

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.10139 of 2012

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1. The Bihar State Shia Wakf Board, through Mr. Rasheed Ahmed, the Chief Executive Officer, Resident of 2nd Floor, Haj Bhawan, 334, Ali Imam Path, Harding Road, Patna 800 001.

.... Petitioner/s

Versus

1. The Secretary, Minority Welfare Dept., Govt. of Bihar, Old Secretariat, Patna.
2. Mr. Syed Abid Imam, Resident of 5 Sharaf Apartment, Fraser Road, P.S.- Gandhi Maidan, Patna- 1 (since deceased).
2.1) Syed Shahid Imam, Son of late Syed Abid Imam (Mutawalli), Resident of- 705, Sharaf Apartment, behind Head Office of Union Bank, Frazer Road, Police Station- Kotwali, District Patna.
3. M/S Ganpati Property Developers Pvt. Ltd. through its Director, Sri Ram Shanker Singh, Son of Sri Vishwanath Singh, Resident of Pandey Plaza, Exhibition Road, P.S. Gandhi Maidan, Patna 800001.
4. The Commissioner, Municipal Corporation, Resident of 3rd Floor, Maurya Lok Complex, Dak Bunglow Road, Patna.

.... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Raghieb Ahsan, Sr. Adv. Mr. Iqbal Asif Niazi, Adv. Mr. Kashif Yunus, Adv.
For the Respondent-State:		Mr. Avnish Nandan Sinha, GP-11
For the Respondent No.3:		Mr. Sanjay Singh, Adv.
For the Respondent-PMC:		Mr. Sanjay Prakash Verma, Adv.
For the Respondent No.2:		Mr. Khatim Reza, Adv.

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

C.A.V. JUDGMENT

Date: 31-01-2018

This writ petition has been filed to question the judgment and order dated 19.10.2011 passed by the Bihar Wakf Tribunal, Patna (hereinafter referred to as the ‘Tribunal’) in Title Suit No.10 2011, whereby the suit has been dismissed on maintainability as according to the learned ‘Tribunal’ the issue raised was hit on the principle of *res-judicata* and in the nature of the relief prayed, the ‘Tribunal’ had no jurisdiction to hear or decide the suit.



It is during the pendency of the writ petition that the defendant no.1 before the 'Tribunal' Syed Faiz Murtaza Ali who is respondent no.2 herein deceased and was substituted by Syed Abid Imam vide order passed on 21.8.2014 and who also deceased on 27.1.2017. While interlocutory application bearing I.A. No.1988 of 2017 has been filed by the plaintiff-petitioner to expunge his name, I.A.No.2352 of 2017 has been filed by one Syed Shahid Imam seeking intervention in the proceedings who while informing that the substituted respondent no.2, Syed Abid Imam died on 27.1.2016 informs that before his death he was Mutawalli of Block 'A of Hasan Imam Wakf Estate.

Mr. Raghib Ahsan, learned senior counsel has appeared for the petitioner along with Mr. Iqbal Asif Niazi. While the respondent no.1 is represented by the learned Government Counsel, the respondent no.2 is represented by Mr. Khatim Reza, Advocate, the respondent no.3 is represented by Mr. Sanjay Singh, learned Advocate who appears along with Mr. Uma Kant Prasad and the respondent no.4 is represented by Mr. Sanjay Prakash Verma, learned Advocate.

Mr. Ahsan, leaned senior counsel appearing for the petitioner after taking this Court through the judgment and order passed by the learned 'Tribunal' put to challenge herein has referred



to the copy of the plaint placed at Annexure 'G' to the interlocutory application filed by one Syed Shahid Imam, son of late Abid Imam (Mutawalli) for being impleaded as respondent in the writ petition to submit that the judgment and order passed by the learned 'Tribunal' dismissing the suit by rejecting the plaint could not have been done without affording the parties opportunity to lead evidence in support their respective claim. He submits that the suit property described in Schedule 'A' to the plaint is the property of Bihar State Shia Wakf Board.

