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**(1969) 07 SC CK 0008**

**In the Supreme Court Of India**

**Case No :** Civil Appeal No. 579 of 1966

Ayesha Bibi — APPELLANT

Vs

The Commissioner of Wakfs, West Bengal & Ors — RESPONDENT

**Date of Decision :** 15-07-1969

**Acts Referred:**
Bengal Wakf Act, 1934 — Section 70, 70(1)
Civil Procedure Code, 1908 (CPC) — Section 115, 80

**Citation :** AIR 1970 SC 287 : (1969) 2 SCC 305 : (1970) 1 SCR 585

**Hon'ble Judges :** M. Hidayatullah, C.J;G. K. Mitter, J

**Bench :** Division Bench

**Advocate :** D.N. Mukherjee, for the Appellant; B.C. Mitter and S.C. Majumdar, for the Respondent

**Final Decision :** Dismissed

## Judgement

M. Hidayatullah, C.J.—This is an appeal by special leave from the judgment and order of the High Court of Calcutta, August 20, 1964, in an application u/s 115 of the CPC, reversing the judgment of the Subordinate Judge, Howrah. The facts are as follows :

2. One Haji Abdul Karim, grandfather of respondents 2 to 4 executed a Wakf al-al-aulad on March 30, 1917. He constituted himself as the first Mutwali and named his two sons and widow as Mutwalis after his own death. The Wakf provided for the benefit of the family and after the extinction of all the family a scheme for feeding the poor. On February 14, 1956 the present appellant Ayesha Bibi filed a suit claiming 1/16th of the property as a sharer after the death of her husband Abdul Hamid. This claim was made against respondents 2 to 4 who were the Mutwalis. Ayesha Bibi joined the Commissioner of Wakfs, West Bengal as a defendant to the suit. The suit was filed in the Court of Munsif, Howrah and reliefs claimed were a declaration that the Wakf was invalid, inoperative and void and that its enrolment in the Wakf Office was wrongly done and was of no avail. She also asked for a permanent injunction restraining the Commissioner of West

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Bengal and other respondents from interfering with the possession of the property. The Commissioner of Wakfs appeared in answer to the notice of the suit and filed a written-statement on. April 4, 1956. He contended that the properties were governed by the Wakf which was valid and also that he was entitled to a notice u/s 80 of the CPC before the suit was filed. He stated that although he was entitled to a notice u/s 70(1) of the Bengal Wakfs Act, 1934 it was not necessary to add him as a defendant and he denied collusion between himself and the other defendants. He observed that the other defendants were interested in secularising the wakf property for their own selfish ends.

3. On November 15, 1957 an application for amendment of the relief against the Wakf Commissioner was made to which the Wakfs Commissioner objected. In his objections he stated that the suit was of a collusive mature as was apparent from the nature of the pleadings of the plaintiff and defendants other than himself. The petition, however, was allowed. No action was taken by the Commissioner to get that order set aside. On May 15, 1958 the parties to the suit, other than the Commissioner, filed an application of compromise and May 22, 1958 was fixed for decision. On the same day an application for striking off the name of the Commissioner from the array of the defendants was made. This was heard in the presence of the counsel for the Commissioner and he did not object to the name being struck off. As a result the name of the Commissioner was struck off as a defendant. The suit was also decreed the same day on compromise declaring the Wakf to be invalid and void and granting a perpetual injunction.

4. On June 20, 1958 the Commissioner made an application u/s 70(4) of the Act for a declaration that the decree was void as no notice was given to him u/s 70(1) of the Act. The appellant objected but on April 20, 1960 the Munsif allowed the application and declared the decree to be void. The appellant appealed to the Court of the Subordinate Judge, Howrah and the appeal was allowed. It was held that the application u/s 70(4) was incompetent as the Commissioner was present in the suit and the compromise decree was passed with the knowledge of the Commissioner and" there was no need for a fresh notice to him u/s 70(1) of the Act. The Commissioner then filed a revision u/s 115, C.P.C. and a learned single Judge of the High Court by the order, now under appeal, reversed the decision of the Subordinate Judge and restored the decree of the Munsif. The order is challenged in this appeal.

