IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE V.CHITAMBARESH

FRIDAY, THE 8TH DAY OF MAY 2015/18TH VAISAKHA, 1937

El.Pet..No. 2 of 2011 ( )

PETITIONER(S)/PETITIONER:

ASHARAF KOKKUR, AGED 55 YEARS
S/O.HAJI MOHD. ABDUL HEYYIE, MANAMKANDATH HOUSE
P.O KOKKUR, MALAPPURAM DISTRICT 679 591

BY ADVS.SRI.K.RAMAKUMAR (SR.)
SMT.SMITHA GEORGE
SRI.C.R.REKHESH SHARMA
SMT.ASHA BABU
SRI.K.G.RAJEESH

RESPONDENT(S):
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1. SRI.K.V.ABDUL KHADER,
KARUPPAM VEETTIL HOUSE, BLANGADU P.O
THRISSUR DISTRICT - 680 506

2. SHRI.DAYANANDAN MAMPULLY,
MAMPULLY HOUSE P.O., PUNNAYUR
THRISSUR DISTRICT 679 562.

3. SHRI.MUHAMMED ASHARAF, 4/521,
THAYAMKULAM HOUSE, VILLANNOOR, P.O.KARIKKAD
THRISSUR DISTRICT 680 519

4. SHRI. ASHARAF VADAKOOT,
KOMBATHAYIL HOUSE, VADAKKEKAD P.O
THRISSUR DISTRICT 679 562

5. SHRI.C.V. PREMRAJ, CHAKKANDAN HOUSE,
P.O.BLANGAT, CHAVAKKAD, THRISSUR DISTRICT 680 506

6. SHRI.K.V.ABDUL KAHADER,
KODAKKAT VALAPPIL HOUSE, AYNIKOD P.O
NANNAM MUKKU SOUTH, MALAPPURAM DISTRICT 673 521

7. SHRI VIJAYANATH,
KUTTIKATT HOUSE, KOTTAYAM 686 001

8. ADV.SHAMEER BABU,
KANDATHIYIL HOUSE, KOTT, TS ROAD
THIROOR 676 101, MALAPPURAM DISTRICT

9. SRI AKBAR,NALAKATH KUTTIKATT HOUSE,
P.O. CHAVAKKAD 680 506

10. SRI.RASHEED,
CHINAKKAL HOUSE, PO KADAPPURAM, CHAVAKKAD 680 514

11. SRI.CHANDRAN,
PALLATH HOUSE, OPP. S B M L P S
P.O. KOORKENCHERY 680 007

R,R1 BY ADV. SRI.M.K.DAMODARAN (SR.)
R,R1 BY ADV. SRI.P.K.VIJAYAMOHANAN
R,R1 BY ADV. SRI.SOJAN MICHEAL
R,R1 BY ADV. SRI.GILBERT GEORGE CORREYA
R,R1 BY ADV. SRI.V.S.BOBAN
R,R1 BY ADV. SRI.NISHIL.P.S.
R,R1 BY ADV. SMT.O.V.BINDU
R,R1 BY ADV. SRI.J.VIMAL

THIS ELECTION PETITION HAVING BEEN FINALLY HEARD ON 09.04.2015, THE COURT ON 08-05-2015 DELIVERED THE FOLLOWING:

APPENDIX IN E.P.No.2 of 2011

EXHIBITS: (DOCUMENTS MARKED AND PROVED IN THIS COURT)

