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*The Member for the
Board of
Agricultural
Income Tax, Assam*

v.

*Smt. Sindhurani
Chaudhurani*

Kapur J.

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but it appears that she could not be served and given notice of the hearing of the appeal and, therefore, although her appeal is allowed, as it is based on a point common to other appeals, the parties will bear their own costs in that appeal.

*Appeal No. 162 of 1955 dismissed.
Appeals Nos. 38 to 44 of 1956 allowed.*

BASHIRUDDIN ASHRAF

v.

THE STATE OF BIHAR

(S. R. DAS C.J., JAFFAR IMAM, S. K. DAS, GOVINDA
MENON and A. K. SARKAR JJ.)

Mutawalli—Majlis, powers of—Budget—Mutawalli's failure to prepare and send copy to Majlis—Conviction—Validity—Sentence of fine, in default imprisonment—Legality—Bihar Waqfs Act, 1947 (Bihar Act 8 of 1948), ss. 58, 65—Constitution of India, Art. 19(1) (g).

The appellant failed to prepare a budget of the Waqf Estate of which he was the mutawalli, for the year 1952-53 and send a copy of it to the Majlis before January 15, 1952, as he was bound to do under s. 58(1) of the Bihar Waqfs Act, 1947, and was convicted by the Magistrate under s. 65(1) of the Act and sentenced to pay a fine of Rs. 100, in default to undergo fifteen days simple imprisonment. It was contended for him that the conviction and sentence were not valid because (1) s. 58 of the Act contravened Art. 19(1)(g) of the Constitution of India, as it gave unrestricted power to the Majlis to alter or modify the budget prepared by the mutawalli without a right of appeal against the action of the Majlis and so imposed an unreasonable restriction on the mutawalli in carrying on his occupation as such, and (2) s. 65 of the Act did not provide for any imprisonment in default of payment of fine.

Held, that having regard to the fact that a mutawalli occupies the position of a manager or custodian and the supervision over him by the Majlis with the respect to due administration of the waqf property is necessary and that the powers of the Majlis to alter or modify the budget prepared by the mutawalli are controlled by sub-s. (6) of s. 58 of the Act, the restrictions imposed by s. 58 of the Act on the exercise of his powers

by a mutawalli are reasonable. Accordingly, the provisions of s. 58 of the Act do not offend Art. 19 (1) (g) of the Constitution.

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Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, (1954) S.C.R. 1005, relied on.

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The order of the Magistrate providing for imprisonment in default of payment of fine is not invalid in view of s. 33 of the Code of Criminal Procedure read with ss. 40 and 67 of the Indian Penal Code.

CRIMINAL APPELLATE JURISDICTION : Criminal
Appeal No. 39 of 1955.

Appeal by special leave from the judgment and order dated January 28, 1954, of the Patna High Court in Criminal Revision No. 69 of 1954 arising out of the judgment and order dated November 23, 1953, of the Sessions Judge, Patna, in Criminal Appeal No. 288 of 1953 against the judgment and order dated August 27, 1953, of the Munsif Magistrate of Patna Sadar.

Murtaza Fazl Ali, and *R. C. Prasad*, for the appellant.

S. P. Varma, for respondent No. 1.

1957. April 25. The Judgment of the Court was delivered by

Imam J.

IMAM J.—The appellant was removed from his position as mutawalli of Gholam Yahia Waqf Estate on September 1, 1951, by an order passed by the Majlis constituted under the Bihar Waqfs Act, 1947 (Bihar Act 8 of 1948) (hereinafter referred to as the Act). He appealed to the District Judge of Monghyr, as he was entitled to do under the provisions of the Act, and the operation of the order of removal passed by the Majlis was stayed by the District Judge pending the hearing of his appeal. A complaint against him was filed in the Court of the Sadar Sub-Divisional Magistrate, Patna, on July 1, 1952, by Mahommad Samual, Nazir of the Majlis, on the order of its Sadar. It was alleged in the complaint that it was the duty of the appellant to prepare a budget of the waqf estate of which he was a mutawalli, under s. 58(1) of the Act, for the year

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1952-53 and to send a copy of it to the Majlis before January 15, 1952. The appellant had deliberately failed to comply with the aforesaid provisions and therefore had committed an offence punishable under s. 65(1) of the Act. The office of the Majlis where the budget had to be filed was situated at Patna within the local jurisdiction of the Magistrate in whose Court the complaint was filed. The appellant was subsequently tried at Patna by a Munsif Magistrate with First Class powers and convicted under s. 65(1) of the Act and sentenced to pay a fine of Rs. 100, in default to undergo fifteen days simple imprisonment. He appealed to the Sessions Judge of Patna who dismissed his appeal. An application filed by the appellant in the Patna High Court in its criminal revisional jurisdiction was rejected. The appellant obtained special leave to appeal against the order of the High Court.

