

(1995) 01 CAL CK 0044
In the Calcutta High Court
Case No : C.O. No. 9242 (W) of 1992

Kutubuddin Ahmed and Another

APPELLANT

Vs

Board of Wakfs and Others

RESPONDENT

Date of Decision : 20-01-1995

Acts Referred:

Bengal Wakf Act, 1934 — Section 12, 21, 53, 6(8), 60
Constitution of India, 1950 — Article 226
Writ Applications of Calcutta High Court Rules — Rule 12

Citation : (1995) 1 CALLT 451

Hon'ble Judges : Ruma Pal, J

Bench : Single Bench

Advocate : Sahidullah Munshi, for the Appellant; Arun Prokash Chatterjee and Q.F. Rahaman for Respondent No. 1 and 2 and Dipak Prokash Kundu and Krishnapada Pal for Respondent No. 6 and Gayetri Chowdhury and D. Murshed for Respondent No. 11, for the Respondent

Final Decision : Dismissed

Judgement

Ruma Pal, J.—The petitioners claiming to be members of the Muslim Public and "person interested in a wakf under the provisions of Section 6(5) of the Bengal Wakf Act, 1934 (hereinafter referred to as the Act), filed this writ application. The petitioners have challenged the functioning of the Board of Wakf and have prayed for inter alia the following reliefs;

"(a) A writ in the nature of Mandamus commanding the Respondents and each of them and/or their subordinates and agents to forbear from granting any permission or sanction u/s 53 of the Bengal Wakf Act, excepting leave of the court and also to forbear from acting any further on the basis of the resolutions of the Board adopted at its meeting held on 20th April, 23rd May, 27th May and 23rd May 1992 and to act in accordance with law.

(b) A writ in the nature of Mandamus restraining the respondent No. 11 from participating any further in any meeting either of the Board or of any purported

sub-committee on the basis of the appointment letter dated 1st April 1992, issued by the Deputy Secretary, Judicial Department, Government of West Bengal.

(c) A declaration that the present Board is not a properly constituted Board as envisaged u/s 8 of the Bengal Wakf Act, 1934 and a declaration that the delegation of authority to a sub-committee consisting of a few members of the Board is an improper delegation of power and such exercise of power by such sub-committee is unauthorised in law.

(d) A writ in the nature of Certiorari commanding the Respondents to certify and transmit to this Hon"ble court, all the records of the instant case so that conscionable justice may be done by quashing the illegal decision of Board so far taken and to pass suitable orders in the interest of justice after perusing the said records."

2. The petitioners have also prayed for an ad interim order of injunction restraining the Board of Wakf and its members from, according to any sanction for any transfer of any wakf property u/s 53 of the Act or under any other provisions of law and from regularising any lease sale or transfer of any kind. An interim order was passed on 26th June 1992 directing the status quo as of that date with regard to transfer of possession of any of the properties mentioned in Annexures B and C to the petition and under the jurisdiction and domain of the Board of Wakf until the disposal of the application. The order was corrected on 30th August 1993 to the extent that the properties mentioned in Annexure A and B were to be read as Annexures B and C.

3. It is the petitioners' case that there are about 16000 recorded wakf estates in West Bengal. It was alleged that the Board of Wakf which was to be constituted under the 1934 Act was misusing the power granted to it u/s 53 of that Act by according sanction to the transfer of wakf properties without any legal necessity and without making an enquiry as to the true intention behind such transfer. It was said that powers conferred on the Board and the Commissioner of Wakfs was being used for the personal gain of some interested persons resulting in destruction of the wakf estates. It was further alleged that although on paper the Board of Wakfs consisted of 11 members but in practice the functions of the Board were being discharged by five members only. Three instances of wakf properties being permitted to be transferred have been given.

4. It was also alleged that while granting permission u/s 53 of the Act, the Board of Wakfs was calling upon the purchasers to donate money to Muslim Girls hostel being set up at 43, Dilkhusa Street for needy Muslim Girls. It is said that this collection of funds which was made openly gave rise a "lurking suspicion" as to the existence of "an unholy alliance between the developers and some members of the Board". It is said that in any event the Board has no right to collect donations under the said Act.

5. It is also alleged by the petitioners that relatives of members of the Board had

been appointed to posts in connection with the girls hostels without any official advertisement. There were other appointments in the Wakf office also of relatives.

6. The next allegation against the Board was that it spent monies in excess of the amount sanctioned by the State Government. It is said that no expenditure could be made u/s 59 read with Section 61 of the Act without the permission of the State Government. Reference was made to a letter of the State Government which according to the petitioners allowed the Board to spend money only up to Rs. 15.02 Lacs out the Wakf fund whereas admittedly the Board had spent approximately Rs. 32 lacs in constructing the hostel.

