

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

C.O. 173 of 2022

Khanu Bibi

Vs.

Md. Kader Khan & Ors

For the petitioner

:Mr. Ashim Kumar Routh, Adv.
Ms. Ananya Mondal, Adv.
Mr. Subhayan Barik, Adv.

Heard On

:06.08.2024, 20.08.2024

Judgment On

:04.09.2024

Bibhas Ranjan De, J. :

1. Challenge in this revision application is the judgment and decree dated 24.12.21 and 11.01.2022 respectively passed by the Ld. Waqf Tribunal, West Bengal in connection with Suit No. 8 of 2018.
2. The case of the petitioner, in brief, is to the effect that the subject property being Waqf property were managed by four mutwallis namely Yusuf Ali Khan, Hurunnessa Bibi, Khanu Bibi (petitioner herein) & Muharram Ali. The Learned Waqf

Tribunal, West Bengal in Suit No.8 of 2018 allowed the suit in part on contest but against the defendant Nos.1 and 3 to 8 and 9 therein and ex-parte against the defendant Nos. 10, 11 and 12 therein by granting relief to the plaintiff therein, claimed in Clauses (a), (b), (d) and (e) in the copy of the plaint declaring that the Waqf Estate is hereby entitled for decree of declaration that the suit properties including Schedule A and Schedule B properties are Waqf properties, Waqf Estate is hereby entitled to decree of declaration that Sale Deed No.1097/1966 having Volume No.I, Book No. 14, Pages 125 to 127 confers no right, title and interest in respect of Schedule B property in favour of defendant Nos.1 and 3 to 8, Waqf Estate is hereby entitled to decree of declaration that the Sale Deed No.1097/1966 having Volume No.I, Book No.14, Pages from 125 to 127 is void ab initio, Waqf Estate is hereby entitled to decree of permanent injunction restraining the defendants Nos.1 to 9 and their men, agents, servants, staffs, employees or any person claiming through them from interfering into the suit properties (both Schedule A and B properties) in any manner whatsoever and the plaintiff is not entitled to relief claim in Clauses (c) and (g) of the prayers clause and the decree be drawn accordingly.

Being aggrieved by and dissatisfied with the said order of the Ld. Waqf Tribunal the petitioner herein has preferred the present application under Article 227 of the Constitution of India for setting aside of the same.

3. Ld. Counsel, Mr. Ashim Kumar Routh, appearing on behalf of the petitioner by delineating in brief the whole sequence of action which gave rise to the instant revision application has submitted that the impugned Judgment dated 24.12.2021 passed by the Learned Wakf Tribunal, West Bengal in connection with the suit filed by the Opposite party No.1 is not sustainable in the eye of law as the opposite party no.1 has no locus standi to file the said suit because his Mutawaliship has already been declined by the said Tribunal.
4. It is further submitted that at the instance of the Opposite party No.1, no such suit is maintainable in as much as the suit properties have already been declared as Wakf properties and the Petitioner herein being the sole Mutawali, is under obligation to maintain the suit properties according to the directions of the Wakf Board, West Bengal and in case of any deviation thereof, the petitioner herein is under obligation and is duty bound to answer all questions to the Wakf Board, West

Bengal. The Petitioner is under possession and occupation of suit properties but the opposite party no. 1 by taking advantage of the impugned judgment is trying to disturb the same and in the garb of the said Judgment, the Opposite party No.1 is trying to take the possession of the said Wakf properties.

5. Before parting with, Mr. Routh has contended that the suit being No. 8 of 2018 filed by the opposite party no. 1 is also violating the provisions of the Waqf Act, 1995 as he is not entitled to get any relief under Section 83 of the said Act of 1995.

Analysis:-

6. Before delving into the merit, I propose to reproduce the observation of the Ld. Tribunal under caption "Appreciation of evidence" along with Issue no- 1 to 6, which stand as follows:-

"Appreciation of evidence:

Plaintiff, Md. Kader Khan has examined himself as P.W.1 deposing that he is "present Mutawalli" in para-1 of his affidavit-chief. In his pleading in para-1 he has also stated that he is "present Mutawalli" of the Waqf Estate. In prayer (c) he has prayed for decree of declaration that he is entitled to be appointed as Mutawalli of the Waqf Estate. P.W.1 has produced Exhibit-4 i.e. Resolution dated 01.04.2010 by which he was recorded as

Mutawalli of the Waqf Estate under Section 3(i) of the Waqf Act, 1995 in terms of Waqf Deed in place of his father, Abul Hossain. He has also produced Exhibit-5 to show that he was appointed as Mutawalli vide Resolution dated 01.04.2010 duly confirmed on 22.04.2010. But Plaintiff knowingly suppressed the fact of setting-aside the said resolution in Judgment dated 28.06.2012 passed in O.A. No. 15/2010. Judgment dated 28.06.2012 passed in O.A. No. 15/2010 is Exhibit-C produced by D.W.1.