It has been found as a fact that the appellant failed to prepare a budget of the estimated income and expenditure of the waqf estate and to send a copy of it to the Majlis before January 15, 1952. The only question for consideration is whether the appellant's failure to comply with the provisions of s. 58(1) of the Act makes him liable to be punished under s. 65(1). At this stage, it is necessary to set out the provisions of s. 58 of the Act which are as follows :

"58(1) The mutawalli of every waqf shall, before the fifteenth day of January in each year, prepare a budget of the estimated income and expenditure of such waqf for the next succeeding financial year and shall forthwith send a copy thereof to Majlis.

(2) The Majlis may, within six weeks from the date on which it receives such copy, alter or modify the budget in such manner and to such extent as it thinks fit.

(3) If the Majlis alters or modifies any budget under sub-section (2), it shall forthwith send a copy of the budget as so altered or modified to the mutawalli of the waqf concerned, and the budget as so altered or modified shall be deemed to be the budget of the waqf.

(4) If within the period mentioned in sub-section (2) and for two weeks thereafter the Majlis does

not send to the mutawalli of the waqf concerned a copy of the budget altered or modified as aforesaid, the Majlis shall be deemed to have approved the budget without any alteration or modification.

(5) If the mutawalli fails to prepare and send a copy of the budget as required by sub-section (1), the Majlis shall prepare a budget for the waqf concerned and such budget shall be deemed to be the budget of that waqf for the year in question.

(6) Nothing contained in this section shall be deemed to authorise the Majlis to alter or modify any budget in a manner or to an extent inconsistent with the wishes of the waqif, so far as such wishes can be ascertained, or the provisions of this Act."

Section 65 provides that a mutawalli may be punished if he fails to comply with certain matters mentioned therein including his failure to comply with sub-s. (1) of s. 58. Sub-section (1) of s. 65 reads as follows :

"65(1) If a mutawalli fails without reasonable cause, the burden of proving which shall be upon him, to comply with any order or direction made or issued under clauses (i), (o) or (q) of sub-section (2) of section 27 or under section 56, to comply with the provisions of sub-section (1) of section 57, sub-section (1) of section 58, section 59 or section 60, or to furnish any statement, annual account, estimate, explanation or other document or information relating to the waqf of which he is mutawalli, which he is required or called upon to furnish under any of the other provisions of this Act, he shall be punishable with fine which may extend, in the case of the first offence, to two hundred rupees and, in the case of second or any subsequent offence, to five hundred rupees."

It is clear from the provisions of s. 58(1) that before January 15, each year, the mutawalli of each waqf shall prepare a budget for the next succeeding financial year and shall forthwith send a copy thereof to the Majlis. Under s. 65(1), if he fails to comply with the above, he is liable to be punished with fine.

It was contended by the learned Advocate for the appellant that s. 58 of the Act was an invalid provision because it gave unrestricted power to the Majlis to alter

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or modify the budget prepared by the mutawalli without a right of appeal against the action of the Majlis altering or modifying the budget. The provisions of s. 58 imposed an unreasonable restriction on the mutawalli in carrying on his occupation as such. Accordingly, the provisions of s. 58 offended Art. 19(1) (g) of the Constitution.

The Act was enacted for the purpose of providing for the better administration of waqfs in the State of Bihar as its preamble states. Section 5 provides for the establishment of two bodies corporate known as Majlis to discharge respectively the functions assigned to them by the Act with reference to Sunni waqfs and Shia waqfs. Section 27 provides that the general superintendence of all waqfs in the State shall be vested in the Majlis, which will do all things reasonable and necessary to ensure that waqfs are properly supervised and administered and that the income thereof is duly appropriated and applied to the objects of such waqfs and in accordance with the purposes for which such waqfs were founded or for which they exist so far as such objects and purposes can be ascertained. Sub-section (2) of this section enumerates, *inter alia*, the various powers and duties of the Majlis including the removal of a mutawalli from his office under certain conditions. The various powers set out in this sub-section clearly indicate that the mutawalli is subordinate to and under the control of the Majlis. The Majlis under s. 47 may also make an application to the District Judge for an order, amongst other things, for the removal of the mutawalli. Chapter X deals with mutawallis and their duties and under s. 56 it is specifically enjoined that every mutawalli shall carry out all directions which may from time to time be issued to him by the Majlis under any of the provisions of the Act. Previous to the passing of the Act, the Mussalman Wakf Act (Central Act XLII of 1923) was enacted to make provisions for the better management of waqf property and for ensuring the keeping and publication of proper accounts in respect of such properties. It applied to all waqfs, except those to which s. 3 of the Mussalman Wakf Validating Act,