7. The respondents Nos. 1 and 2 have submitted that the petitioners had no locus stand to file the writ petition and were not "person interested" within the meaning of Section 6(8) of the Act. It is also argued that the petition was not maintainable as the parties whose appointments were challenged or who would be affected by any decision on the existence of legal necessity with regard to transfer of wakf properties were not before the Court. It is also pointed out that the writ application had not been filed in a representative capacity. It is also contended that the petitioner No. 2 was a fictitious person as he could not be traced at the address stated in the Cause Title. As far as the petitioner No. 1 was concerned he was a contractor who had built a portion of the girls hostel. The petitioner No. 1 had submitted an inflated bill which had been paid to a large extent but there was a dispute regarding the balance. It is stated that the petitioner No. 1 had filed the application out of grudge.

8. It is also submitted that the petition is not maintainable as the court was being asked to supersede the Board of Wakfs. The nature of the prayers would amount to a permanent restriction on some of, the present members of the Board from, ever functioning.

9. The Counsel for the respondent No. 6 adopted the arguments of the respondents Nos. 1 and 2 and relied on various decisions to show that the petition was not maintainable. The respondent No. 6 also said that the allegations against the Board were wholly vague, without any particulars and not based on any evidence whatsoever. The respondent No. 6 has emphasised that the writ petitioner No. 1 had committed fraud upon the Court by not disclosing that he himself was involved in the building of the girls hostel in respect of which complaint had been made.

10. The respondent No. 11 adopted the arguments of the respondents Nos. 1, 2 and 6.

11. After the matter was heard in part, an application was filed by the writ petitioners for leave under Rule 12 of the Rules of this court for the grant of leave to make the application in a representative capacity with directions for publication of notices. The application was rejected by this court as being grossly belated.

12. In reply the petitioners claimed that the petitioner no. 2's address had been wrongly set out in the cause title. On the question of locus standi a submission was made that apart from the right of a member of the Muslim public to file such writ, the Court should treat the application as public interest litigation and take judicial notice- of the impropriety complained of.

13. In my view the writ petition is liable to be dismissed both on the question of maintainability as well as on merits.

14. The issues sought to be raised in the writ affect parties who are not before the court and given the supervisory nature of duties performed by the members of the Wakf Board and the Commissioner, the reliefs prayed would affect the entire community. As already noted no leave under Rule 12 of this courts Rules relating to applications under Article 226 had been asked for at the lime of initiation of the proceeding. The petition had also not been filed by way of public interest litigation. All the case cited by the petitioners in connection with public interest litigation namely, 5. S.P. Gupta Vs. President of India and Others, . People's Union for Democratic Rights and Others Vs. Union of India (UOI) and Others, , Siddha Raj Dhadda Vs. State of Rajasthan, and C.K. Rajan Vs. State of Kerala and Others, had been filed as such. The claim that the petitioners had filed a public interest litigation was made for the first time in the course of arguments in reply. Both in the writ petition, the written notes submitted as well as the arguments made in support of the petition at the opening were based on the petitioners being "persons interested in a wakf within the meaning Section 6(8) of the Act. The claim that: the petition was public interest litigation was an after thought.

15. It is one of the pre-conditions of public interest litigation that the petition must be filed bona fide. The belated claim that the writ petition fell within this exceptional category of litigation is not indicative of bona fides.

16. Another facet of the requirement of bona fides is that the litigation must be genuinely in the interest of the public and not to ventilate a private-grudge. The petitioner No. 1 failed to mention that he had in fact, carried on construction work in respect of the hostel for Muslim girls the setting up of which by the Board was one of the subject matters of complaint in the writ. It was not stated that the petitioner No. 1 had a subsisting dispute with the Board relating to the payment of the petitioner No. 1's bills for such construction work. This was a material fact which the court would have considered in assessing the petitioners' bona fides. The suppression of the fact as well as the fact itself coupled with the belated nature of the claim do not persuade me either to treat the case as public interest litigation or entertain it as such at the petitioners' instance.

17. The petitioners claim of standing on the basis of Section 6(8) of the Act is also not tenable. Section 6(8) of the Act reads as follows :

"(8) "person interested in a wakf" means a person who is entitled to receive any pecuniary or other benefit from the wakf land includes a person who has a right

to worship or to perform any religious rite in a mosque idah, imambarab, dargah, maqbara or other religious institution connected with the wakf or to participate in any religious or charitable ministrations under the wakf"

18. Admittedly there are 16,000 enrolled wakfs in West Bengal both public and private. The petitioners cannot claim to be interested in respect of all the wakfs. The definition would indicate that it is limited to persons interested in a particular wakf. The petitioners have not claimed to be connected with any particular wakf. If the definition in Section 6(8) is to be read as a general reference to all Muslims, it would not have been necessary to have worded the definition in the limited manner it has been.

