

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 11.07.2018

Delivered on: 17.07.2018

CORAM:

THE HON'BLE MR.JUSTICE M.M.SUNDRESH
and
THE HON'BLE MR.JUSTICE N. ANAND VENKATESH

W.A.No.1971 of 2010

- 1.The Tamil Nadu Wakf Board,
Rep by its Chief Executive Officer,
1, Jaffer Sarang Street,
Vallal Seethakathi Nagar,
Chennai-600 001.
2. The Chief Executive Officer,
1, Jaffer Sarang Street,
Vallal Seethakathi Nagar,
Chennai-600 001.
3. The Superintendent of Wakf,
Tirunelveli Zone,
34/15, S.N.High Road,
Tirunelveli-627 001. Appellants/Respondent 1 to 3

..Vs..

1. Kadayanallur Rahmania Trust,
Rep. By it Managing Trustee and President,
Mr.S.S.Kalandar Masthan,
25, Nadu Ayyapuram Street,
Rehmaniapuram, Jumma Masjid Complex,
Main Road, Kadayanallur,
Tirunelveli district. 1st Respondent/Writ petitioner
2. U.T.Mohamed Gani,
Muthavalli,
Naina Mohamed Jumma Pallivasal
Rahmaniapuram,
Kadayanallur-627 757.

3. The Management Committee,
Rep. By its Member Mr.S.S.Syed,
Naina Mohammed Jumma Pallivasal,
Rahmaniapuram,
Kadayanallur-627 757.

... Respondent 2 & 3/Respondents 4 & 5

PRAYER: Writ Appeal filed under Clause 15 of the Letters Patent,
to set aside the order in W.P.No.17299 of 2009 dated 30.06.2010.

WP.NO.17299/2009:

Writ Petition filed under Article 226 of Constitution of India to issue a Writ of Certiorarified Mandamus or any other Writ, order or direction in the nature of "Certiorarified Mandamus" calling for the records of the 1st respondent in its order dated 29-11-2007 stated to have been pronounced on 3-12-2008 comprised in item. N.144/2004 in Na.Ka. 6405/03/Aal Tili to quash the same in so far as the direction given to 2nd respondent for initiating action against the petitioner Trust and consequently direct the 1st respondent to dispose of the petitioners application under Section 36 and 70 of the wakf ACT 1995 filed on 17-02-003 along with the Application of the 4th respondent dt 30-4-2003.

For Appellants : Mr.V.Laksmi Narayanan

For R1 : M.N.S.Mohamed Habeeb Raj

For R2 & R3 : No Appearance

JUDGMENT

N. ANANDVENKATESH, J.

The present writ appeal has been filed by the Tamil Nadu Wakf Board along with the Superintendent of Wakf, being aggrieved by the orders of the learned Single Judge made in W.P.No.17299/2009, dated 30.06.2010.

2. Case of the appellants in brief:-

2.1) The second respondent in the present appeal is the Muthavalli of Naina Mohamed Jumma Pallivasal. He gave a

petition on 30.04.2003, wherein he has stated that by a resolution dated 30.08.2000, no objection certificate was granted for the construction of shops in the Wakf land. Later on, revised estimate and plans were submitted to the Board for the construction of hospital and shops and the Board granted permission vide resolution dated 22.08.2002. In his petition, the second respondent further mentioned that a lease agreement for 11 months was entered into with Rahmania Trust in this regard and the said Trust was allowed to construct hospital and shops with the condition that if the cost of construction is repaid by the Pallivasal to the Rahmania Trust, the entire building would be handed over to the Pallivasal management and till then Rahmania Trust would continue to collect the rent. The Rahmania Trust was collecting the rent from the entire building, which consisted of a shopping complex and also a hospital. In his petition, the second respondent requested the Rahmania Trust to be registered as a Wakf. Consequent upon the submission of the application by the second respondent, a Wakf Inspector was appointed to submit his report in this regard. The Wakf Inspector as well as the then Superintendent of Wakf, recommended the registration of the Rahmania Trust as a Wakf.

2.2) Since the 2nd respondent had carried on the above activities in violation of the Board's order, the appellant issued a show cause notice to the second respondent under Section 64 (h) (j) (k) and section 67 of the Wakf Act and called upon him to explain as to why action should not be taken on the proposed charges against him. The appellant framed nearly 8 charges against the second respondent. The second respondent submitted his reply to the said show cause notice.

