2019 INSC 1087

**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**
**CIVIL APPELLATE JURISDICTION**
**CIVIL APPEAL NO. 4025 OF 2010**

**Md. Abrar** **...Appellant**

**Versus**

**Meghalaya Board of Wakf & Anr.** **...Respondents**

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**J U D G M E N T**

**MOHAN M. SHANTANAGOUDAR, J.**

1. This appeal arises out of judgment dated 28.01.2009 of the Shillong Bench of the Gauhati High Court. The High Court by the impugned judgment dismissed the appellant's revision petition and confirmed the order of the Wakf Tribunal dated 19.3.2008 dismissing the appellant's application seeking appointment as joint mutawalli, along with Respondent No.2, of his predecessor's waqf property.

2. The facts giving rise to this appeal are as follows: One Haji Elahi Baksh ('waqif'), who was resident of Shillong, executed a registered

waqf deed dated 9.11.1936 dedicating properties belonging to himself, his son Md. Shafi and his son-in-law cum nephew Haji Kammu Mia to the waqf. The relevant clauses of the waqf deed are reproduced as follows:

> "1. The settlor's son Md Shafi and son in law Kammu Mia, son of late S.K. Gajnu, shall be joint Mutawallis during their lifetime.
>
> 2. On the death of either of the joint mutawallis, the survivor shall be the sole Mutawalli for the time being and shall have power to nominate his successor from the family line of the settlor.
>
> 3. Each successive Mutawallis thereafter shall have the right to nominate his successor from the same source.
> 5. Should a Mutawalli die without nominating a successor, the senior most member among the lineal descendants of the said Md Shafi and Kammu Mia, if otherwise competent shall be entitled to hold the office of Mutawalli."

Md. Shafi died on 20.12.1960, whereupon the surviving mutawalli among the joint mutawallis, namely Haji Kammu Mia became the sole mutawalli. However Kammu Mia did not appoint the successor to the deceased Md. Shafi. Hence Respondent No. 2 in the present appeal, Md. Sulaiman, who is the son of the late Md. Shafi, approached the Assam Wakf Board, which had territorial jurisdiction at that time, seeking appointment as joint mutawalli with Kammu Mia.

The Assam Wakf Board, by order dated 4.3.1973, found that under Clause 2 of the waqf deed dated 9.11.1936 (supra), the surviving mutawalli from amongst the joint mutawallis was required to nominate the successor of the deceased mutawalli from the waqif's family line. Since the surviving mutawalli Kammu Mia had failed to do so, the Wakf Board, taking note of the fact that Respondent No. 2 was the son of the deceased mutawalli, appointed him as joint mutawalli along with Kammu Mia. It is relevant to note that this order was not challenged by any of the parties herein.

Thereafter, Respondent No. 2 Md. Sulaiman acted as the joint mutawalli along with Kammu Mia, till Kammu Mia's death on 2.2.1980, upon which Md. Sulaiman became the sole mutawalli. However, this time it was Md. Sulaiman who failed to nominate a successor to the deceased Kammu Mia. This was even though Kammu Mia during his lifetime; by deed dated 19.2.1973 had nominated his daughter's son Md. Taiyab as his successor, which fact was also communicated to the Assam Wakf Board.

In the meantime a separate Wakf Board, i.e. Respondent No.1 was constituted for the State of Meghalaya. Respondent No. 1 by order

dated 7.2.1980 recognized Md. Sulaiman as the sole mutawalli. Aggrieved by the same, Md. Taiyab approached Respondent No. 1 seeking appointment as the sole mutawalli; however his application was dismissed on the ground that he does not belong to the waqif's family line. His appeal against the order dated 7.2.1980 was dismissed by orders of the Assistant Deputy Commissioner and Additional Deputy Commissioner of Wakfs respectively. Further, the High Court dismissed Md. Taiyab's suit against Respondent No. 1 due to lack of notice to the Wakf Board as required under Section 56 of the Wakfs Act, 1954.

