

**IN THE SUPREME COURT OF BANGLADESH**

**APPELLATE DIVISION**

**PRESENT:**

**Mr. Justice Hasan Foez Siddique**  
**Chief Justice**

**Mr. Justice M. Enayetur Rahim**

**Mr. Justice Jahangir Hossain**

**CIVIL APPEAL NO.32 OF 2014.**

(From the judgment and decree dated 26.05.2009 passed by the High Court Division in First Appeal No.120 of 2002.)

Haji Mohammad Kutubul Alam being  
dead his legal heirs:  
Md. Shah Alam and others Appellants.

**=Versus=**

Md.Gousuzzaman and others  
Respondents.

For the Appellants : Ms. Nahid Yesmin, Advocate,  
instructed by Mr. Mohammad  
Ali Azam, Advocate-on-Record.

For the Respondent No.1: Mr. A.J. Mohammad Ali, Senior  
Advocate, instructed by  
Mrs.Sufia Khatun, Advocate-  
on-Record.

Respondent Nos.2-51: Not represented.

***Date of hearing* : 14.02.2023, 01.03.2023  
& 14.03.2023**

***Date of judgment* : 02.05.2023**

**JUDGMENT**

**Hasan Foez Siddique, C. J:** This appeal is directed against the judgment and decree dated 26.05.2009 passed by the High Court

Division in First Appeal No.120 of 2002 reversing those dated 26.01.2002 passed by the Joint District Judge, First Court, Nawabgonj in Other Class Suit No.05 of 1998.

The relevant facts, for the disposal of this appeal, are that, on 25.03.1998, the plaintiff-appellant instituted Other Class Suit No.05 of 1998 in the First Court of Joint District Judge, Nawabgonj for declaration that the deeds described in schedule 'Kha' to the plaint regarding 'Ka' scheduled land are null, void, inoperative, collusive and those are not binding upon the Rajarampur Hamidullah Waqf Estate and the plaintiff. The plaintiff stated that the scheduled property belonged to the Rajarampur Waqf Estate. One Md. Hamidullah, son of Miajan Biswas, by a registered deed of waqf dated 05.08.1918, dedicated the suit property along with some other properties to the Almighty Allah. It was stipulated that during his life time, he would act as the Mutawalli of the Waqf Estate and after his death, his

eldest son would be the next Mutuwalli. In absence of his eldest son according to their age his other sons and, thereafter, his grandsons, and, thereafter, his adopted son Badiuzzaman, would be appointed as Mutawalli. The Waqif acted as Mutuwalli of the Estate during his life time and after his death, Badiuzzaman acted as Mutawalli and after the death of Badiuzzaman, Anwarul Islam acted as the Mutawalli of the Estate. After the death of Anwarul Islam, his brother Md. Gousuzzaman, defendant No.30 became the Mutawalli of the Estate. The Estate was duly enrolled. He obtained permission for sale of the property of the Waqf Estate on 09.05.1995 illegally and with ill motive and against the interest of Waqf Estate, vide Memo No.709/Raj. Defendant No.31, the Waqf Administrator did not hold inquiry upon hearing any person who are interested in the Waqf Estate before according such permission for transfer. Such transfers were not at all necessary for the improvement of the Waqf

Estate. The defendant No.30, by the impugned registered sale deeds, transferred the suit property to the defendant No.1 to 29. The defendant No.30 transferred those properties entirely for his own benefit and interest with ill motive and those transfers were void and not binding upon the Hamidullah Waqf Estate. Though the properties were transferred at a consideration of tk.47,31,000/-, savings account No.6923 with the Agrani Bank, Nawabgonj Branch, which was maintained by the Waqf Estate, would show that an amount of Tk.43,20,490/- only was deposited. The defendant No.30 misappropriated rest money. He, being a prospective Mutawalli of the Waqf Estate in the line of Mutawalli, is interested in the subject matter of the suit. On 04.02.1998, he came to know about the transfers. Hence, was the suit.

The defendant Nos.1-25, 26-27, 28-29 30,32, 34-39 and 41-51 contested the suit by filing separate sets of written statements.

The defendant No.30 Mutwalli in his written statement contended that in order to protect the Waqf Estate from the acquisition to be made by the Government and to increase the fund of the estate and for giving stipend to the beneficiaries he prepared a plan for construction of a modern market and community centre. For realization of such funds, he sought permission from the Waqf Administrator to transfer the property of the Estate. The Waqf Administrator accorded permission on 09.05.1995 following provisions of law. Thereafter, he published notice in the local dailies, namely, 'The Dainik Barta' and 'The Danik Sonaly Sangbad' on 10.07.1995 for sale of the suit land and transferred the same to the defendant Nos.1-29 by the impugned deeds. The sale proceeds were deposited in the account of Hamidullah Waqf Estate, maintained with the Agrani Bank, Nawabgonj Branch in Savings Account No.6923. From the sale proceeds, the defendant No.30 spent some

money for construction of complex. The suit should be dismissed.

