

IN THE SUPREME COURT OF BANGLADESH

HIGH COURT DIVISION

(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 10023 of 2016

-AND-

IN THE MATTER OF

An application under Article 102 of the Constitution
of the People's Republic of Bangladesh.

-AND-

IN THE MATTER OF:

Md. Abdullah Md. Ehtesham

.....Petitioner .

-Versus-

Secretary, Ministry of Religious Affairs , People's
Republic of bang, Bangladesh Secretariat, Ramna,
Dhaka and others Respondents

Mr. Rafiq Ul Huq with

Mr. Ahmed Naquib Karim Advocate

....for the petitioner

Mr. Mahbubey Alam with

Mr. M. Fida Kamal

Mr. Md. Raihanul Mustafa

....for the respondent No.4.

Mr. M. Harun Ur Rashid and

Nasid Sultana Jemy Advocates

....for the respondent No.2 and 3

Heard On 05.12.2016 and 06.12.2016

Judgment on 14.12.2016

Present:

Mr. Justice Tariq ul Hakim

and

Mr. Justice Md. Faruque (M. Faruque)

Tariq ul Hakim,J:

This Rule Nisi has been issued on an application under Article 102 of the Constitution by the Petitioner calling upon the respondents to show cause as to why the impugned Memo No. 16.02. 0000.05.031.396.57/273 (1-4) dated 01.08.2016 issued by the respondent no. 3 and notification published in

the Daily Azadi on 04.08.2016, appointing respondent no. 4 Mutawalli in violation of the waqf deed and the waqf Ordinance, 1962 as evidenced by Annexure A and A(1) respectively should not be declared to have been issued and published without lawful authority and of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper .

The case of the Petitioner is that late Haji Abdul Gani Saudagar by registered deed Nos. 857 and 2342 dated 08.10.1945 and 16.3.1947 respectively donated all his property for creating a Waqf and Awlad. In the said deeds Mr. Saudagar stated that he would be the Mutwalli of the said waqf estate until his death and after his death if he does not have any son or daughter, his brother's son Danu Miah will be the Mutawalli . It was further stated in the said deed that after the death of Danu Miah his eldest son Jamaluddin Khan will be the Mutawalli. In clause 1 of the Waqf Deed it was further stated that the said Jamaluddin Khan will appoint a Mutawalli before his death who will take his place after his death. Likewise each Mutawalli will appoint a Mutawalli to succeed him after his death.

Mr. Saudagar died on 16.11.1973 leaving behind no son or daughter. In accordance with Clause 1 of the aforesaid Waqf Deed therefore his brother's son Danu Mia became the Mutawalli . Danu Mia died leaving behind four sons (1) Jamaluddin Khan (2) Md. Feroz Khan (3) Md. Saifuddin Khan and (4) Md. Azizuddin Khan and four daughters. After the death of

Danu Miah Jamaluddin Khan became Mutawalli in accordance with Clause 1 of the said Waqf Deed. It is stated that the said Jamaluddin Khan vide registered deed dated 10.03.2004 appointed the petitioner Mutwalli after his death as per Clause 1 of the said Waqf Deed subject to his attaining the age of majority by then. The petitioner attained the age of majority on 15.03.2011 and since then he has been acting as Mutawalli on behalf of his father. Jamaluddin Khan died on 16.05.2016 leaving behind his wife, one son and nine daughters. Before the death of Jamaluddin Khan, the respondent No.4 on 09.07.2007 filed an application under section 32(1) of the Waqf Ordinance, 1962 for removing Jamaluddin Khan from the office of Mutawalli. The said application was however filed after Jamaluddin Khan had been acting as Mutawalli for 20 years. After the death of Jamaluddin Khan on 16.5.2016, the respondent No.4, a brother of late Jamaluddin Khan, by an application dated 22.5.2016 applied to the Respondent No. 2 to be appointed Mutawalli. On the same date another brother of Jamaluddin Khan one Azizuddin Khan and a sister Anowara Khanam by two separate applications both dated 22.5.2016 also applied for being appointed Mutawalli. The petitioner by his letter dated 25.5.2016 (received on 31.5.2016) also made an application to the respondent No.2 Administrator of Waqf enclosing a copy of the registered Deed dated 10.03.2004 for being appointed Mutawalli. Respondent No. 3 after hearing all the applicants vide the impugned order appointed the respondent No.4 as official Mutawalli of

the waqf estate for a period of 5 years under section 44 of the Waqf Ordinance, 1962.

Being aggrieved, the petitioner has come to this Court and obtained the present Rule.

