

August 18, 2023
Sl. No.09
Court No.19
s.biswas

CO 3584 of 2022

Biswajit Bhowmick and other
vs.
The Chief Executive Officer, Board of Auqaf,
West Bengal and others

Mr. Saptangshu Basu
Mr. Syed Shamsul Arefin
Mr. Soumen Dutta
Mr. Rajendra Nath Barik

... for the petitioners

Mr. Nadeem Sulaiman

... for the Board

Mr. Sumit Kumar Ray
Mr. Munshi Ashiq Elahi

For the opposite party no.3

This revisional application has been filed challenging the orders dated August 3, 2022 and August 8, 2022, passed by the learned Waqf Tribunal, West Bengal arising out of Suit No.14 of 2022.

By the order dated August 3, 2022, the learned tribunal rejected the application for temporary injunction with cost of Rs.50,000/-. The learned tribunal found that the plaintiffs did not approach the learned tribunal with clean hands and an attempt was made indirectly to nullify the order passed by the learned tribunal in OA 6 of 2018. A notice of removal of encroachment had been issued by the Board against the plaintiffs. The plaintiffs failed to produce sufficient documents to justify the occupation and possession in respect of the suit property. The property was registered as waqf property in the register of the Board and hence, no

injunction could be granted. As the plaintiffs failed to prove prima facie case, the balance of convenience and inconvenience was in favour of not granting an order of injunction.

This court is of the view that the order impugned dated August 3, 2022 does not call for any interference by this court, inasmuch as, in order to obtain an injunction prima facie case, balance of convenience and inconvenience and irreparable loss and injury would have to be established by the parties seeking injunction.

As the learned tribunal, on appreciation of facts found that the plaintiffs failed to produce sufficient documents to justify their right of occupation and possession in respect of the property in question, the tribunal rejected the said application with cost. The tribunal also found that the plaintiffs had withdrawn C.O. 4247 of 2019 by which the judgment dated September 17, 2019 passed in O.A. 06 of 2018, had been challenged before this court. Such withdrawal of the civil revisional application also weighed on the mind of the tribunal while rejecting the prayer for injunction. The order dated August 3, 2022 does not call for any interference, as the petitioners have not been able to demonstrate before this court as to why the injunction ought to have been granted under the special facts and circumstances of the case.

However, the cost of Rs.50,000/- is reduced to Rs10,000/-.

It is made clear that non-interference of this court with the order rejecting the application for temporary injunction, does not amount to a final decision on the 'lis'. All the observation of the learned tribunal while disposing of the injunction application are always tentative. The observations shall also not be binding when the suit is being decided. The issues involved will be decided on evidence.

With regard to the order dated August 8, 2022, this court is of the view that the learned tribunal has confused itself and has proceeded on the basis of certain facts on its own conjecture. First of all, the tribunal framed a preliminary issue as to whether the suit was maintainable in law, on its own motion, at a time when neither any written objection to the injunction application, nor any written statement had been filed by the defendants in the suit. The tribunal proceeded to hear the said issue without inviting any written statement from the defendants. Although the entire issue of maintainability was decided on factual aspects and incidents of the past, none of those documents were brought on record by either party.

The issue ought to have been framed after the defendants in the suit, had filed their written statement. Unless the parties were at issue, the question of framing the preliminary issue with regard to the maintainability of the suit would not arise.

There is another area where the learned tribunal went wrong. Relying on the oral arguments, the maintainability of the suit was decided against the plaintiff on the ground that the plaintiff ought to have challenged the proceedings under Section 54 of the unamended Waqf Act within the prescribed time limit. The learned Tribunal held that as per Section 54(4) of the Waqf Act, 1995 (before amendment) the petitioners ought to have filed the present suit within a reasonable time. While holding so, the tribunal also stated that the Waqf Act did not provide any limitation. It was ultimately held that the plaintiff had misused the process of court by approaching the Tribunal after 17 years from the date of notice issued by the Chief Executive Officer of the board.

The Tribunal came to the conclusion that there was sufficient proof that the suit property was a waqf property and that the plea of adverse possession was not applicable in case of immovable property, which was a waqf estate.

