

(1969) 01 PAT CK 0022
In the Patna High Court
Case No : M.A. No. 220 of 1966

Mohammad Khoda Buksh and Others	APPELLANT
Vs	
Mohammad Ishaque and Others	RESPONDENT

Date of Decision : 21-01-1969

Acts Referred:

Bihar Wakf Act, 1947 — Section 27(3), 54

Citation : (1969) 17 BLJR 712

Hon'ble Judges : Tarkeshwar Nath, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Tarkeshwar Nath, J.—This miscellaneous appeal u/s 54 of the Bihar Waqfs Act, 1947 (Bihar Act 8 of 1948), hereinafter to be referred to as the Waqfs Act for the sake of brevity, is directed against the order of the Additional District Judge declaring the order dated 25-4-1963 of the Sadr of the Majlis as invalid and illegal and also the appointment of a Committee by the Majlis to look after the Waqf properties in question (which appointment was made by the order dated 23-6-1963 of the Majlis).

2. The facts giving rise to this appeal are these. There is a mosque of Sher Shah in mahalla Agha Hussain Ka Chowraha in Patna City and there are certain properties appertaining to the said mosque. The mosque and the lands appertaining to it were registered by an order passed by the Sadr on 19-1-1963, and it was further mentioned that Mohammad Ishaque (respondent No. 1) was registered as Mutawalli. A certificate was issued in his name on 4-3-1963 showing him as Mutawalli of the said mosque and the properties appertaining to it. It appears that Syed Mohammad Qasim was the previous Mutawalli and his name stood recorded in the last Municipal survey records in respect of the properties of the mosque. He died in the year 1946 and thereafter there was no Mutawalli of the Waqf property. Respondent No. 1, however, took possession of the properties of waqf, including a piece of land adjoining the said mosque.

Musammat Soghra, wife of Syed Mohammad Qasim, filed a petition before the waqf Board challenging the validity of the appointment of respondent No. 1 as Mutawalli, and she further alleged that respondent No. 1 was making an unauthorised construction on the piece of land adjoining the said mosque. On 8-4-1963 the residents of the said Mahalla also filed an application challenging the validity of the appointment of respondent No. 1, and some of them suggested that Mohammad Khoda Baksh (appellant No. 1) should be appointed as Mutawalli and appellants 2 to 11 should be appointed as members of the Committee to manage the waqf property. On 11-4-1963 a notice was issued to respondent No. 1 to stop the illegal construction of a house on the waqf land. One Moulvi Zamiruddin, a member of the Committee, was requested to make an enquiry, and he submitted the final report on 16-4-1963 recommending the replacement of the Mutawalli Mohammad Ishaque (respondent 1) by appellant No. 1. The first report of Moulvi Zamiruddin was dated 10-4-1963 about the construction which was being made by respondent No. 1 and that led to the issuance of the notice on 11-4-1963. As the Mutawalli (respondent No. 1) disobeyed the said order and did not stop the construction, the Sadr (respondent No. 3) passed an order on 25-4-1963 removing respondent No. 1 from Mutawalliship, as his continuance was likely to deprive the waqf of a valuable piece of land. Subsequently, this action of the Sadr was considered by the Majlis, and the Majlis passed a resolution on 23-6-1963 confirming the order of removal of respondent No. 1 which was passed by the Sadr on 25-4-1963. On the same date the Majlis constituted a Managing Committee consisting of appellants 1 to 11 as the members. Syed Mohammad Nazim, appellant No. 2 died during the pendency of this appeal and the remaining members of the Committee are now prosecuting this appeal.

3. Being aggrieved by the order of the Sadr dated 25-4-1963 and that of the Majlis dated 23-6-1963, respondents 1 and 2 filed an application before the District Judge u/s 27(3) of the Waqfs Act for setting aside those orders, and the application was registered as Miscellaneous Case No. 102 of 1963. Later on, it was transferred to the Court of the 3rd Additional District Judge, and he heard that case. By order dated 14-7-1966 he allowed the miscellaneous case registered before him as Miscellaneous Case No. 102/6 of 1963/66 and declared the order of the Sadr dated 25-4-1963 as invalid and illegal and also the appointment of a Committee by the Majlis to look after the waqf properties in question. Hence, the members of the Committee (appellants. 1 to 11) filed this miscellaneous appeal.