The trial Court, upon hearing the parties, by its judgment and decree dated 26.01.2002 decreed the suit. Defendant No.30 Respondent No.1 Md. Gousuzzaman, Mutwalli of the Waqf Estate preferred First Appeal No.120 of 2002 in the High Court Division. The defendant No.1-14, 15-17, 28-29 filed Cross Appeal No.02 of 2003. The High Court Division, by the impugned judgment and decree, allowed the appeal observing that the cross appeal should be disposed of in the light of the judgment and decree of the appeal. Thus, the plaintiff has preferred this appeal upon getting leave.

Ms. Nahid Yesmin, learned Advocate for the appellant, submits that the High Court Division has committed error of law in not holding that the authority of the Waqf Administrator described in Sections 33 and 56 of the Waqf Ordinance is very limited to accord permission to transfer immovable property of Waqf Estate and that the Waqf deed itself imposes an embargo that the waqf

property should not be transferred. She submits that the Waqf Administrator could not accord permission for transfer of the property of the Waqf Estate in view of spirit of Islamic jurisprudence established to deal with waqf property. She further submits that title of the suit property has been vested in the Almighty Allah after execution and registration of the waqf deed. She submits that no one is entitled to transfer waqf property since such transfer usually damages the waqf property. She further submits that the High Court Division manifestly failed to appreciate that Civil Court's jurisdiction has not been ousted rather under Section 9 of the Code of Civil Procedure, the Civil Courts have jurisdiction to try all suits of civil nature and the dispute as raised by the plaintiff in the instant suit is a civil dispute which has been rightly adjudicated by the trial Court because the transfers of Waqf property were, fraudulent, void, malafide and collusive. She, lastly, submits that the High Court Division miserably failed to hold that the Waqf Administrator collusively permitted to

transfer more waqf property which was in excess of land sought to be transferred.

Mr. A.J. Mohammad Ali, learned Senior Counsel appearing for the respondent No.1, submits that the appellant has failed to bring any specific allegation within the four corners of his pleading as to the illegality, fraud or collusion of transferring the waqf property. He submits that the proper forum for the plaintiff was under the provisions of Section 32 (1) (i) (ii) and (iii) read with Section 62 of the Waqf Ordinance to ventilate grievance, if any, the trial Court illegally entertained the instant suit and the High Court Division rightly dismissed the suit. He further submits that the impugned transfers were made for the interest and the benefit of the Waqf Estate upon getting proper sanction from the Waqf Administrator, the High Court Division rightly dismissed the suit.

The Civil Courts, subject to the provision of the law, have jurisdiction to try all suits of civil nature except the suit of which cognizance is either expressly or impliedly barred. Unless the relevant statute



entails a provision expressly or indicates by necessary implication that the jurisdiction of the Civil Court is excluded to try the suit, the Civil Court has jurisdiction to try the suit. In this case, the plaintiff sought for declaration that the impugned deeds are void along with some other reliefs. Only Civil Court is authorised to declare whether a deed is fraudulent and void or not. It is settled principle that exclusion of jurisdiction of civil Court should not be readily inferred. The tests to be applied to decide whether or not the Civil Court has jurisdiction are as under:

- (i) Is legislative intention of excluding jurisdiction of Civil Court explicit or clear by necessary implication?
- (ii) Does the statute provide adequate remedy in case of grievance against the order made under the statute [State of A.P. Vs. Manjeti Laxmi Kantha Rao (2000) 3 SCC 689]?

We are of the view that only Civil Court is empowered to make declaration as prayed for as per provision of section 9 of the code

of Civil Procedure. We do not find force in the submission Mr. A.J. Mohammad Ali.

So far the right to sue is concerned the High Court Division in the case of Hafizuddin Ahmed V. Aslam Mia and another [55 DLR (2003)95] observed that in case of any waste or harm of any such property, not only the Administrator or the Mutwalli but also any stranger to the family of the waqif professing Muslim faith may sue anyone including the Administrator or Mutwalli to rescue or recover the waqf property, which is illegally alienated or transferred. No doubt, it could be said that as the property in a waqf, vests in the Almighty, there must be a concern and, undoubtedly, a moral duty to act in a manner that the object of the waqf is fostered. We are of the view that the aforesaid proposition is correct. That is, the plaintiff was entitled to file the instant suit.

Admittedly, the property had been enrolled as a waqf property. The waqf deed was a registered deed. The terms and conditions of the deed clearly reflect that

the said waqf deed was created for charitable purpose. In order to adjudicate the dispute between the parties, it is relevant here to mention some portions of the waqf deed which was executed by Md. Hamidullah on 05.08.1918. The relevant portions of the waqf deed are quoted below:

“কষ্য ওয়াকফ নামা পত্র মিদং লিখিতং কার্য্যাএগ্গে আমি পরম কর্ণনাময় খোদা তায়ালার অনুগ্রহে নিজ উপার্জন দ্বারা জোত জমি ও জমিদারী প্রভৃতি সম্পত্তি অর্জন করিয়া। তাহাতে অন্যের নিরাপত্তিতে নির্বিঘ্নে দলিল কার আছি। আমি হানাফি মোঝাবি মুসলমান ধর্ম বিশ্বাসী এক্ষণে খোদাতায়ালার অনুগ্রহে যদি ও আমি সুস্থ শরীরে স্বচ্ছন্দে চিন্তে কালাতিপাত করিতেছি। তথাপি মানব জীবন ক্ষনভদুর প্রকৃতির নিয়ম অনুসারে কখন কি ঘটে বলা যায় না। ধর্মই জীবনের একমাত্র লক্ষ্য। পরকালে যাহাতে আমার সদগতি হয় এবং খোদা তালার নৈকট্য লাভ হইতে পারে। তৎপক্ষে সকলের বিশেষ চেষ্টা করা উচিত। অপর পক্ষে নিজের ও আপন পরিবার বর্গের ও সন্দ্বন্দন-সম্পত্তি এবং বংশধর গণের ভরন পোষণ সংসার যাত্রা নির্বাহের উপায় বিধান করাও মানব মাত্রেরই একান্ত কর্তব্য। এবং তাহা মুসলমান ধার্ম্যানুযায়ী ধর্ম কাজ বটে। এই সমস্ত বিবেচনা করিয়া ধর্মার্থে ও আমার নিজের এবং পরিবার বর্গের সংসার যাত্রা নির্বাহের জন্য আমার সৌপার্জিত স্বত্ব দখলিয়া নিম্নে (ক) তপশীল লিখিত জমিদারী (খ) তপশীল লিখিত স্বাক্ষর ও নিরাক্ষর প্রভৃতি সর্ব প্রকারে জোত ভূমি (গ) তপশিল লিখিত নগদ টাকার কারবার (ঘ) তপসিল লিখিত লাইফ ইনস্যুরেন্স পলিসি (ঙ) তপসিল লিখিত অস্থাবর সম্পত্তি।

পাতা নং ২ আমি স্বজ্ঞানে সুস্থ শরীরে স্বচ্ছন্দচিন্তে স্বেচ্ছা পূর্বক অন্যের বিনা উত্তেজনায ওয়াকফ করিয়া তদার্থে এই ওয়াকফ নামা লিখিয়া দিয়া অঙ্গিকার করিতেছি যে,

এই ওয়াকফ নামার লিখিত যাবতীয় সম্পত্তিতে যে কিছু মালেকি স্বত্ব ছিল তাহা অদ্যকার তারিখ হইতে লোপ পাইয়া ঐ সকল সম্পত্তি খোদা তালার সম্পত্তি বলিয়া পরিগণিত হইল।

ভবিষ্যতে কশ্চিনকালে আমি বা আমার কোন ওয়ারেশ উত্তরাধিকারী বা স্থালভিসিঙ্ক  
কহে কখন ও কোন প্রকারে এই ওয়াকফ সম্পত্তি মালেকী স্বত্বে দাবী দাওয়া করিতে  
পারিবেক না করিলে তাহা অগ্রাহ্য হইবেক। আমার কোন ঋণ নাই অথবা কোন প্রকার  
 ওয়াকফ সম্পত্তি দায় সংযোজন যোগ করি নাই। এই দলিলের লিখিত তারিখের পরে আমি  
 কোন ঋণ করিলে সেই ঋণ দায়ে অথবা আমার কোন ওয়ারেশ বা উত্তরাধিকারী গণের কোন  
 প্রকারঋণ দায়ে এই ওয়াকফ সম্পত্তি কি তাহার কোন অংশ কোন প্রকারে দায়যুক্ত বা নিলাম  
বিক্রয় হইতে পারিবেনা। (underlined by us)

অতঃপর আমি বা আমার কোন ওয়ারিশ কি উত্তরাধিকারী কেহ কখন এই ওয়াকফ  
 সম্পত্তি কোন প্রকারের দান বিক্রয় হেবা হস্তান্তর বা ভাগ বন্টন করিয়া লইতে পারিবেনা ও  
 পারিবেক না। করিলে তাহা হইবে অশিদ্ধ হইবে। এই ওয়াকফ সম্পত্তির কার্য পরিচালনা  
 উপস্বত্ব লভ্যাংশ খরচ করার জন্য নিম্ন লিখিত নিয়ম সমূহ বিধিবদ্ধ করা হইল। কখনও এই  
 সকল নিয়মে (৩নং পাতা) কোনটির কোন রূপ পরিবর্তন হইবেনা।”

The recital of the waqf deed clearly established that it was a permanent dedication of the waqf property to the Almighty Allah. Once the waqf is created it continues to be a waqf. Waqf property can never lose its character as waqf property once it is shown that it is a permanent dedication of property. If we read the recital of the waqf deed, it will be apparent that the same is a public waqf. Public waqf

is an endowment made by the founder to support the general good and welfare of the society, the poor and the needy.

It appears from the schedule of the waqf deed that the total area of the waqf Estate was measuring an area of 800 bighas 14 kathas and 3 chataks.

