

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:
Hon'ble Justice Shampa Sarkar

C.O. No.139 of 2021

Rayees Alam
vs.
M/S Ganges Garden Realtors Pvt. Ltd. & Ors.

For the petitioner	: Mr. Sabyasachi Chowdhury, Mr. Tanmoy Mukherjee, Mr. Iftekar Munshi.
For the opposite party Nos.1-7	: Mr. Abhrajit Mitra, Sr. Adv., Mr. Satadeep Bhattacharyya, Mr. Mehboob Rahaman.
For the Board of Wakf	: Md. Galib, Mr. Abu siddique Mallik.
For the K.M.C	: Mr. Alok Ghosh, Mr. Subhrangshu Panda.

Hearing concluded on : 15.02.2021
Judgment on : 09.03.2021

Shampa Sarkar, J.:-

The revisional application has been filed by the plaintiff in Suit No.13 of 2020, challenging the order dated December 23, 2020, passed by the learned Wakf Tribunal, Kolkata. By the order impugned, the learned Tribunal rejected an application under Order 39 Rules 1 and 2 read with Section 151 of the Code of Civil Procedure. The petitioner filed a suit before the Wakf Tribunal for declaration that the suit property belonged to Zohra Begum Wakf Estate enrolled under EC 1365, declaration confirming that the property was rightly registered as a wakf in the Wakf Register, that the plaintiff as the mutawalli of the wakf estate had the right to enter

into and inspect the said property and utilise the same for the benefit of the wakf estate, declaration that the order dated May 29, 2013 passed by the Assessor Collector (South), Kolkata Municipal Corporation, in mutation case No.0/117/23 MAY-13/27189 dated May 29, 2013 was erroneous, null and void and not binding and that the defendants did not have any manner of right, title and interest over the suit property. The plaintiff further prayed for permanent injunction restraining the defendants/opposite parties Nos. 1 to 7 from illegally encroaching upon the suit property and from changing the nature and character of the said wakf property. The schedule of the property as mentioned in the plaint is quoted below:-

Schedule “A”

“All that piece and parcel of land ad-measuring 6 Bighas, 15 Cottahs, 7 Chittacks and 28 square feet, laying and situate at premises no.112 B.L. Saha Road, Ward No.117, Borough – XIII, Police Station – Behala, Kolkata-700053, being Dag No.507 and 511 and Khatian No.597 under Mouza – Purja Sahaput, J.L No.-9.

Butted and bounded by:-

ON THE NORTH BY: 86, B.L. Saha Road, Kolkata-700053.

ON THE SOUTH BY: 124, B.L. Saha Road, Kolkata-700053.

ON THE EAST BY: B.L. Saha Road, Kolkata-700053.

ON THE WEST BY: K.M.C Road, Kolkata-700053.”

2. The contentions of the plaintiff/petitioner in the suit was that the suit property was a wakf property known as Zohra Begum Waqf Estate. The plaintiff was the mutawalli. That Mussamat Zarrah Begam alias Zahruh Begum, widow of Tipu Sultan, permanently dedicated the suit property by a registered deed of wakf executed on May 5, 1848 registered on May 11, 1848 in the name of ‘Almighty’, along with houses, trees, tanks etc. standing thereon. The income from the property was to be

applied for the construction of a Mosque. It was provided that the mutawalli would not have any right to apply the income from the wakf estate for his personal use, except for daily expenses. That the said wakf estate was enrolled in the register maintained by the Board of Wakf as a public wakf in terms of the Wakf Act, 1995. The plaintiff started negotiating with a developer to exploit the property commercially for the purpose of increasing the income from the estate. While getting the papers ready, the plaintiff came to know that the defendants/opposite party Nos.1 to 7, had mutated their names in the records of Kolkata Municipal Corporation (in short KMC) behind the back of the mutawalli and the Board of Wakf. Accordingly, the plaintiff filed two successive applications under Section 6 (1) of the Right to Information Act, 2005 (in short R.T.I. Act). The Assessors Collector (South), KMC, by a letter dated March 7, 2020, intimated the petitioner that the premises was recorded as a wakf in the Inspection Book No.2/1995-96 on the basis of the letter of Chief Executive Officer of the Board of Wakf (West Bengal) vide no.4777 dated March 7, 2003. Similarly, the Chief Executive Officer, Board of Wakf answered to another query of the petitioner under the Right to Information Act, that premises No.112, B.L. Saha Road was enrolled as a wakf under the Zohra Begam Estate vide EC 1365. That on October 19, 2019 the plaintiff discovered that the defendants/opposite party Nos. 1 to 7 with their men and agents were raising an unauthorised construction over a portion of the suit property which was diminishing the character of the wakf and thereby causing substantial loss to the wakf estate and its beneficiaries. That on January 25, 2020, construction was started on a

small portion of the suit property, but the same was stopped due to local agitation. On the failure of the Board of Wakf to take steps despite intimation by the plaintiff, the plaintiff had no other alternative but to file the suit for the reliefs mentioned hereinbefore. The plaintiff, petitioner herein, prayed for a temporary injunction by filing an appropriate application with the afore-mentioned allegations. It was averred that the wakf property was in imminent danger of being wasted and damaged and the dedication to the Almighty as made by the wakif, would be completely frustrated unless a temporary injunction was granted to save the wakf estate from irreparable loss and injury. The plaintiff prayed for an order restraining the defendants/opposite party Nos.1 to 7 from disturbing the plaintiff's possession over the suit property and from changing the nature and character of the same without permission of the plaintiff.

3. By an order dated November 18, 2020, the learned Tribunal passed an ad-interim order of *status quo* with regard to the nature and character of the suit property. The said order was challenged by the defendants/opposite party Nos.1 to 7 before this court vide CO No.1489 of 2020. CO No. 1489 of 2020 was disposed of by an order dated December 10, 2020, with a direction upon learned Tribunal to dispose of the application for temporary injunction within seven days. This court directed the parties to maintain *status quo* for the aforementioned period. The said application was heard on contest and the impugned order was passed.

