
(2010) 06 GAU CK 0048
In the Gauhati High Court
Case No : CR(P) No.40(SH) of 2008

Asadur Rahman (Md.)

APPELLANT

Vs

Lutfu Islam & Ors.

RESPONDENT

Date of Decision : 08-06-2010

Acts Referred:

Waqf Act, 1995 — Section 64(4), 64(4), 83(2), 83(2), 89, 89

Citation : (2012) 2 GLR 799 : (2010) 5 GLT 422

Hon'ble Judges : T.Vaiphei, J

Bench : Single Bench

Advocate : Advocates appeared for the Petitioner: Mr.R.Choudhury, Mr.M.F.Qureshi & Mr.K.Chisa, Advocates appeared for the Respondents: Ms.P.D.B.Baruah, Mr.H.S.Thangkhiew & Mr.K..S.Kynjing, Advocates appearing for Parties

Judgement

T. Vaiphei, J.—This revision under Article 227 of the Constitution is directed against the judgment and order dated 3.12.2008 passed by the Wakf Tribunal in Wakf Appeal No. 2 of 2008 setting aside the appointment of the petitioner as the joint mutawalli.

2. The facts giving rise to this revision, as pleaded by the petitioner, may briefly be noted at the outset. The late Haji Kasimuddin Mollah had executed a deed of Wakf on 5.2.1930 making his landed property named Rockwood Cottage complex at Mahatma Gandhi Road, Shillong and his other properties located at Janai, Hooghly District, West Bengal as wakf estates on certain terms and conditions. In accordance with the terms and condition of the deed, the father of the petitioner, namely, late Md. Rownaq Ali had become the joint mutawalli jointly with the late Jb. Aulad Hussain in the year 1977 after the death of his mother the late Rafatan Nessa. His father died on 19.3.1997 thereby rendering one of the joint mutawalliship vacant. The petitioner then filed the application dated 30.5.2001 to the Meghalaya Wakf Board, Shillong ("the Board") for appointing him as one of the joint mutawallis by virtue of his being his only son in accordance with the

stipulation in the deed of wakf. The Meghalaya Wakf Board rejected his application which prompted him to file appeal being Wakf Appeal No. 1 of 2001 before the Wakf Tribunal, which ultimately disposed of the appeal by the order dated 23.2.2005 by directing the Board to consider his case for the appointment as joint mutawalli in accordance with the wakf deed. The Board, however, vide their petition dated 12.9.2.....(sic) disclosed before the Tribunal that they could not dispose of the application of the petitioner as the matter was subjudice before the Calcutta High Court. In the meantime, on receipt of the judgment and order dated 23.2.2005, the Board constituted a SubCommittee under the Chairmanship of Janab Sayeedullah Nongrum, which after hearing the parties recommended the petitioner for his appointment as joint mutawalli in place of his father, the late Md. Rownaq Ali in accordance with the terms and conditions of the wakf deed. It would appear that the respondent No. 2 had made some allegations against the petitioner with a view to malign him, but these allegations were not entertained by the SubCommittee as being unsubstantiated. However, the Board for further evaluation of the enquiry report of the said SubCommittee constituted another SubCommittee under the Chairmanship of Jb. C.Z. Ghafoor, Chairman of the Board and this second SubCommittee also accepted the report/recommendation of the first SubCommittee.

3. It is the further case of the petitioner that even after the favourable recommendation of the second SubCommittee in his favour, the Board wanted to explore other means for avoiding further litigations between the parties and took interim steps in the interest of the wakf estates, which were, however, withdrawn by them where after it passed the order dated 4.8.2008 appointing the petitioner as the joint mutawalli in place of his deceased father, Md. Rownaq Ali, on the basis of the recommendation of the two SubCommittees. Aggrieved by this, the respondent No. 1 filed Wakf Appeal No. 2 of 2008 under Section 83(2) of the Wakf Act, 1995 ("the Act") before the Wakf Tribunal challenging the appointment of the petitioner as the joint mutawalli. The petitioner, in contesting the appeal, had raised objection against the maintainability of the appeal contending that Section 83(2) does not contemplate the filing of an appeal but is confined only to a suit, and if such a suit is to be filed, Section 89 of the Act requires the petitioner to issue two months' notice in writing upon the Board. It was his contention that if no such notice was issued by the respondent No. 1, the suit was not maintainable. The objection was rejected by the Tribunal, which, according to the petitioner, was unjustified and illegal. It is also the contention of the petitioner that the Tribunal has completely overlooked Annexures "B" and "C" of his show cause wherein the petitioner was found fit for appointment of the joint mutawalli of the wakf estates in terms of the wakf deed. The petitioner maintains that he was rightly appointed as the joint mutawalli by the Board in its meeting held on 13.7.2007, which should not have been upset by the Tribunal.

