



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 08.11.2024

Pronounced on : 12.11.2024

CORAM

THE HONOURABLE MR. JUSTICE N. SATHISH KUMAR

C.R.P.No.2000 of 2023
and C.M.P.No.12562 of 2023

The Managing Committee
Nesavupettai Shafi Jamath Mosque
Rep by its President
Ilayangudi Taluk, Sivagangai District

.. Petitioner

Versus

1.A.Mohammed Abdul Khader

2. The Tamil Nadu Wakf Board
Rep by its Chairman
No.1, Jaffer Syrang Street
Vallal Seethakathi Nagar
Chennai – 600 001

3. The Chief Executive Officer
Tamil Nadu Wakf Board
No.1, Jaffer Syrang Street
Vallal Seethakathi Nagar
Chennai – 600 001

.. Respondents

Prayer:- Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the fair and decretal order dated 24.03.2023 passed in O.A.No.70 of 2018 on the file of the Tamil Nadu Wakf Tribunal, Chennai.



For Petitioner : Mr.Zaffarullah Khan
For Respondents : Mr.N.A.Nissar Ahmed, Senior Counsel
for Mr.N.A.Nassir Hussan for R1
Mr.Haja Mohidden Gisthi for R2 & R3

ORDER

Challenging the order of the Waqf Tribunal partly allowing the application directing the Tamil Nadu Waqf Board to register the T.O.Mohamed Thambi Waqf, Illayangudi Taluk, Sivagangai District as a seperate waqf, prepare a proforma report showing the "Rule of Succession" to the post of mutawalli as "hereditary", conduct a detailed enquiry among the legal representatives of the waqif/founder namely late T.O.Mohamed Thambi and appoint mutatwalli for the said waqf by following the procedures prescribed under the Waqf Act, 1995 (as amended in 2013) as per the intention of the waqif.

2. The brief facts leading to filing of this revision are as follows:

2.a. One Mr.Mohammed Thambi had executed a settlement deed in respect of one acre and seventy five cents at Salaiyur, Ilayangudi to his daughter Mrs.Mohammed Mariyath Beevi with conditions that after his demise, he has to be buried in 121*120 feet strip of land, to lit a lamp regularly in his tomb and in the remaining place, a building shall be



accommodated so as to conduct prayers regularly and shall offer fathiha and carried out sandals during mouludh and shall carry out activities as per islamic law. There was also a restriction that the land which is the subject matter of Waqf cannot be alienated and the income from the land shall be used for the purposes set out in the deed. Further, he has also stated that her daughter and her descendants shall carry out the above objectives.

2.b. After the demise of Mr.Mohammed Thambi, her daughter had treated the property as her own property and had tried to change the character of the property. The president of the petitioner jamath filed an application to the Waqf Board to declare the subject property as Waqf. On 21.11.1966, the Tamilnadu Waqf Board, by its order dated 21.11.1996 removed Mrs.Mariyath Beevi as Muthavalli as she acted against the interest of the Waqf and has caused eminent danger to the Waqf by demolishing the structure and compound wall and further directed the petitioner Jamath to take charge of the Waqf Property and administer the same. Challenging the said order, Mrs.Mariyath Beevi filed a suit in O.S.No.84 of 1967 on the file of Subordinate Judge, Ramanathapuram seeking for a declaration to set aside the order passed by the Tamil Nadu Waqf Board and further for an injunction



restraining Jamath from interfering with the management of the property. The said suit was dismissed on 11.11.1967 confirming the order of the Tamil Nadu Waqf Board. Against the decree and judgment, appeal was filed in A.S.No.64 of 1969 before the District Judge, Ramanathapuram and the same was also dismissed on 26.06.1970.

2.c. Thereafter, Mrs.Mariyath Beevi filed a review application with the Waqf Board seeking clarification with respect to the appointment of Mutawalli. The Waqf Board declined the request and confirmed that the petitioner Jamath shall administer the Waqf as Mariath Beevi had acted against the interest of Waqf. When the matter stood thus, on 05.02.2015, the first respondent claiming to be the descendant of Mohammed Thambi filed an application alleging social activities are performed in the Waqf property. Hence, the management has to be given back to the legal descendants. The Waqf Board, by resolution No.75/2018 dated 21.07.2018 dismissed the application filed by the respondent and ordered that it would be beneficial for the Waqf that the property vest with the petitioner jamath as Mrs.Mariyath Beevi and her family members had tried to treat the subject property as their own property. Challenging the said order, the first respondent filed an



application in O.A.No.70 of 2018 before the Tamilnadu Waqf Tribunal to set aside the order passed by the Tamilnadu Waqf Board and further for a declaration to declare the first respondent as hereditary mutawalli of T.O.Mohammed Thambi Waqf, Sivagangai District.

