

GAHC010013162017



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/949/2017

NURUL ISLAM CHOUDHURY
S/O LT. IRSHAD HUSSAIN CHOUDHURY, VILL. and P.O. BARHAILAKANDI
PT.-III, DIST-/P.S. - HAILAKANDI MUTAWALLI OF LATE GULAM RAJA
CHOUDHURY, WAKF ESTATE- HAILAKANDI

VERSUS

THE ASSAM BOARD OF WAKF and 3 ORS.
SIJUBARI, GHY-28

2:THE CHIEF EXECUTIVE OFFICER
ASSAM BOARD OF WAKF SIJUBARI
GHY-28

3:THE DY. COMMISSIONER
HAILAKANDI
ASSAM

4:ABDUL KALIQUE CHOUDHURY
S/O LT. MOSHUR UDDIN CHOUDHURY
VILL. and P.O. BARHAILAKANDI PT.-III
DIST.andP.S. HAILAKAND

Advocate for the Petitioner : MR.N H MAZARBHUYAN

Advocate for the Respondent : MR.S A HUSSAIN

**BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA**

ORDER

Date : 16-07-2024

Mr. M.H. Saikia, learned counsel for the petitioner has prayed for an adjournment of the matter on the ground that the learned counsel holding the brief is out of station for medical treatment.

2. The prayer for adjournment is refused as the learned counsel for the petitioner did not circulate the memo of adjournment in advance and by the time the prayer was belatedly made, the learned counsel for the respondent No.4 was substantially heard.

3. Heard Mr. A. Sahad, learned counsel appearing for the respondent No.4.

4. By filing this writ petition under Article 226 of the Constitution of India, the petitioner has challenged the order dated 30.11.2016 passed by the Wakf Tribunal, Cachar at Silchar in Misc. (Wakf) Case No.1/2014. By the said order, the decision dated 25.11.2013 of the Chief Executive Officer of the Wakf Board, Silchar was set aside and the case was decided in favour of the respondent No.4.

5. In brief, the case of the petitioner is that the predecessor-in-interest of the petitioner and the respondent No.4, namely, Abdul Khalique Choudhury, had registered a Deed of Wakf dated 19.08.1928, which was registered on 02.10.1928 and thereby a Wakf Estate was constituted in respect of the land

measuring 39 Bigha 7 Katha 9 Chatak at Village Rangauity Part-II and Part-III in the District of Hailakandi. Amongst others, it was provided in the said Deed of Wakf that after his death, his son Irsad Hussain Choudhury would be the Mutawalli and in this way, his son's son and thereafter their son's son, who will be suitable, efficient and pious according to the opinion of the pious Muslim community, shall act as Mutawalli. It was also provided that if any time, person's amongst the defendants are seen to be equally efficient and pious, one who is elder, shall be appointed as Mutawalli. Clause-(i) of the Deed of Wakf, relevant for determination of this case, is quoted below:

“i) During my life-time management and preservation of the wakf property shall remain with me as Mutawalli. And after the payment of revenue and local taxes out of its income the rest shall be utilized for charitable purposes like- the appointment of and payment to a pious person as Imam in the said Mosque at Hailakandi donated by me who shall render five times prayer as Imam teaching of the holy Quran to the local Muslim boys and for lighting of candles regularly in the Mosque and after my death my son Irsad Hussain Choudhury will remain as Mutawalli. In this way amongst their son's son and after them amongst their son's sons who will be suitable, efficient and pious according to the opinion of the pious muslim community, shall act as Mutawalli and manage as per the rules laid down in the Wakf-nama.

If at any time two persons amongst the descendents are seen to be equally efficient and pious, one who is elder shall be appointed as Mutawalli. If at any time none found suitable, efficient and pious in my dynasty or any Mutawalli acts contrary to be the provisions of the wakf-name, then the entire Muslim community or social hakim will appoint an efficient person as Mutawalli or remove the existing one and appoint another Mutawalli.”

6. By an order dated 25.11.2013, the respondent No.4 was provisionally appointed as Mutawalli by the Chief Executive Officer, Assam Board of Wakfs. Thereafter, on the basis of applications submitted by the petitioner as well as the respondent No.4, the Chief Executive Officer, Assam Board of Wakfs, by an order dated 25.11.2013, appointed the petitioner as Mutawalli of the Gulam

Raja Choudhury Wakf Estate, being the senior most aulad beneficiary as per the provision laid down in the Wakf-nama, registered as Deed No.3586 dated 02.10.1928 in place of Abdul Khalique Choudhury (respondent No.4), the provisional Mutawalli.

