

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON 09.01.2019

PRONOUNCED ON 21.01.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN
AND
THE HONOURABLE MR.JUSTICE P.RAJAMANICKAM

W.P.No.22839/2017

&

WMP.Nos.24006 & 24007/2017 & 38813/2018

S.Hakuthulli

Petitioner

Vs

1 Union of India
rep.by the Chief Secretary
Department of Personnel &
Administrative Reforms [Personnel wing]
Government of Puducherry
Chief Secretariat, Puducherry.

2 The Secretary to Government
Waqf Secretariat, Government of
Puducherry, Chief Secretariat
Puducherry.

3 Puducherry State Waqf Board
rep.by its Chief Executive Officer-cum-
Secretary, No.1&3, III Floor
Yanam Venkatachalam Pillai Street
Puducherry 605 001.

4 Mr.L.Mohamed Manzoor
CEO-cum-Secretary, No.1&3, III Floor
Yanam Venkatachalam Pillai Street
Puducherry 605 001.

5 Mr.M.O.H.F.Shajahan
S/O.M.O.H.Farooq
Minister for Revenue & Waqf
Government of Puducherry
Legislative Assembly Building Complex
Puducherry.

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Respondents

Prayer:-

Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of certiorari calling for the records pertaining to the order passed in proceedings No.A.22012/1/2014/DPAR/SS.I[2] dated 01.08.2017 on the file of the first respondent and to quash the same.

For Petitioner : Mr.R.Natarajan

For RR 1 to 3 : Mrs.V.Usha, AGP [Pudhucherry]

For RR 4 & 5 : No Appearance

ORDER

M.SATHYANARAYANAN, J.

By consent, the writ petition is taken up for final disposal. Mrs.V.Usha, learned Additional Government Pleader [Puducherry] appears on behalf of the respondents 1 to 3.

2 The writ petition is styled as a Public Interest Litigation and the writ petitioner would aver among other things that the Chief Executive Officer-cum-Secretary to the Wakf Board derives source of authority from the Wakf Act, 1995 and the said office is regulated and governed as per Section 23 of the Wakf Act, 1995. The duties and responsibilities of the Chief Executive Officer-cum-Secretary are very much important as the said official play a pivotal role, in the matter of implementation of the orders passed by the Wakf Board, Wakf Tribunal and the Government. The petitioner, on factual aspect would state that the Wakf Board for the Union Territory of Puducherry, was constituted by the Government in G.O.Ms.No.33/US [Wakf]/T.10/2010 HR1 and Wakf Secretariat dated 30.09.2010 for a period of five years and it was also published in the Official Gazette. Under section 15 of the Wakf Act, 1995, the term of the office of the State Wakf Board has been prescribed as five years and no extension of the said period has been contemplated under the said Act.

3 According to the writ petitioner, the period of five years came to be expired during the year 2015 itself. The 1st respondent - the Government, in exercise of powers conferred u/s.83[1] and [4] of the Wakf Act, 1995, read with S.O.No.572[E] dated 19.08.1996 of the Ministry of Home Affairs, Government of India, New Delhi, in consultation with the High Court of Madras, had issued a Notification dated 21.04.2017 in and by which, the Wakf Tribunal came to be constituted at Puducherry and Karaikkal Districts.

4 It is the case of the writ petitioner that the 4th respondent, who was working as the Director, Local Administration Department, Puducherry, was appointed as the Wakf Tribunal for Puducherry District vide impugned proceedings dated 01.08.2017 passed by the 1st respondent and was put in in-charge of Chief Executive Officer-cum-Secretary of the said Wakf Board with immediate effect. It is the specific case of the writ petitioner that the Chief Executive Officer-cum-Secretary is the subordinate to the Wakf Tribunal and he cannot hold office of the Chief Executive Officer-cum-Secretary of the 3rd respondent and represent the Board in the said capacity before the Wakf Tribunal at Puducherry for the reason that he is one of the members in the Wakf Tribunal and that apart, the impugned order is in per se violation of section 23 of the Wakf Act, 1995.

