

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.08.2017

CORAM

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

**C.R.P. NPD No.1159 of 2009
and M.P.No.1 of 2009**

M.Jahabar Hussain

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Petitioner

Vs

1.S.M.Mohammed Fathi Ali
2.Chief Executive Officer
The Tamil Nadu Wakf Board
Chennai.
3.Superintendent
Wakf Board
Thanjavur.
4.Wakf Inspector
Nagapattinam
5.Pandian

...

Respondents

Civil Revision Petition is filed under Section 83 (9) of Wakf Act 1995 against the judgment and decree dated 18.02.2009 passed in W.O.P.No.9 of 2006 on the file of the Court of Subordinate Judge, Nagapattinam.

For Petitioner : Mr.K.Govi Ganesan

For Respondents : Mr.S.Vadivel Murugan
for R1
Mr.V.Lakshmi Narayanan
for R2 & R3
No appearance for R4 & R5

ORDER

This Civil Revision Petition is filed against the judgment and decree dated 18.02.2009 passed in W.O.P.No.9 of 2006 on the file of the Court of Subordinate Judge, Nagapattinam.

2. The petitioner is the first respondent, the first respondent is the petitioner and respondents 2 to 5 are the respondents 2 to 5 in W.O.P.No.9 of 2006 on the file of Sub Court, Nagapattinam. The first respondent filed the WOP for declaring the appointment of the petitioner as Muthavalli of the V.M.Hussain Sahib Rawthar Trust by the second respondent in RC No.12727/C3/2004 dated 07.02.2006 as null and void and to cancel the same by appointing the first respondent as trustee and for consequential relief.

3. According to the first respondent, his grand father Osanna V.M.Hussain Sahib Rawthar created a trust by deed of trust dated 26.01.1924 to carryout the acts mentioned therein. According to the terms of the trust deed, Osanna V.M.Hussain Sahib Rawthar was the first trustee till his life time. After his death, his brother Davood Sahib Rawthar was the trustee till his life time. After the death of the brother of the original wakif, the eldest male descendant of original

trustee shall be the Muthavalli. The said Osanna V.M.Hussain Sahib Rawthar had two wives by name Mohammed Gani Ammal and Kathija. The first respondent's father was the only son of first wife of his grand father Osanna V.M.Hussain Sahib Rawthar. The petitioner's father was the first son of second wife of his grand father. The second son of second wife by name Mohammed Ibrahim died issueless. The first respondent's father was the trustee after the death of original trustee, their grandfather. At the time of death of first respondent's father in the year 1985, the first respondent was in Malaysia. In view of the above, the petitioner's father became the trustee and was managing the Trust. During his period as trustee, he executed a trust deed dated 21.04.1988 with modified terms that his eldest male member through his son must be the trustee. If there is no male member to his sons, the eldest male member through his daughter must be the trustee. After the death of the petitioner's father, the petitioner became the trustee and was managing the trust. After that, the first respondent gave representation to second respondent to appoint him as Muthavalli/trustee after removing the petitioner as Muthavalli / trustee. The first respondent also claimed that the trust deed dated 21.04.1988 executed by the petitioner's father altering the terms of original trust deed dated 26.01.1924 as not valid.

4. The petitioner filed counter and contested the WOP on the ground that the first respondent is a citizen of Malaysia. The petitioner is the eldest male member and as per the trust deed, only the eldest male member can become Muthavalli. The petitioner is managing the trust after the death of his father, from the age of 21 years and he is acting as Muthavalli without any interruption. The second respondent conducted elaborate enquiry and vide order dated 07.02.2006, dismissed the petition filed by the first respondent. Hence, the first respondent filed WOP No. 9 of 2006 for the relief referred to above.

5. The 2nd respondent filed counter adopted by respondents 3 and 4 and submitted that the father of the petitioner executed a trust deed dated 21.04.1988 by which terms, the petitioner is entitled to act as a trustee. The first respondent is a citizen of Malaysia and has not claimed trusteeship for a longtime. Before the Tribunal, the Power of Attorney of first respondent viz. M.Syed Jainnulabudeen was examined as PW1 and six documents were marked on his side as Exs.P1 to P6. Sister of the petitioner by name Mahaboob Nisa, who is the Power of Attorney, was examined as RW1 and Mr.Sheik Ayub & Mr.Abdul Samadu were examined as RW2 & 3. Twenty Seven documents were marked on his side as Exs.R1 to R27.

6. The learned Judge, considering the pleadings, oral and documentary evidence, held that the trust deed dated 21.04.1988 executed by the father of the petitioner is not valid. The learned Judge, considering the voter ID filed by the first respondent, marked as Ex.P4 held that the first respondent is a citizen of India and allowed the WOP.

7. Against the said order dated 18.02.2009 passed in W.O.P.No.9 of 2006, the present Civil Revision Petition has been filed.

