

SYEDA NAZIRA KHATOON (D) BY LR.

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v.

SYED ZAHIRUDDIN AHMED BAGHDADI & ORS.

(Civil Appeal No.4045 of 2010)

SEPTEMBER 26, 2019

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[N. V. RAMANA, MOHAN M. SHANTANAGOUDAR
AND AJAY RASTOGI, JJ.]

Wakf – Appointment of Mutawalli – A wakf was created in respect of certain properties by a registered deed of wakf – This deed appointed one person as Mutawalli of the wakf estates – Deed also provided that the office of the Mutawalli would devolve to ‘putro poutradi krome’ of the original Mutawalli – On the death of the original Mutawalli, his eldest son was appointed as the next Mutawalli – Eldest son of the original Mutawalli had six sons and nine daughters – After the death of the eldest son of the original Mutawalli, ‘SBA’ was authorised to act as Mutawalli – ‘SBA’ was the son of the eldest son of the original Mutawalli – ‘SBA’ did not have any male issue – Thereafter, ‘SBA’ executed a trust deed and appointed his wife ‘NK’ as the next Mutawalli after his death – After the death of ‘SBA’, ‘NK’ applied to the Board of wakfs for appointment as Mutawalli – Her application was allowed by the Commissioner of wakfs – Respondent No.1, grandson of the eldest son of the original Mutawalli and nephew of the last Mutawalli (‘SBA’) objected her appointment and alleged that her appointment went against the original wakf deed – Held: In light of the pronouncements of the Supreme Court and High Court Judgments and also authoritative texts on Mohammedan law, it is clear that the Mutawalli does not have a general power to assign or transfer his office to another person, unless he is given such powers by the wakf deed itself – In the instant case, the wakf deed did not give the Mutawalli any such power to select another person as the future Mutawalli on his demise, by creating a trust deed or any other instrument to that effect – In the absence of such an authorization, the transfer of the office of Mutawalli by ‘SBA’ by way of a trust deed in favour of his wife, clearly went beyond the purview of his powers and the settled principles of Mohammedan

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- A *law – Also, reading and interpreting the term ‘putro poutradi krome’ lends support to the view that it means son and grandson, generation after generation and therefore does not include any female descendants – Here, given that ‘NK’ was the wife of the last Mutawalli and not direct descendent in the family, she was not entitled to the Mutawalli – The nephew of the last Mutawalli,*
- B *Respondent No. 1 herein is a male lineal descendant of the original Mutawalli, and is therefore entitled to hold the office of Mutawalli as per the wakf deed.*

Dismissing the appeal, the Court

- C **HELD: Whether a mutawalli has the right to transfer his office to another person, as was done by the last mutawalli, ‘SBA’ through the creation of the trust deed.**

- D **1. In light of the pronouncements of the Supreme Court and the High Court Judgments and authoritative texts on Mohammedan law, it is more than clear that the mutawalli does not have a general power to assign or transfer his office to another person, unless he is given such powers by the wakf deed itself. In the instant case, the wakf deed does not give the mutawalli any such power to select another person as the future mutawalli on his demise, by creating a trust deed or any other**
- E **instrument to that effect. In the absence of such an authorization, the transfer of the office of mutawalli by ‘SBA’ by way of a trust deed in favour of his wife, clearly went beyond the purview of his powers and the settled principles of Mohammedan law. [Para 10] [719-C-D]**

- F **2. The succession of the office of mutawalli should be in accordance with the intention of the *wakif* who created the wakf, and the same cannot be subverted through any other document contrary to the intention of the *wakif*. Here, given that ‘NK’ was the wife of the last mutawalli and not a direct descendant in the family, she would not have been entitled to the mutawalliship**
- G ***even if* the wakf deed were to be interpreted broadly to include female descendants. Thus, the creation of the trust deed to alter the succession of the office of mutawalli in her favour, is tantamount to changing the terms of the original wakf deed. It is a subversion of the intent underlying the wakf deed and is**
- H **illegal, as it goes beyond the powers vested with the mutawalli.**

The claim of late ‘NK’ to the mutawalliship of the said wakf estate is therefore unsustainable. [Para 10] [719-E-F] A

Whether the daughters of the last mutawalli and ‘NK’, including the Appellant herein, would qualify to be the mutawalli under the express terms of the wakf deed.

