Syed Bashiruddin Ashraf

Vs

Bihar Subai Sunni Majlis-E-Awqaf and Others

Civil Appeal No. 739 of 1963

(CJI P. B. Gajendragadkar, M. Hidayatullah, J. C. Shah, S. M. Sikri, R. S. Bachawat JJ)

23.11.1964

JUDGMENT

HIDAYATULLAH, J. -

The appellant Bashiruddin Ashraf was Mutwalli of certain Waqf properties in Monghyr District, dedicated by one Sheikh Golam Yahya by a registered Waqfnama dated April 11, 1870. Under this deed Mutwallis were chosen from the descendants is the male line of the Waqif from generation to generation. The first Mutwalli was the Waqif. After his death, his wife held charge of the Toliat. After her death the appellant's father and from 1930 the appellant were Mutwallis. The Mutwalli in-charge was entitled to 9/48th share of the income as his remuneration. On April 1, 1948, the Bihar Waqfs Act, 1947 (Act 8 of 1948) came into force and this Waqf came under the purview of that Act and was registered as Waqf No. 67. Under the scheme of the Act the Bihar Subai Sunni Majlis-e-Awqaf (shortly Majlis) began supervising this Waqf. At all material times one Syed Bashiruddin was the Sadr (Chairman) of the Majlis and Syed Mehdi Hassan was the Nazir-e-Awqaf under section 22.

On March 2, 1949 Syed Naziruddin Ashraf (step-brother of the appellant) and some others presented an application for removal of the appellant from Mutwalliship on numerous charges, including mismanagement, misappropriation, wanton waste and dissipation of Waqf property, falsification of accounts, etc. This was registered as Case No. 37 of 1949. An enquiry was made by Mehadi Hassan, who reported on May 25, 1950 to the Majlis that the charges levelled against the appellant were proved. His report was considered by the Majlis at its meeting dated August 20, 1950 and a notice was issued to the appellant to show cause why he should not be removed. He showed cause. The Nazir was directed to submit a second report which he did on October 15, 1950. The appellant was then examined and on November 28, 1950 the Sadr passed an order agreeing with the report of the Nazir and confirming the findings given by the Nazir regarding mis-management etc. An auditor was appointed to check the accounts and he reported on February 8, 1951 that a sum of Rs. 9682/1/3 was due from the appellant to the Waqf estate. The Sadr ordered the appellant to deposit this amount in a recognised bank on or before April 2, 1951. When the appellant failed to deposit the amount, the Sadr passed an order on June 28, 1951 removing him from the office and appointed in his place a pleader (Maulvi Mohammad Shoeb) as Mutwalli for a period of one year under section 32 of the Act and directed him to take charge of the property of the Waqf from the appellant.

The appellant then made an application to the District Judge under section 27(3) of the Bihar Waqfs Act for setting aside the order of the Sadr and the proceedings were registered as Miscellaneous Case No. 30/4 of 1951. The order of the Sadr was assailed on several grounds, some of fact and others of law. By the petition the appellant also asked for the removal of Maulvi Md. Shoeb from

Mutwalliship. The present appeal arises from the order passed by the Additional District Judge, Monghyr and the judgment of the High Court dated December 21, 1960 on appeals from that order.

In the proceedings before the District Judge four issues were settled on the pleadings of the appellant and the pleadings in reply. They were :

> (i) Whether the Majlis or the Sadr was competent and had jurisdiction to direct the Mutwalli to produce the accounts of the Waqf estate, hold enquiries and pass orders on the basis of such enquiries for a period prior to the enforcement of the Act ?
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> (ii) Whether the Majlis or the Sadr was competent and had jurisdiction to pass the order of removal of the applicant from the office of the Mutwalli on the grounds mentioned in the order dated 28-6-1951 ?
>
> (iii) Whether the Majlis or the Sadr was competent and had jurisdiction to appoint Maulvi Mohammad Shoeb as a temporary Mutwalli ?
>
> (iv) Whether sections 27 and 32 of the Act are ultra vires of the Constitution of India ?

The Additional District Judge, Monghyr decided all the issues, except the 3rd, against the appellant. On the first two issues he held that the Sadr was competent to pass the order of removal on the basis of disobedience of orders passed prior to the coming into force of the amending Act. The fourth issue was not pressed in that form but a new point analogous to the first issue was raised to which we shall refer presently. The order appointing temporary Mutwalli questioned in the third issue was held to be without jurisdiction on the ground that it had to be ratified by the District Judge under section 32 and the appointment was vacated. The new point was that section 27(2)(h)(iii) added by the amending Act, 1951, was not retrospective and could only operate from June 6, 1951, which was stated to be the date from which the amending Act came into force, and that the power of the Majlis could only be exercised in respect of events happening subsequent to that date. This contention of the appellant was rejected.