2.d.The Waqf Tribunal, by order, dated 24.03.2023 passed in O.A.No.70 of 2018 has set aside the order dated 21.07.2018 and communicated vide proceedings of the 2nd respondent dated 19.09.2018 in Rc.17466/08/A3/Sivagangai and further directed the Tamilnadu Waqf Board to conduct enquiry and appoint mutawalli among the legal representatives of the waqif/founder namely T.O.Mohamed Thambi. Challenging the order of the Tribunal, the present Revision has been filed on the grounds that the Waqf Tribunal has passed the order against the Waqf Act and in contravention to the orders passed by the Civil Court of competent jurisdiction; the petitioner had been in proper and effective administration of the property since 1966 without any allegations, misfeasance or maladministration; the petitioner had been protecting the property for misuse of the family members of the first respondent who had been trying to usurp the waqf property in one way or the other. Hence, it is the contention that



since the Courts of competent jurisdiction had already upheld the administration of the waqf by the petitioner Jamath as early as 1967 confirming the order of the waqf Board. The "Rule of Succession" has been given up and the petitioner Jamath had been in administration for almost 58 years.

3. The learned counsel for the petitioner submitted that Mr.Mohammed Thambi had created a Waqf with several objectives under Deed of settlement dated 20.04.1948 and registered as Doc.No.1017 of 1948. After his death, his legal heir acted against the objectives and treated the property as a private property. Therefore, the Tamilnadu Waqf Board by its Order dated 28.12.1966 has held that Muttavalli trustee has not acted in accordance with the Wakf deed and the property endowed by the late Md.Thambi are wakf properties and directed the petitioner Jamath to take charge of the waqf property from Mariath Biwi and register it with Wakf Board. Challenging the order, Mrs.Mariyath Beevi filed a suit in O.S.No.84 of 1967 on the file of Subordinate Judge, Ramanathapuram seeking for a declaration to set aside the order passed by the Tamil Nadu Waqf Board and further for an injunction restraining Jamath from interfering with the management of the property. The



said suit was dismissed on 11.11.1967, against the same, appeal was filed in A.S.No.64 of 1969 before the District Judge, Ramanathapuram and the same was also dismissed on 26.06.1970 confirming the judgment passed by the Trial Court and re-affirmed the right of the petitioner Jamath to manage and administer the wakf.

4. Hence, it is the contention that right of Muttavalli though presumed as one of the hereditary in nature was not recognised by the trial Court or by the appellate court and both these courts upheld the correctness of the administration and management of wakf property conferred upon the petitioner Jamath. The judgment of the Trial Court which has been merged with the judgment of the appellate Court has been in force since, 1969 and has become final. Mrs.Mariath not content with the decisions, had invoked once again the jurisdiction of the Tamilnadu Wakf Board for appointment of Mutawalli under Doc.No.1017 of 1948 executed by her father. The Waqf Board declined the request by its order dated 23.04.1977 after extending her an opportunity to present her cause and re-iterated its Trust in the petitioner Jamath to approach the Tamilnadu Wakf Board for the creation of proforma under Act 25 of 1954. The Jamath by virtue of orders of the Tamilnadu Wakf



Board and the judgments of the competent Civil Court has been in the management and administration of the properties dedicated by Mr.Mohamed Thambi.

