
(2004) 10 CAL CK 0017
In the Calcutta High Court
Case No : C.O. No. 576 of 2003

Abdur Rahim Dewan

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 11-10-2004

Acts Referred:

Bengal Wakf Act, 1934 — Section 40, 58
Waqf Act, 1995 — Section 83(5), 95

Citation : (2005) 4 CHN 522

Hon'ble Judges : Bhaskar Bhattacharya, J

Bench : Single Bench

Advocate : S. Munshi and N.S. Alam, for the Appellant; Monoj Malhotra, for opposite party Nos. 2 and 3 and M.P. Chakraborty, Ayub Abedin and Swarnali Biswas for opposite party No. 4, for the Respondent

Final Decision : Allowed

Judgement

Bhaskar Bhattacharya, J.—This application under Article 227 of the Constitution of India is at the instance of an appellant before the West Bengal Wakf Tribunal ("Tribunal") and is directed against order dated 27th February, 2003 passed by the Tribunal in Appeal No. 4 of 2002 thereby affirming the order of the Wakf Board by which the petitioner was removed from the post of Mutawalli of the concerned Wakf.

2. The facts giving rise to filing of the present application may be summarised thus :

(a) In the C.S. record-of-rights names of four persons namely (i) Nur Mahammad Dewan, (ii) Hedayat Ali Dewan and (iii) Enayat Ali Dewan, all sons of Late Munsur Ali Dewan and (iv) Rashida Bibi, daughter of Late Munsur Ali Dewan were recorded as Mutawalli in respect of Wakf property.

(b) Hedayat Ali Dewan died long ago leaving his only son, Abdur Rahim Dewan, the present petitioner herein. In the year 1964 Nur Mahammad Dewan died

leaving his only daughter Mst. Hasina Bibi.

(c) On 13th September, 1965 the present petitioner was recorded as Mutawalli on the basis of his application by the Wakf Board. Subsequently, in the year 1966, Mst. Hasina Bibi and Enayat Ali Dewan filed written objection before the Commissioner of Wakf against the recording of the name of the petitioner as sole Mutawalli. On the basis of such objection, the Commissioner of Wakf directed the local Gram Pradhan to enquire into the matter. The said Pradhan sent his report to the Commissioner of Wakf.

(d) Ultimately, on 20th July, 1994 the Commissioner of Wakf referred the matter to the Board for taking decision and the Board by its resolution dated August 29, 1995 decided to remove the present petitioner from the post of Mutawalli for misdealing with the Wakf property and appointed Enayat Ali Dewan and Mst. Hasina Bibi as Joint Mutawalli's u/s 40 of the Bengal Wakf Act, 1934 for two years.

(e) The present petitioner, consequently, filed a writ application being C.O. No. 21128 (W) of 1995 challenging the decision of the Wakf Board but such writ application was dismissed.

(f) Being dissatisfied, the petitioner preferred an appeal being F.M.A.T. No. 2143 of 1996 and the Division Bench after setting aside the order of the learned Single Judge permitted the petitioner to seek his remedy before the Tribunal in accordance with law.

(g) Pursuant to the liberty given by the Division Bench of this Court as mentioned above, the petitioner preferred an appeal before the Tribunal and by the order impugned herein the said Tribunal has dismissed the appeal thereby affirming the order of the Board of Wakf removing the present petitioner from the post of Mutawalli.

3. Being dissatisfied, the petitioner has come up with the present application under Article 227 of the Constitution of India.

4. Mr. Munshi, the learned Advocate appearing on behalf of the petitioner has attacked the order of the Tribunal on various grounds. Mr. Munshi first contends that the learned Tribunal failed to appreciate that the Board of Wakf decided to remove the petitioner without complying with the requirements mentioned in Section 58 of Bengal Wakf Act, 1934 inasmuch as, no show-cause notice was given to the petitioner before removal.

5. Secondly, Mr. Munshi contends that the Tribunal erred in law in taking into consideration additional documents as evidence in support of the plea of mismanagement of the Wakf property although in the Wakf Act there is no provision for taking into consideration any additional evidence by the Tribunal.

6. Mr. Munshi next contends that the Board of Wakf passed an order of removal on the basis of report given by the Gram Pradhan and forwarded to the

Commissioner of Wakf, although law does not provide for removal on the basis of such report.

7. The aforesaid contentions of Mr. Munshi are seriously disputed by Mr. Malhotra, the learned Advocate, appearing on behalf of the Board and Mr. Chakraborty, the learned Advocate appearing on behalf of the private-respondents. According to them, the Tribunal being appellate authority was vested with power to take into consideration any additional evidence and thus, there was no illegality on the part of the Tribunal in accepting those materials. They contend that the fact that the Wakf property has been transferred to the outsiders not having been disputed by the petitioner, this Court should not interfere with the ultimate order passed by the Tribunal approving the order of removal. According to learned Counsel for the respondents, merely because there is some irregularity in the matter of conducting enquiry, such fact cannot invalidate the order of removal when admittedly the petitioner has illegally transferred the Wakf property in violation of law.

8. Their further contention is that while applying for enrolment as a Mutawalli, the petitioner, practised fraud upon the Board by wrongly disclosing in the application that other heirs of the previous Mutawalli were dead although, the other heirs of the previous Mutawalli than the petitioner were alive. They, therefore, pray for dismissal of this application.

