

IN THE HIGH COURT AT CALCUTTA

CIVIL REVISIONAL JURISDICTION

APPELLATE SIDE

Present:-

The Hon'ble Justice Partha Sarathi Sen

CO 1389 of 2022

Shahnawaz Mir @ Mir Shahnawaz And Anr.

Vs

Gulsan Hazra and Anr.

For the petitioner: Mr. Probal Mukherjee, Sr. Adv.

Ms. Salma S. Shah, Adv.

Mr. S. Hossain, Adv.

For the O.P 1: Mr. Sumit Kumar Ray, Adv.

Mr. Munshi Ashiq Elahi, Adv

For the O.P 2: Mr. Md. Salahuddin, Adv.

Mr. Md. A Zaman, Adv

Last heard on: 08.12.2022

Judgement on: 15.12.2022

Partha Sarathi Sen, J:-

1. The present revisional application arises out of Order No.8 dated 28.03.2022 as passed in Suit No. 20/2021 by the Waqf Tribunal of West Bengal whereby and whereunder the said tribunal while disposing of the

present petitioners'/defendants' application under Order 39 Rule 4 of the Code of Civil Procedure has been pleased to direct both the parties to the said suit to maintain status quo till disposal of the said suit.

2. The defendants felt aggrieved and thus preferred the instant revisional application under Article 227 of the Constitution of India.

3. For effective disposal of the instant revisional application the facts leading to filing of the instant revisional application are required to be dealt with in a nutshell.

4. One Gulsan Hazra, the opposite party no.1 herein filed Suit No.20/2021 before the Waqf Tribunal, West Bengal (hereinafter referred to as the 'said tribunal) against the present petitioners being the defendants in the said suit stating inter alia; that CS Plot nos.1995 and 1996 situated under Mauja Dudhkalmi under CS Khatiyani No. 434 P.S Chanditala, Dist. Hooghly, (hereinafter referred to as the 'suit property') is a part and parcel of the Waqf estate as created by one Munshi Tajuddin Ahmed. It is the further plaint case that the plaintiff/opposite party no.1 herein was appointed as a Mutawali in respect of the said Waqf Estate by the Board of Aukaf by a resolution dated 31.10.2017. It is the further plaint case that the suit property has been duly recorded in CS ROR as Waqf. It has been stated further by the plaintiff before the said tribunal that after taking charge of his office he noticed that the defendant no.1 i.e the petitioner no.1 herein illegally recorded the suit property in his name in LR ROR as a secular property and when the plaintiff approached the said defendant no.1, he i.e the petitioner no.1 herein denied

the character of the suit property as Waqf. It has been contended further before the said tribunal that on account of pandemic situation the plaintiff being the Mutawali of the suit property which is a Waqf property could not take steps as against the defendant no.1 for recovery of the said Waqf property as well as for the correction of records of rights and taking advantage of the same, the defendant no.1 in collusion with defendant no.2 i.e the petitioner no.2 herein started illegal construction over the suit property and thus finding no other alternative the plaintiff i.e. the opposite party no.1 in this instant revisional application has approached the said tribunal by filing the said suit with a prayer for decree for declaration that the suit property is a Waqf property, decree for declaration that the defendants have no right, title and interest over the suit property, decree for permanent injunction restraining the defendants and/or their men and associates from interfering with the suit property and for other various ancillary reliefs as stated in the suit.

5. Based on the self same facts and circumstances the plaintiff before the said tribunal also filed an application under Order 39 Rules 1 and 2 read with Section 151 of the Code of Civil Procedure with a prayer for granting ad-interim order of temporary injunction restraining the defendants nos. 1 and 2 from making any illegal construction over the suit property as well as from transferring the same or any part thereof to any third party.

6. On perusal of the plaint and the injunction application along with supporting documents as filed by the plaintiff, the said tribunal by order no.2 dated 08.10.2021 passed an ad-interim order of injunction restraining the

defendant nos. 1 and 2 from making illegal construction over the suit property as well as from transferring the suit property in favour of any third party till the next date of hearing. After receipt of notice of grant of ad interim order of injunction, the present petitioners being the defendant nos. 1 and 2 in the said suit duly entered their appearance and filed an application under Order 39 Rule 4 of the Code of Civil Procedure before the said tribunal.

