

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.8107 OF 2014

Habib Fakhri,
Age-63 years, Occu-Agriculturist,
R/o.902, Golden Tower Society,
Manipada, Kalina, Santakruz (East),
Mumbai-400 098

.. PETITIONER

VERSUS

The State of Maharashtra
through its Minister
Minority Development Department,
Mantralaya, Mumbai

.. RESPONDENT

Mr.P.M.Shah, Senior Counsel for the petitioner
Mr. V.D.Hon, Senior Counsel with Mr.A.G.Magare, AGP for
the respondent

WITH

WRIT PETITION NO.7643 OF 2015

1. Mohammed Azeem Kirkiray
S/o Hisamuddin Kirkiray
Age-54 years, Occu-Business,
R/o. Mujawar Chawal, Room No.4
Dargah Street, Mahim (West)
Mumbai-16

... PETITIONERS

2. Dr. Mudassir Lambe
Age-52 years, Occu-Business,
R/o. Mujawar Chawal, Room No.4
Dargah Street, Mahim (West)
Mumbai-16
3. Mohammad Sabir Ghattay
Age-60 years, Occu-Business,
R/o. Mujawar Chawal, Room No.4
Dargah Street, Mahim (West)
Mumbai-16
4. Anwar Deshmukh
Age-55 years, Occu-Business,
R/o. Mujawar Chawal, Room No.4
Dargah Street, Mahim (West)
Mumbai-16

VERSUS

1. The State of Maharashtra
Through its Minister,
Minority Development Department,
Mantralaya, Mumbai
2. Habib Fakihi
Age-63 years, Occu- Agriculturist,
R/o.902, Golden Tower Society,
Mnipada, Kalina, Santacruz (East)
Mumbai-98
3. Chief Executive Officer,
Maharashtra State Board of Wakf
At Panchakki, Aurarangabad

...RESPONDENTS

Mr.V.D.Sapkal, Advocate for the petitioners
Mr.P.M.Shah, Senior Counsel with Mr.S.S. Kazi, Advocate
for respondent No.2

**CORAM : A.V.NIRGUDE &
V.L. ACHLIYA, JJ.
DATED : 03.05.2016**

ORAL JUDGMENT [PER: A.V. NIRGUDE, J.]

1. Heard learned counsel for the parties. Rule. Rule made returnable forthwith and heard finally with the consent of the learned counsel appearing for the parties.

2. Both these petitions can be disposed of by this common judgment, though the question raised in second writ petition is a little different.

3. The facts leading to these litigations, in short, can be stated as under:-

4. For the sake of convenience the petitioner in Petition No.8107 of 2014 would be referred to as the petitioner and the petitioner in petition No.7643 of 2015 would be referred to as the opponent.

5. The petitioner was appointed as 'Muttawalli' of Mahim Jama Masjid, a registered WAKF. This change in the management of the WAKF was notified under Section 42 of the WAKF Act, 1995. The petitioner then contested the election to the post of member of the State Board of WAKF, and got elected from the category of 'Muttawalli'.

The State of Maharashtra issued notification on 03.04.2013, notifying his appointment as a member from 'Muttawalli' category.

6. The petitioner in Writ Petition No.7643 of 2015 raised an objection as to the appointment of the petitioner as Mutawalli of Mahim Jama Masjid before the Chief Executive Officer with whom the proceedings to record the change report was pending. The order passed by the Chief Executive Officer was challenged before the Presiding Officer, Maharashtra Tribunal, Aurangabad. Vide order dated 09.04.2014, the learned Presiding Officer, Maharashtra Wakf Board, Aurangabad set aside the order dated 09.04.2014 passed by the Chief Executive Officer accepting the change report and remanded the matter for fresh enquiry to decide the matter afresh after giving an opportunity of hearing to both the parties. Admittedly the proceeding is now pending before the Chief Executive Officer. The State Government has treated that the order passed by the Presiding Officer Wakf Tribunal as disqualification to continue as a member of a State Wakf Board and in exercise of the powers under Section 20(1) (a) of the Wakf Act, 1995, vide notification dated 04.09.2014 the State of Maharashtra removed the petitioner Habib Fakihi from being continuing as a member of Maharashtra State Wakf Board. Being aggrieved by the

