

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 12032 of 2013.

IN THE MATTER OF:

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

- A N D -

IN THE MATTER OF :

Hazi Safiuddin Ahmed

---Petitioner.

-V e r s u s-

The Administrator of Waqfs Bangladesh and
others.

-----Respondents.

Mr. ABM Siddiquir Rahman Khan, Advocate.

-----For the petitioner.

Mr. Muntasir Uddin Ahmed, Advocate.

----- For the respondent No.5.

Heard on: 15.05.2016,25.05.2016,26.05.2016,
29.05.2016, 31.05.2016 and
Judgment on 08.06.2016.

Present :

Mr. Justice M. Moazzam Husain
And
Mr. Justice Md. Badruzzaman.

Md. Badruzzaman, J.

This rule *nisi* was issued calling upon the respondents to show cause as to why the order vide Memo No. O.Pro:/Munshi/171 dated 07.11.2013 issued under the signature of respondent No.3 in respect of "Meerapara Jame Mosjeed and Meer Saheber Majar and Eidgah Waqf Estate" situated at village-Meera Para under police station & district Munshigonj bearing E.C No. 18123 should not be declared to have been passed without any lawful authority and is of no legal effect.

The case of the petitioner, in brief, is that father of the petitioner Hazi Samir Uddin Ahmed was the mutawalli of "Meerapara Jame Mosjeed and Meer

Saheber Majar Waqf Estate, situated at village Meerapara within the police station and district Munshigonj. He also transferred 7 decimal land in favour of the Waqf Estate. He functioned as such until his death for a period of 20 years. The petitioner was appointed as mutawalli with a 10 member committee on 3.6.1996. He got the Waqf Estate enrolled with the office of the Administrator of Waqfs on 10.06.1996. The same was enrolled in the name and style "*Meerapara Jame Mosjeed and Meer Saheber Majar and Eidgah Waqf Estate*" under E.C No. 18123. During the tenure of the petitioner one Haji Ashek Ali and Md. Nurul Islam and 3 others transferred 2 decimal land in favour of the Waqf Estate on 8.2.1999 and 8.3.1999 respectively by two separate registered deeds of waqf in which it was stated that the petitioner would be the mutawalli of the Waqf Estate. With prior approval of the Administrator of Waqfs, the petitioner filed Title Suit No. 14 of 1999 against one Abdul Karim Bepary when he tried to grab the waqf property. The tenure of the petitioner was expired in 2003. On 26.8.2003 respondent No.5 was appointed as the next mutawalli for 5 years. The appointment was challenged by the petitioner in W.P No. 6363 of 2003 before the High Court Division in which initially rule *nisi* was issued and upon hearing, the same was discharged on contest by judgment dated 6.3.2006. Being aggrieved by the said judgment the petitioner unsuccessfully moved in the Appellate Division in Civil Petition No. 751 of 2007, which was dismissed on 11.12.2007. Again, respondent No. 5 was appointed as mutawalli on 20.9.2008 for a period of three years.

During his tenure, respondent No. 5 did various illegal acts and deeds. Consequently, an inquiry was made by the Inspector of Waqfs who, upon inquiry, submitted his report on 8.12.2011 stating that respondent No. 5 created a paper transaction in the name of a waqf deed through said Abdul Karim Bepary showing transfer of the self-same property which was covered by the deed of waqf earlier created by Abdul Hamid Miah. The report also recommended to

forming a new committee headed by the petitioner as the mutawalli. Having considered the report, the Administrator on 10.1.2012 appointed the petitioner as mutawalli with a committee for 3 years and directed respondent No.5 to hand over charge of mutawalliship to the petitioner. Though the tenure of respondent No. 5 was expired on 20.9.2011 but he did not hand over charge to the petitioner. Consequently, the petitioner initiated criminal proceeding against respondent No.5 under section 63 of the Waqfs Ordinance. The petitioner also applied to the Administrator of Waqfs and D.C Munshigonj on 2.6.2013 praying for handing over charge to him by evicting respondent No. 5 as per section 32(5) of the Ordinance. Pursuant to the said application the Administrator issued a Memo dated 10.6.2013 requesting respondent No. 4, Deputy Commissioner to makeover the charge of mutawalliship to the petitioner after evicting respondent No.5. But the Deputy Commissioner did not take appropriate steps to evict respondent No.5 and to hand over charge to the petitioner. Suddenly, the petitioner came to learn that on 7.11.2013 the Administrator issued the impugned Memo appointing respondent No.5 as the mutawalli by cancelling appointment of the petitioner. According to the Administrator, the cancellation was made on the basis of two inquiry reports against him (petitioner) and his failure to take over charge of mutawalliship from respondent No.5. However, no reason has been assigned for appointment of respondent No.5 in place of the petitioner.

Challenging the legality of the said order dated 07.11.2013 the petitioner has moved this application and obtained the instant rule and order of stay operation of the impugned order on 2.2.2014.

Respondent No. 5 contested the rule and filed affidavit-in-opposition denying the material averments as stated in the writ petition. His positive case is that since 2003 to 2012 two waqf committees were approved by the Administrator in which Upazila Nirbahi Officer was appointed as the Chairman

and respondent No. 5 as the mutawalli. The petitioner challenged both committees in Writ Petitions No. 6363 of 2003 and 7927 of 2008. In earlier writ petition the petitioner lost up to the Appellate Division and he chose not to prosecute the later. During his tenure, respondent No. 5 convinced Abdul Karim Bepary to gift the disputed land in favour of the Waqf Estate for development of a new *eidgah*. Accordingly, Abdul Karim Bepary gifted 34 decimal land in favour of the Waqf Estate by a registered deed of waqf being No. 2876 dated 28.4.2011. In the said deed respondent No.5 was appointed as mutawalli of the Waqf Estate. In this way respondent No. 5 resolved the longstanding dispute which had been intentionally kept pending by the petitioner so that he could exploit and misappropriate funds of the Waqf Estate in the name of litigation. On the other hand, during his tenure of mutawalliship from 1996 and 2003, the petitioner misappropriated waqf fund which, upon application of respondent No.5, was investigated by th Inspector of Waqfs and the Additional Deputy Commissioner (Revenue), Munshigonj who, after investigation in presence of the petitioner, submitted two separate reports on 29.5.2013 and 21.10.2013 in which it was revealed that the petitioner misappropriated huge amount of money of the Waqf Estate whereas, respondent No. 5 performed his functions smoothly. On the basis of the said reports the impugned order was passed cancelling appointment of the committee headed by the petitioner as mutawalli and approving the committee headed by respondent No.5 as the mutawalli. The earlier appointment of the petitioner dated 10.1.2012 was challenged by respondent No.5 in Miscellaneous Appeal No. 4 of 2012 before the learned District Judge, Munshigonj which was dismissed for non-prosecution on 13.11.2013. Having been satisfied through investigation reports in respect of corruption, breach of trust, mismanagement, malfeasance, misappropriation of waqf fund to the loss of the waqf property by the petitioner, the Administrator

of Waqfs legally and properly passed the impugned order, as such, no interference is called for by this Court.

