
(1984) 03 CAL CK 0008
In the Calcutta High Court
In Re: Md. Dawood

Date of Decision : 02-03-1984

Acts Referred:

Bengal Wakf Act, 1934 — Section 40

Citation : 88 CWN 543

Hon'ble Judges : J.N. Ray, J

Bench : Single Bench

Advocate : Ataun Nabi and Santi Ranjan Goswami, for the Appellant; B. Ghosh for the State, for the Respondent

Final Decision : Allowed

Judgement

G.N. Ray, J.—This writ petition is directed against the Order dated 31st July, 1982 since communicated by Memo No. 2645/4 dated 2nd August, 1982 passed by the Commissioner of Wakfs, West Bengal in respect of Sahebzadi Fatima Begum Wakf Estate (E.C. 4274) appointing the respondent No. 2, Muhammad Ashraf Ali, as the Mutwalli of the said Wakf Estate. The petitioner Md. Dawood Ali has contended that one Sahebzadi Fatima Begum by a registered Wakfnama dated 8th July, 1933 founded a Wakf in respect of premises No. 4, Ripon Lane, Calcutta and Touzi Nos. 151, 152 and 56 in Mouzas Arekpur, Serampore and Gohagachi in the district of 24 Pagans. By the aforesaid Wakfnama, the Wakif Fatima Begum constituted herself as the first Mutwalli and it was provided for in the said deed that after her death, Muhammad Yakub" Ali would be Mutwalli and after his death, the eldest son or in the absence of such eldest son whoever amongst the descendants of Md. Yakub Ali in the male line would be educated, religious and pious would be appointed as Mutwalli and in the absence of male descendants of the said Md. Yakub Ali, his female descendants who would be educated religious and pious would be anointed Mutwalli. If the said Yakub Ali died issueless then the cousin of the Wakif. namely. Sahebzadi Ahmedi Begum and in her absence her descendants would be anointed Mutwalli. There was also other provisions of appointing Mutwalli if Ahmedi Begum and/or her descendants would also not be available. It has also been provided in the Wakfnama that should the Mutwalli for the time being found guilty of misappropriation of Wakf

funds, misfeasance, maladministration, gross misconduct, or is found addicted to wine or company of bad women or embraces any religion other than the Hanafi School of Islamism or fails to act in accordance with the terms and conditions laid down in the Wakfnama then he or she shall be removed from the office of Mutwalli and a pious and religious person shall be appointed Mutwalli in his or her place. The said Wakf estate was enrolled in the office of the Commissioner of Wakfs, West Bengal under Enrolment Case No. 4274. After the death of the first Mutwalli Sahebzadi Fatima Begum, Muhammad Yakub Ali succeeded her to the office of Mutwalli and the said Md. Yakub Ali died in or about January, 1975. According to the scheme of succession set out in the Wakfnama, the petitioner who is the only son of Md. Yakub Ali was appointed Mutwalli in the year 1960 because his father Md. Yakub Ali had voluntarily retired from Mutwalliship. It is the case of the petitioner that after assuming the office of Mutwalli the petitioner had been managing the wakf properties strictly according to the terms and conditions laid down in the Wakfnama and the petitioner had been paying the Collectorate revenue, Municipal taxes and other incidental charges for the repair and maintenance of the Wakf properties. The petitioner had also been spending one third of the gross income from the wakf properties on charities according to the direction laid down in the Wakfnama. The petitioner contends that he is not (sic) of mis-appropriation of wakf funds, misfeasance, maladministration or gross misconduct and he is also not addicted to wine or company of bad women and he has also not embraced any other religion. Accordingly there is no occasion to remove the petitioner from the said office of Mutwalli. The petitioner also contended that some time in the year 1976, the petitioner entered into an agreement and executed a power of attorney on 1st January, 1977 in favour of Messrs. Muhammad Abdul Rahim and Wali Muhammad for the purpose of enhancing the income of wakf properties. Subsequently by an Advocate's notice dated 2nd April, 1979 and also by executing deed of revocation on 14th May, 1973, the said power of attorney was revoked by the petitioner. The petitioner also contends that during the subsistence of the power of attorney, the petitioner had spent one third of the gross income received from the wakf properties, on charities. According to the terms of the agreement the constituted Attorneys were required to pay Rs. 200/- per month to the petitioner and utilize the balance Rs. 191/- out of the total gross income of Rs. 391/- for paying Collectorate revenue, Municipal taxes and for adjusting the amount spent by them on account of addition, construction and repair of the wakf properties by way of development. The petitioner contends that for the said purpose the petitioner had to forego about Rs. 601/- per month from his maintenance allowance. The copies of the Agreement, Advocate's notice and the Deed of revocation of power of attorney have been annexed to the writ petition being marked Annexure "B" collectively.