Waqf is an Islamic endowment of property to be held in trust and used for a charitable or religious purpose. The literal meaning of waqf is detention or confinement and prohibition. The origin of word "waqf" comes from Arabic word "al-waqf", which literary means to stop, to prevent and to suppress. As waqf properties are bestowed upon the Almighty Allah, in the use of a physically tangible entity, a "mutawalli" is appointed by the waqif or by the Waqf Administrator, to manage or administer a waqf. Syed Ameer Ali in "Mohammedan Law" has said, "A waqf is thus interwoven with the entire religious life and social economy of the Mussulmans. "Trusts" in the Mussalman system may for the sake of convenience be divided under three heads, that is, public, quasi- public and private".

He added, "It must be remembered also that a waqf is not a gratuitous transfer of property . It is a transfer to the legal ownership of the Almighty for substantial consideration viz. His reward, which is obtained the moment the waqf is created". He stated, "the Mohammedan Law owes its origin to a rule laid down by the Prophet of Islam," and means "tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings." "As a result of the creation of a waqf, the right of wakif is extinguished and the ownership is transferred to the Almighty".

Supreme Court of Pakistan in C.P. No.522-L, 523-L & 588-L of 2013. Sikander Hayat Khan Jogazai V. Muhammed Hashim etc. has elaborately discussed about origin and subsequent development of waqf and waqf property. It observed,

"Although the word "waqf " is not specifically mentioned in the Holy Quran, yet there are many verses which inspire Muslims to donate and give charity, to obtain piety, righteousness and fore mostly, the closeness and love of the Allah Almighty. A hadith quoted by Hazrat

Abu Hurairah (Allah be pleased with him) is usually referred by the Islamic scholars as the basis of the institution of "waqf" in Islam. He reported Allah's Messenger, Mohammad (may peace be upon him) as saying: "when a man dies, all his acts come to an end, but three; recurring charity, or knowledge (by which people) benefit, or a pious son who prays for him (for the deceased)." *Waqf* is the best form of a continuous charity as the dedicated property earns for the dedicators continuous good deeds even after his death. It is this understanding that motivates the Muslims to promote this religious social-welfare institution. Syed Ameer Ali, a great judge and jurist of the subcontinent (Indo -Pak) speaking for the Judicial Committee of the Privy Council in the case of *Vidya Varuthi v. Blusami* (**AIR 1922 PC 123**) observed:

"13. But the Mahomedan law relating to trusts differs fundamentally from the English law. It owes its origin to a rule laid down by the Prophet of Islam; and means "the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings." When once it is declared that a particular property is wakf, or any such expression is used as implies wakf, or the tenor of the document shows, ... that a dedication to pious or charitable purposes is meant, the right of the wakif is extinguished and the ownership is transferred to the Almighty....."  
(emphasis underlined)

Hazrat Umar-Ibne-Khatab (may Allah be pleased with him) acquired a land at Khaibar. He came to Holy Prophet (may blessings and peace be upon him) and sought his advice in regard to it. He said: Allah's Messenger, I have acquired land in Khaibar. I have never acquired property more valuable for me than this, so what do you command me to do with it? Thereupon He (Allah's Messenger) said: If you like, you may keep the *corpus* intact and give its produce as *Sadaqa*. So, Umar gave it as *Sadaqa* declaring that property must not be sold or inherited or given away as gift. And Umar devoted it to the poor, to the nearest kin, and to the emancipation of slaves, and in the way of Allah and guests.....". Thus, these two traditions of the Holy Prophet (peace be upon him) are commonly considered providing the express basis for the emergence of *waqf* in Islam. "Must not be sold" indicates that it is not valid to sell or buy a *waqf*.

It is not an exaggeration to claim that the *waqf* created in perpetuity has provided foundation for much of what is considered "Islamic civilization." *Waqf* fulfilled a crucial gap between the resources available with an emerging State and the need of a growing community in the early days of Islam, and in the later years became a main source for



various public services. The *Waqf* contributed to the building of Islamic civilisation; through which many mosques, schools, and educational centres were built along with libraries, scientific research centres and other fields in different walks of life. Throughout the history of the Islamic world, such settlements provided for many of the spiritual and temporal wants of Muslims. *Waqf* played an important role in establishing a flourishing civilization. It created a comprehensive scientific and cultural renaissance. These funds were the main resource for schools, scientific centres and libraries, which gave way to the training of many scientists, researchers, inventors, and intellectuals. Therefore, *Waqf* is described as the most important institution which provided the foundation for Islamic civilization as it was interwoven with the entire religious life and the social economy of Muslims. It covered almost all the needs of life during the early period of Islamic civilization; encompassing health, education, basic infrastructures, business and commercial activities, job creation, food provision for the hungry and livestock, shelter provision for the poor and needy, and supporting the agricultural and industrial sectors without any cost to the government. *Waqf* is in fact a comprehensive mechanism of

public finance that is capable of bringing upon economic progress as well as social development.

With this religious and historical perspective of *waqf* in Islam, we now proceed to examine the legal framework regarding the administration and management of the *waqf* properties under the Ordinance and the Rules."

In India, the history of *waqf* can be traced back to the early days of the Delhi Sultanate when Sultan Muizuddin Sam Gaori dedicated two villages in favour of the Jasma Masjid of Multan.