said order the petitioner has preferred the writ petition No.8107 of 2014 challenging the notification dated 04.09.2014 issued by the State Government on the various grounds as set out in the petition. The petitioners in writ petition No.7643 of 2015 have preferred this writ petition seeking writ of *quo-warranto* holding that respondent No.2 is not eligible for holding post of Maharashtra State Wakf Board pursuant to order dated 09.04.2014 passed in W.A. No. 80/2012.

7. The opponent on the other hand contended that the petitioner's appointment as 'Muttawalli' of Mahim Jama Masjid itself bad-in-law, in view of and therefore, his appointment as a member of State Wakf Board is contrary to the provisions of the Act. The Court should therefore issue writ of *quo-warranto* prohibiting from acting and holding the office of member of State Board of WAKF.

8. The relevant provisions of the WAKF Act are quoted below.

"Section-14

“ Composition of Board.—

(1) The Board for a State and the Union territory of Delhi* shall consist of—

(a) a Chairperson;

(b) one and not more than two members, as the State Government may think fit, to be elected from each of the electoral colleges consisting of—

(i) Muslim Members of Parliament from the State or, as the case may be, the

Union territory of Delhi*,

(ii) Muslim Members of the State Legislature,

(iii) Muslim Members of the Bar Council of the State, and

(iv) mutawallis of the wakfs having an annual income of rupees one lakh and above;

Explanation-I- For the removal of doubts, it is hereby declared that the members from categories mentioned in sub-clauses (i) to (iv), shall be elected from the electoral college constituted for each category.

Explanation-II- For the removal of doubts it is hereby declared that in case a Muslim member ceases to be a member of parliament from the State or National Capital Territory of Delhi as referred to in sub-clause (i) of Clause (b) or ceases to be a member of the State Legislative Assembly as required under sub-clause (ii) of clause (b), such member shall be deemed to have vacated the office of the member of the Board for the State or National capital Territory of Delhi, as the case may be, from the date of from which such member ceased to be a member of parliament from the State or National Capital Territory of Delhi, or a member of the State Legislative Assembly, as the case may be.

(c) one and not more than two members to be nominated by the State Government representing eminent Muslim organisations;

(d) one and not more than two members to be nominated by the State Government, each from recognised scholars in Islamic Theology;

(e) an officer of the State Government not below the rank of Deputy Secretary.

1-A No Minister of the Central Government or, as the case may be, a State Government shall be elected or nominated as a member of the Board:

Provided that in case of a Union territory, the Board shall consist of not less than five and not more than seven members to be appointed by the Central Government from categories specified under sub-clauses (i) to (iv) of clause (b) or clauses (c) to (e) in sub-section (1)

Provided further that at least two Members appointed on the Board shall be women.

Provided also that in every case where the system of mutawalli exists there shall be one mutawalli as the member of the Board.

(2) Election of the members specified in clause (b) of sub-section (1) shall be held in accordance with the system of proportional representation by means of a single transferable vote, in such manner as may be prescribed: Provided that where the number of Muslim Members of Parliament, the State Legislature or the State Bar Council, as the case may be, is only one, such Muslim Member shall be declared to have been elected on the Board: Provided further that where there are no Muslim Members in any or the categories mentioned in sub-clauses (i) to (iii) of clause (b) of sub-section (1), the ex-Muslim Members of Parliament, the State Legislature or ex-member of

the State Bar Council, as the case may be, shall constitute the electoral college.

