
(2004) 01 CAL CK 0010
In the Calcutta High Court
Case No : Writ Petition No. 1809 of 1996

Shaw Wallace and Co. Ltd. and Another	APPELLANT
Vs	
State of West Bengal and Others	RESPONDENT

Date of Decision : 09-01-2004

Acts Referred:

Bengal Wakf Act, 1934 — Section 45, 53, 54A

Citation : (2004) 3 CHN 362

Hon'ble Judges : Bhaskar Bhattacharya, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Bhaskar Bhattacharya, J.—By this writ application, the petitioners have challenged an order of eviction passed by the Board of Wakfs since affirmed by the Appellate Authority in exercise of power conferred u/s 54A of the Bengal Wakf Act, 1934 ("Act").

2. The facts relevant for disposal of this writ application are stated below :

The property involved is a part of the estate of the wakf created by Prince Golam Mohammed, a son of Tipu Sultan. By a registered deed of lease dated 29th June, 1909, the then Mutwallis of the estate leased out the property to one Joseph Issac Joseph Hyam for a period of 75 years w.e.f. 1st July, 1909. M/s. Shaw Wallace & Co., the petitioner No. 1 herein was a sub-lessee under the aforesaid lessee. After the lease of 75 years expired w.e.f. 1st July, 1984, the Wakf Estate, the lessor, had not taken any step for recovery of possession from the lessee or sub-lessee but subsequently the said Shaw Wallace & Co. negotiated with Md. Mobinuddin, Trustee-Chairman, Mr. Nazim Ali Mirza and Mr. Asif Ali Shah, the then Mutwallis of the estate for execution of a fresh lease of the property for a period of 31 years and a draft lease-deed was prepared. However, the Wakf Board did not give consent to the Mutwallis for creation of such lease. The Shaw Wallace and Co. had filed a suit being No. 795 of 1984 in the Original Side of this

High Court for a declaration that the company was a monthly tenant in respect of the disputed property. At this stage, the Wakf Board intervened and initiated proceedings u/s 54A of the Act for eviction of the petitioners.

3. The petitioners contested the proceedings before the Wakf Board and ultimately the Wakf Board passed an order for eviction of the petitioners on the ground that on the expiry of lease of 75 years the petitioners not having made any offer of renewal of lease before the Board of Wakfs, they were not entitled to remain in occupation of the property.

4. Being dissatisfied, the petitioner preferred an appeal before the Judicial Secretary in terms of Section 54A(5) of the Act, but the said Appellate Authority by order dated July 17, 1996 dismissed the appeal holding that the petitioners had no right to remain in possession after the expiry of the lease of 75 years.

5. Subsequently, the petitioners preferred an application for review before the Appellate Authority but the same also ended in dismissal with the order dated August 20, 1996.

6. By this writ application under Article 226 of the Constitution of India, the petitioners have challenged the aforesaid order passed by the Board of Wakfs which has since been affirmed by the Appellate Authority.

7. Mr. Sarkar, the learned Senior Counsel appearing on behalf of the petitioners, has challenged the orders impugned on twofold ground.

8. First, Mr. Sarkar contends that Section 54A of the Act is not attracted in the present case in view of the fact that the petitioners did not take possession of the property with the aid of the agreement of tenancy admittedly entered into after the expiry of lease of 75 years. According to Mr. Sarkar, Section 54A applies only to a case where a transferee has taken possession by dint of transfer which is prohibited in terms of Section 53 of the Act. Mr. Sarkar submits that even if the subsequent agreement for tenancy is treated to be void, the petitioner being all along in possession of the property by virtue of earlier lease since expired, the Wakf Board could not pass any order for eviction in terms of Section 54A of the Act.

9. Secondly, Mr. Sarkar contends that even on merit, the petitioners are entitled to retain possession by exercising right u/s 53A of Transfer of Property Act by virtue of their right under the agreement of tenancy. Mr. Sarkar further contends that at the relevant point of time when the agreement of tenancy was entered into after the expiry of lease of 75 years, there was no bar of creation of an agreement of tenancy. Under such circumstances, Mr. Sarkar continues, the petitioners are entitled to retain their possession by insisting on enforcement of agreement.

10. This application is opposed not only by the Mutwallis who admittedly entered into subsequent agreement, but also by the Board of Wakfs and the State of West Bengal being represented by Mr. Dasgupta, Mr. Roy and Mr. Bhattacharya

respectively.