3. Admittedly, the official translation before this Court indicates that the term “*putro poutradi krome*” means future generations or descendants. This is also supported by the dictionaries cited by the Appellant. However, it is to be noted that the same source also shows that the word “*putro*” means son and grandson. In reading and interpreting the term “*putro poutradi krome*”, the meaning of the individual words must also be considered and accounted for. A combined reading of these terms lends support to the view that “*putro poutradi krome*” means son and grandson, generation after generation, and therefore does not include any female descendants. Following this meaning, it becomes clear that the original wakf deed did not envisage female descendants to fall within the purview of these words and hold the office of mutawalli. Thus, ‘NK’ or her daughters (including the Appellant herein) cannot stake any claim to the mutawalliship of the wakf estate. Instead, being the nephew of the last mutawalli, Respondent No. 1 herein is a male lineal descendant of the original mutawalli, and is therefore entitled to hold the office of mutawalli as per the wakf deed. [Paras 12 and 13] [720-C-F] B
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Ahmed G.H. Ariff and others v. Commissioner of Wealth Tax, Calcutta (1969) 2 SCC 471 – relied on. F

Badagara Jumayath Palli Dharas Committee v. Peedikayalakath Ummerkutty Haji AIR 2002 Ker 56 ; *Abdul Latheef v. K.P. Abdurahiman* (2014) 1 KLJ 329 – affirmed. G

Mulla’s Principles of Mohammedan Law (21st edn., 2017) at page 298 – referred to.

Asaf A.A. Fyzee, Outlines of Muhammadan Law (5th edn., Tahir Mahmood) at page 249 – referred to. H

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Case Law Reference**(1969) 2 SCC 471****relied on****Para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4045 of 2010.

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From the Judgment and Order dated 01.10.2008 of the High Court at Calcutta in C. O. No. 936 of 2006.

Satyam Reddy, Sr. Adv., Vishal Arun and S. K. Mehbub Hossain, Advs. for the Appellant.

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Anand, Gautam Misra, Abhijit Sengupta, Ms. Rajeshri N. Reddy and Ms. Manjeet Chawla, Advs. for the Respondents.

The Judgment of the Court was delivered by

MOHAN M. SHANTANAGOUDAR, J.

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1. The instant appeal arises out of a decision of the High Court of Calcutta dated 01.10.2008 in the revisional application C.O. No. 936 of 2006, setting aside the order dated 28.02.2006 passed by the Presiding Officer, Wakf Tribunal, West Bengal in Appeal No. 6 of 2005.

2. The brief facts giving rise to this appeal are as follows:

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One Syed Obaidullah Baghdadi Shah founded a *khankhah*, a Mohammedan institution for imparting religious doctrine and rules of life. He gradually became its first spiritual superior or *sajjadanashin*. One of his devotees, Abdur Rahim, created a wakf in respect of certain properties by a registered deed of wakf dated 07.02.1913 (*hereinafter* ‘the wakf deed’). Written in Bangla/Bengali language, this deed provided that Syed Obaidullah Baghdadi would be appointed as the sole mutawalli (*hereinafter* ‘original mutawalli’) of the wakf. It also provided that the office of the mutawalli would devolve to “*putro poutradi krome*” of the original mutawalli.

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On the death of the original mutawalli, his disciple and son Syed Gyasuddin Ahmed Baghdadi (*hereinafter* ‘Gyasuddin Ahmed’) became the *sajjadanashin* and mutawalli of the wakf estate. In 1977, when Gyasuddin Ahmed died, he was survived by his wife, six sons, and nine daughters. According to his Will, his eldest son Syed Badruddin Ahmed (*hereinafter* ‘last mutawalli’) was authorized to act as the *sajjadanashin* for one of the dargahs in the wakf property. His name was also

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recorded as the mutawalli of the wakf estate.

