
(2014) 11 CAL CK 0018
In the Calcutta High Court
Case No : C.O. 664 of 2012

Abdus Salam Mallick

APPELLANT

Vs

Abdul Hafiz Mallick

RESPONDENT

Date of Decision : 07-11-2014

Acts Referred:

Constitution of India, 1950 — Article 227
Waqf Act, 1995 — Section 3(i), 63, 64, 83(2)

Citation : (2015) 1 CHN 149

Hon'ble Judges : Subrata Talukdar, J

Bench : Single Bench

Advocate : Mahamudul Hassan, Advocate for the Appellant; Safiullah Mondal, Advocate for the Respondent

Judgement

Subrata Talukdar, J.—By filing this application under article 227 of the Constitution of India the petitioners challenge the order impugned dated 23rd February, 2012 passed by the Id. Presiding Officer, Wakf Tribunal, Ghatal, West Bengal in OA 16 of 2009. The petitioners are represented by Shri Mahamudul Hassan, Ld. Counsel. The opposite party Nos. 1-3 are represented by Md. Safiullah Mondal, Ld. Counsel.

2. The brief facts of the case, according to the petitioners are as follows:-

a) That the petitioners filed an application for enrolment before the Wakf Tribunal of land measuring about 3.79 acres in the name of Pirottar Gazi Saheb Wakf Estate (hereinafter refer to for short as the said Wakf Property or the Wakf Property or only the Wakf). The said application for enrolment was registered as Misc. EC case No. 51 of 2006.

b) That Misc. EC case No. 51 of 2006 was considered for enrolment and grant of Mutwalliship in respect of the said Wakf property on 11th August, 2008 by the M.E. Committee. Both the parties, i.e. the petitioners and the Opposite Parties were directed to appear before M.E. Committee on 11th August, 2008 vide

memo No. 815 dated 1st August, 2008.

c) The M.E. Committee at its meeting dated 11th August, 2008 unanimously resolved to appoint the petitioners as Mutwallis of the said Wakf Property for a period of 5 years in terms of Section 63 of the Wakf Act, 1995 read with Section 3(i) of the said Act. Misc. EC case No. 51 of 2006 was renumbered as EC case No. 15415.

d) The resolution dated 11th August, 2008 was confirmed by the Board of Wakfs on 30th September, 2008 as per provisions of Section 63 of the Wakf Act. Challenging the order of confirmation the opposite parties filed a suit for declaration before the Ld. 1st Civil Court (Jr. Div.) at Chinsurah, Hooghly being Title Suit 252/08 claiming their right, title and interest over the Wakf Property. It was, inter alia, contended by the Opposite Parties that the said Wakf Property is actual a secular property belonging to the Opposite Parties and not a Wakf Property at all.

Although from the schedule of property appended to the plaint it will appear that the property in respect of which Title Suit 252/08 was filed and the property in respect of which the resolution was adopted on 11th August, 2008 and confirmed on 30th September, 2008 are identical.

e) The petitioners where thereafter constrained to file a separate application for enrolment of the Wakf Property measuring about 46 decimals of land in the name of Pirottar Panch Pir Wakf Estate which was registered as Misc. EC case No. 51/06(A) (hereinafter referred to for short as the Pirottar Gazi Saheb).

In respect of the Misc. EC case No. 51/06(A) the Board of Wakfs issued a general notice for publication and thereafter issued a notice for hearing on 6th November, 2008. The petitioner contends that the said Misc. EC case No. 51/06(A) is still pending disposal before the Board of Wakfs.

f) The Opposite Parties in the meantime filed the writ application before this Single Bench being WP No. 2154 of 2009 challenging the resolution dated 11th August, 2008 (Supra) and praying for a direction on the Board of Wakfs to allot two separate EC Nos. for two separate proceedings in connection with of Pirottar Gazi Saheb and Pirottar Paanch Pir along with other prayers. It was, inter alia, contended by the Opposite Parties in the said writ application that the Board of Wakfs had amalgamated both the Wakf Properties including both Misc. EC case No. 51/06 and 51/06(A) and, upon amalgamation a common EC Case No. 15415 was given without bifurcating the Wakf Properties.

The petitioner alleges that the prayers made in the such petition were fraudulent in as much as both the Misc. EC case No. in spite of distinct Wakf Properties - Pirottar Gazi Saheb and Pirottar Paanch Pir - were different and while Misc. EC case No. 51/06 was decided in favour of the Mutwalli of the petitioners, Misc. EC case No. 51/06(A) of Pirottar Pir Wakf Estate is still pending without a notice or enrolment or a notice of hearing.

g) That by the order dated 6th March, 2009 an Hon"ble Single Bench of this Court was pleased to direct as follows:-

"The grievance of the writ petitioners is that despite the petitioners having made an application for enrolment of the Wakf Estate in respect of the properties of Pirottar Gazi Shaheb, such application has been clubbed with another and a common committee of Mutwallis has been formed."