It is very much necessary to reproduce the relevant portion of the Judgment dated 28.06.2012.

"There was also no Wakfnama as the original dedicator was Raja Krishna Chandra Roy who was also termed as the Wakif. The said property was being treated as public Wakf by user. It has been further mentioned in the said Wakf Register that the Rule of Succession is not available as there is no Wakf Deed. It has been submitted by the Ld. Advocate on behalf of the applicant that all these persons mentioned above were recorded permanently as joint Mutawallis of the said Wakf Estate and they were never removed from the Office of the Mutawallis by any authority of law whatsoever. He also pointed out by showing the resolution passed by the Chief Executive Officer dated 01.04.2010 which is under challenged where the Chief Executive Officer observed that the name of Md. Kader Khan son of late Abdul Hossain brought on record as Mutawalli u/s 3(i) of the Wakf Act, 1995 in terms of Wakf Deed in place of his father Jb. Abdul Hossain since deceased. It is curious to note that when there is no Wakf Deed, how the Ld. Chief Executive Officer

formed the opinion in the said order? The said order is totally baseless and has no basis and foundation. Accordingly the same is liable to be set-aside. He further pointed out that this resolution was passed by the Ld. Chief Executive Officer who passed this order on the basis of a copy of an order of the Commissioner of Wakf, West Bengal where the father of Abdul Kader Khan was appointed as a sole Mutawalli in terms of order of Title Appeal no. 608 of 1976 in the 5th Court of Additional District Judge, Alipore, 24 Parganas. So long he was the sole Mutawalli till 1981. That interpretation of the Ld. Chief Executive Officer is also baseless as there is no such order passed by the Ld. Court in Title Appeal No.608 of 1976 that the father of Respondent No.1 has been declared as sole Mutawalli in respect of the suit properties.

I carefully gone through the copy of Title Suit No. 331 of 1968 where the father of Respondent No.1 filed the title suit against the applicant and others that the suit was decreed ex-parte against this respondent where the Ld. Additional Court of Munsif in that suit decreed the suit and it was declared that suit property was Wakf property and defendants are permanently restrained from dealing in any way from the suit property and R.S.R.O.R of the suit property is wrong. Accordingly, decree be drawn up on the basis of judgment passed by the Munsif, Additional 3rd Court, Alipore in Title Suit No.331 of 1968. It is unfortunate to state that there is no such declaration that the Plaintiff is the Mutawalli of the Wakf property in the order in Title suit no.331 of 1968 and there was no such issue to that effect in Title suit No.331 of 1968 of Munsif, Additional 3rd Court Alipore. It is true decree be drawn up

on the basis of the judgment, specially the order passed by the Ld. Munsif. But here no such order was passed by the Ld. Munsif in Title Suit No.331 of 1968 that the Plaintiff id. father of the Respondent no.1 is the Mutwalli of that Wakf property. But how the Id. Court drawn up the decree to that effect? Accordingly, I find the smell of fraud for drawing up the said decree in Title suit No.331 of 1968.

This record further discloses that the petitioner filed an application before the Ld. Munsif for setting aside the ex-parte decree in Title suit No.331 of 1968 u/s 9 Rule 13 CPC and that was dismissed on contest. This applicant and others also filed the Title suit No.347 of 1970 before the Ld. Munsif, 6th Court at Alipore. That suit was also dismissed on contest.