5. When the matter stood thus, on 05.02.2015, the first respondent claiming to be the descendant of Mohammed Thambi filed an application alleging social activities are performed in the Waqf property. Hence, the management has to be given back to the legal descendants. The Waqf Board, by resolution No.75/2018 dated 21.07.2018 dismissed the application filed by the respondent and ordered that it would be beneficial for the Waqf that the property vest with the petitioner jamath as Mrs.Mariyath Beevi and her family members had tried to treat the subject property as their own property. Challenging the order, the first respondent filed an application in O.A.No.70 of 2018 before the Tamilnadu Waqf Tribunal to set aside the order passed by the Tamilnadu Waqf Board and further for a declaration to declare the first respondent as hereditary mutawalli of T.O.Mohammed Thambi Waqf, Sivagangai District. The Waqf Tribunal, by order, dated 24.03.2023 passed in O.A.No.70 of 2018 set aside the order dated 21.07.2018 and communicated vide proceedings of the 2nd respondent dated 19.09.2018 in



Rc.17466/08/A3/Sivagangai and further directed the Tamilnadu Waqf Board

to conduct enquiry and appoint mutawalli among the legal representatives of the waqif/founder namely T.O.Mohamed Thambi. Hence, it is the contention that under Muslim Personal Law, hereditary succession to the office of a mutavalli has got to withstand the severe test of custom and usage. In the instant case, from the very inception the assets dedicated under Doc.No.1017 of 1948 has been exploited and misused by the daughter of Mr.Mohammed Thambi. Thus, the Tamilnadu Wakf Board by its orders dated 28.12.1966, 23.04.1977 and 21.07.2018 confirmed and re-confirmed the continuance of the petitioner Jamath to be the custodians and administrator of the assets. In this backdrop, there has never been a practice of hereditary mutavalli being in vogue or there had been no practice and usage of the wakf being hereditary in nature. Under Muslim Personal Law as management by election amongst the best people available at that point of time is the rule and hereditary an exception. Hence, it is the contention that issue pertaining to the hereditary muttavalli which has been decided by two competent Civil Courts, once again revisiting the issue would be barred under Section 11 of the CPC on the point of res judicata.



6. It is further contended by the learned counsel for the petitioner that the Muslim Law does not recognise any right of inheritance or rule of hereditary succession to the office of mutawalli. Further it is the contention that the beneficiary herself challenged the deed as it confers the property as a gift to her. Therefore, the directions contained in the deed will not have any force. It is also submitted by the learned counsel for the petitioner that subject waqf has already been merged with the petitioner Jamath, as far as the waqf is concerned, it has to be treated as a separate wakf. Hence, seeks for allowing this revision.

7. The learned counsel for the first respondent submitted that in the order of the Waqf Board dated 28.12.1966 it has not appointed hereditary trustee, it has only given the administration to the petitioner Jamath as a temporary measure since one of the beneficiary of the document has treated the waqf property as a personal property. Hence, it is the contention that while exercising the powers under the Waqf Act, the Board shall act in conformity with the directions of the waqf, the purposes of the waqf and any usage or custom of the waqf sanctioned by the school of Muslim law to which the waqf belongs. The Tamilnadu Waqf Board has not followed the



mandatory provisions contained under the provisions of Section 32 of the Waqf Act, 1995 nor Section 15 of the Wakf Act, 1954. Further, as per Section 63 of the Waqf Act, 1995, 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, the Board may appoint any other person to act as mutawalli. It is submitted that the subject Waqf is created by a deed and the Rule of Succession to the office of the mutawalli is provided in such a deed while making appointment of mutawallis in that office. Only in the absence of such provisions in the deed, the Board can appoint mutawalli in conformity with any usage or custom of the waqf sanctioned by the school of Muslim law to which the waqf belongs. Therefore, according to him, none of the provisions under the Waqf Act, 1995 or the Wakf Act, 1954 has been followed. The suit has been filed by the settlee claiming to be a separate property, whereas, the Civil Courts have held that it is a waqf property. Therefore, his contention that above suit will not operate res judicata with regard to the appointment of mutawalli as per the terms of the deed. According to him, the appointment of mutawalli has to be made only as per the provisions of the Waqf Act, 1995 or the Wakf Act, 1954. Therefore, the question of applying the principle of res judicata will not arise in this case.



8. In support of his submissions, the learned Senior Counsel for the first respondent placed reliance on the following judgments:

- 1). *Maulvi Abdul Rahman Siyai vs. Sardar Maqbool Hasan and others* reported in 2009 AIR (Allahabad) 62;
- 2). *T.P.Kunhikoyamutty, Secretary, Puthan Peedika Palli Paripalana Committee vs. A.P.Muhammed Kutty* reported in 2017 (4) KLT 740.