EXT.X1	COPY OF GOVERNMENT ORDER SANCTIONING THE PAYMENT OF HONORARIUM AND THE TELEPHONE BILLS.
EXT.X2	COPY OF TRAVELLING ALLOWANCE BILLS.
EXT.X3	COPY OF LETTER RELATING TO THE RESIGNATION OF THE CHAIRPERSON.
EXT.X4	COPY OF LETTER RELATING TO THE RESIGNATION OF THE CHAIRPERSON.
EXT.X5	COPY OF LETTER RELATING TO THE RESIGNATION OF THE CHAIRPERSON.
EXT.X6	COPY OF RULES RELATING TO THE FEES AND ALLOWANCES FOR CHAIRMAN AND MEMBERS OF THE BOARD.
EXT.X7	COPY OF THE PROCEEDINGS OF THE CHIEF EXECUTIVE OFFICER, KERALA STATE WAKF BOARD, ERNAKULAM.
EXT.X8	COPY OF THE GOVERNMENT ORDER DATED 19.12.2006 REGARDING THE MOTOR VEHICLES USED FOR NON DUTY PURPOSES.
EXT.X9	COPY OF THE LEDGER REPORT OF THE KERALA STATE WAKF BOARD, ERNAKULAM.
EXT.X10	COPY OF THE LEDGER REPORT OF THE KERALA STATE WAKF BOARD, ERNAKULAM.
EXT.Y1	COPY OF ARGUMENT NOTES SUBMITTED BY M.K.MOOSAKUTTY, ADVOCATE, TIRUR
EXT.Y2	COPY OF ARGUMENT NOTES SUBMITTED BY THE FIRST RESPONDENT.
EXT.Y3	COPY OF NOMINATION FILED FILED BY THE FIRST RESPONDENT.
EXT.Y4	COPY OF LETTER ADDRESSED BY THE CHIEF EXECUTIVE OFFICER FORWARDING THE LETTER OF RESIGNATION.
EXT.Z1	COPY OF RESIGNATION LETTER PUT IN BY THE FIRST RESPONDENT TO THE PRINCIPAL SECRETARY (REVENUE)
EXT.Z2	COPY OF THE NOTES OF THE GOVERNMENT ACCEPTING THE RESIGNATION.
EXT.Z3	COPY OF THE PROCEEDINGS REGARDING CONVENING OF THE MEETING OF THE MEMBERS OF THE WAQF BOARD .

PETITIONER'S WITNESSES:

PW.1	DEPOSITION OF B.M.JAMAL, CHIEF EXECUTIVE OFFICER, KERALA STATE WAKF BOARD, VIP ROAD, KALOOR, KOCHI - 682 017.
PW.2	DEPOSITION OF V.UNNIKRISHNAN, DEPUTY DIRECTOR OF SURVEYS, CIVIL STATION, PALAKKAD.
PW.3	DEPOSITION OF E.K.MAJHI, PRINCIPAL SECRETARY, REVENUE (F) DEPARTMENT, GOVT. SECRETARIATE, THIRUVANANTHAPURAM.
PW.4	DEPOSITION OF ASHRAF KOKKUR, S/O.HAJI MOHD. ABDUL HEYYIE, MANAMKANDATH HOUSE, P.O., KOKKUR,MALAPPURAM DISTRICT.

//TRUE COPY//

P.S. TO JUDGE.

'C.R.'

V.CHITAMBARESH, J.

Election Petition No.2 of 2011

Dated this the 8th day of May, 2015

J U D G M E N T

Is the Chairperson of the Kerala State Waqf Board ('the Waqf Board' for short) holding an 'office of profit under the Government of the State' and therefore disqualified for being chosen as a member of the Legislative Assembly ?

2. The election of the first respondent to the Kerala Legislative Assembly from the Guruvayoor Legislative Assembly Constituency has been called in question in this Election Petition. The petitioner also seeks a declaration that he is the duly elected candidate from the said Constituency for having secured the next highest number of votes. The petitioner owed allegiance to the Indian Union Muslim League and contested the election with the support of the United Democratic Fund. The first respondent owed allegiance to the Communist Party of India (Marxist) and contested the election with the support of the Left Democratic Fund. The first respondent was declared elected by a margin of 9968 votes in the election held on 13.4.2011 and the other respondents in the Election Petition are

the remaining candidates in the poll fray.

3. The challenge to the election is on the ground that the first respondent was holding an office of profit under the State of Kerala as the Chairperson of the Waqf Board at the material time. This Court earlier by judgment dated 16.11.2011 dismissed the Election Petition as not maintainable on the premise that it did not disclose a cause of action. This judgment was however set aside by the Supreme Court by judgment dated 29.8.2014 in Civil Appeal Nos.69-70 of 2012 and the Election Petition remanded for trial. The Chief Executive Officer of the Waqf Board, the Returning Officer, the Principal Secretary to the Revenue Department and the petitioner were examined. The first respondent alone contested the Election Petition maintaining that the Chairperson of the Waqf Board is not holding an office of profit under the Government of the State as alleged.