The Rule is being contested by the Respondent No.4 by filing Affidavit-in-Opposition stating inter alia that the last Mutawalli Jamaluddin Khan violated the terms and conditions of the original Waqf deeds dated 08.10.1945 and 13.6.1947 registration Nos. 857 and 2342 respectively. It is alleged that Jamaluddin Khan on 10.03.2004 before his death created a new deed extinguishing and destroying the purpose of the original Waqf Deeds and the intention of the waqif. The deed created on 10.03.2004 by the last Mutawalli Jamaluddin Khan is not sustainable in law because it was not made in accordance with the original Waqf Deeds but is a new Waqf deed. The last Mutawalli Jamaluddin Khan by his deed dated 10.3.2004 travelled beyond the intention of the waqif and the original purpose of the Waqf Deed and therefore it is illegal and void. It is further stated that a Mutawalli has no power to appoint his successor during his life time and that such appointment can only be made on his death. The respondent No.4 filed an application to the Administrator of Waqf on 9.7.2007 under section 32(1) of the Waqf Ordinance, 1962 for removal of the then Mutawalli on the ground of breach of trust, mismanagement and misappropriation of the waqf property but no decision was given by the Administrator of Waqf till 16.01.2016. It is also stated that

Jamaluddin Khan died on 16.5.2016 and thereafter on 31.5.2016 the petitioner submitted his application to the Administrator of Waqf showing his appointment as Mutawalli of the said Waqf estate by registered deed dated 10.03.2004 and that neither the Administrator of Waqf nor the respondent No. 4 and other beneficiaries knew about the said deed dated 10.3.2004 earlier. It is further stated that the respondent No. 3 Deputy Administrator of Waqf after hearing all the parties by order dated 1.8.2016 rejected the application of the petitioner for appointment as Mutawalli and appointed the respondent No.4 as official Mutwalli in accordance with section 44 of the Waqf Ordinance, 1962 which does not call for any interference by this Court.

In a Affidavit-in-reply on behalf of the petitioner it has been stated that the application under section 32(1) of the waqf Ordinance, 1962 was filed by the respondent No.4 in 2007 after 20 years of the said Jamaluddin Khan's appointment as Mutawalli with malafide intention and that the said respondent could not prove any of the allegations of mismanagement of the waqf estate. The proceedings against Jamaluddin Khan could not be completed by the respondent No.2 Administrator of Waqf due to the several applications for adjournments for long 9(nine) years by the other respondents. Jamaluddin Khan by his letter dated 20.12.2015 informed the respondent No.2 Administrator of Waqf about appointing the petitioner as Mutwalli after his death pursuant to the registered deed dated 10.03.2004. It is further alleged that the earlier Mutwalli Jamaluddin Khan complied

strictly with the terms of Clause 1 of the Waqf deed and appointed the petitioner Mutwalli after his death. It is further stated that the respondent No.4 has not been able to prove or show that the said registered deed dated 10.03.2004 appointing him as Mutwalli or the aforesaid letter dated 20.12.2015 are forged or that the signature of Jamaluddin Khan on the said deed and letter is not his own and as such the impugned order appointing the respondent No.4 is illegal.

Mr. Rafiq Ul Huq assisted by Mr. Ahmed Naquib Karim the learned Advocate for the petitioner submits that the petitioner was appointed Mutwalli by registered deed dated 10.03.2004 as per clause 1 of the Waqf Deeds dated 08.10.1945 and 13.6.1947 registration nos. 857 and 2342 respectively and therefore the impugned order appointing the respondent No.4 Mutwalli is illegal and not sustainable in law. The learned Advocate further submits that the impugned decision is ultra vires, arbitrary and illegal since it is in complete contravention of the Clause 1 of the said Waqf deed and section 43 of the Waqf Ordinance, 1962 and is liable to be set aside. The learned Advocate further submits that since the registered deed dated 10.03.2004 as well as late Jamaluddin Khan's letter dated 20.12.2015 appointing the petitioner Mutwalli before his death has not been claimed to be forged or illegal and therefore the appointment of the petitioner is in accordance with the wishes of the waqif and the original waqf deed and the

same cannot be questioned and therefore the impugned order of the respondent No.3 Deputy Administrator of Waqf is not sustainable in law.