11. Mr. Dasgupta, the learned Senior Counsel appearing on behalf of the Mutwallis, has strenuously contended that the creation of subsequent tenancy without prior approval of the Wakf Board being forbidden, the Board of Wakf did not commit any illegality in passing direction for eviction. Mr. Dasgupta contends that once the petitioners entered into agreement for subsequent tenancy, the previous right to remain in possession was impliedly surrendered as the same merged with the alleged new monthly tenancy, Mr. Dasgupta contends that it should, therefore, be presumed that the petitioners were in possession of the property in exercise of their rights under the new tenancy claimed by them which is void and, thus, there was no bar in proceeding u/s 54A of the Act. Mr. Dasgupta further contends that even on merit the petitioners have no right to remain in possession because of the fact that the subsequent tenancy was void and could not be created except with by the prior consent of Wakf Board.

12. Mr. Dasgupta lastly contends that even if the case does not come under the ambit of Section 54A of the Act, this Court should not exercise discretion in favour of the petitioners because undisputedly after the efflux of time limited by the lease of 75 years which expired on 30th June, 1984, the petitioners have no subsisting interest in the property. According to Mr. Dasgupta when the petitioners have no subsisting interest in the property, this Court should not assist the petitioner, a trespasser in the field, against order of eviction.

13. Mr. Roy and Mr. Bhattacharya the learned Counsel appearing on behalf of the Wakf Board and State of West Bengal respectively, have adopted the aforesaid contentions of Mr. Dasgupta and in addition, contended that intention of the legislature in enacting Section 54A of the Act is that in relation to the illegal occupation of any wakf property, the decision of the Wakf Board is final and, thus, the petitioners cannot claim that a suit should be filed in the Civil Court for recovery of possession after the expiry of lease of 75 years. They contended that Civil Court has no jurisdiction in the matter of eviction of a tenant of a wakf property whose lease has expired. They, thus, pray for dismissal of the writ application.

14. Therefore, the first question that requires determination in this application is whether the Wakf Board acted within its jurisdiction in passing an order of eviction against the petitioners although the wakf estate has not recovered possession of the property after the expiry of the lease of 75 years from the petitioners who are all along admittedly in possession of the property.

15. In order to appreciate that aforesaid contention raised by the parties it will be appropriate to refer to the enactment contained in Section 53 as it stood at the time of the agreement between the petitioners and the Mutwallis as well as the provisions contained in Section 54A of the Act and those are quoted below :

"Section 53. Bar to transfer of immovable property of wakf.-- (1) Except as provided in Sub-section (2), no transfer of any immovable property of a wakf by

way of sale, gift, mortgage or exchange or by way of lease or tenancy of any kind shall be valid without the previous sanction of the Board and the Board shall, while according such sanction, see that such transfer is intended for legal necessity. (2) Where such transfer is made under an express power conferred by the wakf deed the previous sanction of the Board shall not be necessary, but a notice of the proposed transfer in such form and containing such particulars as may be prescribed by the Board shall be sent by the Mutwallis to the Commissioner one month before the transfer is made.

54A. Recovery of Wakf property transferred in contravention of section 53.-

(1) Notwithstanding anything to the contrary contained in any other law for the time being in force, if any immovable property of a wakf entered as such in the register of wakfs maintained u/s 45 is transferred after the commencement of the Bengal Wakf (Amendment) Act, 1973, without the previous sanction of the Board in contravention of the provisions of Section 53, the Board may, on the application of any person interested in the wakf or of its own motion, after holding an inquiry in such manner as may be prescribed, made an order against the person in possession of such property directing him to deliver possession of such property to the Board, and send the order for execution to the Collector within whose jurisdiction such property is situated :

Provided that no order shall be made under this Sub-section--

(a) except after giving the transferor and the transferee, and any other person in possession of such property, an opportunity of being heard, or

(b) after more than twelve years from the date of the transfer.

(2) As soon as may be after an order is made under Sub-section (1), the Board shall cause a copy of the order to be served on every person referred to in clause (a) of the proviso to that sub-section in such manner as may be prescribed.

(3) On receipt of an order under Sub-section (1), the Collector shall issue a notice requiring the person against whom the order has been made to deliver the property to which the order relates to the Board within a period of thirty days from the date of the service of the notice.

(4) Every notice issued under sub-section (3) shall be served--

(a) by giving or tendering the notice or by sending it by registered post to the person for whom it is intended ; or

(b) if such person cannot be found, by affixing the notice on some conspicuous part of his last known place of abode or business, or by giving or tendering the notice of some adult male member or servant of his family or by causing it to be affixed on some conspicuous part of the property to which it relates:

Provided that where the person on whom the notice is to be served is a minor, service upon his guardian shall be deemed to be service upon the minor.

(5) Any person aggrieved by an order of the Board under Sub-section (1) may prefer an appeal within sixty days from the date of service of a copy of the order under Sub-section (2).