4. The Chief Executive Officer of the Waqf Board proved Ext.X1 Government Order sanctioning the payment of honorarium and the telephone bills in regard

to the Chairperson. He also proved Ext.X2 series Travelling Allowance bills submitted by the Chairperson in addition to Exts.X3, X4 and X5 letters relating to the resignation of the Chairperson. The documents pertaining to the Travelling Allowance, use of the official car and the payment of fees and allowances to the members were marked Exts.X6 to X10. The Returning Officer proved Ext.Y1 objection filed by the petitioner and Ext.Y2 notes of arguments put in by the first respondent. He also proved Ext.Y3 nomination filed by the first respondent and Ext.Y4 letter addressed by the Chief Executive Officer forwarding the letter of resignation. The Principal Secretary to the Revenue Department proved Ext.Z1 letter of resignation put in by the first respondent and Ext.Z2 notes of the Government accepting the resignation. The proceedings relating to the convening of the meeting of the members of the Waqf Board to elect another Chairperson as the Successor were marked Ext.Z3. The petitioner proved Exts.Z4 and Z5 queries obtained under the Right to Information Act relating to the resignation and the drawing of emoluments by the first respondent. The first respondent did not mount the witness box and the documentary evidence adduced is not much germane since there is hardly any factual dispute.

5. I heard Mr.K.Ramakumar, Senior Advocate on behalf of the petitioner and Mr.M.K.Damodaran, Senior Advocate on behalf of the first respondent.

6. The first question to be considered is as to whether the Chairperson of the Waqf Board is holding an office of profit in order to be disqualified to be chosen as a member of the Legislative Assembly. The Chief Executive Officer has deposed that the Chairperson is entitled to travelling allowance for the meetings in addition to honorarium. The same would be paid out of the funds of the Waqf Board constituted by way of grant from the State Government as well as contribution from the Waqfs. The Waqfs having a net annual income of ₹ 5000/- and more are liable to pay contribution to the Waqf Board under Section 72 of the Waqf Act, 1995 ('the Act' for short). The Chairperson is provided with a car and a chauffeur by the Waqf

Board and the petrol charges for official journey is met out of the funds of the Waqf Board. Even the charges for the telephone used by the Chairperson is met from out of the funds of the Waqf Board as revealed from Ext.X1 order of the Revenue (F) Department.

7. The Supreme Court in Shibu Soren v. Dayanand Sahay and others [(2001) 7 SCC 425] has held as follows:-

> “In common parlance the expression 'profit' connotes an idea of some pecuniary gain. If there is really some way, its label - 'honorarium' - 'remuneration' - 'salary' is not material - it is the substance and not the form which matters and even the quantum or amount of 'pecuniary gain' is not relevant - what needs to be found out is whether the amount of money receivable by the person concerned in connection with the office he holds, gives to him some 'pecuniary gain', other than as 'compensation' to defray his out-of-pocket expenses, which may have the possibility to bring that person under the influence of the executive, which is conferring that

benefit on him."

The Supreme Court in Jaya Bhachan v. Union of India and others [(2006) 5 SCC 266] has held as follows:-

> "The term 'holds an office of profit' though not defined, has been the subject matter of interpretation, in several decisions of this Court. An office of profit is an office which is capable of yielding a profit or pecuniary gain. Holding an office under the Central or State Government, to which some pay, salary, emolument, remuneration or non-compensatory allowance is attached, is 'holding an office of profit'. The question whether a person holds an office of profit is required to be interpreted in a realistic manner. Nature of the payment must be considered as a matter of substance rather than of form. Nomenclature is not important. In fact mere use of the word 'honorarium' cannot take the payment out of the purview of profit, if there is pecuniary gain for the recipient. Payment of honorarium in addition to daily allowances in the nature of compensatory allowances, rent free accommodation and chauffeur driven car

> at State expense, are clearly in the nature of remuneration and source of pecuniary gain and hence constitute profit. For deciding the question, as to whether one is holding an office of profit or not, what is relevant is whether the office is capable of yielding a profit or pecuniary gain and not whether the person actually obtained a monetary gain. If the 'pecuniary gain' is 'receivable' in connection with the office then it becomes an office of profit, irrespective of whether such pecuniary gain is actually received or not. If the office carries with it, or entitles the holder to, any pecuniary gain other than reimbursement of out-of-pocket/ actual expenses, then the office will be an office of profit for the purpose of Article 102 (1) (a)."