4. I Have heard Mr. R. Choudhury, the learned counsel for the petitioner and Mrs. P.D.B. Baruah, the learned counsel for the respondent No. 1 and Mr. H.S. Thangkhiew, the learned counsel for the respondent No. 2. The first point for

consideration in this revision is as to whether the appeal before the Tribunal was maintainable? The contention of the learned counsel for the petitioner is that as there is no provision for appeal under the Wakf Act, 1995 ("the Act" for short), the appeal filed by the respondent No. 1 under Section 83(2) of the Act before the Tribunal was incompetent. He further contends that even if the application filed by the respondent No. 1 is held to be not an appeal such an application filed before the Tribunal, which is deemed to be a Civil Court, could not have been entertained without issuing two months' notice to the Board as required by Section 89 of the Act and that the Tribunal in entertaining the application in contravention of Section 89 of the Act has acted with material irregularity. He, therefore, submits that the Tribunal has improperly exercised his jurisdiction, and the impugned order passed by the Tribunal without jurisdiction cannot be sustained in law. To appreciate the controversy, I may straightaway refer to Section 83 of the Act, which reads thus:

"83. Constitution of Tribunals, etc. (1) The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a wakf or wakf property under this Act and define the local limits and jurisdiction under this Act of each of such Tribunals.

(2) Any mutawalli, person interested in a wakf or any other person aggrieved by an order made under this Act, or rules made thereunder, may make an application within the time specified in this Act or where no such time is specified, within such time as may be prescribed, to the Tribunal for the determination of any dispute, question or other matter relating to the wakf.

(3) Where any application made under subsection relates to any wakf property which falls within the territorial limits of two or more Tribunals, such application may be made to the Tribunal within the local limits of whose jurisdiction the mutawalli or any one of the mutawallis of the wakf actually and voluntarily, carries on business or personally works for gain, and, where any such application is made to the Tribunal aforesaid, the other Tribunal or Tribunals having jurisdiction shall not entertain any application for the determination of such dispute, question or other matter.

Provided that the State Government may, if it is of the opinion that it is expedient in the interest of the wakf or any other person interested in the wakf or the wakf property to transfer such application to any other Tribunal having the jurisdiction for the determination of the dispute, question or other matter relating to such wakf or wakf property, transfer such application to any other Tribunal having jurisdiction, and, on such transfer, the Tribunal to which the application is so transferred shall deal with the application from the stage which reached before the Tribunal from which the application has been so transferred, except where the Tribunal is of the opinion that it is necessary in the interest of justice to deal with the application afresh.

(4) Every Tribunal shall consist of one person, who shall be a member of the State Judicial Service holding a rank, not below that of a District, Sessions or Civil Judge, Class I, and the appointment of every such person may be made either by name or by designation.

(5) The Tribunal shall be deemed to be a Civil Court and shall have the same powers as may be exercised by a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, or executing a decree or order.

(6) Notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), the Tribunal shall follow such procedure as may be prescribed.

(7) The decision of the Tribunal shall be final and binding upon the parties to the application and it shall have the force of a decree made by a Civil Court.

(8) The execution of any decision of the Tribunal shall be made by the Civil Court to which such decision is sent for execution in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

(9) No appeal shall lie against any decision or order whether interim or otherwise, given or made by the Tribunal.

Provided that a High Court may, on its own motion or on the application of the Board or any person aggrieved, call for and examine the records relating to any dispute or question or other matter which has been determined by the Tribunal for the purpose of satisfying itself as to the correctness, legality or propriety of such determination and may confirm, reverse or modify such determination or pass such order as it may think fit."

