



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 09.08.2018
Pronounced on : 30.08.2018

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THE HONOURABLE MR.JUSTICE V.PARTHIBAN

W.P. (MD) No.16615 of 2018
and
W.M.P (MD) Nos.14697 and 14698 of 2018

O.M.S.Udhuman Mydeen

... Petitioner

Vs.

1.Tamil Nadu Wakf Board through its
Chief Executive Officer,
No.1, Jaffer Sarango Street,
Seedhakadi Nagar,
Chennai - 01.

2.O.M.S.Hasan Magdhoom Alim,
S/o O.M.S. Sheik Uduman Alim Sahib,
No.68, Big Street,
Kadayanallur Taluk.

... Respondents

Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus calling for the entire records in connection with the impugned order passed by the first respondent vide his proceedings Ref.No.CHE.MU.AANAI.No.6211/12/A1/TVELI dated 05.07.2018, quash the same and consequently, direct the first respondent to pass an order appointing the petitioner as Muthavalli Kadayanallur Naina Mohammed Periya Kutba Palli Vasal till the disposal of A.S.No.1024 of 1993.

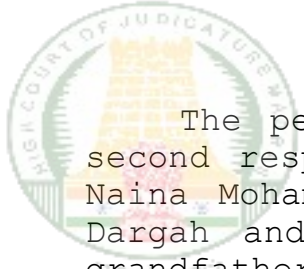
For Petitioner : Mr.Isaac Mohanlal
Senior Counsel for
Mr.Niranjana S.Kumar

For Respondents : Mr.Lakshmi Narayanan for
Mr.K.K.Senthil (for R1)

Mr.N.Ganaga Sapapathy (for R2)

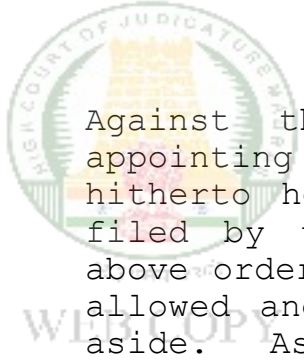
O R D E R

The case of the petitioner has the chequered history. In order to understand the claim of the petitioner, viz-a-vis, the second respondent, the essential facts are briefly stated hereunder:-



The petitioner's grandfather, who was also grandfather of the second respondent, was the Muthavalli of three Wakfs, namely, (i) Naina Mohammed Periya Kuthba Pallivasal, (ii) Syed Masood Nayagam Dargah and (iii) Udhuman Lebbai Sheik Thaika. The petitioner's grandfather died in 1984 leaving behind two sons, namely, O.M.S. Sheik Udhuman Alim Sahib and Late.O.M.S.Abdul Basith Alim Sahib. After the death of the petitioner's grandfather, the elder son, namely, O.M.S.Sheik Udhuman Alim Sahib took charge of Muthavalliship of all the three wakfs to the complete exclusion of the other son, namely, O.M.S.Abdul Basith Alim Sahib, the father of the petitioner herein. Since the petitioner's father was also entitled to become Muthavalli on the basis of the hereditary succession, he approached the Tamil Nadu Wakf Board by filing an application to appoint him as Muthavalli. The application was contested by the elder brother of the petitioner's father and the Wakf Board after hearing the parties, passed an order on 09.02.1985 by appointing the petitioner's father as Muthavalli of Naina Mohammed Periya Kuthba Pallivasal and the second respondent's father as Muthavalli of Syed Masood Nayagam Dargah. Against the order passed by the Wakf Board appointing the Muthavalli for Dargah as well as Pallivasal as between the petitioner's and the second respondent's father, the second respondent's father filed a writ petition in W.P.No.1575 of 1985 challenging the order of the Wakf Board dated 09.02.1985. On 31.07.1986, the said writ petition was allowed by this Court and the order of the Wakf Board was set aside. As against the order of the learned Single Judge, a writ appeal was filed in W.A.No.848 of 1986. The Division Bench of this Court, by an order dated 27.07.1989, disposed of the writ appeal by directing the father of the second respondent to file a suit for deciding the issue of hereditary succession and the said suit was directed to be disposed of within a period of nine months. The Division Bench further directed the status quo shall prevail till the disposal of the suit and the Wakf Board shall stay off its hands from appointment of Muthavalli. In pursuance of the direction, a suit was laid in O.S.No.138 of 1989 by the father of the second respondent before the Sub-Court, Tenkasi, seeking declaration to declare him as Muthavalli of Naina Mohammed Periya Kuthba Pallivasal. On 05.08.1989, the said suit was dismissed. As against the dismissal of the suit, an appeal in A.S.No.1024 of 1993 was filed by the father of the second respondent before this Court and the same is pending as on date.

2.From 1985 to 2012, admittedly, the petitioner's father was acting as Muthavalli in respect of Naina Mohammed Periya Kuthba Pallivasal and the second respondent's father was acting as Muthavalli in respect of Syed Mosood Nayagam Dargah. While so, on 22.05.2012, the father of the petitioner, O.M.S.Abdul Basith Alim Sahib died. The petitioner assumed office upon the death of his father and became Muthavalli of the Naina Mohammed Periya Kuthba Pallivasal and continued as such till 28.06.2014. On 27.06.2014, the Wakf Board passed an order appointing the second respondent as the Muthavalli for a period of three years in respect of Naina Mohammed Periya Kuthba Pallivasal by displacing the petitioner.

