

**In the High Court at Calcutta
Civil Revisional Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

C.O. No.152 of 2021

**Bijoy Modi and others
Vs.
Alauddin Ahmed and another**

For the petitioners	:	Mr. Aniruddha Chatterjee, Mr. Debarata Roy, Mr. Anil Choudhury
For the opposite party no. 1	:	Mr. Haradhan Banerjee, Md. Yamin Ali, Mr. Arif Ali
Hearing concluded on	:	12.07.2021
Judgment on	:	24.08.2021

Sabyasachi Bhattacharyya, J:-

1. The defendants/petitioners have preferred the instant application under Article 227 of the Constitution of India against a judgment and decree dated November 26, 2020 passed by the Waqf Tribunal, West Bengal in Suit No. 4 of 2008, filed by opposite party no. 1.
2. The Tribunal, in the impugned judgment and decree, held that the plaintiffs/opposite party no.1 is entitled to a decree of declaration that the occupation and possession of defendant nos.1 to 6/petitioners in the suit property is illegal, unlawful and unauthorised and that the

said defendants have no right to occupy the suit property. The plaintiff was further granted a decree of possession and injunction restraining the defendant nos.1 to 6, their associates, agents, attorneys and any person claiming through them from creating third party interest in any manner whatsoever in the suit property.

3. The counter-claim filed by the defendant nos.1 to 6/petitioners was dismissed on contest.
4. Learned counsel for the petitioners argues that the Tribunal acted without jurisdiction in negating two certificates issued by the *Thika* Tenancy Controller, declaring the suit property to be a *Thika* property, by entering into the merits of such decision of the *Thika* Tenancy Controller.
5. That apart, it is argued that the Tribunal misinterpreted the judgments cited before it and holding that the property was a Waqf property, despite holding that a Waqf property may be declared to be a *Thika* property, but not automatically, overlooking that the certificates issued by the *Thika* Controller had attained finality, having not been challenged before the appropriate superior forum.
6. It is further argued that the petitioners had constructed a dwelling house over the suit property, which is the admitted position; however, such fact was never considered by the Tribunal, overlooking the legal effect of Section 60(b) of the Indian Easements Act, 1882. Alternatively, the entry of the petitioners into the suit property having been ratified by the then Mutwalli, the creation of a tenancy was

evident from the records, which vitiates the finding of the Tribunal that the petitioner was a trespasser.

7. Even assuming that the petitioners are tenants in respect of the suit property, the Waqf Tribunal assumed jurisdiction not vested in it by law in declaring that the possession of the petitioners was in the capacity of trespassers and directing eviction on such score.
8. It is further argued by the petitioners that, as evident from the records, Chandi Prasad Modi, the father of the defendants/petitioners, erected structures on the suit premises at his own expenses and the petitioners are in possession thereof. Since Late Chandi Prasad Modi was a lessee in respect of the land-in-question but the owner of the structures erected thereon, the suit property was evidently a *Thika* property and the rights of the original owner/landlord have vested in the State.
9. It is further argued that an amount of Rs.20,000/- was taken by the then Mutwallis, namely Sk. Salauddin Ahmed and Sk. Kabiruddin Ahmed, with a promise to grant further lease of 99 years after taking permission from the Commissioner of Waqf. Yet, they failed to take such permission, for which the defendants are entitled to claim an amount of Rs. 74,65,022/- as per calculations in Exhibit-H of the revisional application, for the period from September 2, 1965 to November 30, 2017.
10. Learned counsel appearing for the plaintiff/opposite party no.1 and the Board of Auqaf contend that the Waqf Deed dated April 4, 1924

executed by Munshi S. Ahmed Buksh, marked as Exhibit-5 and a deed of rectification of Waqf dated April 26, 1928 and further rectification deed regarding rules of succession dated February 3, 1983 were marked as Exhibits 5/1 and 5/2 respectively.