Being aggrieved by and dissatisfied with the judgment and decree the title Appeal no.608 of 1976 was preferred. That appeal was also dismissed on contest but without any cost. It is unfortunate to state that the Ld. Chief Executive Office mentioned in the resolution under challenged that he father of the Respondent No.1 was appointed a sole Mutawalli in terms of order under title Appeal No.608 of 1976 n the 5th Court of Additional District Judge, Alipore. 24 Parganas. But I have carefully gone through the copy of the judgment of Title appeal no.608 of 1976 in the 5h Court of Additional District Judge, Alipore, 24 Parganas for there is no whisper either in the body of the judgment or in the body of the order as the father of the Respondent no.1 was appointed as sole Mutawalli in respect of the Wogf Estate. It is, therefore, unfortunate to state that the title Appeal No.608 of 1976 was preferred against the dismissal judgment in Title suit no.347 of

1970. That title Appeal was also dismissed when there is no counter claim of the Respondent no.1 or Defendant i.e. father of the present respondent no.1 either in the title suit or in the appeal for declaring him as he sole Mutawalli in respect of the Wakf Estate, that declaration cannot be passed by the Court of Law in any manner. So the plea taken by the Respondent no.1 either before the Board of Wakf or before the Tribunal is totally misconceived and did not inspire my confidence. It further appears from the case in opposition of Respondent No.1 that the applicant also sold out the Wakf property without taking permission from the Board of Wakf by Registered Deed of Sale dated 01.02.1966 which has been substantiated by the report of the Enquiry Officer of the Wakf Board.

Against this judgment, Plaintiff, Md. Kader Khan moved Hon'ble High Court at Calcutta under C.O. No. 3027/2012 titled as Md. Kader Khan Vs Khanu Bibi and Ors and same was dismissed for default on 18.01.2019. The order of Hon'ble High Court dated 18.01.2019 passed in C.O. No. 3072/2012 is marked as Exhibit- D. Plaintiff by suppressing Exhibits C & D projected himself as "present Mutawalli" of the Waqf Estate and also sought declaration at the same time that he is entitled to be appointed as Mutawalli on the ground that his father was Mutawalli of the Waqf Estate knowingly that C.O. No. 3072/2012 was dismissed and Exhibit-C has attained finality. Plaintiff has also wrongly stated that his father was sole Mutawalli of the Waqf Estate, whereas his father (Abul Hossain Khan) was substituted as Mutawalli in place of his father, Yusuf Ali Khan and his father was Mutawalli alongwith Mst. Khanu Bibi, Mst. Hurnnessa Bibi and Sk. Moharram Ali.

Plaintiff also suppressed this fact that Mst. Khanu Bibi, Mst. Hurunnessa Bibi and Sk. Moharram Ali were never removed from their post as Mutawalli. Plaintiff also misled this Tribunal by making statement that Judgment dated 07.08.1969 passed in T.S. No.331/1968 Defendants were restrained from dealing with suit property. Judgment dated 28.06.2012 passed in O.A. No.15/2010 categorically show the illegality committed by Board of Auqaf in its Resolution dated 01.04.2010 duly confirmed on 22.04.2010 stipulating appointment of Md. Kader Khan on the basis of Deed of Waqf whereas there is no existence of Deed of Waqf in this Waqf Estate. It is interesting to note that after setting aside of Resolution dated 01.04.2010, Board of Auqaf has not moved before Hon'ble High Court and the C.O. No. 3072/2012 filed by Plaintiff has been dismissed and admittedly Plaintiff has not moved Hon'ble High Court for restoration of the C.O. or to move before Hon'ble Apex Court. Judgment dated 28.06.2012 passed in O.A. No. 15/2010 has attained finality and same operates a resjudicata against the present suit, so far as Mutawalliship of Plaintiff is concerned. So far as transfer of Waqf property by Exhibit-6 is concerned, transfer is bad in law as suit property is admittedly Waqf property. Defendant No.9 was Mutawalli of the Waqf Estate and she admits that suit property is Waqf property and hence transfer of Waqf property by virtue of Exhibit-6 is void ab-initio. Defendant No.9 has miserably failed to show that the sold property to Defendant Nos. 1 to 8 was her personal property. In one hand, she admits that suit property is Waqf property and on the other hand, she has deposed that she has right to transfer Waqf property. The transfer of Waqf

property by virtue of Exhibit-6 was made without permission of Board of Augat and hence same is void ab-initio. For guilty of transferring Waqf property (Exhibit-6), Defendant No.9, Khanu Bibi, is disqualified from becoming Mutawali in future unless and until she restores Waqf property sold to Waqf Estate. But Exhibit-C (Judgment dated 28.06.2012 passed in O.A. No.15/2010) has attained finality and same is against the Plaintiff and his entitlement for the post of Mutawalli has been eclipsed. Exhibit-B is equivalent to Exhibit-4 which is no more in existence by virtue of Exhibit-C and D. Mark-X for identification goes against Defendant No.9 as because the sold property by her in the name of Defendant Nos. 1 to 8 has admittedly Waqf property. Mark-Z for identification is not helping Defendant No.9 as because she has not approached this Tribunal well within time for direction to dispose of her representation dated 07.12.2007. She has also not approached this Tribunal after passing of Judgment dated 28.06.2012 in O.A. No. 15/2010 giving direction to the Board of Augaf to allow her to continue as Mutawalli or reappoint as Mutawalli. In absence of counter-claim or there was suit or O.A, this Tribunal cannot pass any order in favour of Defendant No.9, Khanu Bibi. Defendant No.9, Khanu Bibi, is guilty of transferring Waqf property in favour of Defendant Nos. 1 to 8 by Exhibit-6. Other exhibits produced by parties are not so relevant to be discussed at length.

