

07.03.2024
Item No.5
Ct. No.7
KS/RP

W.P.A. 23784 of 2007
Niloy Chowdhury
Vs.
State of West Bengal & Ors.

Mr. Ram Anand Agarwal
Mr. Pijush Chaturvedi
Mr. Dilip Kumar Chatterjee
Ms. Nibedita Pal
Mr. Tarak Nath Halder
Mr. Ananda Gopal Mukherjee
Ms. Sonam Roy

.....for the Petitioner

Sk. Md. Galib
Mr. Abu Siddique Mallik

.....for the Board of Waqf

Mr. Ejaz Hossain

.....for the State

Mr. Joydip Basu

.....for the respondent no.6

1. This writ petition is at the instance of one, Niloy Chowdhury claiming to be the successor of the purchaser of the property-in-question from the original owner namely one, Md. Sonauula.
2. In this writ petition, the petitioner has prayed for setting aside of the order dated August 30, 2007 passed by the Chief Executive Officer, Board of Wakf and the notice of the Auditor, Board of Wakf dated October 1, 2007.
3. It appears from the record that an application under Section 54 of the Wakf Act was submitted by one, Lutfar Rahaman claiming to be the Mutawalli of Sonauula Wakf

Estate alleging that the petitioner has encroached upon the Wakf property. Pursuant to such complaint, a Misc. Case being No.350/39, E.C. No.1464 was initiated and an order dated August 30, 2007 was passed. Thereafter, the Auditor, Board of Wakf, West Bengal issued the notice dated October 1, 2007 requesting the petitioner and the private respondent to appear at the site on October 30, 2007 along with the relevant documents for spot enquiry.

4. Mr. Chaturvedi, learned advocate appearing for the petitioner submits that after conclusion of hearing in connection with Misc. Case No.350/39, the notice of spot enquiry was issued. He submits that the purpose of such spot enquiry, as it appears from the notice, is to identify whether there has been any encroachment upon the property or not. He submits that such a spot enquiry after conclusion of hearing could not have been directed, as the same would amount to violation of the principles of natural justice. He further submits that the Auditor is not competent to hold an inspection for the purpose of ascertaining as to whether there has been an encroachment of the Wakf property.
5. Sk. Md. Galib, learned advocate representing the Board raises an objection as to the maintainability and/or entertainability of this writ petition in view of the

provisions laid down under Section 83 of the Wakf Act, 1995. By referring to the reliefs claimed in the writ petition, Sk. Md. Galib contends that the petitioner has prayed for reliefs, which are relatable to a Wakf property and the petitioner should be relegated to the Wakf Tribunal.

6. By referring to the decision of the Hon'ble Supreme Court in the case of *Board of Wakf, West Bengal and Anr. Vs. Anis Fatma Begum & Anr.* reported at (2010) 14 SCC 588, he submits that even if no order has been passed under the Act, a party can approach the Wakf Tribunal for the determination of any dispute, question or other matters relating to a Wakf or Wakf property. He further submits that all matters pertaining to Wakf or Wakf property should be filed in the first instance before the Wakf Tribunal constituted under Section 83 of the Wakf Act and an approach straightaway to the High Court under the provisions of Article 226 of the Constitution of India should not be entertained. He also refers to an order dated 27th September, 2022 delivered by the Hon'ble Division Bench in *A.P.O.T. 117 of 2022* in the case of *The Board of Wakf & Anr. Vs. Anis Fatima Begum & Ors.* in support of such contention. He further submits that the petitioner has failed to bring the case within the

exceptions carved out by the Hon'ble Supreme Court in the case of *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai & Ors.* reported at (1998) 8 SCC 1. He further submits that the Auditor being an officer of the Board is competent to cause an inspection of the property and to submit a report on the issue of encroachment.

7. Sk. Md. Galib, learned advocate further refers to Rule 16 of the West Bengal Wakf Rules, 2001, in support of his contention as to how an enquiry for removal of encroachment from Wakf property is to be conducted.
8. Sk. Md. Galib further submits that the dispute involved in this writ petition is a dispute falling within Section 54(3) of the Wakf Act, 1995.
9. Learned advocate appearing for the private respondent submits that the petitioner has encroached upon the Wakf property for which he filed an application for removal of encroachment, which gave rise to the initiation of the misc. case. He further submits that unless a spot enquiry/inspection is conducted, the issue of encroachment cannot be decided. With regard to the maintainability of the writ petition, he adopts the argument advanced by Sk. Md. Galib, learned advocate for the Board of Wakf.

