

20.03.2025

A. Bhar

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL APPLICATION
APPELALTE SIDE

C.O. 1153 of 2020
CAN 1 of 2020 (Old No: CAN 4430 of 2020)
CAN 2 of 2020
CAN 3 of 2021
CAN 4 of 2021
CAN 5 of 2024

Ziaul Haque
-Versus-
Board of Auqaf & Anr.

Mr. Anujit Mookherjee,
Mr. Prithish Chandra, ...for the Applicant/petitioner.
Mr. Anwar Hussain,
Mr. Sandeep Prasad Shaw
Mr. SK. Md. Galib,
Mr. Abu Siddique Mallick ...for the Respondent No.1/.
Board of Auqaf

Mr. Ranjit Chatterjee,
Mr. Aniruddha Mitra ...for the Respondent No.2

1. The instant Application under Article 227 of the

Constitution of India is directed against the judgment dated 26.02.2020 passed by the learned Wakf Tribunal, West Bengal in O.A. 28 of 2018 rejecting the prayer of the petitioner Ziaul Haque since deceased for recording his name as Mutawalli by opposite party no.1 and permitting the petitioner to act as a Mutawalli intermittently. Although the petitioner prayed for other reliefs but the main relief claimed was with regard to appointment of Mutawalli to the Estate of M.Safialla Wakf Estate

2. It is the contention of the petitioner that the Learned Tribunal acted illegally and with material irregularity by not considering that the basic tenet of Wakf-Alal- Aulad is to provide benefit to the line of succession of Wakif and accordingly a successor-in-interest of the wakif cannot be denied of becoming a Mutawalli. It is further contended that the Learned Tribunal acted illegally and with material irregularity by not appreciating that the petitioner had already become a Muttawali of M. Safiulla Wakif Estate automatically upon the death of the Erstwhile Muttawali in terms of the deed of the wakif dated August 14, 1946. It is also contended that the Learned Tribunal erred in holding that the wakf is a Wakf-Alal-Aulad composite and further holding that the petitioner cannot act as Mutawalli in respect of M. Safiulla Wakf Estate which is a Wakf-Alal-Aulad simplicitor. It is contended that the direction/observation of the Learned Tribunal is bad in law and should be set aside.

3. During pendency of the Revisional Application the sole petitioner Ziaul Haque died and an application was taken out by one Anishul Haque, brother of Ziaul Haque since deceased for substitution. It is the contention of the applicant that his grandfather Mohammed Safiulla since

deceased by a deed of wakf dated August 14, 1946 created and established a Wakf-Alal-Aulad and dedicated his income of such wakf estate for the benefit, maintenance and support of his family and descendants. It is further contended that one of the main features of such deed of wakf is that Mutawalliship will continue on male lineal descendants in the line of succession from elder to younger, from son to grandson, and thereafter great grandson in a manner so that specific line of succession is completely extinguished before the subsequent lineal male descendants takes over. The applicant contends that the deed of wakf dated August 14, 1946 has established a Wakf-Alal-Aulad simplicitor and the present applicant is entitled to be the Mutawalli as per the said deed. The applicant further contends that being eldest male surviving descendants of the wakf he made representation dated 28.06.2021 and 26.07.2021 to the opposite party no.1 to record his name as the Mutawalli of M. Safiulla Wakf Estate as per deed of wakf and the same has been duly received by the opposite party no.1 but till date no steps have been taken by the opposite party no.1

4. The application for substitution was contested by the opposite parties by filing of affidavits. It is the contention of the opposite party no.1 that the

application for substitution is hit by law of limitation. It is further contended that the Civil Revisional Application no. being C.O. 1153 of 2020 challenged the legality validity and propriety of the judgment dated 26th day of February, 2020 delivered by the learned Wakf Tribunal in O.A. No. 28 of 2018. The challenge in the O.A. No. 28 of 2018 was the resolution dated 8th August, 2018 passed by the Board wherein the board was pleased to unanimously pass resolution by appointing Abrarul Haque, as the sole Mutawalli of M. Safiulla Wakf Estate (hereinafter referred to as the said 'Wakf Estate'). Ziaul Haque since deceased and Abrarul Haque were the applicants before the Board who were claiming the appointment of Mutawalliship of the said Wakf Estate. It is also contended that the issue with regard to the appointment of Mutawalli in respect of a Wakf Estate is governed by the line of succession of Mutawalliship as mandated by the Wakif in the wakf nama, if any.

