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**(1981) 06 CAL CK 0014**  
**In the Calcutta High Court**  
**Case No : Appeal No's. 421 to 424 of 1975**

Mustt. Nasima Khatun and etc.

APPELLANT

Vs

State of West Bengal

RESPONDENT

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**Date of Decision :** 26-06-1981

**Acts Referred:**

Bengal Wakf Act, 1934 — Section 27(1), 59(1)  
Constitution of India, 1950 — Article 25, 26, 27

**Citation :** AIR 1981 Cal 302 : 85 CWN 952

**Hon'ble Judges :** M.M. Dutt, J;A.K. Sarkar, J

**Bench :** Division Bench

**Advocate :** T.P. Das, P. Roychowdhury and Murshed, for the Appellant;S.C. Ukil, for the Respondent

**Final Decision :** Dismissed

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## Judgement

M.M. Dutt, J.—The appellants in these four appeals have challenged the propriety of the judgment of Sabyasachi Mukharji J. whereby the learned Judge discharged the Rules Nisi issued on the respective applications of the appellants under Article 226 of the Constitution.

2. The appellants are Mutwallis of certain wakf estates claimed to be wakf-al-al-aulad. In Appeals Nos. 422 and 423 of 1975, the appellant in both these appeals, Shaikh Basir Ahmed, is the wakif in respect of two Wakfs-al-al-aulad and he constituted himself to be the first Mutwalli in respect of these two wakfs. The Commissioner of Wakf, West Bengal served demand notices u/s 59 of the Bengal Wakf, Act, 1934 as amended by the Bengal Wakf (Amendment) Act, 1973 demanding from the appellants certain amounts towards the contribution of wakf fund and education fund. The appellants being aggrieved by the said demand notices moved this Court under Article 226 of the Constitution challenging the legality of the same. In that connection, they also challenged the constitutional validity of the Bengal Wakf Act, 1934 as amended by the Bengal Wakf (Amendment) Act, 1973. It was contended by them that the provisions of the

Bengal Wakf Act, 1934 as amended by the Bengal Wakf (Amendment) Act, 1973 are violative of the provisions of the Mahomedan Law of Wakf and was not law in force when the Constitution of India came into force and, as such, the same were invalid. Further, it was contended that the provisions of the said Acts were violative of Articles 14, 19, 25, 26 and 27 of the Constitution.

3. The learned Judge overruled all the said contentions of the appellants and, as stated already, discharged the Rules Nisi. Hence these appeals.

4. Mr, T. P. Das, learned counsel appearing on behalf of the appellants has strenuously urged that the said Acts infringed the fundamental rights guaranteed by Article 25 of the Constitution. Article 25(1), inter alia, provides that all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion. The learned Judge has referred to provisions of the Bengal Wakf Act, 1934 as amended by the said Amendment Act of 1973 and held that none of the provisions of the Act interferes or infringes the fundamental rights of the Mahomedan community as guaranteed by Article 25 of the Constitution.

5. The same contention has been repeated before us on behalf of the appellants. It will, however, be seen presently that the Bengal Wakf Act, 1934 as amended does not in any way violate the provision of Article 25 of the Constitution; on the contrary, it protects and preserves the rights in matters of religion of the citizens professing Islam. In *Abul Fata Mahomed v. Russomoy Dhur Chowdhury* (1894) 22 Ind App 76 the Privy Council took the view that a disposition in favour of the settlor and the members of his family and his descendants was not a disposition for a charitable purpose which was sine qua non for the creation of a valid wakf under the Mahomedan Law. Lord Hobhouse observed;

"..... it would be doing wrong to the great law giver to suppose that he is thereby commending gifts for which the donor exercises no self-denial; in which he takes back with one hand what he appears to put away with the other; which are to form the centre of attraction for accumulations of income and further accessions of family property; which carefully protected so-called managers from being called to account; which seek to give to the donors and their family the enjoyment of property free from all liability to creditors; and which do not seek the benefit of others beyond the use of empty words."