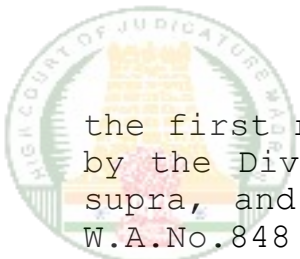


Against the proceedings of the Wakf Board dated 27.06.2014 appointing the second respondent as Muthavalli for the Pallivasal hitherto held by the petitioner. Therefore, a writ petition was filed by the petitioner in W.P(MD)No.12143 of 2014, challenging above order dated 27.06.2014. On 29.04.2016, the writ petition was allowed and the order of the Wakf Board dated 27.06.2014 was set aside. As against the order by the learned Single Judge in the above said writ petition, a writ appeal in W.A(MD)No.865 of 2016 was filed by the Wakf Board and another writ appeal in W.A(MD)No.866 of 2016 was filed by the second respondent. Both the appeals questioning the order passed by the learned Single Judge dated 29.04.2016. On 22.03.2018, the Division Bench of this Court dismissed both the writ appeals and given a specific direction that the petitioner herein should be continued as Muthavalli in respect of Naina Mohammed Periya Kuthba Pallivasal till the disposal of the appeal in A.S.No.1024 of 1993, which is pending before this Court and both the parties will abide by such final order in the said appeals. As the finding rendered by the Division Bench is very essential for consideration of the present writ petition, the operative portion of the Judgment passed in the writ appeals as found in paragraphs 20 and 21 are extracted hereunder:-

"20.This Court taking into consideration of the fact that the appellant in W.A(MD)No.866 of 2016 is acting as Muthavalli in respect of 'Syed Masood Nayagam Dharga', Therku Ayyapuram, Kadayanallur, is of the considered view that till the proceedings takes place, as to the appointment of permanent Muthavalli, in respect of 'Naina Mohammed Peria Kuthba Pallivasal', Peria Street, Kadayanallur, the first respondent in both the Writ Appeals/Writ Petitioner, is to be continued as temporary Muthavalli in respect of 'Naina Mohammed Peria Kuthba Pallivasal, Peria Street, Kadayanallur and it is also made clear that it is also subject to the result of A.S.No.1024 of 1993.

21.This Court would also make it clear that de horse this order, it is always open to the appellant in W.A.No.865 of 2016, namely, Tamil Nadu Wakf Board, to exercise its powers in terms of the Wakf Act, 1995 and the Rules framed thereunder, as to the office of Muthavalliship in respect of 'Naina Mohammed Peria Kuthba Pallivasal', Peria Street, Kadayanallur as well as 'Syed Masood Nayagam Dharga' Therku Ayyapuram, Kadayanallur."

3.Subsequently, on 19.07.2018, the petitioner filed another writ petition in W.P(MD)No.15909 of 2018 to direct the Wakf Board to implement the direction of the Hon'ble Division Bench dated 22.03.2018 in W.A(MD)Nos.865 and 866 of 2016. As notice came to be issued in the said writ petition, an order made on 05.07.2018 issued by the Wakf Board was served on the petitioner on 26.07.2018 appointing the second respondent as Temporary Muthavalli in respect of the Naina Mohammed Periya Kuthba Pallivasal till the disposal of the appeal in A.S.No.1024 of 1993. The said action on the part of



the first respondent being contrary to the specific direction issued by the Division Bench of this Court in paragraphs 20, as extracted supra, and also earlier decision of another Division Bench made in W.A.No.848 of 1986 dated 27.07.1989, the present writ petition is filed.

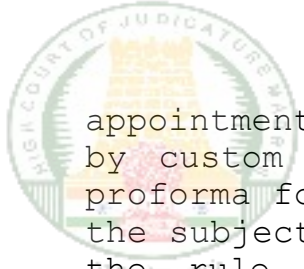
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4.A singular question which has to be decided by this Court is as to whether the proceedings of the Wakf Board, dated 05.07.2018, appointing the second respondent as Muthavalli for the Naina Mohammed Periya Kuthba Pallivasal can be countenanced in the case of the specific direction passed by the Division Bench of this Court, dated 22.03.2018, in W.A(MD)Nos.865 and 866 of 2017 and also in the case of the status quo order passed by the another Division Bench of this Court, dated 27.07.1989, and also the reference to the dismissal of the suit filed by the second respondent which is pending in A.S.No.1024 of 1993.

