

(1974) 10 CAL CK 0004
In the Calcutta High Court
Case No : Appeal No. 274 of 1974

Syed Morad Ali

APPELLANT

Vs

Syed Ahsan Ali and Another

RESPONDENT

Date of Decision : 07-10-1974

Acts Referred:

Constitution of India, 1950 — Article 204, 226
General Clauses Act, 1897 — Section 17, 20

Citation : 79 CWN 893

Hon'ble Judges : Sabyasachi Mukharji, J; R.N. Pyne, J

Bench : Division Bench

Advocate : M. Bose, for the Appellant; H. Imam and Syed M. Ali, for the Respondent

Final Decision : Dismissed

Judgement

Sabyasachi Mukharji, J.—This appeal arises out of the judgment delivered and order passed by Masud, J., on the 21st August 1974, dismissing the appellant's application under Article 226 of the Constitution. On the 5th September 1928 Syed Muslehuddin created a Wakf-al-al-Aulad by a registered document and by the said document he nominated himself as first Mutwalli and after his death his son to be the Mutwalli of the said Wakf. On the 23rd April, 1952, the said Wakif-Mutwalli Muslehuddin executed a power of attorney in favour of the appellant Syed Morad Ali. On the 11th September, 1968 Morad Ali was appointed Naib-mutawalli by the said Wakif-Mutawalli Muslehuddin subject to the terms mentioned in the said document. The appellant Morad Ali made an application on the 25th October, 1968 to the Commissioner of Wakf, West Bengal, praying that he might be appointed to perform the duties of Mutwalli u/s 40 of the Bengal Wakf Act, 1934. On the 12th December 1968, the Commissioner appointed the said appellant ad-interim Mutwalli u/s 40 of the Bengal Wakf Act, 1934, for three years from the date of the order. In view of the points involved in this appeal it would be relevant to set out the terms of the said appointment : --

Whereas the Wakf created by Jb. Syed Moslehuiddins was duly enrolled in the office of the Commissioner of wakfs, West Bengal under enrolment case No. 1945 with himself as the Mutwalli;

And whereas the said Jb. Syed Mos-lehuiddin, the recorded Mutwalli migrated to Pakistan and has been residing in that country permanently;

And whereas the recorded Mutwalli cannot come down to India for the discharge of his duties as Mutwalli and as such there is a temporary vacancy in the office of Mutwalli;

And whereas it is expedient to appoint u/s. 40 of the Bengal Wakf Act, 1934 and ad-interim Mutwalli to the above wakf;

And whereas a local enquiry revealed that Jb. Syed Murad Ali of 83, Tal-tala Lane, Calcutta-14 has been possessing the wakf properties and has been managing the affairs of the wakf in absence of the recorded Mutwalli;

And whereas it is desirable that the said Jb. Syed Murad Ali be appointed as such;

Now therefore, in exercise of the power conferred upon the Board of Wakfs, West Bengal by section 40 of the Bengal Wakf Act, 1937, and delegated to the Commissioner of Wakfs, West Bengal u/s. 29 of the said Act, I do hereby appoint the said Jb. Syed Murad Ali of 83, Taltola Lane, Calcutta-14 to be the ad-interim Mutwalli of the aforesaid Wakf for a period of 3 (three) years or until further order or orders subject to any order of a competent court of Law". On the 11th December, 1971, the appellant's appointment under the aforesaid order expired. On the 20th January, 1972, the Commissioner again appointed the appellant for a period of five years. In, the said order, after setting out the previous appointment, the Commissioner stated as follows: --

And whereas he has again applied for his appointment as ad-interim Mutwalli for a further period of 5 (five) years;

And whereas it appears that he has been managing the above Wakf estate quite efficiently and with good motives;

And whereas the recorded Wakif Mutwalli Janab Syed Moslehuiddin is still not available for all practical purposes of management of the above wakf estate;

Now therefore I do hereby in exercise of powers conferred on the Board of Wakfs, West Bengal, u/s. 40 of the Bengal Wakf Act, 1934 delegated to the Commissioner of Wakfs, West Bengal u/s. 29 of the said Act, appoint Janah Syed Murad Ali to act as ad-interim Mutwalli of the above wakf estate for a further period of 5 (five) years with immediate effect, subject to any order of a competent Court of Law.

