

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on	25.09.2019
Delivered on	12.11.2019

CORAM:

THE HONOURABLE MR.JUSTICE **M.GOVINDARAJ**

W.P. (MD)Nos.20085 and 20417 of 2019

and

W.M.P. (MD)Nos.16620, 16621, 16622, 17065 and 17066 of 2019

W.P. (MD)No.20085 of 2019:

K.A.M.Muhammed Abubacker,
Member,
Tamil Nadu Waqf Board,
Member of Tamil Nadu Legislative Assembly,
Kadayanallur Constituency,
Constituency Office,
Near New Bus Stand,
Kadayanallur,
Tirunelveli.

: Petitioner

Vs.

The Government of Tamil Nadu,
Rep. By its Secretary,
Backward Classes, Most Backward Classes and
Minorities Welfare Department,
Secretariat,
Fort St. George,
Chennai.

: Respondent

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus, to call for the records relating to the impugned proceedings of the respondent in letter No.4451/T1/2019-02, dated 06.09.2019 and quash the same as illegal and consequently, direct the respondent to notify the two members of Parliament from the State of Tamil Nadu, namely Mr.Mohamed Jaan and Thiru.Nawaz Gani to have become the members of the Tamil Nadu Waqf Board, as per Sec.14(1)(b)(i) of the Waqf Act, 1995, within the time stipulated by this Court.

For Petitioner	:	Mr.M.Mahaboob Athiff, For M/s.Ajmal Associates
For Respondent	:	Mr.K.Chellapandian, Additional Advocate General, Assisted by, Mr.J.Gunaseelan Muthiah, Additional Government Pleader



W.P. (MD)No.20417 of 2019:

K.A.M.Muhammed Abubacker,
Member,
Tamil Nadu Waqf Board,
Member of Tamil Nadu Legislative Assembly,
Kadayanallur Constituency,
Constituency Office,
Near New Bus Stand,
Kadayanallur,
Tirunelveli.

: Petitioner

Vs.

1.The Government of Tamil Nadu,
Rep. By its Secretary,
Backward Classes, Most Backward Classes and
Minorities Welfare Department,
Secretariat,
Fort St. George,
Chennai.

2.A.Karthik,
Secretary to Government,
Backward Classes, Most Backward Classes and
Minorities Welfare Department,
Government of Tamil Nadu,
Secretariat,
Fort St. George,
Chennai.

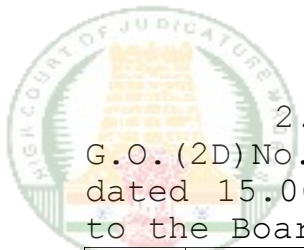
: Respondents

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari, to call for the records relating to the impugned order made by the respondents in G.O.Ms.No.58, Most Backward Classes and Minority Welfare (T1) Department, dated 18.09.2019 and quash the same as illegal.

For Petitioner	: Mr.M.Mahaboob Athiff, For M/s.Ajmal Associates
For Respondent No.1	: Mr.K.Chellapandian, Additional Advocate General, Assisted by, Mr.J.Gunaseelan Muthiah, Additional Government Pleader

COMMON ORDER

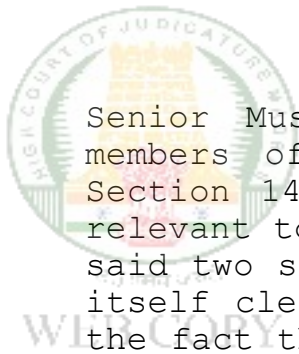
Challenge to the Writ Petitions is the show cause notice as well as the order dated 18.09.2019, superseding the Waqf Board.



2. According to the petitioner, as per the constitution, in G.O.(2D)No.18, Backward Classes, Most Backward Classes Department, dated 15.06.2012, the following persons were elected and nominated to the Board:

Sl. No.	Member	Category	Appointed vide
1.	K.AM.Mohamed Abubaker (Petitioner)	Elected - Muslim Member of State Legislature	GO.2D No.24, dated 10.10.2017
2.	M.Ajmal Khan, Senior Advocate	Elected - As no member of the Tamil Nadu Bar Council is a Muslim, nominated as per proviso to Sec.14(1) (b) (iii) of the Act.	GO.2D No.23 dated 14.09.2017
3.	A.Sirajudeen, Senior Advocate	Elected - As no member of the Tamil Nadu Bar Council is a muslim, nominated as per proviso to Sec.14(1) (b) (iii) of the Act.	GO.2D No.23, dated 14.09.2017
4.	Mohamed Nasimuddin, I.A.S.	Nominated - officer of the State Government	GO.2D No.23, dated 14.09.2017
5.	K.S.Masthan, M.L.A.	Elected - Muslim Member of State Legislature	GO.2D No.24, dated 10.10.2017
6.	Dr.Haja K.Majeed	Elected - Mutawalli	GO.2D No.24, dated 10.10.2017
7.	Syed Ali Akbar	Elected - Mutawalli	GO.2D No.24, dated 10.10.2017
8.	Tamil Mahan Hussain	Nominated - Professional (Social worker)	GO.2D No.23, dated 14.09.2017
9.	Amatul Athifa	Nominated - Islamic Scholar in Shia Theology	GO.2D No.23, dated 14.09.2017
10.	A.S.Fathima Muzaffar	Nominated - Islamic Scholar in Sunni Theology	GO.2D No.23, dated 14.09.2017
11.	A.Anwar Raajhaa, M.P.	Elected - Member of Parliament	GO.2D No.24, dated 10.10.2017

3. It is further stated that the first respondent has admitted the two senior advocates only under the elected members category and rightly so, in view of the fact that the appointment of



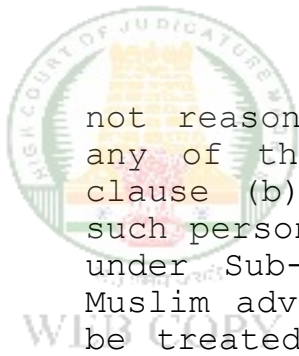
Senior Muslim advocates from the State in the place of Muslim members of the bar council is enumerated in the category under Section 14(1)(a) and (b), which refers to elected members. It is relevant to note that, G.O.Ms.No.23, dated 14.09.2017, by which, the said two senior advocates were appointed as the member of the board itself clearly states, that they have been so nominated in view of the fact that there is no Muslim member in the Bar Council of Tamil Nadu. Therefore, the appointment of the said two Senior Advocates though nominated, is in view of the fact that the first respondent was satisfied that it is reasonably not practicable to hold elections in respect of the said category.

4. Mr.Anwar Raajhaa, the member appointed by virtue of being a member of the Parliament, ceased to be a member of Parliament in view of expiry of his tenure as an M.P. Consequently, he also ceased to be a member of the Board. Therefore, resultantly, there are ten members. In the above scenario, in the elections held to the Lok Sabha and the Rajya Sabha, Mr.Nawaz Gani had been elected as a member of Lok Sabha and Mr.Mohamed Jaan had been elected as the member of the Rajya Sabha. In such view of the matter, two vacancies in the board to be filled up by the members of the Parliament from Tamil Nadu is to be notified as filled up, as there are two MPs and no other member of the Parliament is a Muslim. That if the appointment of the two senior advocates are considered to be under the nominated category and are not elected, still, in view of the nomination being made in furtherance of Section 14(1)(b)(iii) read with Section 14(3), the same would not fall vice of Section 14(4). In the meanwhile, one of the Senior Muslim Advocates, namely A.Sirajudeen, tendered his resignation. Therefore, the very basis on which supersession is made is *per se* illegal and the action of the respondent was with premeditation, malice and lack of jurisdiction.

5. Even assuming the two senior advocates should be considered as nominated, with the appointment of two Muslim members of Parliament of the State, the ratio between elected and nominated members would be 6:5. The Government had taken a decision to supersede the Board and issued a show cause notice for the same. The proceedings dated 06.09.2019, calling upon the Waqf Board to show cause as to why the Tamil Nadu Waqf Board should not be superseded by the State Government under Section 99 of the Waqf Act, 1995, is under challenge in W.P.(MD)No.20085 of 2019.

6. During the pendency of the above Writ Petition, Government Order in G.O.Ms.No.58, Most Backward Classes and Minority Welfare (T1) Department, dated 18.09.2019, superseding the Board under Section 99 of the Waqf Act, 1995 was passed, which is challenged by the petitioner herein in W.P.(MD)No.20417 of 2019.