5.Mr.Isaac Mohanlal, learned Senior Counsel appearing for the petitioner would submit that the impugned proceedings of the first respondent dated 05.07.2018 is contrary to the specific direction of the Division Bench in its order dated 22.03.2018 in W.A(MD)Nos.865 and 866 of 2016. In the particular paragraph 20 of the Judgment, it is clearly stated that the petitioner herein, who is the first respondent in both the writ appeals, is to be continued as temporary Muthawalli in respect of the Naina Mohammed Periya Kuthba Pallivasal and such Muthavalliship will be subject to the result of A.S.No.1024 of 1993. Since the appeal suit is pending on the file of this Court and the lis of the parties has not been finally resolved by the civil Court, the impugned proceedings by the first respondent dated 05.07.2018 is unsustainable in law and in fact, such proceedings is a brazen attempt of the first respondent to trifle with the direction of this Court. On these grounds alone, the learned Senior Counsel would submit that the impugned order is liable to be set aside.

6.The learned Senior Counsel would submit even otherwise that in earlier round of litigation, the petitioner's father had succeeded and the Division Bench of this Court in its earlier Judgment dated 27.08.1989 in W.A.No.848 of 1986 has clearly held that the status quo must prevail till the disposal of the suit meaning that the petitioner's father, who was then acting as Muthawalli of Naina Mohammed Periya Kuthba Pallivasal should not be displaced.

7.According to the learned Senior Counsel, the second respondent having failed to get any relief from the civil Court has now influenced the first respondent Wakf Board to issue proceedings in his favour and claimed Muthavalliship for both the Dargah and Pallivasal to the total exclusion of the right of the petitioner, even though this Court interfered and recognized the Muthavalliship of the petitioner in respect of Naina Mohammed Periya Kuthba Pallivasal. According to the learned Senior Counsel, both the



appointment to the Dargah and Pallivasal is hereditary in nature and by custom and he would draw the attention of this Court to the proforma for appointment to the position of Muthavalli in respect of the subject Dargah and Pallivasal. Wherein, it is clearly mentioned the rule of succession is by hereditary according to custom. Therefore, he would submit that the rule of succession cannot be claimed by one legal heir alone to the exclusion of the other. In any event, according to the learned Senior Counsel, the petitioner's father admittedly worked as Muthavalli from 1985 till 2012 and thereafter, the petitioner till 28.06.2014. Further, the earlier appointment of the second respondent as Muthawalli for Naina Mohammed Periya Kuthba Pallivasal vide order dated 27.06.2014 had been set aside by the learned single Judge of this Court in W.P(MD) No.12143 of 2014 vide order dated 29.04.2016, which has been confirmed in the appeal. It is once again not open to the Wakf Board to appoint the second respondent as Muthawalli for Naina Mohammed Periya Kuthba Pallivasal. Such action by the Wakf Board is nothing but a clever attempt to circumvent the order passed by this Court in favour of the petitioner. The first respondent Wakf Board in order to favour the second respondent has passed the impugned proceedings, notwithstanding the clear direction of this Court in favour of the petitioner as aforementioned. Therefore, learned Senior Counsel would submit that the impugned proceedings literally over turned the direction of the Division Bench of this Court as found in paragraph 20 of the Judgment dated 22.03.2018. He would therefore submit that the impugned proceedings cannot be countenanced both in law and on facts and the same is liable to be set aside.

8.Per contra, the learned counsel Mr.V.Lakshmi Narayanan representing the first respondent would vehemently contend that the the claim of the petitioner for continuing as Muthawalli of Naina Mohammed Periya Kuthba Pallivasal is untenable and invalid for the following reasons; besides maintainability of the writ petition, in view of effective alternative remedy available under the provisions of Wakf Act.

First of all, the learned counsel would submit that as by various decisions of the Hon'ble Supreme Court and this Court, appointment to the post of Muthavalli is not hereditary and therefore, such claim on the part of the petitioner is illegal and without any basis and therefore, the entire argument built on such premise cannot be countenanced. The learned counsel would submit that the earlier status quo order passed by the Division Bench in W.A.No.840 of 1986 dated 27.07.1989 was only till the disposal of the suit and the suit has been disposed of as early as on 1989 and thereafter, it was open to the Wakf Board to appoint the regular Muthavalli in terms of the provisions of the Wakf Act.

9.The learned counsel for the first respondent would also submit inter alia that the writ petition is not maintainable for the reason that the order dated 05.07.2018 is only a consequential order implementing the detailed resolution of the Wakf Board dated 19.06.2018. Instead of challenging the resolution, the challenge to the consequential order is not maintainable. Therefore, he would

pray that the writ petition has to be dismissed on this ground alone.

10. According to the resolution, the second respondent is the fit and qualified person for appointment as Muthavalli for the Naina Mohammed Periya Kuthba Pallivasal, whereas the petitioner is not a qualified person in terms of the provisions of the Wakf Act.