5 Mr.R.Natarajan, learned counsel appearing for the writ petitioner has invited the attention of this Court to section 3 of the Wakf Act, 1995, viz., Definitions and would submit that section 3[d] defines the Chief Executive Officer, which means, "the Chief Executive Officer appointed under sub-section[1] of section 23" and section 13 of Chapter IV of the Wakf Act, 1995, speaks about the incorporation of the Wakf Act and also drawn the attention of this Court to the proviso. It is also the submission of the learned counsel for the petitioner that section 99 of the Wakf Act speaks about the power to supersede the Board and as per section 108-A of the said Act, which came to be inserted by Act 27 of 2013, with effect from 01.11.2013, the provisions of the Wakf Act shall have overriding effect notwithstanding anything inconsistent therewith, contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than the said Act and in the light of the section 23[1], the Chief Executive Officer shall be appointed by the State Government vide Notification in the Official Gazette from a panel of two names suggested by the Wakf Board and they shall not be below the rank of Deputy Secretary to the State Government and in case of non-availability of Muslim Officer of that rank, a Muslim Officer of equivalent rank shall be appointed on deputation. In sum and substance, it is the submission of the learned counsel for the petitioner that admittedly, five years period of the Wakf Tribunal came to an end on 29.09.2015 and thereafter, no steps have been taken by the State Government in terms of proviso to section 13[1] to constitute the Wakf Board and in the absence of the Wakf Board, names cannot be suggested and therefore, the appointment of the 4th respondent as the Chief Executive Officer-cum-Secretary of the Wakf Board is not at all proper. It is also pointed out by the learned counsel for the 4th respondent was the Director of Local Administration Department of Puducherry and vide Notification of the Department of Hindu Religious Institutions and Wakf, dated 21.04.2017, he was

appointed as the Member of the Wakf Tribunal and while holding the said post, he cannot be considered for the post of the Chief Executive Officer-cum-Secretary of the State Wakf Board for the reason that the Chief Executive Officer-cum-Secretary of the State Wakf Board is subservient to the State Wakf Board and sitting as a Member of the Wakf Tribunal, the 4th respondent cannot represent the State Wakf Board and some times, it may lead to conflict of interest also.

6 The learned counsel for the petitioner would further submit that after the entertainment of this writ petition and grant of interim orders, vide Notification dated 30.10.2018, the Department of Hindu Religious Institutions and Wakf of Government of Puducherry has appointed Tmt.B.Zareena Begum, the Officer on Special Duty, Directorate of Health and Family Welfare Services, Puducherry, as a Member of Wakf Tribunal for Puducherry District and vide Notification dated 12.11.2018, he has indicated that the 4th respondent tendered his resignation from the post of Member of Wakf Tribunal and it shall be deemed to have been accepted by the Hon'ble Lieutenant Governor from 11.10.2018 and the effect of Notification dated 12.11.2018 is that the 4th respondent now continues to act as the Chief Executive Officer-cum-Secretary of the Wakf Board and he cannot hold that post in the absence of suggestion of names by the Wakf Board and since the term of the Wakf Board came to be expired on 29.09.2015, he cannot continue as the Chief Executive Officer-cum-Secretary and hence, prays for appropriate orders.

7 Per contra, Mrs.Usha, learned Additional Government Pleader [Puducherry] would submit that in the light of the fact that the terms of the Wakf Board expired on 29.09.2015, the function and administration came to a stand still and in order to tied over the crisis and emergency, the 4th respondent, who was functioning as a Member of the Wakf Tribunal, Puducherry, was appointed as the Chief Executive Officer-cum-Secretary of the Wakf Board and in the light of the infirmities pointed out in the writ petition as to the said appointment, he tendered his resignation as the Member of the Wakf Tribunal and in his place, Mrs.B.Zareena Begum came to be appointed and as of now, he is functioning as the Chief Executive Officer-cum-Secretary of the Wakf Board and in the absence of express bar, considering the situation, he can be allowed to continue as the Chief Executive Officer-cum-Secretary ; otherwise, the functions overseeing the affairs and administration of Wakfs would definitely come to a stand still and it may not augur well for the Institution and Wakf properties and hence, prays for dismissal of the writ petition.