By filing an affidavit-in-reply the petitioner has brought to our notice some facts which happened subsequently to the issuance of instant rule. It is stated that though the impugned order was stayed in this writ petition but respondent No. 5 had been illegally holding the post of mutawalli disregarding the order of this Court for which the petitioner filed Contempt Petition No. 157 of 2014 and, after hearing, a Division Bench of this Division by order dated 8.6.2014 issued contempt rule with a direction to implement the order dated 2.2.2014 by handing over charge of the office of mutawalli to the petitioner without any delay and to file affidavit of compliance within 8.7.2014. The Court also directed respondent No.5 to appear in person before it at 10.30 a.m on 8.7.2014.

Being aggrieved by the aforesaid order respondent No. 5 filed Civil Petition for Leave to Appeal No. 2924 of 2014 before the Appellate Division and the honourable Judge-in-chamber, after hearing, passed an order of status-quo. The CPLA, after hearing, was dismissed and the order of status-quo was vacated by the Appellate Division by judgment dated 10.12.2014. Thereafter, the petitioner filed several applications to the respondents for compliance with the court's order and since no action was taken, the petitioner served another notice of contempt of Court upon them on 23.3.2015. Lastly, on 5.4.2015 respondent No.4 through concerned Upazila Nirbahi Officer handed over to the petitioner two sets of keys (total 14 keys) of *mazar* and safe of the Waqf Estate by taking those back from respondent No.5 but the register, cheque books and other documents of the office of mutawalli were not handed over to him. The petitioner was appointed on 10.1.2012 as mutawalli for three years but due to delay in making over the charge by respondent No.5, he could not assume the office, as such, he applied to the Administrator on 9.4.2015, 13.9.2015 and

3.3.2016 for extension of his tenure so that he could fulfil his three years tenure of mutawalli from the date of getting charge of office from 5.4.2015 but those applications were not considered by the Administrator of Waqfs.

Mr. ABM Siddiqur Rahman Khan learned Advocate appearing for the petitioner at the very outset, having taken us through the impugned order, different papers, documents annexed to the writ petition as well as the affidavit-in-reply raised a number of contentions which boil down to five. **First**, the Administrator of Waqfs within his jurisdiction provided in the Waqfs Ordinance is empowered to remove and appoint a new mutawalli but he travelled beyond his jurisdiction in passing the impugned order which is without any lawful authority and is of no legal effect. **Second**, the impugned order is ambiguous and the Administrator does not even mention under which sections of the Waqfs Ordinance the order (excluding the petitioner from the post of mutawalliship and appointing respondent No.5 in his place) has been passed and issued. **Third**, the petitioner was not given an opportunity of being heard or to reply to the allegations made against him before passing the impugned order which is a clear violation of principle of natural justice. **Fourth**, failure on the part of the petitioner in taking over charge of mutawalliship from respondent No.5 cannot be a ground for cancellation of the appointment of the petitioner as mutawalli. **And finally**, power of attorney by which respondent No.5 appointed one Kazi Siraj ud Dulla as his attorney for prosecuting his case was not executed in accordance with law and thus affidavit-in-opposition sworn in by the attorney on behalf of respondent No.5 is not admissible, as such, the same cannot be taken into consideration.

Mr. Muntasir Uddin Ahmed, learned Advocate appearing for respondent No. 5, on the other hand, has taken us to the inquiry reports as well as different papers and documents annexed to affidavit-in-opposition and submitted that the rule is liable to be discharged **firstly**, because of the reason that the rule has

become infructuous in the event of expiry of the tenure of the petitioner; **secondly**, the writ petition itself is not maintainable as sections 32 and 43 of the Waqfs Ordinance 1962 provides alternative remedy in an appeal to be preferred before the District Judge against the order of the Administrator removing mutawalli or appointing new mutawalli and **thirdly**, the petitioner did not come before this court with clean hands because he suppressed the facts of inquiry reports referred to in the impugned order itself. He **next** submitted that since inquiries were held in presence of the petitioner and on the basis of inquiry reports the impugned order has been passed cancelling his appointment it cannot be said that the petitioner has not given an opportunity of being heard before passing of the impugned order. Mr. Ahmed **finally** tried to assail the maintainability of the writ petition saying that the writ petition is also barred under Article 111 of the Constitution because the issues involved in this case have been settled by the Appellate Division in the case between the same parties reported in 14 BLC (AD) 94.

We have heard the learned Advocates and perused the records of the case. Before going into the merit of the case we would like to see as to how the instant waqf has been created. Learned Advocates for both the parties contended that the waqf was created by one Abdul Hamid Mia by a registered deed of waqf dated 30.7.1969 being No. 5295. On our query the deed has been produced before us. For better appreciation the contents of the deed is quoted verbatim below:

“Wj wLZs Avāj nwg` wgv wczv gZuMni wgv` ;Rwiz gjnj gvb e`vemv- Muu` bevm i vgbMi _vbw gSMA wRj v XvKv|
 Km` I qvKd bvgv cT wgs` KvhfOvX i vg bMi wvRv w` E wgv cvov RvX
 gmiR` bvxg Kw_Z gmiR`xi weQvbw cT wj ewE Cgvxi gwinqvbw BZ`w` i LiP
 mgvRi I Rgvxi P`vq Ghver wber nBqv AvimXX I gmiR` msj M`ugi
 mvXXi ` i Mvi wvRvZ nBXX| gmiR`xi I gvRvxi ` Qx fvX wvRvZi Wv
 e`ve` Ov _vKvq Avgvi `Zj` Lj xq ZcvQxi wj wLZ Rgx I qvKd Kw qv w` evi Gi var
 Kw qv AvimXXQ| ZvB Avgvi eU w` Xi gXvMZ Airfclq gX ZcvQj f³ figi
 Avgvi `Lj `Z`j f` Ajvi I qvX`D³ gmiR` eivei I qvKd Kw qv `Xvi I

