**(2007) 08 CAL CK 0009**

**In the Calcutta High Court**

**Case No :** Writ Petition No. 15943 (W) of 2003

Mohsin Ali and Another — APPELLANT

Vs

Wakf Tribunal and Others — RESPONDENT

**Date of Decision :** 07-08-2007

**Acts Referred:**
Waqf Act, 1995 — Section 109, 23, 24, 25, 32
West Bengal Wakf Rules, 2001 — Rule 17

**Citation :** (2007) 3 CALLT 334

**Hon'ble Judges :** Jayanta Kumar Biswas, J

**Bench :** Single Bench

**Advocate :** Amal Baran Chatterjee and K.J. Yusuf, Sardar Amjad Ali and Shukla Kabir Sinha, for the Appellant; Ashok Banerjee, Sahidullah Munshi and Nilofer Siddiqui Alam for Fourth Respondent and Amitabrata Roy and Labanya Jana, for the Respondent

**Final Decision :** Allowed

## Judgement

Jayanta Kumar Biswas, J.—The two petitioners in this writ petition dated September 29th, 2003 are aggrieved by the order of the Wakf Tribunal, West Bengal dated July 22nd, 2003 dismissing their appeal against the decision of the Board of Wakf, West Bengal dated August 19th, 2002 removing them from the office of mutawalli.

2. By a deed executed in 1937 the wakf, a wakf alal nalad was created by three persons: Haji Samsher Ali Mondal, Haji Ershad Ali Mondal and Musammat Rojan Bibi. Subsequently the deed was amended by further deeds executed in 1940 and 1962. While the first petitioner took charge of the office of the mutawalli in 1969, the second petitioner took charge thereof in 1979. In terms of the deed creating the wakf two persons were to hold the office of the mutawalli jointly.

3. The fourth respondent (Muhammad Asgar Ali) is a descendant of Hazi Samsher Ali Mondal, one of the wakifs. In 1999 he made certain complaints alleging that the affairs of the wakf were being mismanaged by the petitioners.

Certain preliminary inquiries were made and certain reports were filed. There is nothing to show that those things were done in accordance with the provisions in Section 70 of the Wakf Act, 1995. But then on the basis of the observations made in the reports, the fourth respondent, as a person interested in the wakf, filed a complaint dated August 2nd, 2001 with the board u/s 64 of the Wakf Act, 1995.

4. On receipt of the complaint the chief executive officer of the board issued a notice dated August 22nd, 2001 calling upon the petitioners to show cause why they should not be removed from the office of the mutawalli of the wakf. Allegations made against them were briefly indicated in the show cause notice. By submitting a reply dated September 13th, 2001 they denied and disputed the correctness of the allegations. Thereupon the chief executive officer by an order dated January 11th, 2002 directed an auditor of the board to make a spot inquiry for ascertaining whether the allegations made in the complaint of the fourth respondent were true and correct.

5. Accompanied by an office superintendent and the deputy chief executive officer of the board the auditor heard the petitioners in presence of eighteen persons who were present at the spot of inquiry, and submitted report dated April 17th, 2002 to the chief executive officer. Then after hearing the petitioners and the fourth respondent, the board, accepting the report, gave the final decision dated August 19th, 2002 holding that allegations made in the complaint had stood established. Feeling aggrieved the petitioners preferred the appeal u/s 64(4) to the tribunal constituted u/s 83(1) of the Wakf Act, 1995.

6. In Section 64 the grounds on which a mutawalli can be removed from his office have been mentioned. In the present case the tribunal upheld the decision of the board holding that the petitioners were liable to be removed, since they (a) had failed, without reasonable excuse, to maintain regular accounts for two consecutive years and also to submit, in two consecutive years, the yearly statement of accounts, as required by Section 46(2);and (b) continuously neglected their duties and committed misfeasance, malfeasance, misapplication of funds and breach of trust in relation to the wakf and in respect of money and other property of the wakf. These are the two grounds mentioned in Section 64(1)(g) and (i).

7. The provisions in Section 64(3) empowered the board to remove a mutawalli from his office only after holding an inquiry into the matter in the manner prescribed, and then taking a decision by a majority of not less than two thirds of its members. The provisions in Section 109 empowered the State Government to make rules providing for the manner in which any inquiry is to be held u/s 64. In exercise of that power the State Government made the West Bengal Wakf Rules, 2001 providing in its Rule 17 that for the purpose of Section 64(3) the board should cause an inquiry to be made by a member or an officer of the board duly authorized by it, and that the member or the officer, as the case might be, making the inquiry should give the mutawalli an opportunity of being heard after

 

giving at least seven days'' notice to him.

8. In the present case, there is nothing to show that the provisions in Section 64(3) and Rule 17 were followed by the board. It was its duty cast by Section 64(3) to make an inquiry into the complaint in a prescribed manner, and according to the manner prescribed by Rule 17, it was under the obligation to cause the inquiry to be made by one of its members or officers, duly authorized by it. There is nothing from which it can be said that it authorized the auditor or the persons accompanying him to make the inquiry that produced the report dated April 17th, 2002. Rather it is apparent from the report submitted by the auditor alone that the chief executive officer of the board ordered him to make the inquiry.

9. Facing with these facts, counsel for the board and the fourth respondent have said these. In view of the provisions in Sections 23, 25 and 32 the chief executive officer, the ex-officio secretary of the board, was empowered to authorize the auditor of the board to make an inquiry for satisfying the requirements of the provisions in Section 64(3) . In any case, the auditor was accompanied by the deputy chief executive officer of the board, and hence there is no reason to say that the inquiry was not made by an officer of the board. Besides, when the petitioners themselves admited that they did not submit accounts for a long period, there is no reason to interfere with the order of the tribunal and the decision of the board on the ground that a proper inquiry within the meaning of Section 64(3) was not made.

