

(1963) 11 CAL CK 0001
In the Calcutta High Court

Sk. Abdur Rahman Mutwalli	Vs	APPELLANT
The Commissioner of Wakfs		RESPONDENT

Date of Decision : 20-11-1963

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : 68 CWN 509

Hon'ble Judges : P.B. Mukharji, J

Bench : Single Bench

Advocate : Rabindra Nath Chaudhuri, for the Appellant; Bhabesh Chandra Mitter and Miss Aruna Mukherjee, for the Respondent

Final Decision : Allowed

Judgement

P.B. Mukharji, J.—This is an application by Sheikh Abdur Rahman against the Commissioner of Wakfs and the Inspector of Wakfs, West Bengal under Article 226 of the Constitution for a Writ of Mandamus and Certiorari quashing the proceeding of the Commissioner of Wakfs by which he purported to make an appointment of an Administrative Committee u/s 27(2)(iii) of the Bengal Wakf Act.

2. The petition has a long and chequered career. It was first moved before Sinha, J., who dismissed the petition in limine. Against that order of dismissal the petitioner went up in appeal where a Division Bench of this Court set aside the order of dismissal passed by Sinha, J. All these proceedings have taken seven years since their inception in June, 1956.

3. The petitioner is the present Mutwalli of a Wakf estate in the district of Maldah. This Wakf estate is duly enlisted in the office of the Commissioner of Wakfs, West Bengal. It is an ancient Wakf created by a registered deed as early as in theirs 1858 and 1864. It is expressly provided in the Wakf deed that the Wakf would be administered by the heirs and successors of the donors so long as there would be any one of them alive and that no outsiders should be allowed to

interfere with its management. This is a significant provision in the Wakf Deed. There is no denial of this fact which has been pleaded in paragraph 2 of the petition. The petitioner is the heir of the donor's line and succeeded to the office of the Mutwalli and his name was enrolled as such by the Commissioner of Wakf in the year 1949. Accounts submitted by the petitioner had been audited and passed from time to time by the Wakf authorities concerned and there is on record no complaint by the Wakf authorities about them.

4. Obviously some co-villagers are not well disposed towards this Mutwalli and they have been carrying tales to the Commissioner against this petitioner. Be that as it may what the Commissioner did was to make an enquiry without giving an opportunity to the petitioner either to have a copy of the allegations against him so that he could rebut them or to allow him to check the allegations against him and the Commissioner made the order complained against without even hearing him. The petitioner inter alia complains that this whole enquiry is illegal, ultra vires the Act, unsatisfactory, in breach of the rules, and in violation of the principles of natural justice.

5. By Order No.384/38 (E.C. No. 119) dated the 22nd April, 1955 the Commissioner of Wakfs made the following order which is now challenged before this Court:

Reference: Misc. Case No.384/38 (E.C. No. 119).

WHEREAS it is found on enquiry that the management of the Wakf estate created by late Khairullah Haji enrolled in this office under enrolment case No. 119 is not unsatisfactory:

WHEREAS it appears desirable in the best interest of the Wakf that the estate should be placed under an administrative committee to be appointed u/s 27(2) (iii) of the Bengal Wakf Act, 1934.

6. I do not hereby in exercise of the powers conferred on the Board u/s 27(2)(iii) of the Wakf Commissioner u/s 29 of the said Act, appoint a committee consisting of the marginally noted gentlemen as members for better and efficient management of the estate. Janab Asadulla Chowdhury, a member of the committee is hereby appointed President of the Committee. He is hereby directed to convene a meeting of the Committee for the election of the office bearers of the committee other than the President, within a fortnight from the receipt hereof and report compliance thereof.

7. Given under my hand and the seal of this office this the 22nd day of April, 1955.

Sd./ Illegible

Commissioner of Wakfs,

West Bengal.

Dated 27.4.55.

No. 3411-19.

Copy forwarded to As noted above for information and necessary action.

Sd./ Illegible

Commissioner of Wakfs,

West Bengal

1. Janab Asadulla Chowdhury, M.A.B.T., President, Hat Road, English Bazar, Malda.

2. Janab Ahmed Hossain, Hat Road, English Bazar, Malda

3. Sk. Rahmatullah, Mirchawk, English Bazar, Malda.

4. Haji Md. Ishaque, English Bazar, Malda.

5. Fazlur Rahman, English Bazar, Malda.

6. Md. Manick Miah, English Bazar, Malda.

7. Md. Sirajuddin, English Bazar, Malda.

8. Moulvi Md. Ismail, Fulbari, English Bazar, Malda.

9. Haji Abdus Sattar, Bansbari, English Bazar, Malda.

8. Then again on the 26th May, 1955, the Commissioner introduced two more persons to this Administrative Committee including the petitioner himself and another person called Janab Jummar Swarnakar. This order is in the following terms:

Re. Misc. Case No. 384 of 1938 (E.C. No. 119) (khainulla Haji Wakf Estate).