3. Md. Taiyab again served notice on Respondent No. 1 in 2002, after coming into force of the Waqfs Act, 1995 ('1995 Act'). The Wakf Tribunal by order dated 19.7.2006 relied upon Section 25 of the Indian Succession Act, 1925 to interpret the term 'family line of the settlor' as stated in the waqf deed. Section 25 of the Indian Succession Act provides as follows:

> "**25. Lineal consanguinity.**—(1) Lineal consanguinity is that which subsists between two persons, one of whom is descended in a direct line from the other, as between a man and his father, grandfather and great-grandfather, and so upwards in the direct ascending line, or between a man and his son, grandson, great-grandson and so downwards in direct descending line…"

Hence the Wakf Tribunal concluded that since Md. Taiyab was Kammu Mia's descendant through the female line, he could not be regarded as a direct lineal descendant, and hence was not eligible for appointment as mutawalli.

Additionally, one Md. Zakaria, who was also Kammu Mia's daughter's son, was impleaded before the Tribunal in the same matter seeking appointment as joint mutawalli. The Tribunal rejected Md. Zakaria's claim as well, holding that it was the intent of the wakif that Md. Shafi and Kammu Mia would enjoy joint mutawalli-ship only during their lifetime. Such joint mutawalli-ship was to cease on the death of either of the joint mutawallis, and thereafter the surviving mutawalli and his successors would continue as the sole mutawalli.

Md. Zakaria filed a revision petition against the Tribunal's order dated 19.7.2006 under Section 83(9) of the 1995 Act whereas Md. Taiyab filed a writ petition challenging the same order. The High Court by common order dated 25.7.2007 in W.P. No. 184/2006 and C.R.(P) No. 26/2006 dismissed both petitions, affirming the Tribunal's findings. With respect to the issue of joint mutawalli-ship, the High Court found that the trust property included property of the deceased Kammu Mia. Hence the waqif would have definitely intended that one person from Kammu Mia's family should be included in the

management of the trust. Therefore Kammu Mia's descendants would be entitled to be appointed as a joint mutawalli along with the descendants of Md. Shafi.

However, the Court simultaneously observed that while Part IV of the Indian Succession Act excludes applicability to Muslim persons, in the absence of any definition of lineal descendants in the 1995 Act or any authoritative pronouncement of Mohammedan law in this regard, the definition under Section 25 of the Indian Succession Act could be taken into consideration for interpreting the meaning of the term 'family line'. Since Kammu Mia was not survived by any son, his descendants through the female line could not be considered for the office of joint mutawalli-ship. Further, that allowing the same as a matter of law would lead to additional expansion in the list of claimants which would not be in the interest of administration of the trust property. This Court by order dated 7.9.2007 in SLP (C) No. 15494 of 2007 and by order dated 13.12.2007 in SLP (C) Nos. 24316-24318 of 2007 declined to grant leave to appeal to Md. Zakaria and Respondent No. 1 Wakf Board respectively, though it observed that 'Question of law, if any, is left open.'

4. In view of this Court's observation, the appellant herein, Md. Abrar, who is the brother of Md. Zakaria and also a descendant of

Kammu Mia through the female line, approached the Wakf Tribunal seeking appointment as a joint mutawalli. The Tribunal by order dated 19.3.2008 dismissed the appellant's application on the ground that the High Court order dated 25.7.2007 had attained finality and hence the question of mutawalli-ship has been decided. The appellant filed a revision petition before the High Court challenging the Tribunal order dated 19.3.2008.

The High Court, in substantial reliance upon the decision of the Calcutta High Court in ***Md. Eshaque* v. *Md. Amin***, AIR 1948 Cal 312, held that while the founder's female children may be considered as his successors for mutawalli-ship, the descendants of the founder's daughters would not be considered as lineal descendants under Mohammedan law, "*unless there is a special term in the wakf deed indicating an intention to the contrary*" (emphasis supplied). Hence the appellant was excluded from consideration for mutawalli-ship.