(6) The provisions of section 58A shall apply mutatis mutandis to an appeal under Sub-section (5).

(7) Where an order made under Sub-section (1), has not been complied with and the time for appealing against such order has expired without an appeal having been preferred or the appeal, if any, preferred within that time has been dismissed, the Collector shall obtain possession of the property in respect of which the order has been made, using such force, if any, as may be necessary for the purpose and deliver it to the Board.

(8) That Board shall deal with any property of which it has recovered possession under this section in such manner as may be prescribed."

16. After hearing the learned Counsel for the parties and after going through the aforesaid provisions, I find that at the relevant point of time no transfer by way of even tenancy could be made in respect of a wakf estate which has been entered in the register of the wakfs maintained u/s 45 of the Act except after taking prior approval of the Board. There is no dispute that in this case, the Wakf Board has not given prior approval to the Mutwallis for creation of fresh tenancy in favour of the petitioners. Therefore, the subsequent monthly tenancy alleged to have been created by the Mutwallis is void altogether but the question still remains notwithstanding such fact, the Board of Wakfs can proceed u/s 54A of the Act for eviction of the petitioners who have not obtained possession for the first time by virtue of the alleged void transfer.

17. After going through the provisions contained in Section 54A of the Act, I am of the firm opinion that the legislature gave authority to the Board of Wakfs to proceed under the said provision only in those cases where a third party has taken possession of the wakf property pursuant to the transfer which is void in terms of Section 53 of the Act; but in respect of cases where a third party already in possession tried either to validate such possession or to have further better right in their favour with the help of a transaction contravening Section 53, Board of Wakfs is not entitled to proceed u/s 54A of the Act.

18. I am not at all impressed by the submission of the learned Counsel for the respondents that once the petitioners agreed to accept the tenancy created by Mutwallis in violation of Section 53 of the Act, it should be presumed that they had surrendered their earlier possession and took fresh possession from the Mutwallis. I am quite conscious of the position of law that in view of the doctrine of merger, if any new tenancy is created, the right existing under earlier tenancy is impliedly extinguished; but we must bear in mind that doctrine of merger comes into play only when the new transaction takes effect in accordance with law. If the new transaction is not in accordance with law, the doctrine of merger is not applicable and it should be presumed that the third party is in possession

in exercise of earlier right.

19. If I accept the contention of the learned Counsel appearing on behalf of the respondents that even if a void transfer is created in favour of a party, in such a case, his earlier right in the property if any, extinguishes, the result will be disastrous as would appear from the following examples :

If there is a tenant of a wakf property validly created with approval of the Wakf Board but if such tenant during the subsistence of tenancy purchases the property by execution of a sale deed in his favour without prior approval of the Wakf Board, in such a case, his right under subsequent sale deed should be treated to be void but his existing right under prior valid tenancy cannot evaporate and in such a case, merely because the subsequent sale deed is invalid, the Wakf Board cannot proceed to recover possession from such third party by taking recourse to Section 54A notwithstanding the fact that his earlier tenancy right continues. Similarly, if a valid mortgage is created by Mutwallis after taking prior approval of the Wakf Board and mortgagee is put into possession and subsequently, the Mutwallis execute a sale deed in favour of such mortgagee without any prior approval of the Wakf Board, in such a case, the sale may be void, but execution of such sale deed by Mutwallis in favour of the mortgagee cannot give right in favour of the wakf estate to proceed to evict mortgagee in possession by virtue of the earlier mortgage deed notwithstanding the fact that the money taken under the mortgage has not been repaid.

20. The aforesaid two instances make it clear that in order to exercise of power of eviction in terms of Section 54A of the Act, it must be shown that the person proceeded against has taken possession for the first time by virtue of a void transfer, but the said provision cannot be made applicable for eviction of a person who is already in possession. The aforesaid Section 54A does not authorise the Wakf Board even to evict rank trespassers in possession of the wakf property and if that be so, it necessarily follows that the Wakf Board could not proceed to evict the petitioners without taking recourse to due process of law after the expiry of lease of 75 years.

21. I, thus, find substance in the first contention of Mr. Sarkar that ingredients of Section 54A for the purpose of invoking power under that section have not been fulfilled. Even if I accept the contention of the respondents that the petitioners have at present no right to remain in possession after the expiry of lease of 75 years, the petitioners cannot be evicted by taking recourse to Section 54A of the Act.

22. The next question is if in a given situation it appears that an authority illegally usurped jurisdiction not vested in it by law and tries to dispossess a person, whether a Writ Court will entertain an application at the instance of the petitioners when apparently he has no existing right in the property after" the expiry of the lease by virtue of which he originally came into possession.