5. Even a cursory look at the various provisions of Section 83 extracted above will indicate that there is, with the possible exception of Section 64(4), no remedy of appeal against the determination by the Board of Wakf of any dispute, question or other matter relating to a wakf or wakf property under the Act. There can be no dispute that appointment or removal of a joint mutawalli is one of the functions and powers of the Board of Wakf as evident from subclause (g) of Section 32(2) of the Act. Therefore, the appointment or removal of a joint mutawalli will constitute an order made under the Act. Consequently, any person aggrieved by such an order can certainly file an application under Section 83 (2) of the Act before the Tribunal, which has the power to decide such a dispute. In approaching the Tribunal, the respondent No. 1 was filing an application/appeal under Section 83(2) of the Act. In my opinion, the learned counsel for the petitioner was apparently swayed by the use of the nomenclatures "application/appeal", which, according to him, should be construed as an appeal, which did not lie before the Tribunal. However, the respondent No. 1 was in substance aggrieved by the order passed by the Board of Wakf appointing the petitioner as the joint mutawalli, for which she has indisputably the remedy under Section 83(2) of the Act. It is by now a settled principle of law that wrong use of nomenclature cannot nonsuit a litigant if the source of the jurisdiction to

entertain an application or suit is traceable within the four corners of a particular provision of law. In the instant case, the grievance of the respondent No. 1 is one which can be entertained under Section 83 (2) of the Act. Under the circumstances, there is no difficulty in holding that the Tribunal is correct in entertaining the application of the respondent No. 1 even though one of the nomenclatures used in the cause title is "appeal". Once it is found that the respondent No. 1 was not actually filing an appeal before the Tribunal but was, in fact, filing an application under Section 83 (2) of the Act, the same is maintainable. On the contention of the learned counsel for the petitioner that even an application under Section 83 (2) of the Act amounts to a suit, and as the application was filed by the respondent No. 1 without issuing two months' notice to the Board of Wakf, the same is barred by Section 89 of the Act, the contention, in my judgment, does not deserve serious consideration in view of the fact that what the provision contemplates is a suit thereby meaning a civil suit, which is triable only by a Civil Court and not an application to be entertained by a tribunal constituted under Section 83 of the Act. A suit is normally tried only by a Civil Court under Section 9 of the Code of Civil Procedure. A tribunal with many a trapping of a Court, nevertheless, are not Courts in the strict sense of exercising judicial powers. Some such features as the power to summons witnesses, as giving of a final decision, competence to hear contentious matters, power to render decisions affecting the rights of subjects, existence of a provision for appeal against its decision and it being a body to which a matter can be referred by another, do not necessarily make a quasijudicial body a Court. This is amply borne out by Section 85 of the Act, which bars a civil suit or other legal proceeding in any Civil Court in respect of any dispute, question or other matter relating to any wakf, wakf property or other matter which is required by or under this Act to be determined by a Tribunal. For any suit or other legal proceeding not covered by Section 85, the remedy of a civil suit is open to a party, and it is in respect of such a suit, two months' notice upon the Board of Wakf appears to be mandatory under Section 89. Therefore, the Tribunal constituted under Section 83(1) of the Act is not, and cannot be, a Civil Court and as the application filed under Section 83 (2) cannot be construed to be a suit, there is no requirement under Section 89 to issue notice of a suit upon the Meghalaya Board of Wakf for filing such an application.

6. Alternatively, it is contended by Mr. R. Choudhury, the learned counsel for the petitioner, that the respondent No. 1 has the remedy of appeal under Section 64(4) of the Act as she is, in substance, aggrieved by her removal from the joint mutawalliship of the wakf estate. At this stage, I may refer to the provisions of Section 64 of the Act, which are in the following terms:

"64. Removal of mutawalli.

(1) Notwithstanding anything contained in any other law or the deed of wakf, the Board may remove a mutawalli from his office if such mutawalli

(a) has been convicted of any offence more than once of an offence punishable

under Section 61; or

(b) has been convicted of any offence of criminal breach of trust or any other offence involving moral turpitude, and such conviction has not been reversed and he has not been granted full pardon with respect to such offence; other mental or physical defect or infirmity which would render him unfit to perform the functions and discharge the duties of a mutawalli; or

(d) is an undischarged insolvent; or

(e) is proved to be addicted to drinking liquor or other spirituous preparations, or is addicted to the taking of any narcotic drugs; or

(f) is employed as a legal practitioner on behalf of, or against, the wakf; or

(g) has failed, without reasonable excuse, to maintain regular accounts for two consecutive years or has failed to submit, in two consecutive years, the yearly statement of accounts, as required by subsection (2) of Section 46; or

(h) is interested, directly or indirectly, in a subsisting lease in respect of any wakf property, or in any contract made with, or any wakf being done for the work or is in arrears in respect of any sum due by him to such wakf; or

(i) continuously neglects his duties or commits any misfeasance, malfeasance, misapplication of funds or breach of trust in relation to the wakf or in respect of any money or other wakf property; or

(j) wilfully and persistently disobeys the lawful orders made by the Central Government, State Government, Board under any provision of this Act or rule or order made thereunder;

(k) misappropriates or fraudulently deals with the property of the wakf.

