

arise on the pleadings. Evidently, any decision given by the High Court in the course of the order would not in that trial *de novo* be binding and the cases will have to be tried afresh by the Civil Judge. The High Court was of the view that the interpretation of para. 3 of the first schedule of the Indian Arbitration Act raised a substantial question of law. But by the direction of the High Court, this question was also left open to be tried before the Civil Judge. We fail to appreciate how an observation on a question which is directed to be retried can still be regarded as raising a question of law of great public or private importance justifying grant of a certificate under Art. 133 (1) (c) of the Constitution.

We accordingly vacate the certificate granted by the High Court and dismiss these appeals with costs. One hearing fee.

*Appeals dismissed.*

HAZRAT SYED SHAH MASTERSHID ALI  
AL QUADARI

*v.*

THE COMMISSIONER OF WAKFS,  
WEST BENGAL.

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

*Mutawalli—Temporary appointment—When can be made by the Commissioner—Delegation of powers—Duty interwoven with power—Distinction—Bengal Wakf Act, 1934 (Ben. XIII of 1934), ss. 29, 40.*

During controversy between two brothers each of whom claimed to be appointed Mutawalli, the Commissioner of Wakfs appointed a third brother as a temporary Mutawalli under s. 40 of the Bengal Wakf Act, which appointment was challenged on the ground that the order of the Commissioner appointing a temporary Mutawalli was illegal because under the rules framed by the Government of West Bengal the Board constituted under Bengal Wakf Act could alone make the appointment and the Commissioner could only make a report and recommendation to the Board.

*Held*, that under the provisions of s. 40 read with s. 29 of the Bengal Wakf Act, a temporary Mutawalli can be appointed by the Commissioner to whom the powers and duties have been

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delegated by the Board. The Rules cannot affect the powers of the Board to delegate its functions under s. 29 of the Act to the Commissioner, and once the delegation is made the rules cease to apply.

*Held*, further, that where power and duty are interconnected and it is not possible to separate one from the other in such wise that power can be delegated while duty is retained and *vice versa*, the delegation of powers takes with it the duties.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 237 of 1956.

Appeal by special leave from the judgment and order dated December 13, 1954, of the Calcutta High Court in Appeal from Original Order No. 117 of 1954.

*B. Sen, P. K. Chatterjee and S. N. Mukherjee*, for the appellant.

*B. C. Mitter and D. Mukherjee*, for respondent No. 1.

1961. February 6. The Judgment of the Court was delivered by

*Hidayatullah J.*

HIDAYATULLAH, J.—This appeal is as much without substance, as it was unnecessary. Hazrat Syed Mastershid Ali Al Quadari (the appellant) is the eldest son of one Hazrat Sahib Syed Shah Mastershid Ali Al Quadari (shortly, Hazrat Sahib), the first Mutawalli of a wakf created on August 9, 1931, for the maintenance of the shrine of a Muslim *Pir* in the town of Midnapur. After the death of Hazrat Sahib, the appellant, claiming to succeed to his father as *Sajjadanashin*, being his eldest son, made an application to the Commissioner under the Bengal Wakf Act. His younger brother, Syed Shah Rushaid Ali Al Quadari, opposed his claim, the ground being that he was nominated as the successor by Hazrat Sahib. While this controversy was afoot, the Commissioner, acting under s. 40 of the Bengal Wakf Act, appointed Syed Shah Rasheed Ali Al Quadari (the third son of Hazrat Sahib) as a temporary Mutawalli. The appellant then moved a petition in the Calcutta High Court under Art. 226 of the Constitution against the appointment, which was allowed by Sinha, J. and the order of the Commissioner was set aside. On appeal to the Divisional Bench, consisting of Chakravarti, C. J. and Lahiri, J. (as he then

was), the order of Sinha, J. was reversed, and the petition was dismissed. This appeal has been filed with special leave.

It is contended in this appeal that the order of the Commissioner appointing a temporary Mutawalli was illegal, because under the Rules framed by the Government, only the Board constituted under the Bengal Wakf Act could make the appointment. This argument, in our opinion, is wholly unsound. The learned Chief Justice of the High Court examined the matter at great length in reaching his conclusion; but, in our opinion, the reasons can be stated within a narrow compass.