1913, applied. Reference to some of the provisions of the Mussalman Wakf Act may now be made. Section 3 provides for the furnishing of particulars relating to a waqf to the Court, that is to say, a District Judge or within the limits of ordinary original civil jurisdiction, to such Court subordinate to the High Court as the State Government may by notification in the Official Gazette designate. Section 5 provides that within three months after the thirty-first day of March next following the date on which the statement referred to in s. 3 had been furnished, and thereafter within three months of the thirty-first day of March in every year, the mutawalli shall prepare and furnish to the Court a full and true statement of accounts of all moneys received or expended by him on behalf of the waqf of which he was the mutawalli during the period of twelve months ending on such thirty-first day of March. Section 10 provides for punishment for failure to comply with the provisions of s. 3 or s. 4 by a mutawalli, who becomes liable to be fined a sum which may extend to five hundred rupees, or, in the case of a second or subsequent offence which may extend to two thousand rupees. It is clear that the purpose of the Act and that of the Mussalman Wakf Act was to ensure that the waqfs were properly administered and that the income of the waqf was duly appropriated for the purposes for which the waqf had been founded. Having regard to the fact that the mutawalli occupied the position of a manager or a custodian and that some kind of control or supervision over him by the Majlis with respect to due administration of the waqf property and due appropriation of funds was certainly necessary, we are of the opinion that the provisions of s. 58 of the Act are reasonable restrictions on the exercise of his duties as a mutawalli and it cannot be said that the provisions of s. 58 offend any of the provisions of the Constitution. As was said in the case of *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*⁽¹⁾ a budget is indispensable in all public institutions and that it is not *per se*

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(1) [1954] S. C. R. 1005, 1037.

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unreasonable to provide for the budget of a religious institution being prepared under the supervision of the Commissioner or the Area Committee. Under s. 58 of the Act, the mutawalli has to prepare a budget and send a copy of it to the Majlis within a specified time and the Majlis, which has the powers of supervision over him, is authorized to alter or modify the budget. This power of alteration or modification is inherent in the power of supervision and such a provision in s. 58 cannot be said to be unreasonable. Reliance, however, was placed on a passage in the judgment of this Court in the case cited above to the effect that if an Area Committee under cl. 3 of s. 70 of the Madras Hindu Religious and Charitable Endowments Act, 1951, makes any addition or alteration in the budget, an appeal against it lay to the Deputy Commissioner. The passage upon which reliance is placed is no authority for the proposition that the provisions of s. 58 of the Act become unreasonable because there is no provision for an appeal against the orders of the Majlis. The powers of the Majlis to alter or modify the budget prepared by the mutawalli are not unrestricted. Sub-section (6) of s. 58 expressly provides that nothing contained in the section shall be deemed to authorize the Majlis to alter or modify any budget in a manner or to an extent inconsistent with the wishes of the waqf, so far as such wishes can be ascertained, or the provisions of the Act. In our opinion, nothing contained in sub-ss. (2), (3) and (4) of s. 58 amount to unreasonable restrictions on the exercise of the duties of the mutawalli as a person administering a waqf. Even if it were to be assumed that the said provisions amounted to an unreasonable restriction, sub-ss. (2), (3) and (4) are clearly severable from sub-ss. (1), (5) and (6) of s. 58. Even if sub-ss. (2) (3) and 4 were struck down, the mutawalli would still be under a legal obligation under sub-s. (1) to prepare a budget and submit a copy thereof to the Majlis within a specified time and his failure to do so would make him liable to punishment under s. 65(1).

It was urged that the Sessions Judge erred in placing the onus on the appellant under s. 65(1) to prove that he had submitted the copy of the budget within time.

This objection, however, does not require a detailed consideration because the Sessions Judge clearly stated in his judgment that apart from the onus, he was satisfied that the prosecution had fully established on the evidence that the appellant had failed to send a copy of the budget as required by law.

It was also pointed out that s. 65 does not provide for any imprisonment in default of payment of fine, but the appellant was sentenced to 15 days simple imprisonment in default of payment of fine. Section 33 of the Code of Criminal Procedure read with ss. 40 and 67 of the Indian Penal Code appears to us to be a clear answer to this contention.

It was also pointed out that under s. 65 of the Act a sentence of fine extending upto five hundred rupees could be imposed for a second or for a subsequent offence. We need not, however, consider that matter in the present appeal as it was conceded on behalf of the appellant that the sentence of fine imposed upon him in the present case was for a first offence.

The appeal is accordingly dismissed.

Appeal dismissed.

UNION OF INDIA

v.

CHAMAN LAL LOONA

(S. R. DAS C.J., JAFER IMAM, S. K. DAS,

GOVINDA MENON and A. K. SARKAR J.J.)

Partition of India—Distribution of rights and liabilities—Contract by Governor-General in Council, if and when for the purposes of Pakistan—Test—Such purpose, if can be modified by powers of control vested in Joint Defence Council—Adjudication of rights and liabilities under such contract—Indian Independence (Rights, Property and Liabilities) Order, 1947, Arts. 8(1), 3(2)—Joint Defence Council Order, 1947, Art. 8(c).

The correct test to determine whether a contract made before the partition of India on behalf of the Governor-General in Council comes within the purview of cl. (a) of Art. 8(1) of the Indian Independence (Rights, Property and Liabilities) Order,

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