
(1977) 08 CAL CK 0043
In the Calcutta High Court

Quader Nowaz and Others

APPELLANT

Vs

Commissioner of Wakfs and Others

RESPONDENT

Date of Decision : 12-08-1977

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : 82 CWN 503

Hon'ble Judges : Sabyasachi Mukherji, J

Bench : Single Bench

Advocate : R.C. Deb, N.C. Roy Choudhury and Hasan Imam, for the Appellant; P.K. Das and Mr. Jafar for Respondent No. 3 and D. Basu for the Commissioner of Wakfs, for the Respondent

Final Decision : Allowed

Judgement

Sabyasachi Mukherji, J.—It appears that a Wakf was created by one Janab Ashraf Ali Khan Choudhury by a registered deed dated the 9th August, 1931, and one Syed Abdus Sleik by a registered deed dated the 24th August, 1933. The said Wakf was enrolled with the office of the Commissioner of Wakf as a single wakf estate on the basis of an enrolment application in 1936. After appointment of Mutwallis, both the deeds provided that after the death of the first Mutwalli or in his absence the next Mutwalli will be as follows:

?and in his absence His Male decendant, who will be his Sajjadanashin in his place will be in the absence of that Mutwalli his male decendants who will be his Sajjadanashin in His place, will be the Mutwalli and in this manner the succeeding Sajjadanashin will be succeeding Mutwalli.

2. On or about the 6th February, 1953, the first Mutwalli Syed Shah Ershad Ali Alquadri died. He left three sons, namely, Syed Shah Mustarshid Ali Alquadri, the Respondent No. 3 herein, Syed Shah Rushid Alquadri, and Syed Shah Rashad Ali Alquadri, the Respondent No. 4 herein. The eldest son applied in or about the 13th March, 1953 to the Commissioner of Wakfs for mutation of his name as

Mutwalli in the place of his late father, the outgoing Mutwalli. His claim was that he being the surviving eldest son of the last Sajjadanashin, automatically became the Sajjadanashin and consequently the Mutwalli in place of his late father under the century-old usage, custom and practice prevailing in his Holy family. His second son, who is since dead and in support of whose claim the present application has been made, applied on the 30th December, 1953 for mutation on the ground that his father had nominated him as Sajjadanashin by Wasiatnama. The third son, namely, Syed Shah Rashad Ali Alquadri, the Respondent No. 4 herein, however did not put forward any claim for Mutwalliship. Both the contesting claimants filed documents before the Commissioner at the hearing of the matter. The second son filed documents before the Commissioner at the hearing of the matter. The second son filed an alleged Photostat copy of the alleged Wasiatnama. The first son prayed for impounding it and also for taking the photograph for examination by an expert. Thereafter, on or about the 9th November, 1953, the Commissioner of Wakfs appointed the Respondent No. 4 as a temporary Mutwalli for two years. The Respondent No. 3, being the first son and the claimant, on the 17th November, 1953, moved this Court under Article 226 of the Constitution challenging the said order u/s 40 of the Bengal Wakf Act, 1934, passed by the Commissioner. A rule nisi was issued in the Matter No. 100 of 1953. The rule nisi came up for hearing before Mr. Justice D.N. Sinha, as the learned Judge then was, and the rule was made absolute on the 11th March, 1954. (Supdt. and Remembrancer of Legal Affairs, Govt. of West Bengal Vs. Fatik Naskar,) I would have occasion to refer to certain observation in the decision of Mr. Justice Sinha in dealing with the contentions raised in this case. The Commissioner of Wakfs, however, being dissatisfied preferred an appeal. The appeal came up for hearing before Chief Justice Chakraborti and Mr. Justice Lahiri and the appeal was allowed and the judgment and decision of Mr. Justice Sinha was set aside. There was a further appeal to the Supreme Court and the Supreme Court on or about the 6th February, 1961 dismissed the appeal. The decision of the Supreme Court on or about the 6th February, 1961 dismissed the appeal. The decision of the Supreme Court will be referred to in connection with the power of the Commissioner of Wakfs to make an appointment of Mutwalli. It appears that thereafter there had been successive orders u/s 40 of Bengal Wakf Act, 1934 and by the said orders the third son, being the Respondent No. 4, herein, had from time to time been appointed temporary Mutwalli. The said orders were successively challenged by the first son, being the Respondent No. 3 herein. But before the rules could come up for hearing these became infructuous, because the impugned orders would have spent their force by efflux of time. Thereafter, on or about the 1st September in 1970, on the expiry of the immediately last appointment u/s 40 of the Bengal Wakf Act, 1934, the first son again applied to the Commissioner for mutation of his name as the Mutwalli. The Commissioner made an appointment of the third son again as the temporary Mutwalli. The first son, being the Respondent No. 3, alleged that the said appointment was made