In this Division in the case of Md. Hafizuddin Vs. Mozaffor Mridha being dead his heirs: Asia Begum and others, reported in 10 SCOB(2018)AD, this Division has observed:

"From the recital of *waqf* deed it appears that the object, for which the property in question has been dedicated, is charitable, pious or religious in nature and a portion of the usufructs should be used by the descendants. Therefore, the dedication was complete and it could not be divested for any other purposes. Therefore, when a property can be used only for religious or charitable purpose, it acquires a permanent character. The *waqf* property vests in the implied ownership of the

Almighty in the sense that nobody can claim ownership of it. Even in waqf al aulad, the property is dedicated to the Almighty and only the usufructs are used by the descendants. Once the property is given to waqf, it remains for the waqf for ever. The property cannot be alienated or transferred nor is it subject to the rights of inheritance. It cannot be sold or given away to anybody except in accordance with law. The Islamic Law is a sacred Law, and, thus transaction, or obligation is measured by the standards of religious and moral rules. Those rules are developed through analogical reasoning by Muslim Jurists. When ownership of the waqf property is relinquished by the waqf, it cannot be acquired by any other person, rather it is arrested or detained. In section 56 of the Bangladesh Waqfs Ordinance 1962 Mutwalli's power of alienation of waqf property has been restricted like section 53 of the Bengal Wafq Act, 1934 where the bar to transfer of immovable property of a waqf was provided."

A Waqf has three distinct features, those are (i) it is perpetual, (ii) inalienable (iii) irrevocable. It is an institution which is close to the heart of the Muslim Community. After execution and registration of the waqf deed, the title of the property,

in question, has been vested to the Almighty who is the real owner of the entire Universe, the Mutawalli is essentially a Manager and Administrator of the waqf which vests in Almighty. Since the ownership of the property is transferred to the Almighty Allah from the waqif in the case of waqf, the property can not be taken back from Allah once a property becomes waqf, it will always stay waqf. Waqf Administrator is entrusted with the duty of administering and supervising all waqf properties. Waqf is a permanent dedication of the property for purposes recognized by Muslim Law as pious religious or charitable and the property, having been found as waqf, would always retain its character as a waqf. Transfer of waqf property would not in any manner nullify the earlier dedication of property and will not change its original character or title. The property which is the subject matter of a waqf cannot be alienated since the concept of a waqf, wherein, upon a dedication there is an implied transfer of the property to the Almighty which would in law render any alienation impermissible. We find support of the above view in the case of

Sayyed Ali Vs. Andhra Pradesh Wakf Board Hyderabad and others reported in (1998)2 SCC 642.

Al-Bhukhaari (2764) and Muslim (1632) narrated that "Umar-al-Khattab (may Allah be pleased with him) wanted to give some palm trees of his in charity, so he consulted the Prophet ( blessings and peace of Allah be upon him). He instructed him to turn it into a waqf and said: Give it in charity as a waqf that not to be sold or bought." Which clearly indicates that a waqf is an inalienable charitable endowment.

In order to sell the waqf property the respondent No.1 on 17.11.1989 filed application to the waqf Administrator for according permission. On the basis of such application an inquiry was held by an Inspector of Waqf who, holding inquiry, submitted report on 24.03.1990. The contents of the said report run as follows:

“বাংলাদেশ ওয়াক্ফ প্রশাসকের অফিস

৪নং নিউ ইসকাটন রোড, ঢাকা।

২৪/৩/৯০ইং তারিখের ওয়াক্ফ হিসাব পরীক্ষক এর তদলুড় প্রতিবেদনের সহি মোহর নকল  
অত্রাফিসের ডাইরী নং-১৮২৩, তাং ২৯/৩/৯০ইং

ই,সি, নং-৮৯৪ (হামিদুল-হা ওয়াকফ এস্টেট)।

বরাবর,

ওয়াকফ প্রশাসক, বাংলাদেশ

৩৭, নবাব কাটারা নিমতলী, ঢাকা।

বরাত : ই,সি, নং-৮৯৪ (মোঃ হামিদ উল-হা ওয়াকফ এস্টেট)

বিষয়ঃ তদান্ধ বিবরণী।

জনাব,

আপনার ২/১২/৮৯ ইং তারিখের ২১৩/রাজ নং স্মারক লিপির নির্দেশ মতে উপরোক্ত ওয়াকফ এস্টেটের মোতওয়াল-ী জনাব ডঃ মোঃ গাউসুজ্জামান কর্তৃক দাখিলকৃত ১৭/১১/৮৯ইং তারিখের দরখাস্ত মর্মে সরেজমিনে তদান্ধ করিয়া নিম্নোক্ত বিবরণী দাখিল করা হইল।