On 19.11.1992, Syed Badruddin Ahmed died, leaving behind his widow, Nazira Khatoon, and his daughters, one of whom is the Appellant herein. Crucially, he did not have any male issue. After his death, Nazira Khatoon applied to the Board of Wakfs to be appointed as the mutawalli of the wakf estate. Her claim was based on a trust deed dated 03.02.1984 executed by Syed Badruddin Ahmed, by which he had appointed her to be the mutawalli of the wakf estate after his death (*hereinafter* ‘the trust deed’).

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3. By order dated 30.01.1995, the Commissioner of Wakfs allowed this application and appointed Nazira Khatoon as the permanent mutawalli of the wakf estate. Her name was accordingly substituted in place of her deceased husband’s.

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However, a dispute ensued when Respondent No. 1 herein, who is the grandson of Gyasuddin Ahmed and nephew of the last mutawalli, filed a writ petition, objecting to the appointment of Nazira Khatoon. He alleged that her appointment went against the original wakf deed. Consequently, the High Court directed the Wakf Board to decide the application submitted by Nazira Khatoon again, after considering the objections of Respondent No. 1.

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Upon consideration of arguments by both the parties, the Wakf Board passed a new resolution on 14.10.1999 observing that the wakf deed only provides for a male lineal descendant to be the mutawalli of the wakf estate. It was observed that by appointing Nazira Khatoon as the mutawalli of the estate, the Board committed an error, and her appointment based on the trust deed dated 03.02.1984 was in violation of the provisions of the original wakf deed. Thus, adhering to the line of succession in the original wakf deed, the members of the Wakf Board cancelled the appointment of Nazira Khatoon as the mutawalli of the estate. Instead, Respondent No. 1 was appointed as the mutawalli, being the male lineal descendant of the original mutawalli.

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4. This resolution was challenged by Nazira Khatoon in a writ application, which was transferred to the Wakf Tribunal, West Bengal and numbered as Appeal No. 6 of 2005. After hearing both the parties, the Presiding Officer allowed the appeal by judgment and order dated 28.02.2006. This was done on the basis of the determination that the Wakf Board does not have the power to review its earlier decision. Thus, it was held that the order cancelling Nazira Khatoon’s initial appointment amounted to a review, and was liable to be set aside.

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A 5. Being aggrieved by this judgment and order of the Wakf Tribunal, Respondent No. 1 herein approached the High Court of Calcutta by way of a revision application under Article 227 of the Constitution of India. The High Court allowed this revision application by the impugned judgment dated 01.10.2008, holding that the original wakf deed had to be given utmost importance. The term “*putro poutradi krome*” in the wakf deed was interpreted to indicate that the office of mutawalli would go to the sons and grandsons (through successive generations). In view of this, it was held that Nazira Khatoon would not qualify to be the mutawalli of the said wakf estate.

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C Further, upon examination of judicial decisions and the role of the mutawalli in the Wakf Act, 1995, the Court concluded that a mutawalli does not have an independent authority to transfer his right in the wakf to another person by creating a separate and independent instrument like a trust deed to that effect. Given that the original wakf deed did not accord such a right of transfer to the mutawalli, it was held that the trust deed created by the last mutawalli in favour of his wife could not be given effect. Thus, Respondent No. 1 was held to be entitled to the office of the mutawalli of the wakf.

D 6. In view of this factual background, two questions arise for consideration before this Court.

E **First**, whether the mutawalli can transfer his office to another person by creating a trust deed, despite the existence of a wakf deed providing a line of succession to the office. Consequently, it is to be seen whether the trust deed in favour of Nazira Khatoon is valid.

F **Second**, whether the female descendants of the last mutawalli (including the Appellant herein) fall within the purview of the term “*putro poutradi korme*” as stated in the wakf deed, so as to qualify as a mutawalli of the wakf estate.