The petitioners say that there is no basis to such order made by the Board of Wakfs and submit that in the absence of any Presiding Officer at the Wakf Tribunal, the petitioners have no other efficacious alternative remedy.

The Wakf Board will consider the feasibility of bifurcating the two applications, namely the application relating to the properites of Pirottar Pir Gazi Shaheb and Pirottar Pir Panch Pir.

The Board of Wakfs should consider the matter and afford the writ petitioners an opportunity of being heard before taking a resolution. The decision of the Board should be reasoned and should be communicated to the petitioners. Such decision should be taken within a period of twelve weeks from date.

The petition has been considered only in respect of the relevant resolution of the Board of Wakfs at its meeting held on August 11, 2008 and the other grievances of the petitioners have not been gone into since the order made may make such other grievance irrelevant.

h) The petitioner further contends that on the basis of the order dated 6th March, 2009 the Board of Wakfs called the parties for a hearing on 11th May, 2009. At the hearing on 11th May 2009 the petitioner has contended through its Ld. Counsel before the Board of Wakfs that the two Wakf Estates were Distinct and cannot be treated together. However, the petitioner received a memo dated 23rd March, 2009 wherein it was contended that the Opposite Parties have been given and appointed for the period of 5 years as Joint Mutwalli under Section 63 of the Wakfs Act with the direction to submit yearly statement of account. The Board of Wakfs was pleased to modify its earlier resolution dated 11th August, 2008 accordingly. The Board proceeded on the basis that the order of the Hon"ble High Court be complied with and the properties may be considered for bifurcating by amending the resolution dated 11th August, 2008.

i) Being aggrieved by the order of the Board of Wakfs dated 23rd September, 2009 the present petitioners filed original application before the Wakf Tribunal which was registered as OA 16 of 2009 under the provisions of Section 83(2) of the Wakf Act, 1995. The Opposite Party filed an affidavit in opposition to OA 16 of 2009 and Board of Wakfs was pleased to decide the same by the order impugned dated 23rd February, 2012. The Board, inter alia came to the finding that Misc. EC case No. 51/06(A) in connection with Pirottar Pir is still pending for enrolment and appointment of Mutwalliship. According to the Ld. Tribunal, the Board was duty-bound to dispose of the same as early as possible.

3. The Ld. Tribunal further came to the conclusion that in view of its observation made in the body of the judgment for bifurcating of the Wakf properties, there is no reason to interfere with the order passed by the Board of Wakfs in EC No. 15415/Misc. EC No. 51/06. Accordingly, the order under challenge dated 11th May, 2009 which was confirmed by the Board of Wakfs on 28th May, 2009 was confirmed. OA 16 of 2009 was therefore rejected.

4. Shri Hassan, appearing for the petitioners, contends that Mutwalliship of his clients granted in connection with Ec 51/06 is for 5 years and expires in the year 2014. Shri Hassan further contends that the dispute is going on between the parties since the year 2009. It is further contended that no question of bifurcating of two Wakf Properties can arise. He points out that in respect of EC 51/06 recording has already been done and there can be no clubbing of EC 51/06 with EC/51/06(A).

5. Taking this Court to the provisions of the Wakfs Act, Shri Hassan submits that Sections 63 and 64, inter alia, provide that the Mutwalli can be appointed only if the existing Mutwalli is removed. In such circumstances there cannot be any automatic appointment of the Opposite parties as Mutwallis in EC/51/06(A).

6. In support of his submission Shri Hassan relies upon Khadar Shariff and Others Vs. Tamil Nadu State Wakf Board and Others, , Relying on paragraphs 20 and 21 of the said judgment Shri Hassan submits that the Board of Wakfs has no power to manage a Wakf Property so long as a Mutwalli is appointed in respect of the such property and there are no proceedings pending against such Mutwalli. He submits that the Wakf Act is specific with regard to the confirmation of powers to the Board and in the light of such specific confirmation, no powers can be implied to be exercised by the Board.

