
(1943) 01 CAL CK 0030

In the Calcutta High Court

Case No : Appeal from Appellate decree No. 462 of 1940

Sm. Badary Jahan Bibi

APPELLANT

Vs

Major Hazi Dabiruddin Ahmad and Others

RESPONDENT

Date of Decision : 26-01-1943

Acts Referred:

Citation : (1943) 01 CAL CK 0030

Judgement

Edgley, J.—In the suit out of which this appeal arises the Plaintiff sought for a declaration that a wakf which had been created by her father in 1920 was a wakf-al-al-aulad and that an order of the Commissioner of Wakfs, dated the 31st of January, 1938, whereby this wakf had been classified as a public wakf, was illegal and without jurisdiction. She further asked that it might be declared that the appointment of a committee of management for the wakf estate was illegal and she sought for a permanent injunction, restraining the Defendants from functioning as members of the committee. The lower Appellate Court did not accept the Plaintiff's contentions on the points with regard to which issues had been raised and she has, therefore, appealed to this Court. The first point raised by the learned Advocate for the Appellant is to the effect that the order made by the Commissioner of Wakfs on the 31st of January, 1938, was without jurisdiction. It appears that shortly after the Bengal Wakf Act was passed, the estate with regard to which this dispute has arisen was enrolled as a public wakf under the provisions of sec. 45 of the Act. Subsequently, the Appellant in her capacity as matwalli presented a petition to the Commissioner of Wakfs as a result of which the register was amended and the estate was enrolled as a private wakf (wakf-al-al-aulad). The order of the Commissioner on this point is dated the 28th of April, 1937. Some months later some interested persons filed another petition with reference to this matter as a result of which the entry in the register was again amended and the estate was described as a public wakf. A little later the Commissioner appointed a committee for the management of the wakf estate.

2. Dr. Sen Gupta on behalf of the Appellant contends that after making the order

dated the 28th of April, 1937, the Commissioner had become functus officio by virtue of the new sec. 46A which was inserted in the Bengal Wakf Act under the terms of the Bengal Wakf Amendment Act, 1935. His argument is to the effect that the order made by the Commissioner on the 28th of April, 1937, must be taken to be a final order which could only be revoked or modified by a competent Civil Court. From the terms of secs. 44, 45 and 4G of the Bengal Wakf Act it appears that most of the functions of the Commissioner in connection with the maintenance of the Register of Wakfs are of a purely administrative character, and under the provisions of sec. 46 the Commissioner is empowered at any time to amend the Register. Dr. Sen Gupta argues that the Commissioner's functions in this respect had been considerably curtailed by the later amendment whereby the new sec. 46A was inserted in the parent Act. The material portion of the new section reads as follows:

Any question whether a particular property is wakf property 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 * * *.

3. From the language which has been used by the Legislature in the new section it seems to me that it was intended to give finality to a decision by the Commissioner with reference to the points specified in the section if any question relating thereto had been definitely put in issue before him and had been decided by him judicially or at least in a semi-judicial manner. In the case with which we are now dealing, the original entry in the Register of Wakfs had been amended by the Commissioner on two occasions namely on the 28th of April, 1937, and on the 31st of January, 1938. Admittedly, the order passed on each of these occasions was of an ex parte character and it seems to me from the facts to which the Courts below have referred in their judgments and which appear on the record of this case, that on each of these occasions the Commissioner was merely acting in an administrative capacity in connection with the maintenance of the Register of Wakfs, which he was empowered to amend at any time under the provisions of sec. 46 of the Bengal Wakf Act. In my view it cannot be said that any question was ever raised before the Commissioner within the meaning of sec. 46A, nor does it appear that he arrived at any decision on any such question. I must, therefore, hold that the new sec. 46A has no application to the facts of the present case and that the order made by the Commissioner of Wakfs on the 31st of January, 1938, was within his powers.

4. It is next argued by Dr. Sen Gupta that the wakf with which we are now dealing must in any event be regarded as a wakf-al-al-aulad, having regard to the provisions of the deed whereby this estate was created. In this connection, the learned Advocate has referred me to the provisions of sec. 6 (11) of the Bengal Wakf Act which provides that

Wakf-al-al-aulad" means a wakf under which not less than seventy-five per cent. of the net available income for the time being payable to the wakif for himself or any member of his family or descendants.

