

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

Present:

The Hon'ble The Chief Justice Jyotirmay Bhattacharya.

AND

The Hon'ble Justice Abhijit Gangopadhyay.

**MAT 901 of 2016
with
(CAN 8992 of 2016)**

**The Board of Auqaf, West Bengal
-Versus-
Golam Mustapha & Another**

For the Appellant : **Mr. Sk. Md. Galib, Adv
Mr. Abu Siddique Mallick, Adv.
Mr. Akbar Ali, Adv.**

For the Respondents: **Mr. Partha Pratim Roy, Adv.,
Mr. S. Sanyal, Adv.**

Heard on : **06.06.2018**

Judgement on : **15th June, 2018**

Jyotirmay Bhattacharya, CJ. :-

This Mandamus Appeal is directed against the judgement and/or order passed by the learned Single Judge of this Court on 22nd December, 2015 in a writ petition being W.P. No. 29863 (W) of 2015 filed by the writ petitioners/respondents herein.

By the impugned order the writ petition was disposed of with a direction upon the Board of Wakf (appellant) to consider the claim of the writ petitioners for appointment as Joint Mutawallis in accordance with law, as early as possible; but not later than 8 (eight) weeks from the date of receipt of the copy of the said order. Such direction was passed by overruling the objection raised by the counsel appearing for the Board of Wakf, the appellant herein, regarding maintainability of such writ petition before the High Court. The legality and/or propriety of the said decision of the learned Single Judge of this Court are under challenge in this mandamus appeal.

For proper appreciation of the merit of the appeal, let us now give the facts in brief leading to filing of the writ petition. The writ petitioners' claim that they were appointed as Joint Mutawallis in

respect of Ashraful Islam Wakf Estate (hereafter described as the “said Wakf Estate”) by the Board of Wakf (hereafter described as “the Board”) in the year 2000, for a period of five years. After expiry of the tenure of five years they had approached the Board with an application for their further appointment. Since the said application was not considered for long time, reminders were issued. Still the Board did not take any decision on the writ petitioners’ claim for their continuance as Joint Mutawallis of the Wakf Estate. It was claimed by the writ petitioners that they were still looking after the said Wakf Estate as Mutawallis and maintaining the same properly for the benefit of the persons interested in the Wakf. Under such circumstances, the writ petitioners filed the said writ petition seeking an order on the Board to decide their claim for Mutawallis hip. The said writ petition was disposed of in the manner as aforesaid. The legality of the impugned decision is challenged by the appellant practically on two-fold grounds.

Mr. Galib, learned advocate appearing for the appellant, submitted by pressing strong reliance on the decision of the Hon’ble Supreme Court reported in (2010) 14 SCC 588 (Board of Wakf, West Bengal & Anr. Vs. Anish Fatma Begum & Anr.) and an unreported

decision of a Co-ordinate Bench of this of Court dated 19th April, 2011 in W.P. No. 6923 (W) of 2011 (Musst. Hazera Khtoon & Anr. Vs. The State of West Bengal & Anr.), that the learned Writ Court was not justified in overruling his objection regarding maintainability of the writ petition by holding that the observation of the Hon'ble Supreme Court in 'Anis Fatma' (supra) that High Court cannot be straightway approached under Article 226 of the Constitution loses the precedential value, as such observation which was made by the Hon'ble Supreme Court, was in the nature of obiter dictum. The learned Writ Court held that the observation made by the Hon'ble Supreme Court to the effect that High Court cannot be straightway approached under Article 226 of the Constitution, having been made without any argument advanced before the Court on such issue, cannot be treated to be a binding precedent. To support such conclusion, the Writ Court placed reliance upon the decision of the Hon'ble Supreme Court reported in AIR 1990 SC 781 (M/s. Goodyear India Ltd. Vs. State of Haryana), where Hon'ble Supreme Court had the occasion to observe that a decision on a question which has not been argued cannot be treated as a precedent.

Mr. Galib, learned Counsel argued that even if the decision of the Hon'ble Supreme Court in 'Anis Fatma' - that no one can approach the Writ Court straightway, is obiter dicta, the High Court cannot get over such decision of the Supreme Court which was passed after due consideration of the relevant provisions of law.

In support of such submission he has relied upon a decision of the Hon'ble Supreme Court in the case of The Commissioner of Income-tax, Hyderabad, Deccan Vs. M/s. Vazir Sultan and Sons reported in AIR 1959 Supreme Court 814 wherein it was held that obiter dicta of the Supreme Court, however, are entitled to considerable weight. He also relied upon another decision of the Hon'ble Supreme Court in the case of Sarwan Singh Lamba and Ors. Vs. Union of India and Ors. reported in AIR 1995 Supreme Court 1729, in support of his above contention.

Mr. Galib learned advocate further argued that the ratio which was decided by the Hon'ble Supreme Court in Anis Fatma case should be regarded as a precedence having binding effect of law declared by the Supreme Court. He further argued that when the Hon'ble Supreme Court renders judgement, it does so with great care and responsibility and when law is declared by the Supreme Court, it

is binding on all Courts and all authorities in the territory of India are required to act in aid of it.