5. Ziaul Haque since deceased threw a challenge to the resolution of the Board dated 8th August, 2018 wherein his claim for Mutawalliship of the said Wakf Estate was rejected. It is contended that there cannot be any question of and/or concept of substitution, with regard to the Office of Mutawalli

of a Wakf Estate far less in a proceeding before the Civil Revisional Jurisdiction of this Court. It is further contended that the proceeding abates on the death of the sole petitioner Ziaul Haque whose claim for the post of Mutawalliship of the said Wakf Estate was rejected by the board. It is contended that the relief prayed for in the application be rejected.

6. The opposite party no.1 has also opposed the application for substitution. It is contended that the application for substitution is not maintainable as the applicant has no *locus standi* to challenge the appointment of opposite party no.2 as Mutawalli of the said estate. Since the applicant, Anisul Haque is not an Indian Citizen but a Citizen of Bangladesh, he is not qualified to be appointed as Mutawalli because of statutory bar to appoint a foreign national as such under Wakf Act, 1995. It is further contended that the applicant has suppressed the fact that he is not a citizen of India thus, the application is liable to be dismissed.

7. The Applicant has filed Affidavit in reply to the opposition submitted by the opposite party no-1 and opposite party no-2. It is contended in the Affidavit in Reply that the right to sue survives upon the applicant as the eldest male surviving

descendant of the Wakif and rightful Mutawali to the Wakf Estate as per, the desire of the Wakf as specified in his Wakf Deed upon the death of Ziaul Haque.

8. Heard Learned Advocate for the applicant and Learned Advocates for the opposite party no-1 and opposite party no-2.

9. Learned Advocate for the applicant submits that the applicant has right to proceed with the revisional application and the substitution application is maintainable. Learned Advocate further submits that the grandfather of his client by Deed of Wakf dated 14th August 1946 created and Established a Wakf-alal-Aulad and it was for the benefit maintenance, and support of his family and descendants. Learned Advocate submits that the opposite party no-1 lacks authority to appoint mulawalli in respect of Wakf-alal-aulad, simplicitor and the observations of the Learned Tribunal cannot be sustained. Learned Advocate submits that in order to assail the findings of Tribunal on the points of law regarding Deed of Wakf created by his grandfather it is necessary to implead the applicant as a party.

10. Learned Advocate relies upon the following judicial decisions.

**Phool Runi (Smt and others VS SH
NAUBAT RAI AHWWA Ltd.**

Reported in (1973) 1 SCC.

**Board of Wakf West Bengal and Another VS
Anis Fatma Begum and Anr.**

Reported in (2010) 14 SCC P-588.

11.Learned Advocates for the opposite party no-1 and opposite party no-2 submits that the application for substitution is not maintainable Learned Advocates further submit that Wakf property is not secular in nature but created for religious or charitable purpose hence there is no question of inheritance with regard to Wakf property. Learned Advocates also submit that pursuant to the death of original petitioner Ziaul Haque the right to proceed with the revisional application does not survive. It is submitted that on the death of the original petitioner, the applicant does not automatically become Mutwalli even if he succeeds in the Revisional Application but he has to apply before the Board to be appointed as Mutwalli.

12.The following decisions are relied upon by Learned Advocates for the opposite party no-1 and opposite party no-2.

Mahanath Ramsarup VS Rameshwar

Reported in A IR-1950 Patna-184.

**PV. Sarma and others VS Chairman
Committee of Management The S.C. Rly
Employees Co-op Credit Society Sewnderabud.**

Reported in AIR-1977 AP-319.

Sham Chand Giri VS Bhayaram Pandey

1894 ICR-22 Cal-92 Para-5

**Phool Rani (Smt.) and ors. VS Sh.
Naubat Rai Ahluwalia.**

Reported in 1973(1) SCC-P-688.