8 In response to the said submission, the learned counsel for the writ petitioner would submit that the Notification dated

30.10.2018, appointing Tmt.B.Zareena Begum, Officer on Special Duty, Directorate of Health and Family Welfare Services, Puducherry, as the Member of the Wakf Tribunal, Puducherry and the subsequent Notification dated 12.11.2018, accepting the resignation of the 4th respondent as a Member of the Wakf Tribunal, were subsequent developments and the bar under section 23[1] of the Act, still operates and as such, the 4th respondent cannot continue as the Chief Executive Officer-cum-Secretary of the Wakf Board - the term of which, came to an end on 29.09.2015.

9 It is also pointed out by the learned counsel for the petitioner, by placing reliance upon the judgment of the Hon'ble Supreme Court of India reported in 2011 [3] SCC 436 [State of Orissa and Another Vs. Mamata Mohanty], that if an order is bad in inception, it does not get sanctified at a later date for the reason that the illegality strikes at the root of the order and as such, the subsequent proceedings did not come to the aid of the State as well as to the 4th respondent.

10 This Court paid its anxious consideration and best attention to the rival submissions and also perused the materials placed before it.

11 It is relevant to extract section 3[d] and section 23 of the Wakf Act, 1995:-

'3(d) "Chief Executive Officer" means the Chief Executive Officer appointed undersub-section (1) of section 23; ''

23. Appointment of Chief Executive Officer and his term of office and other conditions of service.-1[(1)There shall be a full-time Chief Executive Officer of the Board who shall be a Muslim and shall be appointed by the State Government, by notification in the Official Gazette, from a panel of two names suggested by the Board and who shall not be below the rank of Deputy Secretary to the State Government, and in case of non-availability of a Muslim officer of that rank, a Muslim officer of equivalent rank may be appointed on deputation.]

(2) The term of office and other conditions of service of the Chief Executive Officer shall be such as may be prescribed.

(3) The Chief Executive Officer shall be ex officio Secretary of the Board and shall be under the administrative control of the Board. ''

12 It is not in dispute that the 4th respondent, while

functioning as the Director of Local Administration Department, Puducherry, was appointed as a Member of the Wakf Tribunal for Puducherry District vide Notification dated 21.04.2017 of the Department of Hindu Religious Institutions and Wakf of Government of Puducherry. The Department of Personnel and Administration Reforms [Personnel Wing], Government of Puducherry, the 1st respondent herein, vide impugned order dated 01.08.2017, directed him to hold the post of the Chief Executive Officer-cum-Secretary of the State Wakf Board, Puducherry, with immediate effect. It is to be noted at this juncture that at the time of passing of the impugned order on 01.08.2017, the 4th respondent was holding the post of the Member of the Wakf Tribunal, Puducherry District. As rightly pointed out by the learned counsel for the writ petitioner, as the Chief Executive Officer-cum-Secretary of the Wakf Board, he has to represent the Wakf Board in that capacity before the very same Wakf Tribunal, in which he was a Member.

13 The primordial question arises for consideration in this writ petition is whether the appointment/direction of the 4th respondent to hold the charge of the post of the Chief Executive Officer-cum-Secretary of the Wakf Board is in consonance with section 23 of the Wakf Act, 1995?

14 In terms of sub-section [1] of section 23 of the Wakf Act, 1995, a full time Chief Executive Officer shall be appointed by the State Government by Notification in the Official Gazette from a panel of two names suggested by the Board and who shall not be below the rank of Deputy Secretary to the State Government and in case of non-availability of a Muslim Officer, a Muslim officer of equivalent rank may be appointed on deputation.