(3) Notwithstanding anything contained in this section, where the State Government is satisfied, for reasons to be recorded in writing, that it is not reasonably practicable to constitute an electoral college for any of the categories mentioned in sub-clauses (i) to (iii) of clause (b) of sub-section (1), the State Government may nominate such persons as the members of the Board as it deems fit.

(4) The number of elected members of the Board shall at, all times, be more than the nominated members of the Board except as provided under sub-section (3).

(5) Where there are Shia wakfs but no separate Shia Wakfs Board exists, at least one of the members from the categories listed in sub-section (1), shall be a Shia Muslim.

(6) In determining the number of Shia members or Sunni members of the Board, the State Government shall have regard to the number and value of Shia wakfs and Sunni wakfs to be administered by the Board and appointment of the members shall be made, so far as may be, in accordance with such determination.

(7) In the case of the Union territory other than Delhi, the Board shall consist of not less than three and not more than five members to be appointed by the Central Government from amongst the categories of persons specified in sub-section (1): Provided that there shall be one mutawalli as the member of the Board.

(8) Whenever the Board is constituted or re-constituted, the members of the Board present at a meeting convened for the purpose shall elect one from amongst themselves as the Chairperson of the Board.

(9) The members of the Board shall be appointed by the State Government by notification in the Official Gazette.

Section-15

Term of Office – The members of the Board shall hold office for a term of five years from the date of notification referred to in sub-section (9) of Section 14.

Section-16

Disqualification for being appointed, or for continuing as, a member of the Board.—A person shall be disqualified for being appointed, or for continuing as, a member of the Board if—

(a) he is not a Muslim and is less than twenty-one years of age;

(b) he is found to be a person of unsound mind;

- (c) he is an undischarged insolvent;
- (d) he has been convicted of an offence involving moral turpitude and such conviction has not been reversed or he has not been granted full pardon in respect of such offence;
- (da) he has been held guilty of encroachment on any waqf property;
- (e) he has been on a previous occasion—
 - (i) removed from his office as a member or as a mutawalli, or
 - (ii) removed by an order of a competent court or tribunal from any position of trust either for mismanagement or for corruption.

Section-20

Removal of Chairperson and member.—

- (1) The State Government may, by notification in the Official Gazette, remove the Chairperson of the Board or any member thereof if he—
 - (a) is or becomes subject to any disqualifications specified in section 16; or
 - (b) refuses to act or is incapable of acting or acts in a manner which the State Government, after hearing any explanation that he may offer, considers to be prejudicial to the interests of the wakfs; or
 - (c) fails in the opinion of the Board, to attend three consecutive meetings of the Board, without sufficient excuse.
- (2) Where the Chairperson of the Board is removed under sub-section (1), he shall also cease to be a member of the Board.

Section-64

Removal of mutawalli.—

- (1) Notwithstanding anything contained in any other law or the deed of wakf, the Board may remove a mutawalli from his office if such mutawalli—
 - (a) has been convicted more than once of an offence punishable under section 61; or
 - (b) has been convicted of any offence of criminal breach of trust or any other offence involving moral turpitude, and such conviction has not been reversed and he has not been granted full pardon with respect to such offence; or
 - (c) is of unsound mind or is suffering from other mental or physical defect or infirmity which would render him unfit to perform the functions and discharge the duties of a mutawalli; or
 - (d) is an undischarged insolvent; or
 - (e) is proved to be addicted to drinking liquor or other spirituous preparations, or is addicted to the taking of any narcotic drugs; or
 - (f) is employed as a paid legal practitioner on behalf of, or against, the wakf;

or

(g) has failed, without reasonable excuse, to maintain regular accounts for two consecutive years or has failed to submit, in two consecutive years, the yearly statement of accounts, as required by sub-section (2) of section 46; or

(h) is interested, directly or indirectly, in a subsisting lease in respect of any wakf property, or in any contract made with, or any work being done for, the wakf or is in arrears in respect of any sum due by him to such wakf; or

(i) continuously neglects his duties or commits any misfeasance, malfeasance, misapplication of funds or breach of trust in relation to the wakf or in respect of any money or other wakf property; or

(j) wilfully and persistently disobeys the lawful orders made by the Central Government, State Government, Board under any provision of this Act or rule or order made thereunder;

(k) misappropriates or fraudulently deals with the property of the wakf.