7. The said order dated 25.11.2013, passed by the Chief Executive Officer, Assam Board of Wakfs was assailed by the respondent No.4 before the Wakf Tribunal, Cachar at Silchar under Section 83(1) & (2) of the Wakf Act, 1995. The petitioner herein contested the proceedings by filing his written statement. Accordingly, on the basis of the pleadings, the following issues were framed:

“1) Whether the application of the instant case is to be prepared and filed as per Rules 59 and 60 of the Wakf Rules 1998?”

2) Whether the instant application is maintainable under Rule 59 and 60 of Wakf Rules 1998 Assam?”

3) Whether this case is bad for mis-joinder and non-joinder of parties?”

4) Whether the reasons to withdraw the appointment dated 24.01.2013 mentioned by the CEO/ Board are correct, legal, valid according to the operative conditions of the Wakf Deed No- 3586?”

5) Whether the CEO/Wakf Board fairly passed the order in question after making scrutiny of all relevant records related to the hearing of the appointment to Mutawalli?”

6) Whether the petition of the case refer to claim to determine disputes, question and any other matter including the grounds of grievance, as stated in his favor.

7) Whether the suit is barred under the provision of the sub section (5) and (6) of Sec 83 of the Wakf Act and Sec 89 of the same Act as the petitioner

has not complied with the provision of the Act.”

8. The respondent No.4, who was the petitioner before the Wakf Tribunal, had examined himself as PW-1 and had exhibited 14(fourteen) documents marked as Ext.1 to Ext.14.

9. The petitioner herein, who was one of the respondents in the proceedings before the learned Wakf Tribunal, had examined himself as DW-1. He had exhibited 3(three) exhibits marked as Ext.A to Ext.C.

10. From the impugned order passed by the learned Wakf of Tribunal, it appears that the learned Tribunal had taken up issue No.3 regarding misjoinder and non-joinder of parties. In respect of issue No.3, it was held that the case was not bad for misjoinder and non-joinder of parties. In respect of issue No.4, it was held that the respondent No.4, Abdul Khalique Choudhury, is well educated and literate in comparison to the petitioner herein, namely, Nurul Islam Choudhury, and accordingly, it was held that the order of the Chief Executive Officer, Assam Board of Wakfs is not correct, legal and valid in terms of Wakf-nama No.3586. In respect of issue No.5, it was held that the petitioner did not took over charge of Mutawalli. In respect of issue No.6, although there was a discussion but the following cannot be easily deciphered. However, in the later part of the order, it has been reflected that in view of decision of issue No.4 was in the favour of respondent No.4, issue Nos.5 and 6 is also decided in favour of the respondent No.4 herein. In respect of issue No.7, the Tribunal is not very clear. However, in the later part of the judgment, it has been mentioned that the issue No.7 is also decided in favour of the respondent No.4.

Accordingly, the decision of the Chief Executive Officer, Assam Board of Wakfs was set aside.

11. It may be mentioned herein that although by the impugned order dated 30.11.2016, the decision of the Assam Board of Wakfs dated 25.11.2013 was set aside, there is no positive direction to appoint the respondent No.4 as the Mutawalli of the Gulam Raja Choudhury Wakf Estate.

12. The respondent No.4 has contested this writ petition by filling affidavit-in-opposition, justifying the appointment of the respondent No.4 as the Mutawalli of the said Wakf Estate on the ground that the respondent No.4 is a double graduate with a degree of B.A., LLB and that he is an advocate by profession and therefore, it is claimed that he is more better educated than the petitioner herein.

13. The respondent No.4 has filed an additional affidavit on 03.09.2018 to project that during the pendency of the writ petition, the petitioner has illegally sold a part of the wakf property to one H.R.M. Memorial Trust, Hailakandi and that the respondent No.4 has filed an objection before the Deputy Commissioner, Hailakandi on 17.01.2018 with an enquiry which is stated to have been initiated.

14. It may be mentioned that the learned counsel for the respondent No.4 has made his submissions in support of the candidature of the respondent No.4 on the ground that he is more educated and, therefore, the respondent No.4 is more qualified in education and that being an advocate, there cannot be any

doubt that he is not efficient and that he has all other qualifications to act as a Mutawalli on the ground that the members of the Muslim community had nominated the name of respondent No.4 to be the Mutawalli of the said Wakf Estate.