2. On the 26th December, 1972 the Wakif-Mutwalli Syed Muslehuiddin died. On the 9th January, 1974 the respondent No. 1 who is the son of the original wakif and who is named as the Mutwalli under the registered deed of wakf-al-al-aulad

made an application for recording his name as Mutwalli in the place of his deceased father and to cancel the order appointing the appellant as the ad-interim Mutwalli. The 16th January, 1974 was the date fixed for hearing of the application dated 9th January, 1974. The 29th January 1974 was the second date fixed for hearing of the said application. On the 6th February 1974, it is stated, the respondent No. 1 made an application to the Commissioner of Wakf requesting withdrawal of the operation of the order u/s 40 of the Bengal Wakf Act, 1934 and to treat the application dated the 9th January, 1974 as completely withdrawn and superseded by the said application and requesting the Commissioner to signify his willingness to abide by the terms of the wakf deed without which it would not be useful, for the respondent No. 1 to attend the hearing on 12th February, 1974. On the 12th February, 1974 the appellant appeared before the Commissioner for hearing but the respondent No. 1 did not. On the 13th March, 1974 there was a letter which the commissioner wrote to the respondent No. 1 with reference to his application dated the 6th February, 1974 fixing 29th March, 1974 at 2 p.m. with a copy to the appellant annexing a copy of the application of respondent No. 1 dated the 6th February 1974 asking both the parties to appear on the date and hour positively with evidence oral or documentary in support of their respective claims. On the 29th March, 1974 the date of hearing, the appellant did not put any objection. On the 23rd April, 1974 the Commissioner made an order recording the name of the respondent No. 1 as Mutwalli and vacating with immediate effect the previous order of appointment of the appellant. The order after setting out the history and reasons, stated as follows : --

..I, therefore, order that the name of Syed Ahsan Ali be recorded as Mutwalli in place and stead of Syed Moslehuddin deceased Mutwalli and that the order dated 20.1.72 of the Commissioner of Wakfs communicated under this office No. 686 dt. 22.1.72 appointing Syed Murad Ali as ad-interim Mutwalli for a period of five years be vacated with immediate effect. Syed Murad Ali is directed to hand over charge of the Wakf Estate including all records, documents, accounts, cash-in-hand or Bank balance to Syed Ahsan Ali Mutwalli of the Wakf Estate and Syed Ahsan Ali is also directed to take over charge of the wakf estate including all records, documents, accounts, cash bank balance as aforesaid from Syed Murad Ali and administer the wakf estate as Mutwalli in the most satisfactory manner and submit accounts, pay contribution as required under the law. He will remain responsible for proper management of the wakf estate.

3. On the 29th April, 1974 the Commissioner communicated order dated 23/d April, 1974 to the appellant. The appellant thereupon moved the application under Article 226 of the Constitution and the application as mentioned before ultimately came up for hearing before Masud, J. and was dismissed by an order passed and judgment delivered on 21st August 1974. This appeal arises out of the aforesaid order and judgment.

4. The points which were urged before the learned Trial Judge were also mainly

urged before us in support of this appeal. It was firstly, contended that under the terms of section 40 of the Bengal Wakf Act, 1934 the appellant had been appointed for five years and in the facts and circumstances of the case, the Commissioner had no authority and power to pass any order purporting to remove or cancel the appellants appointment. It was contended that the appellant had been appointed for a period of five years. That period had not expired. It was secondly, contended that the appellant had been appointed by the Board and in view of the provisions of section 58 as amended by the Bengal Wakf Act, 1973, the commissioner had no power and or jurisdiction to pass the impugned order of removal. Thirdly, it was urged that the order in question was passed in violation of the principles of natural justice. Lastly it was contended that the basis of the order of appointment, of appellant namely the named Mutwalli not being available continued and there was no evidence to show that the respondent No. 1 would be available to discharge his obligations as a Mutwalli which had induced the Board to appoint the appellant as interim Muta Walli for five years. For all these reasons, it was contended that the Commissioners action was without jurisdiction and without authority of law.