9. In continuation of this order dated 22.4.55 it is hereby further ordered that Janab Sk. Abdul Raman, Mutwalli of Vill. Mirchak, P.O. & Dist. Malda and Janab Jummar Swarnakar of Vill. Fulbari P.O. English Bazar, Dist. Malda be appointed members of the above noted Wakf estate committee of management.

10. Given under my hand and the seal of this office this is the 26th day of May, 1955.

Sd./- H. R. Chowdhury,

Commissioner of Wakfs,

West Bengal.

No. 3984 dated 28.5.55.

Copy forwarded to (1) Janab Sk. Abdur Rahman C/Order Aswini Kumar Das, Pleader, Judges Court, Malda for information and action.

Sd./- Illegible

Commissioner of Wakfs,

West Bengal.

11. The petitioner challenges the whole procedure and the order appointing this Administrative committee as entirely illegal and ultravires the Act and in breach of the rules framed thereunder.

12. An examination of the relevant sections of Bengal Wakfs Act and the rules made thereunder will at once make it clear that the petitioner is justified in making this objection. The Administrative committee was appointed u/s 17(2)(iii) of the Bengal Wakfs Act which says as follows:

Subject to the provisions of this Act and of the rules made by the State Government thereunder, the functions of the Board shall include constituting committees, where necessary, for the administration of Wakfs.

13. By Rule 4 of the Rules published by Notification No. 2718 Mis. 28th November 1936 it is expressly provided as follows:

If the Board is satisfied from the report of the auditor, or of the Commissioner that a Wakf other than an Wakf-al-alaulad is being systematically mismanaged or that its properties have been endangered, the Board may constitute a committee of competent local men, not more than three in number, to supervise the administration of the Mutwalli, and the latter shall be bound to carry out the directions of the committee so appointed.

14. Now the Commissioner of Wakf relies on this particular statutory provision to justify his appointment of the 9-men or rather 11-men Committee of management. If that is so then the respondent Commissioner has done something which is clearly in breach of that rule which limits the number of such a committee for administration to not more than three. But the Commissioner in this case has appointed as many as eleven. Therefore, such a committee cannot be said to be in accordance with the Act and the rules made thereunder.

15. Secondly, under Rule 4 as quoted above, the committee is expressly said to supervise the administration of the Mutwalli. It does not mean that the Mutwalli is ousted from the office by the appointment of such a committee but the very purpose of the committee is to supervise the administration of the Mutwalli who remains and the Mutwalli is compelled to carry out the direction of the committee so appointed. Therefore, it is not intended either by the Act or the rules made thereunder that the Mutwalli himself should be a member of such a committee to supervise himself. But this is exactly what has been done by the Commissioner by his second order introducing the Mutwalli also in this committee of administration. This again therefore is clearly beyond the Act and the rules made thereunder.

16. For these reasons I hold that this committee of administration is illegally

constituted and must be set aside. It is not possible for this Court to select three out of these eleven persons to make the legal number three, for that is the function of the Board or its delegate, the Commissioner of Wakf, and not of this Court. The result is that the whole of the Administrative Committee of eleven persons must be set aside. I order and direct accordingly.

17. Coming now to another objection of the petitioner, it is necessary to refer to the provisions of Section 28 of the Bengal Wakf Act which provides as follows:

The Commissioner and the Board in exercising their powers under this Act in respect of any Wakf shall act in conformity with the directions of the Wakif, the purposes of the Wakf and any usage or custom of the Wakf sanctioned by the Islamic Law:

Provided that in furtherance of the objects of the Wakf or in the interest of the beneficiaries, the Board may revise any provision in the Wakf deed which has become inoperative or impossible of execution owing to efflux of time or changed conditions.

