



WEB COPY

W.A.(MD)No.1468 of 2018:

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : **23.07.2019**

PRONOUNCED ON : **23.10.2019**

CORAM:

**THE HONOURABLE MR.JUSTICE R.SUBBIAH
and
THE HONOURABLE MR.JUSTICE B.PUGALENDHI**

W.A. (MD) Nos.1468 & 1707 of 2018
and
C.M.P. (MD) Nos.10364 & 12425 of 2018
in
WP (MD) No.16615 of 2018

W.A. (MD)No.1468 of 2018:

The Tamil Nadu Waqf Board
Rep. by its Chief Executive Officer,
1, Jaffer Syrang Street,
Vallal Sethakadi Nagar,
Chennai.

... Appellant

Vs.

1.O.M.S.Udhuman Mydheen

2.O.M.S.Hasan Madhoom Alim

... Respondents

For Appellant : Mr.V.Lakshmi Narayanan
for Mr.V.Raghavachari

For Respondents : Mr.P.Wilson,
Senior Counsel
for Mr.Niranjan S.Kumar
for R.1

Mr.Veera Kathiravan,
Senior Counsel
for Mr.C.Jeganathan
for R.2

W.A. (MD)No.1707 of 2018:

O.M.S.Hasan Magdhoom Alim

... Appellant



Vs.

1.O.M.S.Udhuman Mydheen

2.Tamil Nadu Waqf Board
through its Chief Executive Officer,
No.1, Jaffer Sarango Street,
Seedhakadi Nagar,
Chennai - 600 001.

... Respondents

For Appellant : Mr.Veera Kathiravan
Senior Counsel
for Mr.C.Jeganathan

For Respondents : Mr.P.Wilson,
Senior Counsel
for Mr.Niranjana S.Kumar
for R.1

Mr.V.Lakshmi Narayanan
for Mr.V.Raghavachari
for R.2

COMMON PRAYER: Writ Appeals filed under Clause 15 of the Letters Patent against the order passed by this Court in W.P.(MD)No.16615 of 2018 dated 30.08.2018.

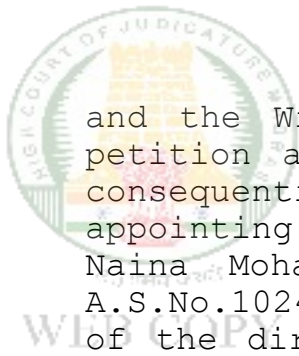
Prayer in WP(MD). 16615/ 2018 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue a Writ of Certiorarified Mandamus calling for the entire records in connection with the impugned order passed by the 1st 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 1st respondent to pass an order appointing as Muttavalli Kadayannallur Naina Mohammed Periya Kutba Palli Vasal till the disposal of A.S.No.1024 / 1993.

COMMON JUDGMENT

B. PUGALENDHI, J.,

These writ appeals are filed as against the order passed in W.P.(MD)No.16615 of 2018, dated 30.08.2018. The said writ petition was filed as against the order passed by the Chief Executive Officer, Tamil Nadu Wakf Board in Ref.No.CHE.MU.AANAI.No.6211/12/A1/TVELI dated 05.07.2018, in and by which, the Wakf Board appointed O.M.S.Hasan Magdhoom Alim as Muthavalli to the Naina Mohammed Peria Kuthba Pallivasal, Peria Street, Kadayannallur from 27.06.2018 to 26.06.2021. This order was challenged by O.M.S.Udhuman Mydeen in the above said writ petition



and the Writ Court, by order dated 30.08.2018, allowed the writ petition and quashed the impugned order dated 05.07.2018, with a consequential direction to the Wakf Board to pass appropriate orders appointing the writ 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 in W.A.(MD) Nos.865 & 866 of 2016 dated 22.03.2018. As against this order, the Wakf Board as well as the second respondent in the writ petition, namely, O.M.S.Hassan Magdhoom Ali have filed the instant intra Court appeals.