4. In the written objection filed by the defendants/opposite party Nos.1 to 7, it was contended that the suit property vested in the State

under the West Bengal Estate Acquisition Act, 1953 (in short WBEA Act) as also under the West Bengal Land Reforms Act, 1955 (in short WBLR Act) and the recorded owners of the said premises prior to the transfer to the said opposite parties were, Shri Rajendra Lal Saha, Smt. Chinmoyee Saha, Shri Asok Kumar Saha, Shri Ajoy Saha, Shri Manindra Lal Saha, Shri Nirmal Kumar Singh, Smt. Beauty Singh, Smt. Rita Saha, Shri Ranjit Saha, Shri Sujit Saha, Shri Abhijit Saha and Smt. Jogmay Shaw, (together referred to as the 'Sahas' for convenience). That out of total 135 Cottahs approximately comprising the said premises, 103.10 cottahs had already been mutated under Section 50 of the West Bengal Land Reforms Act, 1955, in favour of the said defendants/opposite parties. The balance land would also be gradually recorded in their favour. That the suit property was also recorded in the names of the Sahas in the records of KMC and thereafter mutation was carried out in favour of the defendants/opposite party Nos. 1 to 7. That the plaintiff was never in possession, control and ownership of the suit property. The suit property was always under the possession of the Sahas and their predecessors-in-interest. That one of the Mutawallis had intervened in a suit for partition between the Sahas with respect to the suit property and the High Court rejected the claim of the Mutawalli to be added in the proceeding, granting liberty to file an independent suit. Yet, no such suit was filed. That the present suit was belated and as such injunction could not be granted to the party who slept over his right. That the Sahas sold the suit property to the defendants/opposite party Nos. 1 to 7, by separate deeds of conveyance all dated September 28, 2012. The development of the suit property was

done by a registered partnership firm known as M/s. Merlin Ganges Projects (hereinafter referred to as the developer). That the building plan was sanctioned by the KMC on December 8, 2018 and the notice of commencement of construction was issued on December 19, 2018. That the construction had been completed up to the second floor level along with foundation work, basement, ground floor and first floor. That the project was registered under the West Bengal Housing Industry Regulation Act, 2017. That registered agreements had been entered into between the developer/promoter with around hundred interested purchasers. That the defendants/opposite party Nos. 1 to 7 acquired a right in respect of the premises from the Sahas as the suit property had vested in the State under the WBEA Act, 1953, and the predecessors-in-interest of the Sahas became direct tenants under the State. That stoppage of the construction work would cause irreparable loss and injury to the developer and also to the buyers and the mortgagee bank. That the suit was hit by the proviso to Section 34 of the Specific Relief Act and no injunction could be granted in a defective suit.

5. The Wakf Board also filed a written objection supporting the claim of the plaintiff.

6. Mr. Chowdhury learned Advocate appearing on behalf of the plaintiff, submitted that the plaintiff was appointed as a mutawalli of the wakf estate by a resolution of the Board of Wakf, West Bengal dated September 21, 2011 duly confirmed on February 22, 2012. He referred to the Wakf Register to assert that the estate was registered as a public wakf. Reference was made to the Wakfnama in order to demonstrate that the

said wakf was not a private wakf but was dedicated to the 'Almighty', with the condition that the proceeds therefrom would be utilized for the construction of a mosque, the foundation stone of which had been laid by the Wakif herself. Attention was also drawn to the letter of the Board of Wakf, written to the plaintiff as a reply to the query under the R.T.I. Act that the suit property was enrolled in the Wakf Register. Mr. Chowdhury further placed reliance on the reply of the Assessor Collector (South), KMC to another query made by the plaintiff under the R.T.I. Act, in support of the contention that in the Inspection Book of 2/1995-96 of the KMC, the suit property was recorded as a wakf property, on the basis of a letter written by the Chief Executive Officer of the Board of Wakf dated March 7, 2003.

7. According to Mr. Chowdhury, the contentions of the defendants/opposite party Nos.1 to 7 about being non-agricultural tenants could not be accepted as the predecessors-in-interest of the Sahas could not have been non-agricultural tenants, not having met the criteria laid down under the provisions of the West Bengal Non Agricultural Tenancy Act, 1949 (hereinafter referred to as the said Act of 1949).

8. He further submitted that the provisions of Section 3A of the WBLR Act by which non-agricultural tenants became raiyats directly under the State, came into force in 1980 whereas, the Sahas were claiming title to the property in question on the basis of vesting under the WBEA Act, on and from April 15, 1955. Mr. Chowdhury categorically denied the fact of vesting as claimed by the defendants/opposite party Nos. 1 to 7. He further emphasised that the plea of the predecessors-in-

interest of the Sahas being direct tenants under the State upon the promulgation of the WBEA Act was baseless as the wakf property had been retained under Section 6 (1) of the WBEA Act.

9. Mr. Chowdhury further contended that entries in the finally published LR record of rights would only indicate possession but such entries would not confer title. That once a wakf was created, its character could not be extinguished by any action of the mutawalli or anyone claiming through him. He relied on the decision of the Supreme Court in **Chhedi Lal Misra (dead) vs. Civil Judge, Lucknow & Ors.**, reported in **(2007) 4 SCC 632**. Next, he relied on the decision of **M. Gurudas & Ors. vs. Rasaranjan & Ors.** reported in **(2006) 8 SCC 367**, in support of his contention that the Tribunal having considered the *prima facie* case and the balance of convenience and inconvenience of the parties, ought to have allowed the application for injunction as the issues raised by the plaintiff were serious issues and the wakf property was being wasted, depleted, alienated and damaged.