Mr. Galib further argued - when in an identical circumstance, another learned Single Judge of this Court had held in an unreported decision in W.P. No. 6923 (W) of 2001 (Musst. Hazera Khatoon & Anr. Vs. The State of West Bengal & Anr.), that there is absolutely no scope of approaching the High Court under Article 226 of the Constitution of India at any stage by bypassing the remedy available under Section 83 of the Wakf Act, 1995 before the Tribunal; the learned Writ Court ought not to have come to a different conclusion by ignoring the binding effect of the decision laid down in the said unreported decision pronounced by the Court of co-ordinate jurisdiction. He submitted that for maintaining judicial discipline, the Writ Court, in case it does not agree with the decision of the other Co-ordinate Bench, ought to have referred the matter to the Hon'ble Chief Justice for getting the point of difference resolved by a larger Bench. In support of his submission he has relied upon the following decisions of the Hon'ble Supreme Court:-

(i) In the case of Dental Council of India Vs. Dr. Dedgewar Smruti Rugna Seva Mandal, Hingoli and Ors. reported in (2017) 13 Supreme Court Cases 115.

(ii) In the case of Sri Venkateswara Rice Ginning and Groundnut Oil Mill Contractors Co. and Ors. Vs. State of Andhra Pradesh and Ors. reported in 1971(2) Supreme Court Cases 650.

(iii) In the case of Ram Jivan Vs. Smt. Phoola (Dead) by L. Rs. and Anr. reported in (1976) 1 Supreme Court Cases 852.

Relying upon the aforesaid decision of the Hon'ble Supreme Court, Mr. Galib submitted that the learned Writ Court ought not to have entertained the writ petition, by following the principles laid down by the Hon'ble Supreme Court in Anis Fatma.

Mr. Roy - learned advocate appearing for the writ petitioners supported the judgment of the Writ Court by submitting that Writ Court does not lose its jurisdiction to entertain the writ petition when no dispute as contemplated under Sections 6 and 7 of the Wakf Act, 1995 concerning a listed Wakf and/or its properties, is at issue between the parties which is required to be resolved only by the Wakf Tribunal constituted under Section 83 of the said Act. He submitted that the writ petition was filed by the writ petitioners by seeking

direction upon the Wakf Board for early disposal of their prayer for appointment as Mutawallis over the said Wakf Estate; which was awaiting consideration before the Wakf Board for a considerable time. According to him, the High Court, while entertaining such writ petition and/or passing direction thereon upon the Board to activate it, cannot be considered as a forum for resolution of any dispute as contemplated under Sections 6 and 7 of the Wakf Act, 1995 and as such the jurisdiction of the Writ Court either to entertain such writ petition and/or to pass necessary order thereon is not barred. In support of such submission he has relied upon the following decisions of the Hon'ble Supreme Court:-

(i) In the case of Faseela M. Vs. Munnerul Islam madrasa Committee and Anr. reported in (2014) 16 Supreme Court Cases 38.

(ii) In the case of Ramesh Gobindram (dead) through Lrs. Vs. Sugra Humayun Mirza Wakf reported in AIR 2010 Supreme Court page 2897.

Relying upon the aforesaid decisions of the Hon'ble Supreme Court, Mr. Roy submitted that Section 83 Sub-Section (1) simply provides for constitution of Wakf Tribunal for determination of any dispute, question or other matter relating to a Wakf or Wakf property

and such disputes which are required to be resolved by such tribunal cannot be dealt with by the Civil Courts; in view of the provision contained in Section 85 of the said Act which excludes the jurisdiction of the Civil Court in respect of any or every question or dispute relating to Wakf or a Wakf property. He thus submitted that the Hon'ble Supreme Court in both the aforesaid decisions declared uniformly that by Section 85 of the said Act, jurisdiction of the Civil Court shall stand excluded in relation to only such matters as are required by or under the said Act to be determined by the Tribunal. Relying upon those decisions Mr. Roy further submitted that any matter and/or every matter, though it relates to Wakf or Wakf property, does not constitute a dispute within the meaning of *dispute* as contemplated under Sections 6 and 7 of the said Act, and as such, such disputes can very well be decided by the Civil Court as the jurisdiction of the Civil Court to decide such matters are not excluded by operation of Section 85 of the said Act.

Mr. Roy thus contended that the relief which the writ petitioners claimed in the writ petition does not constitute any dispute as contemplated under Sections 6 and 7 of the said Act and as such the Writ Court did not commit any illegality either by entertaining such

writ petition or by allowing the writ petitioners' prayer therein by the impugned order.

Let us now consider the legality of such judgment in background of the submission made by the learned counsel of the respective parties.