AmiKvi Kwi xxiQ x wRj v XvKv _vbw I mve xxiR ÷ vi gšMÄ Awab ugqv cvov ubevmx
 gmnj gvb RvZxq x e"vemvqx gZiQv x` Avj x gšx mv xxi ci Rbve vvt kiwd
 Dwi b ugqv mve xxi vyzqwj - vvkqk Kwi j vg | xqvZqwj - mve xxi Zvrv m½xq 1 |
 BQi Avj x gv`ei 2 | vvt kl KZ Avj x gšx 3 | vvvvRwi b gšx 4 | vvyxg gv`ei
 5 | Avāj gvbd gšx mve xxi MY x m`m" ubhy³ Kwi j vg | vyzqwj - mve xxi Zvrv
 m½xq m`m" Mxi gZvbyv x AÎ I qvKd K v fvg Pvlver` Ki vBqv mGZ mm" Øvi v
 vUvKv Avq Avg`vbx nBx Zvrv D³ Rvx gmmRxi I `iMvi xev RwiZ x e"q
 nBx | vyzqwj - e"v³ MZ fvx I qvKd K v fvg `Lj ev mm" mRb Kwi x ev Avq
 Avg`vbx UvKv cqmv AvZfvv Kwi x cwi xbv | eZgvb vyzqwj i Afvx ugqv
 cvov Rgvxi vvk hvv x ugqv cvov Rvgvxi vvk nBx hvv x ci xRMvi xvk
 I AvgvbZ `vi ewj qv vevPbv Kwi xbv wZvb vyzqwj - nBxb | ci ci vyzqwj -
 AÎ `ij xi kZ vyzv x K vR Kwi xbv | Rvgi LvRvvi mmmZ vvb m"úK vvk x
 bv | AÎ I qvKd K v fvgi eZgvb gj" 500, cuP kZ UvKv nBx GZ` vx" vj xi
 ggAeMZ nBqv vjvq mÁv x AÎ I qvKd bvgv vj wLqv w`j vg BwZ 1376 mb Zis
 14B kreb Bs 30/07/1969

ZciQj

wRj v XvKv _vbw I mve xxiR ÷ vi gšMxi Aaxb 26bs vRv ivgbMi w" E
 2bs LwZqvxi 18 Avvri `vxi wUv Rvg 75 kZvsk DEx imivR Wv³vi c x
 i v v v x gmmR` ci v x mZ" Zvj K` vi ex |"

On a careful scrutiny of the recitals of the purported deed of waqf it appears that before execution of the deed there was an established mosque namely 'Miapara Jame Masjid' and a *Dargah* namely 'Meer Saheber Dargah' which is adjacent to the mosque within mouza Ramnagar under the then police station-Munshigonj and district- Dhaka and at present police station and district- Munshigonj which are, by their nature, waqf properties. Expenditure for maintenance of the mosque and *dargah* and the salary of the Imam were being borne by the subscription of *Musallies* of the mosque. The recital of the deed suggests that for the purpose of a permanent solution in respect of the expenditure of the mosque and *dargah* said Abdul Hamid Mia came forward and gifted 75 decimal land, which was adjacent to the mosque, by way of the said deed of waqf being No. 5295 dated 30.1.1969. So it can easily be construed that the aforesaid deed of waqf is, in fact, a deed of gift made in favour of the existing *Meerapara Jame Mosjeed* and *Meer Saheber Majar Waqf Estate*. The land gifted by Abdul Hamid Mia has been merged with said Mazar and mosque and became part of the Waqf Estate. However, in the aforesaid deed, the donor appointed

one Md. Safiuddin Mia (not the present petitioner) as the mutawalli and other 5 (five) persons as the member. It was also stipulated therein that after the death of the mutawalli, the next mutawalli would be appointed from the members of the *Musallies*, who according to them are pious Muslims. Since the said deed cannot be construed as one that created "Meerapara Jame Masjid and Mir Saheber Mazar Waqf Estate" the provision of appointment of mutawalli contained in the deed would not be applicable in respect of appointment of mutawalli of the Waqf Estate.

Likewise, on perusal of other three alleged deeds of waqf (out of which two were produced by the petitioner and the other by respondent No. 5) it appears that out of the three , the so-called two deeds of waqf dated 8.2.1999 and 8.3.1999 being Nos. 416 and 799 (Annexure-I and I-1) by which two decimal land was gifted/dedicated by Hazi Asak Ali and Nurul Islam & others respectively in favour of the Waqf Estate by which the petitioner was appointed as the mutawalli, are not deeds of waqf but mere deeds of gift and the land which was gifted through those deeds has been merged with the original waqf property. Another so-called deed of waqf dated 28.4.2011 being No. 2876 (Annexure-2) which comes fourth in serial, by which 34 decimal land was shown to have been gifted by one Hazi Abdul Karim Bepary in favour of the Waqf Estate and respondent No. 5 was shown to have been appointed as the mutawalli, is not also deed of waqf but a mere deed of gift. Interestingly, by this deed the land which has been shown to have been gifted in favour of the Waqf Estate was part of waqf property which has been earlier gifted by Abdul Hamid Miah in 1969 by deed No. 5295 as stated above. During inquiry, the Inspector of Waqfs also found that by the said deed though Abdul Karim Bepary has shown to have gifted 34 decimal land, was a mere paper transaction and created in connivance with respondent No.5 with ulterior motive and collateral purpose for their personal benefit(inquiry report, Annexure-A to the writ petition).

In the aforesaid circumstances, it can easily be concluded that the present Waqf Estate is not established by either of the 4 (four) deeds as mentioned above and the same is, by its nature and character, a public waqf (*wakf-e-lillah*) having had no written deed of waqf. Accordingly, the petitioner as well as respondent No. 5 would not enjoy any vested right nor get any preference in terms of above gift deeds in respect of appointment as mutawalli of the Waqf Estate.

On perusal of the impugned order it appears that two types of actions i.e removal/exclusion of the petitioner from the office of mutawalli and appointment of respondent No. 5 in the same office have been taken but it is unclear under which section(s) of the Waqfs Ordinance it has been taken. This non-mention of section suggests that there is a lingering confusion in the office of the Administrator of Waqfs about the position of law in dealing with a situation of the present kind. The confusion calls for a comprehensive discussion of relevant provisions of Muslim Law and relevant sections of Waqfs Ordinance in order to disabuse the office of Administrator of Waqfs of the extent and ambit of power under the Waqfs Ordinance.

The Waqfs Ordinance, 1962 provides specific provisions under what circumstances a mutawalli may be removed and in doing so what criteria should be followed. Section 32(1) provides that the Administrator of Waqfs may on his own motion or on an application of any person remove a mutawalli on some specified grounds, which among others, include breach of trust, mismanagement, malfeasance or misappropriation of the Waqf Estate. The section also includes a proviso that 'no such order for removing the mutawalli shall be made without giving him an opportunity of being heard'. Sub-section (2) gives the aggrieved person a right of appeal to the District Judge, but no such appeal lies, unless the mutawalli has made over charge of the waqf estate to the new mutawalli. Under sub-section (3) a revision also lies to the High Court Division against the order of

District Judge. The mutawalli has a right to be heard and to reply to the allegations made against him, especially when this right has been given in the proviso to the section. It has always been considered a cardinal principle of interpretation of any deed or statute that the proviso always governs the enacting part of the section. If the Administrator denies the mutawalli his right to be heard in the proceeding of his removal the denial would amount to a breach of the mandatory provision of the Waqfs Ordinance. In this connection section 38 is relevant which is quoted below:

“38. Power of the Administrator for the purpose of an Enquiry Under this Ordinance- (1) For the purpose of any enquiry under this Ordinance, the Administrator shall have the power to summon and enforce the attendance of persons and witnesses including the parties interested to examine them, to compel the production of documents, and to issue commissions for the examination of witnesses, in the same manner as is provided in the case of Civil Court under the Code of Civil Procedure, 1908 (Act V of 1908).