5. Before we consider the question whether the Commissioner's application u/s 70(4) was proper it is necessary to examine the scheme of the Wakf Act. The Act was passed to make provision for proper administration of Wakf properties in Bengal. It applies to all wakfs whether created before or after the commencement of the Act, any property of which is situated in Bengal. By Chapter II a Wakf Board is constituted and a whole-time Officer called the Commissioner of Wakfs is appointed. Chapter III lays down the functions of the Board and the Commissioner and one of the functions u/s 34 is the protection of Wakfs-al-al-aulad. Chapter IV deals with the enrolment of the Wakfs for which

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purpose a register of Wakfs is maintained. u/s 45 the Commissioner has the power to enroll wakfs and also to amend the register from time to time. u/s 46A the decision of the Commissioner is final subject to a decision of a competent court. Chapter V deals with wakf accounts and Chapter VI with statements of wakfs-al-al-aulad. Chapter VII creates a bar to transfer of immovable property of wakfs. Chapter VIII lays down the duties of Mutwalis with other ancillary matters. Chapter IX deals with finance and Chapter X deals with judicial proceedings. Chapter XI, XII and XIII deal with amendments and appeals, rule-making power of the Provincial Government and power of the Board to make by-laws and include some miscellaneous provisions.

6. We are concerned in this case with Chapter X which deals with judicial proceedings. Section 69 in this Chapter provides as follows :

69. Bar to compromise of suit or proceeding without sanction of Court.

No suit or proceeding by or against a mutwali as such in any Court shall be compromised without the sanction of the trying Court.

Section 70 then provides :

70. Notice of suits etc., to be given to the Commissioner.

(1) In every suit or proceeding in respect of any wakf property or of a mutwalli as such except a suit or proceeding for the recovery of rent by or on behalf of the mutwalli the Court shall issue notice to the Commissioner at the cost of the party instituting such suit or proceeding.

(2) Before any wakf property is notified for sale in execution of a decree, notice shall be given by the Court to the Commissioner.

(3) Before any wakf property is notified for sale for the recovery of any revenue, cess, rates or taxes due to the Crown or to local authority notice shall be given to the Commissioner by the Court, Collector or other person under whose order the sale is notified.

(4) In the absence of a notice under Sub-section (1) any decree or order passed in the suit or proceeding shall be declared void, if the Commissioner, within one month of his coming to know of such suit or proceeding, applies to the Court in this behalf.

(5) In the absence of a notice under Sub-section (2) or Sub-section (3) the sale shall be declared void, if the Commissioner within one month of his coming to know of the sale, applies in this behalf to the Court, or other authority under whose order the sale was held.

Section 71 enables the Commissioner to join as a party in any litigation on his own application and to conduct or defend certain suits or proceedings on behalf of or in the interest of the wakf.

7. It will be noticed from the analysis of the Act that the Commissioner has a

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definite duty to perform in all suits in which the interests of the wakfs are involved. Sub-section (1) of Section 70 requires that in every suit or proceedings in respect of any wakf property the court shall issue a notice to the Commissioner. This was done here because the Commissioner was a party and a summons had gone to him from the Court. It is contended before us that this was not a notice but only a summons but we think that nothing much turns upon this distinction. The Commissioner had notice of the proceedings. He appeared in the case, defended the wakf, characterised the suit as collusive and he was fully cognizant of all that was happening in the suit. The learned Judge in the High Court also held that there was no need to give the Commissioner another notice under Sub-section (1) because the Commissioner had already notice of the suit.

8. The question, therefore, is whether in the absence of a notice under Sub-section (1) the decree could be declared to be void. Here the argument of the Commissioner in the High Court was that he had been removed from the array of the defendants and that he was, therefore, entitled to a special notice of the petition of compromise in the case. It is to be noticed that Section 70 speaks of several special notices, such as, in Sub-section (2) before any wakf property is notified for sale in execution of a decree, or in Sub-section (3) before any wakf property is notified for sale for the recovery of any revenue, cess, rates or taxes, but it does not provide for any special notice of a petition for compromise of a suit except the first notice that a suit had been filed in the court. It is significant that in Section 69 although compromise cannot be made without the sanction of the trying court, there is no mention of any special notice to the Commissioner. It follows, therefore, that the Commissioner was entitled to a notice of the suit. That may be by a letter from the court giving him this notice, or if he was made a party, by a summons to attend the court. In the present case the second course was followed and a copy of the plaint must have accompanied the summons and in our opinion this was sufficient compliance with the provisions of the first Sub-section of Section 70. It is to be recalled that the Commissioner did appear, filed a written-statement, contested the suit and also described it as a collusive action between the plaintiff and the other defendants. It is, however, surprising that when an application was made for striking off his name from the array of the defendants the Commissioner agreed to such a course. This meant that in spite of notice to him of the collusive nature of the suit he was content to remain outside the suit and to give up all his pleas about the wakf and the collusive nature of the suit. Having so acted it seems difficult to think that the decree could be declared void simply because the Commissioner had no special notice of the compromise. No special notice of compromise petition is required to be issued under the Act. He had notice of whole of the suit and of the claim made by the plaintiff in the case. He was afforded an opportunity to resist the suit and, in fact, resisted it but later gave up the fight and agreed to go out of the suit. In these circumstances, it will be wrong to hold that the decree was void because the Commissioner was not given a notice of the compromise petition.