2.3) The Appellant Board consisting of 8 members and the chairman took up the proceedings and heard all the parties concerned. The Appellant Board, on consideration of the entire materials on record and the submissions made by the parties came to the following conclusions:-

"a) The Board had specifically ordered before starting of the construction work that the source of funds for the construction should be intimated to the Board. However, contrary to the Board's order, the Wakf had entrusted the construction of the building to Rahmania Trust and while doing so, a rental agreement was entered into by the second respondent with Rahmania Trust for 11 months and a land measuring 10,000 sq.feet was given on a monthly rent of Rs.5,000/- and the trust was allowed to construct the building and to obtain the rental income. None of this was informed by the second respondent to the Appellant Board.

b) The Rahmania Trust was formed on 05.07.2001. On 15.07.2001, the second respondent submitted a petition

requesting for issuance of no objection certificate for the construction of shops and hospitals. On 25.07.2001, the second respondent executes the rental agreement. All those actions have been pre-planned and Rahmania Trust has in fact obtained money from "Sugam Poly Clinic" and thereafter has constructed the commercial complex. A sum of Rs 21,00,000/- was obtained as advance by the said Rahmania Trust.

c) The Rahmania Trust did not make any request to register as a Wakf and it is the second respondent who filed such a petition and he has no right to make such a request since he was the Muthavalli of Naina Mohamed Jumma Tholugai Pallivasal. It was done only to justify the action of dealing with the Wakf property contrary to the Board's orders.

d) The Board found that the entire construction and the rent collected by Rahmania Trust were all illegal and against the Board's orders and the entire Wakf property has been dealt with as per the whims and fancies of the second respondent.

2.4) Appellant Board therefore passed an order removing the second respondent from the post of Muthavalli and brought the Wakf under its direct management. The third appellant was appointed as a Executive Officer of the Wakf and the second respondent was directed to hand over all charges to the second appellant. The Appellant Board further directed the recovery of the entire property and the shops and hospital were directed to be made the direct tenants of the Wakf. The Appellant Board further directed to take action against the Wakf Inspector and the then Superintendent of Wakf, Thirunelveli who recommended registration of the Rahmania Trust as a Wakf.

3) The case of the first respondent/writ petitioner in brief:-

3.1) The decision to lease the property and to put up construction was done only keeping in mind the interest of the Wakf in order to augment income. The construction was made only after getting a no objection certificate from the Superintendent of Wakf. A huge amount has been invested for the construction. The Wakf also directed that the Rahmania Trust will hand over the possession of the building as and when the costs of construction is paid back to the trust by the Wakf. It is the further case of the respondent that application was filed under Section 36 and 70 of the Wakf Act in order to declare the Rahmania Trust as a separate Wakf. However, no orders were passed in the said application. In the mean time, proceedings were initiated by the Appellant Board. It is the further case of the respondent that the orders were reserved on 29.11.2007 wherein it was heard by the chairman and 8 members. However, the order was pronounced on 31.12.2008 without any notice to the respondent and it was only signed by the chairman and none of

the members of the Board have signed the order and therefore the order itself is a nullity. The impugned order in effect removed the Muthuvalli, brought the Wakf under the direct management of the Board and also directed to recover the entire property and bring the tenants under the direct control of the Wakf. As against removal, the second respondent filed an appeal before the Wakf Tribunal and the respondent/writ petitioner filed the writ petition challenging the impugned order passed by the Board.

3.2) The learned Single Judge on consideration of entire facts and circumstances and on consideration of the submissions made by the counsel for either party, came to the conclusion that since the impugned order was only signed by the chairman and none of the members have signed the order, the entire order is without jurisdiction and on the sole ground, the impugned order was quashed and the matter was remanded to the Appellant Board with the chairman to proceed from the stage where it ended and to pass suitable orders on merits and in accordance with law.

4. Submissions:-

4.1) The submission made by the learned counsel for the appellant:-

- * The writ petition itself not maintainable, since it was filed by the lessee under the Muthavalli who had no right, title or interest over the Wakf property.

- * The writ petition filed by the respondent is also not maintainable on the ground that the Muthavalli has already challenged the order before the Wakf Tribunal and the respondent, if at all is aggrieved by the order, should have moved the Wakf Tribunal under Section 83 of the Wakf Act.