without giving the others any hearing. He accordingly moved this Court under Article 226 of the Constitution and obtained a rule nisi in Matter No. 554 of 1970. It is stated that before Mr. Justice P.K. Banerjee, the third son appeared but none else did. The second son, who was also a claimant for the Mutwalliship though he had been made a party, did not appear. The challenge to that order was on the ground that the Commissioner could not make any order extending the life of the Mutwalli by 5 years without hearing the Petitioner in that application, being the Respondent No. 3 in the present application. Mr. Justice P. K. Banerjee by his judgment dated the 25th July, 1972 held that such an appointment could not be made without hearing the Respondent No. 3. The learned Judge observed that the order of extension of appointment in favour of the Respondent No. 4 made by the Commissioner of Wakfs must be held to be invalid as the extension had been made without giving the Petitioner therein, being the Respondent No. 4 herein, any opportunity to show cause why the Mutwalli should not be continued or terms thereof should not be extended. Mr. Justice Banerjee noted that it was contended on behalf of the Petitioner in that application before the learned Judge, that at that moment there was no impediment for recording a permanent Mutwalli. It was urged that the Respondent No. 3 in that application had not raised any dispute in so far as the appointment of the Petitioner was concerned, as Mutwalli. His Lordship in those circumstances made the rule nisi absolute and directed, inter alia, as follows:

The impugned order dated 18th September, 1970 is set aside and there will be no order as to costs. The Respondent Wakf Commissioner may however rehear the matter after giving the party an opportunity of being heard and thereafter decide about the question of the right of the parties to the Mutwalliship of the Wakf property. There will be no order as to costs.

3. It appears that thereafter between January, 1974 and March, 1975 the Commissioner of Wakf heard all the brothers at length on as many as 20 occasions and passed his order on the 22nd March, 1975. After setting out the rival contentions and the history of the case and the evidence produced before him, the Commissioner observed that u/s 47 of the Bengal Wakf Act, 1934, the Commissioner observed that u/s 47 of the Bengal Wakf Act, 1934, the Commissioner had to record the name of the incoming Mutwalli on the death of the recorded Mutwalli. He further noted that the Commissioner was to record the name of such incoming Mutwalli on "prima facie evidence" of the right or title of such incoming Mutwalli. The Commissioner recognized that he was not competent to decide whether such prima facie right or title was genuine or not. That according to the Commissioner was the function of the Court of law. Thereafter the Commissioner noted that the Mutwalliship in respect of the applicant was dependant upon the question of Sajjadanashin and that question had not been decided by any competent Court of law since 1953. Accordingly, the Commissioner had to take action on the prima facie evidence obtained so far. The Commissioner further observed that the interim Mutwalli appointed by the Commissioner since 1953 had failed to protect or preserve the interest of the

Wakf and, therefore, there was little scope for applying, according to the Commissioner, Section 40 again. He, therefore, concluded that he had to decide on prima facie evidence the right to Mutwalliship of the contending brothers, namely, the first and the second brother. He then discussed the prima facie evidence and the fact that the first brother seemed to be vitally interested in the protection of Wakf property. He noted that the second brother had not taken step to vindicate his right in any appropriate Court of law and he also noted the observations of Mr. Justice P.K. Banerjee. He held accordingly:

Under the above circumstances, on the basis of prima facie evidence as already cited and in consideration of other facts and circumstances already dealt with, and also in consideration of the above observations of Mr. Justice Banerjee, and in the best interest of the wakf estate I hold that the name of the first son Syed Shah Mustarshid Ali Al-Quaderi should be recorded as Mutwalli of the wakf estate situated at 23, Khanka Sharif Lane, Calcutta, u/s 47 read with Section 46 of the Act, in place and stead of his father Hazarat Syed Shah Ershad Ali Al-Quaderi, the recorded mutwalli since deceased.