23. On this question, I am of the- opinion that in view of the provisions contained

in Section 6 of the Specific Relief Act, the petitioners have right to contend that they cannot be dispossessed from immovable property except by "due process of law". Once I hold that provision u/s 54A of the Act is not a "due process of law" for eviction of a lessee whose lease has expired and this Court finds that such authority is trying to evict such a person with the assistance of "State" within the meaning of Article 12, in such a case, a Writ Court should protect the interest of the petitioners (See State of Uttar Pradesh and Others Vs. Maharaja Dharmander Prasad Singh and Others, Moreover, it is rightly pointed out by Mr. Sarkar appearing on behalf of the petitioners that at the relevant point of time there was no bar of execution of any agreement of tenancy and, as such, even if prior permission of the Wakf Board is necessary for actual creation of tenancy, in view of the decisions of the Supreme Court in the case of Mrs. Chandnee Widya Vati Madden Vs. Dr. C.L. Katial and Others, and R.C. Chandiok and Another Vs. Chuni Lal Sabharwal and Others, , the Court can even grant specific performance of agreement subject to the sanction of the approving authority. The Mutwallis having admittedly taken money from the petitioners in pursuance of the agreement can be forced to apply before the Wakf Board for approval. If ultimately Board does not approve, in such a situation, the petitioners will be entitled to refund of money taken from the petitioners by the Mutwallis or even damages; but the Mutwallis after executing the agreement and receiving money thereunder, cannot demur at the same and insist that this writ application should not be entertained even though they are going to take possession of the property other than by due process of law with the assistance of State resulting in ultimate gain from their own misdeed.

24. Mr. Das Gupta in this connection has placed strong reliance upon the decisions of the Supreme Court in the cases of (1) Premji Ratansey Shah and Others Vs. Union of India (UOI) and Others, and (2) State of Orissa Vs. Ram Chandra Dev and Mohan Prasad Singh Deo, in support of his contention that this Court should not assist the petitioners who have no right in the property.

25. The case of Premji Ratansey Shaw and others (supra) arose out of a suit for declaration of title and injunction. The plaintiffs failed to prove title and thus, the suit was dismissed although the plaintiffs were in possession. The appeal preferred by the plaintiffs also ended in dismissal. Under such circumstances, the Apex Court held that the plaintiffs having failed to prove title, the Courts below rightly refused relief of injunction against the true owner. In my view, the principles laid down therein cannot have any application to a case where the true owner tries to dispossess a person in possession other than by due process of law with the help of State machinery in such a circumstance the person in possession can approach a Writ Court for protecting his right viz. not be dispossessed of Immovable property except by due process of law (See State of U.P. v. Maharaja Dharmandar (supra)).

26. In the case of State of Orissa v. Ramchandra (supra) the State itself was the grantor of the property in favour of the writ petitioner on certain conditions which

made the grant resumable. After resumption, the petitioner approached High Court on the allegation that the State was trying to take possession without filing a suit. The High Court although found that within the scope of the writ application it was difficult to decide the disputed question of title but nevertheless granted relief to the petitioner by preventing dispossession except by due process of law. Under such circumstances, the Supreme Court held that the High Court without deciding the right of the petitioner could not protect possession of the petitioner because as between State and the grantee, possession of the grantee under a resumable grant could not justify a claim under Article 226 of the Constitution simply on the basis of possession where the grant has been resumed. In my view, the said decision cannot help the wakf estate because in this case the State is not the lessor but it is the wakf estate which is the lessor and as such the lessee in possession after expiry of lease has right to contend that he may not be dispossessed except by due process of law and such right is recognized by section 6 of the Specific Relief Act. In the aforesaid case of *State of Orissa v. Ramchandra*, the State being the grantor, the writ petitioner therein had no such right in view of clear provisions of Section 6(2) (b) of the said Act (corresponding to Section 9 of the Old Specific Relief Act). It is preposterous to suggest that a person has no right to get relief u/s 6 of the Specific Relief Act even if the true owner is not the State but a wakf estate. Thus, the principles laid down in *State of Orissa v. Ramchandra* (supra) cannot be applicable to a case where the grantor is a person other than State.

27. I, thus, find substance in the writ application. The orders impugned are set aside on the ground that the respondents authority could not proceed u/s 54A of the Act in the fact of the present case and, thus, on that ground alone the orders are liable to be set aside. I make it clear that I have not gone into the merit of the other contentions regarding existing right of the petitioners, including the alleged one u/s 53A of the Transfer of Property Act as the same is beyond the scope of this application and I have proceeded on the basis that even if the petitioners have at present no right to remain in the possession for the sake of argument, Section 54A cannot be invoked.

28. The writ application is thus allowed.

29. In the facts and circumstances, there will be, however, no order as to costs.