

S/L 10
19.01.2023
Court No.652
SD

CO 651 of 2020

Nil Kamal Ghosh & Ors.
Vs.
Kazi Mohammad Israil & Ors.

Mr. Syamal Kumar Das
Ms. Smita Pal

...for the Petitioners.

Mr. N. Chatterjee
Mr. Anjan Banerjee
Mr. S. Maity
Mr. Soumyajit Maiti

...for the Opposite Parties.

This application has been preferred challenging the Order No.31 dated 19.8.2019 passed by the learned Wakf Tribunal in Suit No.16 of 2016.

By the impugned order, learned Wakf Tribunal, while dealing with the maintainability issue, was pleased to held that Section 7(5) of Wakf Act, 1995 is not attracted in this case as subject matter of the present suit is suit for declaration that the suit property is a wakf property and defendants herein have been described as encroachers and as such nature of present suit and earlier suit is different and accordingly defendant's prayer for dismissal of the suit on the ground of maintainability was rejected.

The plaintiffs/opposite parties filed a suit being Suit No.16 of 2016 before the learned Wakf Tribunal for declaration that the properties mentioned in the Schedule A to the plaint are wakf property permanently dedicated by Golam Mohammed Kazi with further declaration that

impugned transfer of the properties mentioned in Schedule A or any portion thereof is void, nullity and not binding upon the mosque. Defendant no.1 and 2, i.e., the petitioners herein appeared in the said suit and filed an objection with regard to the maintainability of the suit on 11.01.2019.

It is specifically stated in the petition challenging maintainability that the present suit instituted by some of the legal heirs of the original plaintiff in Title Suit No.178 of 1980, suppressing the order dated 03.5.2016 passed in the said Title Suit No.178 of 1980 and also the order passed in the civil revision being CO 1983 of 2016 by the Hon'ble High Court in connection with said Title Suit No.178 of 1980.

The parties of the said Title Suit No.178 of 1980 adduced their evidence in the suit and the learned court below posted the suit for argument but the plaintiffs most curiously filed a petition on 09.02.2016 before the said civil court for withdrawal of the suit with liberty to file afresh before the learned Wakf Tribunal.

The learned court allowed the said prayer and the defendant nos.1 and 2 challenged the same before the Hon'ble High Court by filing a civil revision being CO 1983 of 2016 and the Hon'ble High Court was pleased to set aside the part of the order where liberty was granted by the trial court to file a fresh suit before the Tribunal. This was agitated before the learned Wakf Tribunal that Hon'ble Court while disposing the said revisional application did not grant any liberty to file fresh suit to the plaintiffs/opposite

parties, but in spite of that by suppressing the material fact the plaintiffs/opposite parties herein filed the aforesaid suit being Suit No.16 of 2016 before the Wakf Tribunal which is not maintainable but learned Tribunal by the impugned order rejected the defendant's aforesaid contention.

Learned counsel appearing on behalf of the plaintiff/opposite parties supporting the order impugned contended that as per annexure the plaintiffs of Title Suit No.178 of 1980 are different. He further submits that Title Suit No.178 of 1980 was a suit of representative character while present suit no.16 of 2016 has been filed by plaintiffs not under representative character, so the nature of suits are quite different and as such, order passed in or touching aforesaid suit is not binding upon others as the parties of two suits are different. He further submits that the public character of schedule properties in the wakf, was not in issue in the previous judgments/orders and as such, those orders/judgments do not operate as res judicata in respect of question relating to public character of those properties raised in this suit and as such the order impugned does not call for interference by this Court.

On perusal of the plaint of Suit No.16 of 2016 it appears that the dispute between the plaintiff and the defendants/petitioners herein is that according to the petitioners, the property described in the schedule is a secular property and accordingly, it is transferable and the petitioners are the owners of suit property by virtue of their

purchase from descendant of waqf and on the contrary, the plaintiffs prayed for a declaration that the property described in the Schedule A is a wakf property permanently dedicated by Golam Mohammed Kazi and that transferring of any portion thereof is void and non est in the eye of law and not binding upon the mosque and accordingly, plaintiffs prayed for injunction restraining the defendants from entering into the mosque property. So, the main dispute relates to the present suit is whether the property is a wakf property or a secular property and whether it is transferable and if any transfer had taken place whether such transfer is binding upon the mosque or not.

On perusal of the earlier suit being Title Suit No.179 of 1980 it appears from the prayer portion of the plaint of said suit, that there was no prayer for declaration that the property is a wakf property which is the main subject matter of the present suit. It is also submitted that the plaintiffs and the defendants in the said two suits are not the same. In the present suit, as many as 58 defendants have been impleaded whereas the earlier suit was brought by some other plaintiffs against five defendants. Accordingly, it appears that the real dispute between the present parties, as to whether suit property is a secular property or wakf property and whether defendants had any right to purchase the same, was never an issue before any court of law and said issue was never adjudicated also. Now, if the said issue is kept alive on any technical ground, that would frustrate the object of filing the

suit. As such, the court below has not erred in observing that the litigating parties in the two suits are not same and the previous cases have not finally adjudicated real dispute between the parties, nor any prayer was made for determination about nature of property and as such present suit is not barred by any law and in the interest of effective and conclusive adjudication of aforesaid real dispute between the parties, the present suit is maintainable before the Wakf Tribunal who has got the jurisdiction to decide as to whether the property in question is a wakf property or not.

In view of the above, CO 651 of 2020 is dismissed.

However, learned Wakf Tribunal is directed to make every endeavour for the expeditious disposal of the suit and to conclude the entire proceeding preferably within a period of ten months from the date of communication of the order.

Be it also mentioned that I have not gone into the merits of issue in controversy and all other points shall be kept open to be agitated by the parties before the learned Tribunal at the time of hearing of the case.

There will be no order as to costs.

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

(Ajoy Kumar Mukherjee, J.)