



## Star LAW report

## Transfer cannot bring an end to the waqf

High Court Division (Civil Revisional Jurisdiction)

The Supreme Court of Bangladesh

Civil Revision No. 1982 of 2001

Hafizuddin Ahmed

V

M. Aslam Miah and others

Before Mr. Justice Mohammad Abdur Rashid and Mr. Justice Syed Mahmud Hossain

Judgment: July 8, 2002

Result: Rule absolute

and improve the charities there under. To achieve this purpose, the legislation allowed transfer of a part of the waqf property earlier, in India with sanction of the court and in Bangladesh, of the administrator.

Once the alienation is found to be invalid, the occupant of the property on the basis of an invalid transfer becomes trespasser and a suit is always maintainable, if it is instituted within the period of 12 years of such alienation for possession. In Bangladesh, such suit for a declaration of title in respect of the waqf property will never fail for want of a relief for possession being hit by the proviso to section 42 of the Specific Relief Act, for the simple reason that once the occupant becomes a trespasser he will be liable to be evicted under section 64 of the Ordinance. No suit is therefore necessary for eviction of a trespasser.

On 08.06.85 and 09.06.85 by two impugned deeds defendant no. 2 transferred 15 decimals out of 22.5 decimals of the waqf land to defendant no. 1 and on 03.09.85, the suit was instituted. The plaintiff first as a son of the waqf and then, as the present mutawalli challenged the transfer on ground of collusion and fraud. The suit for a decree of declarations that the alienated land is still waqf property and that the transfer by impugned deeds was illegal and void is quite maintainable. The concurrent decision of the court of appeal below that the suit at the instance of the plaintiff is not maintainable therefore cannot be sustained in law.

Now, we take the moot question, whether or not the transfer by defendant no. 2 with sanction of the administrator to defendant no. 1 is valid and binding upon the waqf. The whole argument on behalf of the transferees is based on the premise that as the transfer was effected with the statutory sanction of the administrator so those are valid and binding on the waqf property. In order to appreciate the submissions, the provisions of the Waqf Ordinance, 1962 (Ordinance I of 1962), hereinafter referred to, as the Ordinance regarding sanction and transfer of waqf property must be considered.

We find, under section 33 of the Ordinance the Administrator may transfer a part of the waqf property by sale, mortgage or exchange or lease, with the previous sanction of the Government and when he considers such transfer necessary for the improvement and benefit of the waqf. But section 56 as couched in negative terms, providing that no such transfer by a mutawalli shall be valid, without the previous sanction of the Administrator. Further rider is provided by the proviso the even sanction of the Administrator 'shall not validate any transfer, which is in contravention of any other law for the time being in force or is otherwise invalid'.

In allowing transfer, the intention of the legislature was made manifest in section 33 and 56. The power of the administrator under section 33 to transfer a part of the waqf property is made limited and conditional. First, he must be satisfied that such transfer is necessary for improvement and benefit of the waqf. Then, he will have to obtain a sanction of the Government. But section 56 is not generally intended to empower a mutawalli to transfer any part of the waqf property by way of sale, mortgage or exchange, or by lease for more than five years. That is, he can lease out for a period of five years only. In case of an absolute transfer, no such transfer could be valid without prior sanction of the Administrator. Again, the proviso warns that even sanction cannot validate a transfer, which is in contravention of a law or otherwise invalid. So, the sanction is not sacrosanct. Even a transfer with sanction may not be valid for either contravention of the law or when the sanction itself was not valid. Moreover, we could not find any reason for not to read the conditions or limitations as provided in section 33 that before granting sanction the Administrator must be satisfied that such transfer was necessary for the improvement and benefit of the waqf in section 33 for a transfer by a mutawalli in section 56 and/or granting sanction by the Administrator in section 57. Underlining implied limitation must not also be forgotten that the law was never intended to validate a transfer even with sanction, which ultimately results in injury, waste or loss of the waqf.

The preamble of the Ordinance has made it clearer. The preamble of The Waqfs Ordinance declares:

"Whereas it is expedient to consolidate and amend the law relating to the administration and management of waqf properties in Bangladesh ... the Government is pleased ... to make and promulgate the Ordinance."