**Maniben Deraj Shah. VS
Municipal Corporation of Brihan
Mumbai.**

Reported in 2012(5) SCC P-157

**Mool Chandra VS Union of India and
anr.**

Reported in 2025(1) SCC P 625

**State of Madhya Pradesh VS Ram
Kumar Chowdhary.**

Reported in 2024 SCC Online SC 3612

**Thakur Mohd Ismail. VS Thakur
Sabir Ali and others**

Reported in AIR-1962. SC. 1722

**Bibi Saddique Fatime VS Saiyed
Mohammed Mahmood Hosan**

Reported in AIR 1978 (SC) P-1362.

**Sri Radhakanta Deb and Anr VS
Commissioner of Hindu Religious
Endowments Orissa.**

Reported in 1981(2) SCC 226.

**Maharashtra State Board of
Wakfs VS Shaikh Yusuf Bhai Chowla and
ors.**

2022 SCC Online SC. 1653

**Committee of Management
VS State of U.P. and ors.**

2010 SCC Online All-446

**Syed Irfan Ali VS Union of
India and ors.**

WPA No. 13765 of 2021.

**Axis Fatma Begum VS
Board of Wakf West Bengal**

Reported in 2003(3) CHN 42.

**Board of Wakf West Bengal
VS Anis Fatma Begum and Anr.**

Reported in 2003(3) CHN-42

**Board of Wakf West Bengal
and Anr. VS Anis Fatma Begum
and Anr.**

Reported in 2010 SCC
online SC 1326.

**Pandurang Kalu Patil and
Anr. VS State of Maharashtra.**

Reported in 2002(2) SCC-490.

13. Before proceeding to decide the material in issue it is necessary to consider the definition of Mutwalli.

Section 3(i) of the Wakf Act 1995 defines Mutwalli as follows:

‘Mutawalli 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 any person who is a mutawalli of a [Wakf] by virtue of any custom or who is a naib-mutawalli of a [Wakf] by virtue of any custom or who is a naib-mutawalli; khadim mujavar, Sajjadanashin amin or other person appointed by a mutawalli to perform the duties of a mutawalli and save as otherwise provided in this Act any person committee or corporation for the time being managing or administering any [Wakf] or [Wakf] property provided that no member of

a committee or corporation shall be deemed to be a mutawalli unless such member is an office-bearer of such committee or corporation.

Provided further that the mutawalli shall be a citizen of India and shall fulfil such other qualifications as may be prescribed.

Provided also that in case a Wakf has specified any qualifications such qualifications may be provided in the rules as may be made by the State Government.

Mutawalli can be appointed:-

- (1) By the Wa'kif
- (2) By the person authorised by the Wa'kif
- (3) By the Wakf Board U/s. 63
- (4) By order of the Court
- (5) By the State Government under Section 66.
- (6) By the mutawalli on temporary basis. However if the mutawalli is empowered by the Wa'kif or authorised by the terms of Wakf deed, he can appoint his successor on permanent basis.

(7) By virtue of any custom: - Where there is no instruction from the Wa'kif and where such appointment is governed by the prevailing custom or usage, a mutawalli may be appointed by virtue of such custom. This is held in *Ismail Mia vs. Wahadani Begum*,. Reported in 26 Bom 308(14) Bombay LR-120. The Waqf Act, 1995 has now included in the definition of mutawalli any person who is a mutawalli by virtue of any custom.

14.It has been held in different Judicial decision that in Urdu language the word mutawalli refers to one who is on a work or one who keeps friendship. Whereas in Arabic language the word mutwalli is equivalent to 'Nazir or Qayyam' But within the scope of the Act mutawalli is the manager administrator curator superintendent and custodian of the Waqf property but not the

owner of the Waqf property. This limitation on his position is both legal as well as religious. According to Islamic law he is manager and administrator of the Waqf Property but he is essentially not the owner of the Waqf property as the ownership of the Waqf property vests with Allah, the almighty, and mutawalli is merely a servant of the Almighty.