(2) The Administrator shall be deemed to be a public servant for the purposes of section 188 of the Penal Code and Civil Court for the purposes of section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898 (Act V of 1898).”

Since the proceeding under section 32 of the Ordinance is of civil nature and inquires under it are required to be conducted as per procedure followed by a civil Court, the Administrator while conducting such inquiry turns into a civil court. It is in the sense; the Administrator has no scope to decide the issue unilaterally without hearing the affected person. Furthermore, it is now fairly well settled that there is no such thing as absolute administrative discretion and before passing any order or taking any decision adversely affecting right or interest of a party he must be allowed opportunity to be heard. In the case of Nurzzaman vs. The Secretary, Education Department reported in 17 DLR 46 it has been held by a Division Bench of the then Dhaka High Court that *‘a proceeding under section 32 of the Waqf Ordinance is of a civil nature and all enquiry by it*

must be conducted in a manner followed in a civil court which only means that the Administrator is to act judicially'.

Moreover, an appealable order must be a speaking order based on evidence, collected/recovered following the mandate of section 38 of the Waqfs Ordinance which envisages an enquiry under section 32, the enforcement of attendance or examination of witnesses or production of documents or the issuance of commission for the examination of witnesses by the Administrator of Waqfs. The law should be more stringently followed specially when the question of removal of a mutawalli is involved.

Provisions of a statute which takes away right and imposes penalties, should be construed strictly and no penalty should be imposed upon any person behind his back without allowing him reasonable opportunity to be heard even if the law is silent about it. Section 32 of the Waqfs Ordinance is of a penal nature as it empowers the Administrator to remove a mutawalli from his office. The provision of section 32, therefore, must be put to strict construction and sparingly applied following the principle of natural justice. Our view lends support from the case of Nadira Rahman Vs. Amir Hussan reported in 35 DLR 277 wherein their Lordships held, “ *Because of this sense of penalty the law givers in their anxiety had made it incumbent upon the Administrator of Waqfs to hear the person who is an accused before him and hear him before he is penalized and before he is found guilty of the allegations made. The Administrator of Waqfs being a court of law while acting under section 32 of the Ordinance needs to come to a finding as a court of law*”.

The provisions of sections 37 and 38 of the Ordinance provide necessary guideline and procedure for such a proceeding i.e for removal of a mutawalli under section 32. Since section 38 has quoted above the same is not further quoted for avoiding repetition. Section 37 reads as follows:

“37. Application for Enquiry or Audit of accounts- Any person interested in a waqf may make an application, supported by an affidavit, to the Administrator to institute an enquiry relating to the Administration of a waqf or for examination and audit of the accounts of a waqf; and the Administrator, on receipt of such application and on being satisfied from facts set forth in the affidavit that there are reasonable grounds for believing that the affairs of the waqf are being mismanaged, shall take such action thereon as he thinks fit;

Provided that an application for the examination and audit of accounts shall not be made in respect of accounts relating to a period more than three years prior to the date of such application.”

In the case of Shoukat Ali Vs. Administrator of Waqfs, 29 DLR 276 it has been observed, *“Section 37 requires that an application by an interested person under the section shall be on affidavit and shall not be made in respect of the accounts relating to a period more than three years prior to the date of such application”*. In Yar Ali Khan Chowdhury vs. Administrator of Waqfs reported in 20 DLR 535 it is held that *“The proviso to section 37 of the Ordinance limits the power of examination and audit of accounts to a period of three years prior to the date of such application”*.

It may further be remembered that the actions against a person thus penalized must come fairly and squarely within the plain words of the statute. It will not be enough if the allegations come substantially within the scope of law, giving a wide discretion to the court in interpreting laws to fit in a given fact. It follows, therefore, that any order passed under the Waqfs Ordinance specially touching upon appointment, removal or cancellation of appointment of a mutwalli must be passed by reference to the section(s) under which it has been passed as well as within in the meaning of the language used by the Statute that the affected party is left with no confusion about his next course of action.

Let us now consider how far the natural justice clause, that has been incorporated by the proviso to section 32, has been complied with in issuing the impugned order of cancellation of appointment of the petitioner as mutawalli.

It is not disputed before us by the respondent that the father of the petitioner functioned as mutawalli for 20 years and after his death the petitioner was appointed as mutawalli in 1996 and he performed as mutawalli up to 2003. After expiry of his tenure respondent No. 5 was appointed as mutawalli in 2003. The appointment was challenged by the petitioner by filing Writ Petition No. 6363 of 2003 but he lost up to the Appellate Division and the judgment of the Appellate Division was reported in 14 BLC (AD) 94. Respondent No. 5 was again appointed as the mutawalli on 20.08.2008 for a period of three years, which has also been challenged by the petitioner in another writ petition being No. 7927 of 2008 but at one stage he withdrew the writ petition. On perusal of Annexure A, the inquiry report dated 8.12.2011, it appears that upon allegation of various acts and misdeeds being done by respondent No.5 an inquiry was held by the Administrator through the Inspector of Waqfs and upon inquiry it revealed that a sham transaction was made by the deed of waqf (Annexure-2) in connivance with respondent No.5 and Abdul Karim Bepary showing gift of 34 decimal land in favour of the Waqf Estate though the same land had been earlier dedicated by Abdul Hamid in 1969. Since the tenure of respondent No.5 expired and some misdeeds on the part of respondent No.5 revealed, the Inspector of Waqfs recommended for appointing a committee of 11 members headed by the petitioner as mutawalli. Considering the said report and recommendation the Administrator on 10.1.2012 approved the said committee headed by the petitioner as mutawalli for a period of three years with a direction to respondent No.5 to hand over the charge of management of the Waqf Estate to the petitioner within 10 days and to inform the office of Administrator. Respondent No. 5 without handing over charge filed miscellaneous appeal being No. 4 of 2012 before the learned District Judge, Munshigonj and also filed application before the Administrator against the petitioner alleging misappropriation of waqf fund by the petitioner during his previous tenure i.e from 1996 to 2003. On

the other hand, the petitioner has been pressing the Administrator to take over charge from respondent No.5 and to hand over the same to him. The Administrator instead of making over charge to the petitioner directed to hold inquiry by the ADC (Revenue), Munshigonj and Inspector of Waqfs, who, upon separate inquiry about the allegation of misappropriation by the petitioner in his earlier tenure, submitted two reports disclosing some truths in the allegation made against the petitioner and the Administrator, upon the report mechanically passed the impugned order without giving any opportunity to the petitioner of being heard. In this case we find no trace on records that any application was filed for removal of the petitioner in accordance with the provisions of sections 32 and 37 .