Let us scan and evaluate the evidence of P.W.1 and D.W.1 issue-wise.

Issue Nos. 1 & 2:

This case has been filed by previous Mutawalli Md. Kader Khan seeking permanent injunction and declaration

against Defendant Nos. 1 and 3 to 8 and declaring Sale Deed No.1097 as null and void. The suit is filed by previous Mutawalli Md. Kader Khan and same is verified. Md. Kader Khan has filed the affidavit in support of his suit. Paragraph-2 of the affidavit is duly verified as per provision of CPC. The prayer made in the plaint is lawful. Even previous Mutawalli of Waqf Estate has every right to file a suit and protect the Wagh property. Mutawalli or person interested need not to be dependent on the Board of Auqaf for filing suit before this Tribunal. In paragraph-13 of the suit, cause of action has been shown. Defendant Nos. 1 to 8 have appeared in this case. Defendant Nos. 1 and 3 to 8 filed written statement but rest Defendants, save and except Defendant No.9, did not file written statement against the present suit. Defendant Nos. 1 and 3 to 8 despite knowing the fact that Plaintiff has sought decree of declaration declaring their Sale Deed null and void, they stopped appearing after filing their written statement. This means that they have no defence at all against the prayer made by the Plaintiff. Plaintiff has proved necessary documents and same are exhibited from Exhibit-1 to Exhibit- 6. If entire facts of the plaint are perused, it clearly makes out a good cause of action to file the present suit.

Thus, Issue No.1 is decided in favour of Plaintiff and against the Defendants holding that the suit is maintainable in its present form and prayer partially.

Issue No.2 is also decided in favour of Plaintiff and against the Defendants holding that Plaintiff has cause of action to institute the present suit.

Issue Nos. 3 & 4:

P.W.1 has proved Exhibit No. 1 and 2 which clearly show that the Waqf property

is enrolled with Board of Auqaf under E.C. No.13909 vide enrolment application dated 23.08.1965 made by Yusuf Ali Khan. Exhibit-1 shows the details of properties of Waqf which was donated by Raja Krishna Chandra Roy in favour of "Bibi Fatema and Imam Saheb Pirottar Waqf Estate". Exhibit-2 also shows details of Waqf properties. There is no reason to disbelieve Exhibit Nos. 1 and 2. Exhibit-3 is the certified copy of Judgment and Decree dated 07.08.1969 passed by 3rd Addl. Court of Munsif, Alipore in T.S. No.331/1968. In this suit, Ld. Civil Judge has declared the suit property as Waqf property and restrained Defendants including Defendant No.9 from dealing in any way with the suit property. In spite of this, Khanu Bibi transferred some portion of suit property in favour of Sk. Muslim and Abu Taleb. Schedule of the property has been given in the plaint which clearly shows that Schedule-B property is the part of Schedule-A property. Defendant Nos. 1 to 8 who are stated to be purchasers of suit property, have not come forward to disprove the case of the Plaintiff. The Plaintiff has proved his case within the principle of preponderance of probability. The evidence of P.W.1 has not been rebutted and controverted. There is no reason to disbelieve the evidence produced by P.W.1. P.W.1 is previous Mutawalli as reflected in Exhibit-C.

Hence, Issue No.3 is decided in favour of Plaintiff/Waqf Estate and against the Defendants holding that suit properties are Waqf properties.

Issue No.4 is decided in favour of Plaintiff/Waqf Estate and against the Defendants holding that Schedule-B property is part of Schedule-A property belonging to "Bibi Fatema and Imam Saheb Pirottar Waqf Estate" under E.C. No.13909.