5. The main contention, is, whether the appellant could have been removed by the impugned order by the Commissioner in the manner he had done. In this connection, counsel drew our attention as mentioned before, to the provisions of section 58 of the Act as Amended by Bengal Wakf (Amendment) Act, 1973 which provides as follows : --

58. (1) Notwithstanding anything contained in any other law for the time being in force, the Board, after giving a mutwalli an opportunity to show cause against the action proposed to be taken, may, if a decision in this behalf is taken by a majority of the total number of members of the Board, by order, remove him from office if such mutwalli--

- (a) Has been fined or convicted more than once u/s 57; or
- (b) has been convicted of an offence of criminal breach of trust or of any other offence involving moral turpitude; or
- (c) has applied for being adjudged or has been adjudged an insolvent; or
- (d) is of unsound mind or is suffering from any other mental defect or infirmity Which would render him unfit for discharging the functions of a mutwalli; or
- (e) has migrated from India.

(2) Where a mutwalli has been removed from office under sub-section (1) the Board may, by order direct the mutwalli to deliver possession of the wakf property to the Board or to any officer thereof duly authorised by the Board in this behalf or to any person or committee appointed by the Board or other competent authority to act as the mutwalli of the wakf property and such order of the Board shall be deemed to be a decree of a Civil Court and shall be executed by the competent Civil Court as if it had passed the decree.

58. An appeal from an order of the Board under sub-section (1) of Section 58 shall be made within thirty days from the date of order before such authority and in such manner as may be prescribed.

6. It was contended that there being no decision by the majority of the Board the appellant could not have been removed or his appointment cancelled. Furthermore, the ground upon which the appellant could have been removed were circumscribed by the provisions of section 58 and none of these grounds being present in this case, there was no authority to remove him. Thirdly, it was urged that, in any event, the Commissioner could not remove a person validly appointed by the Board to be a Mutwalli. The expression "Mutwalli" is defined in section 6(6) of the Bengal Wakf Act, 1934, as follows: --

6 In this Act, unless there is anything repugnant in the subject or context--

(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 of 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;

7. It appears to us that in order to come within the purview of section 58 a person sought to be removed must be a mutwalli as contemplated u/s 6(6) of the Act. As we read the definition firstly it has to be borne in mind that this definition would be applicable subject to the context. The context therefore, has to be borne in mind in finding out the meaning of the expression "Mutwalli". In order to be a mutwalli according to the definition he must be either (i) a person appointed either verbally or under a deed or instrument by which the wakf was created or (ii) a person appointed by a competent authority to be a mutwalli and includes a naib mutwalli or other person appointed by a mutwalli to perform the duties of a mutwalli or (iii) any person or committee for the time being managing or administering the wakf property. The question, is does the appellant come within any one of these categories. The appellant was not appointed a mutwalli either verbally or by the deed creating the wakf. It was contended that he was the appointed mutwalli by a competent authority as contemplated by the said definition. A person appointed to perform the duties of a mutwalli, in our opinion, cannot be described to be a person appointed as a mutwalli by a competent person. Firstly, it has to be borne in mind that when a person is appointed to perform the duties of a mutwalli he is not appointed a mutwalli but only to perform the duties of a mutwalli. Section 40 of the Act provides as follows :

In the case of any wakf of which there is no mutwalli or where there appears to the Board to be an impediment to the appointment of a mutwalli the Board, subject to any order of a competent Court, may appoint for such period as it thinks fit a person to act as mutwalli.