10. Lastly, he submitted that the suit would not fail even if the prayer for recovery of possession was absent as the defect was curable and could be rectified by amending the plaint. That the cause of action as enumerated in the plaint would indicate that there was no laches on the part of the plaintiff and mere delay in filing the suit, which was not otherwise barred by limitation would not prevent the court from granting an injunction, if the plaintiff could prove *prima facie* case, balance of convenience and inconvenience in favour of grant of an injunction and that irreparable loss and injury would be caused to the suit property, if no

injunction was granted. Mr. Chowdhury referred to the order impugned and submitted that the learned Tribunal had itself recorded that the suit property was a public wakf and that the question whether the character of wakf had been extinguished only on the ground that the sub-lessees had mutated their names in the record of rights or upon vesting under the WBEA Act, were issues to be decided at the trial on evidence. Further, Mr. Chowdhury urged that when the Tribunal observed that the plea of vesting was a wild plea and the suit property was in danger of being wasted and damaged, the learned Tribunal was wrong in refusing the injunction.

11. Mr. Galib, learned advocate appearing on behalf of the Board of Wakf submitted that on the basis of Section 43 of the Wakf Act 1995, the suit property which was already registered as a public wakf under Bengal Wakf Act, 1934 automatically got registered as a wakf property. That the Wakf Register classified the suit property as a public wakf. That sale, gift, exchange, mortgage or transfer of any immovable property which was registered as wakf property would be void *ab-initio* under Section 51 (1-A) of the Wakf Act, 1995 (hereinafter referred to as the said Act). He submitted that Section 51 of the said Act provided that any lease of wakf property would be void, unless effected with the prior sanction of the Board. He also referred to the provisions of Section 104(A) of the said Act which totally prohibited sale, gift, exchange mortgage, or transfer of any movable or immovable property which was enrolled as a wakf property. He submitted that the Sahas could not transfer any land as their predecessors were recorded as *dakhaldars* in the R.S record of rights. He

relied on the decision of **Rajnibai (Smt.) Alias Mannubai vs. Kamla Devi (Smt.) & Ors.**, reported in **(1996) 2 SCC 225**, and submitted that the court while granting an injunction must consider whether any protection should be given in the pending suit and not whether there was any entitlement to any right in the property. He further relied on the decision of **Mst. Zohra Khatoon vs. Janab Mohammad Jane Alam & Ors.**, reported in **AIR 1978 CALCUTTA 133**, in support of his contention that the Mutawalli had a right to the office and not over the immovable property pertaining to the wakf estate, and it was the bounden duty of the court to protect the property of the 'Almighty', even if the mutawalli had not discharged his function diligently and had approached the court at a belated stage.

12. He relied on the decision of **Sayyed Ali & Ors. vs. Andhra Pradesh Wakf Board**, reported in **AIR 1998 SC 972**, in order to reiterate the principle that 'once a wakf always a wakf' and any grant of patta to any other person would not nullify the earlier dedication of the property to the 'Almighty'. He submitted that after the wakf was created it would continue to be so for all times to come and would be governed by the provisions of the Wakf Act and any subsequent sale, transfer or alienation would not change the original character of the wakf property.

13. Mr. Mitra, learned Senior Advocate appearing on behalf of the defendants/opposite party Nos. 1 to 7 submitted that the suit was hit by the proviso to Sections 34 and the provisions of 41(h) of the Specific Relief Act 1963. He submitted that the suit was not maintainable in the absence of a prayer for recovery possession when admittedly, the plaintiff

was not in possession. Thus an injunction could not be granted. In support of this contention he relied on the decisions of **Thimmaiah v. Shabira & ors.** reported in **(2008) 4 SCC 182** and **Anathula Sudhakar v. P. Buchi reddy & ors.** reported in **(2008) 4 SCC 594**. He submitted that the suit property was given on lease by the then mutwalli to one Charuchandra Ghosh on March 16, 1916. The said leasehold right was transferred by Charuchandra Ghosh to Basanta Lal Saha and Shivlal Saha. That the said predecessors of the Sahas were recorded as *dakhalkars* in the R.S record of rights. That by promulgation of the WBEA Act, the predecessors-in-interest of the Sahas, became direct tenants under the State. That alternatively, the non-agricultural tenants who were in khas possession of the said lands as *dakhaldars* became raiyats under the State as per Section 3A (2) of the WBLR Act. The predecessors of the Sahas acquired absolute right, title and interest over the suit property and as such, the defendants/opposite party Nos. 1 to 7 being subsequent purchasers from the Sahas, had acquired absolute right, title and interest in the suit property. Moreover, on the presumption of correctness of the entries in the record of rights, the plaintiff's claim over the said property was not sustainable in law. That even after the final publication of the LR record of rights, the plaintiff did not file an application for correction of the same. That the right to sue arose in 2008 with the knowledge of the partition suit between the Sahas over the suit property. The then mutawalli wanted to be added as a party in the suit which was allowed by the trial court where the partition suit was pending. The said order was ultimately set aside by the High Court. Yet, the mutawalli did not file a

separate suit claiming title over the property. That the instant suit was bad on account of delay. For such delay in filing the suit, the question of granting an injunction did not arise, especially when third party rights had been created and construction had been going on. The developers had entered into an agreement with at least 108 intending purchasers for sale of flats to be constructed in three towers over the suit property and substantial construction had already been done. He submitted that the very fact that the predecessors-in-interest of the Sahas were recorded as '*dakhalkars*' in the RS record of rights, would itself mean that they were non-agricultural tenants and had become direct raiyats under the State and acquired all rights to the suit property including the right to transfer. In this context, he referred to the decisions of this Court in the matter of **Adyama Complex Private Limited & ors. v. The State of West Bengal & ors.** reported in **2019 (1) CHN 146**, **State of W.B. and anr. v. Arun Kumar Basu & anr.** reported in **(1997) 5 SCC 317**, **Jugal Kishore Mondal v. Bikash Ranjan Chandra** reported in **2016 SCC Online Cal 4267**.