Issue No.5:

Exhibit-3 is the certified copy of judgment and decree passed by 3rd Addl. Munsiff, Alipore in T.S. No.331/1968. The suit was decreed in favour of father of Plaintiff i.e., in favour of Waqf Estate and against the Defendants particularly Defendant No.9 in the suit and Defendant No.3 in Suit No.331/1968. Exhibit-4 shows that Khanu Bibi filed T.5. No.347/1970 against Abul Hossain Khan and she lost the case on merit and her Appeal No.608/1976 against the judgment of T.S. No.347/1970 also resulted into failure. Civil Court was the competent court to adjudicate the dispute in T.S. No.331/1968 and his judgment and decree has attained finality. Till today, the judgment and decree of T.S. No.331/1968 has not been reversed by Hon'ble High Court or Supreme Court. Defendant Nos. 1 and 3 to 8 have not disputed the finality of Judgment and Decree dated 07.08.1969. The Judgment and Decree dated 07.08.1969 is final and binding on the parties to that suit.

Thus, Issue No.5 is decided in favour of Plaintiff and against the Defendants holding that Judgment and Decree dated 07.08.1969 in T.S. No.331/1968 passed by 3d Addl. Munsiff, Alipore is final and binding.

Issue No. 6:

Exhibit-6 is the certified copy of Sale Deed being No.1097/1966 executed by Khanu Bibi in favour of Abu Taleb and Sk. Muslim. Khanu Bibi was not owner of portion of suit property which she sold to Sk. Abu Taleb and Sk. Muslim. The sold property is the part of Waqf property and Waqf property cannot be sold by any person without the permission of Board of Auqaf. Both in West Bengal Waqf Act, 1934 and Waqf Act,

1995, the sale of Waqf property is held illegal and void *ab initio*.

Before coming to any conclusion, let us see the relevant provisions of old Act as well as new Act to see whether Waqf property can be sold or not.

The West Bengal Waqf Act, 1934:

53. Bar to transfer immovable property of Waqf.- (1) Except as provided in sub-section (2), no transfer or agreement for transfer of any immovable property of a Waqf by way of sale, gift, mortgage or exchange or by way of lease or tenancy of any kind shall be made without the previous sanction of the Board and any such transfer or agreement for such transfer, if effected without the prior sanction of the Board, shall be void and the Board shall, while according such sanction, satisfy itself that such transfer or agreement for transfer is for legal necessity.

(2) Where such transfer or agreement for transfer is made under an express power conferred by the Waqf deed, the previous sanction of the Board shall not be necessary, but a notice of the proposed transfer in such form and containing such particulars as may be prescribed by the Board shall be sent by the Mutawalli to the Commissioner one month before the transfer is made.

(3) If a Mutawalli or a member of a committee constituted for the administration of Waqf or a person interested in a Waqf or any other person contravenes the provisions of sub-section (1) either as a transferor or as a transferee or as a party to an agreement for transfer, he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five thousand rupees, or with both.

(4) Notwithstanding anything contained in the Code of Criminal Procedure 1973 (2 of 1974), the fine imposed under sub-section (3), when realized shall be credited to the Waqf Fund.

The Waqf Act, 1954:

36-A. Alienation of Waqf property without sanction of Board to be void. -

(1) Notwithstanding anything contained in the Waqf deed, any gift, sale, exchange or hypothecation of any immoveable property which is Waqf property, shall be void unless such gift, sale, exchange or hypothecation is effected with the prior sanction of the Board.

(2) The Board may, after publishing in the Official Gazette, the particulars relating to the transaction referred to in sub-section (1) and inviting any objections and suggestions with respect thereto and considering all objections and suggestions, if any, that may be received by it from the concerned mutawalli or any other person interested in the Waqf, accord sanction to such transaction if it is of opinion that such transaction is-

(i) necessary or beneficial to the Waqf;

(ii) consistent with the objects of the Waqf;

(iii) the consideration thereof is reasonable and adequate;

Provided that the sale of any property sanctioned by the Board shall be affected by public auction and shall be subject to confirmation by the Board within such time as may be prescribed:

Provided further that the Tribunal may, on the application of the aggrieved mutawalli or other person, for reasons to be recorded by it in writing, permit such sale to be made otherwise than by public auction, if it is of opinion that it is necessary so to do in the interest of the Waqf.

(3) The utilization or investment of the amount realized by the sale, exchange or hypothecation of any property shall be made by the Mutawalli subject to the approval of the Board, and where any amount has been raised by mortgage, of any such property, the Mutawalli or other person shall make repayment of the mortgage-debt and obtain a discharge of the mortgage-debt from the mortgagee within such reasonable time as the Board may specify.