5. The High Court further found that there was no provision in the waqf deed dated 9.11.1936 for the appointment of another joint mutawalli by the surviving mutawalli after the death of one of the original joint mutawallis. The concept of joint mutawalli-ship would cease to have any effect after the death of any of the original joint mutawallis. The surviving mutawalli is only empowered to nominate

his successor. Further, that once a daughter gets married, she becomes a member of other families and her children cannot be the direct lineal descendants of her father. Hence, it is only after the direct lineal descendants of the waqif are exhausted that Kammu Mia's descendants can be considered for appointment as mutawallis. The High Court also found that there was no custom or usage to the contrary supporting the appointment of joint mutawallis after the death of Md. Shafi and Kammu Mia. Hence this appeal.

6. Heard both sides. It is relevant to note that Respondent No. 2 Md. Sulaiman, the present mutawalli of the waqf, has not appeared before this Court contesting the appellant's case. Respondent No. 1, Meghalaya Wakf Board, is agreeable to appoint the appellant as a joint mutawalli along with Respondent No. 2. However, Respondent No. 1 has only sought a clarification in so far as the common order of the High Court dated 25.7.2007, in W.P. No. 184/2006 and C.R.(P) No. 26/2006, had found that the waqif had intended that Kammu Mia's descendants should continue as one of the joint mutawallis. Whereas the High Court in the impugned judgment made a contradictory finding to the effect that the waqf deed dated 9.11.1936 provided for the cessation of joint mutawalli-ship upon the death of either of the original joint mutawallis.

7. Since this Court in SLP (C) No. 15494 of 2007 and SLP (C) Nos. 24316-24318 of 2007 has declined leave to appeal against the High Court order dated 25.7.2007, we will not be interfering with the findings therein, but will limit our conclusions to the questions of law and fact raised in the present appeal. The two issues which arise for our consideration in the present appeal are:

*First*, whether a person from the waqif's family line could succeed to the vacant post of joint mutawalli after the death of any of the two original joint mutawallis?

*Second*, if the first issue is answered in the affirmative, whether joint mutawalli-ship can be held by the appellant herein, though he is Kammu Mia's daughter's son?

8. With respect to the first issue, we may refer to the following observations of learned author Mulla in *Principles of Mahomedan Law* (21st edn., 2017, Prof. Iqbal Ali Khan ed.) (for short "**Mulla**") on page 253, which were relied upon by the High Court in the impugned judgment:

> "S **205A. Succession where two are more mutawallis are jointly appointed**. Where two or more mutawallis are appointed as joint mutawallis i.e., as joint holders of a single office, and there is no direction, express or implied, given by the waqif and where there is no evidence of custom supporting a usage to the contrary, the office of mutawalli-ship held jointly will pass on the death of one holder to the survivor or survivors…

> …A, B and C are appointed joint mutawallis of a waqf. There is no direction in the waqfnama with regard to what is to happen if one of them were to die and there is no evidence of custom. A dies, but before he dies he appoints X as a mutawalli to succeed him. X cannot act as mutawalli because on the death of A, the mutawalli-ship passes to B and C, and A has no power to appoint X as a mutawalli." (emphasis supplied)

The aforementioned illustration cited by **Mulla** is taken from the decision of the Privy Council in ***Haji Abdul Razaq* v. *Sheikh Ali Baksh***, (1947-48) 75 IA 172. ***Abdul Razaq*** was referred to by the Calcutta High Court in its decision in ***Commissioner of Wakfs* v. *Asraful Alam Shani and another***, AIR 1975 Cal 162, which was in turn relied upon by the High Court in the impugned judgment.

***Asraful Alam Shani*** (supra) was a case similar to the present case wherein two persons were appointed as joint mutawallis, and after the death of one, the surviving mutawalli claimed to be the sole mutawalli. The High Court upon consideration of the terms of the waqf deed in ***Asraful Alam Shani*** found that the intention of the waqifs was that upon the death of any one of them, the survivor shall be the sole mutawalli. Any person nominated by either of the mutawallis as their successor during their lifetime could only assume the office when both joint mutawallis died.

9. From the above discussion it can be said that ordinarily, upon

the death of one of the joint mutawallis, the surviving mutawalli becomes the sole mutawalli of the waqf property. In a case where there are more than two joint mutawallis, after the death of one of the mutawallis, only the remaining mutawallis would be entitled to continue as joint mutawallis. Any successor nominated by the deceased mutawalli can only assume office after the death of the original mutawallis, *unless there is an express or implied direction in the waqfnama to the contrary*.