The Administrator of Waqfs holds a very high office of the Republic and acts as a Court when exercises power under section 32 of the Waqfs Ordinance. He must take his decision upon evidence advanced by the parties exactly as is done by a civil court not upon inquiry report or any other extraneous document. We cannot but express our anxiety that in most cases the Waqfs Administrators are found to be unaware of the law and the legal procedure to be followed in disposing of matters of the present kind. The law does not confer on the Administrator, an arbitrary power, to put an end to a mutawalliship, either by suspending or excluding or removing him at will.

On perusal of the impugned order it appears that the Administrator firstly based on the reports for cancellation of the committee headed by the petitioner and secondly, failure on the part of the petitioner in taking over charge of the office of mutawalli from previous mutawalli whereas none of the reasons can form lawful ground for cancellation of appointment of mutawalli or the committee. To appreciate the magnitude of illegality committed by the Administrator the provisions of sub-section (4) and (5) of section 32 are relevant. Sub-section (4) provides, “ *when a mutawalli has been removed, or when a*

mutawalli has resigned and his resignation has been accepted, the Administrator may appoint a new mutawalli to whom the outgoing mutawalli shall make over possession and charge of management of the waqf property together with the case and all papers relating thereto by such date as may be specified by the Administrator". Sub-section (5) envisaged specific procedure of taking over possession and charge of management from an outgoing mutawalli in the event of his failure or refusal to make over possession and charge of management to the succeeding mutawalli providing, *"if an outgoing mutawalli fails or refuses to make over possession and charge of management of the waqf property together with the case and all papers relating thereto to the succeeding mutawalli under sub-section (4), the succeeding mutawalli or the Administrator may apply to the Deputy Commissioner who shall evict the outgoing mutawalli and make over possession of the waqf property together with the case and all papers relating thereto to the succeeding mutawalli or the Administrator, as the case may be".*

A combined reading of both the provisions of sub-sections (4) and (5) of section 32 suggests that an outgoing mutawalli, after expiry of his tenure, is bound to make over possession and charge of management of the waqf property to the new/ succeeding mutawalli and if he fails or refuses to do so the succeeding mutawalli or the Administrator have to apply to the concerned Deputy Commissioner who shall evict the outgoing mutawalli and make over charge of the office of mutawalli and the possession of waqf property to the succeeding mutawalli or the Administrator, as the case may be.

Apart from the measures of eviction, the Administrator is further equipped with power under section 63 to prosecute the defiant outgoing mutawalli which provides, *"if an outgoing mutawalli fails or refuses to make over charge of management of the waqf, and of the accounts, documents, records, papers and cash of the waqf and to surrender possession of the property and produce of the land, if any, to the succeeding mutawalli, on being required to do*

so under any of the provisions of this Ordinance, he shall be punishable with fine which may extend to two thousand takas and in default with imprisonment which may extend to six months”.

Provisions of sub-sections (4), (5) of section 32 and that of section 63 of the Ordinance are clear and unambiguous which read together suggests that it is more a statutory duty of the Administrator than the new mutawalli to ensure handing over charge and thereby to give effect to the order passed by him, not to bound down to the defiance of the outgoing mutawalli and cancel the new appointment made by him ascribing his own failure to the new mutawalli.

In this case, it appears that the petitioner several times made applications to the Administrator and Deputy Commissioner praying for eviction of respondent No. 5 and make over office of mutawalli and management of the Waqf Estate to him. So, the petitioner has performed his duty in full in order to take over charge. But the Administrator and the Deputy Commissioner have utterly failed to discharge their legal obligation in giving effect to the order of new appointment. For the precise reason the impugned order of cancellation of new appointment is on the face of it illegal, arbitrary and based on reasons unknown to law. Such ignorance of law on the part of the Administrator is clearly disappointing and reprehensible.

Now question arises as to whether appointment of respondent No.5 has been made in conformity with the provision of Mahomedan Law as well as the Waqfs Ordinance.

Mulla in his famous treatise on Mahomedan Law i.e “Principles of Mahomedan Law” under section 173 spelt the word ‘waqf’ as ‘wakf’ and classified it into two groups, viz. public waqf (*wakf-e-lillah*) and private waqf (*wakf-al-al-aulad*). A public waqf is one for a religious or charitable purpose. A private waqf is one for the benefit of the settlor’s family and his descendants.

Under the Mahomedan Law the moment a waqf is created all rights of property pass out of the waqif and vest in the Almighty. The mutawalli has no right in the property belonging to the waqf; the property is not vested in him, and he is not a trustee in the technical sense. He is merely a superintendent or manager. (Mulla, sec.202)

Mulla detailed in respect of appointment of mutawalli in section 203 and 204, which are reproduced below:

“203. Who may be appointed mutawalli. –

(1) Subject to the provisions of sub-section (2), the founder of a wakf may appoint himself (Baillie, 601; Hedya, 238); or his children and descendants (Baillie, 601) or any other person, even a female or a non-Mahomedan, to be mutawalli of wakf property.

But where the mutawalli has to perform religious duties or spiritual functions which cannot be performed by a female, *e.g.*, the duties of a *sajjadanashin* (spiritual superior) or *khatib* (one who reads sermons) or *mujavar* of a dargah, or an *imam* in a mosque (whose function is to lead the congregation), a female is not competent to hold the office of mutawalli, and cannot be appointed as such. Similar remarks apply to non-Mahomedans. The duties of a graveyard are secular and can be performed by a female.

(2) Neither a minor nor a person of unsound mind can be appointed mutawalli (Baillie, 601). But where the office of mutawalli is hereditary and the person entitled to succeed to the office is a minor, or where the mode of succession to the office is defined in the deed of waqf and the person entitled to succeed to the office on the death of the first or other mutawalli is a minor, the Court may appoint another mutawalli to act in his place during his minority.

204. Appointment of mutawalli-

(1) The founder of the wakf has power to appoint the first mutawalli, and to lay down the scheme for administration of the trust and for succession to the office of mutawalli. He may nominate the successors by name, or indicate the class together with their qualifications, from whom the mutawalli may be appointed, and may invest the mutawalli with power

to nominate a successor after his death or relinquishment of office.