4. The said order dated 22nd of March, 1975 is the subject matter of challenge in this application under Article 226 of the Constitution which was moved by the three Petitioners on behalf of the other disciples and members of the Quadaria order interested in the Wakf estate of Mohammed Asraf Ali Khan choudhury and Syed Abdus Salek and other Muslims interested in the said Wakf estate. A rule nisi was issued.

5. The main question is whether the impugned order passed by the commissioner is within the scope of law. In order to examine this contention it is necessary to refer to certain relevant sections of the Bengal Wakf Act, 1934. Section 6 Sub-section (6) defines Mutwalli as follows:

(6) "Mutwalli" means any person appointed either verbally or under any deed or instrument by which a wakf has been created or by a competent authority to be the mutwalli or a wakf and includes a naib mutwalli or other person appointed by a mutwalli to perform the duties of a mutwalli and save as otherwise provided in this Act, any person or committee for the time being managing or administering any wakf property as such.

Section 27 deals with general powers and duties and Sub-Section 1 of Section 27 deals with the functions of the Commissioner and Clause (a) includes the following functions of the Commissioner -

(a) Investigating (and determining) the nature and extent of wakfs and wakf property (causing whenever necessary, a survey of the wakf property), and calling from time to time for accounts, returns and information from mutwallis;

Clause (e) of Sub-section (1) of Section 27 includes the following:

(e) Generally, doing all such acts as may be necessary for the due control, maintenance and administration of wakfs;

Chapter IV of the Bengal Wakf Act, 1934 deals with the enrolment of wakf and Section 46 in the said chapter deals with the power of the Commissioner to cause enrolment of wakfs and to amend register and the said Section is in the following terms.

46. The Commissioner on his own motion or on the petition of any person interested verified in the manner referred to in Sub-section (7) of Section 44 may direct a mutwalli to apply for the enrolment of a wakf or to supply any information regarding a wakf or may himself collect such information and may cause any wakf to be enrolled or may at any time amend the register of wakfs.

6. By amendment introduced by the Bengal Wakf (Amendment) Act 1935 Section 46A was introduced and provides as follows: -

Decision if a property is wakf property or a wakf is wakf-al-al-aulad. 46A. Any question whether a particular property is wakf property or not or whether a wakf is wakf-al-al-aulad or not shall be decided by the Commissioner whose decision, unless revoked or modified by a competent Court, shall be final, and any decision of any such question made before or after the commencement of the Bengal Wakf (Amendment) Act, 1935 by a person appointed by the (State Government) under Sub-section (1) of Section 2 of this Act shall be deemed to have been made by the Commissioner under this Section.

Section 47 is to the following terms:

Notification of changes in enrolled wakfs. 47(1) In the case of any change in the management of an enrolled wakf due to the death or retirement or removal of the mutwalli, the incoming mutwalli shall forthwith, and any other person may, notify the change to the Commissioner.

(2) In the case of any other change in any of the particulars mentioned in Section 44, the mutwalli shall within (three months) from the occurrence of the change notify such change to the commissioner.

7. As mentioned hereinbefore, the main question is whether the Commissioner had the power to mutate the name of Hazarat Syed Shah Erashad Ali-Al-Quadari as mutwalli. The Commissioner has sought to exercise the powers u/s 47 read with Section 46 of the Act set out hereinbefore. In this connection it may be relevant to refer to another section, namely, Section 40 which deal with the power of appointment of mutwalli in certain cases. That power as provided in Section 40 is as follows:

Power to 40. In the case of any appoint a wakf of which there is no mutwalli or where the in certain mutwalli is not available, cases. Or the mutwalli is, in the opinion of the Board, not capable of acting as such or where there appears to the Board to be an impediment to the appointment of a mutwalli, the Board may appoint for such period and on such conditions as it thinks fit a person to act as mutwalli.