The preamble affords a key to interpret and/or understand the various provisions of the Ordinance. It did not leave any manner of doubt in expressing the object of the legislation. The office of the administrator is created and powers are given to him to better manage and administer the waqfs and to

regulate the actions and omissions of the mutawalli in the management of the waqfs for protection and benefit of the waqfs but in no way any of them is authorised to do anything to waste or squander the properties of the waqfs.

Section 57 empowers the administrator to grant sanction. But before granting of the sanction, he is required to make an enquiry into the matter. Law requires him to enquire himself. From the order of the Administrator granting sanction, it is clear, he did not make any enquiry on the prayer made on behalf of the mutawalli for sale of 15 decimals of land out of 22.5 decimals. Nor did he record anything to suggest that such sale was necessary for the improvement or benefit of the waqf.

The sanction granted by not following the statutory requirements cannot be said to be a valid one within the meaning of section 57, and such sanction cannot be immune from challenge even under section 102 or section 103 of the Ordinance. The Court is always entitled to see the sanction was granted, in accordance with the law and that the sale effected by such sanction is valid and binding upon the waqf.

After the creation of the waqf, as stated above, the title in the property vests absolutely in Allah. So, no interference or dealing, in any way, with the title of such property, particularly where no express power to transfer is given in the waqf-deed is permitted under the law.

The waqf dedicated the land measuring about 22.5 decimals in the name of Allah for making a mosque on the land divesting himself and everyone of his heirs of all the interest in the land. The dedication was absolute. He did not empower anybody to transfer or charge the land in any way.

In interpreting the terms of any waqf, it is now well settled, care must always be taken to put such interpretation as it would benefit the trust not to waste or frustrate, in any way, the intention or wish of the waqf. The power to transfer as is given either under section 33 to the Administrator or 56 of the Ordinance to the Mutawalli must be understood to have been given for the benefit of the waqf in carrying out the intention or wish of the Waqf.

The above ordinance must be understood in very restricted and limited way. So much of the encumbrance or charge of such waqf property would be valid as would carry out the intention and wish of the waqf and/or would be for the benefit and improvement of the waqf. One thing must be remembered the transfer cannot bring an end to the waqf.

In 1954, the waqf was created and only in 1983, the waqf was got enlisted. That was also done with the intention to sell but not to build any mosque. Their intention became clearer when they did not deposit any money with the administrator. Similarly, the administrator abetted the Mutawalli in granting the sanction without himself ascertaining the price of the land and then, by not taking any action either to recover the sale proceeds or against the transfer.

We find the Courts below missed the actual scope of enquiry in the suit and fell in serious error in dismissing the suit without, considering the moot issues raised in the suit. There is no escape from the conclusion that the sanction granted by the Administrator is neither valid nor of any legal effect. The transfer of 15 decimals of land out of the waqf land made in breach of the waqf cannot be held to be valid and binding upon the waqf. The transferred land therefore still belongs to the waqf. The concurrent decree of the Court of appeal below cannot therefore be sustained in law. It has no doubt resulted in serious miscarriage of justice.

## Decision

The Rule is made absolute. The defendants will give costs throughout. The impugned judgment and decree affirming those of the trial Court are hereby set aside. The suit is decreed as prayed for. It is declared that impugned sale deeds being no. 4212 and 4225 dated 08.06.85 and 09.06.85 as described in schedule Kha to the plaint are illegal and void, and not binding upon the waqf. It is further declared that the land transferred by said deeds is still covered by the waqf created by Mohammed Ali by the registered deed of waqf being no. 4953 dated 15.07.54. The Administrator is directed to take action under section 64 of the Ordinance to remove the unauthorised occupants from said 15 decimals of land, immediately.

Syed Mahmud Hossain, J. I agree.

Mr. Zulfikar Ahmed with Mr. Md. Salim, Advocates for the petitioner. Mr. Ozair Faruque with Mr. Shahidul Islam, Advocates for Opposite Party (1) (K).

## LAWweek



## Judge under attack

A judge was stabbed by a group of armed attackers as the verdict went against them. Mr. Ishaq Ali, a Judge of Mithapukur thana of Rangpur district was stabbed while he was delivering judgement. The attackers damaged the court properties and finally stabbed him. This is, probably, for the first time a judge is attacked and injured in the court premises. Earlier, a judge of the Chittagong Labour Court came under attack while hearing the case and confined himself in toilet to escape assault. -Daily Jugantor, 23 July.