9. It is the contention of the learned counsel for the respondents 2 and 3 that the Tamil Nadu Waqf Board has passed the order and the same has been set aside by the Tamil Nadu Waqf Tribunal directing the Waqf Board to conduct enquiry and pass orders; and they will follow the procedures and pass appropriate orders as per law.

10. Heard both sides and perused the materials placed on record.

11. In light of the above submissions, now the points arising for consideration are as follows:

- i) Whether the order of the Tamilnadu Waqf Tribunal hit by principle of res judicata?



ii) Whether the Tamilnadu Waqf Board can dehorse the direction contained in the deed while exercising the powers under Section 32 of the Waqf Act, 1995.

Points Nos. (i) and (ii)

12. The fact that an extent of 1 acre 75 cents in S.No.30/2, Ilayangudi Village and Taluk, Sivagangai District was originally endowed by one Mr.T.O.Mohammed Thambi is not disputed and he has executed a gift deed dated 20.04.1948 bearing Doc.No.1017/1948 appointing his daughter Mariath Beevi as mutavalli. Since the mutawalli has acted against the interest of the waqf, the Waqf Board has passed the proceedings dated 21.11.1966 in W.E.A.No.41/65 holding that it is a waqf property and directed the Mariath Beevi to register the waqf with the Waqf Board. Challenging the said order, Mariath Beevi filed a suit in O.S.No.84/1967 on the file of Sub Court, Ramanathapuram for declaration and injunction. The Trial Court by its judgment and decree dated 11.11.1968 held that they are waqf properties and dismissed the suit. The said decree and judgment has been confirmed in A.S.No.64 of 1969 before the District Court, Ramanathapuram. Once again, Mariath Beevi filed an application before the Waqf Board for appointment of hereditary trustee and the said application came to be dismissed on



23.04.1977 and directed the waqf to be treated as waqf in the name of T.O.Mohammed Thambi Waqf. Now, the first respondent claiming to be the descendant of the founder wakif, gave an application for appointment of hereditary trustee making allegations that the petitioner Jamath was acting against the interest of the waqf by conducting adal padal programmes in the waqf property. The Waqf Board by Inam No.75/18 dated 21.07.2018 dismissed the application and ordered that it would be beneficial for the waqf that the property vest with the petitioner Jamath as Mrs.Mariath Beevi had tried to treat the subject property as their own property and permitted the petitioner Jamath to administer the waqf property. Challenging the said order, O.A.No.70 of 2018 has been filed before the Tamilnadu Waqf Tribunal to declare the first respondent as the hereditary mutavalli. These facts are not in dispute.

13. In the impugned order, the Waqf Tribunal had dismissed the application with regard to the relief of declaration to declare the first respondent herein as the hereditary mutawalli, however, a direction was issued to the Tamil Nadu Waqf Board to register the T.O.Mohammed Thambi Waqf as a separate waqf, prepare a proforma report showing the "Rule of



Succession" to the post of mutawalli as "hereditary" and conduct a detailed enquiry among the legal representatives of the waqif/founder namely late T.O.Mohammed Thambi and appoint mutawalli for the said waqf by following the procedures prescribed under the Waqf Act, 1995 (as amended in 2013) as per the intention of the waqif.

14. It is the contention of the learned counsel for the petitioner that as the Civil Courts had already held that the property is a waqf property and resolution and order of the Tamilnadu Waqf Board passed in the year 1966 has been confirmed, the same issue cannot be re-agitated. It is relevant to note that suit was filed by Mariath Beevi challenging the order of the Waqf Board dated 21.11.1966, wherein, she had pleaded that the gift deed has not created any waqf, therefore, she sought for a declaration that it is an individual property. The Trial Court, by its decree and judgment dated 11.11.1967 has held that the suit property is a waqf property and not a gift to the beneficiary or to the legal heirs. The Appellate Court also confirmed the same. Now, it is not the case of the first respondent that they are disputing the said finding. Their contention is that the directions contained in the waqf deed has to be followed while appointing mutawalli. Therefore, when the issue with regard



to the character of the property was not raised in the subsequent proceedings and the subsequent proceedings is only with regard to the appointment of hereditary trustee, it cannot be said that the issue is already decided in the earlier suit.