15 The respondents, in their additional typed set of documents had also filed the Model Wakf Rules and Rule 44 speaks about the terms and conditions of service of the Chief Executive Officer of Board and sub-rule [1] says, "if the person appointed as Chief Executive Officer [CEO] under section 23 of the Act, is an officer who has retired from Government service....." and sub-rule [3] says that "in case a vacancy to the post of the Chief Executive Officer arises due to repatriation or removal, the Government shall have powers to appoint any senior officer of the Board as Acting Chief Executive Officer till the vacancy is filled".

16 A faint attempt was made by the learned Additional Government Pleader [Puducherry] appearing for the official respondents that in order to tied over the immediate crisis of want of the Chief Executive Officer on account of the fact that the term of the Wakf Board came to an end on 29.09.2015, there

was an absolute necessity to direct the 4th respondent to hold the charge as the Chief Executive Officer-cum-Secretary also. That apart, it is also the submission of the learned Additional Government Pleader [Puducherry] that in case of non-availability of a Muslim Officer of that rank, a Muslim officer of equivalent rank may be appointed on that basis as per section 23[1] of the Wakf Act, 1995 and as such, the Government is having every power to appoint a Muslim Officer on deputation and for that purpose, there need not be any name to be suggested by the Wakf Board. In the considered opinion of the Court, the said submission lacks merit for the following reasons.

17 A Division Bench of the Bombay High Court, in the order dated 05.05.2017 made in WP.No.551/2017 - Durrani Abdullah Khan Vs. The State of Maharashtra through its Secretary, Minority Development Department, Matralaya, Mumbai-32 and others, has considered the scope of pre-amendment and post-amendment of section 23 of the Wakf Act, 1995 and it is relevant to extract paragraph Nos.11, 13, 15, 16 and 17:-

''11. Sec. 23 as it existed prior to the amendment of the year 2013 empowered the State Government to appoint a Chief Executive Officer, who shall be a Muslim in consultation with the board. However, after the amendment to Sec. 23 in the Wakf Act 1995 in the year 2013 rigor of consultation of the board has been done away with. However, the State Government is empowered to appoint Chief Executive Officer of the Board from panel of two names suggested by the board and who shall not be below the rank of the Deputy Secretary to the State government and in case nonavailability of Muslim officer of that rank, a Muslim Officer of equivalent rank may be appointed on deputation. Sec. 23 as it exist after amendment does not require the State government to consult with the board while appointing a full time Chief Executive Officer. It is for the reason that, the State Government has to appoint a Chief Executive Officer from the panel of two names suggested by the Board. It is because the State Government's powers have been restricted to the appointment of the Chief Executive Officer from the panel of two names suggested by the Board, the State is not required to consult the board. Prior to the amendment as the State Government could appoint any person as a Chief Executive Officer in that case consultation of the board was pre-requisite. However, after amendment in the year 2013, the State Government now can appoint the

Chief Executive Officer of the board from the names recommended by the Board.

.....

13. In Sec. 23 of the Wakf Act, two contingencies are spelt out (i) the Chief Executive Officer of the Board shall be a Muslim and shall be appointed by the State Government by notification in official Gazette from the panel of two names suggested by the Board and who shall not be below the rank of Deputy Secretary to the State Government and (ii) in case of non availability of Muslim Officer of that rank, a Muslim Officer of equivalent rank may be appointed on deputation. Both these contingencies are conjoined by word "and".

...

15. If we read the provisions of Sec. 23 prior to amendment, it required appointment of Chief Executive Officer by the State to be made in consultation with the board. By virtue of amendment the aspect of consultation is not required, however, the appointment is to be made by the State Government of the Chief Executive Officer of the board from the panel of two names suggested by the board. It is prerogative of the board to suggest two names to the State and the State Government is obliged to appoint a full time Chief Executive Officer of the Board from the panel of two names suggested by the board and that is why the aspect of consultation does not find place in the amended provision.