While giving the background of the case he submits that Late Syed Hasan Imam, Bar-at-Law created a wakf for the Schedule-I property along with others through a deed of wakf dated 28.4.1931. He submits that the suit property is registered with the Bihar State Shia Wakf Board. According to Mr. Ahsan, the suit property has all along been controlled by the plaintiff-Board as per the Wakf Laws. He submits that Syeda Mehdi Imam, wife of Syed Mehdi Imam (Mutawalia) had sought permission from the Board for developing the wakf property through conversion basis, through builder which was accordingly granted by the Board but neither any development agreement was submitted by the said Mutawalli nor the work started until she died on 22.2.2004. He submits that following her death, the original defendant no.1 Syed Faiz Murtaza



Ali and the developer (defendant no.2) started interfering with the suit property to their advantage and which led to institution of an FIR as also the suit in question for restraining the illegal acts of the defendants.

According to Mr. Ahsan, the learned 'Tribunal' has got swayed by the judgment of this Court reported in **AIR 1975 Patna page 48 (Asma Jafar Imam Vs The State of Bihar)** particularly paragraphs 20 and 23 to dismiss the suit even when the issue was clarified by a Bench of this Court in a Judgment reported in **2008 (3) BBCJ 130 (Syed Hasan Francis Imam Vs. Muzaffarpur Properties Pvt. Limited).**

Learned counsel in reference to the definition of term 'wakf' as found in section 2(m) of the Bihar Wakf Act 1947 (hereinafter referred to as the '1947 Act') has submitted that it includes a 'wakf-al-aulad'.

It is submitted that Wakf Act, 1954 (hereinafter referred to as the '1954 Act') which was a Parliamentary Act at section 3(1) (iii) defined 'wakf' to mean a permanent dedication by a person professing Islam of any movable or immovable property for pious, religious and charitable purpose recognized by the Muslim law and included 'wakf-alal-aulad' to the extent it is dedicated for any purpose recognized by the Muslim law as pious, religious or



charitable.

It is the argument of Mr. Ahsan that this definition has undergone a change vide Wakf (Bihar Amendment) Act, 1974 (Bihar Act 3 of 1975) whereby section 3(l)(iii) of the '1954 Act' was substituted to remove all limitations and to include 'wakf-alal-aulad' in its entirety. According to Mr. Ahsan, by this amendment the wakf in question came within the entire regulatory control of the plaintiff-Board.

He submits that although under the Bihar Wakf Act, 1995 (hereinafter referred to as the '1995 Act'), the definition of 'wakf' has undergone a change but that would not alter the situation.

In sum and substance the argument of Mr. Ahsan to question the judgment and order of the learned 'Tribunal' is that:

- (a) Where the rejection of plaint under Order 7 rule 11 of the Code of Civil Procedure is on the principle of *res-judicata* then the parties ought to have been allowed to lead evidence and the matter could not have been decided on the basis of affidavits and arguments;
- (b) Although the judgment and order of the 'Tribunal' put to challenge is entirely resting on the Division Bench judgment of this Court passed in the case of **Asma Jafar Imam** (supra) but the learned 'Tribunal' has failed to



notice the view expressed by this Court in the case of **Syed Hassan Francis Imam** (supra).

- (c) In view of the Bihar Amendment to section 3(1)(iii) to the '1954 Act' amending the description of 'wakf-alal-aulad' by including 'wakf-al-aulad' in its entirety within the definition of 'wakf' without any limitation, all wakfs whether created before the amendment or thereafter shall come within the regulatory control of the plaintiff-Board.

