

**(2023) 10 CAL CK 0035**  
**In the Calcutta High Court**  
**Case No : C.O. No. 3982 Of 2019**

Jb. Mansoob Zahedi

APPELLANT

Vs

Board Of Waqf, West Bengal & Ors

RESPONDENT

**Date of Decision :** 06-10-2023

**Acts Referred:**

Constitution Of India, 1950 — Article 227  
Wakf Act, 1995 — Section 63  
Wakf Act, 2002 — Section 3(i)  
Code of Civil Procedure, 1908 — Section 11

**Citation :** (2023) 10 CAL CK 0035

**Hon'ble Judges :** Ajoy Kumar Mukherjee, J

**Bench :** Single Bench

**Advocate :** Md. Safiullah Mondal, M.A Samad, Sundar Gopal Bhattacharyya

**Final Decision :** Dismissed

## Judgement

Ajoy Kumar Mukherjee, J

1. Petitioner herein has assailed Order no.2 dated 29.09.2019 passed by learned Waqf Tribunal in O.A no 23 of 2019.

2. The background of the present case is one Abdul Jabbar Khan and his wife Sademan Nessa of Village Kasiara, Burdwan executed a deed of waqf being no 1905 for the year 1910 and dedicated their entire properties. In the said deed of waqf the aforesaid wakifs (dedicators) directed that after their death, their third son Md. Abdus Samad would be the Mutwalli. After his death Mutwalliship would be chosen from among the heirs and successors of said Md. Abdus Sammad who would be older in age and competent to carry out the activities of the Waqf estate. After the death of Md. Abdus Sammad his son Md. Abdul Ahad became next Mutwalli of the waqf estates who on 12.06.1935 made application for enrolment of the waqf properties. The commissioner of waqf accordingly enrolled the waqf under E.C no 1154A. Said Abdul Ahad thereafter made two enrolment applications one after another on 19.01.1954 and 10.07.1954 respectively. The

enrolment application dated 10.07.1954 was admitted as accreditation while enrolment application dated 19.01.1954 was entertained with a new number being E.C 1154. Md. Abdul Ahad prior to his death executed two registered deed of appointments being deed no 7045 date 07.10.1980 and deed no 7046 dated 07.10.1980 in order to give appointment to two persons namely Jb. Meheboob Zahedi and Jb. Md. Abdul Quavi in respect of aforesaid E.C no 1154 and 1154A respectively. Petitioner's case is after the death of Abdul Ahad the Board of waqf relying upon aforesaid deed of appointment dated 7.10.1980, issued appointment letter to aforesaid Mehabub Zahadi in respect of E.C no 1154 on 12.11.1980 and further issued a separate letter of appointment to aforesaid Abdul Quavi who is the father of opposite party no 2 as Mutwalli in respect of E.C no 1154A on 13.11.1980.

3. After the death of aforesaid Mahboob Zahadi, the Board of waqf appointed his two sons as joint Mutwalis in respect of E.C no 1154 for a term of five years under Section 63 of Wakf Act, 1995. After the demise of Abdul Quavi his successor in interest i.e. opposite party No.2 became recorded Mutwalli on 02.05.2002 in respect of E.C no 1154A.

4. Opposite party no. 2 contended that after the death of Abdus Sammad his son Md. Abdul Ahad became next Mutwalli of the waqf estate and the commissioner of waqf enrolled the waqf under E.C. no 1154A admitting aforesaid Abdul Jabbar and his wife Sadamon Nessa as waqif thereof. It is further case of the opposite party no .2 that aforesaid Md Abdul Ahad being wrongly advised for the purpose of getting entire properties out of the track of vesting and to show the income and expenditure of the waqf properties distinctively made two enrolment applications and on the basis of two enrolment applications, the Board of waqf, without causing any enquiry issued a new number being E.C no 1154 though no deed of waqf or wish of the wakif in respect of appointment of Mutwalli was existing as required by law. Further case of the opposite party no. 2 is that the properties mentioned in the aforesaid two enrolment applications are the same and identical properties which originally belonged to aforesaid dedicators/waqif, Abdul Jabbar and his wife sademan Nessa. Opposite party no. 2 further contended that said Abdul Ahad again being wrongly advised executed two registered deed of appointments being deed no. 7045 dated 7.10.1980 and deed no. 7046 dated 7.10.1980 and thereby appointed Maheboob Zahedi as Mutwallis in respect of E.C no 1154.