7. The learned counsel appearing for the petitioner would contend that a reading of Sub-Section (3) of Section 14 would clearly show that where the State Government is satisfied that it is



not reasonably practicable to constitute an electoral college for any of the categories mentioned in sub-clauses (i) to (iii) of clause (b) of sub-section (1), the State Government may nominate such persons as the members of the Board. Since the members selected under Sub-Clause (iii) fall under electoral college, the Senior Muslim advocates elected in the place of Bar Council members shall be treated as elected members. In that event, in compliance with Sub-Section (4), there will be more number of elected members than the nominated members. Even assuming that they are construed as nominated members, the intention of the legislature under Sub-Section (4) is that they should be excepted and in that event, Sub-Section (4) will not be applicable. Further, the judgment cited in the impugned order was in a different situation. At that point of time, no elections were conducted and no Muslim members of Parliament were available. But, at present, two members of Parliament are available to be appointed. When there is a possibility of constituting the Board with two elected members of Parliament, adopting a different course reveals malice in law in the conduct of the respondents. Therefore, the impugned order dated 18.09.2019 should be set aside.

8. Per contra, the learned Additional Advocate General appearing for the official respondent would contend that at the time of original constitution itself, there were 5 elected members and 6 nominated members. As per Sub-Clause (iii) of Clause (b) of Sub-Section (1) of Section 14, in the absence of any Muslim member from the Bar Council of the State, the Government may nominate two Muslim advocates to be the Board members. The very word "**nominate**" employed in the provision will clarify that senior advocates appointed to the Board are nominated members. Further, on expiry of the tenure as Member of Parliament of Mr. Anwar Raajhaa, the strength of the elected members has reduced into '4'. Therefore, it is clear that the Board was unable to perform and hence, a policy decision is taken by the Government to supersede the Board. As per Section 14(1) (b)(i), the Government, as it may think fit, select one from category of Member of Parliament and not more than two. Even assuming two members are selected, it will make the ratio as 5:6. Further, as per Section 19, resignation of the member takes effect only after notification of appointment of the successor in his place. Therefore, the constitution of the Board clearly is not in conformity with Sub-Section (4) of Section 14.

9. Insofar as the supersession is concerned, all it requires is that principles of natural justice should be followed. Accordingly, show cause notice was issued to all the members and they have submitted their explanations and suggestions. After considering all these aspects, the Government, being satisfied, formed an opinion that the continuance of the Board is likely to be injurious to the interests of the Auqafs in the State, hence, by notification in the official Gazette, superseded the Board for a period of six months. The supersession is not permanent in nature



and there is no *mala fide* intention in doing the same. Since the Board would not perform any of its functions, the Government has taken a decision to supersede the same and, therefore, no interference is warranted to the Government Order impugned in the above Writ Petition.

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10. I have heard both sides.

11. The case on hand, in its entirety, revolves around Section 14 of the Waqf Act, 1995. The above provision deals with the composition of the Board.

12. It is beneficial to extract Section 14, which reads as under:

"Composition of Board.- (1) The Board for a State and the National Capital Territory of Delhi shall consist of -

(a) a Chairperson;

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

(i) Muslim Members of Parliament from the State or, as the case may be, [the National Capital Territory of Delhi],

(ii) Muslim Members of the State Legislature,

(iii) Muslim members of the Bar Council of the concerned State or Union territory:

Provided that in case there is no Muslim member of the Bar Council of a State or a Union territory, the State Government or the Union territory administration, as the case may be, may nominate any senior Muslim advocate from that State or the Union territory, and;

(iv) mutawallis of the auqafs having an annual income of rupees one lakh and above.

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

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



Assembly, as the case may be;

(c) one person from amongst Muslims, who has professional experience in town planning, or business management, social work, finance or revenue, agriculture and development activities, to be nominated by the State Government;

(d) one person each from amongst Muslims, to be nominated by the State Government from recognized scholars in Shia and Sunni Islamic Theology;

(e) one person from amongst Muslims, to be nominated by the State Government from amongst the officers of the State Government not below the rank of Joint Secretary to the State Government;

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

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

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

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

(2) Election of the members specified in clause (b) of sub-section (1) shall be held in accordance with the system of proportional representation by means of a single transferable vote, in such manner as may be prescribed:

Provided that where the number of Muslim Members of Parliament, the State Legislature or the State Bar Council, as the case may be, is only one, such Muslim Member shall be declared to have been elected on the Board.

Provided further that where there are no Muslim Members in any of the categories mentioned in sub-clauses (i) to (iii) of clause (b) of sub-section (1), the ex-Muslim Members of Parliament, the State Legislature or ex-member of the State Bar Council, as the case may be, shall constitute the electoral college.

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



Government may nominate such persons as the members of the Board as it deems fit.