(4) Every approval given by the Board under sub-section (3) shall be communicated to the mutawalli and shall also be published in the prescribed manner.

(5) The mutawalli or any other person having an interest in the Waqf who is aggrieved by the decision given under sub-section (3), may, within ninety days from the date of communication to him of such decision or the publication of the decision, as the case may be, prefer an appeal to the tribunal against such decision, and, thereupon, the Tribunal may, after giving the appellant and the Board of the Waqf Commissioner, as the case may be, a reasonable opportunity of being heard, confirm, modify or set aside such decision.

The Waqf Act, 1995:

Section 51. Alienation of Waqf property without sanction of Board to be void.

-(1) Notwithstanding anything contained in the Waqf deed, any lease of any immovable property which is Waqf property, shall be void unless such lease is effected with the prior sanction of the Board:

Provided that no mosque, dargah, khanqah, graveyard, or imambara shall be leased except any unused graveyards in the States of Punjab, Haryana and

Himachal Pradesh where such graveyard has been leased out before the date of commencement of the Waqf (Amendment) Act, 2013.

(1A) Any sale, gift, exchange, mortgage or transfer of Waqf property shall be void ab initio:

Provided that in case the Board is satisfied that any Waqf property may be developed for the purposes of the Act, it may, after recording reasons in writing, take up the development of such property through such agency and in such manner as the Board may determine and move a resolution containing recommendation of development of such Waqf property, which shall be passed by a majority of two-thirds of the total membership of the Board:

Provided further that nothing contained in this sub-section shall affect any acquisition of Waqf properties for a public purpose under the Land Acquisition Act, 1894 (1 of 1894) or any other law relating to acquisition of land if such acquisition is made in consultation with the Board:

Provided also that -

(a) the acquisition shall not be in contravention of the Places of Worship (Special Provisions) Act, 1991 (42 of 1991);

(b) the purpose for which the land is being acquired shall be undisputedly for a public purpose;

(c) no alternative land is available which shall be considered as more or less suitable for that purpose; and

(d) to safeguard adequately the interest and objective of the Waqf, the compensation shall be at the prevailing market value or a suitable land with reasonable solatium in lieu of the acquired property.

Thus, Section 51 of the Waqf Act, 1995 amplifies the powers of the Board under section 32(2)(j) in respect of transfer of immovable property of Waqf by way of sale, gift, mortgage or exchange Lease of immovable property is dealt with separately under section 56 of this Act.

There is a clear and categorical prohibition in Muslim Law of alienation by way of sale, gift, exchange or mortgage of other Waqf properties, unless the deed of thorizes the Mutawalli to do so for any specific purpose or unless the permission of the Kazi is obtained.

Under the Muslim Law, the Mutawalli may alienate or encumber the Wag! property wholly or in part under special circumstances with the previous sanction of the kazi. Any such act done without the prior sanction of the kazi is wholly void and inoperative. The functions of the kazi are taken over by the courts in this country and Indian Courts in earlier cases have invariably given effect to the rule that the sanction of the Court is a condition precedent. In *Nimi Chand Adya v Gulam Hossain* **(1909) 37 Cal 179** the High Court of Calcutta took a discordant view and granted retrospective sanction for the creation of a mortgage without the sanction of the court, in the suit brought by the mortgagee to enforce the mortgage.

Commenting strongly against this decision, Hon'ble Justice Ameer All has pointed out that "ex Post facto" sanction was never contemplated by the Mussalman Jurists and the prior permission of the Judge was made an absolute condition to see not only that the loan was necessary but also whether it was proper, that the terms were not onerous and there was no other mode of meeting the necessity.

Section 36A of the Waqf Act 1954 inserted by the Amendment Act 34 of 1964 and substituted by the Amendment Act 69 of 1984 and the corresponding section 51 of this act have categorically laid down that any alienation of Waqf property by way of sale, gift, exchange or mortgage shall be void unless the same is effected with the prior sanction of the Board. The rule of the original Muslim Law has thus happily been restored. The rule is clear that any alienation of Waqf property by way of sale, gift, exchange or mortgage in order to be valid must be (1) with the sanction of the Board and not the court, and (2) the sanction must be anterior to the transaction and both these conditions must be concurrently satisfied. There is no longer any room for ex post facto sanction.