14. According to Mr. Mitra, even if the land could be retained under the provisions of Section 6(1) of the WBEA Act, such right subsequently ceased under Section 3A of the WBLR Act. Even rights of charitable and religious institutions were limited to a maximum of 7 standard hectares under Section 14M(6) of the WBLR Act. His next contention was that there was a presumption of correctness of every entry in the record of rights under Section 44(4) of the WBEA Act and Section 51A(9) of the WBLR Act. That although the mutawalli had an opportunity to challenge such entries

in the record of rights, the mutawalli failed to do so. He further submitted that the transfer by the Sahas to the defendants/opposite party Nos. 1 to 7 by the registered deeds of conveyance dated September 28, 2012 were deemed notice and the reliefs claimed in the suit were barred by law. Reference was made to the decision of the Apex Court in the matter of **Dilboo & ors. v. Dhanraji & ors.** reported in **(2000) 7 SCC 702**. He next contended that the construction had reached the third floor of the first tower. The common basement of three towers had also been constructed and such an ongoing project could not be held up by an order of injunction. He relied on the decision of **Kishorshinh Ratanshinh Jadeja vs. Maruti Corporation and Ors.** reported in **2009 (11) SCC 229**. According to Mr. Mitra, the learned Tribunal rightly applied the principles laid down in **Vinay Krishan vs. Keshav Chandra** reported in **1993 Suppl 3 SCC 129** and held that the plaintiff not being in lawful possession ought to have prayed for recovery of possession and in the absence of such prayer, temporary injunction could not be granted and further due to inordinate delay in filing the suit the prayer for injunction was rightly refused.

15. Mr. Alope Ghosh, learned Advocate for the KMC submitted that the on the basis of the records of rights and sale deeds the names of the defendants/opposite party Nos.1 to 7 had been mutated in the records of the KMC and the building plan was sanctioned. That previously the names of their predecessor-in-interest (Sahas) had been mutated in the municipal records. That the actions of the KMC would not confer any title on the defendants/opposite party Nos. 1 to 7. He submitted that KMC

had rightly answered to the query of the plaintiff, that the property in question as per the Inspection Book No.2/1995-1996 was as a wakf property and such recording was done on the basis of a letter written by the Chief Executive Officer of the Board of Wakf.

16. Heard the parties. While exercising jurisdiction under Order 39 rules 1 and 2 of the Code, the Court would not determine legal rights to property, but merely keep the property in its actual condition until the legal title could be established. The Court interferes on the assumption that the party who seeks its interference has the legal right which he asserts, but needs the aid of the Court for the protection of the property in question until the legal right could be ascertained. A man who seeks the aid of the Court must be able to show a fair *prima facie* case in support of the title which he asserts. He is not required to make out a clear legal title, but he must satisfy the Court that he had a fair question to raise as to the existence of a legal right which he sets up.

17. Admittedly, the property had been enrolled as a wakf property. The Wakfnama was a registered deed. The terms and conditions of the deed clearly reflect that the said Wakf was created for charitable purpose. In the Wakf Register too, the property was listed as a public wakf. The certified copies of the Wakf Register were obtained by the defendants/opposite party Nos. 1 to 7 under the Right of Information Act sometime in December, 2019 and thereafter upon obtaining the information that the property was enrolled as a wakf property, the agreements for sale had been entered into with the third parties. The defendants/opposite party Nos. 1 to 7 had not been able to convince the

Tribunal about the vesting of the wakf property either under the WBEA Act or WBLR Act. The answers to the queries of the petitioner under the R.T.I. Act, both by the Board of Wakf and the KMC reflect that the suit property was recorded as a wakf property in their respective records as 'Zohra Begam Wakf Estate'. The deed of conveyance through which the defendants/opposite party Nos.1 to 7, allegedly acquired right, title and interest also mentions that the suit property was a wakf property and Charuchandra Ghosh was the original lessee under the wakf estate who inducted Basanta lal Saha and Shivlal Saha (predecessors-in-interest of the Sahas) as the sub-lessees for a period of fifteen years. That after the expiry of the lease between the wakf and Charuchandra Ghosh, the predecessors-in-interest of the Sahas started paying rent directly to Jahanara Begam the then mutawalli of the wakf estate and after the promulgation of WBEA Act, the predecessors-in-interest of the Sahas were recorded as '*Dakhalkars*'. Thus, title of Shivlal Saha (predecessor-in-interest of the vendors of the defendant) has been traced on the basis of vesting of the suit property under the WBEA Act, and it was contended that consequent upon such vesting, Shivlal Saha became a direct tenant under the State. *Prima facie*, the plaintiff has been able to demonstrate that the property was a wakf property.

18. The next question is whether the wakf property ceased to be so on account of vesting. The WBEA Act had the effect of abolishing zamindari in the State of West Bengal from the date of notification in the official gazette, and from the date of such notification, the estates and rights of intermediaries vested in the State free from all encumbrances.

19. The WBEA Act was promulgated to acquire estates, all rights of intermediaries therein and certain rights of raiyats and under-raiyats of agricultural tenants in occupation of the lands comprised in the estate. Section 4(1) empowered the State Government to issue notification under the Act from time to time declaring that with effect from the date mentioned in the notification all estates and all rights of every intermediary in each such estate situated in a district or a part of the district specified in the notification “shall vest in the State” free from all encumbrances. The procedure had been provided in this behalf in subsection (2) to (6) of Section 4 of the Act. The effect of notification as adumbrated in Section 5 thereof was that, all grants of and confirmation of titles to estates and rights therein, to which the declaration applied and which were made in favour of the intermediaries would stand determined. Therefore, by statutory operation, the pre-existing rights and all grants of and confirmation of the titles to the estate and the rights therein, had been determined by the issuance and publication of the notification under Section 4(1) read with Section 5 of the Act. Section 6 of the Act, by employing a non obstante clause, curved out exceptions to the operation of Sections 4 and 5 and preserved the right of an intermediary to retain possession and title of certain lands in certain circumstances. The Act came into force on February 12, 1954. The effect of the Act was to vest the rights of intermediaries (an expression subsequently extended to cover raiyats and under-raiyats) in the State Government. However, section 6 conferred certain rights on the intermediaries to retain certain lands.