## Law regulating cable networks soon

The Government plans to enact a new law titled "Cable Television Networks (Regulation and Management) Act, 2002" in order to regulate the cable television networks of the country. A preliminary draft of the proposed legislation has already been prepared by the Ministry of Information and will be finalised within a week or two after an inter ministerial consultation on the draft law. The law will bring the satellite channel distributors and operators under government registration and they will be levied a new license fee. A very small number of cable operators have paid the license fee. Presently, there is no law to bring them under regulatory regime. -The Daily Star, 21 July.

## Case against infant

A High Court Division Bench comprising of Justice M A Aziz and Justice Mamtaz Uddin Ahmed issued a suo moto rule asking the Deputy Commissioner and Superintendent of Police of Manikganj district and Officer in Charge of Santipur thana of the said district to show cause as to why the proceeding against the child should not be quashed. The court also directed the concerned investigating officer to be present in the court at 10.30 AM on 18 July with the FIR, Charge sheet and other relevant documents of the case. Khoka, one and a half year old boy was prosecuted by Santipur police, in this district. A news item on the matter and a photograph of the child was published in almost every daily, which the court took cognizance. -The Daily Independent, 22 July.

## Protection of newsmen's rights

A proposal to amend sections 501 and 502 of the Code of Criminal Procedure came from the members of the newly constituted body of Bangladesh Press Council (BPC) in order to protect journalists from arrest and harassment by implicating them in false cases. Journalists' unions have long been demanding that warrant process under these provisions should be transformed into summon process so that police could not arrest an editor or reporter whenever anyone sues a newspaper. They proposed that the court should take permission from BPC before taking cognizance of any defamation case against a journalist. -The New Nation, 15 July.

## Cabinet approves OPRC

The Cabinet approved the International Convention on Oil Pollution Preparedness Response and Cooperation 1990 (OPRC 90) on 22 July 2002 paving the way for claiming compensation in case of any oil-tanker accident in the territorial water. London based International Maritime Organization (IMO) arranged the OPRC in 1990 aiming at minimizing tanker accidents and helping the affected maritime countries to realise compensation. A total of 90 countries including Bangladesh, India and Pakistan had taken part in the convention. IMO held the convention in the wake of frequent oil-tanker accidents on various seas exposing the coastal countries to serious environmental pollution and endangering marine creatures. The OPRC also aims at checking deliberate violation of the basic precepts of the maritime safety by vessels and taking evasive strategies to tackle maritime pollution that endangers life. -The Daily Star, 23 July.

## Writ petition faces unnecessary delay

The writ petition against the repression and torture of the religious minority is not yet disposed of though eight months have passed. Ain o Salish Kendro (ASK), a human rights organization has filed a writ petition on 23 November 2001 upon which a High Court Division Bench comprised of Justice Md. Abdul Matin and Justice Marzi-ul Haque issued a rule nisi asking the Government as to why they should not be guilty for failure to protect some fundamental rights guaranteed by the constitution. The Bench also directed the Inspector General of Police (IGP) and the Ministry of Home Affairs to submit the report as to what initiatives were taken by them against this repression. Eight months have passed after the direction of the court and neither the written statement nor the report has been submitted. Six times the Court extended time upon Government's requests on the ground that the report is yet not prepared. This unnecessary delay on the part of the government raises the question whether it really wants to dispose of the writ petition or not. -Daily Bhorer Kagoj, 20 July.

## New audit law in progress

As the donors, including the world bank, have been persistently pressing the government to introduce greater financial accountability for insuring good governance, the Government is contemplating enacting a new law, the Audit Act-2002, to prevent misuse, wastage and misappropriation of public funds. The office of the Comptroller and Auditor General (CAG) is now working on a draft of the proposed bill in this connection which is likely to be placed in the Parliament soon. The concerning officials have been reviewing similar laws on audit and accounts of about 15 countries and trying to replicate some of the suitable provisions from there. Under the new law it will be mandatory for all ministries, divisions and directorates to comply with the recommendations of the Public Accounts Committee (PAC), one of the important standing committees of parliament. The office of the CAG under proposed law is likely to be placed under the Speaker of the Parliament or the President instead of the Finance Division. The CAG's office is likely to be recommended for assuming full administrative and financial powers. According to the proposed Act, the term of the Comptroller and Auditor General shall be at least five years. At present, the CAG retires at the age of 60. The new law would have provisions for special allowance and rewards for the audit officials, like those of the Customs department, for detecting serious financial irregularities relating to misappropriation, theft and embezzlement. -The News Today, 11 July.