As against this, Mr. Mahbubey Alam assisted by Mr. M. Fida Kamal and Md. Raihanul Mustafa, the learned Advocates for the respondent No.4 submits that in the registered deed dated 10.03.2004 executed by late Jamaluddin Khan he has travelled beyond the wishes of the waqif and the original waqf deed. The learned Advocate submits that the respondent No.4 was appointed official Mutwalli by the respondent No.2 Administrator of Waqf as the respondent No.4 was the elder brother of late Jamaluddin Khan who is a senior person of the family and competent to conduct the affairs of the waqf estate. Furthermore the learned Advocate further submits that in the said deed of 2004 late Jamaluddin Khan stated how future Mutwallis for the said waqf estate are to be appointed after the death of the petitioner which is contrary to the mode of appointment of Mutwalli stated by the waqif in the original waqf deed. Finally the learned Advocate submits that since the deed of 2004 was made malafide and contrary to the terms of the original waqf deed the said deed should be struck down in its entirety as has been done by the respondent No.3 Deputy Administrator of Waqf. It has been further submitted that the petitioner was acting as Mutwalli prior to the death of Jamaluddin Khan since 2002 and he has been depriving the respondent No. 4 and other beneficiaries from the income of the waqf estate and

therefore he has disqualified himself from being appointed as Mutwalli and the impugned order should not be interfered with.

It appears that the aforesaid waqf estate was created pursuant to waqf deeds dated 08.10.1945 and 13.6.1947 bearing registration nos. 857 and 2342 respectively. After the death of the waqif Danu Mia became the Mutawalli . After his death Jamaluddin Khan became the Mutawalli . It may be mentioned that Jamaluddin Khan was alive during the life time of the waqif and he became Mutawalli in accordance with the terms and wishes of the waqf deed. It appears that by a registered deed dated 10.03.2004 Jamaluddin Khan appointed his son the petitioner as Mutawalli of the aforesaid Waqf estate upon his death . Clause 1 of the Waqf deed states inter alia :

“যদি আমার ঔরষজাত কোন সন্তান সন্ততি জন্ম গ্রহন না করে, তাহা হইলে উক্ত মহাং দানু মিত্রগাই তাহার জিবদশাকাল পর্যন্ত মোতওল্লী থাকিবে , তাহার মৃত্যুর পর তাহার ঔরষজাত মহাং জামাল উদ্দিন খান মোতওল্লী হইবে, সে তাহার জিবদশাকাল পর্যন্ত মোতওল্লী পদে থাকিয়া আমার এই ওয়াকফ নামার নির্দেশ মত সশন সংরক্ষন ও পরিচালন করিয়া পরলোক গমন করতে পূর্বে তাহার নির্দেশানুসারে তাহার মোতওল্লী নিযুক্ত হইবে এবং থাকিবে, এই প্রকারে পুরুষানুক্রমে উল্লেখিত রূপে প্রত্যেক শেষোক্ত মোতওল্লীর নির্দেশ মতে মোতওল্লী নিযুক্ত হইয়া আমার এই ওয়াকফ সম্পত্তীয়াদী পরিচালিত হইতে থাকিবে ”

The aforesaid provision clearly states that Jamaluddin Khan will have complete discretion to appoint a Mutawalli upon his death and the appointed Mutawalli will again be empowered to appoint his successor and in this way through the generations Mutawallis for administering the waqf estate will be appointed in accordance with the original waqf deed and wishes of

the waqif. In the instant case the petitioner was appointed Mutwalli by the aforesaid registered deed dated 10.03.2004 by late Jamaluddin Khan. This matter of appointment was also communicated to the respondent No.2 by Jamaluddin Khan by his letter dated 20.12.2015 under the heading “পরবর্তী মোতোয়াল্লী নিয়োগ প্রসঙ্গে” which appears in Annexure G of the Affidavit-in-reply of the petitioner. The said letter is reproduced below :

মাননীয়,

ওয়াকফ প্রশাসক,
বাংলাদেশ ওয়াকফ প্রশাসকের কার্যালয়,
নিউ ইস্কাটন, ঢাকা।

সূত্রঃ ইসি নং- ১৩৫৯৮, হাজী আবদুল গণি ওয়াকফ এস্টেট, চট্টগ্রাম।

বিষয়ঃ পরবর্তী মোতোয়াল্লী নিয়োগ প্রসঙ্গে।

জনাব,

আমি সূত্রে উল্লেখিত ওয়াকফ এস্টেটের বর্তমান মোতোয়াল্লী হই। উক্ত ওয়াকফ এস্টেটের পরবর্তী মোতোয়াল্লী কে হইবে তাহাকে নিয়োগ প্রদানের জন্য ওয়াকফ আমাকে নির্দেশ প্রদান করিয়াছেন। যাহা ওয়াকফ দলিলে স্পষ্টতঃ উল্লেখ আছে। তদানুযায়ী বিগত ১০/০৩/২০০৪ ইং তারিখে আমি আমার একমাত্র পুত্র আবদুল্লাহ মোহাম্মদ এহতেশামকে পরবর্তী মোতোয়াল্লী পদে নিয়োগ প্রদান করিয়াছি। প্রয়োজনীয় অবগতির জন্য হুজুর সমীপে আমি অত্র নোটিশ প্রদান করিলাম।

