
(1978) 08 CAL CK 0017
In the Calcutta High Court
Case No : A.F.A.D. No. 164 of 1966

Asrafannessa Khanum

APPELLANT

Vs

Mirza Ali Zamin and Others

RESPONDENT

Date of Decision : 31-08-1978

Acts Referred:

Bengal Wakf Act, 1934 — Section 70(1)

Citation : AIR 1979 Cal 53 : 83 CWN 41

Hon'ble Judges : B.N. Maitra, J

Bench : Single Bench

Advocate : Syed Hasan Imam and Prasanta Kumar Bandopadhyay, for the Appellant; S.C. Dasgupta, Tapan Kumar Sengupta and Soumen Das Gupta, for the Respondent

Final Decision : Allowed

Judgement

B.N. Maitra, J.—The plaintiff instituted the suit for declaration that he was the sole mutawalli of the wakf estate in question and the defendants were not validly appointed mutwallis. The defence was that the suit was not maintainable, because Wakf Commissioner was not made a party. The learned Munsif relied on the decision in 48 CWN 157 : (Commissioner of Wakfs Vs. Shahebzada Mohammed Zahangir Shah and Others, and repelled that contention that the notice u/s 70 of the Wakf Act was necessary. The suit was decreed in part against defendant No. 3 and dismissed against the rest. An appeal was taken out. A cross-objection was filed. The learned Subordinate Judge stated that the appellant could not be the sole mutwalli and her brother, that is, respondent No. 2, was also a mutwalli. So the appeal and the cross-objection were dismissed. Hence this appeal.

2. In this Court the learned Advocate appearing on behalf of the appellant referred to the decision of Mr. Justice P. B. Mukherji in The Commissioner of Wakfs Vs. Sm. Ayesa Bibi and Others, and stated that the notice u/s 70 (1) of the Wakf Act was mandatory unless Wakf Commissioner was a party to the suit.

Some other submissions have been made on the merits. It has been contended that in view of that decision, the suit must fail, because the Wakf Commissioner was not a party and no notice required by Section 70 (1) of the Act was issued.

3. The learned Advocate appearing on behalf of the respondent has contended that the records of the learned District Judge show that when the appeal was filed, two applications were put in. One prayer was made according to the provisions of Order 1, Rule 8, C. P. C. and later necessary publication made in the local newspaper, viz., "Bartabaha". Secondly, a prayer was made to issue a notice on the Wakf Commissioner. That prayer was also allowed. So it has been contended that since at the stage of the appeal such proper notice was sent and the Wakf Commissioner did not raise any objection within one month from the date of receipt thereof, the present objection raised on behalf of the appellant cannot be sustained.

4. Reference may be made to the Bench decision of our High Court in Benoy Kumar Acharjee Choudhury and Others Vs. Ahammad Ali and Others, to show that u/s 70 of the Bengal Wakf Act notice is necessary to be served on the Commissioner of Wakf in a suit in respect of wakf property, unless the suit falls within the exception mentioned in the section. It should be pointed that this Bench decision was considered by our Supreme Court in the case of Mst. Ayesha Bibi Vs. The Commissioner of Wakfs, West Bengal and Others, . Hidayatullah, C. J. has stated that the proposition was correctly laid down in the case of Benoy Kumar v. Ahmed Ali.

5. Of course the learned Advocate appearing on behalf of the respondent has referred to the aforesaid decision of Ayesha Bibi at p. 291 to show that in that case the Commissioner had been served with a notice, but he was not made a party. But there was no final decision on the point by the Supreme Court because it has been observed at p. 291 that, though the decision of Muzafar Ahmed Vs. Indra Kumar Das and Others, was considered, that decision might require careful consideration.

6. Section 70 (1) of the Wakf Act clearly lays down that in every suit or proceeding in respect of any wakf property or of mutwalli as such the Court shall issue notice to the Commissioner at the cost of the party instituting the suit. Here there is reference to the suit and not to appeal. The wakf property has been given in the schedule to the plaint and the dispute is as to who will be the mutwalli. So the fact that only at the appellate stage a notice was issued to the Wakf Commissioner is of little consequence. Here we can again refer to the observations made in the case of Benoy Kumar Acharjee Choudhury and Others Vs. Ahammad Ali and Others, by a Bench of our Court. It has already been observed that the principles enunciated in this case were stated to be correct by the Supreme Court. In Benoy's case no notice u/s 70 of the Act was issued. In that case also the suit did not come within the exception mentioned in Sub-section (1) of Section 70, as in the present case. For that defect the decisions of the courts below were set aside and the High Court directed that the suit be

heard de novo on all the points after issue of notice to the Commissioner of Wakf according to the provisions of Section 70 of the Act. Same procedure will be adopted in this case. Hence for the ends of justice the suit must be sent back on remand. On receipt of the records, the learned Munsif will direct the plaintiff to issue a notice by registered post to the plaintiff at his own cost. Thereafter the suit will be tried afresh on all points and the learned Munsif will decide the same according to law.

7. The appeal is allowed. The judgment and decree appealed against be set aside and the suit remitted to the trial court for disposal in accordance with law in the light of the observations made in the body of the judgment.

8. There will be no order as to costs in this appeal.

9. Since the suit will be heard de novo, the cross-objection is not required to be decided on the merits and the same is dismissed without costs.

10. Let the affidavit-in-opposition and the affidavit-in-reply filed by the parties be kept on the record.