

(1991) 09 CAL CK 0036
In the Calcutta High Court
Case No : S.A. 1102 of 1982

Sk. Rahimuddin

APPELLANT

Vs

Sk. Serajuddin

RESPONDENT

Date of Decision : 13-09-1991

Acts Referred:

Waqf Act, 1954 — Section 70, 70(1), 70(4)

Citation : AIR 1992 Cal 58 : (1992) 1 CALLT 109

Hon'ble Judges : J.N. Hore, J

Bench : Single Bench

Advocate : Gopal Ch. Mukherjee, for the Appellant; S.A. Habibullah and Miss Gayatri Chowdhury, Sadek Hussain, for the Respondent

Judgement

1. This appeal is directed against the judgment and decree passed by the learned Additional District Judge, 1st Court at Howrah in Title Appeal No. 5 of 1981 affirming those of the learned Munsiff, 4th Court at Howrah in Title Suit No. 183 of 1979.

2. The plaintiff-respondent instituted the said Title Suit against the defendant-appellant for declaration and permanent and mandatory injunction. Plaintiffs case is that he is the Mutawali of the Wakf Estate under which the defendant is monthly tenant in respect of the disputed premises comprising eight rooms from 1960. The tenancy was for residential purposes only. The rate of rent was originally Rs. 10/- per month, which was subsequently enhanced to Rs. 30/- per month by a solennama decree which also empowered the defendant to sublet. The rent was further enhanced to Rs. 50/- The defendant tried to convert the suit premises into a factory from April 1979 without taking written consent of the plaintiff. The plaintiff opposed the illegal act of the defendant and filed objection to the Howrah Municipality against the trade licence and filed the suit for declaration that the defendant had no right to convert the tenancy for residential purpose into a tenancy for manufacturing purpose without Written consent of the plaintiff and permanent "injunction restraining the defendant from doing such

conversion, from making any addition or alteration or construction in any way and mandatory injunction directing the defendant to remove such illegal construction.

3. The defendant contested the suit by filing a written statement in which it was pleaded inter alia that the tenancy was both for the residential as well as factory purposes for which the rate of rent was enhanced from Rs. 30/- to Rs. 50/-. The plaintiff gave consent to supply of 440 volt current for factory purpose and signed in the Form of application to the Calcutta Electric Supply Corporation. It was further contended that in the absence of notice u/ S. 70 of the West Bengal Wakf Act the suit was not maintainable.

4. Upon the consideration of the materials on record, the learned Munsiff has held that the tenancy was for residential purpose only. Regarding notice u/S. 70 of the Wakf Act, the learned Munsiff has held that under sub-section (4) of Section 70 the decree passed in the suit shall be declared void only if the Commissioner within one month of his knowledge of such suit applies to the Court in this behalf. According to the learned Munsiff the suit has been filed for the interest of Wakf Estate for injunction against an illegal act and the Commissioner was not expected to allow the defendant to do such illegal act. At any rate, the plaintiff has taken a risk by not giving a notice to Wakf Commissioner and in such circumstances non-service of notice was not fatal to this suit. The learned Munsiff has, therefore, passed a decree in favour of the plaintiff as asked for.

5. The findings of the learned Munsiff were upheld by the lower appellate Court, and the appeal was dismissed. Being aggrieved, the defendant has preferred this second appeal.

6. The only point that has been urged by Mr. Mukherjee, learned Advocate for the appellant, is that notice under Sec. 70(1) of the Wakf Act is mandatory and in the absence of such notice the impugned decree is liable to be set aside. Section 70(1) provides that the Commissioner shall be notified of the suit in respect of any Wakf property. In the case of *The Commissioner of Wakfs Vs. Sm. Ayesa Bibi and Others*, , it has been held that a notice u/s 70 is mandatory unless the Commissioner is a party defendant in the suit. The effect of non-service of such a notice is contained in sub-section (4) of S. 70 which lays down that any decree or order passed in the suit or proceeding shall be declared void if the Commissioner within one month of his coming to know of such suit or proceeding applies to the Court in this behalf. It is clear, therefore, that the decree is not void ab initio but voidable at the instance of the Commissioner if he files an application within one month from the date of his knowledge of the suit. Notice u/ S. 70(1) was not sent to the Commissioner has not challenged the decree passed by the trial Court and affirmed by the lower appellate Court within one month of service of notice. The Commissioner has, on the other hand, supported the decree passed in favour of the plaintiff. In these circumstances, the decree as passed by the trial Court and affirmed by the first appellate Court should be

allowed to stand. In *Muzafar Ahmed Vs. Indra Kumar Das and Others*, , the decree was allowed to stand under similar circumstances. In that case, the Commissioner was sent a notice but was not made a party. The suit was dismissed. In the appeal that followed, the Commissioner was not made a party and no notice of appeal was served on him. The appeal was allowed. In the second appeal, a ground was taken that the appeal below was incompetent as there was no notice to the Commissioner. Notice of the second appeal was, however, issued to the Commissioner the decree was held to be not void but voidable and as the Commissioner had not applied within a month, the decree was allowed to stand. In the instant case the Commissioner had also supported the decree passed in favour of the plaintiff. In *Mst. Ayesha Bibi Vs. The Commissioner of Wakfs, West Bengal and Others*, arising out of *The Commissioner of Wakfs Vs. Sm. Ayesa Bibi and Others*, the Supreme Court has held that notice u/s 70(1) to the Commissioner of Wakf can be by way of a letter from the Court giving him notice or, if he is made a party, by a Summons to attend the court. While dealing with the case of *Muzafar Ahmed Vs. Indra Kumar Das and Others*, of *Mst. Ayesha Bibi Vs. The Commissioner of Wakfs, West Bengal and Others*, the Supreme Court does not seem to approve the view that the words "suit or proceeding" u/s 70(4) did not include an appeal and opines that it requires careful consideration.

7. There is thus no merit in the appeal which is dismissed. The judgment and decree of the Court below are affirmed.

8. Appeal dismissed.