11. The learned counsel for the first respondent would further submit that the principal contention of the learned Senior Counsel appearing for the petitioner that it was not open to the first respondent to appoint any Muthavalli to the Naina Mohammed Periya Kuthba Pallivasal in view of paragraph 20 of the Judgment dated 22.03.2018 made in W.A(MD)Nos.865 and 866 of 2016, is not valid piece of submission, since the Hon'ble Division Bench has quantified its observation in paragraph 20 by giving liberty to the Wakf Board to exercise the power in terms of the Wakf Act for appointment to the office of the Muthawalliship in respect of both the Kuthba Pallivasal and Nayagam Dargah in para 20 of the same order. The Hon'ble Division Bench of this Court held that such power could be exercised de-hors the said order. Therefore, the first respondent taking advantage of the observation of the order passed by the Hon'ble Division Bench has thought fit to pass the impugned proceedings dated 05.07.2018 appointing the second respondent as Muthavalli of Naina Mohammed Periya Kuthba Pallivasal. Since the second respondent was found to be a qualified person, who could recite verses in Quran by heart and he was in possession of virtuous qualities.

12. The learned counsel for the first respondent would contest the claim of the petitioner that the appointment to the post of Muthavalli is by hereditary in nature. According to the counsel, the Court has held that such appointment is not hereditary and in respect of his contention, he would rely on the decision reported in AIR 1961 SC 808 (Mohammed Yunus vs. Syed Unnissa and others). The relevant paragraphs 8 to 10 are extracted hereunder:-

"8. The trial court as well as the first appellate court held on an exhaustive review of the evidence that there was an immemorial custom governing the institutions whereby the plaintiffs were not entitled to perform service or share the income, emoluments and perquisites. But since the enactment of the Shariat Act of 1937, this custom must be deemed inapplicable to the members of the family. By s. 2 of the Act, it was enacted as follows:

"Notwithstanding any customs or usage to the contrary in all questions (save questions relating to agricultural lands) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubarrat, maintenance, dower, guardian. ship, girls, trusts and trust properties, and wakfs (other than charities and charitable institutions



and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

9. Under the Shariat Act, 1937, as framed, in questions relating to charities and charitable institutions and charitable and religious endowments, the custom or usage would prevail. But the Act enacted by the Central Legislature was amended by Madras Act 18 of 1949 and a. 2 as amended provides:

"Notwithstanding any custom or usage to the contrary, in all questions regarding intestate succession, special property of females including personal property inherited or obtained under contract, or gift or any other provision of personal law, marriage, dissolution of marriage, including Tallaq, ulla, zihar, lian, Khula and Mubarrat, maintenance, dower, guardianship, gifts, trusts and trust proper, ties and wakfs the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

10. Manifestly by this act "the rule of decision" in all questions relating to intestate succession and other specified matters including wakfs where the parties to the dispute are Muslims is the Muslim Personal Law. The terms of the Act as amended are explicit. Normally statute which takes away or impairs vested rights under existing laws is presumed not to have retrospective operation. Where vested rights are affected and the question is not one of procedure, there is a presumption that it was not the intention of the legislature to alter vested rights. But the question is always one of intention of the legislature to be gathered from the language used in the statute. In construing an enactment, the court starts with a presumption against retrospectivity if the enactment seeks to affect vested rights: but such a presumption may be deemed rebutted by the amplitude of the language used by the Legislature. It is expressly enacted in the Shariat Act as amended that in all questions relating to the matters specified, "the rule of decision" in cases where the parties are Muslims shall be the Muslim Personal Law. The injunction is one directed against the court: it is enjoined to apply the Muslim Personal Law in all cases relating to the matters specified notwithstanding any custom or usage to the contrary. The intention of the legislature appears to be clear; the Act applies to all suits and proceedings which were pending on the date when the Act came into operation as well as to suits and proceedings filed after that date. It is true that suits and proceedings which have been finally decided would not be affected by the enactment of the Shariat Act, but if a



suit or proceeding be pending even in appeal on the date when the Act was brought into operation, the law applicable for decision would be the Muslim Personal Law if the other conditions prescribed by the Act are fulfilled. In our view, the High Court was right in holding that it was bound to apply the provisions of the Shariat Act as amended by Madras Act 18 of 1949 to the suit filed by the plaintiffs."

13. Further the learned counsel relied on the decision of the Hon'ble Supreme Court reported in AIR 1976 SC 1569 (Mohd S. Labbai v. Mohd Hanifa) and would specifically draw reference to paragraphs 17 and 35, which are extracted hereunder:-

"17. Exhibit B-30 dated February 26, 1941 is a judgment of the High Court in original Suit No. 112 of 1935 brought in the Court of the District Munsif against the Municipal Council, Tiruvarur praying for an injunction restraining the Municipal Commissioner from interfering with the plaintiffs right of access to the grave-yard. Here also the public character of the Wakf was taken for granted and an injunction against the Municipal Council was granted by the High Court. This judgment is of no assistance in deciding either the question of res judicata or for that matter the question of public character of the mosque.