In the case of Hazrat Syed Shah Mastershid Ali Al Quadari Vs. The Commissioner of Wakfs, West Bengal, dealing with the appointment made in respect of the instant Wakf estate on the 9th November, 1953, u/s 40, the Supreme Court observed that a temporary mutwalli could be appointed either by the Board u/s 40 or if the powers and duties of the Board under that section had been delegated to the Commissioner u/s 29, then by the Commissioner. Where the Board had not delegated its functions u/s 40 to the commissioner then under Rule 2 of the Rules framed by the Government, the commissioner was bound to make his report and recommendation, and the Board alone was empowered to appoint a temporary mutwalli u/s 40. It is not necessary for me to refer in detail to the decision of the Supreme Court. It is apparent that only in the contingencies referred to u/s 40 there is power to make an appointment of mutwalli by the Board or by the Commissioner. Apart from Section 40 and the circumstances mentioned therein neither the Board nor the Commissioner can make any appointment of mutwalli. It is clear that the permanent mutwalli cannot be appointed by the Board or by the Commissioner because Section 40 does not cover a situation of that nature. There is, therefore, no question of the Commissioner having any power to make any appointment, as such, of a permanent mutwalli.

8. The next question is whether the commissioner has the power to record, where there is any dispute as to the mutwalliship or make entry consequently therein and whether, for that purpose, in a particular case where there is a dispute, the Commissioner has the power to adjudicate upon the rival rights of the claimants to the mutwalliship. Whether the right to mutate carries with it, as incidental or ancillary power, the right to adjudicate in case of a dispute over the mutwalliship is the main question that falls for consideration in this application. Whether there is such right of adjudication or not has to be decided in the light of the provisions of the section.

9. On behalf of the Respondent No. 3 it was contended that in any event the order passed by the Commissioner was an administrative order and, as such, was immune from challenge in an application under Article 226 of the Constitution. It is not in dispute that any administrative order, which is malafide nor which is passed in an arbitrary manner, can be challenged. But that is not the ground of challenge in the instant case. In support of the argument that the impugned order was an administrative order, Counsel drew my attention to the observations of Edgley, J. in the case of Prasanna Dev v. Bissessar Das 47 C.W.N. 380. There, the learned Judge observed that an *ex parte* order made by the Commissioner u/s 46 of the Bengal Wakf Act, amending the register and altering the classification of a particular wakf, merely on the representation of some interested party, was an administrative order and not a final order, as contemplated by Section 54A. Which could only be revoked or modified by a competent Court. A final order, contemplated by Section 46A, was an order passed by the Commissioner in judicial or quasi-judicial manner, after consideration of some questions within the section definitely in issue before him.

But, in my opinion, the question whether the impugned order is an administrative order is not of much significance. Because even if it is an administrative order, if the order is beyond the scope of the power given to the Commissioner and adversely affects the rights of the parties such an administrative order will be vulnerable to attack in an application under Article 226 of the Constitution. From this point of view the distinction between administrative and quasi-judicial orders has become very thin and has lost much of its edge.

10. The main question, as I have mentioned before, is the question whether the impugned order can come within the scope of the power of the Commissioner either u/s 47 or both the sections read together. Where an Act sets up machinery for investigation of certain matters and carrying out certain matters, it is the provision of the Act, which must primarily be looked into as to the scope of the powers given to different authorities under the Act. In the case of *The Queen v. Commissioner for Special Purpose of the Income Tax* 21 Q.B. 313 Lord Esher, M.R. in an illuminating and often quoted judgment at page 319 of the report observed as follows:

They (the Commissioners for General Purposes) have to determine that question, and they must determine it, as it seems to me, according to the rule I have laid down. But when they have determined it, can their decision be questioned afterwards? It will be said on the one side that their jurisdiction depends on the decisions of that question and applying a well-known formula, that they cannot give themselves jurisdiction by a wrong decision on the facts. I have considered that formula with great care and though it is correct enough for certain purposes, I think its application is often misleading. When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether the state of facts exists, and if, they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things, which may exist. The legislature may entrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of

their jurisdiction depends, and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction.

11. Therefore, in each case, it has to be found out from the scope of the section whether the legislature has vested the authority or the Tribunal with the power to adjudicate the question upon which the Tribunal or the authority can exercise its function properly. In the case of Rai Brij Raj Krishna and Another Vs. S.K. Shaw and Brothers, the Supreme Court had dealt with the question where u/s 11(1) of the Bihar Building (Lease, Rent and Eviction) Control Act, 1947, the Controller had been given power to go into certain incidental question. The said section was to the following effect:

Notwithstanding anything contained in any agreement or law to the contrary and subject to the provisions of Section 12, where the tenant is in possession of any building, he shall not be liable to be evicted therefrom, whether in execution of a decree or otherwise except -

(a) In the case of a month tenant, for non-payment of rent or breach of the conditions of the tenancy, or for subletting the building of any portion thereof without the consent of the landlord, or if he is an employee of the landlord occupying the building as an employee, of his ceasing to be any such employment.