Reference may also be made in this connection to two earlier decisions of the Privy Council in *Mahomed Ashanulla v. Amarchand Kundu* (1889) 17 Ind App 28 and *Abdul Gafur v. Nizamuddin*, (1892) 19 Ind App 170 where a somewhat similar view was expressed,

6. The decision of the Privy Council in *Abdul Fata Mahomed's* case (supra) holding that such a wakf was invalid caused considerable dissatisfaction among certain sections of the mahomedans in India as, according to them, the said decision was against the fundamental notions of Islamic Law. A representation was made to the Government of India with the result that a legislation was

passed, namely, Mussalman Wakf Validating Act, 1913. Section 3 of the said Act provides as follows :--

"3. It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes;

(a) for the maintenance and support wholly or partially of his family, children or descendants, and

(b) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated;

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognized by the Mussalman Law as a religious, pious or charitable purpose of a permanent character."

Section 4 of the said Act is as follows :--

"4, No such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf."

7. After the Mussalman Wakf Validating Act, 1913, a wakf created for the benefit of the wakif, his children and descendants is a valid wakf, provided the ultimate benefit is expressly reserved for the poor or for any other purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character. The wakfs with which we are concerned, fulfil the requirements of the Mussalman Wakf Validating Act, 1913 and, as such, they are valid wakfs. The law as laid down by the Privy Council in Abdul Fata Mahomed's case ((1894) 22 Ind App 76) (supra) was effective and binding till the enactment of Mussalman Wakf Validating Act, 1913. The interpretation given by the Privy Council of the Mahomedan law regarding purely Mahomedan disposition has not been upset by any subsequent Privy Council decision or by the Supreme Court. The law that prevailed before the Mussalman Wakf Validating Act, 1913 was, therefore, that a valid wakf could not be created exclusively for the benefit of the wakif, his children and descendants as interpreted by the Privy Council in Abul Fata Mahomed's case (supra) although, according to the members of the Muslim community, under the pure Mahomedan law a wakf exclusively for the benefit for the settlor's family and descendants was valid. Be that as it may, the Mussalman Wakf Validating Act, 1913 accepted the view of the Mahomedan community and provided for the creation of a wakf exclusively for the benefit of the settlor's family and descendants provided the ultimate gift was for some religious, pious or charitable purpose recognised by the Mahomedan Law.

8. Thus it appears that the Indian legislation has recognised the concept of wakf-al-al-aulad under the Islamic law. The Bengal Wakf Act, 1934 as amended by the

said amending Act of 1973 has also recognised the creation of such a wakf for the benefit of the wakif, his children and descendants. The Statement of Objects and Reasons in the Bill introducing the Bengal Wakf Act, 1934 is as follows:

"Muslim Law vests the Wakf property in God. The Crown exercises the rights as representative of God. It is, therefore, the duty of the Crown to preserve, protect, maintain, administer and improve the Wakf property."

The above object and reasons manifest the intention not to take away any religious right of the Muslim community, but to protect the same. The learned counsel for the appellants has not been able to lay his hands on any of the provisions of the Bengal Wakf Act, 1934 as amended by the said Amending Act of 1973 as offending the fundamental right to freedom of religion of the Muslim community as guaranteed by the provisions of the Constitution, except that our attention has been drawn to Clause (f) of Sub-section (1) of Section 27 of the Bengal Wakf Act, 1934 as infringing such fundamental right of the Muslims. Clause (f) was added to subsection (1) of Section 27 by the said Amending Act, 1973. Clause (f) of subsection (1) of Section 27 provides as follows:

"Subject to the provisions of this Act and the rules made by the State Government there under-

(1) the functions of the Commissioner shall include--

(f) creation of an Education Fund for the education of poor and meritorious boys and girls professing Islam reading in schools, colleges and vocational institutions recognised by the State Government."

It is urged on behalf of the appellants that Clause (f) infringes the fundamental right of the citizens of India professing Islam. It is submitted that in the case of wakf-al-al-aulad, the wakf shall be administered in accordance with the directions of the wakif as embodied in the deed of wakf. It is contended that Clause (f) has put an unreasonable restriction on the fundamental right of the Muslims as provided in Articles 26 and 27 of the Constitution. Article 26 provides as follows:

"Subject to public order, morality and health, every religious denomination or any section thereof shall have the right--

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law."