- (2) If any person appointed as mutawalli dies, or refuses to act in the trust, or is removed by the Court, or if the office of mutawalli otherwise becomes vacant, and there is no provision in the deed of wakf regarding succession to the office, a new mutawalli may be appointed-
- (a) by the founder of the waqf,
 - (b) by his executor (if any),
 - (c) if there be no executor, the mutawalli for the time being may, subject to the provisions of sec. 205 below, appoint a successor on his death-bed;
 - (d) if no such appointment is made, the Court may appoint a mutawalli. In making the appointment the Court will have regard to the following rules:-
 - (i) the Court should not disregard the directions of the founder except for the manifest benefit of the endowment.
 - (ii) the Court should not appoint a stranger, so long as there is any member of the founder's family in existence qualified to hold the office.
 - (iii) where there is a contest between a lineal descendant of the founder and one who is not a lineal descendant, the Court is not bound to appoint, the lineal descendant, but has a discretion in the matter and may in the exercise of that discretion appoint the other claimant to be mutawalli."

Besides above principles of Mahomedan Law in respect of appointment of mutawalli, 'The Waqfs Ordinance (1 of 1962)' has been promulgated 'to consolidate and amend the law relating to the administration and management of waqf properties in Bangladesh' providing specific powers and functions of the Administrator of Waqfs. 'Apart from general powers and functions necessary for due control, maintenance and administration of waqfs, the Administrator is given authority to call for accounts of the waqf estate from the mutawalli either present or past' as is held in Yar Ali Khan Chowdhury vs. Administrator of Waqfs,

20 DLR 535. The Ordinance also provides specific provisions conferring power upon the Administrator to take over and assume the administration, control, management and maintenance of any waqf property (section 34) and to appoint mutawalli in certain cases and under special circumstances. There is no scope on the part of the Administrator to go beyond the Waqfs Ordinance or ignore Mahomedan Law in performing his functions. He cannot pass any order appointing mutawalli or cancelling the appointment at his sweet will.

In order to appreciate the respective procedure in respect of appointment of mutawalli, as laid down by the Ordinance, it is necessary to set out the relevant sections of the Ordinance. Section 32(4) provides that when a mutawalli has been removed or when a mutawalli has resigned and his resignation has been accepted, the Administrator may appoint a new mutawalli. The provision, however, does not provide any guideline for such appointment. There is also provision of appointment of mutawalli or committee in section 34.

Section 34(1) provides, "Notwithstanding anything contained elsewhere in this Ordinance, or in any other law for the time being in force, or in any decree or order of any court, or any deed, or instrument the Administrator may, by notification in the Official Gazette, take over and assume the administration, control, management and maintenance of any waqf property, including any shrine, *dargah*, *imambarah* or other religious institution appertaining to such waqf property". Section 34(3) further provides that the Administrator may manage the waqf property, thus taken over by him under sub-section (1), through any officer subordinate to him or by an agent or official mutawalli or, if he considers necessary, by appointing a managing committee in the case of any shrine, *dargah*, *imambara* and other religious institutions. Sub-section (4) provides that if a managing committee is appointed, the mutawalli of the waqf property concerned, the manager, or *sajjada-nasin*, if there be one, and the Deputy Commissioner or his representative, shall be among the members

thereof; and the President and the Secretary of each such committee shall be appointed by the Administrator from among the members of the committee.

But section 34 of the Waqfs Ordinance does not give the Administrator of Waqfs an absolute powers to take over the administration of an waqf estate without reference to sections 37 and 39 of the Ordinance. Since section 37 has quoted earlier it is not again quoted for avoiding repetition. Section 39 reads as follows:

“39. Protection of Waqf from Mismanagement- If after making an enquiry under section 37 the Administrator is of opinion that the affairs of any waqf have been mismanaged to such an extent as to make it desirable, for the protection of the waqf property or in the interest of the beneficiaries, that the waqf should be subjected to greater control and supervision, he may take over and assume the administration, control, management and maintenance of such waqf property under the provisions of section 34, or he may subject the waqf property to such provisions of this Ordinance for such specified period as he deems fit.”

It has been held in the case of Makaulal Haq Vs. Administrator of Waqfs reported in 17 DLR 30 that *“the words ‘notwithstanding anything contained elsewhere in this Ordinance’ do not exclude the attraction of the provisions of section 37 and 39. If these three sections are read together carefully, the only meaning that appears to us to follow is that section 34 only gives the power to the Administrator to take over possession of any waqf property. The procedure to be followed for doing so has been laid down in sections 37 and 39. The provisions contained in section 37 and 39, therefore, do not go counter to the provisions of section 34. They are rather supplementary to the provisions of section 34”*.

Section 43 also stipulates provisions for appointment of mutawalli in certain situations stating that when there is no mutawalli or where there appears to the Administrator to be an impediment to the appointment of a mutawalli in terms of the deed of waqf or where the successor to the office of

mutawalli is a minor, a person of unsound mind or a person adjudged insolvent by a competent court of law, the Administrator may, for such period as he deems fit, appoint a person to act as mutawalli.

Section 44 also provides that “ notwithstanding anything contained in the Ordinance or in any other law for the time being in force or in any deed or instrument, the Administrator may, where considered necessary, appoint an official mutawalli”.

In Abdul Jabbar vs. Atahar Ali and ors, 17 DLR (Dacca) 781 it is held that *‘Furthermore, it seems to us that the power vested in the Administrator and that in the District Judge under section 43 of the Ordinance are to make a stop-gap arrangement for the appointment as a Mutawalli with regard to a Wakf, so that it may not be jeopardised or destroyed’*. In A.J.M Asadulla vs. A.K.M Ahmad-ul Huq, 22 DLR 781 it is also held that *“Power conferred on the Administrator of Wakfs under sub-section 32(4) is a power to fill up the gap in the case of removal of a Mutawalli. Reading the provisions of section 43 of the Ordinance it also becomes apparent that the Mutawalli appointed by the Administrator of Wakfs is ‘to act as Mutawalli’.* *It is patent from these provisions that the Mutawalli so appointed by the Administrator of waqfs is only to function as a Mutawalli in a stop-gap arrangement as an acting Mutawalli until a regular appointment is made in accordance with provisions of Muslim Personal Law”*. (underlines are mine).

In the case of Altaf Miah vs. Anwar Hossain and another reported in 35 DLR (AD) 108 the Appellate Division held that *‘It is to be noticed that Muslim Law does not recognise any right of inheritance to the office of Mutawalli. But the office may become hereditary by customs in which case the customs should be followed. Now, how the court will be guided has been laid down by the judicial decisions over the years in the sub-continent. Where there is a vacancy in the office of Mutawalli and the Court is called upon to appoint a Mutawalli, the Court will ordinarily appoint a member of the founder’s family in preference to a*

stranger and a senior member in preference to a junior member; the Court is obviously to look into the attending circumstances of each case and act to its own criteria, as to the eligibility of a candidate for the Mutawalliship. In the instant case Anwar Hossain, the respondent informed the Administrator that after the death of his father Moyna Mia he has assumed the office of Mutwalliship. When his claim was challenged by Altaf Mia, a cousin of Anwar Hossain, it was the duty of the Administrator to make an appointment in terms of section 43 for a specified period thereby leaving the parties for adjudication of the dispute by a Civil Court. Instead, he made an inquiry and attempted to evaluate the claim of each candidate which the High Court rightly described as arrogating to himself the functions of the Civil Court. Such action on the part of the Administrator is not authorised by law and the learned Single Judge was fully justified in making such view’.