2. The facts leading to the filing of the present appeals are as follows:

2.1. Both the appellant in W.A.(MD)No.1707 of 2018, namely, O.M.S.Hasan Makhdoom Alim Sahib and the writ petitioner, namely, O.M.S.Uduman Mohideen Sahib are decendents of one O.M.S.Syed Masood Alim Sahib. The said O.M.S.Syed Masood Alim Sahib was the Muthavalli of 'Naina Mohammed Peria Kuthba Pallivasal', Peria Street, Kadayanallur; 'Syed Masood Nayagam Dargah', Therku Ayyapuram, Kadayanallur; and 'Uduman Labbai Sheik Thaikkal', Peria Theru, Kadayanallur. According to the parties, the rule of succession of the office of the Muthavalli is hereditary according to custom.

2.2. O.M.S.Syed Masood Alim Sahib died on 14.08.1984, leaving behind his two sons, namely, O.M.S.Sheik Uduman Alim Sahib and O.M.S.Abdul Basith Alim Sahib. Both the brothers claimed for Muthavalliship for all the three Wakfs. The elder brother, namely, O.M.S.Sheik Uduman Alim Sahib claimed that as the eldest son, he is entitled to succeed his father. On the other hand, the younger brother, namely, O.M.S.Abdul Basith Alim Sahib claimed that he only assisted his father in the management of the Mosque, Dharka and its properties and that apart, he is a qualified Moulvi, Hafiz and Fazil and quite competent to hold the office of the Muthavalliship.

2.3. The Tamil Nadu Wakf Board, after enquiry, by its proceedings dated 09.02.1985, has held as follows:

"Though the rule of succession is hereditary according to custom, it is not the case that the eldest son O.M.S.Sheik Uduman Alim Sahib that to is entitled to be appointed as Muthavalli for all the three wakfs is not sustainable. The younger brother Abdul Basith is a lalfiz that is to say he knows the Holy Kuran by heart and he is also holding a diploma from the Madharsha of Lalpet. We, therefore, appoint Janab Abdul Basith as the Muthavalli for Nainar Mohamed Periya Kuthba Pallivasal. His claim to the office of the Masood Nayagam Durga is rejected.

Mr. O.M.S.Abdul Basith Alim Sahib will run the Mosque with



the income from the land belonging to the wakf property and from public contribution."

2.4. Aggrieved over the same, the elder brother, namely, O.M.S.Sheik Uduman Alim Sahib filed a writ petition before this Court and the same was allowed. As against that order, O.M.S.Abdul Basith Alim Sahib filed an appeal before this Court in W.A.(MD) No.848 of 1986 and the same was disposed of on 24.07.1989 in the following terms:

"... We direct the first respondent - writ petitioner to file a suit within one month from today. As and when such a suit is filed, it shall be disposed of with utmost expedition, preferably within nine months from the date of filing of the suit. The status quo as on today shall prevail till the disposal of the suit. Till then, the wakf board shall stay off its hands concerning the appointment of mutawalli. We make it clear we have not expressed any opinion on the merits of the case."

2.5. Accordingly, O.M.S.Sheik Uduman Alim Sahib filed a suit as against his brother O.M.S.Abdul Basith Alim Sahib before the Sub Court, Tenkasi, in O.S.No.138 of 1989 for a declaration that the appointment of Muthavalli to the 'Nainar Mohammed Periya Kuthba Pallivasal', Peria Street, Kadayanallur, should be as per rule of Primogeniture. But, the suit was dismissed on 05.08.1993, holding that the plaintiff did not prove the rule of Primogeniture. Aggrieved by that order, O.M.S.Sheik Uduman Alim Sahib filed an appeal before this Court in A.S.No.1024 of 1993 and the same is pending. Admittedly, in the suit, the Wakf Board is not a party. Both O.M.S.Sheik Uduman Alim Sahib and O.M.S.Abdul Basith Alim Sahib have continued as Muthavalli for the 'Syed Masood Nayagam Dargah', Therku Ayyapuram, Kadayanallur and 'Naina Mohammed Peria Kuthba Pallivasal', Peria Street, Kadayanallur, respectively, for a period of nearly 25 years from 1985.