35. This brings us to the second question, namely, regarding the mosque and its adjuncts being public Wakfs. We have already found that the judgments relied upon by the appellants did not operate as res judicata and we now proceed to decide this issue on the facts and the evidence that have been led in this case. The parties admittedly belong to the Hanafi sect of the Mahomedans and are governed by the Hanafi (Sunni) School of Mahomedan Law. Before, however, going into this question it may be necessary to enter into an exhaustive discussion of the law on the subject, particularly because we find that the Civil Courts before whom this question came up for consideration from one angle or the other have betrayed a profound ignorance of the Mahomedan Law (Hanafi School) of Wakf relating to a public mosque. The word "wakf" means detention or appropriation. According to the well recognized Hanafi School of Mahomedan Law when a Mahomedan dedicates his property for objects of charity or to God, he completely parts with the corpus which vests in God and never returns to the founder. Mahomedan Law contemplates two kinds of Wakfs-a wakf which is private in nature where although the ultimate object is public charity or God, but the property vests in a set of beneficiaries chosen by the founder who appoints a Mutawalli to manage the wakf property. We are, however, not concerned with private wakfs which are normally known as wakf-alal-aulad. We are concerned with public wakf i.e., dedication made for the



purpose of public charity e.g. an Imam-Bada, a mosque, a Serai and the like. So far as the dedication to a mosque is concerned, it is governed by special rules and special equity in the light of which a particular dedication has to be determined. A mosque is obviously a place where the Muslims offer their prayers. It is well-known that there are certain formalities which have to be observed by the Muslims before they observe the prayers. These formalities are-

(i) Wazoo i.e. washing of hands and feet in a manner prescribed by Shariat;

(ii) the recitation of "Azaan" and "Ikamat" which is usually done by the Pesh Imam or the Muazzin;

(iii) there must be a person who possesses virtuous qualities and a knowledge of Koran and other religious rites who should lead the prayers."

14. According to the learned counsel, the above decision would fortify the submission made on behalf of the first respondent that the person appointed as Muthavalli must be a qualified person and appointment cannot be on the basis of the hereditary.

15. As regards the maintainability of the writ petition in view of the availability of alternative remedy as provided under Section 83 of the Wakf Act, the learned counsel would also rely on the decision of the Hon'ble Supreme Court reported in (2010)14 SCC 588 (Board of Wakf, West Bengal and another vs. Anis Fatma Begum and another) wherein he would draw the attention to paragraphs 7 and 10, which are extracted hereunder:-

7. The dispute in the present case relates to a Wakf. In our opinion, all matters pertaining to Wakfs should be filed in the first instance before the Wakf Tribunal constituted under Section 83 of the Wakf Act, 1995 and should not be entertained by the Civil Court or by the High Court straightaway under Article 226 of the Constitution of India. It may be mentioned that the Wakf Act, 1995 is a recent parliamentary statute which has constituted a special Tribunal for deciding disputes relating to Wakfs. The obvious purpose of constituting such a Tribunal was that a lot of cases relating to Wakfs were being filed in the courts in India and they were occupying a lot of time of all the Courts in the country, which resulted in increase in pendency of cases in the Courts. Hence, a special Tribunal has been constituted for deciding such matters.

8. Section 83 (1) of the Wakf Act, 1995 states:

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"83. Constitution of Tribunals, etc. - (1) The State Government shall, by notification if the



Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a Wakf or Wakf property under this Act and define the local limits and jurisdiction under this Act of each or such Tribunals."

9. Section 84 of the Act states:

"84. Tribunal to hold proceedings expeditiously and to furnish to the parties copies of its decision - Whenever an application is made to a Tribunal for the determination of any dispute, question or other matter relating to a Wakf or Wakf property it shall hold its proceedings as expeditiously as possible and shall as soon as practicable on the conclusion of the hearing of such matter give its decision in writing and furnish a copy of such decision to each of the parties to the dispute".

10. Thus, the Wakf Tribunal can decide all disputes, questions or other matters relating to a Wakf or Wakf property. The words "any dispute, question or other matters relating to a Wakf or Wakf property" are, in our opinion, words of very wide connotation. Any dispute, question or other matters whatsoever and in whatever manner which arises relating to a Wakf or Wakf property can be decided by the Wakf Tribunal. The word 'Wakf' has been defined in Section 3 (r) of the Wakf Act, 1995 and hence once the property is found to be a Wakf property as defined in Section 3 (r), then any dispute, question or other matter relating to it should be agitated before the Wakf Tribunal.

16. He would submit that instead of exhausting the effective alternative remedy, which is provided under Section 83 of the Wakf Act, the petitioner has directly approached this Court invoking extraordinary jurisdiction under Article 226 of the Constitution of India. Therefore, he would submit that on this ground also the writ petition has to be dismissed.

17. The learned counsel for the first respondent relied on the decision reported in 1992-2-L.W (Syed Ansaruddin vs. Tamil Nadu Wakf Board), wherein this Court's attention is drawn to the observation made by the learned single Judge, which is extracted as follows:-

"This appeal filed by the plaintiff is against the judgment and decree in O.S.No.4272/77, on the file of the First Assistant City Civil Judge, Madras. The suit is for declaration that the order dated 13.05.1976 of the first defendant-first respondent Wakf Board in W.A.No.17/71, on its file, is not binding on the



plaintiff and for appointment of the plaintiff as hereditary muthavalli of the suit Wakf. The Court below has granted first of the above said two prayers, but negatived the next. The Court below has negatived the above said prayer on the ground that Muslim Law does not recognise hereditary muthavalliship. Hence, the plaintiff has preferred this appeal seeking the later relief, namely, the appointment of himself as hereditary muthavalli.