7. Shri Hassan also relies upon a judgment of the Kerala High Court reported in The Kerala Wakf Board, Ernakulam Vs. Alam Aboobacker Sait and Others, , Relying on the said judgment at paragraph 4 thereof Shri Hassan submits that the power of appointment of Mutwalli can only be exercised by the Board of Wakfs on vacancy in the office of the Mutwalli. Such power or appointment is only an enabling provision and cannot be exercised when a Mutwalli is already functioning and no proceeding is pending against him in terms of the provisions of the Wakf Act.

8. Per Contra Shri Mandal, Ld. Counsel has argued as follows:-

i) Drawing the attention of this Court to page 78 of CO 604 of 2012 Shri Mandal submits that it will be evident from paragraph 5 thereof that the Inspector of the Board of Wakf, West Bengal submitted his Report dated 7th May, 2007 to the Chief Executive Officer, Board of Wakfs. It was stated in the Report that an enrolment application form dated 4th September, 2006 has been submitted by Ekkri Mullick, Abdul Hakim Mullick, Abdul Hafiz Mullick and Gulam Hossain Mullick (being the Opposite Parties herein) in respect of the properties of Pirottar Gazi Saheb Wakf measuring an area of 3.79 acres.

Subsequently one Sk. Ali, Sk. Nur Md. and Sk. Shamser Ali submitted enrolment application of the same date, i.e. 4th September, 2006 for enrolment of properties of Pirottar Pir Wakf Estate of an area of 0.56 acres. Also one Sk. Abdul Hannan submitted an enrolment application dated 7th September, 2006 for enrolment of both Pirottar Properties.

ii) The Inspector of Wakfs in his Report had observed that the Pirottar Gazi Saheb Wakf Estate and the Pirottar Paanch Pir Wakf Estate may be enrolled separately with the enrolment form submitted by Sk. Year Ali and two others for Pirottar Paanch Pir Wakf Estate and Ekkari Mullick and three others for Pirottar Gazi Saheb Wakf Estate as Mutwallis in the respective Wakf Estate.

The Report of the Inspector also clarified that the Mutwallis of both Wakf Estate may be directed to keep accounts and submit the same regularly as well as rectify the record of plot No. 405 under Pirottar Gazi Saheb as well as discrepancy of properties of Pirottar Paanch Pir.

iii) Shri Mandal further submits that the recommendation of the Inspector were not taken into consideration and the Board of Wakfs illegally and arbitrarily appointed a Committee on 30th September, 2008 appointing the present petitioners as the Mutwallis. The Opposite Parties were left with no option but to prefer the writ petition being WP No. 2154 (W) of 2009 being the recorded "Khadims" from the time of their predecessors in the Wakf Property.

9. Shri Mandal points out that the order of the Hon"ble Single Bench dated 6th March, 2009 was correctly complied with by the Board of Wakfs and the observations made by the Inspector in his Report were correctly noticed and followed. The Tribunal has correctly noticed the facts and the order impugned dated 23rd February, 2012 needs no interference.

10. Heard. Considered the materials on record.

11. At the very outset this Court notices that the Board of Wakfs discussed the issues threadbare in its meeting dated 11th August, 2008. The Board noticed that an enquiry was conducted by its Inspector on 20th April, 2007 and inspection report was submitted on 7th May, 2007. It was specifically suggested in the inspection report that in respect of an enrolment application dated 7th September, 2006 submitted by one Sk. Abdul Hannan, no action was required to be taken. It was also suggested in the inspection report that the two Wakf properties of Imam Saheb and Gazi Saheb respectively are to be enrolled separately.

12. On the issue of appointment of Mutwallis, the resolution of the Board dated 11th August, 2008 noticed that the Wakf Estate of Gazi Saheb was not guided by any Wakf Deed and hence there was no rule of succession. The present opposite parties were managing the affairs of the Wakf Estate of Gazi Saheb and also a mass petition has been received on 17th April, 2007 for appointment of a Committee Mutwalli comprising 5 persons as, the members of the public were

not satisfied with the management of this said Wakf Estate.

13. However, the present opposite parties were not in favour of sharing the Mutwalliship with the representatives of the general public headed by the petitioner No. 1 and others. In that view of the matter it was decided to form a Committee Mutwalli without including any representative from the Khadim Group headed by the present OP No. 1.

14. This Court now notices that both the Board of Wakfs and the Ld. Wakf Tribunal proceeded to deal with the matter de novo pursuant to be order of the Hon"ble Single Bench dated 9th April, 2009. From the impugned order of the Ld. Wakf Tribunal dated 23rd February, 2012 it appears that the Ld. Tribunal came to the conclusion that vide the resolution of the Board Dated 11th August, 2008 the present OPs were removed from their Mutwalliship in respect of the Wakf Estate of Gazi Saheb. The Ld. Tribunal also observed that complaint was received from the general public with regard to the dismal management of the Wakf property of Gazi Saheb under the present OPs. In the opinion of the Ld. Tribunal no cogent oral and documentary evidence could be found either from the inspection report dated 7th May, 2007 or in the resolution dated 11th August, 2008 forming the basis of the said complaint of mismanagement.

