure the lapsing of the time to approach the Tribunal in the meanwhile by him. In a case of the nature under discussion, the right of action of the affected person would arise as soon as such person comes to learn of the resolution. If he approaches the Tribunal u/s 83(2) of the Act even within 30 days of deriving knowledge, his application would suffer from the vulnerability of not being entertained on the ground that it is time barred and the Tribunal has no power to condone delay in its presentation. He would then be left without a remedy. The recent decision of the Supreme Court, reported in (2011) 1 WBLR (SC) 308: Board of Wakf, West Bengal v. Anis Fatma Begum, holds that no Court including the High Court in its writ jurisdiction can entertain any grievance in

respect of a wakf or wakf property without the Tribunal being first approached. Considering that there can be no wrong without a remedy, the argument that Section 5 of the Limitation Act or its principles do not apply to condone the delay in entertaining time barred applications u/s 83(2) of the Act has to be eschewed.

24. In the process of determining the issue raised in this application, I have considered it necessary to read the decision of the Supreme Court reported in Gopal Sardar Vs. Karuna Sardar, wherein, after consideration of various provisions of the West Bengal Land Reforms Act, 1955 it was held that an application u/s 8 of such Act for pre-emption is in essence a suit, which ought to be instituted within the period specified therein and that applicability or operation of Section 5 of the Limitation Act stands excluded by necessary implication.

25. The decisions cited by the learned advocates for the parties need not be discussed separately since none relate to the Wakf Act. However, the decision in Hukumdev Narain Yadav (supra) having been accepted as the authority on the point in Gopal Sardar (supra) on the ground that it is by a Bench of three learned Judges, my reasoning here has undoubtedly been inspired by the ratio thereof.

26. I, therefore, hold that applicability and/or operation of Section 5 of the Limitation Act is not excluded either by express reference or by necessary implication and, therefore, a party presenting a time barred application u/s 83(2) of the Act is entitled to urge the Tribunal to satisfy itself that there existed sufficient cause for which the application could not be presented earlier and that it could be entertained even after expiry of the specified period i.e. the period specified by Rule 26 of the Rules.

27. In the result, the order impugned is set aside. The Presiding Officer of the Tribunal is requested to re-consider the application filed by the petitioners for condonation of delay, treating as it one filed u/s 5 of the Limitation Act. A reasoned decision shall be given by him on such application as early as possible but not later than a month from date of receipt of a copy of this order.

28. Before I part, I consider it proper to request the Board to consider the desirability of communicating its orders or resolutions to the parties who might be affected thereby till such time the regulations of the nature referred to in Section 17(1) read with Section 110(2) (a) and (b) are framed. Photostat certified copy of this judgment and order may be furnished to the applicant at an early date.