(2) The removal of a person from the office of the mutawalli shall not affect his personal rights, if any, in respect of the wakf property either as a beneficiary or in any other capacity or his right, if any, as a sajjadanashin.

(3) No action shall be taken by the Board under sub-section (1), unless it has held an inquiry into the matter in a prescribed manner and the decision has been taken by a majority of not less than two-thirds of the members of the Board.

(4) A mutawalli who is aggrieved by an order passed under any of the clauses (c) to (i) of sub-section (1), may, within one month from the date of the receipt by him of the order, appeal against the order to the Tribunal and the decision of the Tribunal on such appeal shall be final.

(5) Where any inquiry under sub-section (3) is proposed, or commenced, against any mutawalli, the Board may, if it is of opinion that it is necessary so to do in the interest of the wakf, by an order suspend such mutawalli until the conclusion of the inquiry: Provided that no suspension for a period exceeding ten days shall be made except after giving the mutawalli a reasonable opportunity of being heard against the proposed action.

(6) Where any appeal is filed by the mutawalli to the Tribunal under sub-section (4), the Board may make an application to the Tribunal for the appointment of a receiver to manage the wakf pending the decision of the appeal, and where such an application is made, the Tribunal shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), appoint a suitable person as receiver to manage the wakf and direct the receiver so appointed to ensure that the customary or religious rights of the mutawalli and of the wakf are safeguarded.

(7) Where a mutawalli has been removed from his office under sub-section (1), the Board may, by order, direct the mutawalli to deliver possession of the wakf property to the Board or any officer duly authorised in this behalf or to any person or committee appointed to act as the mutawalli of the wakf

property.

(8) A mutawalli of a wakf removed from his office under this section shall not be eligible for re-appointment as a mutawalli of that wakf for a period of five years from the date of such removal.

9. The first question that arose for our consideration is, whether the order of the Tribunal dated 09.04.2014 amounted to disqualification of the petitioner under Section 16 of the Wakf Act, 1995. After the petitioner was appointed as 'Muttawalli' of Mahim Jama Masjid in 2012, he became entitled to contest the election for the office of member of State WAKF Board from the category of Mutawalli. He was elected from Electoral College of Muttawalli. Accordingly notification under sub-section 9 of Section 14 was, thereafter issued by the State Government appointing petitioner as a member of State Wakf Board. By virtue of said notification, petitioner came to be appointed as a member of Wakf Board for a term of five years. Section 20 of the Wakf Act provides that the State of Maharashtra could remove the member of Wakf Board as that of petitioner if he had incurred disqualification specified in Section 16(i)(a). It is no one's case that the petitioner has incurred any disqualification as provided under Section 16. The relevant portion of the impugned notification dated 04.09.2014 issued by Minorities Development Department, Mumbai dated 04.09.2014 reads as under.

"AND WHEREAS, Shri Habeeb Fakhir was

appointed as Mutawalli of Mahim Jama Masjid, Mumbai vide order dated the 9th April, 2012;

AND WHEREAS, the said order dated the 9th April, 2012 of appointment of Shri Habeeb Fakhir as Muttawalli of Mahim Jama Masjid, Mumbai has been quashed and set aside by the Maharashtra Wakf Tribunal, Aurangabad vide order dated the 9th April, 2014 in Wakfs Application No.80 of 2012;

AND WHEREAS, in view of the provisions of the sub-clause (I) of clause (e) of section 16 of the Wakf Act, 1995 the said Shri Habeeb Fakhir has become disqualified for being continuing as the member of the said Board, as he is no more Muttawalli of the Wakfs having an annual income of Rupees one lakh and above;

Now, therefore, in exercise of the powers conferred by clause (a) of Sub-section (1) of section 20 of the Wakf Act, 1995 (43 of 1995), the Government of Maharashtra hereby removes Shri Habeeb Fakhir from being continuing as a member of the Maharashtra State Board of Wakfs, having its headquarters at Panchakki, Aurangabad."