15. In the case of Nazir reported in AIR-1934 (All) – 732 the Hon'ble Court observed as follows:

‘It is true that a wakf property is not vested in the “mutawalli” but the latter is the only individual who has the right of administration vested in him; and so long as he is in charge of the wakf property no outsider has any right of interference. The view that the “mutawalli” must be regarded merely as an officer whose duty it is to carry out

wishes of the founder of the trust” may be correct but it is not suggested that the original founder dedicated the chabuttra for the educational needs of the locality. It may be inferred from its situation that it was meant for purposes incidental to the use of the mosque. The rooms and the chabuttra in front of it might have been intended for temporary stay of Muslim way-farers as is not uncommonly the case with mosques in this country. Moreover the ‘mutawalli’ for the time being is to carry out the known objects of the ‘wakf’ and is not bound to allow such use of the wakf property however laudable as is not shown to have been one of the objects of the wakf.

16. Thus from the judicial decisions it is clear that Mutwalli is not owner of Wakf property but Manager In other words right to be appointed as Mutawalli is not right to property but right to office. Now the point for consideration is whether

right to sue survive when original applicant/plaintiff dies during the pendency of suit, where the suit is with regard to right of office.

17. In the case of Mahanth Ramsarup (*supra*) the Hon'ble Court observed as follows:

'Reliance was also placed on behalf of the appellant on the decision of the Court of Appeal in the case of *Phillips V. Momfrau*. In that case their Lordships pointed out generally the cases in which the right to sue survives. In the course of their long judgment, their Lordships have made the following observations:-

"The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act appear to us to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. In such cases, whatever the original form of action it is in substance brought to recover property or its proceeds or value, and by amendment could be made such in form as well as in substance. In such cases the action, though arising out of a wrongful act does not die with the person. The property or the proceeds or value which, in the lifetime of the wrongdoer, could have been recovered from him can be traced after his death to his assets, and

recaptured by the rightful owner there. But if is not every wrongful act by which a wrongdoer indirectly benefits that falls under this head, if the benefit does not consist in the acquisition of property, or its proceeds or value.”

The facts of that case were entirely different and have no resemblance to those of the present. But their Lordships have considered the application of the common law rule of *actio personalis moritur cum persona*. That was also a case in which a decree had been passed; but that decree had not become final, as the enquiries directed by the Court in the first instance had yet to be made, and one of the defendants died after the passing of the decree but before the enquiry had been completed. This case was cited on behalf of the appellant to meet the respondent’s argument that the rule would not apply to a case where the suit had resulted in a decree. This ruling has been followed in the later case of *Chapman v. day*⁽¹⁾.

In answer to these rulings relied upon on behalf of the appellant, Mr. Lalnarayan Sinha made reference to the decision of a Full Bench of the Allahabad High Court in the case of *Muhammad Husain v. Khushalo*⁽²⁾. In this case a suit had been instituted by a member of a joint Hindu family for recovery of what he called his share of ancestral family property which had been sold in execution of a money decree for a debt contracted by the plaintiff’s grandfather. The trial Court dismissed the suit; but on appeal, the lower appellate Court decreed it in respect of the plaintiff’s

interest in the property. The defendants appealed to the High Court. During the pendency of the appeal in the High Court, the plaintiff died. The appellants got his widow substituted on the record in place of the deceased plaintiff-respondent. When the matter came before a Division Bench, the appellants relied upon a previous decision of the Allahabad High Court in the case of *Padarath Singh v. Raja Ram*⁽³⁾. As the Division Bench was doubtful of the correctness of the ruling relied upon on behalf of the appellant, they referred the case for decision to a larger Bench. The Full Bench, consisting of the Chief Justice and four other Puisne Judges, agreed with the following observations of the Learned Chief Justice:-

“I have always understood the law to be that in those cases in which an action would abate upon the death of the plaintiff before judgment, the action would not abate if final judgment had been obtained before the death of the plaintiff, in which case the benefit of the judgment would go to his legal representative. Whether the deceased plaintiff's representative can enforce the whole of the judgment in this case is a different matter-see *Phillips v. Homfray*⁽¹⁾.”

