

28.9.2022
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Ct. no. 652
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**C.O. 489 of 2020
With
CAN 2 of 2022**

**The Commissioner of Wakfs, West Bengal
Vs.
Syed Amirul Islam & Ors.**

Mr. Sk. Md. Galib, Sr. adv.
Mr. Abu Siddique Mallik
Ms. Tanwishree Mukherjee
...for the petitioner

Mr. T.M. Siddique
Mr. Suddhader Adak ...for the O.P. nos.1 & 2

Being aggrieved by the order no. 144 dated 18.12.2019 passed by the learned Civil Judge (Junior Division), 2nd Court, Arambagh in title suit no. 120 of 1995, the present revisional application has been preferred.

The petitioner instituted the above-mentioned suit on 25th October, 1995 before the learned Civil Judge (Junior Division), 2nd Court, Arambagh for declaration and other consequential reliefs. On 13th August, 2019, the Chief Executive Officer, Board of Wakf, West Bengal preferred an application before the said court praying inter alia withdrawal of the suit with liberty to institute the same before the appropriate forum. Upon contested hearing, learned Civil Judge (Junior Division), 2nd Court,

Arambagh by the impugned order was pleased to reject the same.

Learned counsel for the petitioner submits that it would be germane to mention that before the introduction of Wakf Act of 1995 which came into effect on 1st January, 1996 wakf property in West Bengal was governed under the Bengal Wakf Act 1934 wherein there was post of Commissioner of Wakfs which was later changed to Chief Executive Officer by the operation of the Wakf Act, 1995. Hence the Chief Executive officer, Board of Wakf, West Bengal is to sue and be sued on behalf of the board as per Regulations 38 of the West Bengal Wakf Regulations, 2008. He further submits that Section 7 of the Wakf Act 1995 provides that 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 Wakf Act, 1995, such an application may be entertained by the Tribunal , within a period of one year of such commencement. He further contends that as per Section 1 of Wakf act 1954 it is very much clear that said act of 1954 extends to any state by way of notification but in the States of Bihar, Uttar Pradesh and West Bengal no such notification has yet been issued stating that the wakf act, 1954 shall have any application in West Bengal. In this context, he also relied upon a division bench judgment of this court reported in AIR 2016 Cal

351 in support of his contention that the Act of 1995 has created a bar under Sub-section (5) of Section 7 that the tribunal shall not have any jurisdiction to determine any matter which is the subject matter of any suit or proceeding instituted or commenced under Wakf Act, 1954 in a civil court under Sub-section (1) of Section 6 before the commencement of the Wakf Act or which is the subject matter of any appeal from the decree passed before such commencement in any such suit or proceeding or of any application for decision or review arising out of such proceeding or appeal as the case may be.

In this context, he further submitted that the Chairperson, board of Wakf west Bengal had taken a resolution on 10.7.2019 that considering the fact that the progress of title suit no. 120 of 1995 is not at all satisfactory and also to the fact that at the relevant time of filing the suit there was no existence of wakf tribunal so after due deliberation and discussion it was unanimously resolved that title suit no. 120 of 1995 be withdrawn from the court of learned Civil Judge (Junior Division), 2nd Court, Arambagh. Accordingly, the withdrawal petition was made before the said trial court and further the learned trial court after considering the contentions made by the parties was pleased to reject the prayer for transfer of the said suit from the said court.

The same question earlier raised before this court in C.O. 3495 of 2015 but it is submitted on behalf of the petitioner that the observation made therein has no binding effect in the present suit as said matter relates to Section 7(5) of the Wakf Act, 1995 but the present application has been made under Order 23 Rule 1 of the Civil Procedure Code for withdrawal of the suit. The plaintiff being the dominus litus has every right to withdraw the suit, however learned court failed to appreciate the same and was pleased to reject the plaintiff's prayer.

Learned counsel for the opposite party submits that the dispute arose herein has already been settled by this court in C.O. 3495 of 2015 and no challenge has been made against the order passed in C.O. 3495 of 2015 and as such it has attained its finality. He further submits that in view of the various case laws it is now well settled that pending proceedings before commencement of 1995 Act would continue before the civil court and the tribunal shall not have the jurisdiction to determine those matters.

Considering the submissions made by both the parties, it appears that in the civil revision being C.O. 3495 of 2015 was preferred assailing the order passed by learned wakf tribunal, Calcutta wherein the said tribunal held that in view of Section 7(5) of Wakf Act, 1995 the

said learned tribunal had no jurisdiction to try the matter.

In that revisional application Learned counsel for the petitioner argued that the trial court had ignored legal position. He submitted that act of 1995 came into force on 01.01.1996 but the suit was filed on 25.10.1995 thus when the suit was filed the Act was not in force. Learned tribunal correctly held that it has no jurisdiction to dispose of the matter. After hearing both the sides this court was disposed of the said revisional application being CO. 3495 of 2015 with following observations:

“Thus, I have taken into consideration the argument made by the learned advocates of the parties and I have taken into consideration the legal position as enumerated in Sections 7(5) and 85 of the Act. It may be noted that the said act came into force with effect from 01.01.1996 as per Notification No. S.O. 1007(E), dtd. 27.12.1995.