Two appeals were filed against the order of the Additional District Judge by the appellant and Maulvi Md. Shoeb respectively. A revision application was also filed on behalf of the Majlis and Maulvi Md. Shoeb as a matter of abundant caution. The appellant had raised in the High Court as many as 41 grounds : the first five grounds raised the contention that the powers conferred on the Majlis, which formerly belonged to the District Judge, could only operate from June 6, 1951 and as no order or direction of the Majlis was disobeyed after June 6, 1951, the order passed on June 28, 1951 on the old material was illegal and void. Grounds 23 and 29(a) to (f) raised the contention that sections 27, 55, 56, 57, 59 and 60 of the Bihar Act 8 of 1948 were void as offending the fundamental rights of appellant under Articles 19, 25, 26, and 31 of the Constitution. The remaining grounds dealt with the jurisdiction to order the enquiry to be held by the Nazir and the merits of the order of the Sadr in relation to the evidence. By these grounds the appellant contended that the order of the Sadr was actuated by bias, prejudice and malafides and was erroneous, perverse and illegal. The order of the Additional District Judge was also characterised as perverse, erroneous and illegal.

The two appeals were heard together. The High Court by a common judgment delivered on December 21, 1960, dismissed the appeal of the appellant and accepted that of Maulvi Md. Shoeb, In dealing with the appeal of Maulvi Md. Shoeb the High Court pointed out that section 32 of the

Act was clear in conferring jurisdiction on the Majlis to make temporary appointment when there was a vacancy in the office of the Mutwalli and that words in that section "subject to any order by the competent court" did not mean that there had to be either prior permission or subsequent assent before the appointment was complete. The High Court rightly pointed out that those words denoted that the appointment was to endure according to its tenor till an order to the contrary was passed by a competent court. This conclusion is so patently correct that we need say nothing more than this.

On merits of the removal of the appellant the High Court endorsed the view of the Additional District Judge. The learned Advocate raised the contention before us that a number of his arguments on facts brought to the notice of the Hon'ble Judge were not considered and in the application for leave to appeal to this Court he had mentioned those contentions as ground No. 31(a) to (p). We did not permit the learned counsel to raise these grounds and we may say here that we deprecate the growing practice of making such allegations against the High Courts. The judgment here is fairly long and considered and it appears to take note of arguments on questions of fact and law. It is not necessary that the judgment should record and repel each individual argument however hollow. If any material point does not come under scrutiny the fact should be brought to the notice of the High Court before the judgment is signed and an order of the High Court on such submission obtained before it is raised in appeal. This Court will ordinarily regard the details of the argument given in the judgment of the High Court as correct and will not enter upon an enquiry as to what was or was not argued there. To permit points to be mooted on the plea that they were raised before the High Court but were not considered by it would open the door to endless litigation and this would be destructive of the finality which must attach to the decision of the High Court on matters of fact. The High Court is a Court of Record and unless an omission is admitted or is demonstrably proved this Court will not consider an allegation that there is an omission. The truth of the allegations against the appellant was investigated by the Nazir and the charges were held proved. The report of the Nazir was accepted by the Sadr, the Additional District Judge and the High Court. The appellant has had a very fair trial and it is plain that the appellant cannot be allowed to have the whole issue debated again because he has thought out fresh arguments.

This disposes of all questions of fact and we now proceed to consider arguments relating to law which were mainly concerned with the jurisdiction of the Majlis and/or the Sadr to pass the order of removal. It may be pointed out here that at the suit of the present appellant, section 58 of the Bihar Waqf Act, 1947 was previously challenged as ultra vires the Constitution. This Court by its judgment in Bashiruddin Ashraf v. State of Bihar ([1957] S.C.R. 1032.) held the section to be valid. The appellant was already removed from his office of Mutwalli when he raised that contention in a criminal matter arising under section 65(1) of the Bihar Waqfs Act for disobeying orders and directions made to him by the Majlis. At that time the appellant did not question the validity of any other section of the Act; nor did describe any other section as offending his fundamental rights. Though he raised the questions of his fundamental rights the provisions of the Waqfs Act are so manifestly in the public interest that the appellant did not challenge the Act as such. The only sections which he challenged before the Additional District Judge were sections 27 and 32 of the Act. In the High Court some other sections were also challenged, but at the hearing before us the attack was confined to section 27 and the powers of the Sadr to act for the Majlis under section 32 of the Act. These cannot be said to be unconstitutional in any way and the action has thus been placed before us as falling outside these sections or not supported by them.