Hence in the present case, it has to be seen what scheme of succession was laid down in the waqf deed dated 9.11.1936 (relevant portion quoted supra). Upon perusal of the terms of the waqf deed, we are of the considered opinion that the waqif intended that after the death of any of the original joint mutawallis, the survivor was required to nominate a person from the waqif's family line to succeed the deceased.

It is crucial to note that Clause 2 of the waqf deed dated 9.11.1936 provides that upon the death of either of the joint mutawallis, the survivor shall be the sole mutawalli '<u>for the time being</u>.' (emphasis supplied) This differentiates the waqf deed from the present waqf deed in ***Asraful Alam Shani*** (supra) where it was simpliciter stated that upon the death of either of the joint mutawallis,

the survivor shall become the sole mutawalli. The phrasing of the waqf deed dated 9.11.1936 indicates that the waqif intended that after the death of either of the mutawallis, the survivor shall continue as the sole mutawalli only for a temporary period. In the interim, the survivor is required to nominate a competent successor to the deceased mutawalli from the waqif's family line, and thereafter, the said successor shall have the right to nominate *his* successor (i.e. successor's successor) from the same source.

Further, having regard to the fact that the waqf was constituted of properties belonging to Md. Haji and Kammu Mia, it can be inferred that the waqif intended that the succeeding mutawalli should be nominated from the descendants of the deceased mutawalli. It is unreasonable that the waqif would have wanted the surviving mutawalli to continue as a sole mutawalli, and administer the properties of the deceased in exclusion of the family members of the deceased mutawalli, unless the family line of the deceased mutawalli was to be exhausted.

Our interpretation of the waqf deed in the above terms is supported by the order of the Assam Wakf Board dated 4.3.1973 allowing Respondent No. 2's claim to be appointed as joint mutawalli together with the deceased Kammu Mia. The Wakf Board strongly

condemned the deceased Kammu Mia for continuing as sole mutawalli and observed that this indicated a desire on his part to misappropriate the income of the waqf for his own family, to the exclusion of the other descendants of the waqif.

The aforesaid order of the Wakf Board has not been challenged by the respondents in the present appeal at any point of time. We find it difficult to understand how it can lie to Respondent No. 2 to seek appointment as joint mutawalli after his father's death as his father's heir and deny the same right to the descendants of his erstwhile co-mutawalli Kammu Mia.

10. Therefore, what remains to be decided is whether the appellant can be construed as part of the 'family line' of the waqif Haji Elahi Baksh as required under Clause 2 of the waqf deed. It is relevant to note that the issue for consideration before us is not whether the waqif's daughter or a female descendant can be the mutawalli, but whether the *offspring* of the daughter can be considered for mutawalli-ship. The High Court in the impugned judgment negatived this contention in reliance upon the decision of the Calcutta High Court in ***Md. Eshaque*** (supra). In ***Md. Eshaque***, the waqif provided for the devolution of mutawalli-ship in the waqf deed as follows (relevant portion):

"Clause (a). —…the said office stall devolve till the passing of

> ages (i.e. for ever) and repetition of months, as God the merciful wills upon the offspring of my son (ba farzandani—farzandam) from generation to generation (Naslan baad naslin) womb after womb (batnam baad batnin)…
>
> Clause (b).—But, whoever from among the male issue of my son and of the children (off spring) of my son, is learned and God fearing, and virtuous, and adorned with the ornament of truth and purity, and embellished with the qualities of fidelity and honesty and celebrated for, and qualified with laudable qualities and pleasing manners, shall be appointed to the office of the aforesaid 'tawliat'.
>
> Clause (d).—And, if from among the children of the Mutwalli, several persons are found to adorned and qualified with the aforesaid attributes, then the person who is senior-most in age among them be entitled to the 'tawliat', and, supposing they be equal in age, then one of them shall be entitled according to the advice of religions Musalmans and sober (i.e. pious) learned men, and so long as there exist male issue, the said office shall not be transferred to female issue."
>
> Clause (e).—"If by Divine decree the male issues become extinct, then it shall be transferred to the females, with the same aforesaid conditions as are applicable to the class of males and with the same…" (emphasis supplied)

In that case, the original mutawalli's son died without any issue. The question which arose for consideration was whether the son of the mutawalli's widowed daughter was competent to succeed as mutawalli. The High Court, upon extensive consideration of the opinions of Mohammedan jurists on this point, came to the conclusion that the Persian word 'farzand' used in the waqf deed (the Arabic synonym of which is 'aulad') is legally understood to include both sons

and daughters in the male line, but exclude any descendants, of whatever gender, in the female line.