8. The learned counsel for the petitioner contended that the first respondent is a citizen of Malaysia and he cannot hold or possess immovable properties in India without special or general permission from Reserve Bank of India and he is debarred from holding trusteeship in Wakf. The learned Judge failed to see that the petitioner represented and admitted the said fact in the proof of affidavit filed in O.S.No.462 of 2004 which was marked as Ex.R27. The learned Judge erred in holding that the first respondent is not a citizen of Malaysia. Petitioner's father has executed trust deed dated 21.04.1988 whereby the terms of original deeds was validly modified and the same was accepted by the respondents 2 and 3. As per the terms of the said

trust deed, the petitioner alone is entitled to act as Muthavalli. The learned counsel for the petitioner further contended that the learned Judge erred in holding that the petitioner was represented by his Power of Attorney after recording that the petitioner gave evidence in the court.

9. The learned counsel for the first respondent submitted that the first respondent was doing business in Malaysia and returned to India in the month of May 2004. The authority has issued Voter ID to him which shows that he is a citizen of India. The original trustees formed a trust by a trust deed dated 26.01.1924 and formulated terms and conditions for appointment of trustee and the petitioner's father has no right to modify the said terms deleting the descendant of original trustee through his wife Mohammed Ganiammal. The respondents 2 and 3 have not properly conducted the enquiry and dismissed the petition filed by the first respondent. The petitioner is a permanent resident of Dubai and he was represented by his Power of Attorney Mahaboob Nisa. Even before the Wakf Board, during enquiry, she only represented the petitioner. She gave evidence as RW1 on behalf of the petitioner. The petitioner was not in India during pendency of WOP and he did not give any evidence. By inadvertence,

the Tribunal has stated that the petitioner has given evidence before the Tribunal. The first respondent is the eldest male member of the descendant of original trustee and as per the original trust deed dated 26.01.1924, he is the only qualified person to be appointed as trustee.

10. The learned counsel for respondents 2 and 3 submitted that the tenure of the petitioner as Muthavalli has already expired and thus the revision petition has become infructuous. The learned counsel for the respondents 2 and 3 also submitted that second respondent will start the procedure for appointment of Muthavalli / Trustee and that only Wakf Board has power to appoint Muthavalli / Trustee and Tribunal erred in appointing first respondent as Trustee. The learned counsel further submitted that the first respondent did not issue mandatory notice to the second respondent under Section 89 of the Act. Hence, Tribunal ought to have dismissed the WOP on this ground alone. In support of his contention, the learned counsel relied on the following judgments -

(i) 2006 (10) SCC 696 [M.P.Wakf Board v. Subhan Shah (Dead) by LRs and others.

28. The Tribunal had been constituted for the purposes mentioned in [Section 83](#) of the 1995 Act. It is

an adjudicatory body. Its decision is final and binding but then it could not usurp the jurisdiction of the Board. Our attention has not been drawn to any provision which empowers the Tribunal to frame a scheme. In absence of any power vested in the Tribunal, the Tribunal ought to have left the said function to the Board which is statutorily empowered therefor. Where a statute creates different authorities to exercise their respective functions thereunder, each of such authority must exercise the functions within the four corners of the statute.

(ii) 2003 (3) LW 184 [M.S.Abdul Hameed v. S.M.Sheik Mohammed & others]

19. No doubt, [Section 89](#) is mandatory and in the negative form as it comes to be revealed from the language of Section which reads: "No suit shall be instituted against the board in respect of any Act purporting to be done by it in pursuance of this Act or any rules made thereunder, until their expiration of two months next after notice in writing has been delivered to, or left at, the office of the Board, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left". The tenor and temper of the language employed in the Section leaves no room for any mis-interpretation to the effect of dispensing with

the notice under Section 89 and therefore so far as the warranting Section 89 is concerned, the only conclusion that the Court could arrive at is that no suit shall lie without compliance of Section 89 and in fact such a suit, as it has been instituted in the form of Wakf O.P., should not have been entertained and taken on file by the Tribunal.

11. Heard the learned counsel for the petitioner as well as respondents and perused the materials available on record.

12. The points for consideration arisen in this Civil Revision Petition is -

(1) Whether the trust deed dated 21.04.1988 executed by the father of the petitioner is valid and legal ?

(2) Whether the first respondent is disqualified from acting as Muthavalli ?

(3) Whether the OP is not maintainable for non-issuance of statutory notice under Section 89 of Wakf Act ?