19. I am, for the reasons stated, not satisfied that the petitioners have the locus standi to file the petition.

20. The writ petition is also otherwise not maintainable as parties likely to be affected by the reliefs prayed for not before this Court.

21. The primary grievance of the petitioners relates to the grant of permission by the Board of wakfs for the transfer of wakf properties under Sections 53 of the Act on the ground of legal necessity. Section 53 of the Act bars transfer of immovable properties of wakfs unless there is an express power conferred by the wakf deed. In all other cases the previous sanction of the Board is required and the Board while granting such sanction is required to satisfy itself that such transfer or agreement for transfer is for legal necessity. Neither the representatives of; all the wakfs nor the parties who may have entered into an agreement for the transfer of wakf property have been brought on record. Indeed, an application for being added as a party has been made by one Mira Basak who had entered into an agreement for taking long term lease in respect of certain wakf properties. By reason of the order of injunction passed in these proceedings although Mira Basak had deposited a huge amount of money for execution and registration of the lease. No lease could be executed in her favour by the wakf. Similarly, other wakf and purchasers may be seriously affected by the orders passed in this writ application without being made parties to the proceedings. Even assuming that the court has the power to enquire into the allegations relating to a particular wakf, the court cannot; embark upon an enquiry as to the legal necessity in respect of transfers of properties of all wakfs. The question of existence of legal necessity is one of the fact. Given the absence of any representative of any wakfs, it would be a practical impossibility for the court to undertake such an effort. The mere taking of donations by the Board does not negate the existence of legal necessity. Even the petitioners had to limit their case not to a firm statement of the absence of legal necessity but only to a "lurking suspicion".

22. The petitioners have also complained about the collection of donations from proposed purchasers for the purpose of the Muslim Girls' Hostel. There is not one instance of any of the purchasers making any complaint regarding the

donations said to have been made by them. None of such purchasers have been made parties to the proceedings.

23. The charge of nepotism made in respect of appointees to posts in the wakf office and in the Muslim Girls' Hostel has also been made behind the back of the appointees. No finding can be arrived at regarding the nature of such appointees in their absence and without giving such appointees an opportunity of being heard. In *Diwakar Shrivastava and Others Vs. State of Madhya Pradesh and Others*, , relaxation granted to certain candidates with regard to admission into certain colleges had been challenged. The appeal before the Supreme Court was dismissed on the preliminary ground that the persons likely to be affected had not been brought before the court. The court said that the validity of their appointments could not possibly be decided in their absence. On this ground, the writ application was dismissed.

24. Sweeping allegations have been made in the petition against, the members of the Board and the Commissioner without any particulars and without a shred of evidence in support; of the same. Instances of some of the allegations are set out hereinbelow :

"Your petitioners have reasons to believe that since they joined the Board, their personal assets have increased considerably which are grossly disproportionate to their declared source of income." (petition para 7A).

"It, is learned that there are cases where the mutwallis are being threatened to be removed if they do not agree to sign the Deed of Agreement for sale or lease with persons according to the choice of the said sub-committee or its members." (petition para 10).

"It is learnt that the mutwailli is receiving huge amounts of money as salami by allotting the said shop rooms and without crediting such amounts to the wakif funds and the members of the Board are pretending to be unaware of the said fact." (petition para 11).

"Presumably the developers are chosen by the said Sub-committee not out of any objective consideration but due to personal benefit obtained by the said members of the Board from the Developers." (petition para 14A).

"Your petitioners state that the abovementioned money was kept under Term Deposit Scheme and the Commissioner used to receive the quarterly interest. It is doubtful as to whether such money was properly shown in the office records". (petition para 15).

25. Not only are the allegations wholly speculative but they are also not stated with any degree of certainty. Yet all these paragraphs have been affirmed as true to the knowledge of the petitioners. The court cannot accept or act on this. As said by the learned Single Judge of this Court in *Siddhartha Bhattacharjee Vs. Municipal Corporation of Calcutta and Others*,

"I fail to understand how such sweeping allegations made, inter alia, against the Corporation Authorities can be true to the knowledge of the deponent. On this ground alone this petition is entitled to be rejected in limine."

26. The petitioners have alleged that monies were being unauthorisedly collected and disbursed by the Board. It may be that there is no express power granted to the Commissioner or the Board to raise donations but on the other hand there is no bar to the Boards receiving voluntary donations for laudable objects under the Act. Section 60 of the Act recognizes the Commissioner with the approval of the Board may borrow money for undertaking development projects. Of course, a donation is not strictly within the terms of Section 60 but the underlying principle would be applicable.