20. Pursuant to sub-section (1) of Section 4, a notification was published which prescribed the date of vesting as April 15, 1955. Chapter VI of the Act deals with the provisions of acquisition of interests of raiyats and under-raiyats. Under Section 49, the provisions of Chapter VI were to come into force on such date and in such district or part of a district as the State Government may, by notification in the Official Gazette, appoint. The notification under Section 49 was published on April 9, 1956, by which Chapter VI was brought into force in all the districts of West Bengal with effect from April 10, 1956. The effect of such a notification was that the provisions of the earlier chapters of the Act became operative *mutatis mutandis* to raiyats and under-raiyats as if such raiyats and under-raiyats were intermediaries and the lands held by them were estates and a person holding under a raiyat or a under-raiyat was a raiyat for the purpose of clauses (c) and (d) of section 5. The notifications were issued under Section 4 by the State Government as a result of which the interests of raiyats and under-raiyats vested in the State with effect from April 14, 1956.

21. So far as the non-agricultural tenants were concerned, their lands did not vest in the State under the WBEA Act. The definition of an intermediary as given in Section 2(i) of WBEA Act had also made it clear that the term intermediaries did not include among others a non-agricultural tenant. Even though with the coming into effect of Chapter VI of the Act, the interest of the raiyats and under-raiyats vested in the State with effect from 1st Baisakh, 1363 B.S., there was no provision in the West

Bengal Estates Acquisition by which the interest of a non-agricultural tenant could vest in the State.

22. Section 6(1) is an enabling provision by virtue of which an intermediary could retain different categories of land to the extent of the ceiling limit on the footing that he was a raiyat under the State. The intermediary exercised his option by filing a 'B' Form return indicating the lands he intended to retain.

23. Under Section 6(1)(i) of the Act, a religious or charitable institution or a person holding under a trust or an endowment or other legal obligations was entitled to retain and to hold lands as an intermediary exclusively for charitable as well as religious purposes and such an intermediary could retain lands held in khas possession for such purpose including lands, held by any person, not being a tenant by lease or license of such corporation or institution or person. Section 6 thus empowered an intermediary to hold land subject to such checks as mentioned in the section.

24. In this case, one record of rights clearly shows that the suit land was settled in favour of the mutawalli representing the wakf estate by "Bharat Samrat" prior to the promulgation of the 1953 Act. There is a subsequent record of rights from which it appears that Charuchandra Ghosh with others were recorded as the lessees under the then mutawalli for a period of forty years. In the finally published RS record of rights under the WBEA Act, the mutawalli of the wakf estate has been mentioned as the superior title holder and the predecessors-in-interest of the Sahas were recorded as *Dhakhalkars*. These names as *Dhakkaldars*

were inserted in the R.S. Record by way of a correction under Section 45 of the WBEA Act below the entry of the name of the mutawalli. In view of the presumption of correctness of the finally published record of rights under Section 44 (4) of WBEA Act, and the entry of the name of the mutawalli Jahanara Begum, it *prima facie* appears that the suit lands could have been retained by the mutawalli under the provisions of Section 6(1)(i) or 6 (1) (a)(b)(c) of the WBEA Act as the wakf estate also consisted of dwelling house, homestead lands, tanks etc. Thus, it is a matter of evidence and trial for the Court to arrive at a conclusion that the suit property had vested in the State after promulgation of the WBEA Act as contended by Mr. Mitra.

25. The contention of the defendants/opposite party Nos.1 to 7 with regard to vesting of the rights pertaining to the suit property under Section 3A (2) of the WBLR Act, is *prima facie* unconvincing and contrary to the plea of vesting under the WBEA Act and the predecessors-in-interest of the Sahas becoming direct tenants under the State. Moreover, whether the predecessors-in-interest of the Sahas were non-agricultural tenants under the Act of 1949 has to be established by evidence. Vesting under Section 3A and conferment of raiyati interest under WBLR Act could not have happened prior to September 9, 1980. Whereas, the deed of conveyance mentions that Shivilal Saha became a direct tenant under the wakf estate and paid rent to the mutawalli after expiry of Charuchandra Ghosh's lease and thereafter paid rent directly to the State of West Bengal from 1362 BS, that is, from 1955 after the promulgation of the WBEA Act. Thus, if the predecessors-in-interest of the Sahas became

direct tenants under the State after promulgation of WBEA Act, the question of them being non-agricultural tenants and subsequent vesting of the rights in the suit property under the provisions of Section 3A of the WBLR Act is not a convincing argument.

26. Section 3A of the WBLR Act, operates to vest the interests of all non-agricultural tenants and under-tenants under the W.B. Non-Agricultural Tenancy Act 1949 in the State.

27. To appreciate what the terms “non-agricultural tenant” and “non-agricultural under-tenants” mean, reference to Section 3 of the W.B. Non-Agricultural Tenancy Act 1949 is apposite. The provisions are quoted below:-

“3. Classes of non-agricultural tenants. (1) There shall be, for the purposes of this Act, the following classes of non-agricultural tenants Namely:

(a) tenants and

(b) under-tenants.”

