

(1984) 01 CAL CK 0005
In the Calcutta High Court
Case No : Civil Rule No. 1177 (W) of 1976

A.H.Z. Haider

APPELLANT

Vs

Commissioner of Wakf and Others

RESPONDENT

Date of Decision : 11-01-1984

Acts Referred:

Bengal Wakf Act, 1934 — Section 27(1), 27(2), 40
Constitution of India, 1950 — Article 226

Citation : 88 CWN 418

Hon'ble Judges : A.K. Sengupta, J

Bench : Single Bench

Advocate : Samar Banerji, for the Appellant; Altamas Kabir for the Respondent
No. 3 to 7 and None appears for the Respondent Nos. 1 and 2, for the
Respondent

Judgement

Ajit Kumar Sengupta, J.—In this application under Article 226 of the Constitution of India, the petitioner has challenged two orders dated 9th June, 1975 and 27th December, 1975. The order dated 9th June, 1975 was passed by the Commissioner of Wakfs (hereinafter referred to as the said Commissioner), appointing a committee of mutwalis consisting of 5 members; the order dated 27th December, 1975 was also passed by the said Commissioner in terms of the resolution of the Board of Wakfs dated 24th December, 1975 reappointing the said committee of mutwalis consisting of 5 members to act as ad-interim committee of mutwalis u/s 40 of the Bengal Wakf Act, 1934 (hereinafter referred to as the said Act) for a period of five years with effect from 10th March, 1976. The case of the petitioner is that he is the mutwali of the Wakf Estate created by his great grand father Hazi Mohammed Kabil by a deed of wakf executed on 1st January, 1892. The said deed provides that the eldest male descendant of the executant of the said deed of wakf shall be the mutwali and shall perform all works according to the terms of the said deed being devoted to religion.

2. Sometimes in March, 1945, the mother of the petitioner, Lailun Nahar Begum, since deceased, was appointed as mutwali as there was no male descendant

available and the petitioner was a child of 5 years at that point of time. On or about 10th April, 1975, the petitioner's mother, the then mutwali died leaving behind the petitioner. According to the petitioner, he being the eldest male member, automatically became the mutwali of the wakf estate on the death of his mother, the last recorded mutwali. By a letter dated 5th June, 1975, the petitioner informed the Commissioner that his mother, the last recorded mutwali, had died and he being the eldest son had taken the charge of the wakf estate as mutwali in place and stead of his deceased mother. It was also stated therein that in terms of the wakfnama dated 1st January, 1892, the petitioner was eligible to be substituted as mutwali to the wakf estate in place and stead of his deceased mother. He accordingly requested the Commissioner to substitute his name as mutwali. By a letter dated 25th June, 1975, the Commissioner intimated that the application of the petitioner dated 5th June, 1975 for substitution of name as mutwali was received in the office of the Commissioner on 11th June, 1975 and prior to that on 9th June, 1975, a committee of mutwali consisting of 5 members had been appointed to act as mutwali and as such, prayer of the petitioner for substitution of his name as mutwali of the wakf estate could not entertained and was rejected. It is the case of the petitioner that the said order dated 9th June, 1975 as referred to in the order dated 24th June, 1975 was not served upon the petitioner nor the petitioner was informed of the reasons for appointment of a committee of mutwalis when the deed of wakf specifically provided how the vacancy should be filled in.

3. By a letter dated 5th July, 1975, the petitioner intimated to the Commissioner that before the purported appointment of the committee of mutwalis neither any general notice inviting objection to such appointment was issued nor any enquiry was made. It was stated therein that the said order dated 9th June, 1975 passed by the Commissioner was in utter violation of the principles of natural justice. The petitioner, therefore, requested the Commissioner to recall the said order and reopen the case giving a hearing to him. In reply to the said letter dated 5th July, 1975, the Commissioner by his letter dated 1st August, 1975 fixed the hearing on 28th August, 1975 and directed the petitioner to appear personally or through duly authorised agent with evidence, if any, in support of the claim of the petitioner for mutwaliship of the wakf estate. Before the petitioner was heard by the Commissioner, the Commissioner by his letter dated 18th August, 1975 addressed to all the tenants of the wakf estate informed that the said wakf estate was under the management of a committee of mutwalis consisting of 5 persons appointed by the Commissioner and directing them to pay rent to the said committee. It appears that hearing took place on 28th August, 1975 and 27th September, 1975. Thereafter, the Commissioner by his order dated 27th December, 1975 intimated that as per the resolution of the Board's meeting held on 24th December, 1975, the committee of mutwalis consisting of five persons had been reappointed for a period of 5 years with effect from 10th March, 1976 u/s 40 of the said Act. Upon receipt of the said order dated 27th December, 1975, the petitioner through his advocate-on-record served a letter dated 9th