13. The grandfather of the petitioner and first respondent is the trustee who created the trust by registered trust deed dated 26.01.1924. As per the terms of the trust deed, he was the original trustee till his death. After his death, his brother Davood Sahib Rawthar became the trustee. After the death of his brother, the eldest

male member must be the trustee. The original trustee had two wives. First respondent's father is the son of first wife. The petitioner's father is the son of second wife. The first respondent's father was acting as Muthavalli till his death. At the time of his death, the first respondent was in Malaysia. According to the first respondent, in view of his absence, the petitioner's father became Muthavalli/Trustee. During his trusteeship, the petitioner's father executed a new trust deed dated 21.04.1988 and in the said trust deed, terms and conditions for being trustee was modified. Instead of eldest male member of trustee, he has modified as eldest male member of his descendant. The petitioner's father did not have any right to create a new trust deed contrary to the original trust deed whereby the member of one branch was excluded.

14. The contention of the learned counsel for the first respondent that trust deed executed by the petitioner's father is invalid has considerable force. The father of the petitioner cannot unilaterally exclude the descendants of original trustee through his first wife from being appointing as Trustee/Muthavalli. The petitioner's father did not have right or power to modify the original trust deed conferring the trusteeship / Muthavallie only on his descendants. The learned counsel

for the respondents 2 and 3 submitted that subsequent trust deed is valid but they have not substantiated the same. In view of the above facts, the finding of the learned Judge that trust deed executed by petitioner's father is invalid is confirmed.

15. The next point to be considered is whether the first respondent is disqualified from holding the post of Trustee. The contention of the petitioner is that the first respondent is not a citizen of India. He is a citizen of Malaysia. To substantiate the same, the petitioner has relied on the document marked as Ex.R27, the deposition of the first respondent let in O.S.No.462 of 2004 on the file of District Munsif Court, Nagapattinam. In Ex.R27, the first respondent has stated that he is a citizen of Malaysia and he was doing business in Malaysia till 2004. He has further stated that he came back to India in May 2004 and is residing in India. The authority has issued Voter ID to the first respondent which shows that he is a citizen of India and is entitled to vote in elections. The petitioner has not disproved these averments by producing acceptable evidence. The learned counsel for the first respondent submitted that the petitioner is a permanent resident of Dubai and he is represented by Power of Attorney Mahaboob Nisa who is his sister. She only filed counter statement on

behalf of the petitioner before the Tribunal. She only gave evidence as RW1 on behalf of the petitioner. The learned counsel for the first respondent referred to counter statement filed on behalf of the petitioner contained in typed set of papers filed by the petitioner. From the counter statement filed, it is seen that only Power of Attorney of the petitioner has signed and filed counter statement. The learned counsel for the first respondent also referred to impugned order of the Tribunal wherein the learned Judge has recorded names of witnesses examined on the side of the petitioner. From the list of witnesses examined on the side of the petitioner, name of the petitioner is not found and only the name of the Power of Attorney viz. Mahaboob Nisa is mentioned as RW1. In view of these undisputed facts, it is clear that the petitioner is not residing in India and that he is a permanent resident of Dubai, as alleged by the first respondent. The first respondent has proved that he is a citizen of India and he came back to India during May 2004 which is not rebutted by the petitioner by letting in any acceptable evidence. In view of the statement of the first respondent that he came back to India during May 2004, Ex.R27 has not evidential value.

16. The learned counsel for the respondents 2 and 3 have contended that WOP is bad for non-issuance of notice under Section 89 of the Wakf Act. The notice contemplated in the said section is to put the Wakf Board on notice, the legal proceedings contemplated that is going to be initiated against the Wakf Board. In the present case, the Wakf Board, after entering appearance and filing counter, did not take this plea before the Tribunal. It clearly shows that second respondent was waived his right with regard to Section 89 of the Wakf Act. The respondents 2 and 3 have not pleaded and proved any prejudice caused to them by non-issuance of notice under Section 89 of the Act. In view of the same, the said contention is unsustainable and untenable and without any merits.

17. The learned counsel for the respondents 2 and 3 submitted that the term of the petitioner as trustee / Muthavalli has expired on 07.12.2008 and that the Civil Revision Petition has become infructuous but the second respondent has not taken any steps to appoint Muthavalli as per the terms of trust deed dated 26.01.1924. In view of the failure on the part of the second respondent to take steps to appoint Muthavalli, the order of the Tribunal appointing the first respondent as Trustee/Muthavalli is hereby confirmed.

18. In view of the above, the judgments relied on by the learned counsel for the respondents 2 and 3 are not applicable to the facts of the present case. The learned Judge has properly appreciated the Voter ID card issued by the authority and accepted the contention of the first respondent and rejected the contention of the petitioner by giving valid reason. A reading of the impugned order reveals that the learned Judge has appreciated all the materials on record in proper perspective manner and exercised his power conferred on him properly and allowed the WOP filed by the first respondent appointing him as trustee / Muthavalli. In the above said circumstances, I do not find any illegality or irregularity in the order impugned in this revision, warranting interference by this Court.

19. In the result, this Civil Revision Petition is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

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Index : Yes/No

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V.M.VELUMANI, J.

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To

The Subordinate Judge,
Nagapattinam.



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