(2).....Omitted as irrelevant.....

(3).....Omitted as irrelevant.....

or

(c) is of unsound mind or is suffering from

(4) A mutawalli who is aggrieved by an order passed under any of the clauses (c) to (j) of subsection (1), may, within one month from the date of the receipt by him of the order, appeal against the order to the Tribunal and the decision of the Tribunal on such appeal shall be final.

..... Rest of the provisions omitted as irrelevant

7. A bare perusal of the provisions extracted above will plainly indicate that there is no question of filing an appeal by her under Section 64(4) of the Act since she was never removed as joint mutawalli by the Board of Wakf in accordance with Section 64(1) of the Act. Section 64(4) of the Act will be applicable when

removal of a mutawalli is made on any of the grounds specified therein. In this view of the matter, the objection of the learned counsel for the petitioner on the maintainability of the application filed by the respondent No. 1 on the ground of availability of a statutory remedy of appeal has no substance and is, accordingly, rejected.

8. Coming now to the merits of the case, it is the contention of Mr. R. Choudhury, the learned counsel for the petitioner, that the Tribunal has grossly erred in setting aside his appointment as the joint mutawalli of the wakf estate when his appointment was made by the Board of Wakf on the recommendation of the two SubCommittee constituted by it. According to the learned counsel, the reliance placed by the Tribunal upon Annexures 8 and 9 for setting aside his appointment is wholly misconceived inasmuch as the enquiry report dated 16.12.2003 had been cancelled by the West Bengal Board of Wakf on the ground that it had been conducted by an Upper Division Assistant of that Board, who was not competent to conduct the enquiry. Per contra, Mrs. P.D.B. Baruah, the learned counsel for the respondent No. 1 submits that the wakf deed plainly indicates that each mutawalli is to be appointed from one family line only, and two mutawalli cannot be appointed from the same family line and that if the petitioner is appointed as joint mutawalli, it will amount to appointing a joint mutawalli from the same family line. She further contends that the respondent No. 1 has already been appointed as joint mutawalli by the Board of Wakf, West Bengal vide the order dated 3.4.2006, which appointment continues to be valid till date. She maintains that the Tribunal rightly set aside the appointment of the petitioner as joint mutawalli in accordance with the wakf deed, which does not call for the interference of this Court. Mr. H.S. Thangkhiew, the learned counsel for the respondent No. 2, also adopts the submission of the learned counsel for the respondent No. 1 and submits that the impugned order is perfectly in order and does not suffer from any jurisdictional error for invoking the revisionary power of this Court.

9. As the Tribunal relied upon the decision of this Court in W.P.(C) No. 214 (SH) of 2001 for construing the various clauses of the wakf deed in question, I may refer to that decision, which is dated 8.12.2001. In that case, the present petitioner filed the writ petition arraigning the respondent No. 2 herein, one Jb. Moyenuddin Ahmed, the State of Meghalaya and the Meghalaya Wakf Board as partyrespondents. The dispute was also over the interpretation of the same wakf deed. This is what this Court said at paragraphs 9 and 10 of the judgment:

"9. A bare perusal of these conditions mentioned above, there cannot be Joint Mutawalli at the same time to and in favour of the writ petitioner and his father or with his sister Smt. Lufta Islam (the respondent No. 1 herein) though, in terms of condition No. 6 Mutawalli shall have the right to nominate future mutawallis from their respective families (emphasis supplied). This means that a right has been given to the mutawalli to nominate future Mutawall not present Mutawalli. Therefore, any appointment made by the said Rawnaq Ali for his son,

the writ petitioner as Joint Mutawalli in addition to him i.e. Rawnaq Ali is against the terms and conditions of the Wakf deed (AnnexureA) and, as such, the appointment of the writ petitioner Md. Asadur Rehman by Rawnaq Ali is not tenable in the eye of law. In my considered view, the learned Wakf Tribunal had rightly held that the appointment of the writ petitioner by his father Rawnaq Ali having Joint Mutawalli with him is beyond the ambit of Wakf deed and not in accordance with Wakf deed. The relevant findings and observations made by the learned Tribunal are important and relevant in the instant case and, accordingly, the same are quoted below:

"Let me scan the Wakf of deed. Annexure"A1 is the English version of the wakf of deed. The relevant portion runs as follows.