The Supreme Court again in U.C.Raman v. P.T.A.Rahim and others [(2014) 8 SCC 934] has held as follows:-

> "This Court has given categorical clarification on more than one occasion that an 'office of profit' is an office which is capable of yielding a profit or pecuniary gain. The word 'profit ' has always been treated equivalent to

> or a substitute for the term 'pecuniary gain'. The very context in which the word 'profit' has been used after the words 'office of', shows that not all the offices are disqualified but only those which yield pecuniary gains as profit other than mere compensatory allowances, to the holder of the office."

The post of Chairperson of the Waqf Board carries with it the emoluments of honorarium of ₹ 2000/- per month in addition to travelling expenses apart from a chauffeur driven car and a telephone. The monetary benefits though styled as honorarium is nevertheless a pecuniary gain which is sourced from the own funds of the Waqf Board constituted under Section 77 of the Act. Thus pecuniary gain is receivable in connection with the office (whether or not it was received) and therefore the first respondent was holding an office of profit as the Chairperson of the Waqf Board.

8. The next question to be considered is as to whether the first respondent continued to be a Chairperson as on the date of nomination and its

acceptance or even on the date of election. The first respondent has contended that he did submit Ext.X3 resignation letter on 21.3.2011 along with Ext.X4 covering letter to the Waqf Board. The contention of the first respondent is that he ceased to be the Chairperson of the Waqf Board on 23.3.2011 on which date was Ext.Y3 nomination paper filed. The resignation letter is seen forwarded by the Waqf Board to the State Government by Ext.X5 letter dated 28.3.2011 with a request to take further action. Section 19 of the Act dealing with the resignation of the Chairperson and members of the Waqf Board is as follows:-

> 19. Resignation of Chairperson and members:- The Chairperson or any other member may resign his office by writing under his hand addressed to the State Government.
>
> Provided that the Chairperson or the member <u>shall continue in office until the appointment of his successor is notified in the Official Gazette.</u> (emphasis supplied)

It is conceded by all that a successor to the post of

Chairperson of the Waqf Board was elected only in the month of July, 2011 and therefore the first respondent is deemed to continue in office till such time. The Chairperson of the Waqf Board holds office until the appointment of his successor is notified in the official gazette as per Section 19 of the Act. The irresistible conclusion therefore is that the first respondent held the post of Chairperson of the Waqf Board even on the date of declaration of results.

9. The further question to be considered is as to whether the first respondent was holding an office of profit under the Government of Kerala in order to incur disqualification. The relevant part of Article 191 of the Constitution of India is as follows:-

> 191. Disqualifications for membership:- (1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State-
>
> (a) if he holds any office of profit under the Government of India or

> <u>the Government of any State</u> specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder;
>
> (b) x x x x
>
> (c) x x x x
>
> (d) x x x x
>
> (e) x x x x
>
> Explanation:- For the purposes of this clause, a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State. (emphasis supplied)

The Supreme Court in Satrucharla Chandrasekhar Raju v. Vyricherla Pradeep Kumar Dev [(1992) 4 SCC 404] has opined as follows as regards the holding of an office of profit 'under the Government':

> “11. On a careful examination of the ratio laid down in the abovementioned cases some of the tests or principles that emerge for determining whether a person holds an office of profit under the Government, may be summarised thus:

(1) The power of the Government to appoint a person in office or to revoke his appointment at its discretion. The mere control of the Government over the authority having the power to appoint, dismiss, or control the working of the officer employed by such authority does not disqualify that officer from being a candidate for election as a member of the legislature.

(2) The payment from out of the government revenue are important factors in determining whether a person is holding an office of profit or not of the Government. Though payment from a source other than the government revenue is not always a decisive factor.