7. In the said application under Order 39 Rule 4 of the Code of Civil Procedure the defendants contended that in respect of land situated at CS Plot No.1995 under CS Khatiyon no. 434 in Mauja Dudhkalmi corresponding to RS plot no. 1995 and current CR Plot No. 2304 at the time of cadastral survey records, the settlement cost in respect of the above mentioned property could not be paid by the then settlers and thus on 11.05.1939 a certificate case was started and on the basis of such the aforementioned property was transferred to one Ali Mohammad Sarkar and thereafter by way of subsequent transfer and on the basis of judgement and decree as passed in Title Suit no. 30/1959 one Marjina Khatun Bibi along with others became joint owners of half portion of the above mentioned property. It is the further case of the defendants that thereafter by a registered gift of deed dated 12.05.1986 the said Marjina Khaun Bibi transferred her half share in the said property to one Mossammet Meherun Nissa who in turn by a registered deed of sale dated 16.07.1993 transferred 10 decimal of land in the said property in favour of the father of the present petitioner no.1 and again on 11.09.1993 the said Mossammet Meherun Nissa by a registered deed of sale transferred a

demarcated portion of the said plot measuring about 11.5 decimals to the father of the defendant no.1. It is the further case of defendants before the learned trial court that on 16.07.1993 the said Mossammet Meherun Nissa by a registered deed of sale further transferred a demarcated 11.5 decimal of land in the said property to the defendant no.1. It is thus contended by the defendants before the said tribunal that by virtue of the aforesaid registered deed of gift dated 12.05.1986 and two registered deed of sale dated 16.07.1993 and 11.09.1993 the defendant no. 1 being the owner mutated his name in the record of right in respect of the suit property.

8. It is the further case of the defendant no.1 before the said tribunal that he thereafter entered into an agreement with the defendant no.2/petitioner no.2 herein to construct a building over the suit property and after obtaining the sanction plan from the local Gram Panchayat both the petitioners have started construction over the suit property. It has been contended further before the said tribunal that at no material point of time the suit property was a Waqf property and on the contrary the suit property is a secular property and based on the aforementioned averments, the defendants nos. 1 and 2 before the learned trial court has made a prayer for modification of the ad-interim order of injunction as passed by the said tribunal vide order no.2 dated 08.10.2021.

9. On perusal of the certified copy of the impugned order it reveals to this Court that the said tribunal on perusal of the entire materials as placed before them express its view that since in the petition under Order 39 Rule 4 of the

Code of Civil Procedure the present petitioners being the defendants in the said suit has only sought for modification of the order no.2 dated 08.10.2021 and not for setting aside the ad interim order of injunction, it directed both the parties to maintain status quo in respect of the possession and nature and character of the suit property till disposal of the said suit giving rise to the present revisional application.

10. At the time of hearing of the instant revisional application Mr. Mukherjee, learned senior advocate appearing on behalf of the defendants/petitioners draws attention of this Court to the certified copy of the impugned order. Attention of this Court is also drawn to the copies of the plaint and the injunction application as filed by the plaintiff/opposite party no.1 before the said tribunal as well as the order no.2 dated 08.10.2021 as passed by the said Tribunal. Attention of this Court is also drawn to the copy of petition under Order 39 Rule 4 of the Code of Civil Procedure as filed by his client before the said tribunal.

11. In course of his argument Mr. Mukherjee, learned senior advocate for the defendants/petitioners submits before this Court that the schedule of the plaint and the schedule of the injunction application are at variance. It is further submitted that on perusal of letter no.2114/1(2) dated 03.09.2019 as written by the Chief Executive Officer, Board of Auqaf, West Bengal to District Magistrate Hooghly, it would reveal that the suit property is not included in the schedule of the Waqf property as wrongly claimed by the plaintiff. Drawing attention to the photocopies of the aforementioned deed of gift and the

aforementioned two deed of sale, it is submitted that before the said tribunal the present petitioner being the defendants are successful in establishing that the present petitioner no.1 being the defendant no.1 in the said suit is the recorded owner of the suit property, at least prima facie which the plaintiff being the opposite party no.1 of the instant revisional application has miserably failed to establish. It is contended further that on comparative study of the documents as filed by the parties to the said suit, the said tribunal ought to have modified the order dated 08.10.2021, thereby permitting the present petitioners to raise construction over the suit property in accordance with the sanctioned plan as issued by the local Gram Panchayat. Mr. Mukherjee, learned senior advocate for the defendants/ petitioners thus submits that it is a fit case for allowing the instant revisional application after setting the impugned order as passed by the said tribunal.