January, 1976 on the Commissioner demanding justice, inter alia, contending that the conditions precedent for exercise of jurisdiction u/s 40 of the said Act had not been fulfilled. Upon receipt of the said letter demanding justice from the advocate-on-record of the petitioner, the Commissioner intimated the advocate-on-record by his letter dated 14th January, 1976 that the Board of Wakfs at its meeting held on 7th July, 1975 passed a resolution directing the Commissioner to hear the petitioner and the committee of mutwallis and to place his report before the Board. It was also stated in the said letter dated 14th January, 1976 that the matter was heard and the Commissioner recommended for the appointment of mutwali for a longer period in the interest of the wakf estate and also recommended for the rejection of the petition of the petitioner praying for mutwaliship. It was also stated in that letter that the matter was considered by the Board of Wakfs at its meeting held on 24th December, 1975 and after consideration of the report of the Commissioner, the Board reappointed the committee of mutwalis for a further period "of 5 years and also rejected the petition of the petitioner,

4. Thereafter, the petitioner moved this present application in this Court on 22nd January, 1976 challenging the said orders dated 9th June, 1975 and 27th December, 1975.

5. An affidavit-in-opposition was filed on 4th July, 1977 on behalf of the respondent Nos. 3 to 7 who were appointed as the members of the said committee of mutwalis. In the said affidavit a copy of the order dated 9th June, 1975 as well as a copy of the report of the Commissioner recommending reappointment of the committee of mutwalis had been annexed. It may be mentioned that neither of the said orders was communicated to the petitioner at any earlier stage of the proceeding. "An affidavit-in-opposition was also filed on 18th September, 1978 on behalf of the respondent Nos. 1 and 2, the Commissioner of Wakfs and the Board of Wakfs.

6. On or about 8th April, 1980, the petitioner made an application for amendment of the petition. It has been alleged in the said application for amendment that from the affidavits filed by the respondents, the petitioner came to know for the first time that an enquiry was made before the order dated 9th June, 1975 was passed by the Commissioner and a report was submitted by the Commissioner to the Board of Wakfs on 23rd December, 1975 which was relied on by the Board in taking the purported resolution dated 24th December, 1975 reappointing the committee of mutwalis. Neither the report of the enquiry nor the report of the Commissioner was furnished to the petitioner and no opportunity was given to the petitioner by the Board to deal with the said report. It has been alleged that there has been gross violation of the principles of natural justice. By the amendment the action, of the Board was challenged, inter alia, on the ground of violation of the principles of natural justice and noncompliance with the mandatory provision of Section 40 of the said Act. The said amendment was allowed.

7. From the order dated 9th June, 1975 passed by the Commissioner, it appears that he relied on a report of the Inspector, Janab Abdul Hossain Mullick stating that the local muslims in a congregational meeting held on 25th May, 1975 selected the administrative committee to be appointed as a Board of Mutwalis u/s 40 of the said Act in absence of legal claimant for mutwaliship in terms of the wakf deed. The said report, it appears, mentioned that the administrative committee had done much improvement to the Mosques and during the period of the recorded mutwali Mussamat Lailun Nahar Begum, since deceased, the wakf estate had been mismanaged. In the said report it has been observed that according to the President of the said Administrative Committee, the petitioner had no claim to the office of mutwali in terms of the deed of wakf. The Inspector suggested for hearing in presence of the parties concerned.

8. It further appears from the said order dated 9th June, 1975 that a petition was submitted by the local muslims of Ekbalpur area objecting to the recording of the name of the petitioner as mutwali and they had elected the Administrative Committee to be "Board of Mut-walis" in absence of any male descendant from the male line of the wakif. It has also been recorded in the said order dated 9th June, 1975 that there is no application by the petitioner and from the provision of the wakf deed, he is not entitled to mutwaliship. It appears that upon consideration of the report of the said Inspector and the petition submitted by the local muslims and upon consideration that the local muslims had selected the members of the Administrative Committee to supervise the work of the deceased mutwali, and as according- to the Commissioner, there was no mutwali, he purported to have appointed the said Administrative Committee as interim mutwali u/s 40 of the said Act for a period of six months in the best interest of the wakf estate. It is not in dispute that neither the copy of the report of the Inspector relied on by the Commissioner nor the copy of the petition submitted to the Commissioner objecting to the appointment of the petitioner as mutwali, had been furnished to the petitioner. No hearing was given to the petitioner before the said order dated 9th June, 1975 was passed by the Commissioner.