অতএব, হুজুর সমীপে আমার বিনীত অনুরোধ আমার মৃত্যুর পর আবদুল্লাহ মোহাম্মদ এহতেশামকে সূত্রে উল্লেখিত ওয়াকফ এস্টেটের পরবর্তী মোতোয়াল্লী হিসাবে নিয়োগ প্রদানে বাধিত করিবেন।

তারিখ- ২০/১২/২০১৫ ইং

(মোহাম্মদ জামালউদ্দীন খাঁন)
মোতোয়াল্লী
পিতা-মরহুম হাজী দানু মিঞা
২৬৭, চন্দনপুরা, গণি বেকারী
থানা- চকবাজার, জিলা- চট্টগ্রাম,
হাজী আবদুল গণি ওয়াকফ এস্টেট, চট্টগ্রাম।
ইসি নং- ১৩৫৯৮।

From the aforesaid letter it is clearly apparent that the earlier Mutwalli Md. Jamaluddin Khan appointed the petitioner Mutwalli of the aforesaid waqf estate and in the said letter the aforesaid registered deed dated 10.03.2004 has also been mentioned. There is nothing before us to show that the existence of the deed dated 10.3.2004 or the aforesaid letter dated 20.12.2015 has been disputed or that the same has been forged or obtained illegally. No evidence has been adduced or statement made that the signatures of late Md. Jamaluddin Khan appearing on the aforesaid letter dated 20.12.2015 or registered deed dated 10.03.2004 are not that of Md. Jamaluddin Khan. The only submission by the respondent No.4 is that since in his registered deed of 2004 Md. Jamaluddin Khan has given directions for apportioning the income of the waqf estate and appointing subsequent Mutawallis from amongst his decedents contrary to the provisions of the original Waqf Deed therefore the entire deed appointing the petitioner as Mutwalli is to be disregarded. We find the said submission and reasoning totally misconceived; simply because certain provisions of the deed of 2004 are inconsistent with the original waqf deeds does not make the entire deed of 2004 invalid or illegal. The primary objective and purpose of the deed of 2004 was to appoint a Mutawalli for the waqf estate to administer it in accordance with the wishes of the waqif. The submission of the learned Advocate for the respondent No.4 that such appointment can only be made when the Mutwalli is on his death bed or when he is in fear of his death has

got no substance whatsoever. Human life is uncertain and one never knows at what moment in time one will expire. It is sufficient if a Mutawalli makes an appointment of his successor in accordance with the terms of the original waqf deed and wishes of the waqif at any time before his death. In the instant case such appointment was categorically made in Md. Jamaluddin Khan's deed of 2004 and subsequently communicated by him to the respondent No.2 by his letter datd 20.12.2015 under the heading “পরবর্তী মোতোয়াল্লী নিয়োগ প্রসঙ্গে” leaving no doubt about late Md. Jamaluddin Khan's appointment of the petitioner as Mutawalli. Although certain allegations have been made about the administration of the waqf estate by late Md. Jamaluddin Khan during his life time, such allegations will not be any impediment to the appointment of the petitioner as Mutawalli of the said waqf estate. If the waqf estate is not managed and administered in accordance with the wishes of the waqif and the original waqf deeds under section 32(1) of the Waqf Ordinance, 1962 the beneficiaries can always lodge complaint to the Respondent No. 2 Administrator of Waqf. In such situation the respondent No.2 is empowered to interfere. However, in the present facts before us section 44 of the Waqf Ordinance, 1962 empowering the Administrator of Waqf to appoint Official Mutwalli has no manner of application and therefore the impugned order of appointment of Mutawalli under the said provision of law appears to be illegal and is set aside.

Accordingly, the Rule is made absolute. The impugned Memo No. 16.02. 0000.05.031.396.57/273 (1-4) dated 01.08.2016 issued by the respondent no. 3 and notification published in the Daily Azadi on 04.08.2016, appointing respondent no. 4 Mutawalli is hereby declared to have been issued and published without lawful authority and of no legal effect.

There will be no order as to costs.

Md. Faruque (M. Faruque), J:

I agree.