- * The second respondent has committed a fraud on the Wakf by dealing with the entire Wakf property and handing it over to the third party who was earning income out of the property and ultimately the sufferer was the Wakf and therefore the Appellant Board was right in removing the second respondent and bringing the entire Wakf under its direct control.

- * The matter was heard by the chairman and all the members and there is no such requirement that the order must be signed by all the members under Section 17 (3) r/w 64 (3) of the Wakf Act and it is enough if the chairman signs the order.

- * The learned counsel brought to the notice of the Court the earlier orders passed by the Appellant Board on 24.02.2000 and also 22.08.2002 in respect of the very same Naina Mohamed Jumma Tholugai Pallivasal wherein the order was signed only by the chairman, even though the issue was heard by the chairman

and all the other members. Therefore, it was contended that this was the regular practice which was followed by the Appellant Board in all its proceedings.

* The learned Single Judge should have appreciated the fact that encroacher of the Wakf property was trying to plead the case of the Muthavalli, when the Muthavalli himself has chosen to file an appeal before the Wakf Tribunal. In effect the grievance of the Muthavalli was parallelly proceeded on the one hand before the Wakf tribunal and on the other hand before this Court by way of a writ petition.

* Therefore, the learned counsel for the appellant would submit that the order of the learned Single Judge requires interference and the same is liable to be set aside.

4.2) The submission made by the learned counsel for the first respondent/writ petitioner:-

* The day on which the order was pronounced by the Appellant Board, there was no notice issued to the parties and it was not even listed and therefore the entire order is illegal.

* The learned Single Judge has recorded that the order was signed only by the chairman and remaining members have not signed the order and remanded the matter back to the Appellant Board to pass order in accordance with law. The writ petition is maintainable, since the order has been passed without any jurisdiction.

* The no objection certificate was granted by the Superintendent of Wakf and thereafter, the construction have been put up and therefore the Appellant Board was wrong in finding that the constructions are unauthorised and put up without the permission of the Board.

* The application seeking for registration of the writ petitioner as a Wakf was pending before the Appellant Board and without conducting any enquiry, the Appellant Board ought not to have passed the impugned order. The order passed by the Appellant Board is not in the interest of the Wakf and the Appellant Board, by virtue of passing the impugned order, had failed to safeguard and protect the interest of the Wakf.

* The learned counsel for the respondent/writ petitioner also filed his written submissions and has also placed reliance on the following judgments in order to substantiate his case.

- (1) (2017) 3 SCC Page 330 in the matter of Ajay Singh and another Vs State of Chattisgarh and another
- (2) (2008) 2 SCC Page 588 in the matter of Krishi Utpadan Mandi Samithi Achanera and another
- (3) AIR 2008 SC Page 1534 in the matter of K.V.Rami Reddy Vs

Prema.

- (4) 2007 (2) CTC Page 830 in the matter of M.P. Wakf Board Vs Subhan Shah (D) by L.Rs and others
- (5) AIR 1991 SC Page 1902 in the matter of Bangalore Medical Trust Vs B.Muddappa and others
- (6) 2008 (1) Supreme page 544 in the matter of Chief Engineer Hidar Project and others Vs Ravindranath and others
- (7) (1987) 4 SCC Page 525 in the matter of Dr.(Smt Kuntesh Gupta Vs Management of Hindu Kanya Maha Vidyalaya Sitapur (U.P.) and and others
- (8) (2003) 2 SCC Page 107 in the matter of Harbanslal Sahnia and another Vs Indian Oil Corporation and others.
- (9) AIR 1963 SC Page 107 in the matter of Nawab Zain Yar Jung (Since deceased) and others Vs Director of Endowment and others
- (10) 1978 (1) SCC Page 405 in the matter of Mohinder Singh Mill Vs Chief Election Commissioner

5. Discussion:-

5.1) This Court has carefully considered the submissions made on either side and also the materials available on record. This Court also carefully considered the written submissions made by the counsel for first respondent/writ petitioner.