15. The earlier suit has been filed claiming right as a separate property in favour of the settlee, Mariath Beevi which was dismissed holding that the the property is a waqf property. Further, waqf board resolution handing over the administration of waqf property to the petitioner Jamath was also confirmed in the above suit. The Order of the Waqf Board dated 28.12.1966, when carefully perused same clearly indicate that as mutawalli trustee has acted against the waqf, the Board was convinced eminent danger to the waqf and its properties had directed the petitioner Jamath to take charge of the waqf property from Mariath Beevi and register with Waqf Board. Only taking note of the fact of eminent danger to the waqf and its properties at that time, since the Mariath Beevi has acted against the waqf, the petitioner Jamath took over the charge of the property and since then there was no appointment of hereditary trustee or mutawalli. Only to preserve the properties from misuing by the then mutawalli, administration was given to the petitioner Jamath.



Therefore, those proceedings no-where dealt with the appointment of hereditary trustees.

16. The Waqf Board having confirmed that it is a waqf created by way of deed executed by one Mr.T.O.Mohammed Thambi has not acted in tune with Section 15(1) of the Wakf Act, 1954 which reads as follows:

"15. Functions of the Board :- (1) Subject to any rules that may be made under this Act, the general superintendence of all wakfs in a State in relation to all matters, except those which are expressly required by this Act to be dealt with by the Wakf Commissioner, shall vest in the Board established for the State, and it shall be the duty of the Board so to exercise its powers under this Act as to ensure that the wakfs under its superintendence are properly maintained, controlled and administered and the income thereof is duly applied to the objects and for the purposes for which such wakfs were created or intended:

Provided that in exercising its powers under this Act in respect of any wakf, the Board shall act in conformity with the directions of the wakif, the purposes of the wakf and any usage or custom of the wakf sanctioned by the Muslim law."

17. While exercising the powers, the Bord should act in conformity with the directions of the wakf and any usage or custom of the wakf sanctioned by the Muslim Law, however, the Wakf Board has not taken note of the above provision. Be that as it may, when the settlee namely Mariath



Beevi also sought for appointment of hereditary trustee, the same was dismissed by the Tamilnadu Waqf Board on 23.04.1977 declining the request of the settlee mainly on the ground that she acted against the interest of the waqf and directed the petitioner Jamath to administer the waqf. From the year 1977, the petitioner Jamath are in the administration. On 05.02.2015, the first respondent has given a complaint alleging anti-waqf activities by the petitioner Jamath, however, the said complaint was dismissed. While dismissing the complaint, by Order dated 21.07.2018, it is recorded that the property has been let out for the Aadal Padal and cultural events, which is in fact against the very object of the Waqf and directed that no such activities should be carried out in the waqf properties. However since already administration is given to the petitioner Jamath, they were directed to administer the functions of the waqf. Challenging the said finding, O.A.No.70 of 2018 has been filed and the Tamilnadu Waqf Tribunal had set aside that order and directed the Waqf Board to register the T.O.Mohamed Thambi Waqf, Illayangudi Taluk, Sivagangai District as a separate waqf, prepare a proforma report showing the "Rule of Succession" to the post of mutawalli as "hereditary", conduct a detailed enquiry among the legal representatives of the waqif/founder namely late T.O.Mohamed Thambi and appoint mutawatwalli for



the said waqf by following the procedures prescribed under the Waqf Act,

1995 (as amended in 2013) as per the intention of the waqf.

18. It is relevant to extract Section 32 of the Waqf Act, 1995 which is in pari materia to Section 15 of the Wakf Act, 1954, which reads as follows:

32. Powers and functions of the Board.—(1) Subject to any rules that may be made under this Act, the general superintendence of all auqaf in a State shall vest in the Board established or the State; and it shall be the duty of the Board so to exercise its powers under this Act as to ensure that the auqaf under its superintendence are properly maintained, controlled and administered and the income thereof is duly applied to the objects and for the purposes for which such auqaf were created or intended:

Provided that in exercising its powers under this Act in respect of any waqf, the Board shall act in conformity with the directions of the waqif, the purposes of the waqf and any usage or custom of the waqf sanctioned by the school of Muslim law to which the waqf belongs.