4. Learned Counsel for the appellants urged two points in this appeal. The first one was that the order of the Sadr passed on 25-4-1963 was affirmed by the Majlis on 23-6-1963 it was open to the Sadr to pass an order for the removal of respondent No. 1 in exercise of his powers u/s 37 of the Waqfs Act. He contended that the learned Additional District Judge had completely overlooked the provisions of Section 37 and pointed out that although there was no evidence of delegation of any of the powers of the Majlis to the Sadr, as envisaged by

Section 38, yet the order of removal was quite valid u/s 37. The second point urged by him was that it was in the interest of the waqf itself that an order was passed for the stopping of the construction and in exceptional circumstances such an order could be passed by the Sadr u/s 37. It will be convenient to deal with these points in the order in which they had been urged.

5. Section 37 reads thus:

If any necessity arises for immediate action by the Majlis, and a meeting of the Majlis cannot be arranged in time to take such action, the Sadr may exercise any power that could be exercised under this Act by the Majlis, but shall at the next meeting of the Majlis make a report in writing of the action taken by him under this section and the reasons for taking such action.

Section 38 deals with the delegation of powers of the Majlis. This section enacts:

The Majlis may delegate any of its powers and duties under this Act to the Sadr, to be exercised and performed in such special circumstances as the Majlis may specify, and may likewise withdraw any such delegation.

The two sections should be read separately, and one is not dependent on the other. Learned Counsel for respondents 1 and 2, on the other hand, contended that unless the Majlis had delegated any of its powers and duties to the Sadr, it was not open to the Sadr to pass an order, even if any necessity arose for immediate action. If this contention were to be accepted, then the provisions of Section 37 would become absolutely nugatory. It may be that the Majlis may delegate some of its powers and duties to the Sadr, but even if there was no delegation of powers, the Sadr has been given the authority to pass such orders as he may consider necessary in the circumstances of a particular case. The provisions of these two sections came to be considered by the Supreme Court in *Syed Bashiruddin Ashraf Vs. Bihar Subai Sunni Majlis-e-awqaf and Others*, . These two sections were quoted towards the end of the judgment and then their Lordships observed thus:

There is nothing to show that the powers of the Majlis were not delegated. But even if Section 38 did not apply it would appear from Section 37 that the Sadr possessed all the powers of the Majlis in an emergency and the High Court and the Additional District Judge have concurrently held that it was necessary to remove forthwith the appellant and to take away from him the property of the Waqf, particularly when he disobeyed the order of the Majlis and did not deposit the amount which the auditor found was due to the waqf. The order of the Sadr was reported to the Majlis and the Majlis also approved of it. This is hardly a ground which can be considered in this Court.

This decision clearly pointed out that the Sadr possessed all the powers of the Majlis in an emergency. There are Cogent reasons for enacting a provision like this. It may not be possible for the Majlis to call a meeting at quick intervals and before the calling of the meeting a situation may arise when the Sadr has to look

after the properties of the waqf and safeguard them. While performing such a duty he may have to pass orders so that immediate action may be taken in pursuance of that order. To meet all these emergencies, Section 37 finds place in the Waqfs Act.

6. In the present case, there can be no doubt that the Sadr had passed the order on 25-4-1963 for the removal of respondent No. 1. But then this order was considered by the Majlis on 23-6-1963. It would be proper to quote a part of that order:

The affairs of Waqf No. 1132, Shershah Mosque, and the formation of the Managing Committee for the Waqf was considered and Sadr's order No. 24, dated 25-4-63, removing Md. Ishaque alias Hajjan from the Tauliat was confirmed and in his place constitution of a Managing Committee consisting of the following gentleman as recommended by Moulvi Zamiruddin Saheb was approved.