মোতওয়াল-ী উপরোক্ত দরখাস্তে বর্ণিত হাল ২০৩ নং দাগের ১.৬৫ শতাংশ বা ৫ বিঘা জমি পরিদর্শন করিয়া দেখা গেল যে, উক্ত জমিটি নবাবগঞ্জ শহরের কেন্দ্র স্থলে গুরুত্বপূর্ণ স্থানে অবস্থিত। জমিটি খিলা অবস্থায় পড়িয়া থাকায় বিভিন্ন সরকারী ও বেসরকারী প্রতিষ্ঠান তাহাদের প্রয়োজনে উহা হুকুম দখল করিয়া নেয়ার চেষ্টায় আছে বলিয়া জানা যায় এই রকম একটি মূল্যবান জমি হাতছাড়া হইয়া গেলে এস্টেটের অপূরণীয় ক্ষতি হওয়ার সম্ভাবনা আছে। তাই অনতিবিলম্বে উক্ত জমিতে ঘর বাড়ী প্রস্তুত করিয়া দখল স্বত্ব বজায় না রাখিলে অচিরেই জমিটি হুকুম দখল হইয়া যাইবে।

বর্ণিত জমির উপর বানিজ্যিক ভিত্তিতে একটি মার্কেট নির্মাণ করিতে পারিলে হুকুম দখলের হুমকি এড়ানো সম্ভব হইবে এবং এস্টেটের আয়ও বিপুল পরিমাণে বৃদ্ধি পাইবে। কিন্তু এতবড় একটি জমিতে মার্কেট নির্মাণ করিতে যে, বিরাট অংকের অর্থের প্রয়োজন হইবে তাহা এস্টেটের তহবিল হইতে দেওয়া কোন ক্রমেই সম্ভব নহে। তাই মার্কেট নির্মাণ কল্পে তহবিল গঠনের জন্য মোতওয়াল-ী সাহেব প্রস্তুত করেন যে, উক্ত ১.৬৫ শতাংশ ওয়াকফ জমি মধ্যে  $\frac{1}{2}$  অংশের .৮২ শতাংশ বা  $২ \frac{1}{2}$  বিঘা বিক্রয় করিয়া বিক্রয় লব্ধ অর্থ দ্বারা অবশিষ্ট  $২ \frac{1}{2}$  বিঘার উপর প্রস্তুত মার্কেট নির্মাণ করা যাইতে পারে।

মোতওয়াল-ীর উক্ত প্রস্তুতবের সমর্থনে জমিটির বর্তমান বাজার মূল্য যাচাই করিয়া জানা যায় বর্তমানে নবাবগঞ্জ শহরে প্রতি কাঠা জমি কম বেশি ২৫,০০০/- টাকা ক্রয় বিক্রয়

হইতেছে। সেই হিসাবে  $2\frac{1}{2}$  বিঘা জমির বিক্রয় মূল্য আনুমানিক ১২,৫০,০০০/- টাকা হইতে পারে। উক্ত জমির বিক্রয় লব্ধ অর্থ এবং প্রস্তুতকৃত মার্কেটের অগ্রীম ভাড়া সালামী বাবত যে অর্থ পাওয়া যাইবে তাহা দ্বারা অনায়াসে একটি মার্কেট নির্মাণ করা যাইতে পারে বলিয়া মনে হয়।

অতএব, ওয়াকফ এষ্টেটের বৃহত্তর স্বার্থে উক্ত জমি হাতছাড়া হওয়ার পূর্বে উহার দখল স্বত্ব বজায় রাখার ও এষ্টেটের আয় বাড়াইবার প্রয়োজনে মোতওয়াল-ীর দরখাস্তে বর্ণিত ১.৬৫ শতাংশ জমির  $\frac{1}{2}$  অংশে .৮২ শতাংশ বা  $2\frac{1}{2}$  বিঘা জমি নিম্নলিখিত শর্তে বিক্রয় করিবার অনুমতি প্রদান করা যাইতে পারে।

শর্তে সমূহ

১। প্রস্তুতকৃত  $2\frac{1}{2}$  বিঘা জমির প্রতি কাঠা সর্ব নিম্ন ২৫,০০০/- টাকা দরে বিক্রয় করিতে হইবে।

২। বিক্রয় লব্ধ সাকুল্য টাকা আপাতত এষ্টেটের নামে কোন বানিজ্যিক ব্যাংকে স্থায়ী আমানতে জমা রাখিতে হইবে।

৩। বিক্রয় বাদে অবশিষ্ট  $2\frac{1}{2}$  বিঘা জমির উপর প্রস্তুতকৃত মার্কেট নির্মাণ করিলে একটি নং ১ ও আনুমানিক খরচের এষ্টিমেট প্রস্তুত করিয়া তাহা ওয়াকফ প্রশাসক, বাংলাদেশ এর অনুমোদনের জন্য দাখিল করিতে হইবে।

হেতেম খান,

রাজশাহী।

তাং-২৪/০৩/৯০

আপনার অনুগত

স্বাক্ষর/ অস্পষ্ট

ওয়াকফ হিসাব পরীক্ষক,

রাজশাহী।”

Thereafter, the Waqf Administrator accorded sanction for sale of the waqf property. Contents of the said sanction letter are as follows:

“বাংলাদেশ ওয়াকফ প্রশাসকের অফিস

ওয়াকফ ভবন

৪নং নিউ ইসকাটন রোড, ঢাকা।

স্মারক নং-৯০৯/রাজ,

তারিখঃ ০৯/৫/১৯৯৫ইং

বরাবরঃ ই,সি, নং-৮৯৪ (মোহাঃ হামিদ উল-াহ ওয়াকফ এস্টেট)