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

[*****]

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

[*****]

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

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

13. Sub-Clauses (i) to (iv) of Clause (b) of Sub-Section (1) specify the constitution of electoral college.

14. Clauses (c), (d) and (e) of Sub-Section (1) pertain to nominated members.

15. The electoral college specified in Sub-Clauses (i) to (iv) provides for election of one and not more than two members from the following categories:

- | | |
|---|--------|
| (i) Muslim Members of Parliament from the State | 1 or 2 |
| (ii) Muslim Members of State Legislature | 1 or 2 |
| (iii) Muslim Members from State Bar Council | 1 or 2 |
| (iv) Mutavallis | 1 or 2 |

Thus, maximum of 8 and minimum of 7 elected members form electoral college.

16. The nominated members as per Clauses (b), (c) and (d) of Sub-Section (1) are;

- | | |
|---|-----|
| (c) One Muslim member having professional experience | - 1 |
| (d) Recognized scholars one each from Sunni and Shia Theology | - 2 |
| (e) Nominee of Government amongst Muslims not below the rank of Joint Secretary to Government | - 1 |

Thus, minimum of 4 nominated members.



17. As per G.O.(2D)No.18, Backward Classes, Most Backward Classes Department, dated 15.06.2012, the composition of Board consists of 11 members. Naturally, the members of electoral college constitute majority and the ratio, normally, should be 7 : 4.

18. It is pertinent to note that as per Sub-Section (4) of Section 14, the elected members shall be more than the nominated members.

19. In the year 2017, State Government, vide G.O.(2D)No.24, dated 10.10.2017 constituted a new Board consisting of 11 members. The list members, as per the above G.O., is given in Paragraph No.2 of this judgment. Out of these 11 members, one member of Parliament from the State ceased to be a member due to the expiry of his tenure as a member of Parliament.

20. Since no Muslim members were available in the Bar Council, two Senior Advocates were selected to be the members in the place of Bar Council members. They, as per proviso to Sub-Clause (iii) of Clause (b) of Sub-Section (1) and on the basis of the legal opinion, were considered as nominated members.

21. Thus, the two categories of existing members viz., elected and nominated members are given as under:

Sl. No.	Elected	Sl. No.	Nominated
1.	K.AM.Mohamed Abubaker -MLA	1.	M.Ajmal Khan - Senior Advocate
2.	K.S.Masthan - MLA	2.	A.Sirajudeen - Senior Advocate
3.	Dr.Haja K.Majeed - Mutawalli	3.	Mohamed Nasimuddin - Officer of State
4.	Syed Ali Akbar - Mutawalli	4.	Tamil Mahan Hussain - Professional Worker
		5.	Amatul Athifa - Scholar in Shia Theology
		6.	A.S.Fathima Muzaffar - Scholar in Sunni Theology

22. In this factual scenario, Section 14 has to be analysed as to whether the Senior Advocate has to be considered as elected members or not and whether Sub-Section (4) provides for exception in the peculiar circumstances.

23. First Proviso to Sub-Section (2) of Section 14 of the Act contemplates a situation where only one Muslim Member is available under Clause (b) that one member shall be declared to have



been elected. Such a situation does not arise in this case, as two members from State Legislature were selected to the electoral college.

24. Second Proviso to the above Sub-Section (2) of Section 14 is also not applicable, as there are two members of Parliament available. But, this proviso is subject to the limitations that at the discretion of the State Government to select from the available members, as it may think fit. The State Government has not thought it fit to select one or two members of Parliament from the State at this juncture. Therefore, the above said provisos have no application to the present issue concerned.

25. Sub-Section (3) of Section 14 of the Act provides for a contingency where it is not reasonably practicable to constitute an electoral college for any of the categories mentioned in Sub-Clauses (i) to (iii) of clause (b) of Sub-Section (1). In the instant case, as stated *supra*, two members of State legislature are already members. Two Senior Advocates in the place of Bar Council members were already nominated. The State Government has not chosen to exercise its discretion in respect of Members of Parliament.

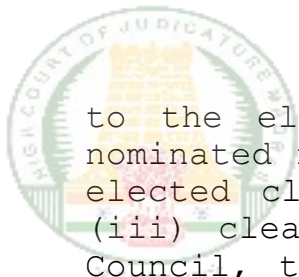
26. With this background, the exception provided under Sub-Section (4) has to be read.

27. Sub-Section (4) of Section 14 of the Act reads as under:

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

28. A combined reading of Sub-Sections (3) and (4) will make it clear that if it is not reasonably practicable to constitute an electoral college from Sub-Clauses (i) to (iii) of Clause (b) of Sub-Section (1), the resultant position will be that, there will be nominations to all the above clauses and all the members would be nominated members, except the Mutawallis elected under Sub-Clause (iv). In such a situation, it is highly improbable to conceive that elected members will be more than nominated members. The legislation, therefore, provides exception to Sub-Section (4). But, in the instant case, such a situation does not arise, as nomination has been made only to Sub-Clause (iii) - i.e., Muslim members of Bar Council of the State.