Importantly, we find from a careful perusal of the decision, that the High Court in ***Md. Eshaque*** (supra) did not rule as a matter of law that mutawalli-ship can never devolve upon the descendants through the female line. In the same decision, the High Court noted that in an earlier decision of the Bombay High Court in ***Sheikh Karimodin* v. *Nawab Mir Sayad Alam Khan,*** 10 Bom. 119., it was held that the expression 'ahfad', if used in the waqf deed, would be wide enough to cover descendants of the daughter as well. The clauses of the waqf deed in ***Md. Eshaque*** also expressly indicated that preference was to be given to the male issue over the female issue.

11. In an earlier decision of the Calcutta High Court in ***Wares Ali* v. *Sheikh Shamsuddin***, (1936) 63 Cal. L.J. 573, the High Court found that since the waqif herself had appointed the son of a daughter as mutawalli, the expression 'legal heirs' in the waqfnama must be taken to include lineal descendants in both the male and female line. In ***Syed Mahomed Ghouse* v. *Sayabarin Sahib*** (deceased), AIR 1935 Mad 638, similar terms 'batnam bad batnam' and 'naslan bad naslan' were used in the waqf deed with regard to succession to mutawalli-ship. The Madras High Court held, referring to the decision in ***Sheikh***

***Karimodin*** (supra) as follows:

> "The primary meaning of the words '*Batnam bad batnam*' seems to be generation after generation: *see* Wilson's Glossary and Durga Prasad's Arabic dictionary. It is contended by Mr. Rangachari, also by the Advocate for the sixth defendant, that these words exclude the cognate descendants. It seems to be so in the case of private grants. In the case of documents relating to private property, the words have now become words of limitation and as such they indicate absolute estate and in the case of absolute estate agnate heirs being residuaries exclude cognates under the Mahomedan law. But where these words occur in documents laying down the line of devolution for a religious office, such as the managership of a wakf, the above said consequence does not necessarily follow. There the words generation after generation must be taken literally and we do not see any reason why at least in the case of descendants of a person claiming through females they should be excluded.
>
> It has been contended relying on *Abdul Ganne Kasam* v. *Hussen Miya Rahimtula* and *Shah Ahmud Hossain* v. *Shah Mohiooddeen Ahmad* that descendants through females should not be regarded as members of the family and must be regarded as strangers. The word 'family' itself is ambiguous. In this decision it is used in the sense of agnate heirs. In a larger sense a man's descendants through females are equally members of his family and certainly under Muhammadan Law are heirs though they are remote heirs and they can come in by the use of the appropriate words, for example, by the use of the word "Ahfad," as in *Shekh Karimodin* v. *Nawab Mir Sayad Alam Khan*.
>
> The passages relied on in the various text books no more than summarise the effect of these decisions and do not help us further. The word "Naslan" certainly includes all descendants: *vide* Tyabji's Muhammadan Law, S. 508 and "*Naslan bad Naslan*" indicates all descendants; That is how it was translated in *Ali Muqtada Khan* v. *Abdul Hamid Khan*. On the whole therefore we come to the conclusion that the words '*batnam bad batnam*' in Ex. D and the words '*naslan bad naslan*' in Ex. M are not intended to exclude the descendants through females. Baillie's Mahomedan Law,

> page 579 does not indicate a contrary view. We have therefore to consider the relative merits of all the claimants including the descendants through females." (emphasis supplied)

Accordingly, the High Court in ***Syed Mahomed Ghouse*** (supra) confirmed the subordinate court's finding that the son of a female descendant would be qualified to manage the waqf property.