2. I must first of all point out that the prayer for "appointment" of the plaintiff as "hereditary muthavalli" is not maintainable at all. The Court has no power to appoint any body as hereditary muthavalli though it has power to appoint a muthavalli under certain circumstances (Vide S.204(2)(d) of Mulla's Principles of Mohamedan Law). If the prayer is for declaration that the plaintiff is hereditary muthavalli, such a declaration no doubt can be granted by the Court. By such a declaration, the Court only puts its seal of its approval of the plaintiff's pre-existing right of hereditary muthavalliship. By appointment, it confers muthavalliship for the first time on the plaintiff. The Court has no such power of conferring hereditary muthavalliship on any person.

3. Further, the Muslim Law does not recognize any right of inheritance to the office of Muthavalli (Vide S.206 in the Principles of Mohamedan Law, by Mulla 18th Edition). No doubt, the very same section in the above text book says that the office of Muthavalliship may become hereditary by custom in which case the custom should be followed. For this proposition, no doubt, Mahammed Soleman V. Tasaddug Hassan, [AIR 1935 Calcutta 623] Mohomed Haji Harron Kadwani, In re, [AIR 1935 Bombay 254] Phatmabi v. Haji Musa [(1913) L.L.R 38 Madras 49] and other decisions have quoted as authorities. But, so far as Tamil Nadu is concerned, this law based on custom cannot be applied, in view of the amendment made by the legislature of then State of Madras to the Central Enactment, Shariat Act, 1937, by Madras Act 18/49. While the Central Enactment Shariat Act, abolished customary law on several matters, it retained the customary law so far as "Charities and charitable institutions and charitable and religious endowments". But, by the above said Madras amendment to charities and charitable institutions and charitable and religious endowments, only the Muslim personal law is made applicable and not any custom or usage to the contrary. This is clear from the above said amendment introduced to S.2 of the Shariat Act, 1937. The Supreme Court also in Mohammed Yonus V. Syedunnissa [AIR 1961 SC 808] has held so, no doubt in a different context, namely whether females can be muthavallis of a



Darga, as per custom or usage.

4. In view of the above said legal position, the arguments of the learned counsel for the appellant, based on the passage in Ex.No.A5, the proforma report of the suit Wakf, that the rule of succession to this Wakf is hereditary by custom", cannot be accepted."

18. According to the learned counsel, the posting and appointment of Muthavalli as the hereditary Muthavalli after coming into the force the Madras Act, 18/49 does not arise at all. Therefore, he would submit that the argument advanced on behalf of the petitioner about the entitlement of the petitioner to be appointed as Muthavalli of Naina Mohammed Periya Kuthba Pallivasal on the basis of the lineage cannot be countenanced in law any more.

19. For all the reasons as stated above, the learned counsel for the first respondent would submit that the writ petition is not only not maintainable but also the same lacks merits and therefore, deserves to be dismissed.

20. At this juncture, the learned Senior Counsel appearing for the petitioner would submit that the petitioner is also well-versed in Quran and nowhere in the provision of the Wakf Act, any qualification is prescribed for appointment of Muthavalli. In any event, he would submit that the petitioner has all the qualities for being appointed as Muthavalli which cannot be disputed. He would further submit as regards the availability of effective and alternative remedy that the impugned order passed by the first respondent is contrary to the specific direction of the Hon'ble Division Bench of this Court in paragraph 20 in W.A(MD)Nos.865 and 899 of 2016 dated 22.03.2018. Since the order per se runs contrary to the specific direction of this Court, the petitioner has chosen to approach this Court.

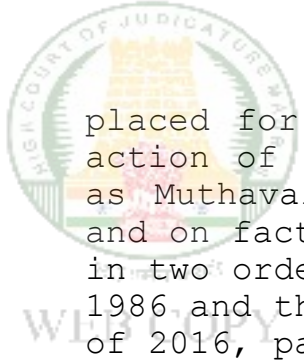
21. According to the learned Senior Counsel, once the order is per se in violation of the specific direction of this Court, the petitioner cannot be directed to approach the Wakf Tribunal by means of alternative remedy. In the extraordinary situation, it is open to the petitioner to approach this Court directly and the Courts have recognized such approach in certain situations, where justice demands for immediate intervention of this Court.

22. Mr. N. Ganaga Sapapathy, learned counsel appearing for the second respondent adopted the arguments advanced on behalf of the first respondent.

23. Heard the learned senior counsel appearing for the petitioner and the learned counsels appearing for the respondents 1 and 2.

