

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(Original Side)

Reserved on: 16.09.2022
Pronounced on: 27.09.2022

APOT 117 of 2022
With
IA No. GA 1 of 2022
GA 2 of 2022

The Board of Wakf and Another

...Appellants

-Vs-

Anis Fatima Begum and Others

...Respondent

Present:-

Sk. Md. Galib,
Mr. Abu Siddique Mallik,
Ms. Tanwishree Mukherjee, Advocates
... for appellants

Ms. Bijoy Adhikary,
Mr. Vishananda Gana,
Mr. M.A. Samad,
Mrs. N. Mulla,
Mr. M. Zahedi,
Mr. Niloy Sengupta,
Ms. Susmita Adhikary, Advocates
... for respondents

Coram: THE HON'BLE JUSTICE PRAKASH SHRIVASTAVA,
CHIEF JUSTICE

THE HON'BLE JUSTICE RAJARSHI BHARADWAJ,
JUDGE

Prakash Shrivastava, CJ:

1. By this intra-court appeal, respondents (Board of Wakf and CEO of the Board of Wakf) have challenged the order of the learned Single Judge dated 23rd of December, 2021 whereby WPO 1502 of 2021 filed by the writ petitioners (respondent no. 1 and 2 herein) has been disposed of with a direction to the appellant to dispose of the request of the

respondent no. 1 for appointment of the respondent no. 2 as Mutawalli in the wakf estate within the specified time.

2. The respondent nos. 1 and 2 (writ petitioners) had filed the writ petition with the plea that the respondent no. 1 was the sole Mutawalli of a private wakf, namely, Shahzadi Begum Wakf Estate and that respondent no. 1 vide letter dated 4th of December, 2020 as well as reminder dated 17th of March, 2021 had requested the appellants to record the name of respondent no. 2 as joint Mutawalli. The said applications remained pending, hence, the writ petition was filed seeking a direction to the appellants herein to record the name of the respondent no. 2, along with the respondent no. 1, as joint Mutawalli.

3. Learned Single Judge by the order impugned has directed the appellants to dispose of the pending application for appointment of respondent no. 2 as Mutawalli of the wakf estate within two months.

4. Learned counsel for the appellants has submitted that no direction ought to have been issued by the learned Single Judge to the appellants to decide the pending application because inaction of the appellants also furnishes a ground to approach the Tribunal under Section 83 of The Waqf Act, 1995 (for short, 'the Act') and there was no reason to bypass this remedy. In support of his submission, learned Counsel for the appellants has placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of **Board of Wakf, West Bengal and Another vs. Anis Fatma Begum and Another** reported in (2010) 14 SCC 588. Learned counsel for the appellants has also referred to the decision of the other Single Benches of this Court dated 19th of April, 2011 in **WP No. 6923(W) of 2011** in the matter of **Musst. Hazera Khatoon and Anr. vs. The State of West Bengal and Anr.** and dated

27th of November, 2019 in **WP No. 21341(W) of 2019** in the matter of **Sahebzada Md. Shahid Alam alias S.M. Shahid Alam vs. The State of West Bengal and others**, wherein following the judgment in the matter of **Anis Fatma Begum (supra)**, a view has been taken that in case of inaction on the part of Wakf Board in deciding the representation, the remedy is under Section 83 of the Act.

5. Learned counsel for the respondents has submitted that considering the circumstances of the case and age of the respondent no. 1, the direction has rightly been issued.

6. We have heard the learned counsels for the parties and perused the record.

7. It is noticed that the respondent no. 1 had approached the Writ Court with the plea of inaction on the part of the appellants in deciding her application for recording respondent no. 2 as joint Mutawalli. Section 83 of the Act provides for constitution of the Wakf Tribunal for determination of any dispute, question or other matter relating to wakf or wakf property. Section 84 of the Act provides that whenever an application is made to a Tribunal for determination of any dispute, question or other matter relating to wakf or wakf property, it will hold its proceedings as expeditiously as possible and take a decision. Hon'ble Supreme Court in the matter of **Anis Fatma Begum and Another (supra)** has considered the scope of Sections 83 and 84 of the Act and has held that:

“7. The dispute in the present case relates to a wakf. In our opinion, all matters pertaining to wakfs should be filed in the first instance before the Wakf Tribunal constituted under Section 83 of the Wakf Act, 1995 and should not be entertained by the civil court or by the High Court straightaway under Article 226 of the Constitution of India. It may be mentioned that the Wakf Act, 1995

is a recent parliamentary statute which has constituted a Special Tribunal for deciding disputes relating to wakfs. The obvious purpose of constituting such a Tribunal was that a lot of cases relating to wakfs were being filed in the courts in India and they were occupying a lot of time of all the courts in the country which resulted in increase in pendency of cases in the courts. Hence, a Special Tribunal has been constituted for deciding such matters.