The administration of a religious denomination or an institution has two aspects-religious and secular. So far as the religious affairs are concerned, Clause (b) of Article 26 confers a fundamental right on every religious denomination to manage its own affairs in matters of religion. Such a right is an absolute right

and cannot be interfered with by the State, unless the denomination so exercises its right as to interfere with public order, morality or health. In this respect, every religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rights and ceremonies are essential according to the tenets of the religion they hold (Samp Singh v. State of Punjab AIR 1959 SC 860 ). The secular aspect of the administration of any religious institution envisages the administration of the property of the institution. There also a fundamental right has been conferred under Clause (d) of Article 26 of the Constitution. Every religious denomination has the fundamental right to administer its property, but only in accordance with law. The State, therefore, is entitled to make law for the purpose of regulating the administration of the property of the religious denomination. If any such law is enacted, every religious denomination has to administer its property in accordance with such law. The administration shall, however, be made by the religious denomination itself and the State has no power to wholly take away the right of any religious denomination to administer its property.

9. It is contended by the learned Counsel for the appellants that Clause (f) of Sub-section (1) of Section 27 of the Bengal Wakf Act, 1934 having provided for the creation of an education Fund for the education of poor and meritorious boys and girls professing Islam and reading in schools, colleges and vocational institutions has interfered with the fundamental right of the wakif and of the Mutwallis of a wakf, whether public or private, to manage their own affairs in matters of religion. This contention is difficult to be accepted. Education of Muslim boys and girls can, by no stretch of imagination, be said to be a matter of religion. Education of boys and girls is a secular matter unconnected with religion. The provision of Clause (f) does not interfere with the fundamental rights of the Muslim community to profess, practise and propagate religion. The creation of Education fund does not put any restriction to propagate religion among the Muslim boys and girls reading in recognized educational or vocational institutions. The primary object of the wakf or a wakf-al-al-aulad is charitable. The provision of Clause (f) is consistent with such object and, in our opinion, beyond any challenge. We are, therefore, unable to accept the contention of the appellants that Clause" (f) of Sub-section (1) of Section 27 offends against the provision of Clause (b) of Article 26. Nor does it offend against the provision of Clause (d) of that Article. It is true that the Wakifs or the Mutwallis of wakfs are entitled to administer Wakf property, but such administration must be in accordance with law and, in the instant case, one of the provisions of such a law being Clause (f) of Sub-section (1) of Section 27, the wakfs with which we are concerned are to be administered by the Wakifs or the Mutwallis, as the case may be, in accordance with Clause (f), that is to say, by contributing such amounts to the Education fund as specified in Sub-section (1) of Section 59 of the Act.

10. Let us now consider whether the provision of Clause (f) of Sub-section (1) of Section 27 violates the provision of Article 27 of the Constitution which provides

that no person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. The contributions which are required to be made to the Education fund and Wakf fund in terms of Section 59 (1) including Clause (f) of Sub-section (1) of Section 27 are for better management of the Wakf property which is consistent with the object of charitable purpose involved in every wakf, public or private. As has been stated already, there is no question of any religious affair involved in the education of poor Muslim boys and girls reading in recognized educational and vocational institutions. The payment, that is, the contribution that has to be made is not tax within the meaning of Article 27 of the Constitution, but it is a fee realized for a secular purpose for the proper management of the Wakf property and not for the promotion or maintenance of any particular religion or religious denomination. As has been observed by the Supreme Court in *Moti Das Vs. S.P. Sahi, The Special Officer In Charge of Hindu Religious Trusts and Others*, that Article 27 does not prohibit the levy of a fee for defraying of expenses of the State for regulating the secular administration of religious institutions. Article 27 is not attracted to such a case as there is no question of favouring any particular religion or religious denomination, by such imposition of fee. There is, therefore, no substance in the contention of the appellants that Clause (f) of Sub-section (1) of Section 27 of the Bengal Wakf Act, 1934 as amended by the said Amending Act of 1973 is ultra vires Article 27 of the Constitution. The learned Judge, in our opinion, is perfectly justified in holding that none of the provisions of the Act as amended by the Amending Act of 1973 is ultra vires Article 25, 26 or 27 of the Constitution. No other point has been urged on behalf of the appellants in these appeals.

11. For the reasons aforesaid, these appeals are dismissed, but in view of the facts and circumstances of the case, there will be no order as to costs.

A.K. Sarkar, J.

12. I agree.