27. There is however, certainly no requirement under the Act to the effect that expenditures cannot be incurred from the wakif fund unless sanctioned by the State Government. Section 61 on which reliance is placed on the petitioners in this context reads as follows :

"61. Wakf Fund-(1) All monies received by the Board or the Commissioner for the purposes of this Act and all other monies realised under this Act shall form a fund to be called the "Wakf Fund"

(2) The State Government may make rules regulating the payment of monies into the Wakf Fund, the investment by the Board of monies received into that fund and the custody and disbursement of such monies.

(3) The Wakf Fund shall, subject to the provisions of Sub-section (2), be under the control of the Board.

28. It was conceded by the petitioners that no rules had been made by the State Government u/s 61.

(2) But Section 62 of the Act provides :-

"62. Application of Wakf Fund-(1) The Wakf Fund shall be" applied to-

(a) Payment to the State Government of cost of wakf properties u/s 2;

(b) repayment of any loan incurred u/s 60 and payment of the interest thereon;

(c) payment of the cost of audit of the Wakf Fund;

(d) payment of, the salary and allowances of the Commissioner, the Deputy Commissioner and or any person appointed u/s 20 to act as Commissioner;

(e) payment of the cost of the establishment employed by the Board; and

(g) payment of all expenses incurred by the Commissioner and Board in the performance of the duties imposed, and exercise of the powers conferred, by this Act.

(2) If any balance remains after meeting expenditure referred to in Sub-section

(1) the Board may use any portion of such balance for the preservation and protection of wakf property, and for granting financial and for constructing or repairing Mosques, or for such other purposes as it may deem fit."

29. Therefore, residuary powers have been granted to the Board to utilise monies for purposes as it may deem fit. It appears from the correspondence annexed to the affidavit-in-opposition of the respondents 1 & 2 that the Commissioner of Wakfs had applied for grant-in-aid to the Board for the Muslim Girls' Hostel. The State Government asked for particulars including the cost of construction and the amount spent by the Board out of its own sources. Thereafter by letter dated 8th July 1991, the Judicial Department wrote to the Commissioner stating :-

"With reference to your letter No. 1800 dt. 15.3.91, on the subject noted above, I am directed to say that the expenditure of Rs. 15.02 lakhs (Rupees fifteen lakhs and two thousand only) for the aforesaid purpose may be met from the Wakf Fund, in the present circumstances, it is not possible to meet the same from Government Exchequer."

30. The letter cannot, be construed as a limitation on the expenditure to be made by the Board for the purpose of the Girls' Hostel. Far from limiting the expenditure it is an expression of inability on the part of the State Government to allot any amount for such construction and that the expenditure should be met from the wakf Fund.

31. The petitioners have also raised a grievance that out of 11 members only a few members operated effectively. The active members cannot be faulted for the indifferent attitude of the other members of the Board. It is not in dispute that the active members constitute the required quorum.

32. Finally the prayers in the writ petition if, granted in effect would amount to a supersession of the Board. u/s 7 of the Wakf Act, the Board of Wakfs is established by the State Government. Initially the Board consists of the Commissioner, five members appointed by the State Government, two members elected by the West Bengal Legislative Assembly from the members of the Assembly and three Shia members also appointed by the State Government if the Wakf is created by a Shia. After the first three years of the Board being established the Board consists of a Commissioner, five members appointed by the State Government, three members elected by the West Bengal Legislative Assembly from members of the Assembly and three Shia members one of whom is required to be a Dawoodi Bohra. A member of the Board holds office for five years. All appointments are required to be notified in the Official Gazette (Sections 10 & 11). Section 12 of the Act provides for the removal of any member of the Board by the State Government by notification in the Official Gazette only in the case of four eventualities :

"if he-

(a) refuses to act or becomes incapable of acting as a member of the Board.

(b) is declared insolvent;

(c) has been or is convicted of any such offence or has been or is subjected by a Criminal Court to any such order as in the opinion of the State Government, implies that he is unfit to continue to be a member of the Board.

(d) Without excuse sufficient in the opinion of the State Government, is absent without the consent of the Board from more than three consecutive meetings of the Board."

33. None of these conditions are fulfilled in this case. The petitioners are really calling upon the Court to legislate and create fresh grounds for removal of the members of the Board.

34. The Commissioner may be removed under the provisions of Section 21. Section 21 reads as follows :

"21. Removal of the Commissioner-If at any time it appears to the State Government that the Commissioner (or the Deputy Commissioner) has shown himself to be unsuitable for his office, or has been guilty of misconduct or neglect which renders his removal expedient, it may, by notification in the Official Gazette, declare that the Commissioner or the Deputy Commissioner as the case may be, shall cease to hold such office."

35. In exercising the power of review under Article 226 the court is limited to considering whether the powers conferred on the State Governments have or have not been exercised rationally. But the State Government has not been approached by the petitioners at all with material for exercise of the powers for removal of the Commissioner.

36. For all these reasons the writ application is dismissed. All interim orders are vacated. There will be no order as to costs.