9. Therefore, the first question that arises for decision in this application is whether the Board removed the petitioner after complying with the formalities required u/s 58 of the 1934 Act.

10. According to the said provision, the Board is vested with authority to remove a Mutawalli after giving him an opportunity of hearing. In the present case the private-respondents made serious allegation of mismanagement of the Wakf property and also complained that the petitioner enrolled his name as sole Mutawalli by suppressing the fact that the other heirs of the previous Mutawalli were alive. On the basis of these allegations the Commissioner of Wakf directed the Pradhan of the village to inquire and the Pradhan submitted his report. But the proceeding continued for about 30 years. Ultimately, the Commissioner of Wakf did not take any decision but as it appears from his order dated July 20, 1994, he simply referred the matter to the Board for taking decision. The Board on the other hand, as it manifests from the decision dated August 29, 1995, proceeded as if the Commissioner of Wakf had already come to the conclusion about the mismanagement of the Wakf property and accordingly took decision of removal of the petitioner. Moreover, no material has been placed before this Court indicating that before taking any decision the Board gave any notice to the petitioner in terms of Section 58 of the 1934 Act disclosing the precise grounds of removal. The Tribunal has proceeded as if the Board considered the entire materials on record and came to its own conclusion not on the basis of the alleged opinion of the Commissioner of Wakf but also on its self-assessment of the records.

11. I am afraid, I am unable to subscribe to the view taken by the Tribunal. The reasoned order passed by the Board does not indicate that apart from the so-called decision of the Commissioner, any other materials were taken note of by the Board and in this case, I have already pointed out that the Commissioner had not taken any decision but he left the matter to the Board for taking decision. Thus, the decision of the Tribunal is based on surmise and conjecture.

12. The Tribunal as an appellate authority was required to see whether the formalities required u/s 58 of the 1934 Act were complied with and if not, it was its duty to set aside the decision and ask the Board to proceed in accordance with law.

13. The next question is whether the Tribunal as an appellate authority in the absence of specific power conferred under the statute could take into consideration any additional evidence.

14. There is no dispute with the proposition of law that appeal is a creature of statute and so is the appellate authority. Therefore, the appellate authority is required to act in accordance with the power conferred upon it by the statute. Although, under the 1934 Act, there was no provision of appeal before the Tribunal against an order removing the Mutawalli, but by virtue of a decision of a Division Bench of this Court giving liberty to the petitioner to prefer such appeal before Tribunal, the appeal was preferred and such decision is binding upon the parties. The Tribunal in this case is a creature of Wakf Act, 1995 and as such, is required to act in accordance with power vested in it by virtue of such statute. Under the Wakf Act, 1995, the Tribunal is required to function both as original and appellate authority. As provided in Section 83(5) of the Act, the Tribunal shall be deemed to be a Civil Court and shall have the same power as may be exercised by a Civil Court under the CPC while trying a suit or executing a decree or order. But powers of an Appellate Court as provided in the Code have not been conferred upon a Tribunal while performing the duties of an appellate authority, although, the law makers were quite conscious that under the Act the Tribunal is vested with both the original and the appellate power. Therefore, it necessarily follows that the legislature deliberately did not confer the powers of the Appellate Court conferred by the CPC including the power to receive additional evidence. Thus, while performing the appellate function, the Tribunal should restrict its scrutiny on the basis of materials on record and pass the necessary order. Accordingly, there is no scope of entertaining any additional materials for the purpose of disposal any appeal before the Tribunal nor could the Tribunal perform the duties of the Board by rectifying the lapses on the part of the Board and by inviting the parties to lead evidence before it for the purpose of adjudicating the allegations against the petitioner. At this juncture, it will be profitable to refer to the provisions contained in Section 95 of the Act which confers power upon an appellate authority functioning under the Act to condone delay in preferring an appeal before it but neither the provisions of the Act nor the rules framed thereunder permit the appellate authority discharging the duties to take

additional evidence. We must not lose sight of the settled position of law that the power to take additional evidence does not inhere in an appellate authority but must be specifically conferred indicating the circumstances when such evidence can be taken.

15. The Tribunal, therefore, acted without jurisdiction in entertaining additional evidence and disposing of the appeal on the basis of such additional documents.

16. As regards the allegation of fraud, in my view, such question is premature at this stage. As pointed out earlier, there has been no adjudication in accordance with law as regards various allegations made against the petitioners. The question of fraud can be considered only when such allegation will be enquired into in accordance with the provisions contained in the statute. Thus, the Tribunal acted without jurisdiction in probing into the allegations of fraud when such allegation has not been decided by the Board in accordance with law.

17. On consideration of all the points, I, thus, find that the Board acted without jurisdiction in removing the petitioner from the post of Mutawalli and the Tribunal in the same way erred in law in affirming such illegal order.

18. I, thus, set aside the orders impugned and hold that removal of the petitioner from the post of Mutawalli was not in conformity with law. This order, however, not stand in the way of the Board in taking fresh proceeding against the petitioner for removal in accordance with law.

19. The revisional application thus succeeds. In the facts and circumstances, there will be, however, no order as to costs.