Section 27 of the Bihar Waqfs Act enumerates the powers and duties of the Majlis. It is divided into three sub-sections. By the first sub-section the general superintendence of all Waqfs is vested in the Majlis and it is granted power to do all things reasonable and necessary to ensure that the waqfs are

properly supervised and administered and their income is duly appropriated and applied to the objects of such waqfs. Sub-section (2) then by way of illustration, and without prejudice to the generality of the provisions of the first sub-section, enumerates particular powers and duties of the Majlis. Clause (h) of this sub-section enables the Majlis "to remove a Mutwalli from his office if such Mutwalli refuses to act or wilfully disobeys the orders and direction of the Majlis under this Act." The italicised words were inserted by section 2 of the Bihar Waqfs (Amendment) Act, 1951 (Bihar Act 18 of 1951) from may 24, 1951 on which date the amending Act received the assent of the Governor of Bihar. Previously these words (omitting "orders and") were included as sub-cl. (iv) of cl. (a) of sub-section (1) of section 47 as part of the grounds on which the District Judge possessed the power to remove a Mutwalli on the application of the Majlis. In other words, the removal of the Mutwalli on the ground that he had wilfully disobeyed the orders and directions of the Majlis under the Act could be made, after amendment, by the Majlis itself without the intervention of the District Judge. After the amendment the District Judge ceased to possess this power.

The contention of the appellant was that as this amendment was not retrospective the power could only be exercised in respect of orders and directions of the Majlis given after the date on which amended Act came into force and not in respect of orders and directions issued previously. According to him, the amending Act is being given retrospective operation which is not permissible. We do not see any force in these contentions. The amendment, no doubt, conferred jurisdiction upon the Majlis to act prospectively from the date of the amendment but the power under the amendment could be exercised in respect of orders and directions issued by the Majlis and disobeyed by the Mutwalli before the amendment came into force. To hold otherwise would mean that in respect of the past conduct of the Mutwalli neither the Majlis nor the District Judge possessed jurisdiction after the amendment came into force. This could hardly have been intended. The enquiry had already commenced before the Majlis and it would have reported to the District Judge for removal of the appellant but this was unnecessary because the Majlis itself was competent to act. A statute is not necessarily used retrospectively when the power conferred by it is based on conduct anterior to its enactment, if it is clearly intended that the said power must reach back to that conduct. It would be another matter if there was a vested right which was taken away but there could be no vested right to continue as Mutwalli after mismanagement and misconduct of many sorts were established. The Act contemplates that such a Mutwalli should be removed from his office and that is what is important. This argument was rightly rejected by the High Court and the court below.

It was also contended that the clause, as it stood in section 47 prior to the amendment mentioned 'directions' but not 'orders' and the bread of 'orders' before the amendment could not lead to the exercise of the new power by the Majlis after the amendment. The argument is not only new but is also utterly wrong. Orders and directions express the binding wish of the Majlis and the two words only differ in degree. An order is more peremptory than a direction and an argument can never be right which suggests that while disobedience of a direction should merit the punishment of removal, disobedience of an order should go unpunished.

Lastly, it was contended that the powers of removal conferred on the Majlis could not be exercised by the Sadr when the matter was already before the Majlis. Sections 37 and 38 provide :

> "37, Exercise by Sadr of powers of Majlis. If any necessity arises for immediate action by the Majlis, and a meeting of the Majlis cannot be arranged in time to take such action, the Sadr may exercise any power that could be exercised under this Act by the Majlis, but shall at the next meeting of the Majlis make a report in writing of

the action taken by him under this section and the reasons for taking such action."

"38, Delegation of powers of Majlis. The Majlis may delegate any of its powers and duties under this Act to the Sadr, to be exercised and performed in such special circumstances as the Majlis may specify, and may likewise withdraw any such delegation."

There is nothing to show that the powers of the Majlis were not delegated. But even if section 38 did not apply it would appear from section 37 that the Sadr possessed all the powers of the Majlis in an emergency and the High Court and the Additional District Judge have concurrently held that it was necessary to remove forthwith the appellant and to take away from him the property of the Waqf, particularly when he disobeyed the order of the Majlis and did not deposit the amount which the auditor found was due to the Waqf. The order of the Sadr was reported to the Majlis and the Majlis also approved of it. This is hardly a ground which can be considered in this Court.

The appeal is devoid of merit. It fails and is dismissed with costs.

Appeal dismissed.

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