12. There the Supreme Court observed that the Act had entrusted the Controller with a jurisdiction which included the jurisdiction to determine whether there was non-payment of rent or not, as well as the jurisdiction, on finding that there was non-payment of rent, to order eviction of a tenant. Therefore even if the Controller wrongly decided the question of non payment of rent and ordered eviction of the tenant his order could not be questioned in any civil Court. The Supreme Court observed, at page 117 of the report, that there could be no doubt that the case before the Supreme Court fell within the second category mentioned by Lord Esher, M.R. because there the Act had entrusted the Controller with jurisdiction which included the jurisdiction to determine whether there was non payment of rent as well as the jurisdiction on the finding there was non payment of rent to order eviction. The Supreme Court observed, therefore, even if the Controller might be assumed to have wrongly decided the question of non-payment of rent, that order could not be questioned in any Civil Court. In the case of Huzrat Syed Shah Mustarshid Ali Al Quadari Vs. Commr. of Wakfs and Others, which is a case relating to the instant Wakf challenging the first appointment made u/s 40, Sinha J. had dealt with the nature of the power under Sections 46 and 47 of the Act. The learned Judge referred in this connection to Sections 186 & 187 of the Calcutta Municipal Act, 1951 and observed that u/s 47 of the Bengal Wakf Act. 1934 the incoming mutwalli had to notify the death of the last mutwalli and the resulting change in the management of the Wakf. But neither such intimation nor the particulars entered in the register of Wakf created any title in mutwalli. His Lordship further observed that

such procedure was akin to the mutation of names in the Collectorate or Municipal records. It neither created nor destroyed one's title. It may incidentally be mentioned that Section 186 of the Calcutta Municipal Act, 1951 only provides for giving a notice of the transfer of the title but Section 187 deals with the entry of names of owners and occupiers in assessment book specifically by Sub-section (2). In case of controversy it empowers the Commissioner to decide the question for the purpose of that Act. The said section is in the following terms:

187. (1) Any owner or occupier may at any time apply to the Commissioner to have his name entered as owner or occupier, as the case may be, in the assessment book; and the Commissioner shall, after giving the parties interested an opportunity of being heard, unless there is sufficient reason to refuse such application, cause such name to be entered in the assessment book:

Provided that if such application is refused, the reason for refusal shall be recorded in writing:

Provided further that such application shall be disposed of within one year from the date of its receipt:

(2) Where there are gradations of owners or occupiers, and doubt exists as to who is entitled to have his name entered in the assessment book as owner or occupier of the premises, the Commissioner shall, after giving the parties interested an opportunity of being heard, determine which of the several owners or occupiers is so entitled, and his decision shall remain in force for the purposes of this Act unless and until it is set aside by the order of a competent Court.

(3) No owner or occupier whose name is not entered in the assessment book shall be entitled to object that any bill, notice of demand, warrant or other notice of any kind required by this Act to be served on the owner or occupier of any land or building, has not been made out in his own name.

13. In the case of Jugal Kishore Singri v. Bhagchas Officer, Raipur and Anr. 77 CWN 941 A. K. Sen, J. had to deal with the power of the Bhagchas Officer u/s 19B of the relevant Act. The said section reads as follows:

19B - (1) If a person owning any land terminates or causes to be terminated the cultivation of the land by a bargadar in contravention of the provisions of the Act, then any officer specially empowered by the State Government in this behalf, shall, on an application by such bargadar, by order direct:

(a) In a case where such land has not been cultivated, or has been cultivated by the owner or by any person on his behalf other than a bargadar that the land be immediately restored to the applicant and further that forty percent of any produce of the land shall be forfeited to the State Government and the remaining sixty percent of such crops shall be retained by the applicant, (b) in a case where such land has been cultivated by a new bargadar engaged by the owner, that the land be restored at the end of the cultivation season to the applicant and further

that the new bargadar shall retain fifty percent of the crops harvested before restoration and make over the remaining fifty percent of such crops to the applicant.