5.2) The first respondent/writ petitioner is admittedly a lessee under Naina Mohamed Jumma Tholugai Pallivasal. The lease was admittedly for a period of 11 months. It is also admitted that no orders have been passed declaring the trust as Wakf. Therefore, the first respondent/writ petitioner continues as a trust. The effect of the impugned proceedings dated 29.11.2007 pronounced on 31.12.2008 is that the second respondent/Muthavalli was removed, Naina Mohamed Jumma Tholigai Pallivasal was brought under the direct management of the Board and the Wakf property, which was dealt with improperly, was directed to be recovered and the tenants of the shops and hospital were directed to be made as tenants of the Wakf. Admittedly, the Muthavalli challenged the impugned proceedings before the Wakf Tribunal and the same was also dismissed on 28.03.2017 as not pressed.

5.3) The averments made in the entire writ petition clearly shows that it is the grievance of the Muthavalli which has been sought to be projected and canvased. On the one hand the Muthavalli approached the Wakf Tribunal challenging the proceedings and on other hand he used the first respondent/writ petitioner and canvased his grievance before this Court by way of writ petition. It is in this back ground the writ petition came to be heard by the learned Single judge.

5.4) One of the main contention that was raised by the learned counsel for the appellant is that the first respondent

has no locus standi to file the writ petition since the trust is not the person aggrieved by virtue of the impugned proceedings. The first respondent is admittedly a lessee under the Wakf, therefore as a lessee, the first respondent cannot canvass the case of the Muthavalli or that of the Wakf. The only grievance that the first respondent at the best can have was on the direction given by the Appellant Board to take over the Wakf properties and bring the tenants under its direct control. By virtue of the impugned proceedings, the status of the first respondent is nothing more than an encroacher.

5.5) Section 3 (ee) defines an encroacher as follows:-

"2[(ee) "encroacher" means any person or institution, public or private occupying waqf property, in whole or part, without the authority of law and includes a person whose tenancy, lease or licence has expired or has been terminated by mutawalli or the Board;] "

Section 51 (1) of the Wakf Act reads as follows:-

"51. Alienation of waqf property without sanction of Board to be void.-[(1) Notwithstanding anything contained in the waqf deed, any lease of any immovable property which is waqf property, shall be void unless such lease is effected with the prior sanction of the Board:

Provided that no mosque, dargah, khanqah, graveyard or imambara shall be leased except any unused graveyards in the States of Punjab, Hariyana and Himachal Pradesh where such graveyard has been leased out before the date of commencement of the Wakf (Amendment) Act, 2013."

Section 52 empowers the Board to recover any property belonging to the Wakf which has been transferred in contravention of Section 51 of the Wakf Act. Section 54 of the Wakf Act also empowers the Chief Executive Officer to remove encroachment from Wakf property and the manner of enforcing the order for removal of encroacher from the Wakf property is provided under Section 55 of the Wakf Act.

5.6) Section 55 of the Wakf Act deals with restriction on the power to grant lease of a Wakf property. In the instant case the second respondent has given the Wakf property on lease to the first respondent/writ petitioner in violation of Section 56 of the Act. Since, admittedly it was not done with the previous sanction of the Board the lease is void and it has absolutely no effect as per Section 56(2) of the Wakf Act.

5.7) The second respondent/Muthavalli has not only entered into lease in violation of the provisions of the Wakf Act, but

also has proceeded to hand over the entire property to the first respondent who in turn has put up constructions and has started receiving rents from the shopping complex and the hospital. Unfortunately, what was fixed as a lease amount was a paltry Rs.5,000/- per month payable by the first respondent to the Wakf. On the one hand the first respondent trust is enriching itself from the income from the shopping complex and hospital and on the other hand the Wakf was deprived of this income. The entire transaction between the first respondent and the second respondent is nothing but a fraud on the Wakf. The contract between the first and second respondent, the construction that were put up in the Wakf property and the income that was collected by the first respondent, had absolutely no approval from the Board. All these transactions smacks with illegality.

5.8) The agreement between the first and second respondent and the financial obligation that arose out of the agreement does not help the Wakf in any manner, since the entire agreement is in violation of the provisions of the Wakf Act. Strictosensu the first respondent/writ petitioner had no locus standi to challenge the impugned proceedings of the Appellant Board. The first respondent/writ petitioner will get a cause of action only when the authorised person under the Act proceed against the trust for removal of encroachment from the Wakf property, in which case the Act itself provides for a mechanism to redress the grievance.

5.9) For the sake of argument, if it is taken that the first respondent/writ petitioner had some grievance against the impugned proceedings, Section 83 of Wakf Act specifically provided for an alternative remedy before the Wakf Tribunal. In fact, the learned Single Judge has given a categorical finding that the first respondent does have an alternative remedy under Section 83 before the Wakf Tribunal. The first respondent has not chosen to avail of this alternative remedy.

