

CIVIL REVISION

Present: The Hon'ble Mr. Justice Tarun Kumar Gupta

Judgment on: August 23, 2010

C. O. No.1643 of 2005

Shabbir Hussain and another

Versus

Daudar Rahaman and others

Points:

Appointment of Mutawalli- Heirs of a person who has not claimed Mutawalliship for 50 years as per deed of Wakf whether can be appointed as Mutawalli- Mahomedan Law-S. 202

Facts:

Hurmatunnessa Bibi, Izzatunnessa Bibi and Munshi Abdur Rahim created wakf with some of their properties by virtue of a registered deed of wakf. The clear and specific recitals of the deed of wakf was that son and/or daughter of Munshi Abdur Rahim be Mutawalli in the said Wakf Estate for three years each and that after them their issues would hold the post of Mutawalli in the same fashion. The only rider is that the person to be selected should be competent. After demise of three founder wakifs the only son of Munshi Abdur Rahim namely Mirza Kabir Hossain was Mutawalli and after his demise his son Mirza Bashir Hossain became Mutawalli in 1951 and continued the same till his death on 22.02.2004. Mirza Bashir Hossain died leaving behind two sons namely Shabbir Hossain and Sharafat Hossain being the petitioners. After his death his two sons as well as one Daudar Rahman being son of one of the sisters of Mirza Bashir Hossain namely Shawkat Ara Begum filed petition before the Board claiming the post of Mutawalli in the said Wakfs.

Held:

It was nowhere stated in the wakf deed that once the son of Mirza Munshi Abdur Rahim became Mutawalli, said Mutawalliship will go down through male descendents only. Said interpretation is rather repugnant to the clear and specific recitals of the deed of wakf wherein it was specifically stated that son and/or daughter of Munshi Abdur Rahim be Mutawalli in the said Wakf Estate for three years each and that after them their issues would hold the post of Mutawalli in the same fashion. The only rider is that the person to be selected should be competent. If that be the position then certainly the sisters of Mirza Bashir Hossain or legal heirs of those sisters had full right to claim Mutawalliship as per terms of said deed of wakf. It is true that Mirza Bashir Hossain since deceased acted as Mutawalli for over 50 years till his death on 22.02.2004 without any objection from his sisters or their legal heirs, but that does not mean that their legal right to claim Mutawalliship in terms of the deed of wakf stood evaporated. As per terms of the deed of wakf there should be rotation of Mutawalliship from son to daughter.

Paras 10 & 11

As per recitals of the wakf deed there may be rotation after three years in the post of Mutawalli and the present petitioners are at liberty to exercise said right in the proper forum at opportune time.

Para 13

Cases cited:

AIR 1930 Allahabad 866

For the petitioners: Mr. Md. Yamin Ali, Senior Advocate; Mr. Udyan Bhattacharya, Mr. Harsha Gopal Jana

For the respondents: Mr. Amal Baran Chatterjee, Mr. Subhajit Dan
Mr. K. Jaweed Yusuf

Tarun Kumar Gupta, J.:-

This revisional application under Section 227 of the Constitution of India is directed against judgment and order dated 20th April, 2005 passed by learned Presiding Officer, Wakf Tribunal, Calcutta, West Bengal in Appeal No.17 of 2004 by affirming the impugned recommendation and resolution made by the Chief Executive Officer and Board of Wakfs, West Bengal.

2. Today respondent No.1 has filed affidavit-in-opposition and the petitioners have filed affidavit-in-reply and those be kept in the record.

3. The admitted position is that one Hurmatunnessa Bibi, Izzatunnessa Bibi and Munshi Abdur Rahim created wakf with some of their properties by virtue of a registered deed of wakf dated 17.04.1901 which was enrolled as Hurmatunnessa Bibi, Izzatunnessa Bibi and Munshi Abdur Rahim wakfs estate under E.C. No.6944 with the Board of Wakfs. As Hurmatunnessa Bibi and Izzatunnessa Bibi had no issue, it was specifically mentioned in the said wakf deed that after demise of founder wakifs any son or daughter of Munshi Abdur Rahim could be said 'Mutawalli' for the period of three years each by rotation and after them their 'Santanadis' i.e., sons and daughters would be Mutawallis in the aforesaid manner and such rule of succession to Mutawalliship will continue from generation to generation. The Genealogical Table is enclosed with the judgment for proper appreciation of this matter. Admittedly, after demise of three founder wakifs the only son of Munshi Abdur Rahim namely Mirza Kabir Hossain was Mutawalli and after his demise his son Mirza Bashir Hossain became Mutawalli in 1951 and continued the same till his death on 22.02.2004. Mirza Bashir Hossain died leaving behind two sons namely Shabbir Hossain and Sharafat Hossain being the petitioners. After his death his two sons as well as one Daudar