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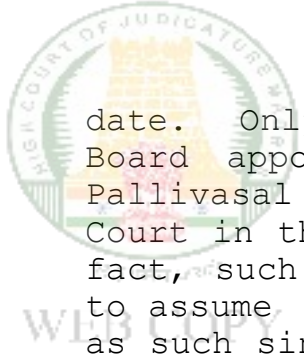
24. As held in preamble to this order, a singular issue which is



placed for consideration before this Court is whether the impugned action of the first respondent in appointing the second respondent as Muthavalli to the Kuthba Pallivasal can be countenanced in law and on facts. In the teeth of the specific direction of this Court, in two orders namely, order dated 27.07.1989 passed in W.A.No.848 of 1986 and the order dated 22.03.2018 passed in W.A(MD)Nos.865 and 866 of 2016, particularly, in paragraph 20 and also the dismissal of the suit in O.S.No.138 of 1989 filed by the second respondent and the pendency of A.S.No.1024 of 1993 before this Court as against the dismissal of the suit, the entire adjudication of the issue before this Court is to be confined only to those three specific events, which would decide the issue in one way or the other in respect of rival claim of both the petitioner as well as the second respondent in regard to appointment of Muthavalli to the Kuthba Pallivasal.

25.From the pleadings and materials placed on records, it could be seen that originally the Division Bench of this Court allowed the writ appeal in W.A.No.848 of 1986 on 27.07.1989 by directing the parties to appear before the Civil Court and ordered status quo to be maintained till the decision of the suit. By which direction by the Hon'ble Division Bench, the petitioner's father was allowed to act as Muthavalli of Kuthba Pallivasal on the basis of his original appointment by the Wakf Board on 09.02.1985. As rightly contended by the learned Senior Counsel appearing for the petitioner, though the suit filed by the second respondent has been dismissed, against which, the appeal in A.S.No.1024 of 1993 was filed and the same is pending before this Court even as on date, which means that the civil proceedings has not attained finality and hence, the status quo ordered by the Division Bench of this Court in the afore-said writ appeal would have to be continued, unless and until the inter se claim is finally decided by the civil Court the question of disturbing the status quo by the Wakf Board does not arise, particularly, in appointing the second respondent as Muthavalli of the Kuthba pallivasal by displacing the petitioner. Such action on the part of the Wakf Board is in violation of the specific direction passed by the Hon'ble Division Bench of this Court dated 27.07.1989.

26.Moreover, the second respondent, who has approached the civil Court in O.S.No.138 of 1989 to declare him as Muthavalli for the Kuthba Pallivasal having failed to obtain any decree cannot get himself appointed as Muthawalli for the said Pallivasal by the proceedings of the first respondent Wakf Board. Such appointment in the opinion of this Court is a clear attempt to circumvent the pending litigation and certainly such appointment would upset the status quo order passed by the Division Bench of this Court. Once the second respondent has chosen to approach the civil Court for enforcement of his right for his appointment of Muthavalli to Kuthba Pallivasal and until the civil proceedings is finally concluded, the question of his appointment would not arise at all. In all fairness, the Wakf Board ought to have waited for the outcome of the civil proceedings, which is pending before this Court, even as on



date. Only in such circumstances, the earlier attempt by the Wakf Board appointing the second respondent as Muthavalli of Kuthba Pallivasal vide order dated 27.06.2014 was discountenanced by this Court in the order dated 29.04.2016 in W.P(MD)No.12143 of 2014. In fact, such order was clearly illegal as the petitioner was allowed to assume office after the death of his father in 2012 and he acted as such since 28.06.2014. This Court is unable to appreciate as to why the Wakf Board has suddenly decided to appoint the second respondent as Muthavalli for the Kuthba Pallivasal.

27. In any event, the said appointment was put to challenge in W.P(MD)No.12143 of 2014 by the writ petitioner and the writ petition was allowed and the order of the Wakf Board dated 27.06.2014 was set aside. Thereafter, the writ appeals were filed in W.A(MD)Nos.865 and 866 of 2014 both by the Wakf Board and by the second respondent and the Division Bench of this Court in the order passed on 22.03.2018 has clearly concluded in favour of the petitioner herein in paragraph 20 of the Judgment as extracted supra. Although much reliance has been placed in paragraph 21 of the Judgment of the Division Bench by the counsel appearing for the first respondent, from the entirety of the order passed by this Court, this Court has necessary come to inexorable conclusion that the Division Bench of this Court has favoured continuance of the petitioner as Muthavalli for the Kuthba Pallivasal. However, liberty was given to the Wakf Board to exercise its power, as per the provisions of Wakf Act, 1995, but it did not mean that such power could be exercised in violation of the direction as contained in paragraph 20 of the Judgment. In fact, in paragraph 20 of the Judgment, the Hon'ble Division Bench made it very clear that the petitioner has to be continued as Muthavalli in respect of the Kuthba Pallivasal subject to the result of the appeal in A.S.No.1024 of 1993. When such clear direction is given and A.S.No.1024 of 1993 has still not attained the finality, this Court finds that the impugned action of the first respondent, dated 05.07.2018, in appointing the second respondent as Muthavalli for the Kuthba Pallivasal is contrary to the direction passed by the Division Bench of this Court and therefore, the same has to be held as illegal and unsustainable. As regards the principal submission made on behalf of the first respondent that the appointment of Muthavalli is not hereditary, this Court is of the view that such contention does not really upset the claim of the petitioner herein in view of the order passed by the learned single Judge of this Court in favour of the petitioner in W.P(MD)No.12143 of 2014 dated 29.04.2016 and also the dismissal the writ appeal, in W.A(MD)Nos.865 and 866 of 2016. Once the Court recognized the appointment of the petitioner as Muthavalli for the Pallivasal and granted seal of approval de-hors the legal provisions whether the appointment is hereditary or not, the petitioner has to be continued in terms of the ruling of the single Judge as well as the Division Bench of this Court. Further, as regards the qualification of the second respondent vis-a-vis, the petitioner for the appointment as Muthavalli, the learned counsel appearing for the first respondent did not draw any specific reference to the provisions of the Wakf