15. On the basis of the above reasoning the Ld. Tribunal proceeded to confirm the resolution of the Board dated 11th May, 2009 as confirmed on 28th May, 2009 and thereby set aside the resolution dated 11th August, 2008. The Tribunal, therefore, confirmed the rectification of the resolution dated 11th August, 2008 by the subsequent resolution dated 11th May, 2009 thereby appointing the present OPs as joint Mutwallis in the Wakf Estate of Gazi Saheb.

16. To the mind of this Court the Ld. Tribunal failed to notice the relevant portions of the resolution of the Board of Wakfs dated 11th August, 2008. As already discussed hereinabove in this judgment the resolution dated 11th August, 2008 makes clear mention of the fact that both the Wakf Estate of Imam Saheb and Gazi Saheb are required to be enrolled separately. In respect of the Wakf Estate of Gazi Saheb the Khadim Group represented by the present OPs did not want to share the Mutwalliship with the general public group represented by the present petitioners. Accordingly, the Committee Mutwalli was appointed under Section 63 of the Wakf Act, 1995.

17. In view of the stated desire of the present OPs not to be associated with the Mutwalliship of the Gazi Saheb Wakf Estate as recorded in the resolution dated 11th August, 2008, the question of their removal as Mutwallis from the Wakf property does not and cannot arise. The Ld. Tribunal also lost sight of the fact that the resolution dated 11th August, 2008 makes clear mention of the fact that the Khadim Group represented by the present OPs did not want to be associated as Mutwallis with the general public group. Accordingly, the Committee Mutwalli was appointed from amongst the general public group and the resolution dated 11th August, 2008 attained finality as the present OPs did not challenge such

resolution before the Ld. Tribunal.

18. The present OPs, however, approached the Hon'ble High Court and were granted the limited relief in respect of the resolution dated 11th August, 2008 on the platform of considering the viability of bifurcating two applications in respect of the Wakf Estate of Gazi Saheb and Pir Saheb.

19. However, although the scope of the relief was clearly specified in the solemn order of the Hon'ble Single Bench dated 9th April, 2009, both the Board of Wakf and the Ld. Wakf Tribunal acted in irregular exercise of jurisdiction by coming to conclusions without their being any material change in circumstances with regard to the management of the Wakf Estate as recorded in the resolution dated 11th August 2008. To the mind of this Court the resolution of the Board dated 11th May, 2009 which was confirmed on 28th May, 2009 and affirmed by the Ld. Tribunal on 27th February, 2011 upsetting the resolution dated 11th August, 2008 reflects reasoning extraneous to ground realities. The subsequent resolution dated 11th May, 2009 as confirmed on 28th May, 2009 by the Board of Wakfs failed to notice that the question of further bifurcation of the two Wakf Estates of Gazi Saheb and Pir Saheb respectively could not have arisen in view of the fact that the inspection report dated 7th May, 2007 had clearly recommended that the two Wakf properties were to be enrolled separately. It is also obvious that in the guise of exploring a bifurcation, the Wakf Board had acted beyond its jurisdiction by ignoring the ground reality of formation of a Committee Mutwalli by the present petitioners in the face of the stated desire of the present OPs not to be associated with the other group in the Mutwalliship. Such ground reality, to the mind of this Court, cannot be brushed aside or swept under carpet by substituting it with a twist of fanciful reasoning. To the further mind of this Court both the Wakf Board and the Ld. Tribunal have erroneously highlighted the purported lack of cogent evidence with regard to the allegations of mismanagement without noticing that by their own volition the present OPs did not want to be associated with the management of the Wakf Estate of Gazi Saheb.

20. In the backdrop of the above discussion the resolution of the Board dated 11th May, 2009 as confirmed on 28th May, 2009 along with the order of the Ld. Tribunal dated 23rd February, 2012 in OA case No. 16 of 2009 are hereby set aside. Needless to state, on the setting aside of the impugned resolution dated 11th May, 2009 and 28th May, 2009 as affirmed on 23rd February, 2012, the operation of the resolution dated 11th August, 2008 stands revived.

CO 664 of 2012 is accordingly allowed.

21. There will be, however, no order as to costs.

22. Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of all requisite formalities.