5. The learned Advocates on both sides agree that, after the payment of the requisite expenses in connection with the preservation of the estate, the annual income amounts to Rs. 1,600. From this sum a further deduction must be made of Rs. 180 on account of the annual salary of the mutwalli, which must be taken to represent the expenditure connected with the management of the estate and not a benefit intended by the wakif to accrue merely to the advantage of one of the members of his family. This leaves a net income of Rs. 1,420 and it, therefore, follows that, if this estate is to be classified as a wakf-al-al-aulad, a sum of not less than Rs. 1,065 must be available for distribution amongst the members of the wakif's family. Admittedly, an annual sum of Rs. 429-8 must be paid for certain charitable purposes. To this sum the Courts below have added a further sum of Rs. 394-5 on account of certain premia which had been paid by the estate in respect of insurance policies which have now matured and also a sum of Rs. 600 which represents the allowances formerly paid out of the estate to certain deceased members of the family. If these two sums can be legally credited to the general fund for charitable purposes, it is admitted that the balance available to the members of the wakif's family will only amount to Rs. 504 annually which would be insufficient to satisfy the test prescribed in sec. 6 (11) of the Bengal Wakf Act.

6. Dr. Sen Gupta contends, however, that it was optional for the mutwali either to pay these sums to the general fund or to use them for the benefit of the descendants of the wakif. In this connection, the learned Advocate places particular reliance on rule 3 included in the wakf deed, which after referring to the monthly allowance payable to the members of the wakif's family recites that

After their death the -matwalli for the time being with the approval of the committee will be competent to disburse the said amount under any item of this Schedule or spend it on any item of pious acts as per Schedule (ga) or apply it towards any work of improvement in regard to this estate.

7. If, however, reference be made to paragraphs 2 and 3 of the "instructions" it is quite clear that the intention of the wakif was not that the allowances of deceased members of his family should go to increase the allowances payable to the surviving members but that, on the contrary, he intended that the sums so saved should be used for the benefit of the public primarily for charitable purposes. In this connection, Instruction 2 recites--

Be it further stated that, if there is any surplus under any item in the Schedule (Una), it will be applied towards expenditure for any pious work under Schedule (ga) or be spent on the walls, etc., round the tombs in the Sadar.

8. Similarly, Instruction 3 includes the following sentence:

In other words, if there is any surplus under any item, it will be spent on the good acts specified in the Schedule (ga) or on the walls round the tombs in the Sadar and their improvements.

9. Further, it is clear from the terms of Rule 5 in the wakf deed that the wakif intended that expenditure for pious purposes should be given preference to disbursements for the maintenance of the members of the family. He says:

In other words, first the estate must be preserved, then payments for the three policies should be made in time, and thereafter the provisions for the pious acts should be given effect to and disbursements for the maintenance of the family members made.

10. It seems to me that on a proper construction of the wakf deed the money represented by the allowances formerly paid to deceased members of the family together with the sum of Rs. 394-5 representing the premia payable in respect of the matured policies must be credited to the general fund which had been constituted for charitable purposes and that this money was not available either to the Appellant or to any other member of the wakif's family. It follows, therefore, that the conditions prescribed by sec. 6 (11) of the Bengal Wakf Act have not been fulfilled and, in my view, the estate has been correctly recorded as a public wakf.

11. Finally, the learned Advocate for the Appellant faintly argued that the Commissioner had no jurisdiction to appoint a committee of management as he made no proper enquiry before doing so. The order under which the Commissioner appointed this committee is dated the 18th of February, 1938, and it seems to me that he acted fully in accordance with the provisions of sec. 27 of the Bengal Wakf Act and that there is no substance in this contention which has been put forward on behalf of the Appellant.

12. It follows that the decision of the lower Appellate Court must be affirmed and this appeal is dismissed with costs which should be paid by the Appellant personally--the hearing-fee being divided equally between the two sets of Respondents represented respectively by Mr. Md. Asir and Mr. Abul Quasem (II) Advocates. Leave to appeal under cl. 15 of the Letters Patent is refused.