(2) “tenant” means a person who has acquired a right to hold non-agricultural land directly under the State for any of the purposes provided in this Act either immediately or mediately under a tenant and includes also the successors-in-interest of persons who have acquired such a right.”

28. In order to be a tenant one must acquire the interest from a tenure holder or a proprietor and he must hold some non-agricultural land for any of the purposes provided in the Act. In order to be a non-agricultural under-tenant one must satisfy three tests: (a) he must hold immediately or mediately under a non-agricultural tenant, (b) he must hold non-agricultural land; (c) he must hold it for any of the purposes provided in the Act. Whether these conditions were satisfied by the predecessors-in-interest of the defendants Nos.1 to 7 is a matter of trial.

29. Non-agricultural land as defined under the Act of 1949 does not include:-

*“ (a) a homestead to which the provisions of [the West Bengal Land Reforms Act, 1955] apply,
 (b) land which was originally leased for agricultural or horticultural purposes but is being used for purposes not connected with agriculture or horticulture without the consent either express or implied of the landlord, if the period for which such been so used is less than twelve years,*****”*

30. Non-Agricultural Tenant under Section 2(5) of the Act of 1949, means a person who holds non-agricultural land under another person and is, or but for a special contract would be, liable to pay rent to such person for that land but does not include a person who holds any premises or part of any premises, situated on non-agricultural land and erected or owned by another person, and who is, or but for a special contract would be, liable to pay rent for such premises or such part of the premises to such person. The explanation states “premises” to mean building, such as a house, manufactory, warehouse, stable, shop or hut whether constructed of masonry, bricks, concrete, wood, mud, metal or any other material whatsoever and includes any land appertaining to such building;

31. In this case, the wakf estate comprises of homestead land, tanks, trees, dwelling houses and land appertaining to such house and whether the predecessor-in-interest of the Sahas would qualify as non-agricultural tenants as per the definition is also a matter of trial.

32. Section 3A has been inserted by the W.B. Land Reforms (Third Am.) Act 1986. Section 3A itself provides in sub-section (5) that Section 3A would be deemed to be enforced on and from 9th day of September 1980.

33. The Court, in an application for an interlocutory injunction in support of a legal right, will deal with the evidence before it, and will confine itself strictly to the immediate object sought, and as far as possible abstain from prejudging the question in the cause. Thus, while deciding the issue of vesting, the aforementioned reasons *prima facie* negates the plea of the predecessors-in-interest of the Sahas to be non-agricultural tenants in respect of the suit property.

34. The next question is whether an injunction should be denied in this case on account of the delay. The Hon'ble Apex Court in the matter of **MST Rukhmabi v. Lala Laxminarayan & ors.** reported in **AIR 1960 SC 335** held as follows:-

“There can be no ‘right to sue’ until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted.”

The said principle was restated and followed by the Judicial Committee in Annamalai Chettiar v. A.M.K.C.T. Muthukaruppan Chettiar [(1930) ILR 8 Rang 645] and in Gobinda Narayan Singh v. Sham Lal Singh [(1930-31) LR 58 IA 125]. The further question is, if there are successive invasions or denials of a right, when it can be held that a person's right has been clearly and unequivocally threatened so as to compel him to institute a suit to establish that right. In Pothukutchi Appa Rao v. Secretary of State [AIR 1938 Mad 193, 198], a Division Bench of the Madras High Court had to consider the said question. In that case, Venkatasubba Rao, J., after considering the relevant decisions, expressed his view thus:

‘There is nothing in law which says that the moment a person's right is denied, he is bound at his peril to bring a suit for declaration. The Government beyond passing the order did nothing to disturb the plaintiff's possession. It would be most unreasonable to hold that a bare repudiation of a person's title, without even an overt act, would make it incumbent on him to bring a declaratory suit.’

He adds at p. 199:

‘It is a more difficult question, what is the extent of the injury or infringement that gives rise to, what may be termed, a compulsory cause of action?’

34. The legal position may be briefly stated thus: The right to sue under Article 120 of the Limitation Act accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such a right, however ineffective and

innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said right.”

35. It has been stated in the plaint, that the cause of action arose on October 19, 2019 when the defendant had prepared to raise construction on the suit property and thereafter on January 25, 2020, when construction had been raised on a portion of the suit property. Applying the above decision, the cause of action as pleaded in the plaint would show that the delay in filing the suit would not defeat the right to an order of injunction when the *prima facie* case, balance of convenience and inconvenience and the irreparable loss are in favour of granting an injunction. There is no quarrel with the proposition that the grant of injunction is an equitable relief. Ordinarily, a person who has kept silent for a long time and allowed another to deal with the property expressly may not be entitled to an order of injunction, but the grant or refusal of injunction has serious consequences and the Court, while dealing with such matters must make all endeavours to protect the interest of the party whose legal right has been affected. In this case, the injury is irreparable and a continuous one and the same cannot be compensated by money. The purpose and object of the provision of Order 39 Rule 1, CPC, unequivocally envisages preservation of the subject-matter of the suit, so that the parties claiming their rights over the subject-matter of the suit have an opportunity to substantiate their respective stand at the end of trial.

36. By the term “irreparable injury” it is not meant that there must be no physical possibility of repairing the injury. All that is meant is, that the injury would be a material one, and one which could not be adequately remedied by damages. The expression “inadequacy of the remedy by damages” means that the remedy by damages would not be such a compensation, which would in effect, though not in specie, place the parties in the position in which they formerly stood (See Kerr on Injunction 6th Edition). If the act complained of threatened to destroy the subject-matter in question, the case may come within the principle, even though the damages may be capable of being accurately measured.