In our view, for deciding this appeal, we are not required to enter into the controversy raised by the parties before us as to the binding effect of the observations of the Hon'ble Supreme Court in Anis Fatma's case that no one can approach the High Court straightway in its constitutional writ jurisdiction, as facts of the present case are totally different from the facts of the case which were before the Hon'ble Supreme Court in Anis Fatma case. It is true that the question as to whether Writ Court can entertain any writ petition touching any matter relating to Wakf or Wakf property was not an issue before the Hon'ble Supreme Court. Hon'ble Supreme Court was not addressed by the parties on such issue. In our view, such observation of the Hon'ble Supreme Court is merely a casual observation and/or a passing remark which is not supported by any law. Decision which is pronounced on the other issues raised in Anis Fatma's case is no doubt a decision in the nature of ratio decidendi

having binding effect on all the Courts and the authorities within the territory of India. In fact, two issues were raised which the Hon'ble Supreme Court decided in the said case. First of such issues was as to whether High Court, in its ordinary original jurisdiction, was competent to entertain any suit of civil nature touching any dispute relating to Wakf or the Wakf properties. Hon'ble Supreme Court held that the High Court cannot entertain such suit in view of Sections 85 and 83(9) of the Wakf Act. Another issue as to whether even in the absence of any order passed under Section 83(2) of the said Act, Tribunal can entertain any application; was also decided by the Hon'ble Supreme Court in the said decision. The said decision has to be read in the context of the facts of the said case. Before the High Court, an originating summons was taken out inviting the High Court to answer two questions as mentioned in the Anis Fatma's case. High Court answered the first question in the negative and the second question in the affirmative. In appeal, Division Bench answered both the questions in the negative. S.L.P. was directed against the answers given by the High Court on such questions.

In fact originating summons are different from suits. In suit, the Court is required to resolve the issues by a reasoned decision

followed by decree but while dealing with the originating summons, the Court is required only to answer the question, put forward before it in short form without giving any reason in support of such answer. No judgment and/or order is required to be passed while disposing of an originating summons. In this context, Hon'ble Supreme Court held that even if no order as contemplated under Section 83(2) of the said Act, is passed, Tribunal can entertain an application touching any dispute concerning Wakf or Wakf properties.

These are the two issues which were resolved by the Hon'ble Supreme Court in the said decision. In our view, decision of the Hon'ble Supreme Court on such issues is the ratio of the said judgment, having its binding effect on all High Courts and subordinate Courts as judicial precedent.

Be that, as it may, for resolving any dispute which is involved in this appeal, we are required to consider the present problem from a different angle altogether. Section 83 provides for constitution of Wakf Tribunal for discharging three (3) types of judicial functions viz. (i) as a trying forum by entertaining suits as contemplated under Section 6, Section 7 and Section 32(3) of the said Act; (ii) as an appellate forum by entertaining appeals as contemplated under Section 33(4), Section

38(7), Section 40(2), Section 40(4), Section 51(5), Section 52(4), Section 64(4), Section 67(4), Section 67(6), Section 69(3) and Section 73(3) and (iii) under Section 83(2) by entertaining applications, as contemplated under Section 35, Section 39(3), Section 48(2), Section 83(2) and Section 94(1) of the said Act. These are the three (3) judicial functions which are vested with the Tribunal to be discharged. The Tribunal was not vested with any supervisory jurisdiction over the Board of Wakf or any other authority created under the said Act. Tribunal cannot assume supervisory jurisdiction to pass any direction upon the Board of Wakf and/or any other authority under the said Act. As such, jurisdiction which was not vested either directly or indirectly upon the Tribunal by the said Act cannot be assumed by the Tribunal by itself. Since the supervisory jurisdiction is not vested with the Tribunal, the Tribunal cannot assume jurisdiction to pass any direction upon the Board of Wakf to dispose of any pending application before it.

In the present case, writ petition was filed seeking direction upon the Board of Wakf for early disposal of a long pending application wherein direction was sought for their appointment as Mutawallis over the said Wakf Estate. Since the Tribunal does not

enjoy the supervisory jurisdiction over the Board of Wakf and/or any other authority, the Tribunal, in our view, was not competent to pass any direction upon the Board under any of the provisions of Section 83 of the said Act. In our considered view, the High Court is the only Court which, by virtue of its supervisory jurisdiction which it enjoys under Articles 226 and/or 227 of the Constitution of India over the Courts and Tribunals subordinate to it, can not only entertain such writ petition but also can pass appropriate direction therein. We, however, make it clear that any dispute as referred to in Sections 6 and 7 of the Wakf Act, which is required to be decided by the Tribunal, ordinarily cannot be entertained by the High Court straightway in its writ jurisdiction.

As such, we are of the view that the Writ Court did not commit any illegality either by entertaining such writ petition or by passing direction upon the Wakf Board for early disposal of the long pending application filed by the writ petitioners before the Wakf Board.

We thus find no merit in this appeal. The appeal is dismissed. The appeal and the application are thus disposed of.

No order as to costs.

Urgent photostat certified copy of this judgement and order, if applied for, be furnished to the appearing parties on priority basis.

(Jyotirmay Bhattacharya, C.J)

I agree.

(Abhijit Gangopadhyay, J.)