11. No document was submitted, on the other hand, by the defendants showing payment of yearly rent in respect of the land with building after the year 1984. Admittedly, no rent was paid thereafter on the ground that the defendants are *Thika* tenants. However, by mere issuance of two certificates, being Exhibit-G/1 collectively, the *Thika* Controller, by virtue of the West Bengal *Thika* Tenancy (Acquisition and Regulation) Act, 2001 (hereinafter referred to as 'the 2001 Act'), could not be directed to be vested in the Government, in view of the nature of the property being Waqf.
12. Hence, it is contended that the Tribunal was justified in passing the decree and dismissing the counter-claim on merits.
13. It is argued that Title Suit No.202 of 2004 was filed for permanent injunction against the defendants restraining them from making illegal unauthorised construction in the Waqf property. Return of the plaint of such suit could not operate as a bar under Order II Rule 2 of the Code of Civil Procedure or under Section 11 of the Code.
14. Suit No.4 of 2008 (the present suit) has been filed for recovery of possession of the Waqf property against a trespasser and for removal of encroachment, as well as the relief of declaration passed on the

leave granted under Section 52 of the Waqf Act, 1995 by the authority of the Board of Auqaf.

15. It is submitted that recovery of possession being a continuing cause of action, a suit could always be brought on expiry of the lease of 1984 under the general law of land before the Tribunal.
16. The argument that the suit was time-barred is not tenable, it is contended, in terms of Section 107 of the Waqf Act, 1995, which excludes suits for possession of immovable property, comprised in any Waqf or for possession of any interest in such property, from the purview of the Limitation Act.
17. The lease of 1964 was in respect of land together with a one-storied building and the subsequent lease up to 1984, also created lease-hold rights in respect of the land, along with two-storied building which was developed during subsistence of the lease. Hence, the property never attained the character of a *Thika* property, as per the definition given in the 2001 Act.
18. The certificates issued by the *Thika* Controller and the challans of payment of rent to the Controller have no probative value in the eyes of law, learned counsel argue, since the *Thika* Controller acted beyond its jurisdiction in creating a *Thika* tenancy, in the absence of such a *Thika* tenancy being created by the owner of the property, either in writing or otherwise. The *Thika* controller cannot create a *Thika* tenancy but can only adjudicate a property, which is already in the nature of a *Thika* property, to be so.

- 19.** Even a tenancy under the West Bengal Premises Tenancy Act, 1956 (hereinafter referred to as 'the 1956 Act') could not be created without the permission of the Waqf Board, since the property is a Waqf property. Moreover, the total lease period, it is argued, up to 1984, if taken together, would come to 25 years, which excludes the property from the purview of the 1956 Act in terms of Section 3 of the said Act. That apart, in the absence of any pleading, evidence or issue being framed to support the case of premises tenancy sought to be alleged by the petitioners, there was no scope for the Tribunal to arrive at such finding. The opposite parties referred to the judgments of *Pravin Chandra Liladhar Vs. Madan Mohan Jaidka and others*, reported at 1988 (2) CLJ 135, and the case of *Shaw Wallace Company Limited and another Vs. The State of West Bengal and others*, reported at (2004) 3 CHN 362, for the proposition that even a tenancy cannot be created without the permission of the Waqf Board in respect of a Waqf property, which was admittedly not obtained in the present case.
- 20.** Next placing reliance on the cases of *Kamal Kumar Mitra Vs. Arun Kumar Chatterjee and others*, reported at (2016) 1WBLR (Cal) 291, and in the case of *Nemai Chandra Kumar and others Vs. Mani Square Limited and others*, reported at (2015) 2 WBLR (SC) 321, learned counsel for the opposite parties argue that, after the expiry of the lease in 1989, the lessee became a trespasser in respect of the property. Thus, the revisionists' claim of *Thika* tenancy, it is

submitted, is devoid of merit and the Tribunal rightly held in favour of the plaintiff.

21. By placing reliance on relevant clauses of the lease deeds, learned counsel for the opposite parties reiterate their submission that the suit property was never comprised of a *Thika* property at all, which vitiates the issuance of certificates by the *Thika* Controller and the rent challans issued by the Controller.
22. The lessee, in the present case, did not exercise his option by giving any notice for renewal to continue as a monthly tenant. In the absence of any such notice in writing, the erstwhile lessee is not entitled to claim as per the relevant clause of the lease deed after 18 years by filing the suit. No suit, it is pointed out, was also filed for specific performance to enforce the renewal clause, nor the option was exercised, sufficient to treat the defendants/petitioners as monthly tenants as per the judgments reported at (2004) 1 SCC 1 and (2007) 5 SCC 674.
23. The alternative case of monthly tenancy was never pleaded or proved by the petitioners, who consistently claimed to be *Thika* tenants in respect of the disputed property. The admission of the DW 1 in cross-examination, that the defendants did not pay rent after 1984, is also highlighted by learned counsel for the opposite parties. Thus, the arguments advanced before the Tribunal by the defendants/petitioners, it is submitted, were beyond the pleadings and evidence on record as well as contrary to the counter-claim of the

defendants claiming *Thika* Tenancy, which was mutually destructive of the case of monthly tenancy.