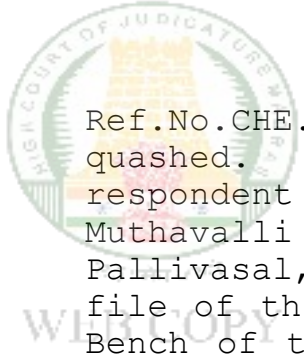
Act as what qualification is prescribed for appointment as Muthavalli for Pallivasal and Dargah. In any event, it is the submission of the learned Senior Counsel for the petitioner that the petitioner also in possession of all the required qualifications for appointment as Muthavalli and such submission has not been seriously disputed by the respondents. That being the case, even this Court is of the view that the petitioner is deemed to be qualified for continuance as Muthavalli for the Pallivasal.

28.Finally, in regard to the objection as to the maintainability of the writ petition on the ground that the resolution dated 19.06.2018 has not been challenged and it is only the consequential order dated 05.07.2018 alone is challenged and as per the Section 83 of the Wakf Act, an effective and alternative remedy is provided and non-exhaustion of the same would be fatal to the present proceedings is concerned, this Court is of the considered view that even in the earlier proceedings initiated by the petitioner, it is only the order passed by the Wakf Board, which was put to challenge and not resolution which proceeded such action.

29.The learned Senior Counsel appearing for the petitioner submitted that the resolution, dated 19.06.2018, has not been made available and therefore, the subsequent communication dated 05.07.2018, is challenged and there is nothing wrong in such challenge by the petitioner.

30.As regards the availability of effective and alternative remedy under Section 83 of the Wakf Act, as rightly contended by the learned Senior Counsel for the petitioner that the entire issue hinges on the implementation of the order passed by the Hon'ble Division Bench of this Court, dated 22.03.2018, in W.A(MD)Nos.865 and 866 of 2016. While that being the case, the question of approaching the Wakf Tribunal under Section 83 of the Wakf Act does not arise at all. In the facts and circumstances of the present case, it is not necessary for the petitioner to approach the Wakf Tribunal, since the order impugned in the present writ petition is contrary to the specific direction passed by this Court dated 22.03.2018 in W.A(MD)Nos.865 and 866 of 2016. Therefore, in such scenario, it is not fair and proper to drive the petitioner to resort to alternative remedy available under the scheme of the Wakf Act. The Hon'ble Supreme Court has held consistently that in extraordinary circumstances, the writ petition can be entertained without compelling the party to resort to alternative remedy provided under various statutes. This Court is of the view that in the instant case, the facts and circumstances warrant direct intervention of this Court and the objection raised on behalf of the respondents on this ground is liable to be rejected, as being without any merits.

31.For the above reasons, this Court find that the petitioner has made out a clear case for relief and hence, impugned order passed by the first respondent in



Ref.No.CHE.MU.AANAI.No.6211/12/A1/TVELI dated 05.07.2018 is hereby quashed. There shall be a consequential direction to the first respondent to pass appropriate order appointing the petitioner as Muthavalli for the Kadayanallur Naina Mohammed Periya Kuthba Pallivasal, till the disposal of A.S.No.1024 of 1999 pending on the file of this Court in furtherance of the direction of the Division Bench of this Court dated 22.03.2018 in W.A(MD)Nos.865 and 866 of 2016 as found in the paragraph 20 of the Judgment, which is reproduced supra. The Consequential order is directed to be passed by the first respondent, within a period of four weeks from the date of receipt of a copy of this order.

With the above direction, this Writ Petition is allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar (Crl.Side)

/True Copy/

Sub Assistant Registrar (CS-I)

To
The Chief Executive Officer,
Tamil Nadu Wakf Board through its
No.1, Jaffer Sarango Street,
Seedhakadi Nagar,
Chennai - 01.

+1CC TO MR.NIRANJAN S.KUMAR ADVOCATE IN S.R.NO.81864.
+1CC TO MR.K.K.SENTHIL VELAN ADVOCATE IN SR.NO.81005.
+1CC TO MR.GANAGA SAPAPATHY, ADVOCATE IN SR.NO.81238.

SKN
DS RP SAR-1 :20.09.2018: 16P/5C

Order made
W.P. (MD) No.16615 of 2018
and
W.M.P (MD) Nos.14697 and 14698 of 2018
30.08.2018