2.6. On 22.05.2012, O.M.S.Abdul Basith Alim Sahib died and therefore, his son, namely, O.M.S.Uduman Mohideen / writ petitioner taken over as Muthavalli of 'Nainar Mohammed Periya Kuthba Pallivasal', Peria Street, Kadayanallur and he was allowed to serve as Muthavalli from 22.05.2012 to 25.06.2014. On 25.06.2014, the Wakf Board passed an order appointing O.M.S.Hasan Makhdoom Alim Sahib, son of O.M.S.Sheik Uduman Alim Sahib as Muthavalli in respect of 'Nainar Mohammed Periya Kuthba Pallivasal', Peria Street, Kadayanallur for a period of three years from 25.06.2014 to 24.06.2017. As against the same, the writ petitioner filed a writ petition in W.P.(MD)No.12143 of 2014 and the same was allowed on 29.04.2016. Aggrieved over the same, the Wakf Board as well as O.M.S.Hasan Makhdoom Alim Sahib have filed separate appeals in W.A.(MD)Nos.865 & 866 of 2016, respectively and this Court, by judgment



dated 22.03.2016, dismissed the above appeals with the following observations:

"15. A perusal of the materials would indicate that as against the judgment and decree dated 05.08.1993 made in O.S.No.138 of 1989, A.S.No.1024 of 1993 has been preferred and the same is pending adjudication on the file of this Court.

16. Attention of this Court was also invited to the order dated 23.01.2014 made in M.P.(MD)No.1 of 2014 in C.R.P.(MD)No.324 of 2005 and the learned Judge in the interim order passed, in Paragraph Nos.8 & 9, has observed as follows:

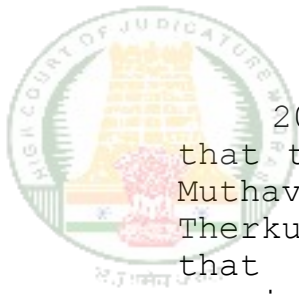
"8. A perusal of the Wakf Board order, dated 09.02.1985, with regard to the dispute between the petitioner's father and his brother would show that the Wakf Board held that the Rule of succession is hereditary. If the petitioner's father, who acted as Muthavalli, as per the wakf order dated 09.02.1985, the petitioner is also permitted to continue as Muthavalli by hereditary ship. Once he is allowed to continue as Muthavalli, the question of recognition or approval under Section 63 of the Wakf Act is only consequential. Therefore, there is no need for the petitioner to seek for approval of the Wakf Board under Section 63 of the Act and he is entitled to continue the proceedings in the place of his father.

9. Moreover, a resolution has been filed before this Court stating that the petitioner has been appointed as the President of Jamath by resolution dated 01.06.2013 as per by law in clause (iv) of the Jamath and therefore on both account, the petitioner has to be brought on record and accordingly, this petition is allowed and in view of the above findings, the proceedings cannot abated."

17. It is to be noted at this juncture that the Tamil Nadu Wakf Board is not a party either in O.S.No.138 of 1989 or in C.R.P.(MD)No.324 of 2005 and it is also not in dispute that the appellant in W.A.(MD)No.866 of 2016, is contuning as a Muthavalli by way of succession in respect of 'Syed Masood Nayagam Dharga', Therku Ayyapuram, Kadayanallur.

18. The impugned resolution of the Tamil Nadu Wakf Board, dated 21.08.2013, also did not indicate that there was a mismanagement or other misdeeds on the part of the first respondent / writ petitioner.

19. Be that as it may, now the office of Muthavalliship in respect of 'Naina Mohammed Peria Kuthba Pallivasal', Peria Street, Kadayanallur, falls vacant on account of the expiry of the tenure of the appellant in W.A.(MD)No.866 of 2016.



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', Periya 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.(MD) 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."

