

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

**C.O. 4454 of 2019
Mahendra Nath Mahato & Ors
Vs
Farjul Islam & Ors.**

For the petitioners : Mr. Sardar Amjad Ali, Sr. Adv.
Mr. Samir Kumar Ghosh

For the Board of Auqaf : Sk. Md. Galib, Sr. Adv.
Mr. Abu Siddique Mallik

Heard on : 16.10.2023

Judgment on : 19.10.2023

Ajoy Kumar Mukherjee, J.

1. Petitioners herein have preferred this application under article 227 of the Constitution of India challenging order no. 32 dated 22.08.2019 passed by Waqf Tribunal in a suit being no. 17 of 2016.

2. The plaintiff/opposite party no. 1 herein filed aforesaid suit for a declaration that the properties mentioned in the schedule to the plaint are the waqf properties in the nature of "waqf by user" and that any individual including the defendants have no right title interest in respect to the suit properties and also for injunction restraining the defendants from dispossessing the plaintiffs and other committee Mutwallis from the suit properties and also not to interfere of its management. Petitioners/proposed

defendants contended that they have valid title deeds and they are also in physical possession of the suit properties and their predecessor's names have been duly recorded in the Record of Rights, who are paying rent to the revenue department but inspite of petitioners having direct interest, they were not impleaded as parties to the suit and for which the petitioners preferred an application under order 1 rule 10(2) of the code of Civil Procedure (CPC) along with the relevant supportive documents. Learned Tribunal below after contested hearing was pleased to reject aforesaid application under order 1 rule 10(2) CPC.

3. Feeling aggrieved by that order, Sardar Amzad Ali, learned counsel appearing on behalf of the petitioners submits that the Tribunal below proceeded with biased mind and with the conclusive assumption that the suit properties are Waqf properties and with wrong notion that once properties recorded to be Waqf, it will always remain as Waqf. In fact the Tribunal failed to appreciate that entry in the record of rights neither creates title nor extinguishes title in the property. The Tribunal did not consider that any property claimed to be Waqf either by way of permanent dedication or by user, has to prove that such properties fulfil the tests of being Waqf within the ambit of Waqf Act 1995(Act of the 1995). This is also because entries in the CS Record of the Rights and the description given therein are vague.

4. Mr. Ali further contended on behalf of the petitioners that plaintiff took the plea that Swami Pragya Chaitanya Bharati (in short Swami) was a tenant in respect of the suit properties inducted by the erstwhile landlord under the Bengal Tenancy Act and as such it is incumbent upon the

Tribunal to examine the Title of the applicants by adding them as parties to the suit. In fact the Tribunal have mis directed itself about purport and import of section 3 of the Act of 1995 and applied the same to the interest to the petitioners to their serious prejudice. He further contended that it has been pleaded that the Waqf Board has enrolled the said properties as Waqf properties but no notice were ever issued by the Board before the enrolment proceeding upon the petitioners herein, who are in possession of the properties, which is evident from the Record of Rights. The fact behind the dispute is the suit plots were given tenancy to Swami Pragyabharati and during Revisional Settlement and in the L.R. Settlement said properties were duly recorded in the record of Swami. The schedule land has been occupied by 58 families residing since last 60 years or more. All taxes and cess were paid by the heirs of Swami to whom the land was bequeathed by the Swami in 1956.

5. Mr. Ali in this context referring section 34 and 35 of the Specific Relief Act contended that in the event of decree of declaration granted by the Court against the defendant no. 1 and 2, the same will have a binding effect on the petitioners herein, since they have claimed their title through defendant no. 1 and 2 by valid legal documents. In such view of the matter the petitioners herein are necessary parties and in their absence an effective decree cannot be passed as they are in possession in the suit properties. Unfortunately while rejecting the aforesaid application under order 1 rule 10(2) of the C.P.C, the learned Tribunal came to a finding that the appellants are encroachers and are not necessary parties for passing effective decree in the

present suit. Moreover in the absence of any prayer for recovery of possession, the suit is barred under section 34 of the Specific relief Act.