We are concerned with sections 40 and 29 of the Bengal Wakf Act. Section 40 reads as follows :

“In the case of any Wakf of which there is no Mutwalli or where there appears to the Board to be an impediment to the appointment of a Mutwalli the Board, subject to any order of a competent Court, may appoint for such period as it thinks fit a person to act as Mutwalli.”

Section 29 provides :

“The Board may, from time to time, authorize the Commissioner to exercise and perform, subject to the control of the Board, any of the powers and duties conferred or imposed on the Board by or under this Act.”

On April 24, 1936, the Board adopted the following resolution :

“(2). In exercise of the powers vested in them under Section 29 of the Act, this Board resolve that the Commissioner of Wakfs be authorised to exercise and perform, subject to the control and approval of this Board, the following powers and duties conferred or imposed on this Board by the sections of the Act mentioned against each case :—

\* \* \*

(c) The powers of this Board under section 40 to appoint a temporary mutwalli.”

These two provisions of the Act show only too plainly that a temporary Mutawalli can be appointed either by the Board, or, if the powers and duties be

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delegated to the Commissioner, by the Commissioner. The appellant contends that the Commissioner can only make a report to the Board, and the Board alone can make the appointment, and refers to two Rules framed by Government. These Rules are :

“1. If it appears to the Commissioner that there is no mutwalli, in the case of any wakf, or that a vacancy in the office of the mutwalli has been caused by death, resignation, retirement or removal of the former mutwalli, and a dispute has arisen between two or more rival claimants to the vacancy, and such dispute is likely to affect the interests of the Wakf, he may institute an enquiry and report the result thereof to the Board with his recommendation.

2. On receipt of the report and the recommendation from the Commissioner, or on its own motion, the Board may appoint a mutwalli under section 40 of the Act.”

It is argued that under the second Rule the Commissioner was bound to make his report and recommendation, but the Board alone was empowered to appoint a temporary Mutawalli under s. 40. The last words of the second Rule, it is said, are clear. This is, no doubt, true of those cases where the Board has not delegated its functions under s. 40 to the Commissioner. Once that delegation has been made, the Commissioner acts for and on behalf of the Board, and the Rules cease to apply. The Rules cannot affect the power of the Board to delegate its functions under s. 29, and harmonious construction requires that the Rules should give way, when there is a delegation of the powers of the Board. The Commissioner was thus competent to make the appointment. Mr. Sen, however, contends that the appointment of a temporary Mutawalli could only be made if there was an “impediment” to the appointment of a permanent Mutawalli, and that there was no impediment to such an appointment but “a challenge to the appellant as a candidate.” The word “impediment” means hindrance or obstruction, and there was certainly an obstruction to the appointment of a permanent

Mutawalli, while the dispute remained undecided. This point has no force whatever.

The question which seemed to have largely engaged attention in the High Court, namely, whether the delegation was only of powers or also of duties of the Board, was not argued before us, though it formed the subject of considerable discussion in the statements of the case. It is without substance. Where powers and duties are interconnected and it is not possible to separate one from the other in such wise that powers may be delegated while duties are retained and *vice versa*, the delegation of powers takes with it the duties. The proposition hardly needs authority; but if one were necessary, reference may be made to *Mungoni v. Attorney-General of Northern Rhodesia* (1).

In our opinion, the appeal has no force whatever. The appellant chose the extraordinary course of dragging the respondents twice to the High Court and again to this Court merely to challenge an order of temporary duration, while the main controversy remained outstanding for years and could have been decided by now.

The appeal fails, and is dismissed. The appellant shall pay the costs of the respondents, who have entered appearance.

*Appeal dismissed.*

MAHANTH RAM DAS

v.

GANGA DAS.

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

*Court fee—Appeal to stand dismissed if court fee not paid within time granted—Extension of time, if can be granted—Code of Civil Procedure, 1908 (V of 1908), ss. 148, 149, 151, O. 47, r. 1.*

The High Court passed a peremptory order that "the appeal will stand dismissed" if a certain amount of court fee was not paid within the time granted by the court. The appellant being unable to find money made an application for extension of time before the expiry of the time granted, and offering to make a partial payment asked for further time. The application was

(1) [1960] A.C. 336.

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