2. The respondent No. 1, namely, the Commissioner of Wakfs, by his Memo No. 5010 dated 29th June, 1982 asked the petitioner to show cause within 15th July, 1982, as to why appointment of some other suitable person should not be made

u/s 40 of the Bengal Wakf Act, 1934. The ground for such appointment as disclosed in the said Memo of the Commissioner of Wakfs is that the petitioner had appointed Muhammad Abdur Rahim and Wali Muhammad as his constituted Attorneys. The Respondent No. 2 did not remove the petitioner from the office of Mutwalli and the petitioner contends that as no valid" ground for removal was there, no such attempt was made by the Commissioner of Wakfs. The petitioner by his letter dated 9th July, 1982 requested the Commissioner to extend time by four weeks from 15th July, 1982 to enable the petitioner to show cause, but instead of extending the said time by a purported order dated 31st July, 1982 the respondent No. 1 appointed Md. Ashraf Ali as the Mutwalli of the Wakf properties for a period of 3 years. The petitioner received the said communication by post on 6th August, 1982 and the copy of the said order of the Commissioner has been annexed to the writ petition being Annexure "E".

3. The petitioner has contended that u/s 40 of the Bengal Wakf Act, 1934, only the Board of Wakfs can pass the order and not the Commissioner of Wakfs. There is no valid delegation of such power by the Board to the Commissioner of Wakfs to make an order u/s 40 of the Bengal Wakf Act, 1934. It has also been contended by the petitioner that so long the petitioner remains the Mutwalli and is not removed from the office of Mutwalli, there cannot be any appointment of a Mutwalli in respect of the said Wakf Estate. The petitioner contends there cannot be two Mutwallis for the said Wakf Estate and in the absence of removal of petitioner by any valid order, the petitioner remains a Mutwalli even inspite of the said purported order of appointment of Respondent No. 2 as the Mutwalli of the Wakf Estate. The petitioner has also contended that in the facts of the case, no reasonable opportunity was given to the petitioner to show cause and although the petitioner asked for extension of time to show cause the said order was passed without even intimating the petitioner that no time for extension would be granted to the petitioner and without giving the petitioner any reasonable time to show cause against the proposal to appoint a mutwalli in respect of the said wakf estate. It is also the case of the petitioner that the power of attorney was revoked by the petitioner long before the date of appointment of the said respondent no. 2 as the Mutwalli of the Wakf Estate. There could not be any lawful or valid ground for appointment of a Mutwalli u/s 40 of the Bengal Wakf Act even assuming that the Commissioner incompetent pass such an order.

4. The official Mutwalli who was appointed Mutwalli for the said Wakf Estate by the impugned order has entered appearance in the instant proceeding and has filed an affidavit-in-opposition. It has been contended that the petitioner executed a General Power of Attorney in the year 1977 and appointed Md. Abdul Rahim and Wali Md. as his constituted attorneys for a period of 5 years for carrying on the management of wakf estate and the said power of attorney was renewable for a further period of 5 years. Such power of attorney was executed without the knowledge and permission of Commissioner of Wakf and the same was illegal and to the detriment to the interest of the Wakf Estate. It is also contended that the agreement in the power of attorney was made in express

violation of the conditionl of the Wakf Deed and were prejudicial to the interest of the "Wakf Estate. It is also contended that the petitioner has not been spending for religious and charitable purposes according to the directions in the Wakfnama and even after the revocation of the power of attorney, the said Messrs Md. Abdul Rahim and Wali Md. have not handed over the management of the Wake Estate to the petitioner. As a matter of fact, the petitioner has instituted a title suit being Title Suit No. 188 of 1980 in the City Civil Court at Calcutta for injunction restraining Messrs. Md. Abdul Rahim and Wali Md. from realising rent from the tenants of the suit premises, namely, the Wakf estate. The petitioner obtained an exparte order of injunction restraining the said Messrs. Abdul Rahim and Wali Md. from collecting rents from tenants, but the said Messrs. Abdul Rahim and Wali Md. who are defendant Nos. 1 and 2 in the said suit filed two applications for setting aside and / or staying the said exparte interim order of injunction and the petitioner in collusion with the said defendants had obtained an order by consent whereby the said defendants were allowed to realise the rents and pay Rs. 200/- per month to the petitioner. It is also alleged that no notice of the said suit was served on the Commissioner of Wakfs v/ho was made proforma defendant no. 3 in that suit. Another exparte order of injunction was passed in the said suit restraining the Commissioner of Wakfs from realising rents from the tenants. It is alleged by the respondent No. 2 that the said facts will show that the petitioner has not at all managed the Wakf Estate in a just and proper manner and in the facts of the case it must be held that there was a vacancy as no Mutwalli was in the management of the Wakf Estate and the Commissioner had appointed the said respondent No. 2 as Mutwalli and such appointment was (sic) legal and vana. it nas Queen contended by me respondant then by his own action the petitioner must be held to have (sic) of munwalli of the walk Estate and as there is vacancy in the once of matwain the said appointment or responaent No. 2A has been (sic) made. hence, no interference is called for by the writ court.