10. In our view what is recorded in the impugned notification dated 04.09.2014 that the petitioner has become disqualified from being continued as a member of Board as per Section 16(e)(i) of the Wakf Act, as he is no more Mutawalli appears to be erroneous and based upon misinterpretation of order dated 09.04.2014. As discussed above President of Wakf Tribunal has only set aside the order passed by the Chief Executive Officer accepting the change report and remanded the matter for fresh enquiry. Undisputedly the enquiry in respect of change report is

pending before the Chief Executive Officer. By no stretch of imagination the order dated 09.04.2014 passed by the presiding officer can be interpreted in a sense that the petitioner had been removed as Mutawalli and he is no more continued as a Mutawalli of Jama Masjid Mahim. In fact it is nobody's case that the petitioner has incurred disqualification as provided under Section 16. Therefore the impugned notification appears to be issued under some misconception and wrong interpretation of the order passed by the presiding office of the Wakf Tribunal.

11. Section 42 of the Wakf Act requires to notify the change in the management to WAKF Board. In this case, the petitioner was appointed as 'Muttawalli', and in such proceeding, the question would be, whether the change is lawful. Such enquiry is still going on. In fact, as said above, the Tribunal has only referred the case back to the Board for deciding the matter afresh by giving opportunity of hearing to all concerned.

12. Assuming that finally the appointment is held to be illegal, still such order would not amount to disqualification under Section 16 of the Wakf Act. Once 'Muttawalli' is appointed, his removal is possible only through operation of Sections 64 and 83 of the Wakf Act. Clause (e) of Section 16 contemplates incurring of

disqualification if a member is removed from his office either as a member of the Board or as 'Muttawalli' by an order of competent Court or Tribunal. The order passed under Section 42 is not an order of removal. The order of removal is passed only after an enquiry into moral conduct of a member or Muttawalli and in contingencies referred to in Section 64. Muttawalli's election as a member of Board is an independent affair.

13. As stated supra the petitioner got elected as a member of State Wakf Board from the category of Mutawalli. By virtue of the notification the petitioner has been appointed for a period of five years. The State Government may remove the Chairperson or Board of Member thereon if any contingency as referred in Clause-a to c of Sub-section (1) of Section 20 arose. In the instant case the impugned notification reflects that the State Government has exercised its power under clause-a of Sub-section (1) of Section 20 to remove the petitioner as a member of Wakf. Such powers to remove member as of the petitioner can be exercised if such member attracts disqualification as specified in Section 16 of the said Act. As discussed in foregoing paras no such eventuality has occurred whereby the petitioner has incurred disqualification as contemplated under Section 16 and remove him from the office as Mutawalli. Despite the

appointment of the petitioner as a Mutawalli is subjudice and pending for enquiry with Chief Executive Officer, the State Government could not have exercised powers under Section 16 of the Wakf Act to remove the petitioner.

