

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Original Side

Present :-

The Hon'ble Justice Moushumi Bhattacharya

WPO 25 of 2023

M/s. Hooghly Building and Investment Company Limited and Anr.

vs

The State of West Bengal & Ors.

For the petitioners	:	Mr. Rupak Ghosh, Adv. Mr. Biswajib Ghosh, Adv. Mr. K. A. Bhaduri, Adv. Ms. Sonali Ghosh Basu, Adv.
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For the Board of Waqf	:	Md. Salahuddin, Adv. Md. Ahsanuzzaman, Adv. Md. Raziuddin, Adv
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For the respondent no. 5	:	Mr. Rauf Rahim, Adv. Mr. Ali Azgar Rahim, Adv. Ms. Neha Mishra, Adv. Ms. Ankita Choudhury, Adv.
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Last Heard on	:	15.05.2023.
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Delivered on	:	09.06.2023.
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Moushumi Bhattacharya, J.

1. The petitioners seek quashing of a Notice issued by the respondent no. 2 Waqf Board under section 54 of The Waqf Act, 1995. The impugned Notice dated 17.3.2022 seeks removal of an alleged encroachment made by the petitioners. The Board issued a second Notice dated 18.11.2022 also for removal of the encroachment. The petitioners filed a supplementary affidavit against a Notice dated 27.4.2023 issued by the Board under section 54 of the Act.

2. The petitioners claim to be in possession of the property, which is a subject matter of the impugned notices, for more than 100 years by virtue of a lease granted in favour of the petitioners. The petitioners say that the petitioners made several constructions on the property under the said lease. The grievance of the petitioners arises from the impugned notices issued under section 54 of the Act and learned counsel appearing for the petitioners submits that a Suit for eviction filed by the Mutawalli is pending before the Civil Court at Sealdah and the petitioner no. 1 is contesting the said Suit.

3. Counsel submits that the principal ground taken in the application filed by the petitioner no. 1 for dismissal of the Suit is that the Suit is barred by the Kolkata Thika Tenancy Act, 2001. Counsel submits that since proceedings are also pending before the learned Thika Controller, the Board could not have issued the impugned notices under section 54 of the Act. Counsel relies on several sections of the Thika Tenancy Act to urge that the Waqf Tribunal does not have jurisdiction to embark on the issue of eviction.

4. Learned counsel appearing for the Waqf Board/Board of Auqaf, West Bengal takes an objection to the maintainability of the writ petition. Counsel submits that the property which is the subject matter of challenge before the Court is admittedly Waqf property under the Nawab Zaibunessa Begum Waqf Estate. Counsel submits that the petitioner no. 1 is an encroacher over the Waqf property as there has not been any renewal of the lease and hence the Board was justified in issuing impugned notices under section 54 of the Act asking the petitioners to show cause as to why an order should not be passed requiring the petitioners to remove the said encroachment. Counsel relies on section 83 of the Act to urge that the Waqf Tribunal constituted under the said provision is empowered to determine any dispute or question relating to a Waqf or Waqf property including eviction of tenants or determination of rights and obligations of the lessor/lessee of the Waqf property. It is submitted that the Waqf Tribunal is the proper forum which should adjudicate on the issue and this Court hence does not have jurisdiction to entertain the writ petition.

5. Learned counsel appearing for the respondent no. 5 Mutawalli submits that the Waqf Board has jurisdiction to issue the impugned notices under section 54 of the Act and the Mutawalli can also take action against a tenant/lessee if the lessee has become an encroacher under section 3(ee) of the Act, as amended in 2013. Counsel submits that the petitioners have an existing alternative remedy in the form of defending the suit filed by the Mutawalli. Counsel submits that the Kolkata Municipal Corporation (KMC) should have been impleaded in the writ petition as a necessary party and

should be called upon to produce the records in relation to the property which in turn would show that the petitioners do not have any title to the said property.

6. The undisputed facts which are germane for deciding the present writ petition are as follows. The Waqf in question was created in 1885-1895 in respect of 32 Bighas of land. The lease of 49 years was executed on 26.12.1905 for approximately 4 Bighas of land at Chitpur, Kolkata. The lease was extended on 26.12.1959 for another 49 years. There was no further renewal of the lease thereafter. The petitioners approached the Thika Controller contending that the petitioner no. 1 is a thika tenant. The relevant document provided that there would be no further renewal of lease after expiry of the period of lease and that the property in question will be handed over by the lessees (petitioners) to the lessors. The lease expired on 25.12.2003. The Mutawalli accordingly filed a Title Suit for eviction against the petitioners in the Sealdah Court being TS 135 of 2004. The Thika Controller issued a Notice on 4.12.2012 for declaration of thika. The Waqf Board issued a show-cause Notice dated 17.3.2022 under section 54 of the Act for removal of the encroachment. The Thika Controller issued a Notice on 27.4.2022 fixing a date of hearing of the matter. The Board thereafter issued a Notice dated 18.11.2022. The petitioners also filed an application under Order VII Rule 11 of The Code of Civil Procedure, 1908.