18. The provision contained in Section 28 of the Bengal Wakf Act shows that there is a mandate upon the Commissioner and the Board to act in conformity with the directions of the Wakf. One such direction in the Wakf is clear and that is what has already been quoted, namely, that the Wakf must be administered by the heirs and successors of the donors so long as there would be any one of them alive and that no outsiders would be entitled to interfere with its management. That being the clear direction of the wakf, the Commissioner cannot do anything to go against that express direction of the wakf, unless he can bring himself within the proviso. But in the facts of this case the Commissioner cannot bring himself within the proviso. The limitations of the proviso are clear. No doubt the proviso permits the Board to revise any provision in the wakf deed but that is limited by the fact that it must be such a provision "which has become inoperative or impossible of execution owing to efflux of time or changed conditions". Now the provision in the Wakf deed in this case enjoining that only the heirs and successors of the donors should administer the estate and no outsiders should interfere with the management so long as any such heir or successor of the donor is alive, has not become inoperative nor has it become impossible of execution. The petitioner as the heir is alive. He had been enlisted as a Mutwalli with the Commissioner of Wakfs and therefore, the provision cannot be said to have become inoperative or impossible of execution within the meaning of proviso to Section 28 of the Bengal Wakf Act. The efflux of time or changed condition cannot apply to this case because neither by efflux of time for changed condition this particular provision of Wakf has become impossible of execution or inoperative. It was faintly argued before this Court that the present Mutwalli was an illiterate person but illiteracy is not "inoperative or impossible of execution" within the meaning of Section 28 of the Bengal Wakf Act nor was it so to begin with because he was duly enlisted and allowed to act as Mutwalli by the Commissioner so long in spite of his alleged illiteracy. It cannot also be put

forward as an excuse because it has not been said whether each one of these eleven persons of the so-called Administrative committee which the Commissioner purported to appoint is literate except of course the President. The occupation or the educational qualification of the other ten persons of the Administrative Committee is not stated by the Commissioner.

19. Mr. Chowdhury appearing for the petitioner has also challenged the proceedings in the enquiry which led finally to the order appointing a committee to administration on the ground not only that they violated the Bengal Wakf Act and the rules made thereunder but also the principles of natural justice. In support of this branch of his argument he has drawn my attention to the provision of Section 32 of the Bengal Wakf Act relating to the application for enquiry or audit of accounts. He points out to the statutory provisions made thereunder that any person interested may make an application to the Commissioner supported by an affidavit to institute an inquiry relating to the administration of a wakf or for the examination and audit of the accounts of a wakf. Section 32 goes on to say that on receipt of such application and the prescribed fee and on being satisfied from facts set forth in the affidavit that there are reasonable grounds for believing that the affairs of the wakf are being mismanaged, shall take such action thereon as he thinks fit. He, therefore, says that it must be properly done on facts and there must be reasonable grounds for believing that there is mismanagement and finally, there should be a proper enquiry. For this purpose Section 33 of the Act gives powers to the Commissioner to summon witnesses and compel production of documents as provided in the Civil Procedure Code. Mr. Chowdhury therefore submits that this is a kind of quasi-judicial enquiry and not a one-sided ex parte enquiry keeping the Mutwalli completely in the dark about the allegations against him. Then Mr. Chowdhury relies on some of the rules made u/s 84 of the Act. In particular he relies on rule 1, in notification No. 2727 Mis. Dated 28th November, 1936 which provides inter alia as follows:-

On receipt of an application u/s 32 and on being satisfied from the facts set forth in the affidavit accompanying the application that there is a prima facie case for enquiry under the said section, the Commissioner may, if he thinks necessary:

(a) fix a date for the hearing of the application and cause a notice to be served on the Mutwalli or persons affected by the allegations, together with a copy of the application to appear on the date fixed, and,

(b) on the date fixed for such hearing, or any subsequent date to which the hearing may be adjourned, the Commissioner may allow an opportunity to both sides to represent their case and to adduce evidence, if necessary, and may make any further inquiries as he may consider desirable and pass such orders as he thinks fit.

20. Mr. Chowdhury argues that this rule lays down a sensible procedure for conducting the enquiry. It follows principles of natural justice. It gives an

opportunity to the Mutwalli to see the allegations and to answer them, and it also gives opportunities to all the interested parties to represent their case and to adduce evidence. Undoubtedly in the facts of this case this procedure was not followed. The petitioner-Mutwalli was never given any opportunity to answer the allegations made against him. He was never called to any hearing where he could have produced evidence. But what is said on behalf of the Commissioner is that the word used in Rule 1 above is "may" and not "must". The usual arguments have been exchanged, Mr. Chowdhury for the petitioner contending that "may" should here be construed as "must". It is not necessary to pronounce any final decision on Rule 1 to say whether "may" should be read as "must" in every case, because the order appointing the eleven men committee is bad for other reasons that I have indicated above and is in breach of the other rules. In deference however to the arguments advanced at the Bar, it is only necessary to say this that this Court on the materials present is inclined to think that the procedure laid down in Rule 1 should be followed and even if "may" is not always and necessarily "must" that word at least should mean that wherever possible the discretion involved in the word "may" should be fairly and reasonably used and the procedure laid down there should not be capriciously by-passed or departed from, because the language used is "may". Even a discretion should be properly and fairly used because discretion is not whim or caprice. In the facts of this case no reason is shown why this normal procedure was not followed in the case of an enlisted Mutwalli whose accounts were duly audited and accepted by the Commissioner without complaints.

21. For these reasons the petition must succeed. I make the Rule absolute. There will be no order as to costs.