G 7. Counsel for the Appellant argued that the transfer of the office of mutawalli is in accordance with the wakf deed, which intends for female descendants to be included within the term “*putro poutradi korme*”. In this regard, he relied on the Bangla-to-English translation of the wakf deed given by the original translator appointed by this Court. According to this translation, the office of the mutawalli would go from generation after generation (translated from *putro poutradi korme*) of the original mutawalli. He also relied on *Dev's Bengali-to-English*

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Dictionary to argue that “*putro poutradi*” conjunctively means future generations, posterity, or descendants, and that the term is therefore agnostic to whether such descendant is male or female. Thus, the wife of the last mutawalli, Nazira Kharoon was eligible to be the mutawalli under the wakf deed, and consequently, the Appellant herein also has a right to be appointed as the mutawalli.

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Per contra, Counsel for the Respondent No.1 submitted that the term “*putro poutradi*” should be understood in light of the individual meaning of the word “*putro*”, which means son. Thus, “*putro poutradi*” should be read to include male descendants only. He argued that the last mutawalli was aware of this restriction on mutawalliship under the original wakf deed, and knowingly executed the trust deed appointing his wife (Nazira Khatoon) as the mutawalli. Such appointment was wrongful as it goes against the express terms of the wakf deed. Learned Counsel further submitted that since Nazira Khatoon died on 28.05.2009, during the pendency of her special leave petition before this Court, the right to sue does not survive in her legal representatives under Order XXII of the Code of Civil Procedure, 1908. Thus, the Appellant herein (daughter of Nazira Khatoon) does not have a right to sue in this appeal.

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8. We have heard the arguments advanced by both sides and perused the material on record.

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9. The **first question** to be considered is whether a mutawalli has the right to transfer his office to another person, as was done by the last mutawalli, Syed Badruddin Ahmed through the creation of the trust deed. In this regard, it would be useful to appreciate the role of the mutawalli of a wakf.

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Under Mohammedan law, when a wakf is created, all rights in the property pass from the *wakif* or dedicator to the God. The mutawalli is only a manager of such property and does not have any rights in it. This role envisaged for a mutawalli finds clear exposition in *Ahmed G.H. Ariff and others v. Commissioner of Wealth Tax, Calcutta*,¹ where a 3-Judge Bench of this Court observed as follows:

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“6... the moment a wakf is created, all rights of property pass out of the Wakif and vest in the Almighty. Therefore, the

¹ (1969) 2 SCC 471

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A Mutawalli has no right in the property belonging to the wakf. He is not a trustee in the technical sense, his position being merely that of a superintendent or a manager. A Mutawalli has no power, without the permission of the Court, to mortgage, sell or exchange wakf property or any part thereof unless he is expressly empowered by the deed of wakf to do so.”

B Thus, it is well-settled that a mutawalli only acts in a managerial capacity for the wakf. As regards his power to transfer his office to another person, he cannot undertake such a transfer, unless such a power is expressly given to him by the *wakif* in the wakf deed. The following excerpt from *Mulla’s Principles of Mohammedan Law*,² is relevant in this context:

“§214: Office of mutawalli not transferable – A mutawalli has no power to transfer the office to another, unless such a power is expressly conferred upon him by the founder...”

D This view is also echoed by other scholars including Asaf A.A. Fyzee.³ We may also fruitfully refer to two decisions of the High Court of Kerala in this regard. In *Badagara Jumayath Palli Dharas Committee v. Peedikayalakath Ummerkutty Haji*,⁴ the High Court had to decide the validity of a similar agreement, by which the mutawalli had transferred his office to a society. Adverting to the aforementioned excerpt from *Mulla’s Principles of Mohammedan Law* (supra), the Court observed that there cannot be any transfer of mutawalliship and held the agreement of transfer to be invalid.

F In *Abdul Latheef v. K.P. Abdurahiman*,⁵ the Kerala High Court had occasion to deal with the validity of a transfer of the mutawalli’s office to a Committee, and held the same to be invalid. The following observations from the decision are relevant:

G “24. The upshot of the discussions is that Muhammadan Law does not generally empower a mutawalli to transfer his right during life time. There is a clear distinction in the matter of powers between the appropriator or the waqif who himself becomes the first mutawalli and a mutawalli appointed by the waqif for

² Mulla’s Principles of Mohammedan Law (21st edn., 2017) at page 298.