9. Learned counsel for the Commissioner relied strongly upon a decision of the

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Madras High Court reported in State Wakf Board, Madras Vs. Abdul Azeez Sahib and Others, . in which the decision in the present case was noticed and applied for declaring a decree void. In that case the counsel for the representatives of Wakf Board, Mr. Sherfuddin was also for some time the Chairman of the Wakf Board and his knowledge of the suit was attributed to the State Wakf Board and it was held that there was notice as required by Section 57(1) of Wakf Act 1954 (29 of 1954). Section 57(1) of that Act read :

In every suit or proceeding relating to title to wakf property ... the Court shall issue notice to the Board at the cost of the party instituting such suit or proceeding.

Under Section 57(3) it was further provided :

"In the absence of a notice under Sub-section (1), any decree or order passed in the suit or proceeding shall be declared void, if the Board, within one month of its coming to know of such suit or proceeding, applies to the Court in this behalf".

Under the third Sub-section quoted here the application had to be made within one month of the knowledge of the Board and it was held by the trial Judge that knowledge of Mr. Sherfuddin was knowledge of the Board and the application was delayed. Reversing this decision the learned Chief Justice of Madras held that knowledge of Mr. Sherfuddin was not the knowledge of the Chairman of the State Wakf Board and could not be held to constitute knowledge within the section. According to the learned Chief Justice the knowledge which started limitation for the application was official knowledge in his capacity as a Chairman and not in his capacity as counsel. This case is thus distinguishable. Here the Commissioner of Wakfs Board was made a party and had full notice of the pendency of the suit and that it was a collusive suit between the plaintiff and the Mutwalis. It cannot be said, therefore, that he had no knowledge or that he had no notice of the proceedings. Indeed the learned Chief Justice of Madras while relying upon the decision in the present appeal also said that the facts of the two cases were quite different and the main point involved was also different. He only relied upon a passage that in the judgment of the learned Judge of the Calcutta High Court the private knowledge of the Commissioner did not exonerate the court from its obligation to give notice to the Board. There is no question here of any private knowledge. The knowledge was provided by the summons to the Commissioner and he did appear in the case. In the other case there was no notice whatever from the court, nor even a summons and it is thus clearly distinguishable.

10. The learned Counsel further relied upon Muzafar Ahmed v. Indra Kumar Das and Ors. 77 C.L.J.159 In that case the Commissioner was sent a notice but was not made a party. The suit was dismissed. In the appeal that followed the Commissioner was not made a party and no notice of appeal was served or him. The appeal was allowed. In the second appeal a ground was taken that the appeal below was incompetent as there was no notice to the Commissioner. Notice of the second appeal was, however, issued to the Commissioner. The

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decree was held to be not void but voidable and as the Commissioner had not applied within a month, the decree was allowed to stand. The Court also held that the words 'suit or proceeding' in Section 70(4) did not include an appeal. There is much in this decision which may require careful consideration. It is sufficient to say that the decision does not support the present contention of the Commissioner.

11. Benoy Kumar Acharjee Choudhury and Ors. v. Ahimma All and Anr. 46 C.W.N.339 only lays down that u/s 70 of the Act, a notice is necessary to be served on the Commissioner in a suit in respect of wakf property even though the wakf may not be admitted. To this proposition no exception can be taken but it does not advance the case of the Commissioner.

12. On the other hand, in The Commissioner of Wakfs, Bengal v. Shahbzada Mohammed Zahangir Shah 48 C.W.N.157 it was held that although a Commissioner was entitled to a notice of a suit, u/s 70 of the Wakf Act, but if he actually contested the suit as a party-defendant, he could be treated as an intervener u/s 71, even if no notice was given to him and that the suit was not vitiated. This case supports the proposition that joining the Commissioner as a party and his actual appearance in the suit stand equal to a notice u/s 70(1).

13. None of the cases really supports the proposition now contended for before us. The language of the fourth Sub-section of Section 70 is quite clear that the Commissioner must not have knowledge previously of the suit. Where the Commissioner has knowledge of the suit he cannot claim a second knowledge as the start of limitation. In other words, his presence as a party in the suit after summons to him must be treated as a notice to him under the first Sub-section of Section 70. The decision of the Subordinate Judge was thus correct and was wrongly reversed.

14. The Commissioner attempted to raise the question of a notice u/s 80 of the CPC but that question could only arise in the original suit and not in these proceedings. In the result the judgment under appeal must be set aside and that of the Subordinate Judge, Howrah restored with costs against the Commissioner. We regret this result and only hope that some way will be found out of the difficulty created by the foolish action of the Commissioner in leaving the field clear for the compromise of the suit.

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