The Board before according sanction for alienation has also to take into consideration the objects of the Waqf and the reasonableness and adequacy of the consideration. It is specifically laid down that the alienation sanctioned by the Board has to be effected by public auction and is subject to confirmation by the Board. It is open to the Board to refuse confirmation if adequate price is not fetched. The second proviso empowers the Tribunal on application by the aggrieved Mutawalli or other person to permit such sale to be made otherwise than by public auction if it is necessary to do so in the interest of the Waqf.

The procedure for alienating Waqf properties came up for consideration before the Supreme Court in D.M. Khasim Sab v Court Mohala Mosque Committee reported in (2004) 13 SCC 367. The property in question which originally belonged to the grandfather of the appellant was declared as Waqf property on the basis of the deed

of gift executed by the grandfather of the applicant. Subsequently, the Waqf Board adopted a resolution to part with a portion of the property measuring one Acre in favour of the appellant. The said action of Waqf Board was challenged to the Court Mohala Mosque Committee as violative of section 51 of the Karnataka Waqf Act, 1991. Hon'ble Single Judge of the High Court of Karnataka held that there was non-compliance with the requirements of section 51 of the Act and it was affirmed on appeal. The matter came up before the Supreme Court and Their Lordships pointed out that the publication in the Official Gazette as mandated by sub-section (1). Their Lordships proceeded to observe that even if it is accepted that the requirement of sub-section (1) was complied with, in the absence of compliance with the requirement of sub-section (2), there was no valid sanction by the Board.

In the case of Mohammedia Co-operative Building Society Ltd. vs. Lakshmi S. Co-operative Building Society Ltd. reported in AIR 2009 SC (suppl) 590, wherein Hon'ble Supreme Court has held that for sale of Wakf property, sanction of Board of mandatory.

*In the case of Rajasthan Waqf Board vs. Devki Nandan Pathak reported in **AIR 2017 SC 2155**, wherein Hon'ble Supreme Court has held that question whether the suit land is a Waqf property or not can be decided only by Tribunal and not by the Civil Court. Once a property is declared to be a Waqf property, a fortiori, where sale of such property is made by a person not connected with the affairs of Waqf or by a person dealing with the affairs of the Waqf, the same become void by virtue of Section 51 of the Waqf Act unless it is proved that it was made after obtaining prior permission*

of Board as provided under the Act. One cannot dispute that the matter under filing U/s 51 & 52 of the Act are also required to be decided by Tribunal and hence jurisdiction of the Civil Court to decide such matters is also barred by virtue of provisions content in Section 85 of the Act.

P.W. 1 has proved Exhibit-6 and the portion of the property sold by Defendant No.9, Khanu Bibi is part of Waqf property. Defendant Nos. 1 and 3 to 8 have not produced any evidence either oral or documentary to prove their lawful ownership over the suit property. They appeared, filed written statement and disappeared. They did not cross-examine P.W.1 knowingly. Evidence of P.W.1 remained unchallenged and there is no reason to disbelieve the same.

Thus, Issue No.6 is decided in favour of Plaintiff and against the Defendant Nos. 1 and 3 to 8 holding that Sale Deed being No.1097/1966 confers no title, right and interest in favour of Defendant Nos. 1 and 3 to 8.”

- 7.** It is an admitted fact that the subject property belonged to Raja Krishna Chandra Ray who dedicated the same in the name of an unknown Pir in the year 1783 by virtue of a Sanad. The said dedication and the future usage converted the said property into a Waqf by user and the same was treated as a public Waqf and there was no Waqfnama. The said property registered under Misc. EC NO. 18 of 1965, which was enrolled

as “Pirattar Bibi Fatema and Pirattar Imam Saheb Waqf Estate”.

- 8.** Subsequently, four (4) persons were appointed as joint Mutwallis including Yousuf Ali Khan and Khanu Bibi (petitioner herein).
- 9.** Case of the petitioner herein is that after demise of Yousuf Ali Khan, his son Abul Hossain became joint Mutwalli. Said Abul Hossain died and Abul Kader Khan was appointed as Mutawalli on his application dated 17.05.2006 suppressing the names of other sons and daughters of Abul Hossain since deceased.
- 10.** It appears from the record that after exclusion of her name, Khanu Bibi, (petitioner herein) made an application before Executive Officer, Board of Waqf on 07.12.2007 for recording her name. But Executive Officer recommended Abul Kader Khan, opposite party no. 1 herein which was confirmed by Board resolution dated 22.04.2010.
- 11.** Khanu Bibi challenged the said recommendation of Executive Officer and resolution of Board dated 22.04.2010 in a suit being no. O.A. 15/2010 before the Waqf Tribunal. In that suit the Board resolution dated 22.04.2010 was set aside.