12. In course of his submission Mr. Ray, learned advocate for the opposite party no.1 vividly opposed the arguments as advanced by the learned advocate for the petitioners. It is contended by Mr. Ray, learned advocate for the opposite party no.1 that before the said tribunal the present opposite party no.1/plaintiff is successful in establishing his prima facie case for obtaining an order of injunction. It is further argued that before the said tribunal sufficient materials have been placed to substantiate at least prima facie that the suit property is Waqf in nature. It is further argued that in absence of the alleged certificate of sale, the said tribunal is very much justified in refusing to modify the order of injunction dated 08.10.2021. It is further argued by Mr. Ray,

learned advocate for the opposite party no.1 that considering the balance of convenience and inconvenience and chance of causing irrecoverable loss and injury, the said tribunal has rightly passed the order of status quo and thereby directing both the parties to maintain status quo in respect of the possession, nature and character of the suit property.

13. In course of his submission Mr. Ray, learned advocate for the opposite party no.1 placed his reliance upon two reported decision namely; **Wander Ltd. and Anr. Vs. Antox India Pvt. Ltd. reported in 1990 Supp (1) SCC 727 and Dalpat Kumar and Anr. Vs. Prahlad Singh and Ors. reported in AIR 1993 SC 276.**

14. In course of his submission Mr. Md. Salahuddin, learned advocate for the opposite party no.2 i.e. Board of Auqaf, West Bengal, practically echoed the submission made by Mr. Ray, learned advocate for the opposite party no.1. It is also submitted by him that the said tribunal is very much justified in passing the impugned order.

15. This Court has meticulously perused the order no.2 dated 08.10.2021 as well as the impugned order as passed by the said tribunal in Suit No. 20/2021. This Court has also gone through the entire materials as placed before this Court by the rival parties. This Court has also perused the decisions as cited from the Bar. This Court has given its anxious consideration over the submissions of the learned advocates of both the sides.

16. On perusal of the entire materials as placed before this Court it reveals to this Court that at the time of hearing of the injunction application at the ad-interim stage as well as at the time of hearing of the application under Order 39 Rule 4 Code of Civil Procedure, the plaintiff/opposite party no.1 placed his reliance upon the copy of the registered Waqfnama, copy of CS ROR in respect of the suit property and the Waqf Register. On the contrary the defendants to substantiate their case for modification of the ad-interim order of injunction dated 08.10.2021 placed their reliance upon the copy of the deed of gift dated 12.05.1986 and copies of two registered deeds of sale dated 16.07.1993 as well as copies of the LRROR in respect of the suit property.

17. On comparative study of the entire materials as placed before this court it appears that before the said tribunal, the defendant no.1 is successful at least prima facie, to substantiate his right, title and possession interest over the suit property based on the aforesaid deed of gift and two deeds of sale vis-a-vis the latest LROR. It further appears from the copy of letter dated 03.09.2019 as written by the Chief Executive Officer, Board of Auqaf, West Bengal, that the particulars of the suit property are not at all mentioned in the schedule of the said letter under cover of which the Board of Auqaf had approached the District Magistrate, Hooghly, to record the said properties as Waqf properties in the record of rights. In view of such this Court thus finds the defendants before the said Tribunal are successful in making a prima facie case for obtaining the relief as prayed for in their application under Order 39 Rule 4 of the Code of Civil Procedure. This Court further considers that while

passing the impugned order, the said Tribunal ought to have come to a finding that the balance of convenience and inconvenience tilts in favour of the defendants and if the ad-interim order of injunction is not vacated and/or varied, the defendants may suffer irreparable loss and injury.