24. Hence, it is contended by the plaintiff/opposite party no.1 and the Board of Waqf that the Tribunal acted well within its jurisdiction and within the scope of Section 83 of the Waqf Act, 1995 in deciding and decreeing the suit filed by the plaintiff.
25. It is seen from the arguments of the parties that, apart from the judgments referred to above, the parties as well as the Tribunal referred to two other judgments, being those rendered by the Supreme Court in *Tribhuvanshnkar Vs. Amrutlal*, reported at (2015) 2 SCC 788, and *Biswanath Agarwalla Vs. Sabitri Bera and others*, reported at (2009) 15 SCC 693.
26. Certain salient features which emerge from the judgment of the Tribunal are as follows:
 - (i) At page 89 of the impugned judgment, the Tribunal recorded that there was no dispute that the property is a Waqf property;
 - (ii) At page 91 thereof, it was reiterated by the Tribunal that the property is admittedly a Waqf property;
 - (iii) At page 127, the Tribunal reiterated the above and further found that a Waqf property becomes a *Thika* property, “but not automatically on the wishes of dishonest lessee.”
27. However, subsequently the Tribunal arrived at a contradictory stand that, in the present case, the property retained its character as a Waqf

property and did not become a *Thika* property. While doing so, the Tribunal overlooked the legal effect of Exhibit-G/1, which is comprised of two certificates issued by the *Thika* Controller on August 28, 2017. In view of Section 5(3) of the 2001 Act, if any question arises as to whether a person is a *Thika* tenant or not or whether the land-in-question is *Thika* or not, the Controller, either on his own motion or upon receiving any information, may, after giving the persons interested an opportunity of being heard and after examining such documents and particulars as may be considered necessary, enquire upon and decide such question. The said sub-section was amended by the Amending Act of 2010 with effect from November 1, 2010, thereby extending the domain of the *Thika* Controller, to decide whether the land-in-question is *Thika* land or not.

- 28.** As per Section 3 of the 2001 Act, the provisions of the said Act shall have effect notwithstanding anything inconsistent therewith in any other law for the time being in force or in any custom, usage or agreement or in any decree or order of a court, tribunal or other authority.
- 29.** As such, the Tribunal acted patently without jurisdiction in placing reliance on *Lakshmimoni Das Vs State of West Bengal and others*, reported at *AIR 1987 Calcutta 326*, by overlooking the specific contrary proposition laid down by the Supreme Court in *Zamir Ahmed Latifur Rehman Sheikh Vs. State of Maharashtra and others*, reported at (2010) 5 SCC 246, despite the Full-Bench decision of this Court of 1987

being a pre-2001 Act decision, which is inapplicable in the present case by virtue of the amendment effected in 2010 of the 2001 Act and in view of the promulgation of the 2001 Act itself.

30. The power to decide on the issue as regards whether a property is a *Thika* land is now within the specific domain of the *Thika* Controller and not the civil court anymore. That apart, Section 21 of the 2001 Act stipulates a bar to jurisdiction of the civil court to decide or to deal with any question or to determine any matter which, by or under the 2001 Act, is required to be, or has been, decided or dealt with, by the Controller or the appellate or other authority specified in the 2001 Act and no order or judgment passed, or proceedings including execution proceedings commenced, under the provisions of the said Act shall be called in question in any civil court.
31. Even if it is assumed that the Waqf Tribunal exercises the jurisdiction of a civil court for the purpose of deciding the questions covered by the Waqf Act, 1995, such jurisdiction is barred in respect of matters falling within the domain of the *Thika* Controller.
32. It is to be noted here that Section 16 of the 2001 Act specifically provides that nothing in any contract between a *Thika* tenant and a *Bharatia* shall take away or limit the rights of a *Thika* tenant as provided for in the said Act and that any contract which is made in contravention of, or which is inconsistent with, any of the provisions of the Act shall be void and without effect to the extent of such contravention or inconsistency, as the case may be.