Rahman being son of one of the sisters of Mirza Bashir Hossain namely Shawkat Ara Begum filed petition before the Board claiming the post of Mutawalli in the said Wakfs. The C.O. of the Board of Wakfs after contested hearing recommended Respondent No.1 Daudar Rahman as Mutawalli of said Wakf Estate. The Board of Wakfs approved the said recommendation but present petitioners preferred an appeal before the Wakf Tribunal. The said Tribunal also affirmed said order of Board of Wakfs by the impugned judgment dated 20.04.2005.

5. Learned Advocate Mr. Md. Yamin Ali for the petitioner has challenged the impugned order dated 20.04.2005 of the Wakf Tribunal mainly on two-fold grounds. According to him, as there was no daughter of Mirza Munshi Abdur Rahim, after his death his only son Mirza Kabir Hossain became the Mutawalli. As such there was no scope of considering the daughters of Mirza Kabir Hossain or their legal heirs as to be eligible for being selected as Mutawalli in the said Wakf Estate.

5. The second contention is that Mirza Bashir Hossain admittedly acted as Mutawalli for over 50 years at a stretch without any objection from any quarter and that even if it is admitted for argument's sake that his sisters had any right to claim Mutawalliship after three years, as per recitals of the wakf deed, they did not raise any objection during the said long 50 years and as such they relinquished their right, if any, in this regard and that at this stage no one from their side can be permitted to stake any claim for Mutawalliship as said claim will also be time barred.

7. In this connection he has referred a case law reported in AIR 1930 Allahabad page 866 wherein it was held "the suit for possession of office of Mutawalli is personal action and that in such action law of limitation merely bars remedy and not right".

8. Learned Advocate Mr. Amal Baran Chatterjee for the O.P., on the other hand, has submitted that as per terms of the wakf deed both son and daughter had equal right to be Mutawalli and that they were supposed to hold the post of Mutawalli for three years each and that nowhere in the deed of wakf it was stated that once the son becomes Mutawalli. Mutawalliship will go on in the line of male descendents only.

9. He has further submitted that as per terms of wakf deed stress was also given in the matter of selecting an appropriate and efficient person to act as a Mutawalli of said Wakf Estate. According to him as Mirza Bashir Hossain, the father of the present petitioners, acted as Mutawalli for over 50 years efficiently no claim from the side of his sisters was made during his life time and that said consent did not take away the right of his sisters or their legal heirs for being Mutwalli thereafter.

10. I find much force in the aforesaid submission of the learned advocate for the respondent. It was nowhere stated in the wakf deed that once the son of Mirza Munshi Abdur Rahim became Mutawalli, said Mutawalliship will go down through male descendents only. Said interpretation is rather repugnant to the clear and specific recitals of the deed of wakf wherein it was specifically stated that son and / or daughter of Munshi Abdur Rahim be Mutawalli in the said Wakf Estate for three years each and that after them their issues would hold the post of Mutawalli in the same fashion. The only rider is that the person to be selected should be competent. If that be the position then certainly the sisters of Mirza Bashir Hossain or legal heirs of those sisters had full right to claim Mutawalliship as per terms of said deed of wakf.

11. It is true that Mirza Bashir Hossain since deceased acted as Mutawalli for over 50 years till his death on 22.02.2004 without any objection from his

sisters or their legal heirs, but that does not mean that their legal right to claim Mutawalliship in terms of the deed of wakf stood evaporated. As per terms of the deed of wakf there should be rotation of Mutawalliship from son to daughter. The referred case law has no application in the facts of this case.

12. In view of the above discussions I am of the opinion that the impugned judgment dated 20th April, 2005 of the Wakf Tribunal, West Bengal does not call for any interference by this Court in exercise of power under Article 227 of the Constitution of India.

13. Before I part with this record I like to add that as per recitals of the wakf deed there may be rotation after three years in the post of Mutawalli and the present petitioners are at liberty to exercise said right in the proper forum at opportune time.

14. The revisional application stands dismissed.

15. The order of status quo passed on 19th May, 2005 stands vacated.

16. Urgent xerox certified copy of this judgment be supplied to learned Counsels of the party / parties, if applied for.

(Tarun Kumar Gupta, J.)