## Artha Rin Adalat at a snail's pace

Since the establishment of the Artha Rin Adalat in 1990 for disposing default loan cases with due promptness and urgency it had settled only 96 out of 360 default cases. The court had received 227 cases filed with them in the first decade of its existence involving nearly Tk 1600 crore and could settle only 37 cases covering only 60 crore taka, raising frustration in the context of existing default culture. The more painful side is that the bank recovered only Tk 50 lakh out of 60 crore after getting court verdicts. However, the court agreed that it depends on documents relating to the default loan and the action taken by the offender and the defendant to settle the case. In dispute over large amount of default cases, both the parties are found reluctant which made it difficult for the court to dispose of promptly, the authority said. They further said that it was due to improper behaviour, malpractice and misuse of a section of people that makes difficult to quick disposal of the cases. A section of law officers of nationalised banks and big loan defaulters in connivance with some officials are reportedly playing a dubious role to make the legal system ineffective. According to sources the lower payments for handling loan default cases of bank induces some law officials to do malpractice. They even give less time to the bank cases as they devote in a normal case. The latter type of cases brings more money for them. Besides, weakness in the laws also makes scope of delay in settlement of cases. -The New Nation, 13 July.

## 42 thousand accuseds acquitted

42000 accuseds have been acquitted from their charges during the first 9 months of the coalition government on the ground that the charges which brought against them during the Awami League tenure were politically motivated. All Deputy Commissioners were directed in November last year to review all the cases which were, according to the Government, filed politically from 1 July 1996 to 30 March 2001, except the charges relating to murder, rape, extortion etc. The Deputy Commissioners were directed to send the reports by 20 December 2001 to the Ministry of Home Affairs. Besides, a commission was constituted headed by a retired Justice of the High Court Division on 29 December 2001 to review the cases relating to murder, rape, extortion, abduction etc. which the Government thinks politically motivated. The commission is scheduled to submit their report to the Ministry of Home Affairs on 24 July 2002. -Daily Bhorer kagoj, 23 July.

## READERqueries



## Your Advocate



This week your advocate is Mr. Probir Neogi of the Supreme Court of Bangladesh. His professional interests include civil law, constitutional law and banking law. Send your legal and human rights queries to the Law Desk, The Daily Star. A panel of lawyers will address your problems.

Q: I work in a private bank in Dhaka. I am 26 years old. After an unhappy conjugal life of 2 years, I divorced my husband 3 months ago. I do not have any child. My ex-husband works in a private firm and his financial condition is not very well. My family is quite solvent and I myself get handsome remuneration from my job. Though I have no financial hardship, I do not want to waive any right that I am entitled to get from my ex-husband. I want to file a case against him for maintenance. How should I proceed? Please advise.

Shailla Rahman,  
Mirpur, Dhaka.

Your Advocate: Under the Muslim Law after divorce a wife is entitled to maintenance during the period of iddat. Iddat period means the period in which a Muslim woman can not remarry after dissolution of marriage. For a divorced woman this period lasts till three courses. Since you divorced your husband three months ago, the period of iddat, in your case, is over. Therefore, you are not entitled to maintenance from your husband any more. However, you can file a case against your husband claiming maintenance for the iddat period in the Family Court if he has not paid it yet.

## Corresponding Law Desk

Please send your mails, queries, and opinions to: post - Law Desk, The Daily Star, 19 Karwan Bazar, Dhaka-1215; telephone 8124944, 8124955, 8124966; fax 8125155, 8126154; email <dslawdesk@yahoo.co.uk>; interactive email <lawdesk20@hotmail.com>

## FOR YOUR information

## Choosing a lawyer, you should know...

## LAW DESK REPORT

## When do you need a lawyer?

There are many types of legal problems. You may consider hiring a lawyer if you are accused of committing a crime, if you are involved in or are contemplating a lawsuit, or if you have been involved in an auto accident or if you are falsely implicated in any case etc.