Being aggrieved said Abul Kader Khan preferred revision being no. C.O. 3072/2012 before this High Court. The C.O. 3072 of 2012 was dismissed for default and no step was ever taken at the instance of Abul kader Khan, opposite party no. 1, herein thereby, Mutwalliship of Abul Kader Khan was doused.

12. In the Suit No. 8 of 2018, challenged in this revision application, Abul kader Khan, opposite party no. 1, herein, muzzled entire fact of dismissal of the Suit being no. O.A. No. 15/2010 as well as dismissal of revision application being no. C.O. 3072 of 2012, for obtaining decree from the Waqf Tribunal, in his favour.

13. It is also apposite to note that Khanu Bibi, petitioner of this revision application transferred Waqf property to the opposite party no. 2 to 8 by a deed (exihibit 6 of suit no. 08 of 2018) in violation of provision of Section 53 of the West Bengal Waqf Act, 1934 (for short Act of 1934). Thereby, petitioner of this revision application was disqualified to be a Mutawalli. As a result of which the aforesaid deed executed by the petitioner herein was void ab initio in terms of provision of Section 36A and 51 of the Act of 1934.

- 14.** Provision of Section 53 of the Act of 1934 clearly bars transfer of immovable property save and except the conditions envisaged in sub Section 1 & 2 of Section 53 of the Act of 1934. The same provision also prescribes punishment for transfer of Waqf property in violation of conditions imposed by the provision of sub Section 1 & 2 of the Section 53 of the Act of 1934.
- 15.** However, plaintiff of the Suit no. 08 of 2018, deliberately concealed material fact of dismissal of Suit no. O.A. 15/2010 as well as dismissal of C.O. 3072 of 2012 with a view to protect himself as a Mutwalli of the subject property/ Waqf property.
- 16.** It is settled that the Court should not become a source of abuse of the process of law by the disgruntled litigant. Careful exercise is necessary to ensure that the litigation is genuine, not motivated by extraneous consideration and imposes an obligation upon the litigant to disclose the true facts and approach the Court with clean hands. No litigant can play hide and seek with the Courts or adopt pick and choose. True facts ought to be disclosed as the Court knows law, but not facts.
- 17.** It is also settled that no litigant has a right to unlimited drought on the Court time and public money in order to get his

affairs settled in the manner he wishes. However, access to justice should not be misused as a license to file misconceived and frivolous petitions. A litigant should approach the Court not only with clean hands but also with clean mind, clean heart and clean objective. Wheels of justice can move only on true facts and truth cannot be trampled by an act of fraud.

18. Plaintiff of the Suit being no. 8 of 2018 was bound to state all facts which were relevant to the litigation. He deliberately withheld the material facts in order of gain advantage over other side. Therefore, in my opinion, plaintiff was guilty of playing fraud with the Waqf Tribunal.

19. In the suit being no. 08 of 2018 plaintiff/opposite party no. 1 herein did not disclose the dismissal of O.A No. 15 of 2010 filed by him as well as dismissal of revision application being no. C.O. 307/2012 by the High Court, the plaintiff had to be non-suited on the suppression of material facts. The plaintiff had not come to the Tribunal with clean hand and he also abused the process of law. Therefore, plaintiff was not entitled to any equitable and discretionary relief in his favour from Tribunal.

20. Aforesaid, discussion clearly boils down to the position that in the Suit No. 8 of 2018 neither plaintiff nor Proforma defendant no. 9 are Mutwalli in respect of subject Waqf property and defendant nos.1 to 8 did not acquire any right over the subject property by any deed alleged to have been executed by the defendant no. 9 in violation of provision of the Act of 1934.

21. It is also abundantly clear that the plaintiff being guilty of suppressing material fact are not entitled to any decree as prayed for in the Suit No. 8 of 2028. Ld. Tribunal, in my humble view, ought to have dismissed the said Suit.

22. As a sequel, the judgment and order passed in Suit no. 08 of 2018 was stands set aside.

23. Accordingly, the revision application being no. C.O. 173 of 2022 stands disposed of.

24. Connected applications, if there be, also stands disposed of accordingly.

25. All parties to this revisional application shall act on the server copy of this order downloaded from the official website of this Court.

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

[BIBHAS RANJAN DE, J.]