33. Hence, even if the Waqf Tribunal was of the opinion that the disputed property does not appear to be a *Thika* tenancy on the basis of the lease deeds executed in respect of the property, the operation of such deeds could not extend to contracting away from the purview of the 2001 Act in terms of Section 16 thereof. Hence, the Tribunal acted patently without jurisdiction in holding that the property-in-dispute is not a *Thika* tenancy on the basis of the lease agreements.
34. That apart, Section 23 of the Indian Contract Act, 1872 specifically stipulates that the consideration or object of an agreement shall not be lawful if it is forbidden by law.
35. Read in conjunction, the provisions discussed above clearly indicate that the Waqf Tribunal had no authority to usurp the jurisdiction of the *Thika* Controller and/or sit in judgment over a decision arrived at by the Controller which has already attained finality in the absence of any challenge before the appropriate forum.
36. Moreover, the reliefs claimed in the suit, contrary to the impugned judgment, lie beyond the scope of Sections 6 and 7 of the Waqf Act, 1995, which pertain merely to disputes relating to questions as to whether a particular property specified as Waqf property in the list of *Auqaf* is Waqf property or not or whether a Waqf specified in such list is *Shia* Waqf or *Sunni* Waqf.
37. Section 83 of the 1995 Act, which has been relied on by the Tribunal, merely refers to the constitution of Tribunals and does not delineate the jurisdiction of the Tribunals. Such proposition was underscored

in *Zamir Ahmed Latifur Rehman Sheikh Vs. State of Maharashtra and others* (supra).

38. The Tribunal went overboard in making unwarranted adverse remarks against the Controller, the defendants and the Certificates issued by the *Thika* Controller, calling the *Thika* Controller ‘brainless’ and ‘mindless’. A challenge, if any, against the decision of the Controller lies under Section 12 of the 2001 Act by way of an appeal before the Land Reforms and Tenancy Tribunal (LRTT) or by way of a *suo motu* revision by the State Government under Section 13 of the 2001 Act questioning the legality or propriety of the order or the regularity of the procedure. In the present case, in view of no such appeal having been preferred, the *Thika* Controller’s Certificates attained finality and could not be called in question before the Waqf Tribunal.
39. From another perspective, a conjoint reading of the Preambles of the 2001 and 1995 Acts and Articles 246(3), 251 and 254(2) of the Constitution of India clearly indicates that the 2001 Act, passed by the State Legislature of West Bengal, received the assent of the President, *vide* Notification No. 2118-L as published in the Kolkata Gazette, Extraordinary (Part-III) of November 22, 2002. Hence, the same prevails in West Bengal over all repugnant provisions of the 1995 Act, which is a piece of Central Legislation.
40. Even if Item No.28 of List-III (Concurrent List) of the Seventh Schedule of the Constitution of India is taken to be the category under which

the 2001 legislation comes, the operation of Article 254(2) attributes primacy to the 2001 Act.

41. That apart, it may very well be argued that the subject-matter covered by the 2001 Act falls under Item No.18 of List-II (State List) of the Seventh Schedule of the Constitution, which confers primacy on the 2001 Act (a State legislation) in any event. Comparing the languages of the Preambles and the Objects and Reasons of the two pieces of legislation and the *non-obstante* clauses of Section 3 of the 2001 Act and Section 108-A of the 1995 Act, it would be evident that the 2001 Act prevails over the 1995 Act and the Tribunal acted entirely beyond its jurisdiction in sitting in judgment over the decision of the *Thika* Controller.
42. Thus, the impugned judgment and decree suffer from patent jurisdictional error and ought to be set aside.
43. In view of the above discussions, C.O. No.152 of 2021 is allowed on contest, thereby setting aside the judgement and decree dated November 26, 2020 passed by the Waqf Tribunal, West Bengal at Kolkata in Suit No.4 of 2008. Suit No. 4 of 2008 stands dismissed in its entirety. The counter claim filed by the defendant/petitioners is partially decreed, declaring the defendant no. 6/revisionist-petitioner no. 6 as the sole tenant (*Bharatia*) in respect of the suit premises.
44. The other reliefs sought in the counter claim, however, are refused in the absence of adequate evidence to support those.

45. There will be no order as to costs.
46. Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

(**Sabyasachi Bhattacharyya, J.**)