## How to choose a lawyer?

It is difficult to suggest criteria of choosing a lawyer. Unfortunately, there is no organisational arrangement in Bangladesh to help people find suitable lawyers within respective means. However, you might consult your friends, relatives, neighbours who have either direct or indirect contact with lawyers or have experience of identical problems in past. You can always go to your local Bar Association to meet lawyers of relevant background. There are some NGOs which render legal service free of cost. You can also contact them.

## What sort of questions should I ask when I find one?

Ask about the lawyer's experience and areas of practice. How long has the lawyer and the firm been practicing law? What kinds of legal problems does the lawyer handle most often? Are most clients individuals or business firms?

## Is it proper to ask the lawyer if anyone else will be working on my case?

Since you are the one paying the bill, it is well within your rights. Ask if nonlawyers, such as apprentices or law clerks will be used in researching or preparing the case. If so, will there be separate charges for their services? Who will be consulted if the lawyer is unsure about some aspects of your case? Will the lawyer recommend another lawyer or firm if this one is unable to handle your case?

## I met with a lawyer who referred me to another lawyer. Should I be angry?

Probably not. Occasionally, a lawyer will suggest that someone else in the same firm or an outside lawyer handle your specific problem. Perhaps the original lawyer is too busy to give your case the full attention it deserves. Maybe your problem requires another's expertise. No one likes to feel that a lawyer is shifting him or her to another lawyer. However, most reassignments within firms occur for a good reason. Do not hesitate to request a meeting with the new lawyer to make sure you are comfortable with him or her.

## What, in particular, should I ask about fees and costs?

How are fees charged—by the hour, by the case or by number of appearances before the court for your case? About how much money will be required to handle the case from start to finish? When must you pay the bill? Can you pay it in installments? You can request for a written statement showing specific services rendered and the charge for each.

## When I first meet with my prospective lawyer, should I ask about the possible outcome of the case?

Certainly, but beware of any lawyer who guarantees a big settlement or assures a victory in court. Remember that there are at least two sides to every legal issue and many factors can affect its resolution. Ask for the lawyer's opinion of your case's strengths and weaknesses. Will the lawyer most likely settle your case out of court or is it likely that the case will go to trial? What are the advantages and disadvantages of settlement or going to trial? What kind of experience does the lawyer have in trial work? If you lose at the trial, will the lawyer be willing to appeal the decision?

## Should I ask if and how I can help with my case?

Yes. It is often in your interest to participate actively in your case. When you hire a lawyer, you are paying for legal advice. Your lawyer should make no major decision about whether and how to go on with the case without your permission. Pay special attention to whether the lawyer seems willing and

able to explain the case to you and answers your questions clearly and completely. Also ask what information will be supplied to you. How, and how often, will the lawyer keep you informed about the progress of your case? Will the lawyer send you copies of any of the documents that have to do with your case? Can you help keep fees down by gathering documents or otherwise assisting the effort?

## How can I be sure that my lawyer will not overcharge me?

The fee charged by a lawyer should be reasonable from an objective point of view. The fee should be tied to specific services rendered, time invested and level of expertise provided.

There are some broad guidelines to help in evaluating whether a particular fee is reasonable.

- 1 The time and work required by the lawyer and any assistants, and the difficulty of the legal issues presented;
- 2 How much other lawyers in the area charge for similar work;
- 3 The total value of the claim or settlement and the results of the case;
- 4 Whether the lawyer has worked for that client before;
- 5 The lawyer's experience, reputation, and ability; and
- 6 The amount of other work the lawyer had to turn down to take on a particular case.

## Talk About Fees

Although money is often a touchy subject in our society, fees and other charges should be discussed with your lawyer early. You can avoid future problems by having a clear understanding of the fees to be charged and getting that understanding in writing before any legal work has started. If the fee is to be charged on an hourly basis, insist on a complete itemized list and an explanation of charges each time the lawyer bills you. Legal advice is not cheap. A bill from a lawyer for preparing a one-page legal document or providing basic advice may surprise some clients. Remember that when you



hire a lawyer, you are paying for his or her expertise and time.

## Should I "shop around" for the cheapest lawyer I can find?

With legal advice, as with other products and services, you often get what you pay for. Although you should not expect to get good legal advice without paying for it, you should not pay for anything that you don't actually receive. After you and your lawyer have discussed fees, make sure to follow through by examining each bill carefully. If you feel that any charge is too high or if you do not understand a billed item, ask your lawyer to explain it before you pay.

TO BE CONTINUED