10. Counsel for the petitioners has said that the petitioners never admitted that they did not submit accounts of the wakf. He points out that according to the auditor, the board, and the tribunal, only proper accounts were not submitted by the petitioners. His further submission is that no inquiry was made even by the auditor for reaching the conclusion on the basis of evidence on record that the petitioners were guilty of misfeasance, malfeasance, misappropriation, breach of trust etc. He has made a grievance by saying that the board even did not care to supply a copy of the inquiry report to the petitioners.

11. I find that the board dealt with the matter in a very casual manner, and that the tribunal overlooked the patent illegality vitiating the decision of the board. According to the provisions in Section 64(3) and Rule 17 only the board was authorized to appoint the inquiry officer. I do not see how it can be said that the chief executive officer of the board was competent to authorize the auditor of the board to make the inquiry. The inquiry officer was appointed in gross violation of the provisions in Section 64(3) and Rule 17. The chief executive officer illegally usurped the power of the board, and that too for appointing an auditor of the board as the inquiry officer, when there is nothing to show that the auditor was either a member or an officer of the board.

12. In view of the provisions in Section 24 officers and other employees of the board form two distinctly separate categories of servants of the board. Only an

 

officer, not an employee, of the board could be authorized by the board for making the inquiry. The importance of the inquiry can be visualized from the mere fact that the legislation cast obligation of making inquiry on the board, which was to cause it to be made by one of its members, as a matter of first choice; or alternatively, only for good reasons, by one of its officers, as a matter of second choice. This should be the reasonable interpretation of the provisions in Rule 17.

13. The inquiry report submitted by the auditor was just a nullity; it was no report in the eye of law. But the board and the tribunal gave their decisions entirely on the basis of that report. Besides, a very disturbing feature of the whole thing is that not only the inquiry officer did not record any evidence, but the board also did not care to supply a copy of the inquiry report to the petitioners. No evidence was adduced and recorded to prove the allegations made against the petitioners in the complaint.

14. I do not find any merit in the arguments of counsel for the board and the fourth respondent that in the absence of any provision requiring the inquiry officer to record evidence, there was no scope to adduce and record evidence in the inquiry proceedings. The elementary requirements of a quasi-judicial inquiry, such as the present one was, are that unless the allegations are admitted by the charged person, they are to be proved by adducing oral and documentary evidence; that the witnesses concerned are to be made available for cross-examination by him; and that he is also to be given reasonable opportunity of adducing evidence in defence.

15. In the absence of a detailed procedure prescribed by the rules indicating how the inquiry was to be conducted by the inquiry officer, in my view, the principles of natural justice were to be observed. But they were observed only in total breach. In my opinion, the order of the tribunal, the decision of the board, and the inquiry report - they all collectively form a nullity. I, however, find no reason to say that the complaint was not maintainable. I think the board should be directed to make a proper inquiry into the matter. I am also of the view that during pendency of the proceedings neither the petitioners nor the fourth respondent should be permitted to hold the office of the mutawalli of the wakf.

16. When I wanted assistance regarding the question of appointment of a person to manage the affairs of the wakf, counsel for the parties drew my attention to the provisions in Section 63 empowering the board in such a case as this to appoint any person to act as the mutawalli for such period and on such conditions as it may think fit. Since I propose to remit the matter to the board for a fresh inquiry, I think it will not be unjust to make an order for ensuring due management of the affairs of the wakf till the final decision is given by the board in terms of the provisions in Section 64(3) .

For these reasons I allow this writ petition, set aside the order of the tribunal dated July 22nd, 2003, the decision of the board dated August 19th, 2002, the inquiry report dated April 17th, 2002; and give the following directions.

17. The board shall proceed afresh with the matter for making a proper inquiry in accordance with the provisions in Section 64(3) and Rule 17. It shall authorize one of its members or officers to make the inquiry. The inquiry officer shall make the inquiry after supplying the petitioners a copy of the complaint and giving them an opportunity of submitting their objection. Both the fourth respondent and the petitioners shall be given reasonable opportunity of adducing evidence in support of their respective cases, and the witnesses shall be made available for cross-examination by the party concerned. Authenticated copies of the proceedings shall be supplied to the parties.

18. After concluding the inquiry, the inquiry officer shall submit his report accompanied by the original inquiry proceedings to the board. After supplying copy of the report to the parties who shall be given opportunity of making representation, if any, and after hearing them, the board shall give the final decision in the proceedings in terms of the provisions in Section 64(3) of the Wakf Act, 1995. All the exercises shall be concluded, and the final decision shall be given by the board, within two months from the date of communication of this order to the chief executive officer of the board who shall immediately bring the matter to the notice of the board.

19. During pendency of the proceedings Ms. Shukla Kabir Sinha and Ms. Nilofer Siddiqui Alam, two advocates of this Court, shall manage the affairs of the wakf. The fourth respondent who is functioning as mutawalli in terms of decision of the board (set aside hereby) shall hand over the charge of the wakf with all papers, accounts, and funds to these two advocates who shall be entitled to draw from the income of the wakf their remuneration at the rate of 100 (one-hundred) G.Ms. per month and other travelling expenses. Their appointment shall stand terminated in terms of the final decision of the board. There shall be no order for costs in the case.

20. Urgent certified xerox copy of this order, if applied for, shall be supplied to the parties within three days from the date of receipt of the file by the section concerned; and as a special case, a copy authenticated by the A.R.(C) or A.C.O. shall be supplied to the advocates appointed to manage the affairs of the wakf.

 