সমক্ষে

প্রতিঃ জনাব,

ডাঃ মোহাঃ গাউসুজ্জামান, মোতওয়াল-নী

পিতা মৃত মহাং বদিউজ্জামান,

সাং- পোঃ রাজারামপুর,

জেলা- রাজশাহী।

আপনার ১৭/১১/৮৯ ইং এবং ১১/৩/৯৫ ইং তারিখের দরখাস্তে আলোকে জানান যাইতেছে যে, নিম্নের তপছিল বর্ণিত ১.৬০ শতাংশ পতিত ওয়াকফ সম্পত্তি ওয়াকফ এস্টেটের স্বার্থে নিম্নলিখিত শর্তে বিক্রয় করার অনুমতি প্রদান করা গেল।

শর্ত সমূহঃ-

- ১। স্থানীয় ২(দুই)টি দৈনিক পত্রিকায় বিজ্ঞপ্তি প্রকাশে সর্বোচ্চ মূল্য বিক্রয় করিতে হইবে।
- ২। নিম্নলিখিত ৩(তিন)টি দৈনিক পত্রিকায় বিজ্ঞপ্তি প্রকাশে সর্বোচ্চ মূল্য বিক্রয় করিতে হইবে।
  - (ক) মোতওয়াল-নী, আহবায়ক।
  - (খ) সহকারী ওয়াকফ প্রশাসক, রাজশাহী বিভাগ, সদস্য।
  - (গ) একজন বিশিষ্ট বৃত্তি ভোগী, সদস্য।
- ৩। বিক্রয় লব্ধ টাকা আপাততঃ ওয়াকফ এস্টেটের নামীয় ব্যাংক একাউন্টে জমা রাখিতে হইবে এবং ওয়াকফ প্রশাসকের অনুমতিতে ফসলী বা শহরের জমি ক্রয় কিংবা মার্কেট নির্মাণ করবেন। অথবা উলে-খিত কার্যে বিনিয়োগ না হওয়া পর্যন্ত সমুদয় টাকা পোস্টাল সেভিংস একাউন্ট এ জমা রাখিতে হইবে।
- ৪। কোন টাকা অপচয় বা আত্মসাৎ এর জন্য মোতওয়াল-নী ব্যক্তিগতভাবে দায়ী থাকিবেন।
- ৫। বিক্রিত মূল্য সম্পর্কে মোতওয়াল-নী অফিসকে জানাইতে হইবে।

তপছিলঃ



জেলা, থানা তহশীলঃ নবাবগঞ্জ মৌজা জোত প্রতাপ জে, এল, নং১১৬ খতিয়ান নং আর,এস, দাগ নং-৩০২, জমির পরিমান ১৬৫ শতাংশ।

স্বাক্ষর/ অস্পষ্ট

ওয়াক্ফ প্রশাসক, বাংলাদেশ পক্ষে।”

From those two documents it appears that Inspector in his report opined to accord permission to sell .82 acre of land but the Waqf Administrator accorded sanction for sale of 1.65 acres of land. Inquiry report does not reflect that the inspector had consulted any person interested in the waqf Estate rather the reason had been shown that the said property might be acquired. Such apprehension cannot be termed as valid reason to sell the waqf property which has been dedicated to the Almighty Allah. Sale of waqf property in contravention of the spirit of law is void. Section 56 of the Waqfs Ordinance provides a bar to transfer of immovable property of a waqf. The said provision is quoted below:

“56. (1) No transfer by a mutawalli of any immovable property of a waqf by way of sale, gift, mortgage or exchange, or by way of lease for a term exceeding 5 years shall be valid without the previous sanction of the Administrator:

Provided that the sanction by the Administrator shall not validate any transfer which is in contravention of any other law for the time being in force or is otherwise invalid.

(2) No Court shall grant permission to any Receiver appointed by the Court for the transfer of any waqf property unless the prior sanction of the Administrator has been obtained.

(3) In the absence of the sanction required by sub-section (1), any transfer made by a mutawalli shall be declared void, if the Administrator, within 4 months of his coming to know of such transfer, or within 3 years from the date of such transfer, whichever is later, applies to the Civil Court in this behalf.

(4) Where a mutawalli transfers a waqf property in contravention of sub section (1) and afterwards himself becomes the owner of the property, the mutawalli shall, on the direction of the Administrator, re convey the property to the waqf.

(5) Any transfer made in contravention of the provisions of sub section (1) shall be deemed to be an act of malfeasance and breach of trust for the purpose of sub-section (1) of section 32."

Section 57 of the Ordinance authorises the Waqf Administrator to grant sanction to transfer:

"57. A mutawalli or a Receiver may apply to the Administrator for sanction to transfer waqf property under sub section (1) of section 56, and the Administrator, after making such enquiry and giving notice to such persons in such manner as he thinks fit and hearing them, if they desire to be heard, may accord sanction to such transfer on such terms and conditions as he may, in his discretion, impose:

Provided that where such transfer is to be made under an express power conferred by the waqf deed, the Administrator shall not refuse to accord sanction."