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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.”

8. It is worth noting that similar issue had come up before the learned Single Bench of this Court in **WP 29863(W) of 2015** in the matter of

Mr. Mahamudul Hassan vs. Sk. Md. Galib, wherein an application made to the Board for further appointment of Mutawalli was not considered and decided by the Board and prayer was made in the writ petition to issue a direction to Board to decide the claim. Learned Single Judge by order dated 22nd of December, 2015 in the matter of **Mr. Mahamudul Hassan (supra)** had disposed of the writ petition directing the Board to consider the claim of the petitioners therein, in accordance with law, within 8 (eight) weeks from the date of receipt of copy of the order. This order of the learned Single Judge was affirmed by the Division Bench by order dated 15th of June, 2018 passed in **MAT 901 of 2016** in the matter of **The Board of Auqaf, West Bengal vs. Golam Mustapha & Another** by observing that the Writ Court did not commit any illegality either by entertaining such writ petition or by passing direction upon the Board for early disposal of the long pending application.

9. The above order of the Division Bench was challenged before the Hon'ble Supreme Court in **Special Leave Petition (Civil) No. 21782 of 2018** in the matter of **The Board of Auqaf West Bengal vs. Golam Mustapha & Anr.** by the Board of Auqaf. Hon'ble Supreme Court considering the availability of remedy before the Wakf Tribunal had modified the order vide order dated 14th of August, 2018 as under:

“Having heard learned counsel appearing for the petitioner, we deem it appropriate to make slight modification in the operative direction issued by the learned Single Judge which was confirmed by the Division Bench. Instead of ‘Waqf Board’ the matter shall stand referred to ‘Waqf Tribunal’, which shall in terms of the power conferred upon it under the Waqf Act, 1995, decide and dispose of the matter.

Since the matter calls for a minor modification, we have not issued notice to the respondents and have considered the matter ex-parte.

In case there be any objection, the respondents are at liberty to approach this Court.

The Special Leave Petition is disposed of in the afore-stated terms.”

10. The present case also stands on the same footing. Hence, from the above three orders, it is clear that the respondent nos. 1 and 2 herein should approach the Tribunal and the direction issued by the learned Single Judge to the Wakf Board to decide the application cannot be upheld.

11. That apart, undisputedly a statutory remedy under Section 83 of the Act is available to the respondent nos. 1 and 2 and unless justifiable ground exists, there is no reason to bypass that remedy. It is not a case where the writ petition is for enforcement of any fundamental right or there is any violation of principles of natural justice or the order or proceedings are wholly without jurisdiction or constitutional validity of a legislation is challenged. Therefore, there is no good ground to bypass the statutory remedy.

12. Learned counsel for the respondent nos. 1 and 2 has placed reliance upon the judgment of the Hon’ble Supreme Court in the matter of **State of Andhra Pradesh (Now State of Telangana) vs. A.P. State Wakf Board and Others** reported in **2022 SCC OnLine SC 159** but in that case, validity of a notification was challenged in the writ petition and the High Court had already examined the merits of the contentions raised and there was a question of interpretation of statute and that was not a case where any oral evidence was necessary, therefore, in that background, Hon’ble Supreme Court had taken the view that the party should not be relegated to the statutory remedy. Facts of the present case

are entirely different, therefore, no benefit can be extended to the respondent nos. 1 and 2 on the basis of that judgment.

13. Learned counsel for the appellant has also submitted that though the learned Single Judge in the impugned order has mentioned that the order will not be cited as precedent but it is being followed subsequently.

14. Learned counsel for the appellant has also pointed out the view taken in earlier judgments of learned Single Bench in **Musst. Hazera Khatoon (supra)** and **Sahebzada Md. Shahid Alam (supra)**, therefore, if the learned Single Judge while passing the impugned order wanted to take different view, then proper course available was to refer the matter to the Larger Bench.

15. In the aforesaid circumstances, we are unable to sustain the order of the learned Single Judge dated 23rd of December, 2021 which is accordingly set aside with liberty to the respondent nos. 1 and 2 to file an appropriate application before the Wakf Tribunal under Section 83 of the Act. If such an application is filed, the Wakf Tribunal will decide it in accordance with law as expeditiously as possible.

16. APOT 117 of 2022 is accordingly allowed and connected applications are disposed of.

(PRAKASH SHRIVASTAVA)
CHIEF JUSTICE

(RAJARSHI BHARADWAJ)
JUDGE

Kolkata
27.09.2022

PA(RB)

(A.F.R. / N.A.F.R.)