2.7. Pursuant to that order, the order impugned in the writ petition was passed by the Tamil Nadu Wakf Board on 05.07.2018 appointing O.M.S.Hasan Makhdoom Alim Sahib as Muthavalli for 'Naina Mohammed Peria Kuthba Pallivasal', Peria Street, Kadayanallur, for the period from 27.06.2018 to 26.06.2021. The Writ Court, by order dated 30.08.2018 allowed the writ petition and as against the same, the Wakf Board as well as O.M.S.Hasan Makhdoom Alim Sahib have filed the present writ appeals before this Court.

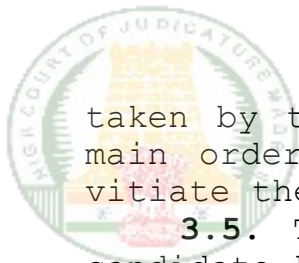
3. The learned Senior Counsel for the appellants, in unison, have raised the following points for the consideration of this Court.

3.1. As per the order passed by the Hon'ble Supreme Court in ***Board of Wakfs, West Bengal v. Anis Fatma Begum***, reported in **2011 (1) CTC 636**, the writ petition is not maintainable as against the order passed by the Wakf Board and any order or any issue relating to the Wakf properties or management has to be filed only before the Wakf Tribunal as per Section 83 of the Wakf Act, 1995.

3.2. The appointment of Muthavalli is a statutory power conferred upon the Wakf Board, which cannot be taken away by the order passed in the writ petition. Selection of Muthavalli on the basis of qualification is the job of experts, ie., Wakf Board and the High Court cannot substitute its reasonings on the same.

3.3. The Wakf Board is the competent authority to assess the qualification of the candidates for the Muthavalliship and the Court cannot substitute the reason of the expert body.

3.4. The order challenged in the writ petition is a consequential order issued on 05.07.2018, based on the decision



taken by the Wakf Board on 19.06.2018 and without challenging the main order, the challenge made to the consequential order cannot vitiate the main order.

3.5. The appointment of Muthavalli cannot be challenged by a candidate by way of a writ petition, without resorting to an appeal under Section 64 of the Wakf Act, 1995.

3.6. The claim of the writ petitioner as hereditary Muthavalli is not maintainable as the Mosque is a public Mosque.

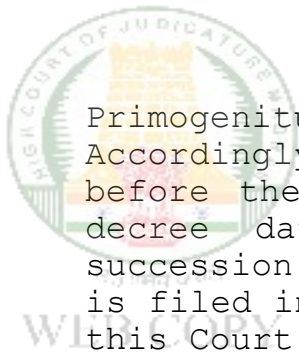
3.7. The Sub Court, Tenkasi, in O.S.No.138 of 1989 has held that Muthavalliship cannot be claimed through hereditary and the learned Single Judge, without considering the order passed by the Division Bench in W.A.(MD)Nos.865 & 866 of 2016 in a proper perspective, has passed the impugned order and therefore, prayed for allowing the present writ appeals.

4. Per contra, the learned Senior Counsel for the writ petitioner would submit that the Wakf Board has held that the rule of succession to Wakf is hereditary in nature, appointed the father of the appellant in W.A.(MD)No.1707 of 2018 as well as the writ petitioner as Muthavallis for 'Naina Mohammed Peria Kuthba Pallivasal', Peria Street, Kadayanallur as well as 'Syed Masood Nayagam Dargah', Therku Ayyapuram, Kadayanallur, by order dated 09.02.1985. That was also challenged by the father of the appellant in W.A.(MD)No.1707 of 2018 by way of a writ petition and this Court, in W.A.(MD)No.848 of 1986 held in categorical terms that Primogeniture can be decided only by way of a civil suit. The suit filed by him in O.S.No.138 of 1989 was also dismissed. While so, when there is no necessity to pass an order appointing the appellant in W.A.(MD)No.1707 of 2018 as a Muthavalli, the Wakf Board has erroneously passed the order against the orders of this Court in W.A.(MD)No.848 of 1986 and W.A.(MD)Nos.865 & 866 of 2016, which was rightly quashed by the learned Single Judge. Therefore, he prays for dismissal of the present writ appeals.