In my opinion, the answer to the question raised on behalf of the appellant depends upon the nature of the suit. If the plaintiff is suing to establish his right to a certain property in his own rights and not by virtue of his office, certainly the cause of action for the suit will survive, and his

legal representative can continue the suit on the death of the original plaintiff, either during the pendency of the suit or of the appeal. But, where the plaintiff's suit is primarily to establish his personal right to an office which would entitle him to possession of the property in question, on his death, either during the pendency of the suit or during the pendency of the appeal, the right to sue would not survive, and the suit will, therefore, abate. The case decided by the Full Bench of the Allahabad High Court, referred to above, related to a right of property not depending upon personal office though in the earlier decision of the Division Bench of the same Court in *Badarath Singh vs Raja Ram*⁽²⁾ their Lordships of that Court went to the length of holding that the suit by a member of Joint family for establishing his right to a property of the joint family would abate on his death. This decision is hardly consistent with the Full Bench decision of the same Court in *Muhammed Hussain v. Khushalo*⁽¹⁾, and its correctness may well be open to doubt. But it is not necessary to consider that question, as it does not directly arise in this case.

The principle is well established that the substituted party can only prosecute the cause of action as originally framed in the suit, and, if it

becomes, necessary materially to alter the pleadings, it become manifest that the original cause of action is being substituted for another cause of action which could very well form the subject-matter, of a separate suit. In such a case, therefore, it is a new suit which has to be tried. The following observations of their Lordships of the Madras High Court in the case of *Subbaraya Mudali v. Manika Mudali*⁽²⁾ are relevant to the question before us:-

“The general rule is that, as the representative of a deceased plaintiff can only prosecute the cause of action as originally framed, so the defendant can raise no other defence against him than he could have raised against the deceased.”

18. Upon hearing the Learned Advocates and considering the facts of the case this Court is of the view that as the dispute involved is with regard to appointment of Mutawalli to a Waqf Estate and the Right of Mutawalli is a right to office and not right to property no fruitful purpose will be served to implead the applicant as a party in the revisional application the reason for this is even if the revisional application is allowed and the impugned order date 26/02/2020 passed by the Learned Tribunal is set aside the applicant does not automatically become the Mutawalli

unless the application for appointment of Mutawalli is considered and decided by the Board of Wakf. However as the power under Article 227 of the Constitution is a supervisory power and even can be exercised suo-moto in the strict sense there cannot be any abatement to a petition under Article 227 of the Constitution of India. Thus this petition C O 1153 of 2020 is treated to be on the file. Moreover in the instant case an application for substitution was already made along with the condonation of delay. It appears that representations made by the applicant dated 28/06/2021 and 26/07/2021 marked annexure – B to the application for substitution which ought to have been considered by the Board of Wakf the opposite party no-1 and decided is not considered. Although the representations made before the opposite party no-1 by the applicant for appointment of Mutawalli not considered and decided by the opposite party no-2 gives rise to a fresh cause of action but the fact the applicant was pursuing this substitution application before this Court for the last 3 years 6 months and to prevent multiplicity of litigation it would not be reasonable to refer the applicant to a fresh litigation. As opposite party no-1 before which representations of the petitioner are pending is

before this Court necessary direction can issued upon the opposite party no-1 to consider and dispose the representation of the applicant in accordance with law.

19.Hence This Application under Article 227 of the Constitutions of India is disposed along with other interlocutory application by directing the Board of Wakf opposite Party no-1 herein to consider and dispose the representations dated 28/06/2021 and 26/07/2021 made by the applicant Anisul Haq marked Annexure B to the application CAN 4/2021in accordance with law at an early date preferably within a period of two months from the date of communication of the order, after hearing all necessary parties. It is hereby made clear that as the Revisional Application is not decided on merits all points are left open to be agitated by the parties. It is needless to mention that any party aggrieved by the decision of Board of Wakf the opposite party no-1 herein may take steps in accordance with Law.

(Biswaroop Chowdhury, J.)