18. As discussed above while passing the impugned order, the said tribunal expressed its view that in their application under Order 39 Rule 4 Code of Civil Procedure the defendants have not made any prayer for setting aside the ad-interim order of injunction and on the contrary they have only prayed for modification of the order dated 08.10.2021 and thus the said tribunal by the impugned order passed an order of status quo. In order to assess as to whether the aforesaid finding of the said tribunal is at all justified or not, this Court considers that a look to the provisions of Order 39 Rule 4 is very much necessary and the same is reproduced hereunder in verbatim.

“

4. Order for injunction may be discharged, varied or set aside.- Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order.

[Provided that if in an application for temporary injunction or in any affidavit supporting such application, a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interests of justice:

Provided further that where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the Court is satisfied that the order has caused undue hardship to that party.]

.....”

19. On perusal of the provisions of Order 39 Rule 4 of the Code of Civil Procedure it reveals to this Court that the Legislatures in their own wisdom have incorporated the words **‘discharged’, ‘varied’, ‘set aside’** in the said section. It thus appears that within the four corners of the provision of Order 39 Rule 4 of the Code of Civil Procedure there is no whisper of the word **‘modification’**. Admittedly, before the said tribunal the present petitioners in their application under Order 39 Rule 4 of the Code of Civil Procedure has prayed for modification of the aforementioned ad-interim order of injunction but that cannot be a ground for refusal to pass an appropriate order under Order 39 Rule 4 of the Code of Civil Procedure especially when the said tribunal finds that the present petitioners being the defendants are entitled to the reliefs as mentioned in the provision of Order 39 Rule 4 of the Code of Civil Procedure. It is the settled principle of law that if the court finds that under a specific provision of law a party to a suit is not entitled to a relief as sought for, however he is entitled to other reliefs, the court must not hesitate to grant such relief/reliefs to the said party if he is successful in establishing his case for obtaining such relief/reliefs.

20. In view of the discussion made hereinabove, this Court finds sufficient merit in the instant revisional application and accordingly the instant revisional application is allowed. As a result the impugned order no.8 dated 28.03.2022 as passed by the Waqf Tribunal, West Bengal in Suit No. 20/21 is

hereby set aside. Consequently the petition under Order 39 Rule 4 of the Code of Civil Procedure is hereby allowed. The Waqf Tribunal. West Bengal is hereby directed to grant permission to defendant nos. 1 and 2 in Suit no. 20/2021 to make construction over the 10 decimal of land LR Khatian no. 1581/1 LR Plot No. 2304, Mauja Dudhkalmi, District Hooghly and adjoining 22 decimals of land in LR Khatian no. 1705/1 LR Plot no. 2304, Mauja Dudhkalmi, District Hooghly which is part and parcel of original CS no. 1995, CS Khatian No.434, Mauja Dudhkalmi **only on production of original sanction plan along with the attested photocopy thereof as claimed to have been issued by the local Gram Panchayat.**

21. Liberty is given to the said tribunal to seek a periodical report preferably once in a month from the Pradhan of the local Gram Panchayat to ascertain as to whether the present petitioners being the defendants of the said suit no.20/2021 are making construction over the said property in accordance with the said plan or not and in the event, any adverse report is received, the said Tribunal is at liberty to pass an order for stoppage of the work of construction over the suit property. It is however made clear that after completion of construction, the present defendants are prevented from seeking any equity in the event they fail to prove their right, title and interest over the suit property and at the same time the present petitioners being the defendants of suit no. 20/2021 are hereby restrained temporarily from making any transfer and/or alienate and /or parting of possession of the construction over the suit

property or part thereof to any third party till disposal of the aforementioned suit.

22. With the disposal of the instant revisional application, the injunction application as filed by the plaintiff in suit no.20/2021 is also disposed of in the light of the observations made hereinabove.

23. The Waqf Tribunal is further directed to dispose of the suit no. 20/2021 positively with in a period of one year from the date of communication of this order without granting unnecessary adjournments to either sides.

24. Urgent Photostat Certified copy of this judgment, if applied for, be supplied to the parties expeditiously after complying with all necessary legal formalities.

(Partha Sarathi Sen, J.)