16. To read the provision in the manner that if a person not below the rank of deputy secretary to the State Government is not available, then the State Government may appoint any Muslim Officer of equivalent rank without getting two names from the board, would be doing violence to the language of the word "and" appearing between two parts of Sec. 23(1) of the Wakf Act. Whether the person to be appointed as a Chief Executive Officer is a person not below the rank of Deputy Secretary and in case of non availability of such a Muslim officer of that rank, a Muslim officer of equivalent rank is to be appointed, the names will have to be suggested by the board. There is one more reason for interpreting it in that manner. The Chief Executive Officer is under the administrative control of the board. The Chief Executive

Officer has to implement the directions given by the Board. It also has to exercise the function delegated to him by the board. The Board should be in a position to repose faith in Chief Executive Officer. The aspect of consultation has been removed by amendment to Sec. 23 of the Act and the powers of the State Government in appointing full time Chief Executive Officer are limited from the panel of two names suggested by the board. The said panel of two names suggested may be the persons not below the rank of Deputy Secretary or in case of non availability of persons of the rank of Deputy Secretary, a person of equivalent rank. Whether the person appointed is not below the rank of Deputy Secretary or of a equivalent rank, he will have to be appointed on deputation, because the Chief Executive Officer to be appointed as per Rule 7 cannot be more than 60 years of age at the time of appointment, his tenure would be three years or at the most five years. In the light of the above discussion, it will have to be held that, the word "and" between both the contingencies specified in Sec. 23 of the Act, will have to be read as conjunctive.

17. Though Rule 7 lays down that appointment of Chief Executive Officer is by the State in consultation with the board the same was in consonance with Sec. 23 of the Act as it stood prior to amendment. On amendment to Sec. 23 of the Act, the aspect of consultation does not find place in Sec. 23 of the Act, instead the State Government is required to appoint full time Chief Executive Officer only from the names suggested by the board. Rules are required to be subservient to the Act and the Rules have to

supplement the statute and not supplant it. It appears that, after amendment made to Sec. 23 of the Act, the said rule has not been effectively amended to bring it in tune with Sec. 23 to the extent of non requirement of consultation."

18 The Division Bench of the Bombay High Court, in the above cited decision, has held that the names will have to be suggested by the Board for appointment of the Chief Executive Officer and further held that in the event of a person not below the rank of the Deputy Secretary to Government is unavailable, still the State Government cannot appoint any Muslim Officer of equivalent rank without getting two names from the Board, in the

light of section 23[1] of the Wakf Act, 1995. Admittedly, in the case on hand, the term of the Wakf Board came to an end on 29.09.2015 and the 4th respondent who was the Director of Local Administration Department of Puducherry, vide Notification dated 21.04.2017 of the Department of Hindu Religious Institutions and Wakf, Puducherry, came to be appointed as the Member of the Wakf Tribunal for Puducherry District and while holding the said post, vide impugned order dated 01.08.2017, he was put in-charge as the Chief Executive Officer-cum-Secretary of Wakf Board of Puducherry. In the absence of the Wakf Board, such appointment, in the considered opinion of the Court, was not at all in order and even otherwise, being the Chief Executive Officer-cum-Secretary of the Wakf Board, he has to appear before the very same Wakf Tribunal, in which he was a Member to adjudicate certain issues and the same is impermissible in law.

19 After entertainment of the writ petition, the State Government of Puducherry, having realised the said legal position, has accepted the resignation tendered by the 4th respondent from the post of Member of the Wakf Tribunal vide Notification dated 12.11.2018 and by means of an earlier Notification dated 30.10.2018, appointed Mrs.B.Zareena Begum, Officer on Special Duty, Directorate of Health and Family Welfare Services, Puducherry, as the Member of the Wakf Tribunal for Puducherry. The Notification dated 12.11.2018 issued by the Department of Hindu Religious Institutions and Wakf, accepted the resignation of the 4th respondent from the post of the Member of the Wakf Tribunal, in effect, makes him as the Chief Executive Officer-cum-Secretary of the Wakf Board and here again, his name was not suggested by the Wakf Board in terms of section 23[1] of the Wakf Act, 1995, and of course, the Wakf Board is not all in existence as its term came to an end on 29.09.2015.