8. Section 40 does not enjoin the appointment of a mutwalli but the appointment of a person to act as mutwalli. In this case also we find that when the appointment of the appellant was made, he was described as "interim mutwalli". The expression "interim mutwalli" is not provided under the Act. What the Commissioner meant was that he was to act u/s 40 of the Act or that he was appointing the appellant on the 12th December, 1968 to perform the duties of mutwalli for a specified period. The second appointment, however, makes it clear that he was appointed to act as interim mutwalli. So none of these two appointments indicated that the appellant was appointed a mutwalli. The Board or the Commissioner acting by virtue of his power u/s 40 of the Bengal Wakf Act, 1934, when making the appointment is not "the competent authority" as mentioned u/s 6(6) in view of principles enunciated under the Mohomedan Law. This position would be clear if reference is made to the commentaries on Mulla's Mahomedan Law, 17th Edition, Art. 204 at page 205. It may be mentioned that the appellant was also not a naib mutwalli nor was he appointed by any mutwalli to perform the duties of mutwalli. Therefore, it appears to us, that the appellant does not come within the second class of persons contemplated by the definition.

9. Another reason which has induced us to hold that a person appointed by an order u/s 40 is not a mutwalli as mentioned in sub-section (6) of section 6 is the last portion of the definition which includes any person or committee for the time being managing or administering any wakf property. It covers a person or a committee which is in actual management not by virtue of order under the Act or by the operation of any provision of the Act, which is specifically excluded by the expression "save as otherwise provided in the Act." Therefore, any person or committee in the act of managing or administering the wakf property, does not come within the per-view of section 6 sub-clause (6) of the definition. In the aforesaid view of the matter, section 58 of the Act, in our opinion, cannot be attracted. Therefore, the main basis of the grievance of the appellant cannot be sustained in this appeal.

10. The next aspect of the matter is that the appointment had been made by the Board through its delegated authority, the Commissioner. The appointment of the appellant as interim mutwalli clearly stated that the Commissioner was acting by virtue of his delegation. Counsel for the appellant contended that when order for removal was passed, it was not mentioned or indicated that the Commissioner was acting as a delegates of the Board. Therefore, it was contended that the Commissioner had not acted as the delegate of the Board, and, therefore, the appointment which had been made by the Board could not have been set aside by the Commissioner in his own authority. In this connection, our attention was drawn to the provisions of section 27 and other provisions of the Act and it was contended that there was no power as such of the Commissioner to make the impugned order. As we have noticed that the appointment was made by the Commissioner as the delegate of the Board and by virtue of section 17 and section 20 of the General Clauses Act, the appointing authority has always the right to revoke and cancel or recall the order of appointment. When the

delegation had been made by the Board to appoint, that carried consequential delegation of the power of revocation or cancellation; it is our necessary to have mentioned in the order of the Commission that he was exercising the power of the delegation. In the aforesaid view of the matter, this contention of the appellant also cannot be accepted.

11. The other argument of Counsel for the appellant was that there was violation of the principles of natural justice. It is true that there was originally an application, which stated that the Commissioner had no jurisdiction, but thereafter, it has been recorded that the respondent No. 1 accepted the position and it was the subsequent application upon which the order of the Commissioner had been made, of which the appellant No. 1 had notice, and it appears from the order of the Commissioner that the appellant did appear and made his submissions. In the facts and circumstances, we do not find anything from the records which calls for the interference of the findings of the learned Trial Judge on this aspect of the matter. It has to be mentioned after all that this wakf is wakf-al-aulad, that is to say, a wakif under which not less than 75% of the net available income for the time being available to the Wakif for himself or for any member of his family or decendants. Under the deed and under the provisions of the Mohamedan Law, the respondent No. 1 is the muswallis named by the Wakif as his son and it has also been stated that he would be available for management of the property as far as it would be necessary. If that is so, then really he would be available and the question of his not being available being the condition upon the exercise of section 40 was made, goes. Therefore we do not find that the appellant can have any serious objection to the impugned order made in this case. Therefore, we see no reason to interfere with the decision of the learned Trial Judge in this case.

In the premises, the appeal fails and is accordingly dismissed. Each party, however, will pay and bear his own costs.