37. The essential requirements that are to be made out by a plaintiff for grant of temporary injunction have been laid down by the Supreme Court in **Seema Arshad Zaheer and others v. Municipal Corporation of Greater Mumbai and others, (2006) 5 SCC 282**. Those are:-

“(i) Existence of a prima facie case as pleaded, necessitating protection of plaintiff’s rights by issue of a temporary injunction;

(ii) When the need for protection of plaintiff’s rights is compared with or weighed against the need for protection of defendant’s right or likely infringement of defendant’s right, the balance of convenience tilting in favour of plaintiff; and

(iii) Clear possibility of irreparable injury being caused to plaintiff if the temporary injunction is not granted. In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff’s conduct is free from blame and he approaches the court with clean hands.”

38. Once it is *prima facie* established that the suit property was a wakf property and there is a doubt with regard to vesting, which can be proved only through evidence at the trial, it is necessary for the Court to

interfere in this case, in order to protect the wakf property from further damage, wastage and alienation. The property being a wakf property, any transfer and alienation of the same is void under Section 51(1-A) of the Wakf Act, 1995. Unless the ongoing construction is stopped the entire nature and character of the suit property which *prima facie* appears to be wakf property will be extinguished. The plaintiff/petitioner has a good case to go to trial. The case of irreparable loss and injury has been made out by the petitioner. Entries in the finally published LR record of rights and those in the records of the Kolkata Municipal Corporation do not confer title. The presumption of correctness of the LR Records is rebuttable by evidence. The injury in this case is of such nature that the same cannot be compensated in terms of money and once the property is developed and alienated, even if the petitioner ultimately succeeds in the suit, the wakf property cannot be restored to its original position and the very nature and character of the wakf property would be completely extinguished and obliterated.

39. Delay in filing the suit is not material where an injunction is sought in aid of a legal right, and mere lapse of time will not be a bar to the grant of an injunction before the trial. Where one party invades the right of another, that other does not in general deprive himself of the right of seeking redress merely because he remains passive, unless indeed he continues inactive so long as to bring the case within the “Statute of Limitations”

40. With regard to the decisions cited by Mr. Mitra, this Court is of the opinion, that the decisions would not be relevant at the stage of

considering the prayer for temporary injunction. In **Adyama Complex (supra)**, the Court held that every entry in the finally published record of rights shall be presumed to be correct and a person whose name was recorded as a '*Dakhalkar*' would not be an intermediary. In this case, in the finally published RS record of rights, the name of the then mutawalli of Zohra Begam Wakf estate has also been recorded with superior title and the predecessors-in-interest of the Sahas were recorded as the *Dakhalkars* subsequently by way of correction. There is a presumption of correctness under Section 44(4) of the WBEA Act, 1953. Whether the predecessors-in-interest of the Sahas were recorded as the *Dakhalkars* under the State of West Bengal or under the wakf is a matter of evidence. In this case, the question to be determined is not whether the predecessors-in-interest of the defendants/opposite party Nos. 1 to 7 were intermediaries or not but whether the wakf estate vested in the State of West Bengal with the promulgation of WBEA Act, 1953. The name of the mutwalli appears in the finally published R.S. Records. This *prima facie* shows that the then mutawalli could have retained the said lands under the provisions of the Section 6 (1) of the WBEA Act. These are matters of trial and the reliance placed on **Adyama Complex (supra)** will not come in aid of the petitioner while deciding the *prima faice* legal right of the plaintiff. The decision of **Jugal Kishore Mondal (supra)** will also not apply at this stage. In the said decision it was held that in view of the provisions of Section 3A of the West Bengal Land Reforms Act, 1955 which came into force from September 9, 1980, non-agricultural tenants became raiyats directly under the State and were entitled to retain the land with the ceiling limit as per Section

14M of the said Act and the intermediaries were only entitled to receive compensation to be determined in accordance with law. In this case, whether the predecessors-in-interest of the Sahas (vendors) of the defendants/opposite party Nos. 1 to 7 were non-agricultural tenants under the Act of 1949 is a matter of evidence. The plea of non-agricultural tenancy under the Act of 1949 and predecessor-in-interest of the Sahas becoming raiyats in terms of Section 3A of the WBLR Act with effect from September 9, 1980, is contrary to the recitals in the deed of conveyance executed between the Sahas and the defendant Nos. 1 to 7. The Sahas have traced their title to the property through vesting under the WBEA Act, 1955. If there was vesting under the WBEA Act, the rights of non-agricultural tenants under the Act of 1949 did not vest in the State. Moreover the wakf property consisted of homestead lands, dwelling house tanks, danga lands etc. which could be retained.

41. The decision in **Arun Kumar Basu (supra)** will not help the defendants/opposite party Nos. 1 to 7 at this stage, inasmuch as, unless the evidence is led it would not be possible to ascertain whether the lands vested in the State by operation of Section 4(1) of the WBEA Act or Section 3A of the WBLR Act, inasmuch as, the question of retention will have to be looked into specially because the name of the mutawalli of Zohra Begam Wakf estate appears in the RS record of rights. The decision of **Dilboo v. Dhanraji (supra)** also does not help the defendants at this stage, inasmuch as, limitation is a mixed question of law and facts and whether the transfer of the suit property in favour of the defendant Nos. 1 and 7 by the Sahas and registration thereof would be deemed notice is a matter of

trial and evidence. In the said judgment it was held that when a fact could be discovered by due diligence the plaintiff would be deemed to have necessary knowledge. In this case, at this stage without any evidence, the question of delay cannot be decided and in any case, the cause of action as averred in the plaint if taken into consideration, the suit do not *prima facie* appear to be time barred. It is for the party who files the suit to show that the suit was within time at the trial.

42. The decision of **GPT Health Care Pvt. Ltd. vs. Soorajmull Nagarmull and ors.** passed in **FMA 1350 of 2017** does not apply. A Division Bench of this Court, deprecated the practice of trial courts in not indicating any reasons for the necessity to pass ex parte ad interim orders of injunction when the plaintiff approached the Court, belatedly.