10. In reply Mr. Chaturvedi, learned advocate for the petitioner submits that the objection as to the maintainability ought to have been taken at the threshold, i.e. when the writ petition was moved and at this point of time, the Board should not be allowed to raise the point of maintainability.
11. Heard the learned advocates for the parties and perused the materials placed.
12. After going through the order dated 30th August, 2007, this Court finds that it has been specifically recorded in the said order, that hearing was concluded. It was further recorded that enough opportunities of being heard, were given to all the parties.
13. The said order is silent as to whether any opportunity of hearing after spot enquiry will be afforded to the parties.
14. Section 54(3) of the Wakf Act, 1995 states that if after considering the objections received during the period specified in the notice and after conducting an enquiry in such manner, as may be prescribed, the Chief Executive Officer is satisfied that the property-in-question is Waqf property and that there has been an encroachment on any such Wakf property, he may make an application to the Tribunal for grant of order of eviction for removing of such encroachment and deliver possession of the land,

building, space or other property encroached upon to Mutawalli of the Wakf.

15. After reading the said provision, it appears to this Court that an enquiry into the encroachment has to be conducted prior to the matter being heard finally by the Chief Executive Officer and only upon being satisfied that there is an encroachment, the Chief Executive officer has to apply to the Tribunal for an eviction order.
16. After going through the order dated August 30, 2007, this Court is of the considered view that the Chief Executive Officer directed a spot enquiry to be conducted after conclusion of hearing. If the Chief Executive Officer was of the opinion that the issue with regard to encroachment could not be decided without holding any spot enquiry or inspection, the same ought to have been conducted prior to the parties being heard, as the report of the spot inspection/enquiry would be a relevant piece of evidence for arriving at a decision on the issue of encroachment and the contesting parties have to be afforded an opportunity to rely upon and/or controvert the findings of such report.
17. There is, however, no quarrel to the proposition of law laid down by the Hon'ble Supreme Court in the case of *Anis Fatma Begum & Anr. (supra)* and the Hon'ble

Division Bench of this Court that all matters pertaining to Wakfs should be filed before the Wakf Tribunal and the High Court should not entertain a writ petition straightaway.

18. As observed by this Court hereinbefore the spot inspection was directed after conclusion of the hearing. This, in the considered view of this Court, is an infirmity in the decision making process. Since the said order did not provide for any further hearing to be conducted this Court holds that the principles of natural justice have been grossly violated in the case on hand. It is well settled that availability of statutory remedy cannot oust the jurisdiction of the High Court under Article 226 of the Constitution of India under certain exceptional circumstances, one of which being violation of the principles of natural justice.
19. Though Section 54(3) of the Waqf Act 1993 provides for conducting an enquiry, such enquiry ought to have been conducted prior to conclusion of the hearing. In view thereof, the notice dated 1st October, 2007 directing inspection to be held on 30th October, 2007 after conclusion of hearing cannot be sustained in the eye of law and for such reasons the same is liable to be set aside and/or quashed.

20. Since the issue is of encroachment upon a Wakf property and the Chief Executive Officer was of the opinion that an enquiry is to be conducted for the purpose of deciding the issue of encroachment and the order dated 30th August, 2007 does not provide for any further opportunity of hearing, this Court is of the considered view that the Chief Executive Officer has to conduct an enquiry through an authorized officer of the Board, and after such enquiry, report of the enquiry is to be supplied to the contesting parties and after affording opportunity to the respective parties to deal with the same and after giving an opportunity of hearing to the parties, final decision in the miscellaneous case is to be taken.
21. For the reasons as aforesaid, the notice dated 1st October, 2007 and the order dated 30th August, 2007 passed by the Chief Executive Officer are set aside and quashed. The Chief Executive Officer is directed to depute an authorized officer for holding spot enquiry/ investigation/ inspection, who shall after conducting such enquiry supply copy of the report to the respective parties and shall thereafter take a final decision in the Misc. Case No.350/39 after giving an opportunity of hearing to the respective parties and pass a reasoned order in accordance with law. The entire exercise is to be

completed by the Chief Executive Officer including passing of the reasoned order within a period of eight weeks from the date of receipt of the server copy of this order.

22. It is, however, made clear that this Court has not gone into the issue of maintainability of the miscellaneous case and all points are left open to be agitated by the respective parties in course of hearing of the miscellaneous case before the Chief Executive Officer. It is also made clear that the issue of competence of the Auditor to hold spot enquiry raised by the petitioner is left open.
23. With the above observations and directions, W.P.A. 23784 of 2007 stands disposed of.
24. There shall be, however, no order as to costs.
25. Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.

(HIRANMAY BHATTACHARYYA, J.)