7. The above primarily indicates two important facts; the lease executed in favour of the petitioners expired on 25.12.2003 and that there was no further renewal of the lease deed. The petitioners and the respondents have

also instituted parallel proceedings against each other which are continuing as on date. The related issue is whether the Court has jurisdiction to entertain the writ petition and if yes, whether the Waqf Board has jurisdiction to issue the impugned notices under section 54 of The Waqf Act, 1995.

8. Section 54 of the Act relates to removal of encroachment from Waqf property and sub-section (1) authorises the Chief Executive Officer (CEO) to serve a notice on the alleged encroacher if the CEO receives a complaint on the fact of encroachment or acts on his own motion with regard to the alleged encroachment. The CEO is empowered to issue a notice calling upon the encroacher to show cause as to why an order requiring him/her to remove the encroachment shall not be made and also send a copy of the notice to the concerned mutawalli. Section 54(2) deals with the manner of service of the notices and sub-sections (3), (4) and (5) are concerned with the steps to be taken after the CEO considers the objection given by the alleged encroacher.

9. The 2013 amendment to the Act inserted section 3(ee) to define “encroacher” meaning any person whose tenancy, lease or licence has expired or has been terminated by the Board. Admittedly, the lease which was granted in favour of the petitioners and renewed for 49 years after creation of the lease expired on 25.12.2003 and the petitioners did not hand over the leased property to the lessors after expiry of the lease agreement. Section 54 empowers the CEO of the Waqf to issue a show-cause notice to the alleged encroacher which has been done in the present case.

10. Therefore, despite the objection taken, the petitioners, after expiry of the lease, falls within the definition of section 3(ee) as a person whose lease has expired. Besides these two provisions, section 108A states that the Act shall have overriding effect notwithstanding any inconsistency with any law for the time being in force. Hence, there is no doubt that the Act permits the Board and its CEO to issue a notice under section 54 of the Act for removal of encroachment.

11. The contention that the present writ petition is not maintainable on the jurisdictional ground under section 85 of the Act is however arguable since section 54(3) contemplates the CEO to make an application to the Tribunal for grant of an order of eviction for removing the encroachment and deliver possession of the land to the mutawalli of the Waqf if the CEO is satisfied that the property in question is Waqf property and that there has been an encroachment on any such Waqf property. Hence, the Waqf Tribunal as defined under section 3(q) and constituted under section 83 of the Act comes into the picture in section 54 itself after satisfaction of sub-sections (1), (2) and (3) of the said section. The Tribunal takes charge from section 54(4) onwards upon receipt of the application from the CEO and is empowered to make an order of eviction directing that the Waqf property shall be vacated by persons in occupation thereof or part thereof and affix the order in the manner provided under section 54(4). Section 54(4) also envisages an opportunity of hearing being given to the person against whom the application for eviction has been made by the CEO.

12. Therefore, relegating the dispute brought to the Writ Court to the Waqf Tribunal would lead to an anomalous result given the in-built space allotted to the Waqf Tribunal in section 54 itself.

13. Moreover, section 83 which provides for the constitution of the Tribunals, contemplates under sub-section (2) an application being made by a mutawalli interested or aggrieved by an order made under the Act to the Tribunal for the determination of any dispute, question or other matter relating to the Waqf or Waqf property including eviction of a tenant or determination of rights and obligations of the lessor. The determination must however precede an application being made by the mutawalli or interested/aggrieved person which is not the case in the present writ petition.

14. The reliance placed on behalf of the petitioners on the provisions of the West Bengal Thika Tenancy (Acquisition and Regulation) Act, 2001 is irrelevant for the present adjudication. The said provisions essentially revolve around the question of whether a person is a thika tenant and whether the land in question is a thika land. This issue is not material for the question which has been brought to the Court, namely, whether the impugned notices issued by the Board to the first petitioner are in accordance with the statutory mandate of The Waqf Act, 1995. In any event, the petitioners claim to have approached the Thika Controller and issues under the Thika Tenancy Act are already before that forum. Any question with regard to the said Act including the legality of the proceedings before

the Thika Controller do not fall within the coverage of the adjudication before this Court.

