

(1953) 12 CAL CK 0023

Calcutta High Court

Case No: Civil Revision Case No. 2284 of 1953

Maulavi Ziaul Haque

APPELLANT

Vs

Munshi Mahammadul Haque

RESPONDENT

Date of Decision: Dec. 11, 1953

Acts Referred:

- Bengal Wakf Act, 1934 - Section 16, 22, 27, 27(1), 27(2)
- Civil Procedure Code, 1908 (CPC) - Section 92
- Constitution of India, 1950 - Article 227
- Religious Endowments Act, 1863 - Section 14

Citation: (1955) 2 ILR (Cal) 445

Hon'ble Judges: Mitter, J; Lahiri, J

Bench: Division Bench

Advocate: S.M. Bose, General, N.C. Chakraverty and C.F. Ali, for the Appellant; A.C. Gupta, Syed Nausher Ali, Noni Coomer Chakraverty and Kumar Krishna Dutta, for the Respondent

Final Decision: Allowed

Judgement

Lahiri, J.

This is a Rule under Article 227 of the Constitution of India obtained by some of the mutwallis of a big wakf against an order of the commissioner of wakfs, West Bengal, by which he appointed one of the mutwallis as a "managing "mutwalli" to the exclusion of others. It appears that one Munshi Golam Kader created a wakf of his estate on October 4, 1915 and appointed himself the first mutwalli. On his death in 1328 B.S. (1921-1922) the mutwalliship devolved upon his three sons Munshi Mahammadul Haque (O.P. no: 1), Munshi Fazle Haque (since deceased) and Maulvi Ziaul Haque (Petitioner No. 1) under the terms of the wakfnama. On the death of Munshi Fazle his interest devolved upon his four sons, Sk. Md. Sulaiman (Petitioner No. 2), Sk. Md. Abu Syed (Petitioner No. 3), Md. Nurul Islam (Petitioner No. 4") and

Sk. Md. Alla Rakha (O.P. No. 3). The right of mutwalliship thus came to be exercised by six persons. It is common ground that on account of personal jealousy and rivalry amongst the six mutwallis they could not pull on together with the result that there was considerable mismanagement of the wakf and a large number of legal proceedings were started in respect of it. On December 3, 1948, the commissioner of wakfs, West Bengal, served a notice upon the mutwallis directing them to submit accounts, clear arrears of statutory dues, to clear current and arrear dues of all beneficiaries, to create a reserve fund and to show cause why a committee should not be appointed for the better and efficient management of the wakf estate. In pursuance of the said notice the O.P. No. 1, Munshi Mahammadul Haque, filed a petition on February 1, 1949, in which he alleged that the wakf in question was a wakf-al-al-aulad, that there was no provision in the wakfnama for the appointment of a committee and that the commissioner might, if he thought fit, appoint one of the six joint mutwallis as managing mutwalli. On October 19, 1949, the opposite party No. 1 filed a second petition in which he set out in chronological order the various acts of mismanagement committed by the remaining five mutwallis and pointed out how he had been managing the wakf estate alone in spite of the difficulties created by the obstructive attitude of the other mutwallis. The commissioner of wakfs considered these allegations and by an order, dated July 11, 1953, appointed opposite party No. 1 Munshi Mahammadul Haque as the "managing mutwalli" before taking a drastic action in the matter. He thought that such an appointment would be conducive to the best interest of the estate.

2. Against this order of the wakf commissioner four out of the remaining five mutwallis moved this Court under Article 227 of the Constitution and obtained the present Rule. At the outset we ought to state that there is some controversy between the parties to the present Rule as to whether the wakf in dispute is a wakf proper or a wakf-al-al-aulad. The mutwallis assert that it is a wakf-al-al-aulad whereas the commissioner of wakfs denies it. The expressions "wakf" and "wakf-al-al-aulad" have been defined in Section 6 of the Bengal Wakf Act (Act XIII of 1934). Section 46A of the Act provides that the question whether a particular estate is wakf or wakf-al-al-aulad shall be decided by the commissioner and his decision shall be final until revoked or modified by a competent Court. In the present case there was no enquiry before the commissioner of wakfs on this question and even the wakfnama is not on the record. In these circumstances we are not in a position to express any opinion on this point. Moreover, it is impossible to hazard a conclusion on this important question in a summary proceeding under Article 227 of the Constitution.

3. The really important question that has been argued in this case is whether the commissioner of wakfs acting under the provisions of the Bengal Wakf Act has any jurisdiction to select one of the different joint mutwallis as the "managing mutwalli" of the wakf. The learned Advocate-General appearing in support of the Rule has argued that he has no such power whereas Mr. Gupta appearing for the opposite