43. The decision of **Thimmaiah (supra)** will also not apply at this stage, inasmuch as, the Hon'ble Apex Court held that in a suit for permanent injunction, the plaintiff must establish that he was in possession in order to be entitled to a decree for permanent injunction and the plaintiff not being in possession was not entitled to the relief without claiming recovery of possession, consequently an order of injunction also could not be granted. The said judgment was passed after final adjudication by the trial court and the High court and in an appeal before the Supreme Court. However, it has been consistently held by the Apex Court and other courts that the proviso to Section 34 does not warrant dismissal of a suit, but the Court should give an opportunity to the plaintiff to amend the plaint if the suit falls within the mischief of the proviso. Moreover, the Wakf Act, 1995 is a substantive law and a complete

code. The suit has been filed under this special law before the Wakf Tribunal. The Wakf Tribunal has been given all the powers of a Civil Court in deciding disputes, questions or matters relating to or arising out of a wakf property and also has the power to grant injunctions. In such a situation, the Wakf Act being a special law having an overriding effect over all other laws, whether the provision of Section 34 of the Specific Relief Act, 1963 should be strictly construed at this stage and injunction be denied, when in my *prima facie* view, this is a fit case for grant of injunction, is answered in the negative. This issue is also open to be decided at the trial.

44. Reference is made to the decision of **Board of Wakf, West Bengal & Anr. vs. Anis Fatma Begum & Anr.**, reported in **(2010) 14 SCC 588**.

The relevant paragraphs are quoted below:-

“10. 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.

11. Under Section 83(5) of the Wakf Act, 1995 the Tribunal has all powers of the civil court under the Code of Civil Procedure, and hence it has also powers under Order 39 Rules 1, 2 and 2-A of the Code of Civil Procedure, 1908 to grant temporary injunctions and enforce such injunctions. Hence, a full-fledged remedy is available to any party if there is any dispute, question or other matter relating to a wakf or wakf property.

12. We may further clarify that the party can approach the Wakf Tribunal, even if no order has been passed under the Act, against which he/she is aggrieved. It may be mentioned that Sections 83(1) and 84 of the Act do not confine the jurisdiction of the Wakf Tribunal to the determination of the correctness or otherwise of an order passed under the Act. No doubt Section 83(2) refers to the orders passed under the Act, but, 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 Sections 83(1) and 84 indicates.

13. *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 makes 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.*

14. *It is well settled that when there is a special law providing for a special forum, then recourse cannot be taken to the general law, vide Justice G.P. Singh's Principles of Statutory Interpretation (9th Edn., 2004, pp. 133-34)."*

45. The decision of **Anathula Sudhakar (supra)** is also not applicable at this stage in view of the reasons assigned hereinabove. **Kishorshinh Ratansinh Jadeja (supra)** does not improve the case of the defendants/opposite party Nos. 1 to 7, inasmuch as, only the basement and first and second floor of one of the three towers has been constructed and around 108 agreements for sale have been entered into. The construction is not substantial. Title has not yet passed in respect of third parties unlike the judgment relied upon and moreover the property in question here is a wakf property in respect of which all sale, transfer, mortgage and gift are void *ab initio*.

46. In the order impugned, the learned Tribunal recorded that the plea of vesting was a 'wild plea' and could not be established by the defendants at the stage of disposal of the application for injunction. The learned Tribunal also recorded that the suit property had been a public wakf duly enrolled in the Wakf Register. The Tribunal observed that the plaintiff made out a *prima facie* case to go to trial and that the balance of

convenience and inconvenience and irreparable loss and injury were in favour of grant of injunction. Yet, in the absence of a prayer for recovery of possession in the plaint, the injunction was not granted. The Tribunal further denied injunction on the ground of delay as the construction started in 2018, but the suit was filed in 2020. In my view, the Tribunal erred in failing to take into account the serious damage, and wastage that was being caused to a wakf property which was for public and charitable purpose. Once the Tribunal was *prima facie* satisfied with the plaint case and discounted the plea of vesting raised by the defendants/opposite party Nos. 1 to 7, the Tribunal ought to have granted an order of injunction primarily for protection of the wakf estate from being damaged, wasted and alienated, or else, such damage and wastage would result in complete extinction of the character and nature of the property. Further alienation by creating third party rights will result in misleading innocent and bona fide purchasers for value into buying the property, the sale of which was otherwise barred by law. Unless the defendants/opposite party Nos. 1 to 7 are enjoined now, the situation will become irreversible as there is a serious risk of complete extinction of the nature and character of the wakf. The conduct of the mutawalli and the delay on the part of the mutawalli in approaching the Tribunal weighed heavily on the learned Tribunal but the mutawalli is a mere manager of the property which has vested in the 'Almighty' and non-action on the part of mutawalli, cannot be a reasonable ground for denial of injunction in such a serious situation. In this case, the Tribunal misdirected itself when it held that the Mutawalli's conduct was unfair and good conduct of a party was an

ingredient for seeking the aid of the Court. Prima facie, the wakf property has vested in the name of the 'Almighty'. The property is detained and tied up forever and has become non-transferable and as such the court must come in the aid to protect the property.

47. The order impugned is set aside. The parties are directed to maintain *status quo* with regard to nature, character and possession of the suit property till the disposal of the suit. Further third party rights will not be created. The learned Tribunal is directed to dispose of the suit expeditiously, preferably within a period of one year from date. The observations made herein are all prima facie and only for the purpose of disposal of the revisional application.

48. The revisional application is disposed of. There shall be no order as to costs.

Urgent photostat Certified Copy of this judgment, if applied for, be given to the parties, on priority basis.

(Shampa Sarkar, J.)

Later

Learned Advocate for the opposite party Nos.1 to 7 prays for stay of this order. Prayer considered. Stay refused.

(Shampa Sarkar, J.)