The authority of the Waqf Administrator to accord permission to transfer the waqf property is not absolute. In view of the aforesaid law, facts and circumstances, the impugned transfers made by the Mutawalli even after taking permission from the Waqf Administrator are void in nature in absence of proper inquiry indicated in section 57 of the Ordinance. Defendant No.30- respondent No.1 Gousuzzaman (D.W.5) in his evidence

said, “-----আমি ওয়াকফ দলিলের শর্ত ভঙ্গক্রমে ওয়াকফ সম্পত্তি বিক্রয় করিয়াছি। -----নাঃ সম্পত্তিতে নিম্ন গাছ, আম, তেতুল গাছ, কলা বাগান, কাঠাল গাছ, ইত্যাদি ছিল এবং ঐ সব গাছপালা মোতাওয়াল-নী হিসাবে আমি কর্তন ও ব্যবহার করি।”

He further said, “-----ওয়াকফ এস্টেটের মোট সম্পত্তি ৭৮০ বিঘা হইবে। ধানী জমি প্রায় ৬০০ বিঘা হইবে। তাহাতে ধান, পাট, কলাই ইত্যাদি সবই হয়।”.

He further said, “-----প্রতি বিঘা ৬০ মন ধান্য হয়।---- আমার দাখিলী রিটার্ন মোতাবেক ৫/৬ মন বিঘা প্রতি হিসাব দেখাইয়াছি।”. From the

evidence quoted above, it is seen that there are huge property of the waqf estate, which were dedicated to the Almighty Allah. The Mutwalli might construct the alleged shops and community centre from the earnings of those properties. Without doing so, the Mutwalli sold the valuable waqf property which has been dedicated. Such attempt cannot be termed as bonafide one. Section 33 of the Ordinance limited the transferring authority of the Waqf Administrator imposing embargo that only necessary for the improvement and benefit of the waqf, the Administrator may, with the sanction of the Government, transfer any part of a waqf property. In the case of Hafizuddin Ahmed Vs. M. Aslam Miah and others 55 DLR (HCD)95 it was observed that we could not find any reason for not to read the

conditions or limitations as provided in section 33 of the Waqf Ordinance that before granting sanction the Administrator must be satisfied that such transfer was necessary for the improvement and benefit of the waqf. It was further observed that the law was never intended to validate a transfer even with sanction, which ultimately results in injury, waste or loss of the waqf. It has become common Phenomenon to transfer waqf properties taking advantage of the law in our country. It is to be borne in mind that inalienability of the subject matter of waqf is rooted in the hadith of the Prophet (pbuh). With the exception provided in the Ordinance and Jurisprudence build up, once a property is decidated to the Alimighty Allah, it cannot be alienated. It is the duty of all concerned to ensure transparency in financial affairs of waqf properties. In the case of Mst. Zohra Khatoon Vs. Jonab Mohammed Jane Alam and others reported in AIR 1978 Cal 133 it was observed that the Mutwalli had a right to the office and not over the immovable property pertaining to the waqf estate, and it was the bounden duty of the Court to

protect the property of the "Almighty" even if the Mutwalli had not discharged his function diligently. In the case of Sayyed Ali V. Andhra Pradesh Waqf Board Hyderabad and others (supra) it was held by the Supreme Court of India that "once a wakf always a waqf" any grant of patta to any other person would not nullify the earlier dedication of the property to the Almighty. Most of the waqf properties are being neglected, left idle, unproductive and misused. It is the duty of the mutwalli to manage the waqf estate prudently and efficiently. Simultaneously, it is also the duty of the Waqf Administrator and Judiciary as well to ensure, to protect and to preserve the waqf property and to see that the Mutwalli is complying with the terms and conditions of the waqf deed as well as the law related to the waqf. The moment a waqf is created, all rights of property pass out of the waqif and vest in the Almighty. The Mutwalli has no right in the property belonging to the waqf. His position is merely that of a superintendent or a manager. A Mutwalli has no power, without the permission

of the Waqf Administrator to sell waqf property or any part thereof. Authority of giving permission of the waqf Administrator is not absolute. He must follow the provision of law, contents of waqf deed, jurisprudence build up in this regard and welfare of waqf estate. He cannot accord permission when it is apparent that such proposal for transfer may cause harm to waqf property itself, consequence of which is ultimate damage and destruction of the property and object of the waqf. The instant permission given by the Administrator may cause damage to the object of the waqf and the estate itself. Such transfers were an unholy racket involved in fraudulent sale of waqf property.

In such view of the matter, the High Court Division has committed error of law in interfering the well reasoned judgment and decree of the trial Court. It is settled principle that a transfer which is void ab initio is in the eye of law no transfer at all.

Accordingly, we find merit in this appeal. Thus, the appeal is allowed. The

judgment and decree passed by the High Court Division is hereby set aside. The respondent No.1 is directed to refund the consideration received by him from the buyers of the land transferred to them.

**C.J.**

**J.**

**J.**

The 2<sup>nd</sup> May, 2023.  
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