Mr. Sanjay Singh, learned counsel has appeared for the defendant no.2 who is respondent no.3 herein and was the principal objector before the 'Tribunal' for raising question on the maintainability of the suit. Learned counsel has again taken this Court through the definition of section 2(m) of the '1947 Act' to submit that it is only to the extent where a 'wakf-al-aulad' is dedicated for religious, pious or charitable purpose that it would be covered by the definition of 'wakf' for a regulatory control and in so far as the present case is concerned, it is not for any such purpose. It is submitted that the dedication was made way back on 28.4.1931 and when the power under section 27 of the '1947 Act' vested in the Majlis for general superintendence of all wakfs. It is submitted that the '1954 Act' was enacted by the Parliament



repealing the existing enactments on the issue and which under section 2(l) defined the 'wakf' and under sub-clause (iii) includes a 'wakf-alal-aulad' to the extent it was dedicated for purpose recognized by the Muslim law as pious, religious and charitable. It is submitted that the '1954 Act' was extended to the State of Bihar with effect from 12.4.1973 vide the Wakf (Bihar Amendment) Act, 1974 and by the same Amending Act the definition of 'wakf' found in section 3(l)(iii) of the '1954 Act' was substituted to include the 'wakf-alal-aulad'. He submits that it is this very amendment which resulted in arbitrary exercise by the plaintiff-Board and was questioned in the matter arising from in the case of **Asma Jafar Imam** (supra). According to Mr. Singh, it is to wriggle out of the restrictions as found in the definition of 'wakf' in '1954 Act' that the Bihar Amendment was introduced.

Learned counsel has next referred to section 15 of the '1954 Act' to submit that the functions of the Board so discussed restricts the power exercised by the Board which has to be in conformity with the directions of the Wakif and the purpose of the wakf. He submits that the '1995 Act' repealed the '1954 Act' under section 112 and in its section 3(r) defined 'wakf' to include a 'wakf-alal-aulad' at sub-clause (iii) to the extent where the property was dedicated for pious, religious or charitable purposes recognized



by the Muslim law. According to Mr. Singh, the definition of 'wakf' in 1995 Act' restored the position of 'wakf-alal-aulad'.

Mr. Singh has referred to section 25(2) of the '1995 Act' to submit that the Board has to act in conformity with the directions of the wakif. He refers to section 3(n) of the '1995 Act' to submit that a Shia Wakf means a wakf governed by Shia Law and thus the wishes of the wakif is paramount.

Responding to the argument of Mr. Ahsan, learned senior counsel appearing for the petitioner in placing reliance on the Bench decision of this Court in the case of **Syed Hassan Francis Imam** (supra) he submits that paragraph 19 of the judgment would confirm that the issue being deliberated was entirely different and all that the Court has held that where an issue would arise under '1954 Act' it would have to be governed under the provisions of the said Act alone.

Mr. Khatim Reza has appeared for the intervener who is son of the Mutawalli who was substituted in place of the deceased defendant no.1 Syed Faiz Murtaza Ali. As already indicated that while the plaintiffs have filed I.A. No.1988 of 2017 to expunge the name of Syed Abid Imam the substituted Mutwalli, his son has filed I.A. No.2352 of 2017 for substitution in his place. Whereas according to the learned counsel for the plaintiff, until such time



that a Mutawalli is appointed by the Board the son of the Mutawalli cannot seek the same status, the intervener claims to be a beneficiary of the Hassan Imam Wakf Estate to seek intervention. Even though the plaintiff has not chosen to add him as a party for the reasons discussed, since it is purely a question of law that this issue needs a decision that this Court has permitted the intervener to address the Court.

Mr. Khatim Reza has referred to the plaint placed at Annexure 'G' to the intervention application to submit that the suit as framed is not maintainable because the nature of relief prayed is beyond the jurisdiction of the learned 'Tribunal'. In reference to the relief prayed in the plaint he submits that a declaration is being sought from the 'Tribunal' to declare the property in question as the property of the plaintiff-Board and which is clearly beyond the jurisdiction of the learned 'Tribunal' as held by the 'Tribunal' in the judgment impugned. Learned counsel has next referred to section 69 of the '1954 Act' to submit that all enactments in force on the subject of 'wakf' stood repealed by the '1954 Act'.

I have heard learned counsel for the parties and I have perused the records.