³ Asaf A.A. Fyzee, Outlines of Muhammadan Law (5th edn., Tahir Mahmood) at page 249.

⁴ AIR 2002 Ker 56.

H ⁵ (2014) 1 KLJ 329.

administering the wakf. Although the waqif may resign his office as first mutawalli and out of his own residuary or general powers as waqif appoint his own successor, the mutawalli appointed by the waqif or any other person succeeding such a mutawalli has no such unbridled power. All the leading authorities on Muhammadan Law declare that a mutawalli cannot assign or transfer his office to anyone or appoint another during his life time, unless he is clothed with powers which are so general in nature.”

10. In light of these pronouncements and authoritative texts on Mohammedan law, it is more than clear that the mutawalli does not have a general power to assign or transfer his office to another person, unless he is given such powers by the wakf deed itself. In the instant case, the wakf deed does not give the mutawalli any such power to select another person as the future mutawalli on his demise, by creating a trust deed or any other instrument to that effect. In the absence of such an authorization, the transfer of the office of mutawalli by Syed Badruddin Ahmed by way of a trust deed in favour of his wife, clearly went beyond the purview of his powers and the settled principles of Mohammedan law.

The succession of the office of mutawalli should be in accordance with the intention of the *wakif* who created the wakf, and the same cannot be subverted through any other document contrary to the intention of the *wakif*. Here, given that Nazira Khatoon was the wife of the last mutawalli and not a direct descendant in the family, she would not have been entitled to the mutawalliship *even if* the wakf deed were to be interpreted broadly to include female descendants. Thus, the creation of the trust deed to alter the succession of the office of mutawalli in her favour, is tantamount to changing the terms of the original wakf deed. It is a subversion of the intent underlying the wakf deed and is illegal, as it goes beyond the powers vested with the mutawalli. The claim of late Nazira Khatoon to the mutawalliship of the said wakf estate is therefore unsustainable.

11. The **second question** to be considered is whether the daughters of the last mutawalli and Nazira Khatoon, including the Appellant herein, would qualify to be the mutawalli under the express terms of the wakf deed. For this, the term “*putro poutradi korme*” requires to be interpreted.

A 12. Different translations of the wakf deed have been produced before us. While the translation adduced by the Appellant at Annexure P-1 interprets “*putro poutradi krome*” to mean “through successive generations or successors”, the translation adduced by the Respondent No.1 at Annexure R-1 interprets it as “sons and grandsons in succession”.

B We are inclined to agree with the interpretation put forth by the learned counsel for the Respondent(s). Admittedly, the official translation before this Court indicates that the term “*putro poutradi krome*” means future generations or descendants. This is also supported by the dictionaries cited by the Counsel for the Appellant. However, it is to be noted that the same source also shows that the word “*putro*” means son and grandson. In reading and interpreting the term “*putro poutradi krome*”, the meaning of the individual words must also be considered and accounted for. A combined reading of these terms lends support to the view that “*putro poutradi krome*” means son and grandson, generation after generation, and therefore does not include any female descendants.

E 13. Following this meaning, it becomes clear that the original wakf deed did not envisage female descendants to fall within the purview of these words and hold the office of mutawalli. Thus, Nazira Khatoon or her daughters (including the Appellant herein) cannot stake any claim to the mutawalliship of the wakf estate. Instead, being the nephew of the last mutawalli, Respondent No. 1 herein is a male lineal descendant of the original mutawalli, and is therefore entitled to hold the office of mutawalli as per the wakf deed. While it is not in dispute that women can also hold the office of mutawalli under Mohammedan law, on the facts at hand, it is clear that the *wakif* intended to create the mutawalliship only in favour of male descendants, from generation to generation.

G 14. In view of the foregoing discussion, we uphold the impugned decision of the High Court of Calcutta dated 01.10.2008 in the revisional application C.O. No. 936 of 2006 affirming the cancellation of the appointment of Nazira Khatoon as the permanent mutawalli of the wakf estate. The instant appeal is dismissed accordingly.