"That during my lifetime, I alone shall continue to be mutawalli of the properties of the Wakf and shall be bound to discharge of my duties under the conditions set forth herein. On my death, my son Moula Baksh and my daughters Nurun Nesa and Rafatun Nesa shall be joint mutawallis and after them those of their male heirs who would be eldest and pious shall likewise be joint mutawallis and this system shall run hereditary and whoever would be mutawallis shall likewise be bound by the conditions of the deed. In the absence of any fit male heir in any of the lines of the aforesaid joint mutawallis, any fit female heiress shall take place."

The family lineage of late Kasimuddin Mullah is as follows:

He had one son Mullah Baksh and two daughters namely Nurun Nesa and Rafatun Nesa. Nurun Nesa died issueless and subsequently Mullah Baksh and Rafatun Nesa became joint mutawallis. Thereafter, on the death of Mullah Baksh, his only son Aulad Hussain (father of the respondent No. 2 herein) became joint mutawallis. Rafatun Nesa had only one son Md. Rawnaq Ali and Rawnaq Ali became joint mutawalli with Aulad Hussain (father of the respondent No. 2 herein). After the death of Aulad Hussain his eldest son Ahmed Hussain (the respondent No. 2 herein) who is the appellant in the present case became joint mutawalli.

As per the wakf deed, it is apparent that one heir could be appointed joint mutawalli in any of the lines of deceased Mullah Baksh and Rafatun Nesa.

As such, it is crystal clear, the appointment of Md. Asadur Rahman (the present writ petitioner) by his father Md. Rawnaq Ali having joint mutawalli with him is beyond the ambit of the Wakf Deed and not in accordance with the Wakf Deed and ultra vires."

10. In my considered view, the learned Tribunal dealt with the matter pertaining to the appointment of the writ petitioner as Joint Mutawallis with his father pros and cons and rightly held that the said joint mutawalli is beyond the ambit of the Wakf deed. I am in full agreement with the observations and findings made by the learned Tribunal in this regard and, apart from that, the Board of Wakf, West

Bengal under its order dated 2.9.1998 recorded the name of Smt. Lutfa Islam (the respondent No. 1 herein), the sister of the writ petitioner as Joint Mutawalli in place of her father Rawnaq Ali along with the respondent No. 1 Ahmed Hussain as Mutawalli of the Wakf Estate."

10. As already noticed, it was the petitioner herein who filed WP(C) No. 214(SH) of 2001, which was dismissed by this Court. However, no appeal was apparently preferred by him from that judgment and order. In my opinion, the findings against him therein have now attained finality. In that case, this Court had already found that in pursuance of the resolution dated 6.8.1998, the Board of Wakf, West Bengal, the name of the respondent No. 1 was already recorded as the joint mutawalli in place of her father, late Rawnaq Ali and that an affidavit was also sworn by the petitioner himself that he had no objection as regards the appointment of the respondent No. 1 to manage the wakf properties with her cousin brother, the respondent No. 2 herein as joint mutawalli and that any appointment made by the late Rawnaq Ali for Md. Asadur Rahman (the petitioner herein) with him or with his sister (respondent No. 1 herein) was against the terms and conditions of the Wakf deed and was not tenable in law. As these findings have not been challenged, they will operate as *res judicata* against the petitioner. Apparently taking cue from the findings of this Court, the Tribunal held that as the petitioner and the respondent No. 1 are brothers and sisters, that too, from the same family lineage, if both of them were appointed as mutawallis, such appointment would be beyond the scope and ambit of the wakf deed and against the intention of the wakf and further that both the properties at Shillong and West Bengal under the same wakfnama could not be bifurcated. In my opinion, on the basis of the materials available on record including the judgment of this Court in WP(C) No. 214 (SH) of 2001, no jurisdictional error has been committed by the Tribunal to call for the interference of this Court. Supervisory jurisdiction under Article 227 of the Constitution, as held by the Apex Court in *Surya Devi Vs. Ram Chander Rai*, (2003) 6 SCC 675, is exercised for keeping the subordinate Courts within the bounds of their jurisdiction. When a subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step to exercise its supervisory jurisdiction. Be it *certiorari* or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby. In my judgment, the petitioner has miserably failed to make out the aforesaid requirements to warrant the interference of this Court under Article 227 of the Constitution in the impugned judgment and order.

11. For what has been stated in the foregoing, there is no merit in this revision petition, which is accordingly dismissed. However, on the facts and circumstances

of the case, the parties are directed to bear their respective costs.