The judgment and order of the learned 'Tribunal' on the suit filed by the writ petitioner is put to challenge before this Court



in writ jurisdiction in view of the statutory provisions underlying section 83(7) and (9) of the '1995 Act' which inter alia, attaches finality to a decision of the learned 'Tribunal' constituted under section 83 of the '1995 Act' for adjudicating on any dispute, question or any matter relating to a wakf or wakf property under the Act and bars any appeal against the decision or order passed by the 'Tribunal'. Section 85 of the '1995 Act' further bars the jurisdiction of the Civil Court in respect of any dispute, question or other matter relating to wakf, wakf property or other matter which is required by or under the Act to be determined by a Tribunal. Section 3(r) of the '1995 Act' defines 'wakf' and includes a 'wakf-alal-aulad' to the extent it is dedicated for pious, religious or charitable purpose recognized by the Muslim law.

It is not in dispute that the property in question is in the nature of the 'wakf-alal-aulad' and a deed of such dedication was executed way back in 1931 when the Musalman Wakf Act, 1923 was in force. The said Musalman Wakf Act, 1923 was repealed under the '1954 Act' and in between the '1947 Act' was enacted with somewhat similar definition of a 'wakf' in so far as it included a 'wakf-alal-aulad'. For some time the definition of 'wakf' in so far as it would include a 'wakf-al-aulad' is concerned, did undergo a change when it was substituted by the Bihar Amendment to the



‘1954 Act’ with effect from 12.4.1973 but even this deviation was set at naught by the definition of term ‘wakf’ as found in ‘1995 Act’ under section 3(r) which restored it to the original position to include ‘wakf-alal-aulad’ only to the extent where it was dedicated for religious pious and charitable purposes.

It is not in dispute that the property in question is in the nature of ‘wakf-alal-aulad’ and the deed was executed for the benefit of the family as would confirm from the deed itself, a copy of which has been placed on record vide Annexure ‘A’ to the interlocutory application filed by the intervener and which clearly mentions in its opening paragraph that it is for the benefit of the family with ultimate benefit to the poor but then this is not the dispute herein. The issue herein as regarding the supervisory control of the plaintiff-Board over the property in question has been fully discussed in the judgment of the Division Bench rendered in the case of **Asma Jafar Imam** (supra) and the opinion present in paragraphs 20 to 25, the Division Bench has concluded that the provisions of the ‘1954 Act’ were not applicable to the property in question as a ‘wakf-alal-aulad’ and thus the Board has no jurisdiction to interfere with the administration and management of the Imam Wakf Estate.

It is not in dispute that the Division Bench judgment



rendered in the case of **Asma Jafar Imam** (supra) has attained finality as it was not questioned by any party before a superior forum.

Though Mr. Ahsan, learned senior counsel appearing for the petitioner has tried to distinguish the opinion of the Division Bench in reference to the Bihar Amendment to the '1954 Act' vide Bihar Amendment (3 of 1975) whereby while extending the application of the '1954 Act' to the State of Bihar with effect from 12.4.1973 it amended the definition of the term 'wakf' as found in section 3(l) (iii) in so far as it concerned the 'wakf-alal-aulad' to remove all limitations. According to Mr. Ahsan, the effect of such amendment qua the judgment of the Division Bench was explained by a coordinate Bench of this Court in the case of **Syed Hassan Francis Imam** (supra) as found in paragraphs 16 to 18 but in my opinion, even the opinion of the coordinate Bench as relied upon does not come to the aid of the plaintiff petitioner because it merely recognizes a supervisory control of the Wakf Board over the property which was subject matter of dispute before the coordinate Bench and nothing further as manifest from paragraph 19 of the judgment.

The contest in hand is not on the issue whether or not the plaintiff-Board has the supervisory control over the property in



question rather a plain reading of the relief prayed in the suit filed by the plaintiff-petitioner before the learned 'Tribunal' would confirm that the plaintiff-petitioner sought a declaration from the learned 'Tribunal' to declare the property in question as the property of the plaintiff wakf board. While praying for such relief the plaintiff-petitioner has sought for temporary injunction against the defendants from changing the physical feature of the suit plot through construction, alienation or sale. As rightly submitted by Mr. Khatim Reza the suit as framed was beyond the jurisdiction because the learned 'Tribunal' had no jurisdiction to adjudicate on such relief.