6. Opposite party/plaintiff is not represented in the present case. Mr. Md. Galib learned advocate appearing on behalf of the Waqf Board contended that the Board of Waqf West Bengal enrolled said properties as waqf properties vide resolution dated 4th December , 2014 in the classification of public waqf being E.C. No. 15602. The board has also appointed a committee Mutwalli for a period of 5 years under section 63 of the Act of 1995. One of the committee members preferred the aforesaid suit. Though petitioners herein claimed that they are in occupation of the suit properties for last 60 years, however Mr. Galib argued that the scope of the suit is for declaration of the suit properties as “Waqf property by user,” wherein the defendants are claiming their right title interest in respect of some of the plots mentioned in schedule B to the plaint. In the C.S. record of rights the suit properties have been recorded as ‘Pirottar’ except one plot namely plot No. 431 and for which while registering the said waqf estate, the Board has excluded plot No. 431. Mr. Galib Strenuously argued that once a property is recorded in C.S. as waqf, it is always a waqf property.

7. Mr. Galib further contended that the defendant in the suit have challenged the enrollment of the suit properties as Waqf properties vide O.A. No. 33 of the 2017. The petitioners herein who are claiming their alleged possessory right can neither be regarded as necessary parties nor proper parties in as much as the adjudication of the suit is restricted to the declaration of the suit properties as “Waqf by user”. He further contended that petitioners herein do not have any direct and/or legal interest in the

controversy involved in the suit. He argued that petitioners have claimed right over the suit properties through Swami, who did not have the right title or interest over the said properties in question. Petitioners in their own pleading admitted that the Swami was a tenant although the Dakhilnama is allegedly missing and as such an alleged tenant cannot transfer title in favour of any transferee.

8. He further contended that some of the purported deeds annexed with the present application although alleged to have been executed by the descendants of the Swami, yet the same do not comprise all the plots contained in B schedule to the plaint. Moreover purported deeds, if any, are void *ab initio* in view of section 51 read with section 104 (a) of the Act of 1995. Swami being a tenant never had any right to transfer the properties in favour of the petitioners and as such the petitioners are neither necessary parties nor proper parties as per the settled proposition of law and accordingly the petitioners have no right to be impleaded as parties in the present suit.

9. It is settled law that where the presence of the Respondent is necessary for complete and effective adjudication of the dispute, though no relief is sought for against such person, he is a proper party. Necessary party is one without whose presence no effective and complete adjudication in dispute could be made and no relief could be granted. Two tests are required to be satisfied to determine the question as to who is a necessary party. The tests are:-

(i) there must be a right to some relief against such party in respect of the controversies involved in the proceedings.

(ii) no effective decree can be passed in the absence of such party.

10. Now let me consider with the help of aforesaid touch-stone as to whether the petitioner can be regarded as a necessary party or even a proper party for the said suit.

11. Fifty Four petitioners had made the prayer before the Tribunal below in a suit where the relief claimed by plaintiff is for a declaration that the suit properties are the waqf properties in the nature of “waqf by user” and for a declaration that no individual have any right title interest in respect of the suit properties including the defendants and for permanent injunction restraining the defendants from dispossessing the plaintiff and other committee Mutwallis from the suit properties and to interfere of its management. Learned Trial Court while adjudicating the aforesaid application under order 1 rule 10(2) came to a finding, relevant portion of which runs as follows:-

“Admittedly , swami Pragya Chaitanya Bharati was a tenant and if it is so his L.Rs or any person claiming through him cannot be owner and cannot have legal right to claim title over the property. It is settled law that every person can approach the Court or Tribunal, cannot made party unless he or she has direct and legal interest in the controversy involved in the suit. The proposed Defendants are claiming that suit plots are their plots whereas suit plots are Pirottar property and their predecessor admittedly was tenant. Their predecessors have made transfer after transfer of pirottar property and hence it cannot be said that they have legal right in the suit property. Their status seems to be encroachers as defined under Section 3(ee) of Waqf Act, 1995. Their participation is not necessary for effective decree be passed, if any, in the present suit. Prima facie at this stage and particularly as per C.S.R.O.R., the suit plots are pirottar property and pirottar property cannot be transferred in favour of any one by tenant/lessee. There is no period of limitation for recovery of waqf property. Living for long period in waqf property cannot avail plea of adverse possession.”