14. It is pertinent to note that the composition of the Wakf Board consists of the members from the various categories which include members of the parliament, members of the State Legislative Assembly, Muslim Members of the Bar Council, Mutawalli's and other persons as specified in the said Act. Section 15 of the said Act and specifically provide that the appointment of such members for a term of five years from the date of notification issued under Sub-section (9) of Section 14. Admittedly tenure of the petitioner is five years from the date of issuance of the notification of the appointment made by the State Government i.e. from 04.09.2014. Thus considering the mandate of Section 15 of the Wakf Act, 1995 which prescribed the tenure of the member as that of petitioner as five years same cannot be curtailed by the State Government by issuing such notification. The State Government thus have no authority to terminate the members once appointed in accordance with Section 14. It is pertinent to note that as per Explanation-II of Sub-Section 14 of the said Act it has been expressly provided

that Muslim members appointed on the Wakf Board from the category of member of Parliament as well as State shall be deemed to have vacated office of member of the Board as the case may be, from the date of which such members ceased to be member of parliament of the State or National capital or a member of a State Legislature Assembly as the case may be. Thus Explanation-II to sub-section 14 restricts the tenure of the member of the Board in respect of particular category of members i.e. the member of Parliament and member of State Legislature Assembly appointed on State board. There is no such deeming provision made in Section 14 providing for ceasation as the member of the Board from the category other than the members of the parliament and Legislative Assembly appointed on the Board before the completion of their tenure as provided under Section 15 of the said Act. In absence of attracting any disqualification as contemplated under Section 16 of the said Act, 1995, the impugned notification issued by the State Government is *per se* illegal and liable to be quashed and set aside.

15. In view of above the State Government's view that the petitioner became disqualified for continuing in the office of member due to order dated 09.04.2014, is erroneous and untenable in law. In the result the Writ Petition No.8107 of 2014 deserves to allowed. Accordingly

same is allowed.

16. As regards the other petition i.e. writ Petition No. 7643 of 2015 seeking writ of *quo-warranto* against the petitioner, we found no merits in it. Learned counsel tried to suggest that since the petitioner's appointment as Mutawalli is illegal, untenable and non-est, the Court should issue *quo-warranto*. The law of *quo-warranto* is explained in judgment of the Supreme Court in the case of **Rajesh Awasthi Vs Nandlal Jaiswal and others**, reported in **(2013) 1 Supreme Court Cases 501**. In this judgment, para No.30 of the Supreme Court has quoted the case of **the University of Mysore and another Vs C.D. Govinda Rao**. Wherein Law of *quo-warranto* is succinctly stated.

"30. In the University of Mysore V. C.D.Govinda Rao, while dealing with the nature of the writ of *quo warranto*, Gajendragadkar, J. has stated thus: (AIR p.494, para 7)

"7 .. Broadly stated that, the *quo warranto* proceeding affords a judicial enquiry in which any person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty; if the inquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of *quo warranto* ousts him from that office. In other words, the procedure of *quo warranto* confers jurisdiction and authority

on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right. It would thus be seen that if these proceedings are adopted subject to the conditions recognised in that behalf, they tend to protect the public from usurpers of public office; in some cases, persons not entitled to public office may be allowed to occupy them and to continue to hold them as a result of the connivance of the executive or with its active help, and in such cases, if the jurisdiction of the courts to issue writ of quo warranto is properly invoked, the usurper can be ousted and the person entitled to the post allowed to occupy it. It is thus clear that before a citizen can claim a rite of quo warranto, he must satisfy the court, inter alia, that the office in question is a public office and is held by usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not"

17. In the instant case We are not inclined to exercise our discretion for issuing *quo-warranto* as desired by the opponent. The first and the foremost reason is that litigation under Section 42 of the Act objecting the appointment of petitioner as a Mutawalli of Jama Masjid is still pending before Chief Executive Officer. Besides, this the office of member vis-a-vis office of 'Muttawalli' are two different positions. As said above,

the person may hold office of 'Muttawalli' and member of the State Board, even after ceases to be 'Muttawalli' as his term as a member of the Board is for five years subject to provisions of Section 20 of the Act.

ORDER

I) Writ Petition No.8107 of 2014 stands allowed in terms of prayer clause (A) and (B). Rule made absolute accordingly.

II) Writ Petition No.7643 of 2015 is dismissed. Rule stands discharged.

[V.L. ACHLIYA, J.]

[A.V.NIRGUDE, J.]