Section 51 of the Waqfs Ordinance provides that in the case of any change in the management of an enrolled waqf due to the death, retirement or removal of the mutawalli, the prospective mutawalli who is eligible or who considers himself to be eligible to succeed to the office of mutawalli in terms of the waqf deed or according to the custom or usage of the waqf, shall forthwith, and any other person may, notify the change to the Administrator. Section 51 does not empower the Administrator to appoint mutawalli. In Amir Sultan Ali Hyder Vs. Md. R. Alam reported in 29 DLR (SC) 295 it is held that “According to section 51 of the Ordinance, if there is any change in the management of an enrolled waqf which may be occasioned by the death or requirement or removal of mutawalli, the prospective mutawalli is to notify the change to the administrator. In the absence of a dispute the latter is not required to make any formal order of appointment of a mutawalli, as successor to the deceased, retired or removed mutawalli. Only when a dispute exists the Administrator is to act under section 43 or 44 of the Ordinance”.

Viewed in the light, generally a regular and permanent mutawalli is to be made for waqf estate in pursuant to the terms of deed of waqf, if any, subject to the provisions laid down in Muslim Personal Law. It is also settled principle that in the event of dispute/claim-counter claim in respect of who is eligible to be appointed as mutawalli it is the duty of the Administrator to make an appointment for a specified period to act as mutawalli in a stop-gap arrangement leaving the contesting parties for adjudication of the dispute by a Civil Court. Until such appointment is made by the Court, the mutawalli so appointed by the Administrator is only entitled to function as an acting mutawalli or an ad-hoc basis..

Furthermore, the Waqfs Ordinance does not empower the Administrator of Waqfs to appoint mutawalli of a waqf estate in a casual manner or as a routine work. Save under exceptional situations/circumstances detailed in the various provisions of the Waqfs Ordinance as discussed above the Administrator has no authority or jurisdiction to appoint mutawalli of any waqf estate. In a normal situation i.e where the terms of the waqf deed in respect of appointment of mutawalli is clear and unambiguous and not inconsistent with Mahomedan Law or there is no dispute to be settled by the Court the prospective mutawalli would assume the office of mutawalli in terms of waqf deed and in that case the provisions of section 51 would follow.

In this case, as it appears from the impugned order, the Administrator did not assign any reason as to what criteria was followed in approving the committee headed by respondent No. 5 as mutawalli. The impugned order of appointment, on the face of it, does not attract by any of the provisions of sections 32, 43, 44, 51 nor it is covered by the provisions of section 34 and 37 read with section 39 for the precise reason that neither notification in the official Gazette was published for taking over and assumption of the administration, control, management and maintenance of the waqf estate by the

Administrator under section 34(1) nor he proceeded in accordance with the provisions of section 37 read with section 39. For the above reasons the impugned order of appointment is *ex-facie* illegal, tainted with biasness, arbitrary, colourable exercise of power and *mala fide*, as such, without lawful authority.

Since, as per records, the present Waqf Estate is comprised of a *dargah*, mosque and *eidgah* and by their nature are public waqfs and since there is no written deed of waqf providing provisions of appointment of mtawalli, the Administrator should take over and assume the administration, control, management and maintenance of the waqf property as per section 34 read with section 37 and 39 of the Ordinance and manage it by appointing a managing committee as per provisions of sub-section (3) read with sub-section (4) of section 34 of the Ordinance.

Learned Advocate for respondent No.5 strongly raised the question of maintainability of the writ petition on the ground of non-exhaustion of appellate forum created under the Statute. Learned Advocate for the petitioner in his reply submitted that since the impugned order is not covered by any of the provisions of the Waqfs Ordinance question of exhaustion of alternative forum provided in the Ordinance does not arise.

On the face of it, the impugned order does not contain any section under which it is passed nor the order conform requirements of any of the sections, namely sections 32(4), 34, 37, 39, 43, 44 or 51 of the Ordinance under which the Administrator is entitled to pass an order touching upon the office of mutawalli. Non-mention of the section has thrown the petitioner into confusion as to what should be the appropriate forum for him to take recourse to, precisely because an order passed under section 32 removing a mutawalli is appealable before the District Judge, and thereafter, revision lies to the High Court Division against the District Judge's order passed in appeal. In case an order is passed under section

34 or 43 appeal lies to the District Judge. On the other hand, there is no forum of appeal against an order passed under section 39 and 44. None of the sections being attracted by the order, we find substance in the contention of the learned Advocate for the petitioner that the petitioner had no alternative but to invoke writ jurisdiction.

As the matter is not the first of its kind and similar orders totally divorced from law are being passed routinely multiplying unnecessary litigations at the cost of the public time and money and of poor litigants, we are constrained to say that the Waqfs Administrator must be well conversant with the law under which his office is created as well as the Mahomedan Law concerning waqf, at the same time the duties and responsibilities attached to his office and save in the order of purely administrative nature, must mention the section under which he passes quasi-judicial order of the present kind.

Now turning to the controversy as to what should be the starting point of tenure of the petitioner i.e from which date the tenure of mutawalliship of the petitioner should be counted. Learned Advocate for respondent No.5 argued that the tenure of the petitioner as mutawalli had started from 10.1.2012, the date of his appointment and the same came to an end on expiry of three years, that is at the beginning of 2015. Learned Advocate for the petitioner strongly opposed the contention raised on behalf of respondent No.5 and submitted that the tenure of office does not ipso facto starts with appointment. Universal rule is that tenure of office starts the moment the appointment carried into effect by filing joining letter or in variation of cases, by entering upon office through takeover of charges. In the instant case, he argued, the outgoing mutawalli i.e respondent No.5 was illegally held over or kept office in his possession in defiance of the appointment of the petitioner as his successor. Tenure of office is not something to vanish with unauthorised occupation of the office by a wrongdoer. To say otherwise is to pay premium to an unauthorised occupant for his defiance of law instead punishing him for the defiance.

