

04.11.2022
Item No.41
BR

CO 2242 of 2021

Pear Mohammad & Ors.
Vs.
Saidur Rahaman & Ors..

Mr. Sandip Das,
Mr. Q.M. Islam
... for the Petitioner

Mr. Sk.Md. Galib , Sr. Advocate,
Ms. Tanwishree Mukherjee,
... for the Board of Wakf

Mr. S. K. Roy,
Mr. Munshi Ashiq Elahi
...for the opposite nos. 1 and 2

The present revisional application under Article 227 of the Constitution have been preferred against the order dated 2.12.2021 passed by Learned Wakf Tribunal in Suit No. 3 of 2020 allowing the application under Order XXII of Rule 3 of the Civil Procedure Code and also the Order rejecting the prayer for maintainability of the suit filed by the defendant nos. 1 to 14.

One nor Mohamamed filed the said suit for declaration that the suit properties are Wakf properties and alleged sale deeds executed by erstwhile Mutwali Sonawallah in favour of defendants are void and also for permanent injunction.

Brief fact of the case is one Sadar Ali Midya executed a deed of wakf on 8th October, 1945 which was registered on 9th October, 1945.

By the aforesaid deed of wakf created a Wakf-al-aulad by way of dedicating expensive area of land comprising more than 60 bighas. According to the terms of the wakf deed, after the death of the Wakf, the original plaintiff Noor Mohammed's father Sanullah was to be recorded as Mutwalli of the wakf estate. The Wakf appointed Sk. Sanullah as his successor Mutwalli in terms of the aforesaid Deed of 1945. Said deed also mentioned that after Sanullah his sons and grandsons would succeed to the office of Mutwalli generation after generation.

Said erstwhile Mutwali Sanaullah died leaving behind four sons and one daughter viz. Noor Mohammed (Sole plaintiff now deceased) and defendant No. 1 to 4 who are petitioner No. 1 to 4 herein. After death of Sanaullah, said deceased plaintiff Noor mohammad was recorded as sole Mutawali vide resolution in 2002. Saidur Rahaman and Md. Najmul Islam who are the sons of deceased plaintiff Noor Mohammad, filed application for substituting their names in place of deceased plaintiff.

Defendants/petitioners filed written objection before Tribunal stating as sole Mutwali expired, his sons cannot be substituted in his place as they have not been appointed as Mutwali. Defendants on the other hand filed application under order XIV, rule 2 CPC contending that after the death of original plaintiff/Mutwali right to sue does not survive and as such suit is no longer maintainable and question of substitution does not arise.

Ld. Tribunal after bearing both side rejected defendants petition under order XIV, rule

2 and allowed petitioner/opposite parties prayer for substitution under order XXII rule 3 by passing the impugned order.

Ld. Counsel appearing for the petitioners submits that all the properties mentioned in the Schedule are not the wakf property and some of the properties are secular and duly recorded in the record of rights in the name of Sk. Sanaullah.

Accordingly, Learned Counsel appearing on behalf the petitioner submits that in terms of the Wakf Deed the son of Sk. Sonaullah will be the Mutwalli and after the death of Nur Mahammad the other sons of Sk. Sanaullah, Peer Mahammad, Jalal Ahmed and Abir Ahmed who are the defendants are entitled and eligible for the post of Mutwalli and not the grandson of Sk. Sonaullah, namely the opposite parties herein.

Regarding the maintainability of the suit, it has been urged that the sole plaintiff filed suit for declaration and permanent injunction. But the sole plaintiff Sk. Noor Mahammed expired on 30.06.2021. The Wakf Board of West Bengal has not appointed any Mutwalli and the properties are not the Mutwalli's properties but secular properties and the properties stand in the name of father of the defendants Sk. Sanaullah as per record of rights and the properties are under challenge as secular property. So after the death of sole plaintiff the suit is not maintainable as the petitioners/opposite parties herein who wants to substitute as plaintiff are not appointed as Mutwali in respect of suit properties and as such right to sue in the instant case terminated with the demise

of the erstwhile Mutwali. He further submits since the survival of right to sue is restricted to the office of the Mutwali and not to the office of a Mohammedan, suit is no longer maintainable.

Mr. Roy, Learned Counsel, appearing on behalf of the O.P. submits that the trial Court rightly substituted the legal heirs as right to Mutwali not to be crystallized by way of substitution. Wakf Board is bound by the line of succession in terms of Walkfnama about appointment of Mutwali and Board is to decide independently on that issue and substitution has got no connection with appointment of next Mutwali in the properties in question.

It is for the protection and preservation of the Wakf property that the suit must go on. The Almighty is the only owner of the property and by the substitution the defendants do not have any cause to prejudice.

In this context, learned counsel appearing on behalf of the opposite party relied upon the judgment reported in **(2009) 7 SCC 76 [Sopan Rao & Anr. –Vs- Syed Mehmood & Ors.]** and also an unreported judgment passed by this Court in **C.O. No. 3197 of 2019 [Motiur Rahaman Khan –Vs- The Board of Wakf, West Bengal & Ors.]**.

It is not in dispute that present suit was filed by erstwhile Mutwali for declaration that the suit properties are Wakf properties against defendants claim that some of the properties in suit are secular properties which recorded in the name of their predecessor Sonullah. Suit has

also been filed for declaration that certain deeds executed by Sonaullah in favour of defendants are void and plaintiff in the suit also prayed for permanent injunction restraining defendants from creating any disturbance in the suit property. So by no means suit was filed by erstwhile Mutwali/plaintiff in individual capacity or for individual interest but for protection preservation and declaration of Wakf property. Petitioners herein have confused "right to sue" with "right to be appointed as Mutwali". Jurisdiction to appoint Mutwali lies with the board of Wakf and process of substitution cannot confer any right to be appointed someone as Mutwali nor Wakf board has any reason to be influenced by the order of substitution. Tribunal rightly held that Mutwali has died but the estate is alive and as such Mutwali may go, but the question of protection and preservation of suit property must not go with the death of Mutwali. The prayer made in the plaint clearly suggests that right to sue survives and if right to sue survives, the Tribunal can very well substitute petitioners as party in order to proceed further with the suit. In view thereof as tribunal was justified in making substitution in order to proceed with the suit for declaration and injunction, consequently defendant/petitioner's prayer under order XIV, rule 2 becomes infructuous. Moreover in view of **sopan Rao and another (supra)** it is well settled that the post of Mutwali is in the nature of managerial post and as such suit does not abate with the death of sole plaintiff/Mutwali. Issues involve in

the suit also do not confined to pure question of law only, so that suit can be adjudicated framing preliminary issue only under rule 2 of order XIV of the code.

CO 2242 of 2021 is accordingly dismissed.

Since I have not decided anything in respect of appointment of Mutwali, without being influenced by any observation of this order, the authorising shall appoint Mutwali as per line of succession in terms of wakfnama.

Urgent photostat certified copy of this order, if applied for, be given to the learned advocate for the parties on usual undertakings.

(Ajoy Kumar Mukherjee, J.)