5. Learned counsel for the opposite party no. 2 strenuously argued that both the E.C no 1154 and 1154A are issued on the identical properties donated by aforesaid Abdul Zabbar and his wife Sademan Nessa. He further contended that the deed of wakf had made specific provision for appointment of single Mutwalli, generation after generation and as such aforesaid deeds of appointments executed by Abdul Ahad is absolutely void documents. However after the death of Abdul Ahad on the basis of aforesaid deeds of appointment dated 07.10.1980, Board issued two letters of appointment one in favour of Mehabub Zahedi in

respect of E.C no 1154 and another in favour of father of opposite party No.2 herein in respect of E.C. no. 1154A.

6. Opposite party no. 2 further submitted that he made several representations before the Board contending that E.C no 1154 and EC no 1154A is a single and identical waqf estate and pursuant to such repeated reminders of opposite party , the Board of waqf ultimately admitted the wrong entry of E.C. no 1154. Opposite party no. 2 further submits that by the resolution dated 19.06.2014, Board appointed opposite party no 2 as Mutwalli of E.C. no 1154, while opposite party no. 2 has already became Mutwalli in respect of E.C. no 1154A under section 3(i) of the Wakf Act 2002 and Board also amalgamated both E.C. no. 1154A and 1154.

7. However aforesaid resolution appointing opposite party no. 2 as Mutwalli in respect of E.C.no 1154A and amalgamation of E.C. no 1154 with E.C. no 1154A was challenged by the petitioner herein by filing O.A. no 12 of 2015 but the waqf Tribunal rejected the contention of the petitioner on 16.07.2019 on contest. Inspite of rejection of prayer in aforesaid O.A. no 12 of 2015, the petitioner herein again filed O.A. no 23 of 2019, challenging same resolution dated 19.06.2014, but the learned Waqf Tribunal by the order impugned rejected O.A. no 23 of 2019 on the ground that such plea is barred by res-judicata.

8. The petitioner herein challenged the decision passed by Wakf Tribunal in O.A. no 23 of 2019 on the ground that the petitioner was earlier appointed as joint Mutwalli by the Board of Wakf, West Bengal along with his another brother of the said Wakf Estate and the opposite party no 2 has been illegally appointed as Mutwalli without removing him and without giving him an opportunity to hear. Petitioner further contended that petitioner filed representation on 19.04.2018 to the Board for Mutwalliship which was not annexed to the O.A. no. 12 of 2015 and for which O.A. no 12 of 2015 was rejected by the learned wakf Tribunal on 16.07.2019 with the observation that no representation was made by the petitioner to the Board for his Mutwalliship. Petitioner further contended that the wakf Tribunal erroneously held that O.A.no 23 of 2019 was filed by Advocate Md. Safiulla Mondal who filed the earlier O.A. no 12 of 2015 . Infact O.A. no 12 of 2015 was filed by Advocate Nilofar Begum and thereafter taking change Syed Asif Ali appeared but thereafter petitioner took change and after no objection given by him, on 25.07.2018 aforesaid Advocate Md. Sofiulla Mondal appeared on behalf of petitioner in the said case. In fact the petitioner have no knowledge about exparte appointment of Mutwalliship of opposite party no. 2 and as such he lost the opportunity to be heard and to oppose the material facts which have been suppressed. He further submitted, as his representation dated 19.04.2018 was not annexed with his application being OA no 12 of 2015, he was compelled to file the second application being O.A. no 23 of 2019 and as such second application being O.A. no 23 of 2019 is not barred by res-judicata. He further contended that the petitioner along with his elder brother were appointed joint Mutwalli by the Board on 03.04.2008 for a period of 5 years and they have

discharged there duty sincerely and honestly but without showing any reason and without hearing them, the Board had ousted them from Mutwalliship by taking illegal and arbitrary resolution dated 19.06.2014. Accordingly petitioner contended that the termination of their Mutwalliship inspite of said representation is totally illegal and the Board should consider the petitioner's aforesaid representation favourably and for which the order impugned should be set aside.

9. It is not in dispute in the present context that the Board appointed the petitioner along with his elder brother as Mutwalli on 3.4.2008 for a period of five years under section 63 of the wakf Act. Said appointment came to an end in April, 2013. Board took resolution for appointment of Respondent no 2 as Mutwalli on 19.06.2014. The petitioner admittedly had made the representation for Mutwalliship four years thereafter on 19.04.2018. Challenging the resolution passed by the Board on 19.06.2014. The petitioner also preferred O.A. no 12 of 2015 before the Wakf Tribunal and Wakf Tribunal by its order dated 16.07.2019 specifically observed that petitioners failed to establish that the wakf estate is waqf-alal-aulad or that he is descendent of waqif and came to a definite finding that the terms and condition of the committee in the resolution dated 19.06.2014 are as per law and the Tribunal did not find any illegality in the aforesaid resolution and as such the original application no 12 of 2015 filed by petitioner against the Board of wakf was dismissed on merit and the resolution dated 19.07.2014 which was confirmed on 24.07.2014 passed by Board of wakf was affirmed. No challenge was thrown against said order of dismissal by the petitioner. During admission hearing of subsequent application being O.A. no 23 of 2019, the Tribunal below refused to admit O.A. no 23 of 2019 with the observation that the said application is not maintainable being barred by res-judicata.