9. The Commissioner submitted a report on 23rd December to the Board dealing with various contentions legal and factual, raised by the petitioner and the Administrative Committee of Mutwalis in course of the hearing given pursuant to the direction of the Board. The Commissioner recommended the reappointment of the said Committee to act as mutwali u/s 40 of the I Act for a period of five years with effect from 10th March, 1976 on the expiry of the said term of six months. The Board, as it appears, approved the report of the Commissioner and passed the resolution dated 24th December, 1975 re-appointing the said committee for a period of five years to act as ad-interim mutwali u/s 40 of the said Act. The Board solely relied on the said report of the Commissioner, copy whereof was not furnished to the petitioner. Nor the petitioner was given any opportunity of being heard before the said resolution was passed by the Board.

10. I have heard the rival submissions of the parties. u/s 27(1) of the said Act,

the Commissioner is empowered to give direction for proper administration of wakfs. It is the Board which is empowered u/s 27(2) of the said Act to constitute a committee when necessary for the administration of wakf. In the instant case, the powers u/s 27 have not been exercised either by the Commissioner or by the Board. The admitted position is that in the instant case the committee of mutwalis was appointed u/s 40 of the said Act. Section 40 of the said Act inter alia, provides that in the case of any wakf of which there is no mutwali or the mutwali is in the opinion of Board, not capable of acting as such or where there appears to the Board to be an impediment to the appointment of a mutwali, the Board, may appoint for such period as it thinks fit a person to act as mutwali. Before power u/s 40 is exercised by the Board appointing Mutwali, the Board must be satisfied whether any of the conditions and contingencies prescribed in Section. 40 are present. It is not clear as to whether the Board exercised the power in the instant case because there is no mutwali or the mutwali is not capable of acting as such. It cannot be said that there was no mutwali inasmuch as, rightly or wrongly the petitioner was acting as mutwali after the death of his mother, who was the last recorded mutwali. The petitioner had informed soon after the death of his mother that he had taken the charge of the wakf estate. The allegation of mismanagement is against the mother of. the petitioner. Although the Commissioner was of the view that the petitioner was not rightful claimant to the Mutwaliship, in his recommendation to the Board he did not pass any final opinion on that issue, as according to him, the matter involved intricate point of law. The order dated 9th June, 1975 was passed by the Commissioner presumably, on the ground that there was no mutwali. In any event the petitioner being the claimant to the post of mutwali, it was the duty of the Commissioner to disclose the report of the Inspector which formed the basis of the Order dated 9th June, 1975 Similarly, the Board had the duty to disclose the report of the Commissioner recommending the re-appointment of the committee of mutwalis in preference to the petitioner. There is no doubt in my mind that the Board have acted mechanically in accepting the recommendation of the Commissioner without giving hearing to the petitioner who was affected by the "decision of the Board. Mutwaliship is not only an office. It is in essence a property.

11. The principles of natural justice are violated if an adverse order is made by the authority on the basis of material not brought to the notice of the person affected by such order. In this case, the Commissioner and the Board decided to appoint a Committee of mutwalis rejecting the claim, of the petitioner to mutwaliship after gathering and considering materials wholly behind the back of the petitioner. The materials on which the Commissioner and the Board had relied on before passing the impugned orders should have been disclosed to the petitioner. The rules of natural justice ought to have been observed and the petitioner should have been given proper opportunity of testing the materials upon which the authorities relied and of providing materials on his own behalf. In my view, in the instant case the Commissioner as well as the Board have acted in

gross violation of the principles of natural justice and the orders passed by them are tainted with illegality.

12. In that view of the matter, this application is bound to succeed. However, I find that the life of the Committee appointed By the Order dated 27th December, 1975 has long since expired. It is, therefore, unnecessary to issue any writs for quashing the impugned orders dated 9th June and 27th December, 1975. I direct the Board to hear afresh the claim of the petitioner to the Mutwaliship of the wakf estate after giving him reasonable opportunity of being heard and to deal with the allegations made in the report of the Commissioner. The petitioner should be furnished with all materials which the Board may rely in determining the claim of the petitioner to the Mutwaliship. The Board shall pass speaking order dealing with "the contentions of the petitioner. So long as the claim of the petitioner to "the Mutwaliship is not disposed of by the Board as directed by this Order, the petitioner will be entitled to act as Mutwali. I have allowed the petitioner to act as Mutwali having regard to the fact that by the interim order passed while the Rule was issued, the operation of the impugned orders dated 9th June, 1975 and 27th December, 1975 were stayed, which in effect allowed the petitioner to continue as the Mutwali for these years. However, the petitioner shall submit full and true statement of accounts to the Commissioner month by month.

This application is disposed of accordingly. There will, however, be no order as to costs.