15. From Clause-(i) of the Wakf Deed, which is the Wakf Deed dated 19.08.1928, registered on 02.10.1928, extracted herein before, the settler has provided that in the event at any time 2(two) persons amongst his descendants are seen to be equally efficient and pious, one who is elder shall be appointed as Mutawalli. On a perusal of the material on record, we find that neither the Board of Wakfs Assam nor the Wakf Tribunal had made any effort to find out as to who out of the petitioner and the respondent No.4 are efficient and pious according to the opinion of the pious Muslim community. Hence, this Court is of the considered opinion that the Assam Board of Wakfs as well as the Wakf Tribunal, Silchar had not considered Clause-(i) of the Deed of Wakf. At least from the contents of the order dated 25.11.2013 passed by the Assam Board of Wakfs, it is not evident as to whether any effort was undertaken to determine the efficiency and piousness of the petitioner and the respondent No.4. Moreover, the learned Wakf Tribunal, Silchar had also not determined as to who amongst the petitioner and the respondent No.4 was more efficient and pious and what was the opinion of the pious Muslim community before taking a decision on the matter.

16. In so far as the impugned order dated 30.11.2016 passed by the learned Wakf Board, Silchar is concerned, we have already indicated herein before that the finding by the learned Tribunal on issue Nos.5, 6 and 7 is not

very clear and only from the last part of the order, it can be seen that the issue Nos.5, 6 and 7 were decided in favour of the respondent No.4 herein. Moreover, even though the appeal of the respondent No.4 was allowed, there was no positive direction to make the respondent No.4 as the Mutawalli of the Gulam Raja Choudhury Wakf Estate.

17. Therefore, the Court is inclined to hold that the impugned order dated 30.11.2016 passed by the learned Wakf Tribunal, Cachar, Silchar in Misc. (Wakf) Case No.1/2014 is liable to be interfered with as the learned Wakf Tribunal has committed jurisdictional error by not deciding the issues on the basis of the prescription of the Clause (i) of the Deed of Wakf dated 19.08.1928, regularized on 02.10.1928. Accordingly, it is held that the impugned decision is preserve and not sustainable.

18. It may be mentioned herein that the learned counsel for the petitioner has placed reliance on the decision of this Court in *Asadur Rahman(Md.) -Vs- Lutfu Islam & Ors.*, reported in 2010 (5) GLT 422 and it was submitted that this Court, by placing reliance on the decision of the Hon'ble Supreme Court in the case of *Surya Dev Rai -Vs- Ram Chander Rai & Ors.*, (2003) 6 SCC 675 have held that as there was no jurisdictional error in the order, the revision under Article 227 of the Constitution of India was not maintainable.

19. In the said regard, this Court is of the considered opinion that under the Gauhati High Court Superintendence of Tribunals Rules, 1992, the Wakf Tribunals are not under the superintendence jurisdiction of this Court. Under such circumstances, there would be no bar to assail the non-appealable order of

the Wakf Tribunal before this Court. Moreover, in the discussions above, this Court has already held that in the order passed by the learned Wakf Tribunal, the findings on issue Nos.5, 6 and 7 are not very clear and, therefore, the said order otherwise also warrants interference of this Court.

20. Accordingly, by setting aside the said order dated 30.11.2016 passed by the learned Wakf Tribunal, Cachar, Silchar in Misc. (Wakf) Case No.1/2014, the matter is remanded back for a fresh decision by the said learned Tribunal. In view of the contents of Clause-(i) of the registered Deed of Wakf dated 19.08.1928 (registered on 02.10.1928), where the manner of appointment of Mutawalli is prescribed and if 2(two) descendants are found equally efficient and pious, the Court hopes that the learned Wakf Tribunal, Cachar, Silchar shall take note of the said clause of the Deed of wakf and decide the matter on the basis of the prescription provided in the said Deed of Wakf.

21. As the impugned order dated 30.11.2016 passed by the Wakf Tribunal, Cachar at Silchar has been set aside, it is provided that the matter would be taken up afresh from the stage of framing of issues.

22. In so far as the additional affidavit filed by the respondent No.4 is concerned, the respondent No.4 will be advised as to the future course of action he may so intend to take for preservation of the property.

23. In view of the discussions above, this writ petition stands allowed to the extent as indicated above. Parties are left to bear their own costs.

24. As the petitioner and the respondent No.4 are both represented, they would appear before the learned Wakf Tribunal, Cachar at Silchar on 05.08.2024 and by producing a certified copy of this order, seek further instructions from the said learned Tribunal.

JUDGE

Comparing Assistant