12. The aforesaid observation of the Tribunal below demonstrates that while disposing an application under order 1 Rule 10(2) of the code he has practically decided the entire issues involved in the suit that the property is ‘Pirottar’ property and the status of the defendants are encroachers and

even if title deeds stand in their favour (which have not been declared null and void by any competent court of law) the defendants or the petitioners herein cannot have any right, title, interest or possession in the property, ignoring the documents/evidence stands in their favour. Before final adjudication of the suit such pre-determined findings about the core issues involved in the suit, appears to be biased and perverse. I am afraid that there is hardly anything left for final adjudication of the suit, after making such observation while disposing an interlocutory application at the initial stage of the proceeding.

13. On a bare reading of paragraph 17 of the plaint it appears that beside seeking declaration that the properties are the waqf properties in the nature of “waqf by user”, the plaintiff has also prayed for declaration that no individual have any right title interest in respect of the suit property and for a permanent injunction restraining the defendants and their men and agents and associates from dispossessing the plaintiff and other committee Mutwallis from the suit properties and also from interfering of its management. When the plaintiff has sought for in the plaint for a declaration that no individual have any right title or interest in respect of the suit properties, I find that it must be treated to claim a right to some relief against the petitioners also in respect of the controversies involved in the proceedings, when the petitioners have claimed their right, title, possession in the property.

14. It is the specific case of the petitioners that some of them have purchased some of the properties from the present defendants and all of them are in possession of the suit properties and in support of their

contention they have also referred their purchase deeds and entries in the record of rights. Therefore, if any injunction is to be granted in terms of the prayer mentioned in the plaint, before granting the same with respect to the properties in which the defendants are claiming right title possession on the basis of deeds, which have not been declared as void, and also on the basis of the recording and/or otherwise, the petitioners ought to have been given an opportunity of being heard. No effective adjudication could have been made without impleading them as defendants and thereafter without giving them an opportunity of being heard, which also necessitated due to prejudging the petitioners as encroachers in the suit properties.

15. The other interesting feature of the present application is that plaintiff has filed the said suit as an individual and not as a member of committee Mutwalli of the alleged Pirottar property. Even then the plaintiff neither opposed the prayer by filing written objection against petitioner's petition under order 1, Rule 10(2), nor has appeared or opposed at the time of the hearing of the Present Application, inspite of service upon the plaintiff/opposite party herein. Out of the opposite parties only the Board of Waqf, who has passed the resolution on 4th December, 2014 and classified the property as public Waqf by giving it's enrolment number, has appeared during the hearing and opposed the prayer. It is submitted during the course of hearing by both the parties that the defendants in the suit have already challenged the enrolment of the suit properties as Waqf properties vide O.A. No. 33 of 2017.

16. In my considered opinion after adding the present petitioners who are claiming right title possession in the property either by registered deed of

instrument or through the right derived from the defendants, the present suit should be heard analogously with aforesaid O.A. No. 33 of 2017 so that, the entire dispute between the parties may be resolved once for all with the participation of all the interested necessary parties as well as proper parties.

17. In such view of the matter order no. 32 dated 22.08.2019 is hereby set aside. The Tribunal is hereby directed to implead all the petitioners herein as defendants in the aforesaid suit no. 14 of 2016 and to hear aforesaid suit no. 14 of 2016 along with O.A. No. 33 of 2017 filed by the defendants of the suit and to make every endeavour for disposal of both the cases within a period of six month from the date of the communication of the order.

18. C.O. **4454 of 2019** is accordingly disposed of.

19. There will be no order as to costs.

Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(AJAY KUMAR MUKHERJEE, J.)