Such findings of the learned tribunal were not based on any evidence. The Tribunal held that the

petitioner could not, in a clandestine manner, take possession of the waqf property and claim legality of such possession. As the petitioner had pleaded cause of action on and from December 9, 2003 and up to 2019, the tribunal held that the initiation of the cause of action in 2003 would bar the suit in 2022. The tribunal did not take into account the fact that in O.A. 06 of 2018, the petitioners were not parties. Whether such eviction notice emanated from a proceeding in which the petitioners were parties and whether the petitioners had been adequately represented before the authorities were also questions of facts, which ought to have been brought on record by evidence.

Mr. Basu, learned advocate for the petitioners cited the decision of the Hon'ble Division Bench in the matter of **Sharmistha Majumder vs. Kriti Safui and others** decided in in FA 120 of 2022. The Bench held that a court could not suo motu invoke the inherent power and decide whether the suit would survive, without allowing the parties to adduce evidence.

The tribunal could not have proceeded on the issue of maintainability as a preliminary issue by framing such issue when the written statement had not been filed. Moreover, the issue of maintainability

in this case, would be a mixed question of law and fact.

Thus, this court is of the view that the learned tribunal ought to allowed the defendants to file their respective written statements, framed the issues, including the issue of maintainability as the first issue and allowed the parties to tender evidence in support of their respective claims.

Mr. Sulaiman, learned advocate for the Board, submits that there were adequate documents to show that the petitioners were well aware of the pendency of the proceeding before the Sub-Divisional Magistrate. The notice of removal of encroachment was served upon the said petitioners, long time ago. The petitioners sat tight over their right to challenge the proceedings under Section 54 of the unamended Act and suddenly when the order passed in O.A. 06 of 2018 attained finality, the suit was filed in 2022 with false and frivolous averments.

Mr. Ray, learned advocate for the respondent no.3/Mutawalli, submits that even if the petitioners claimed adverse possession, they ought to have come before the tribunal within 12 years from the notice of removal of encroachment. It is further submitted that even now, the petitioners could have challenged the notice issued by the authority, instead of filing a separate suit which was ex facie barred by

limitation. The cause of action, arose in 2003. The decision of Hon'ble Supreme Court in the matter of **Sopanrao and another vs. Syed Mehmood and others** reported in (2019) 7 SCC 76 was referred to.

This court has already expressed its view that the factual findings on the basis of which the suit was found to be not maintainable, were matters of evidence. Such evidence ought to have been led by both the parties. The tribunal came to the final conclusion with regard to the abuse of the process of the court by the plaintiffs, based on incidents and documents of the past, without allowing parties to lead evidence. Whether the rights of the petitioners, on the basis of the alleged allotment of land by the Refugee Relief And Rehabilitation Department was inferior, and/or was obliterated by any event, in respect of the same property, is also a matter of evidence.

The tribunal, thereafter, could not have dismissed the suit without affording a chance to the plaintiffs to prove their title in respect of the property. Such findings could have been adequate for refusal of injunction, but for dismissal of the suit, the 'lis' would have to be decided on evidence. A mere reading of the plaint would not indicate that the suit was ex facie barred under any law.

The court also proceeded on the basis of the principles of res judicata in view of the finality attained in O.A. 06 of 2018. The issues involved in the said original application and the parties against whom such decision had been rendered, were not brought on record by evidence.

Under such circumstances, the order dated August 8, 2022 set aside, on the ground of procedural irregularities committed by the learned tribunal. The following directions are passed:-

a) The written statements will be filed by the defendants within four weeks from the date of communication of this order.

b) Issues shall be framed. The issue as to whether the suit was maintainable in law, in its present form, shall be the first issue.

c) Parties will be allowed to adduce evidence.

e) The entire witness action will be completed within two months from framing of issues. The first issue will be decided within two months, thereafter. On the outcome of such issue, the tribunal shall act and proceed in accordance with law to dispose of the suit.

The revisional application is thus disposed of.

Cost of Rs. 10,000/- shall be paid to the waqf estate, through its mutawalli within three weeks from the date of communication of this order.

All the parties are directed to act on the basis of the server copy of the order.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Shampa Sarkar, J.)