5.10) The first respondent has directly approached this Court by filing a writ petition and the same was entertained and allowed by the learned Single Judge only on the ground that the impugned proceeding was signed only by the chariman and the other members have not signed the same. Admittedly, in this case, the hearing went on before the chairman and 8 members of the Tamil Nadu Wakf Board. The Act does not any where provide that the final order should be signed by the chairman and all the members. The learned Single Judge has placed reliance on Section 17 (3) and Section 64 (3) of the Wakf Act to come to this finding.

Section 17 reads as follows:-

“ 17.Meeting of the Board.-

(1) The Board shall meet for the transaction of business at such time and places as may be provided by

regulations.

(2) The Chairperson, or in his absence, any member chosen by the members from amongst themselves shall preside at a meeting of the Board.

(3) Subject to the provisions of this Act, all questions which come before any meeting of the Board shall be decided by a majority of votes of the members present, and in the case of equality of votes, the Chairperson or, in his absence, any other person presiding shall have a second or casting vote.

Section 64 (3) Read as follows:-

" No action shall be taken by the Board under subsection (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."

5.11) A careful reading of the provisions extracted herein above clearly points out that the decision shall be taken by the Board by majority of not less than 2/3 of the members of the Board. It is not anybody's case that any of the members of the Appellant Board disagreed with the decision of the Board. In fact, there is absolutely no material to show that there was dissent by some members and in spite of the same, the chairman has proceeded to pronounce the order by signing the same. In fact, it is the consistent case of the Appellant Board that it was an unanimous decision taken by the chairman and all the members. Therefore, Section 17 (3) and Section 64 (3) of the Act will have no relevance for the purpose of deciding the issue on hand. Both those provisions do not describe that the order must be signed by the chairman and all the members.

5.12) In fact the earlier orders dated 24.02.2000 and 22.08.2002 passed by the Appellant Board with respect to Naina Mohamed Jumma Tholigai Pallivasal has been signed only by the chairman. Even though, the proceedings were held in the presence of the chairman and all the members of the Board. It is therefore clear that it is enough if the chairman who presides over the proceedings of the Board signs the order for himself and on behalf of the all members, in a case where there is unanimity in the decision taken by the Board. Therefore, the finding of the learned Single Judge that the impugned proceeding was not signed by the Board members and therefore the order itself is without jurisdiction, is liable to be set aside.

5.13) Further, contention raised by the counsel for the first respondent/writ petitioner that the orders were reserved on 29.11.2007 and was pronounced only on 31.12.2008 and therefore notice should have been given to the parties before pronouncing the orders, is without substance. The learned

counsel has relied upon the above cited judgments in order to substantiate this point. None of those judgments are applicable to the facts of this case. All those judgments mentioned above are cases where a Court has passed judgments in a Civil or Criminal proceedings without satisfying the requirements of the code. Admittedly, the Appellant Board is a quasi-judicial Authority and the functioning of the Board cannot be equated to that of a Civil or Criminal Court. The only requirement for the Board when it passes an order, is to hear the parties, given reasons and then pass an order. Therefore, there is absolutely no requirement for the Appellant Board to give one more opportunity to the parties at the time when the orders are pronounced.

6) We do not find any merit in the writ petition filed by the first respondent. In fact we find that it is clear case of abuse of process of Court adopted by the first respondent and the second respondent has used the first respondent to parallelly canvas his case. We are not in agreement with the findings of the learned Single Judge and therefore we here by set aside the order of the learned Single Judge made in W.P.No.17299/2009, dated 30.06.2010

7) In the result this writ appeal is allowed and the first respondent is directed to pay costs of Rs.25,000/- (Rupees Twenty Five Thousand Only) to the Appellant Board within a period of four weeks from the date of receipt of a copy of this order.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

dss

TO:

1. Kadayanallur Rahmania Trust,
Rep. By it Managing Trustee and President,
Mr.S.S.Kalandar Masthan,
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+1cc to Mr.V.Raghavachari, Advocate sr.no.46754

+2cc to M.N.S.Mohamed Habeeb Raj, Advocate sr.no.46721

+2cc to M/s.M.Sivasankari, Advocate sr.no.46720

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