5. Mr. Aiaun Nabi, the learned Counsel appearing for me petitioner, has summittea that the petitioner had made an agreement and executed a general power of. attorney flavor of the said Messrs. Abdul Kanimana Waived. for the development of the walk estate but as it was found at a later stage that such continuance of the said persons as constituted attorneys was not admissible, the power of attorney was revoked. The petitioner has also instituted a suit for recovery of possession from the said persons because inspite of revocation the said persons had been interfering with the possession of the petitioner as Mutwalli. He has contended that even assuming that the petitioner was unwise in entering into such agreement and or appointing the said persons as constituted attorneys at one point of time, the petitioner had taken all possible steps for removing the said persons. Accordingly it cannot be contended that the petitioner is acting in a manner prejudicial to the interest of the wakf estate. Mr. Nabi has also contended that if the petitioner is Still found guilty for not acting properly as a mutwalli of the said Wakf Estate, there is provision for removing

the petitioner from the office of mutwalli, but so long the "petitioner continues to remain as mutwalli of the said wakf estate there cannot be any occasion to proceed on the footing that there is vacancy in (sic) 2 (sic) (sic) and a mu (sic) (sic), therefore, be appointed. (sic) (sic) that the revocation of me said power of attorney and (sic) of the said suit clearly establish that me petitioner has not vacated the once the (sic) and he is exercising Ins right as (sic) and is taking an steps necessary for me protection or the wake estate. Accordingly there cannot be any question of holing that the petitioner had voluntarily vacated the once or mutwalli, in this connection, Mr. Ataun Nabi has referred to Lecture VIII of Tagore Law Lecture delivered by Mr. Amir Ali contending inter aha that a Mutwalli cannot be appointed unless a validly appointed mutwalli is removed from the office.

6. Referring to the said Tagore Law Lecture, Mr. Ataun Nabi has also submitted that for mere misfeasance a mutwalli does not cease to hold office unless he is removed from the office of mutwalli. He has also submitted that even for an interim period, a mutwalli cannot be appointed except on due compliance of section 40 of the Bengal Wakf Act and the Board can exercise power of appointment of a mutwalli strictly in accordance with section 40. For this contention, he has referred to a decision of this Court made in the case of Huzrat Syed Shah Mustarshid Ali Al Quadari Vs. Commr. of Wakfs and Others, . He has further submitted that in any event, the petitioner had asked for time to show cause but instead of informing the petitioner the decision, if any, taken on the said prayer for extension of time to show cause, the said exparte order was passed by the Commissioner appointing the respondent no. 2 as mutwalli of the said wakf estate.

7. The learned Counsel for the respondents, has, however, submitted that in the facts of the case, it was quite apparent that the petitioner had not been discharging his duties as mutwalli on the said wakf estate and as a matter of fact he had handed over possession of the wakf properties in favour of the said two persons. In the aforesaid circumstances, it was quite proper to proceed on the footing that the petitioner had vacated the office of mutwalli and hence there was necessity to appoint a mutwalli and the respondent no. 2, the official mutwalli, had been rightly appointed by the Commissioner of wakf. After considering the respective submissions made on behalf of the respective parties, it appears to me that in the facts of the case, it cannot be held that the petitioner had voluntarily vacated the office of mutwalli by executing the said power of attorney which, as aforesaid, was also cancelled by him. In my view, the petitioner is justified in his contention that he has been acting as mutwalli all along and as a matter of fact has instituted a suit in his capacity as mutwalli against the said two persons. In my view, Mr. Ataun Nabi is also justified in his contention that without removing the petitioner from the office of mutwalli for valid reasons by a competent authority, there can be no occasion for appointment of any other mutwalli and for mere misfeasance a mutwalli does not automatically vacate his office Admittedly, the petitioner ha: not yet been removed from the office of mutwalli. Accordingly, there cannot be any occasion to appoint respondent no. 2

as mutwalli. In my view, the petitioner is also justified in his contention that in the facts of the case, no reasonable opportunity was given to the petitioner to show cause. It does not appear that the petitioner was ever informed that his prayer for extension of time would not be accepted and as such he was to show cause within a reasonable time. Even assuming that on the facts of the case, the Commissioner was entitled to pass the impugned order, such order has been passed in the instant case without giving any reasonable opportunity of being heard to the petitioner and there has been gross failure of the salutary principle of audi alteram partem. Apart from other reasons, on that score alone, the impugned order is liable to be quashed. In the aforesaid facts, the impugned order is set aside and the respondent no. 2 is restrained from acting in any manner as mutwalli of the said wakf estate. There will be no order as to costs.