20 Though it is open to the State Government of Puducherry, in terms of proviso to section 13 of the Wakf Act, 1995, to establish/constitute the Wakf Board, the same has not been done so far and according to the learned Additional Government Pleader [Puducherry] appearing for the respondents 1 to 3, the process is under way.

21 Since holding the post of the Chief Executive Officer-cum-Secretary of the Wakf Board by the 4th respondent is in violation of section 23[1] of the Wakf Act, 1995, he cannot continue in that capacity. Though a faint attempt has been made by the learned Additional Government Pleader [Puducherry] for the respondents 1 to 3 to interpret the later portion of section 23 [1] of the Wakf Act, 1995, as to the appointment of a Muslim Officer of equivalent rank on deputation, in the light of the pronouncement of the above cited decision rendered by the

Division Bench of the Bombay High Court, they cannot do so.

22 In the light of the reasons assigned above, the writ petition is allowed and the proceedings of the 1st respondent dated 01.08.2017 is hereby set aside and as a consequence, the 4th respondent cannot continue as the Chief Executive Officer-cum-Secretary of the Wakf Board of Puducherry. However, it is open to the Government of Puducherry to take immediate and necessary steps in terms of section 13[1] of the Wakf Act, 1995, to constitute the Wakf Board, at the earliest, in the best interest and administration of the Wakf Board. No costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

AP

To

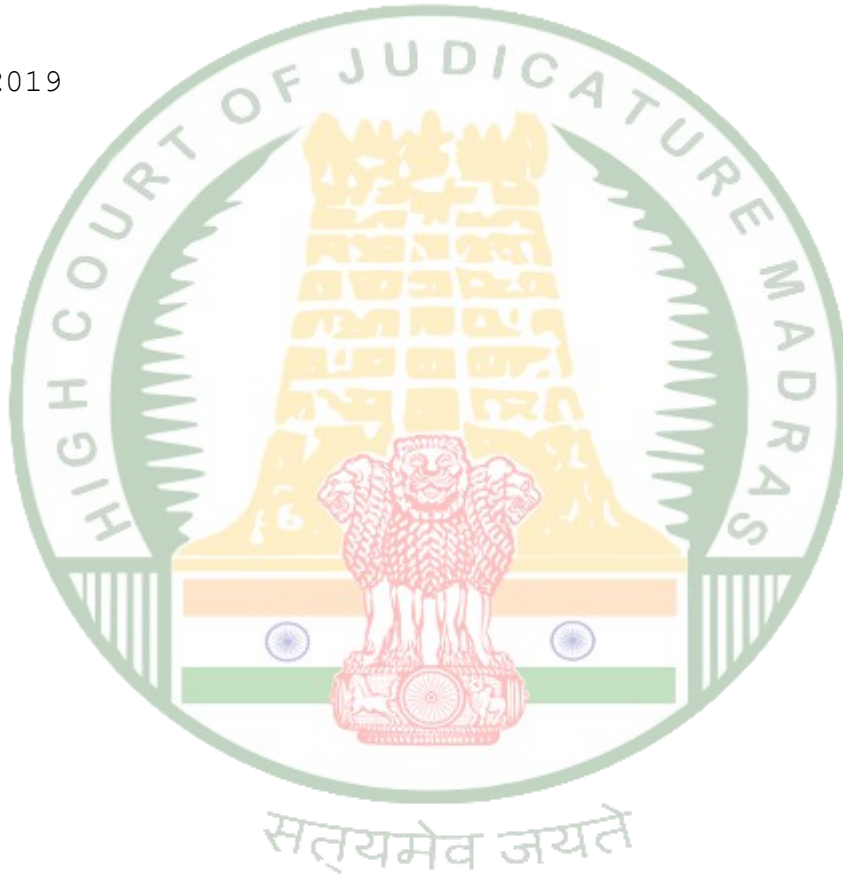
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+1cc to Mr.R.Natarajan, Advocate, S.R.No.4184
+1cc to the Government Pleader, S.R.No.4299

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