

(1991) 05 AHC CK 0045

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 19650 of 1990

Shri Rukunuddin Khan

APPELLANT

Vs

Controller, U.P. Sunni Central Board of Waqfs, Lucknow and
others

RESPONDENT

Date of Decision : 17-05-1991

Acts Referred:

Waqf Act, 1954 — Section 42

Citation : AIR 1991 All 279

Hon'ble Judges : S.N. Sahai, J;A.N. Varma, J

Bench : Division Bench

Advocate : M.A. Qadeer, for the Appellant;

Final Decision : Allowed

Judgement

A.N. Varma, J.—The parties having exchanged affidavits, we are disposing of this petition finally with their consent in accordance with the Rules of the Court.

2. The petition is directed against an order dated 11-7-90 passed by the Controller of U.P. Sunni Central Board of Waqfs, Lucknow, rejecting the petitioner's application for setting aside of the order dated 1 -4-89 passed by the Secretary of the said Board appointing Qamaruddin, the third respondent, as the Mutwalli of the disputed waqf.

3. Admittedly, one Nizamuddin Khan, was the Mutwalli of the waqf. The petitioner is his son and claims to be his spiritual successor. Nizamuddin Khan died on 1-3-1989. On the death of Nizamuddin Khan, the petitioner alleges to have sent an application to the Waqf Board informing it of the death of his father Nizamuddin Khan and also of the fact that the petitioner had taken charge of the waqf under a registered will dated 13-11-1986 executed by Nizamuddin Khan recognizing the petitioner as his successor. Besides an application to the same effect is alleged to have been submitted before the Board by Nizamuddin's counsel on 25-3-89. It is alleged that while these applications were pending, the

Secretary of the Board passed an ex parte order on 1-4-89 without any notice or enquiry appointing Qamaruddin, the third respondent, as the Mutwalli in place of Nizamuddin Khan. This order purports to have been passed upon an application stated to have been filed by Qamaruddin, the third respondent, on 8-3-89 asserting his claim to be appointed the Mutwalli of the waqf after the death of Nizamuddin.

4. The petitioner asserts that immediately on coming to know of this order, he moved an application on 10-4-89 before the Secretary of the Board to recall his order dated 1-4-89 and also stay the operation of the same. The Secretary of the Board stayed the operation of his order dated 1-4-89 and later by an order dated 30-12-89 referred the entire matter to the Board on the ground that as there was a dispute about the office of the Mutwalli between the two individuals, he was not competent to decide the case.

5. The petitioner moved an application before the Controller of the Board to whom the case had been referred by the Secretary, for setting aside the order passed by the Secretary on 1-4-89. By the impugned order, the Controller has dismissed that application. Hence this petition.

6. Learned counsel for the petitioner contends that the Controller has wrongly assumed that there was no dispute about the office of Mutwalli and as a result assumed the jurisdiction which was not vested in him by law. The secretary, it was urged could make an appointment only if there was no dispute about the office of Mutwalli.

7. Having heard learned counsel for the parties and perused the affidavits exchanged between them, we are clearly of the opinion that the Secretary had exceeded his jurisdiction in making the appointment. A dispute as regards the office of Mutwalli had clearly arisen in view of the fact that an application had already been submitted in the proceedings which were pending before the Board for the removal of Nizamuddin Khan. Apart from the application sent by the petitioner as mentioned above directly to the Board, an application had also been submitted on 25-3-1989 by the counsel for Nizamuddin Khan before the Board informing it about the death of Nizamuddin Khan and succession of the petitioner to the office of Mutwalli. Annexure 5 to the petition purports to be a copy of that application and we have no reason to doubt the correctness of the petitioner's assertions in this behalf. In the face of this application, it was apparent the Secretary could not make any appointment of Mutwalli treating it to be a case of "no dispute". It also does not appear that the Secretary had issued any notice to anyone before making the appointment. The Controller has not rejected these assertions of the petitioner, namely, that an application had already been moved on his behalf on 25-3-1989 before the Board and that no notice had been issued by the Secretary before making the appointment. He has, however, upheld the order of the Secretary simply on the ground that according to the Secretary the date on which he appointed Qamaruddin a Mutwalli the case was undisputed. He has further observed that it is another matter whether this finding of the

Secretary is correct or not. We think that the Controller has committed a patent error of law and jurisdiction in taking the view that it was not open to him to sit in judgment over the verdict of the Secretary. The Controller has clearly taken a very restricted and narrow view of his jurisdiction.

8. It may be mentioned that no form has been prescribed in the Act as to the circumstances in which a dispute can be said to arise for the purpose of determining whether the Secretary has jurisdiction to make the appointment. A dispute can arise in diverse circumstances such as where there are two or more applications formally setting up a claim for appointment as Mutwalli. A dispute can also arise if on the record there is material to indicate that two or more persons are asserting the right to be appointed as Mutwalli. The present case relates to the latter category. A claim had already been lodged on behalf of the petitioner before the Board on the basis of the will executed by Nizamuddin Khan in favour of the petitioner. In these circumstances, it was impossible to take the position that there was no dispute in existence on 1-4-89. The Controller should, therefore, have set aside the order passed by the Secretary on 1-4-89 and examined the claims set up by the two parties on merits. As there is sufficient material on the record to indicate that a dispute for the office of Mutwalli had come into existence prior to 1-4-89 no useful purpose would be served by calling upon the Controller to decide this issue as well, namely, whether a dispute did exist on 1-4-89 so as to invest the Secretary with the power to make the appointment.

9. We should not, however, be taken to have expressed any opinion on the merits of the claim either of the petitioner or the third respondent to be appointed as Mutwalli of the waqf. That is a matter which the Controller himself will examine on merits.

10. In the result, the petition succeeds and is allowed. The impugned order dated 11-7-90 passed by the Controller, the first respondent, and, that dated 1 -4-89 passed by the Secretary of the aforesaid Board, are both quashed. The Controller of the U. P. Sunni Central Board of waqfs, Lucknow shall now dispose of the case expeditiously in accordance with law.

11. A copy of this order may be given to the learned counsel within a week on payment of the requisite charges.

12. Petition allowed.