In my opinion, since the issue as to whether the Board yet had the supervisory control over the wakf property in question despite the Division Bench judgment in the case of **Asma Jafar Imam** (supra) which had attained finality by virtue of the Bihar Amendment to the '1954 Act' and in view of the opinion of the coordinate Bench thereon expressed in the case of **Syed Hassan Francis Imam** (supra) is not an issue arising in the present contest, I refrain from expressing any opinion whether or not the opinion expressed by the coordinate Bench in the case of **Syed Hassan Francis Imam** (supra) would govern the issue of supervisory control of the plaintiff wakf board over the suit property.



Section 13 of the ‘1995 Act’ deals with the establishment of the Board including a Shia Wakf Board and section 14 deals with the composition thereof. The power and functions of the Board is discussed in section 32 of the ‘1995 Act’ and is that of general superintendence over all wakfs in the State on its maintenance, control and administration. The power of the Board over the wakf property thus is clearly delineated and is restricted to its general superintendence.

Sections 6 and 7 of the ‘1995 Act’ would also be relevant in the present context as it relates to the nature of dispute which can be raised before the learned ‘Tribunal’. While section 6 of the ‘1995 Act’ inter alia, provides that if any question arises whether a particular property specified as wakf property in the list of wakf is wakf property or not or whether a wakf specified in such list is a Shia wakf or Sunni Wakf, the Board or the Mutawalli of the wakf or any person interested therein may institute a suit in a Tribunal for decision on the question and which will be final, section 7 deals with the power of a Tribunal to determine the dispute regarding wakf and sub-section (1) thereof would be relevant for the purpose which reads under:

“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 property or not, or whether a wakf specified in such list is a Shia wakf or a Sunni wakf, the Board or the mutawaili of the wokf, 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.

... ..
... ..

Section 7(5) of the ‘1995 Act’ again bars the jurisdiction of the Tribunal to determine any matter which is the subject matter of any suit or appeal or proceeding instituted or commenced in a civil court before commencement of the Act.

It is surprising that even when the legal position as to the supervisory role of the plaintiff-board as well as the nature of jurisdiction to be exercised by a Tribunal is self eloquent from the statutory provisions discussed above, the suit in question was filed



by the plaintiff-Board for a decree that the suit property be declared as the property of the Board. The prayer made in the plaint present at Annexure 'G' to the interlocutory application read thus:

“20. That the suit is valued at Rs.48,00,000/- for the purpose of the jurisdiction of this Tribunal but since the suit is of declaratory nature hence, a fixed Court fee of Rs.250/- is being paid and for the purpose of a temporary injunction a value of which a tentative court fee of Rs.20/- total of which comes to Rs.270/- is being paid the plaintiff Board prays for the following reliefs:

- I. On adjudication, the Schedule I property be declared the property of the plaintiff Board.
- II. An order of temporary injunction be passed in favour of the plaintiff Board against the defendants restraining them from changing of physical structure of the suit property through construction, alienation, or sale.
- III. Cost of the suit be passed in favour of the plaintiff Board against the defendants.
- IV. Any other relief or reliefs as deemed fit and proper be passed in favour of the plaintiff Board against the defendants.

Understandably the Tribunal lacking in jurisdiction to adjudicate on such a prayer, has dismissed the suit on maintainability and rejected the plaint. The finding of the Tribunal at paragraph 13 of the judgment and decree impugned is in consonance with the legal position when it concludes that the declaration prayed by the Shia Wakf Board does not come within the jurisdiction of the Tribunal. The opinion expressed by the Tribunal in lacking jurisdiction to adjudicate on the relief prayed stands supported by sections 6 and 7 of the '1995 Act' and suffers



no infirmity.

In my opinion, since the suit as framed itself was not maintainable for the relief prayed was clearly outside the jurisdiction of the learned ‘Tribunal’, while upholding the view of the learned ‘Tribunal’, I do not consider it necessary to express my opinion on the other issues raised by Mr. Ahsan, learned senior counsel appearing for the petitioner.

In result, the writ petition is dismissed.

(Jyoti Saran, J)

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AFR/NAFR	AFR
CAV DATE	15-11-2017
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