(2) An appeal shall lie to the Collector against any order made under Sub-section (1). (3) For purposes of Sub-section (2), Collector shall include an Additional Collector, a Deputy Collector, a Sub-Collector, a Sub-Deputy Collector, or any officer specially empowered by the State Government in this behalf.

14. The learned Judge come to the conclusion that the Bhagchas Officer had the right to decide whether the termination was of a person who was jotedar or a bargadar. Therefore, His Lordship came to the conclusion that the relationship of jotedar and bargadar had to be decided for the purpose of the Act by the Bhagchas Officer u/s 19B. In the instant case, as mentioned hereinbefore, the Commissioner has only the power u/s 46 to collect information and to amend the register of Wakf u/s 47 and it empowers the person to notify the changes. It does not empower the Commissioner to decide any thing as such. The language used in Section 46A, in my opinion, is significantly different from Section 46. Section 46A empowers the Commissioner to decide certain matters and that decisions, by the terms of Section 46A, has been made good, subject to the final decision by the Court. But Section 46 is merely an administrative and ministerial section empowering the Commissioner to take steps. It does not, in my opinion, empower the Commissioner to decide a controversy, where there are contesting claims to the mutawalliship and the entry is dependent upon the adjudication specially. This is would be clear if Section 46 and Section 47 is contrasted with Section 46A of the Act. The Commissioner in his order has observed that he was deciding the matter on prima facie evidence. There is no question, when evidence has been adduced by both sides, which are contradictory and conflicting, of deciding the matter prima facie. What the Commissioner intended to say perhaps was that he was deciding the matter tentatively and to a limited extent, tentatively, in the sense, that until the question is finally decided by a Court of Law and limited to the extent for the purpose of this section. But that power to make either such tentative or limited decision has not been given within the scope of the power u/s 46 of the Act or u/s 47 in contradistinction to Section 46A.

15. It was contended on behalf of the Respondent commissioner that he had merely recorded the fact as to who was mutwalli. I have noted the definition of mutwalli. If the commissioner had made the entry on the ground that the Respondent No. 3 was the person, for the time being, managing or administering the Wakf property, perhaps he could have exercised his power in such a manner but he had not purported to make the entry on the ground that the person, who is claiming to be entered as a mutwalli is the person who is managing or administering the Wakf property, as such. The mutwalli to be recorded means, either a person appointed either orally or by instrument or by a competent authority. In this case, among the two rival claimants, the question involved was,

who was the Sajjadanashin and whether the appointment, by the Will or Wasiatnama alleged to have been made in favour of the deceased's second son, was valid or not. In the case of such a controversy, in my opinion, there was no scope for making a prima facie entry. As I have noted, the language used by the Calcutta Municipal Act in Sub-section (2) of Section 187 is significantly different and it empowers specifically the Commissioner of Calcutta Corporation to make a decision, where there are contesting claimants. In this case, the Commissioner, being a creature of the statute, is not authorized to make that adjudication. It is true that it is well-known rule of construction that power given to an authority must be so construed as to make the exercise of the power effective and to read in the power such authority or incidental power which will make the power effective. It was contended that unless it was held that there was the power in the Commissioner to make a decision tentatively and limited for the purpose of the Act for the purpose of recording an entry, where there are rival claimants, then it would be difficult and sometimes it would be impossible for the Commissioner to exercise his power of enrolment. But the power of enrolment of the Commissioner has been given in a limited manner. The commissioner, on his own or on the petition made, may direct the mutwalli to apply for an enrolment or supply of any information and may cause a Wakf to be enrolled or amend the register. Therefore, when there is a mutwalli to do all these various acts then the power of the Commissioner becomes exercisable for amending the record but where there is no mutwalli, as such, or his title depends upon adjudication, then this power does not come into operation. Therefore, in my opinion, there is no question of this power becoming nugatory without the incidental or ancillary power.

16. Incidentally, it may be mentioned that it was contended that the Petitioner have no locus standi, as such. But in view of the decision in the case of Sree Kalimata Thakurani of Kalighat and Another Vs. Ram Chandra Chatterjee and Others, . I am unable to entertain this contention for the purpose of this application.

17. For the reasons stated, the Rule, therefore, succeeds. The order of the Commissioner is quashed. But this order will not prevent the Commissioner either from making a fresh order in accordance with the law or making any appointment u/s 40 of the Bengal Wakf Act, 1934. In the facts and circumstances of this case, parties will pay and bear their own costs.