29. As discussed above, there are two separate and distinct classes in the composition of the Board. One is elected and the other nominated. These two separate class of members cannot be mixed. At the most, in the absence of elected members, there can be nominations. But, such nominations by itself will not elevate them



to the electoral college. Those members can be treated only as nominated members and by no stretch of imagination as belonging to elected class. At the outset, a reading of proviso to Sub-Clause (iii) clearly mentions that in case of no Muslim member from Bar Council, the State Government may **"nominate"** two Muslim Advocates. In such a view, the two Senior Advocates shall be construed as nominated members. At all times, as per Sub-Section (4), the elected members shall be more than the nominated members. In the case on hand, the Senior Advocates nominated for want of Muslim member from the Bar Council of the State, cannot be fit into electoral college and as such, the number of nominated members are more than elected members. Even after resignation of one of the nominated senior advocates, the position remains contrary to the above said legal provision.

30. In other view, as per Section 19, the resignation takes effect only after notification of appointment of successor in his place.

31. Section 19 reads as under:

"Resignation of Chairperson and members.- The Chairperson or any other member may resign his office by writing under his hand addressed to the State Government:

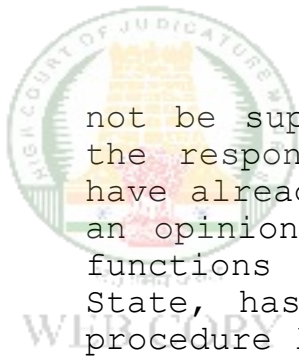
Provided that the Chairperson or the member shall continue in office until the appointment of his successor is notified in the Official Gazette."

32. Even assuming that one of the nominated members under Sub-Clause (iii) of Clause (b) has resigned, as per the above provision, it will take effect only after the notification of appointment of successor in his place. The discretion is vested with the Government that after being satisfied, it may select one or not more than two persons. In the event one member of the Parliament of the State is elected to the electoral college, even then, the ratio will be equal and the elected members will not be more than nominated members. In such circumstances, it cannot be inferred that the action of the respondent is malice in law.

33. Only because two Muslim members of the Parliament of the State are available, their inclusion in the electoral college is not automatic. As stated *supra*, it is based on the discretion of the Government as it may think fit to elect one or two of the members. In that event also, it cannot be considered as malice in law.

34. As per Section 99, when the Government has formed an opinion that it is impossible to maintain the Board, it is open to them to supersede the same.

35. Insofar as the contention that the Members of the Board should be put on notice, to show cause, as to why the Board should



not be superseded is concerned, notice has already been issued by the respondent in this connection and the replies and objections have already been received. Therefore, the Government, having formed an opinion that the Board is not performing its functions and its functions will be injurious to the interests of the Auqafs in the State, has taken a policy decision to supersede the same. When a procedure laid down under Section 99 of the Waqf Act, 1995, has been followed, it cannot be said that the impugned order is without jurisdiction.

36. As per the second proviso to Section 99(1) of the Waqf Act, 1995, which reads that the power of the State Government shall not be exercised unless there is a *prima facie* evidence of financial irregularity, misconduct or violation of the provisions of this Act, when there is no allegation of financial irregularity, it is not necessary to go into the issue.

37. When the very composition of the Board is contrary to Section 14(4) of the Waqf Act, 1995, there is no other choice other than superseding the Board for a period of six months till proper appointments are made. The above said selection process requires sometime. Therefore, it cannot be said that the action taken is premeditated and borne out of malice.

38. In view of the above discussions, the Writ Petition in W.P. (MD)No.20417 of 2019 stands dismissed.

39. Insofar as W.P.(MD)No.20085 of 2019 is concerned, it has become infructuous, pursuant to the supersession of the Waqf Board in G.O.Ms.No.58, Most Backward Classes and Minority Welfare (T1) Department, dated 18.09.2019. Accordingly, the same is dismissed as infructuous.

No costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

Sub Assistant Registrar(CS)

To
The Secretary,
The Government of Tamil Nadu,
Backward Classes, Most Backward Classes and
Minorities Welfare Department,
Secretariat, Fort St. George, Chennai.
+1cc to Special Government Pleader, Sr.No. 98066
SML /sma/29/11/19/12p/3c

Common Order made in
W.P. (MD)Nos.20085 and 20417 of 2019
Delivered on:12.11.2019