It appears that the tenure of mutawalliship of respondent No.5 expired on 20.9.2011 and thereafter the petitioner was appointed as mutawalli on 10.1.2012 with a direction to respondent No.5 to hand over charge to the petitioner within 10 days but the respondent did not comply with the order of the Administrator and without handing over charge of office he preferred miscellaneous appeal in the Court of the District Judge, Munshigonj challenging the order of appointment of the petitioner. It also appears that taking the advantage of pendency of the appeal respondent No. 5 obtained the impugned order dated 7.11.2013 cancelling the appointment of the petitioner along with the committee. Thereafter, respondent No.5 has withdrawn his appeal on 13.11.2013 and had been continuing with the office of mutawalli. In the above premises the petitioner has come up with this application challenging the order dated 7.11.2013 and obtained this rule and order staying operation of the impugned order from this Court on 2.2.2014. Resultantly, the appointment of the petitioner dated 10.1.2012 stood revived but still then the respondent had been illegally continuing in the office. Lastly when he lost up to the Appellate Division in a contempt proceeding was compelled to hand over possession of the Waqf Estate to the petitioner on 5.4.2015 and since then the petitioner has been functioning as mutawalli. Respondent No.5 did never hand over charge of the office of mutawalli until he was evicted on 5.4.2015. By the order he was subsequently appointed on 7.11.2013 was a nullity in the eye of law. Therefore, he never acquired any lawful right to the office he forcibly kept in his occupation. He was nothing but a usurper who succeeded in keeping the petitioner away from his office.

As a well known judicial dictum goes: "No one can take the advantage of the fraud committed by him". It does not lie on the mouth of respondent No.5 that the tenure of office stood eclipsed by his continued occupation of the office. Moreover, since the mischief did by respondent No.5 and the failure on the part of the authority to evict him are all curable, the tenure of office of the petitioner should be counted from the date of handing over charge of the office. We have, therefore, no hesitation to reject the contention that the tenure of the petitioner has already expired.

Since the expiry theory of respondent No.5 is dismissed as not tenable his contention seeking to project the 'rule' as infructuous falls through. Failure of the Administrator to evict an unlawful occupier from office cannot cut short the tenure of an otherwise lawful claimant and virtually punish him for no fault of himself. It follows, therefore, that the tenure of office of the petitioner shall start from the date on which he took over office which means that his tenure, for all practical purposes, has started from 5.4.2014.

Mr. Muntasir raised another point, that is, the earlier case between the petitioner and respondent No.5 [reported in 14 BLC (AD) 94] wherein our Apex Court in a similar situation found the writ petition of the petitioner not maintainable and held that "*the Administrator has power to appoint Mutawalli under the law and the Administrator has the right to do so and if there is any grievance against such action it can be agitated before the District Judge by way of appeal. If a Mutawalli is removed and he is aggrieved he can prefer appeal under sub-section (3) of section 32 of the Ordinance*". He further submitted that since the above finding is binding upon the High Court Division it is incumbent upon this Division to discharge this rule.

In the reported case, referred by Mr. Muntasir, the present petitioner had challenged the order of appointment of respondent No.5 as mutawalli in writ jurisdiction in which he lost. The petitioner, thereafter, moved the Appellate Division in Civil Petition which was dismissed. While dismissing the petition the Appellate Division besides expressing the view, as quoted above, found that "*it is on record that writ-respondent No.2 as a deserving candidate for the post of Mutawalli was appointed in accordance with law. Since the period for which the petitioner was appointed has expired after the expiry of his tenure of office of Mutawalli, he could not cling to the post as a matter of right*". We have already held that the impugned order of appointment of mutawalli and cancellation of the committee headed by the petitioner as mutawalli cannot be said to have been passed under any of the provisions of the Waqfs Ordinance so that the petitioner might figure out a remedy under the Ordinance. Since the facts and issues involved in the previous case and the present one are quite different the

finding arrived at by the Appellate Division does not have any manner of application in this case.

Learned Advocate for the petitioner, however, tried to assail, at the end, the admissibility of the affidavit-in-opposition as, according to him, the Attorney through whom respondent No.5 got his affidavit-in-opposition was not duly appointed. Therefore, the same should not be treated as his reply. It is no more necessary to embark upon the discussion as the impugned order has already been disapproved by us as *ex facie* illegal and passed beyond the authority of law.

The findings arrived at herein above may be summed up as follows:

1. Since the proceeding under section 32 of the Ordinance is of civil nature and inquiries under it are required to be conducted as per procedure followed by a civil Court, the Administrator while conducting such inquiry turns into a civil court. The Administrator has no scope to decide the issue unilaterally without hearing the affected person.
2. Generally a regular and permanent mutawalli is to be made in pursuance of the Muslim Personal Law.
3. In the event of dispute/claim-counter claim in respect of who is eligible to be appointed as mutawalli the Administrator would appoint a third person or committee, as he thinks fit, for a specified period to act as mutawalli in a stop-gap arrangement leaving the contesting parties for adjudication of the dispute by a Civil Court. Until such appointment is made by the Court, the mutawalli so appointed by the Administrator is only entitled to function as an acting mutawalli or an ad-hoc basis.
4. The Waqfs Ordinance 1962 does not empower the Administrator of Waqfs to appoint mutawalli of a waqf estate in a casual manner or as a routine work. Without exceptional situations detailed in the various provisions of the Waqfs Ordinance the Administrator has no authority or jurisdiction to appoint mutawalli of any waqf estate.

5. In a normal situation i.e where the terms of the waqf deed in respect of appointment of mutawalli is clear and unambiguous or there is no dispute regarding appointment of mutawalli, the prospective mutawalli would assume the office of mutawalli in terms of waqf deed and in that case the provisions of section 51 would follow. In this situation no formal order of appointment is necessary.
6. If an outgoing mutawalli, after his retirement due to removal, resignation, expiry of tenure fails or refuses to make over charge of management of the waqf, and of the accounts, documents, records, papers and cash of the waqf and to surrender possession of the property and produce of the land, if any, to the prospective mutawalli or the Administrator, as the case may be, action against such defaulter outgoing mutawalli should follow in accordance with the provisions of section 32(5) and section 63 of the Ordinance.
7. Save in the order purely administrative in nature, the Administrator must mention the section(s) under which he passes quasi-judicial order of the present kind so that the aggrieved party, if so advised, can seek appropriate remedy in proper forum.
8. Any waqf property containing shrine, *dargah*, *imambara* or other religious institutions shall be managed and controlled by the Administrator in accordance with section 34 read with section 37 and 39 of the Ordinance.

For the reasons stated above, we find merit in this rule.

In the result, the rule is made absolute, however, without any order as to costs.

The impugned order dated 7.11.2013 is declared to have been passed without any lawful authority and is of no legal effect.

The Administrator of Waqfs is directed to take over and assume the administration and control of the Waqf Estate in question as per provisions of

section 34 of the Waqfs Ordinance within 30 (thirty) days from the date of receipt of the copy of this judgment and manage the same by appointing a managing committee as per provision of the said section. The petitioner would function as one of the members of the managing committee and continue in office for 3 (three) years with effect from 5.4.2015.

The order of stay granted earlier is hereby vacated.

M. Moazzam Husain,J:

I agree.