Explanation.—For the removal of doubts, it is hereby declared that in this sub-section, “waqf” includes a waqf in relation to which any scheme has been made by any court of law, whether before or after the commencement of this Act.

(2) Without prejudice to the generality of the foregoing power, the functions of the Board shall be—

(a) to maintain a record containing information relating to the origin, income, object and beneficiaries of every waqf;

(b) to ensure that the income and other property of auqaf are applied to the objects and for the purposes for which such auqaf were intended or created;

(c) to give directions for the administration of auqaf;

(d) to settle schemes of management for a waqf: Provided that no such settlement shall be made without giving the parties



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affected an opportunity of being heard;

(e) to direct—

(i) the utilisation of the surplus income of a waqf consistent with the objects of waqf;

(ii) in what manner the income of a waqf, the objects of which are not evident from any written instrument, shall be utilised;

(iii) in any case where any object of waqf has ceased to exist or has become incapable of achievement, that so much of the income of the waqf as was previously applied to that object shall be applied to any other object, which shall be similar, or nearly similar or to the original object or for the benefit of the poor or for the purpose of promotion of knowledge and learning in the Muslim community:

Provided that no direction shall be given under this clause without giving the parties affected, an opportunity of being heard.
Explanation.—For the purposes of this clause, the powers of the Board shall be exercised—

(i) in the case of a Sunni waqf, by the Sunni members of the Board only; and

(ii) in the case of a Shia waqf, by the Shia members of the Board only: Provided that where having regard to the number of the Sunni or Shia members in the board and other circumstances, it appears to the Board that the power should not be exercised by such members only, it may co-opt such other Muslims being Sunnis or Shias, as the case may be, as it thinks fit, to be temporary members of the Board for exercising its powers under this clause;

(f) to scrutinise and approve the budgets submitted by mutawallis and to arrange for auditing of account of auqaf;

(g) to appoint and remove mutawallis in accordance with the provisions of this Act;

(h) to take measures for the recovery of lost properties of any waqf;

(i) to institute and defend suits and proceedings relating to auqaf;

(j) to sanction lease of any immovable property of a waqf



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in accordance with the provisions of this Act and the rules made thereunder:

Provided that no such sanction shall be given unless a majority of not less than two-thirds of the members of the Board present cast their vote in favour of such transaction: Provided further that where no such sanction is given by the Board, the reasons for doing so shall be recorded in writing.

(k) to administer the Waqf Fund;

(l) to call for such returns, statistics, accounts and other information from the mutawallis with respect to the waqf property as the Board may, from time to time, require;

(m) to inspect, or cause inspection of, waqf properties, accounts, records or deeds and documents relating thereto;

(n) to investigate and determine the nature and extent of waqf and waqf property, and to cause, whenever necessary, a survey of such waqf property; (na) to determine or cause to be determined, in such manner as may be specified by the Board, market rent of the waqf land or building;

(o) generally do all such acts as may be necessary for the control, maintenance and administration of auqaf.

(3) Where the Board has settled any scheme of management under clause (d) or given any direction under clause (e) of sub-section (2), any person interested in the waqf or affected by such settlement or direction may institute a suit in a Tribunal for setting aside such settlement or directions and the decision of the Tribunal thereon shall be final.

(4) Where the Board is satisfied that any waqf land, which is a waqf property, has the potential for development as an educational institution, shopping centre, market, housing or residential flats and the like, market, housing flats and the like, it may serve upon the mutawalli of the concerned waqf a notice requiring him within such time, but not less than sixty days, as may be specified in the notice, to convey its decision whether he is willing to execute the development works specified in the notice.

(5) On consideration of the reply, if any, received to the



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*notice issued under sub-section (4), the Board, if it is satisfied that the mutawalli is not willing or is not capable of executing the works required to be executed in terms of the notice, it may, *** take over the property, clear it of any building or structure thereon, which, in the opinion of the Board is necessary for execution of the works and execute such works from waqf funds or from the finances which may be raised on the security of the properties of the waqf concerned, and control and manage the properties till such time as all expenses incurred by the Board under this section, together with interest thereon, the expenditure on maintenance of such works and other legitimate charges incurred on the property are recovered from the income derived from the property:*

Provided that the Board shall compensate annually the mutawalli of the concerned waqf to the extent of the average annual net income derived from the property during the three years immediately preceding the taking over of the property by the Board.