This order obviously indicates that the affairs of the said waqf and the order of the Sadr dated 25-4-1963 were taken into consideration by the Majlis and then the said order was confirmed. Learned Counsel for respondents 1 and 2 took another objection to the effect that before the Majlis there was no report in writing of the action taken by the Sadr and as such there was no compliance with the provisions of Section 37. According to that section, the Sadr had to make a report in writing of the action taken by him. The entire order of the Sadr was before the Majlis on 23-6-1963 and the Majlis became fully aware of the action taken by the Sadr on 25-4-1963. It is difficult to appreciate as to what other report could be submitted by the Sadr. Moreover, the opening words of the order or the resolution of the Majlis quoted above indicates that the affairs of waqf were taken into consideration. I have not the least doubt in coming to the conclusion that before affirming the order of the Sadr the Majlis took into consideration the step taken by the Sadr so far as the removal of respondent No. 1 was concerned. The provisions of Section 37 were not at all considered by the learned Additional District Judge. He observed that the order removing the Mutuwalli was passed by the Sadr alone and there was no evidence on record that there was any meeting of the Majlis in which a resolution was passed to that effect. He further pointed out that no paper had been produced to show that the said power had been delegated to opposite party No. 1 (before him), that is to say, respondent No. 3. I have already indicated that apart from Section 38, Section 37 authorised the Sadr to pass orders in cases of emergency.

7. The next question for consideration is whether the order of the Sadr was expedient and whether an immediate action was necessary. Both sides adduced evidence in support of their respective cases. The appellants adduced evidence to show that respondent No. 1 was constructing a house on the land which belonged to the waqf and the said construction was an unauthorised one. They examined three witnesses on this point. Khoda Baksh (O.P.W. 2) deposed that there was a piece of land on the north of the mosque on which Ishaque

(respondent No. 1) was getting a house constructed and he was getting a room and a latrine constructed. The Mahalla people informed the Waqf Board about it. Respondent No. 1 had not obtained permission either from the Board or from the Municipal Corporation. He stated in cross-examination that one month after the appointment as Mutawalli, Hajjan Mian (which is the alias name of respondent No. 1) started getting a room and a latrine constructed thereon and he got them ready within seven days, working day and night. S.K. Nazim (O.P.W. 3) also deposed that Mohammad Ishaque started construction of a house on a piece of land adjacent to the mosque. He could, not, however, indicate in his cross-examination as to how long after his (Ishaque's) appointment as Mutawalli this construction was started by respondent No. 1. Akhtar Hussain (O.P.W. 4) also stated in his evidence that Mohammad Ishaque began to construct a house on the land of the mosque for Fahimuddin.

8. Respondent No. 1 did not choose to come to the witness-box at all, but examined three witnesses who have deposed that only boundary walls were constructed by respondent No. 1 and beyond that no house was built. These witnesses are Alimuddin, Enayet Karim and Sharafat Hussain (A.Ws. 1, 2 and 3). A.W. 3 was the Joint Secretary of the waqf and he made out that respondent No. 1 was getting the land enclosed for its protection, but when the Board asked him to stop the work he stopped it. According to A.W. 1, boundary walls about 6 feet high were constructed all round the said land and a door was fixed in the passage which was in the eastern side. The position thus is that according to the evidence adduced on behalf of respondent No. 1 as well, this much is clear that boundary walls were constructed about 6 feet in height, but it has not been shown that respondent No. 1 had obtained permission for the construction of the said boundary walls either from the Sadr or from the Majlis. The general superintendence of the waqf in question was vested in the Majlis according to Section 27(i) of the Act. This unauthorised construction was noticed, and it was brought to the notice of the Sadr. I would now refer to some portions of the order dated 254-1963 passed by the Sadr, The order mentions these facts;

Petitions were subsequently filed against this appointment (of respondent No. 1) and I requested Moulvi Zamiruddin, a member of the Majlis, to enquire into the matter and make his recommendations. He submitted an ad-interim report on 10-4-63, recommending the issue of a notice against the Mutawalli directing him to stop construction on the parti land of the Mosque as this was likely to lead to trouble.

A notice was accordingly issued on 11-4-63, to the Mutawalli directing him to stop further construction on the land. No reply to this notice by the Mutawalli, was given, but an anonymous post-card was received requesting for cancellation of this order.

