

## The Commissioner of Wakfs, Bengal Vs Umme Salima and Others

**Court:** Calcutta High Court

**Date of Decision:** Dec. 1, 1936

### Judgement

Mukherjea, J.

This Rule was issued at the instance of the Commissioner of Wakfs, Bengal, and is directed against an order of the

Additional District Judge of Howrah, dated the 4th May, 1936, by which it was held that the Petitioner had no right either to appear in a suit

relating to a certain wakf estate pending before the Judge or to appoint an ad interim mutwalli till a mutwalli was appointed by the Court. The short

facts giving rise to this dispute may be stated as follows:

One Jitan Bibi created a wakf of certain properties situated in the District of Howrah by a document dated the 10th of December, 1893. In the

year 1924, certain persons who are Opposite Parties Nos. 1 to 6 in this Rule instituted a suit against the Defendants in the Court of the Additional

District Judge, Howrah, under sec. 92 of the Code of Civil Procedure, praying inter alia for removal of the existing Mutwallis, for settlement of a

scheme, for accounts and other reliefs. There was a decree passed by the learned Judge in July, 1932, by which the existing mutwallis were

ordered to be removed and investigation of accounts and framing of a scheme were directed. There was an appeal against this preliminary decree

taken to this Court which was disposed of on 11th December, 1935, and the matter went back to the trial Court for carrying out the directions of

the preliminary decree mentioned aforesaid. A few months after that, on 1st March, 1936, the Bengal Wakf Act came into force and on 21st

March, 1936, the Court ordered issue of notice on the Petitioner who is the Commissioner of Wakfs, under sec. 70 of the Wakf Act. The notice

was actually served upon the Petitioner on 30th April, 1936, and on the 2nd of May following, he appeared and represented before the Court that

he had a right to intervene in these proceedings and to be added a party under sec. 71 of the Wakf Act. He also claimed the right to appoint an ad

interim mutwalli under sec. 40 of the Act. Both these rights have been negatived by the learned Judge by his order dated 4th May, 1936, and it is

against this order that the present Rule has been obtained. The learned Judge has held in substance that as the suit was commenced long before the

Wakf Act came into force, the Commissioner had no authority to intervene in this case under sec. 71 or to appoint a temporary mutwalli under

sec. 40 of the Act. Reliance was placed by the learned Additional District Judge in this connection upon the provision of sec. 83 of the Wakf Act

which expressly exempts certain suits and proceedings from the operation of the Act. This position has been challenged before us on behalf of the

Petitioner and Mr. Abul Hossain who appears in support of the Rule has strenuously contended that sees. 70 and 71 of the Wakf Act are

retrospective in operation and apply to suits pending at the time when the Act became law. It is also contended that the saving clauses contained in

sec. 83 of the Act are of no assistance to the parties inasmuch as the rights in this case accrued after the passing of the preliminary decree and thus

the suit was not in respect of any right which had its existence prior to coming into force of the Wakf Act. The Plaintiffs and the Defendants are

both united in opposing this Rule and on their behalf the decision of the Additional District Judge is sought to be supported both on general

principles as well as on the express provisions of the Act.

Sec. 70 of the Wakf Act provides that in every suit or proceeding in respect of any wakf, the Court shall issue a notice to the Commissioner at the

cost of the party instituting the same. There is nothing in the section from which it could be inferred that the section had in view the suits or

proceedings pending at the time when the Act came into force. On the other hand, it is quite possible to construe the words as implying that the

costs of the notice are to be realised from the party at the time of instituting the suit and this pre-supposes that the suit is instituted after the passing

of the Act when the Wakf Commissioner has already been appointed. Under sec. 71, the Commissioner is given the right to intervene and be

added a party to any suit or proceeding by or against a stranger to the wakf or any other person if he so chooses. There can be no doubt that this

right to intervene and carry on the litigation is a substantive right and not a mere matter of procedure and this is conceded by the learned Advocate

who appears for the Petitioner. That being so, the general principle of law which is applicable to such cases is well-established that the law which

exists at the date when an action is commenced must decide the rights of the parties to the suit unless the legislature expresses a clear inten-(sic) to

the contrary. Vide, *Young v. Rushes* [1859] 4 H.&N. 76, *Moon v. Durden* L.R. 2 Exch. 22(1818) and *In re Joseph Suche & Co.* L.R. 1 Ch.

Div. 48 (1875). In the last-mentioned case, a question arose as to the effect of sec. 10 of the Judicature Act upon a winding-up proceeding which

had already commenced and it was said that: "" when the Legislature alters the rights of parties by taking away or conferring any right of action, its

enactments, unless in express terms they apply to pending actions, do not affect them. ""All these cases have been noticed in the recent decision of

this Court in *Kumar Punyendra v. Kumar Jogendra* 64 C.L.J. 212 (1936).

2. Sec. 83 of the Wakf Act, in our opinion, simply embodies this well-known rule of construction and exempts all suits, even if they are

commenced after the Act, provided they are in respect of rights which accrued before the Act. Mr. Abul Hossain does not dispute these principles

of law but what he says is this that the right to have a scheme framed or accounts examined which are the subject-matter of the present proceeding

really flowed from the preliminary decree, and the suit being earlier than that, it cannot be said to be a suit in respect of a right or obligation which

accrued prior to the Act. This argument is, in our opinion, not tenable. The rights accrued before the preliminary decree and originated from facts

which constitute the very foundation of the suit itself. The preliminary decree simply recorded the finding of the Court that many of the allegations

were true but the rights of the parties could not be said to have originated with the preliminary decree. We are, therefore, of opinion that this suit

was in respect of a right or for enforcement of an obligation which was antecedent to the passing of the Wakf Act and as such sec. 83 (b) saved

the suit from the operation of the Act. It was suggested on behalf of some of the Opposite Parties that sec. 71 of the Wakf Act applies only to suits

against strangers and not against mutwallis and even if the section is retrospective, the Wakf Commissioner has no right to come under that section.

This argument may have some force but we are not sure that the words ""any other person"" as used in the section are not wide enough to include a

mutwalli. Be that as it may, as we have already held that the section has no retrospective operation, it is not necessary to decide the point finally.

3. As regards the right to appoint an ad interim mutwalli under sec. 40 of the Wakf Act, it is difficult to see how the section assists the Petitioner.

The power of appointing a temporary mutwalli can be exercised subject to any order of a competent Court. Here, the Court has appointed a

receiver who is in charge of the wakf estate since 1924 and an interference with the management of the receiver by a temporary mutwalli is not

considered by the Court to be in any way conducive to the interest of the wakf property. We are not impressed with the argument of Mr. Abul

Hossain that the receiver himself may be regarded as a mutwalli under sec. 6, sub-sec. (6) of the Wakf Act. If he was already a mutwalli under

operation of law, there is no scope for application of sec. 40 which can be invoked only if there is no mutwalli. In our opinion, therefore, the

contentions urged by the Petitioner must fail and this Rule must be discharged with costs-hearing-fee, one gold mohur.  
Costs would come out of

the estate, and will be divided equally between the appearing sets of Opposite Parties.

M.C. Ghose, J.

I agree.