10. The only point for consideration herein is whether the Tribunal below was justified in rejecting petitioner application being O.A. no 23 of 2019 on the ground of res-judicata.

11. The Tribunal below while passing the impugned order made following observation

"Record shows that same Applicant Mansoob Zahedi filed O.A No. 12/2015 against the Board of Auqaf and others challenging the Resolution dated 19.06.2014 confirmed on 24.07.2014 and same was dismissed by this Tribunal on 16.07.2019 on merits. This Tribunal affirmed the Resolution dated 19.06.2014 confirmed on 24.07.2014 passed by the Board of Auqaf. It is astonishing that same applicant is challenging the same Resolution dated 19.06.2014 in this O.A. It is also noticed that during the pendency of the O.A. No. 12/2015, the Applicant made representation dated 09.04.2019 which is stated to be pending before the Board of Auqaf. The earlier O.A No. 12/2015 was filed by applicant through Advocate Md. Sofiullah Mondal and same Advocate has filed the present O.A.

The representation dated 09.04.2019 was filed by the applicant during the pendency of O.A. No. 12/2015 which was dismissed on 16.07.2019. Applicant challenges resolution dated 19.06.2014 which has already been affirmed by this Tribunal. The representation dated 09.04.2019 does not create any fresh cause of action."

12. It is not in dispute that the prayer of the petitioner in O.A. no 23 of 2019 and the prayer made in O.A. no 12 of 2015 is in connection with the impugned resolution taken by the Board on 19.06.2014. The grounds of also reveal that the petitioner is aggrieved by the said resolution as the petitioner was earlier appointed as joint Mutwalli and no opportunity was given to him before removing him from the post of Mutwalliship. In fact the prayers made in both the two applications are substantially same and the petitioner had not challenged the judgment passed in O.A. no 12 of 2015. The materials available in the record does not show that O.A. No. 23 of 2019 was filed on any different cause of action because O.A. 23 of 2019 is also based on challenging the resolution dated 19.06.2014 which was confirmed on 24.07.2014 passed by the Board of wakf in respect of E.C. no 1154 whereby the appointment of Mutwalli and the members of the mosque management and development committee was made.

13. The words used in section 11 of code of civil procedure are "directly and substantially in issue". If the matter was in issue directly and substantially in a prior litigation and decided against a party, then the decision would be res-judicata in a subsequent proceeding. Section 11 has been embodied in the Code to implement the rules of conclusiveness as evidence and bars as a plea of an issue tried in an earlier suit founded on a plaint in which the matter is directly and substantially in issue and became final. In a later suit between the same parties or their privies in a competent court to try such subsequent suit in which the issue has been directly and substantially raised and decided in the judgment and decree in the former suit, would operate as res-judicata. Since O.A. no 23 of 2019 is based on self-same cause of action challenging the resolution dated 19.06.2014 which was confirmed on 24.07.2014 passed by Board of wakif in respect of E.C.no 1154 concerning appointment of Mutwalli the Tribunal below has not committed any wrong in observing that the Second Application being O.A. no 23 of 2019 is barred by res-judicata.

14. The question as to whether the petitioner was given sufficient opportunity to hear before passing the resolution has been answered by the opposite party no 1/ board of wakif who has stated that the Board of wakif on their part had issued a general notice dated 30.07.2014 under memo no 2396 and service return came back on 18.11.2013 under D.E no. 10016 and that the Board/opposite party no.1 argued that sufficient notice was given by the Board to the petitioner who did not make any representation nor prayed for appointment as Mutwalli at that time when the appointment was made and it was sent only on 09.04.2018.

15. In view of different salutary judicial pronouncements, the scope of Judicial interference under Article 227 of the Constitution of India is well-settled. Under

Article 227 High Court cannot act as a Court of Appeal to re-appreciate evidence. High Court can interfere with the order of Tribunal only to keep the authorities within their bounds and in the cases where it results into manifest miscarriage of Justice and/or where Tribunal ignored material piece of evidence or considers some evidence which it ought not to have considered resulting into injustice. The observation of the Tribunal in the order impugned that petitioner challenges resolution dated 19.06.2014 which has already been affirmed by the Tribunal and that the representation dated 09.04.2019 does not create any fresh cause of action, is neither illegal nor irrational nor suffers from procedural impropriety and as such I find nothing to interfere with the order impugned.

16. C.O. 3982 of 2019 is thus dismissed.

Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.