(3) The incorporation of a body corporate and entrusting the functions to it by the Government may suggest that the statute intended it to be a statutory corporation independent of the Government. But it is not conclusive on the question whether it is really so independent. Sometimes, the form may be that of a body

> corporate independent of the Government, but in substance, it may just be the alter ego of the Government itself.
>
> (4) The true test of determination of the said question depends upon the degree of control the Government has over it, the extent of control exercised by very other bodies or committees, and its composition, the degree of its dependence on the Government for its financial needs and the functional aspect, namely, whether the body is discharging any important governmental function or just some function which is merely optional from the point of view of the Government. (emphasis supplied)

The above decision has been quoted with approval in Shibu Soren's case (supra) and is in tune with Shivamurthy Swamy v. Agadi Sanganna Andanappa [(1971) 3 SCC 870] and other decisions.

10. No doubt that the Waqf Board is a creature of the Statute as revealed from Section 3(c) of the Act and its composition under Section 14 thereof includes elected as well as nominated members. The Waqf

Board consists of 10 such members and the election and nomination is as per Rule 8 of the Kerala Waqf Rules, 1996 ('the Rules' for short). One amongst the members would be elected as the Chairperson of the Waqf Board at a meeting convened for the purpose as per Section 14 (8) of the Act. The appointment as well as the removal of the members of the Waqf Board (including the Chairperson) has to be notified by the State Government as per Sections 14(9) and 20 of the Act. But the mere control of the State Government over the Waqf Board in the matter of appointment or removal of its members does not mean that they hold an office of profit under it. Similarly the fact that the own fund of the Waqf takes in grant from the State Government under Section 77 of the Act is also not a decisive factor.

11. It should however be noticed that the Waqf Board is a body corporate having perpectual succession and a common seal with power to acquire and hold property as well as to transfer it. Section 13 of the Act deals with the incorporation of the Waqf Board and Section 13(3) of the Act is as follows:-

> “The Board shall be a body corporate having perpectual succession and a common seal with power to acquire and hold property and to transfer any such property subject to such conditions and restrictions as may be prescribed and shall by the said name sue and be sued.”

I am not persuaded to think that the Waqf Board is just an alter ego of the State Government and am inclined to hold that it is a body corporate independent of the State Government in the Scheme of the Act. The fact that the State Government can issue directions to the Waqf Board under Section 65(4) of the Act does not at all detract from this conclusion.

12. The true test lies in the question as to whether the Waqf Board is discharging any important Governmental function or just some function optional in the point of view of the State Government. The powers and functions of the Waqf Board as delineated under Section 32 of the Act are confined to the general superintendence of Waqfs registered with it. The Waqf Board shall ensure that the Waqfs under its

superintendence are properly maintained, controlled and administered. It is the duty of the Waqf Board to see to it that the income generated is duly applied to the objects and for the purposes for which the Waqf was created or intended. The Waqf Board in so exercising its powers under the Act shall act in conformity with the directions of the dedicator and the usage or custom of the Waqf sanctioned by the School of Muslim law. The powers and functions of the Waqf Board under Section 32 of the Act are more in the interest of the Waqif (Dedicator) and the Waqf and no Governmental function is discharged by it. This prompts me to hold that the members of the Waqf Board are not holding any office of profit under the State Government to incur the disqualification as alleged.

13. The members of the Waqf Board includes also its Chairperson as is explicit from Section 3(h) of the Act and such person has no disqualification for being chosen as a member of the Legislative Assembly. The composition of the Waqf Board under Section 14 of the Act takes in members elected from the electoral

college consisting of Muslim members of the State Legislature as per Section 14(1)(b)(ii) thereof. It is incongruous to hold that Muslim members of the State Legislature can become members of the Waqf Board or its Chairperson and not vice versa. A Chairperson of the Waqf Board is not disqualified from being a member of the Legislative Assembly and the allegation on this count against the first respondent fails. True it is that Paliament (Prevention of Disqualification) Act, 1959 declares that certain holders of office of profit under the Government are not disqualified. And the Waqf Boards in the States of Tamilnadu and West Bengal as well as the Central Waqf Council do find a place as among those who are not disqualified. The fact that the Kerala Waqf Board has not been mentioned in the said Act does not automatically follow that its members hold an office of profit under the State Government. The Returning Officer has validly overruled the objections of the petitioner and accepted the nomination filed by the first respondent which cannot be faulted with. I do not find any ground to declare the election of the first respondent as a member of the Legislative Assembly to be void in terms of Section 100 of the Representation of the People Act, 1951.

The Election Petition is dismissed. No costs.

Sd/-
V.CHITAMBARESH,
Judge.

nj.