(6) After all the expenses as enumerated in sub-section (5) have been recouped from the income of the developed properties, the developed properties shall be handed over to mutawalli of the concerned waqf."

Emphasis supplied

19. On perusal of the first proviso to the above Section makes it clear that while exercising the powers under this Act in respect of any waqf, the Board shall act in conformity with the directions of the waqif, the purposes of the waqf and any usage or custom of the waqf sanctioned by the school of Muslim law to which the waqf belongs. The Gift Deed which created the waqf directed that all the objects are to be carried out only by the descendants of the founder wakif, however, no order has been passed under Section 32 of the



Waqf Act, 1995 in conformity with the directions of the waqf.

WEB COPY 20. Section 63 of the Waqf Act, 1995 reads as follows:

"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."

The above provision also makes it clear that 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. Any appointment of mutawalli is only for a specific period and it should be specified in the order. Therefore, merely because the administration was originally given to the petitioner Jamath to prevent the eminent danger to the waqf property in earlier orders without specifying any period, it cannot be said that the appointment was made in tune with the provision of Section 63 of the Waqf Act, 1995.

21. Of course, the Muslim law does not recognise any right of



inheritance or rule of hereditary succession, however, there are two exceptions to this principle, i.e., where the founder has laid down the rule of hereditary succession to the office in which case the rule has to be adhered to, and, where the office of the mutawalli becomes hereditary by custom, in which case the custom should be followed.

22. Even in the impugned order, the Waqf Tribunal has directed the Waqf Board to register the T.O.Mohamed Thambi Waqf, Ilayangudi Taluk, Sivagangai District as a separate waqf. However, administration given is not for a specific period.

23. It is relevant note that the Allahabad High Court in the case of *Maulvi Abdul Rahman Siyai vs. Sardar Maqbool Hasan and others* reported in 2009 AIR (Allahabad) 6 has held as follows:

"15. From a plain reading of the provisions of Section 32(1) of the Act, it is clear that subject to any rule made under the Act, the general superintendence of all the wakfs in State is vested in the Board established or the State and it shall be the duty of the Board to ensure that wakfs under its superintendence are properly maintained, controlled and administered and the income thereof is duly applied to the objects and for the purposes for which such wakfs were created or intended. The proviso added to this Section 32(1) is of controlling in nature, which postulates in clearest terms that while exercising its



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power under the Act in respect of any wakf, the Board shall act in conformity with the directions of the Wakf, the purposes of the wakf and any usage or custom of the wakf sanctioned by the School of Muslim Law to which the wakf belongs.

16. Further under Section 32(2)(g) of the Act the Board is empowered to appoint and remove the Mutawalli in accordance with the provisions of the Act, but this power of appointment and removal of the Mutawalli is without any prejudice to the general power of superintendence of the Board over a wakf. Besides, Section 37(c) of the Act also indicates that the rule of succession to the office of Mutawalli is governed by the wakf deed and if the wakf is not created by the wakf deed, the same is governed by the custom or usage. However the power to appoint Mutawalli under Section 63 of the Act can be exercised by the Board only when there is no one to be appointed under the term's of wakf-deed or where the right of any person to act as Mutawalli is disputed, in that situations alone the Board may appoint any person to act as Mutawalli for such period and on such conditions as it may think fit and not in other situations.

17. It implies that while exercising the power of superintendence including the appointment of Mutawalli the Board has no absolute power, instead thereof the Board is under duty to follow directions of the wakf as contained in the wakf-deed and if the wakf is not created by any wakf-deed, it shall be governed by the customs and usage of the wakf, which have sanction of School of Muslim law to which it belongs. Therefore, in my opinion, the power of superintendence and control of the Board over the wakf including to the appointment of Mutawalli to a wakf is not absolute, as such while exercising such power of superintendence in respect of a wakf, the Board cannot act according to its sweet will, rather it has to act in conformity with the directions of the concerned wakf but where the wakf is not created by any wakf-deed or where the wakf is created by user and there exist no such wakf-deed like in present case, in such situation, in view of Section 37(c) of the Act, the rule of succession to the office of



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Mutawalli shall be governed by the customs or usage and/or scheme of the administration of said wakf by virtue of the provision of Section 37(e) of the Act. Therefore, the submission of learned counsel for the revisionist in this regard, cannot be accepted."