12. From the above discussion, we may conclude that it cannot be said as a rule of law that cognatic heirs of the waqif have no right to succeed to mutawalli-ship. As **Mulla** notes on page 90 and as observed in Fyzee's *Outlines of Muhammedan Law* (5th edn., 2008, Prof. Tahir Mahmood ed., page 339), daughter's children and their descendants are also included as descendants of the deceased under Muslim law, though they are considered a more distant class of heirs than agnatic heirs. Rather, as we have found in our earlier discussion on the issue of succession to joint mutawalli-ship mentioned *supra*, it is the interpretation of the waqf deed which is germane in each case.

We may also refer, in this regard, to the recent decision of a two-Judge Bench of this Court, comprising of myself and Rastogi J., where we have held that in order to establish a claim of hereditary succession to mutawalli-ship, the intention of the waqif, as manifested either through the directions given in the waqf deed or the creation of a custom, is of paramount importance (See ***Aliyathammuda***

***Beethathebiyyappura Pookoya & Ors.* v. *Pattakal Cheriyakoya & Ors.***, C.A. No. 9586/2010, judgment dated August 1, 2019). We are of the considered opinion that this principle also applies in determining which *class* of heirs is included or excluded from mutawalli-ship.

Therefore it has to be seen whether in the present case, having regard to the terms of the waqf deed, the waqif intended to exclude his descendants through the female line from mutawalli-ship of the waqf. In the present case, Kammu Mia was the husband of the daughter of the waqif Haji Elahi Baksh. Therefore Kammu Mia's descendants would naturally be Haji Elahi Baksh's descendants through the female line, and the waqif must have been aware of this while drafting the waqf deed. If the waqif had intended to exclude his descendants through the female line from succession to mutawalli-ship, he would have expressly stated that after the death of either the original joint mutawallis, only Md. Shafi's descendants would be eligible to succeed to mutawalli-ship. However, the waqf deed dated 9.11.1936 clearly provides that either of the surviving mutawallis may nominate a successor as he thinks fit and that if mutawalli does not nominate a successor, the senior most member amongst the lineal descendants of *either* Md. Shafi or Kammu Mia would be competent to hold mutawalli-ship, without any preference given to Md. Shafi's

descendants.

Hence it is clear that the waqif not only included the direct descendants of his son but also his descendants through the female line, which includes Kammu Mia's daughter's descendants, as part of his 'family line.' The High Court's finding that the waqif intended that the mutawalli-ship should devolve upon Kammu Mia's descendants only after the waqif's direct lineal descendants are exhausted is patently incorrect in as much as the waqf deed does not contain any such stipulation.

13. However, having regard to the fact that there may be several such descendants in the female line who are vying for mutawalli-ship, we do not wish to make a specific finding in regard to whether the appellant is entitled to the said office. Section 63 of the 1995 Act is useful to refer to at this juncture:

> "**63. Power to appoint mutawallis in certain cases.—** When there is a vacancy in the office of the mutawalli of a waqf and there is no one to be appointed under the terms of the deed of the waqf, or where the right of any person to act as mutawalli is disputed the Board may appoint any person to act as mutawalli for such period and on such conditions as it may think fit."

In the present case, since Respondent No. 2 has shown a disinclination to nominate a successor to the deceased Kammu Mia, as provided for under the terms of the waqf deed, we direct

Respondent No. 1 to appoint a competent person from amongst the said Kammu Mia's descendants, as it thinks fit, to succeed to joint mutawalli-ship. This is provided that the said successor shall thereafter have the right to nominate his successor, per Clause 3 of the waqf deed. We also direct that the said successor shall, in the event of the death of Respondent No. 2, nominate a successor from Respondent No. 2's family line, which includes descendants through the female line, so as to avoid any further dispute in this regard.

14. The appeal is allowed in the above terms, and the impugned judgment is set aside.

**.....J.**
**(N.V. Ramana)**

**.....J.**
**(Mohan M. Shantanagoudar)**

**New Delhi;** **.....J.**
**September 26, 2019.** **(Ajay Rastogi)**