Thus, the suit was filed prior to the existence of the Act, Section 7(5) of the said Act has given no retrospective effect like some other Acts giving power to the Tribunal created for certain purpose. Section 85 of the said act as such cannot debar the learned Civil Court from disposing of the matter which was pending before the Act of 1995 came into force.

It is true that the order passed by the learned Civil Judge Junior Division, 2nd Court, Arambagh within the district of Hooghly was not assailed either by the petitioner or private opposite parties. the question now is simply for that reason can I confer jurisdiction on the learned Auqaf Tribunal? My answer is clearly “no’ this revisional court in exercising its revisional power must say that the order dated as passed by the learned Civil Judge, 2nd Court, Arambagh within the district of Hooghly dated 21.8.2010 was against the legislative intent.

Thus, in view of the discussion so long made, I find no substance in this revisional application to set aside the order of the learned Tribunal.

The order of the learned Tribunal is hereby affirmed.

This revisional application is, thus, dismissed on contest without costs.”

In view of the aforesaid background of the case it is clear that this court has already disposed of the issue involved therein and no prayer challenging the said observation has been made before any forum.

Furthermore in view of the case law reported in **(2014) 16 SCC 45** it was held

“12. On a conjoint reading of Section 7 and Section 85, the legal position is summed up as under:

12.1. In respect of the questions/disputes mentioned in sub-section (1) of Section 7, exclusive jurisdiction vests with the Tribunal, having jurisdiction in relation to such property.

12.2. Decision of the Tribunal thereon is made final.

12.3. The jurisdiction of the civil court is barred in respect of any dispute/question or other matter relating to any wakf, wakf property for other matter, which is required by or under this Act, to be determined by a Tribunal.

12.4. There is, however, an exception made under Section 7(5) viz. those matters which are already pending before the civil court, even if the subject-matter is covered under sub-section (1) of Section 6, the civil court would continue and the Tribunal shall not have the jurisdiction to determine those matters.” (emphasis added)

In the said revisional application also the judgment of **Sardar Khan & Ors. vs. Syed Najmul Hasan (Seth) & Ors.** reported in **AIR 2007 SC 1447** was also referred wherein it was held that in view of Section 7(5) of Wakf Act, 1995, the learned civil court is not debarred from disposing of the title suit as the suit was filed prior to coming into force of the said act.

In this context it may also be mentioned that both the parties have relied upon latest judgment in **Rashid Wali Beg vs. Farid Pindari and others** reported in **(2022) 4 SCC 414** and in the said judgment in para 35 some of the decisions in which this controversy was addressed were presented in the form of a table for the purpose of easy appreciation and it also appears that **Sardar Khan & Ors. Vs. Syed Najmul Hasan (Seth) & Ors.** was also referred in the table where the Supreme Court held that the tribunal will have no jurisdiction to

decide any matter which is the subject matter of any suit instituted or commenced in a civil court before commencement of the 1995 Act. Ultimately in para 36 of the said judgment Apex Court came to the conclusion that

“36. It can be seen from the Table given above that the original proceedings from out of which the decisions at Sl. Nos. 1 and 2 (*Mohd. Mashur Kunhi Koya Thangal* [*Mohd. Mashur Kunhi Koya Thangal v. Badagara Jumayath Palli Dharas Committee*, (2004) 7 SCC 708] & *Sardar Khan* [*Sardar Khan v. Najmul Hasan*, (2007) 10 SCC 727]) arose, were instituted long before the advent of the Waqf Act, 1995 and hence the ratio laid therein on the basis of Section 7(5) of the Act does not throw any light upon the actual controversy on hand.”

In view of the aforesaid discussion it is settled position of law that there is an exception made under Section 7(5) of Wakf Act, 1995 which says that the matters which are already pending before the civil court like the present one even if the subject matter is covered under Sub-section (1) of Section 6 of the Act, the civil court would continue and the tribunal shall not have the jurisdiction to determine those matters.

In view of the aforesaid settled position of law and also in view of the earlier decision passed by this court in C.O. 3495 of 2015 in connection with self –same suit which remains unchallenged and also in view of the provision of Waqf Act, 1995, I find that the present application was made by the petitioner for withdrawal of suit with liberty to file afresh, in order to delay further proceeding of the suit which they had instituted in the year 1995.

In view of above, C.O. 489 of 2020 is dismissed with a cost of Rs. 50,000/- which the petitioner will pay to the opposite party within a period of four weeks from the date of communication of the order. On compliance of this order, further proceeding of suit will continue.

Accordingly, the application being CAN 2 of 2022 is also disposed of.

Urgent photostat certified copy of this order, duly applied for, be given to the parties upon compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)