Moulvi Zamiruddin submitted his final report on 16-4-63, recommending the replacement of the Mutawalli Md. Ishaque, by M. Khoda Bux. I was reluctant to act on this recommendation without myself giving both parties a hearing, but in

the meantime I received reports from different sources that the construction on waqf land had not been stopped, and it was alleged that the house was being constructed for the personal occupation of Fahimuddin with the help and connivance of the Mutawalli. The defiance of the order for stopping further consideration (construction) the hot haste with which construction was attempted to be completed without the sanction even of the Municipal Corporation, but cohere to the view that action of the Mutawalli was not bona fide, and there was substance in the allegation made against him. He was, therefore, served with another notice asking him to show cause why he should not be removed from Mutawalliship for not stopping the work on receipt of notice to do so. As it was alleged that there was danger of the house being completed in a day or two by employing a large number of labourers, reply was asked for on the next day. Next day I was contacted on the telephone by Fahimuddin who protested that the time given for showing cause was too short and asked for further time. I told him that all that the Mutawalli had to say was that he was not disobeying the order and the work had been stopped and for this purpose no extension of time was necessary. No cause has been shown by the Mutawalli yet and I was informed by the opposite party that work was still in progress.

As the Mutawalli is defying the order issued to him on behalf of the Majlis I in exercise of the powers vested in me u/s 37 of the Bihar Waqfs Act, order him to be removed as the matter is most urgent and his continuance is likely to deprive the waqf of a valuable piece of land.

9. The said order clearly indicates that the Sadr took the view that respondent No. 1 had not stopped the construction and he had committed a breach of the order passed against him on behalf of the Majlis. I am of the view that in those circumstances the Sadr rightly exercised his powers u/s 37 of the Waqfs Act. The learned Additional District Judge did not consider the evidence of O.P. Ws. 2, 3 and 4 on the point of construction and he was not right in observing that there was no material before him to hold that the house was being constructed by the applicant. There was undoubtedly a material and, if on consideration of the evidence of those three witnesses he would have disbelieved their testimony, that would have been a different matter. Whatever the position may be, I have already indicated that even the construction of the boundary walls without the permission of the Sadr and the Majlis was wholly unjustified and the Sadr was authorised to pass an order u/s 37,

10. Learned Counsel for respondents 1 and 2 pointed out that the order of removal u/s 27(2)(h)(iii) could be passed only if there was wilful disobedience of the, order of the Majlis and not of the Sadr. For dealing with this contention, the provisions of Section 37 have to be referred to once again, and the real meaning of those provisions is that it was open to the Sadr to pass such orders which the Majlis could do in a meeting if any necessity arose for any immediately action. It is true that the order to stop the construction was passed by the Sadr, but it was in the interest of the waqf, and that order must be deemed to be an order of the

Majlis (although passed by the Sadr in exercise of his powers u/s 37). That order having been disobeyed, the order of removal was passed by the Sadr which, of course, was later confirmed by the Majlis on 23-6-1963.

11. Learned Counsel for respondents 1 and 2 submitted that the show cause application was filed by respondent No. 1 on 20th April, 1963, but it was not considered by the Sadr before passing the order dated 25-4-1963. This petition has been marked Ext. 2. Respondent No. 1 has mentioned in that petition that he has not built a house. I have already referred to the evidence adduced on behalf of respondent No. 1 to the effect that he had not built a house but had constructed only the boundary walls. It is true that this petition was not noticed by the Sadr in his order dated 25-4-1963, but this does not in any way improve the case of respondent No. 1, inasmuch as the construction of the boundary walls was clearly admitted by his witnesses.

12. Learned Counsel for respondents 1 and 2 referred to the provisions of Section 55A of the Waqfs Act and contended that the order of the Majlis dated 23-6-1963 could be only enforced by any Civil Court having local jurisdiction in the same manner as a decree of such Court. In other words, according to him, the appellants could not function as members of the Committee unless the order of the Majlis had been executed in a Civil Court. The question of execution of that order does not at all arise in the present appeal and this was not even the subject-matter of any discussion before the Additional District Judge. The only question which arose either in that Court or in this Court was as to whether the orders dated 25th April, 1963 and 23rd June, 1963 passed by the Sadr and the Majlis were valid.

13. Learned Counsel for the then Sadr (respondent No. 3) supported the order passed by the Sadr on 25-4-1963 and pointed out that the said order had been passed according to the provisions of Section 37 of the Act. I have already dealt with this point in the earlier part of my judgment.

14. In the result, the appeal is allowed with costs payable by respondents 1 and 2, and the order of the learned Additional District Judge is set aside.