24. Similarly, a Division Bench of the Kerala High Court in the case of *T.P.Kunhikoyamutty, Secretary, Puthan Peedika Palli Paripalana Committee vs. A.P.Muhammed Kutty* reported in 2017 (4) KLT 740 has held as follows:

"13. A conjoint reading of Sections 3(i), 32(2)(g), 37(1)(c) and 63 of the Waqf Act, 1995 makes it explicitly clear that, if the waqf is created by a deed or instrument, the rule of succession to the office of mutawalli provided in such deed or instrument should be followed while making appointment to that office. Clause (c) to sub-section(1) of S. 37, indicates that, the rule of succession to the office of mutawalli shall be governed by the provisions under the waqf deed and, in the absence of any provisions under such deed or instrument, the office of mutawalli may become hereditary by custom or usage. Further, it is evident from a plain reading of Section 63 that, the power of the Board to appoint mutawalli, when there is a vacancy in the office of the mutawalli of a waqf, can be exercised only when there is no one to be appointed to that office under the terms of the deed of the waqf or where the right of any person



to act as mutawalli is disputed.

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17. In the light of the above discussions and the law laid down in the decisions referred to supra, we have no hesitation to hold that, though Muslim Law does not recognise any right of inheritance or rule of hereditary succession to the office of muthawalli, if the waqf is created by a deed or instrument, the rule of succession to the office of mutawalli provided in such deed or instrument should be followed while making appointment to that office. In the absence of any such provisions under a deed or instrument, the office of mutawalli may become hereditary by custom or usage. The power of appointment of mutawalli by the Board, as contemplated by Section 42 of the Wakf Act, 1954 or Section 63 of the Waqf Act, 1995 is not a regular appointment of a mutawalli, which power can be exercised only when there is no one to be appointed to that office under the terms of the deed of the waqf or where the right of any person to act as mutawalli is disputed."

25. Therefore, this Court is of the view that merely because on earlier occasions, administration was given to the petitioner Jamath without specifying the period, it cannot be said that directions contained in the waqf deed has ceased automatically. When the creation of the waqf by deed is not disputed, the Waqf Board has to exercise the powers conferred under the Act



to ensure that the properties are properly maintained, controlled and administered and the income thereof is duly applied to the objects and for the purposes for which such waqfs were created or intended. The Board shall in conformity with the directions of the waqf, the purpose of the waqf and any usage or custom of the waqf sanctioned by the school of Muslim law to which the waqf belongs. Therefore, as far as the appointment of the muttawali is concerned, it is well settled that if the waqf is created by deed and Rule of Succession provides in such deed or instrument, the same should be followed while making appointment in the office. Only in the absence of such provision in the deed, office of muttawalli may be filled in other mode. The powers under Section 42 of the Wakf Act, 1954 or Section 63 of the Waqf Act, 1995 has to be exercised in conformity with the directions contained in the waqf deed. Therefore, merely because administration has been given to the petitioner Jamath without any specific period, it cannot be said that mutawalli has been properly appointed. Therefore, the directions of the Waqf Tribunal to the Waqf Board to register the T.O.Mohamed Thambi Waqf, Illayangudi Taluk, Sivagangai District as a separate waqf, prepare a proforma report showing the "Rule of Succession" to the post of mutawalli as "hereditary", conduct a detailed enquiry among the legal representatives of the



waqif/founder namely late T.O.Mohamed Thambi and appoint mutawalli for the said waqf by following the procedures prescribed under the Waqf Act, 1995 (as amended in 2013) as per the intention of the waqif, in view of this Court does not require interference.

26. Such view of the matter, I do not find any merits in this revision and accordingly, this revision stands dismissed. No costs. Consequently, connected miscellaneous petition stands closed.

12.11.2024

dhk

Internet : Yes/No
Index : Yes/No
Neutral Citation : Yes/No
To

1.The Chairman
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N.SATHISH KUMAR, J.

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C.R.P.No.2000 of 2023

12.11.2024