party No. 1 and Mr. Nausher Ali, appearing for the commissioner of wakfs, have argued that he has. Section 7 of the Bengal Wakf Act provides for the establishment of a board of wakfs and Section 16 provides for the appointment of a commissioner of wakfs. Both these appointments are intended to carry out the object of the Act which is stated to be the proper administration of wakf property in Bengal. u/s 22 the commissioner of wakfs is a corporation sole having a perpetual succession. There can be no doubt that he enjoys no powers which are not expressly or by necessary implication conferred on him by the statute. The learned Advocate-General argues that the only provision relating to the appointment of a mutwalli is to be found in Section 40 of the Act which authorises the board to appoint a mutwalli for a temporary period subject to the order of a competent Court in a case where there is no mutwalli or where there appears to the board to be an impediment to the appointment of a mutwalli. The present case does not come within the purview of Section 40, because here the appointment has been made not by the board but by the commissioner and, moreover, this is a case where there are as many as six mutwallis in existence. As the case does not come u/s 40 of the Wakf Act it is argued that the appointment made by the commissioner is without jurisdiction and liable to be quashed. Mr. Gupta, appearing for opposite party No. 1, concedes that the case does not come u/s 40 but contends that the order made by the commissioner of wakfs is authorised by Section 27(1)(c) and (e) of the Act. The real issue, therefore, is whether Clause (c) and (e) of Section 27(1) apply to the circumstances of this case. Section 27 deals with the powers and duties of the commissioner and the board. Sub-section (1) of Section 27 deals with the functions of the commissioner and Sub-section (2) with the function of the board. Clause (c) of Sub-section (1) authorises the commissioner to give "directions for the "proper administration of wakfs" and Clause (e) of Sub-section (1) empowers him generally to do "all such acts as may be necessary "for the due control, maintenance and administration of wakfs". By the order which is challenged before us the commissioner of wakfs has selected one of the six joint mutwallis to be the managing mutwalli to the exclusion of others. The effect of this selection is to deprive the other mutwallis of their right to participate in the day-to-day administration of the wakf and vest it solely and exclusively in one. Such an order cannot in our opinion amount to "giving directions" within the meaning of Section 27(1)(c). We do not, for obvious reasons, attempt to give any precise or exhaustive definition of the expression "giving "directions". This expression does not in our opinion include a judicial determination of the rights of the mutwallis to take part in the management of the estate but includes directions as to submission of accounts, payment of debts and allowances and the like. The next question is whether the order made by the commissioner can be said to be an "act for the control, "maintenance and administration" of the estate. Mr. Gupta has argued that the word "act" in Section 27(1)(e) is very general and is wide enough to cover an order of the nature which has been passed in this case. The rights of the mutwallis to manage the estate flow from the terms of the wakfnama and it is admitted before

us that all the six mutwallis derive their right to manage the wakf estate from the provisions of the wakfnama. There is nothing on the record to show that the appointment of a managing mutwalli is authorised by the wakfnama. Section 28 of the Act enjoins upon the commissioner the statutory duty of conforming to the directions of the wakif in exercising his powers under the Act. It appears to us that in the circumstances of this case in depriving five of the mutwallis of the right to take part in the daily administration of the estate the commissioner instead of acting in conformity with the directions of the wakif has gone against those directions. The word "acts" in Section 27(1)(e), however wide it may be, cannot certainly be interpreted in such a way as to defeat the express provision of Section 28. We are fully alive to the necessity of taking effective steps for the proper administration of the wakf and we also appreciate the anxiety of the commissioner of wakfs to act for the best interests of the estate, but it seems to us that in making the order challenged in this Rule the commissioner has exceeded the powers conferred on him by Section 27(1) of the Bengal Wakf Act. The commissioner of wakfs in his affidavit-in-opposition has stated that there is a longstanding practice in his office to appoint one out of a number of mutwallis as a managing mutwalli if it is found necessary or beneficial in the interests of the wakf estate. Mr. Nausher Ali, appearing for the commissioner, very fairly conceded that if this practice has no foundation in law it cannot be upheld. It is needless to state that we agree with this view. In the absence of any provision in the wakfnama to that effect the commissioner has no jurisdiction to appoint one out of several joint mutwallis as the managing mutwalli of the wakf u/s 27(2) of the Act.

4. The Bengal Wakf Act contains many provisions for the proper administration of wakf in cases of mismanagement; for example, if the wakf in question is a wakf-al-al-aulad the commissioner may after an enquiry u/s 32 take steps u/s 34. In the case of any other wakf he may also make an enquiry u/s 32. Section 72 authorises the commissioner to institute a suit or legal proceeding in his own name regarding a wakf if there is no mutwalli or if the mutwallis neglect or refuse to act within a reasonable time. Section 73 further empowers the commissioner to obtain reliefs u/s 14, Religious Endowments Act (1863) or u/s 92. Code of Civil Procedure, without obtaining the leave or consent referred to in those Acts. It is open to the commissioner to adopt one or other of these remedies if he finds it necessary to do so in the circumstances of the present case. The commissioner of wakfs being a creature of statute his powers must be derived from the statute. We find no warrant in the words of Section 27(1) of the Act for the order which he has made.

5. Mr. Nausher Ali, appearing for the commissioner of wakfs, has raised a preliminary point to the effect that the order made by the commissioner in the present case is not subject to the superintendence of this Court under Article 227 of the Constitution. We cannot accept this contention as sound. The procedure followed by the commissioner indicates that he acted as a tribunal. On December 3, 1948, he issued a notice upon the mutwallis to show cause why the machinery of

law should not be set in motion against them on their failure to comply with certain requisitions made by him. Cause was shown by two applications, dated February 1, 1949, and October 19, 1949. Thereafter, the commissioner heard lawyers who appeared for opposite party No. 1 on June 29, 1953, and passed his order on July 11, 1953, after considering the materials which were placed before him. Moreover, the rights with which the commissioner was dealing are essential ingredients of mutwalliship. The right to manage the wakf is in our opinion the very essence of the right of a mutwalli. Therefore, we hold that the commissioner in the present case acted as a tribunal both as regards the procedure followed and the subject-matter of the dispute before him.

6. We, therefore, make this Rule absolute and set aside the order passed by the commissioner. In the circumstances of this case we make no order as to costs of the Petitioners. The commissioner, however, will get his costs out of the wakf.

Mitter, J.

7. I agree.