15. The parties have not raised any controversy with regard to the nature of the property in question. The property which is a subject matter of the dispute is admittedly Waqf property. The only question is whether the petitioners have any right to the said Waqf property after expiry of the deed of lease on 25.12.2003.

16. The sequence of the proceedings filed by the parties before the writ petition is significant. The Title Suit for eviction filed by the Mutawalli is of 2003 while the petitioners' application before the Thika Controller contending that the petitioner is a thika tenant is of 2012. The Suit is therefore a prior proceeding and the petitioners have already participated in the said suit by filing an application for dismissal of the suit which is subsisting as on date. It is also significant that the petitioner filed the application for dismissal in 2018 as would be evident from an endorsement in the document which is part of records. The petitioners approaching the Writ court for cancelling the said notices despite defending the suit pending since 2003 is neither tenable in fact nor in law.

17. Further, the Board is statutorily entitled to issue the impugned notices under section 54 of the Act, which is an independent mandate given to the Board by the amending Act of 2013. There is little doubt that the objective of the suit as well as the impugned notices is for eviction/removal of the petitioners from the Waqf property.

18. All the legal contentions raised on behalf of the petitioners have been dealt with in the judgment of the Supreme Court in *Rashid Wali Beg vs. Farid Pindari*; (2022) 4 SCC 414, which is an elaborate analysis of the provisions of The Waqf Act, 1995 and particularly the sections relating to bar of jurisdiction of a Civil Court. The petitioner before the Supreme Court was the defendant in a suit for a permanent injunction filed for a direction on the defendants to remove the encroachment made by the defendants. The first respondent before the Supreme Court was the plaintiff who created the concerned Waqf. The Special Leave Petition arose from a decision of the High Court of Judicature of Allahabad, Lucknow Bench, holding that the suit is not barred by section 85 of the Act. The decision contains a tabular statement of the statutory reference to the Tribunal which includes section 54(3) authorising the CEO to make an application to the Tribunal for removal of encroachment on a Waqf property. The Supreme Court held that an eviction of the tenant and determination of rights and obligations of lessor and lessee of Waqf property after the amendment to section 83(1) would be one of the three remedies which are available before the Tribunal.

19. The facts presented to the Court indicate that this stage is yet to be reached since the impugned notices are at the stage of section 54(1) where the petitioner no. 1 has been called upon to show cause as to why an order for removal of the encroachment should not be made. *Rashid Wali Beg* also considered and dealt with all the decisions relied on by the petitioners in the tabular column in paragraph 35 of the Report which includes *Ramesh Gobindram v. Sugra Humayun Mirza Wakf*; (2010) 8 SCC 726 and *Bhanwar*

Lal v. Rajasthan Wakf Board; (2014) 16 SCC 51. Ramesh Gobindram has specifically been dealt with in the said decision and it was held that the basis of *Ramesh Gobindram* stood removed after the Amendment of 2013. Paragraph 51 of the Report notices several decisions including *W.B. Wakf Board v. Anis Fatma Begum; (2010) 14 SCC 588* and *Kiran Devi v. Bihar State Sunni Wakf Board; (2021) 15 SCC 15* which justified *Ramesh Gobindram*. All the other decisions referred to by the petitioners were also dealt with in *Rashid Wali Beg* which presently holds the field.

20. Moreover, the petitioners' argument that the Board could not have initiated parallel proceedings under section 54 of the Act in addition to the suit for eviction is contrary to the Act as amended in 2013. To repeat with emphasis, the power given to the CEO of the Board to act in terms of a complaint or on his own motion and initiate steps in accordance with the stages contemplated under section 54 is an independent statutory mandate which is in addition to any action which a mutawalli may take against a lessee whose lease has expired and who consequently becomes an "encroacher" under section 3(ee) which was also inserted after the amendment of 2013.

21. The framework of The Waqf Act, 1995 and the recent judgment pronounced by the Supreme Court in *Rashid Wali Beg* persuades this Court to hold that the bar of jurisdiction would not apply to the present writ petition but that the petitioners are however not entitled to any relief. The impugned notices and the other communication which have been brought for adjudication are within the statutory mandate in sections 54 and 3(ee) of

the Act and hence no interference is called for with reference to the impugned communications.

22. WPO 25 of 2023 is accordingly dismissed without any order as to costs. All connected applications are disposed of in terms of this judgment.

Urgent Photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)