5. Heard the learned Counsel appearing for the respective parties and also perused the materials placed on record.

6. The Wakf Board, on the earlier occasion, has decided that the Muthavalliship of O.M.S.Sheik Uduman Alim Sahib and O.M.S.Abdul Basith Alim Sahib is hereditary, according to custom and it is not the case that the eldest son alone is entitled to be appointed as Muthavalli for all the three Wakfs and appointed O.M.S.Sheik Uduman Alim Sahib and O.M.S.Abdul Basith Alim Sahib as Muthavallis for 'Syed Masood Nayagam Dargah', Therku Ayyapuram, Kadayanallur and 'Naina Mohammed Peria Kuthba Pallivasal', Peria Street, Kadayanallur, respectively.

7. Aggrieved over the same, O.M.S.Sheik Uduman Alim Sahib filed a writ petition before this Court and this Court, in W.A.(MD)No.848 of 1986 held that the custom of hereditary succession whether by

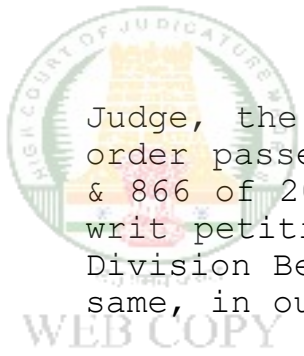


Primogeniture or not can be decided only by filing a civil suit. Accordingly, a civil suit was also filed in O.S.No.138 of 1989 before the Sub Court, Tenkasi and the Sub Court, by judgment and decree dated 05.08.1993, held that the custom of hereditary succession is not by Primogeniture. As against the same, an appeal is filed in A.S.No.1024 of 1993 and the same is still pending before this Court.

8. In the meantime, O.M.S.Abdul Basith Alim Sahib, the Muthavalli of 'Naina Mohammed Peria Kuthba Pallivasal', Peria Street, Kadayanallur died and therefore, on the custom of hereditary succession, the writ petitioner, namely, O.M.S.Uduman Mohideen, the son of O.M.S.Abdul Basith Alim Sahib, taken over the 'Naina Mohammed Peria Kuthba Pallivasal' as Muthavalli and he was also allowed to perform as Muthavalli from 23.05.2012 to 25.06.2014 for nearly two years and thereafter, by order dated 25.06.2014, he was removed, which was challenged in W.P.(MD)No.12143 of 2014 and the same was allowed in favour of the writ petitioner. As against that order, both the appellants herein have filed appeals in W.A.(MD)No.865 & 866 of 2016, wherein, in Paragraph No.20 of the order, the Division Bench of this Court has held 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 writ petitioner is to be continued as temporary Muthavalli and it is also subject to the result of A.S.No.1024 of 1993. However, the Division Bench has also held that it is open to the 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 both 'Naina Mohammed Peria Kuthba Pallivasal', Peria Street, Kadayanallur and 'Syed Masood Nayagam Dargah', Therku Ayyapuram, Kadayanallur. But, without due following the due procedure, the Wakf Board has initiated action for appointing O.M.S.Hasan Makhdoom Alim Sahib as Muthavalli for Naina Mohammed Peria Kuthba Pallivasal, Peria Street, Kadayanallur alone and without taking any decision with regard to Syed Masood Nayagam Dargah, Therku Ayyapuram, Kadayanallur.

9. The issue regarding Muthavalliship for 'Naina Mohammed Peria Kuthba Pallivasal', Peria Street, Kadayanallur was already decided by the Wakf Board by proceedings dated 09.02.1985, which was challenged before this Court by way of a writ petition and this Court, in W.A.(MD)No.848 of 1986, has held in categorical terms that Primogeniture can be decided only by way of a civil suit. The suit in O.S.No.138 of 1989 filed in this regard was also dismissed and the appeal filed in A.S.No.1024 of 1993 is still pending before this Court.

10. With regard to the contention raised by the Tamil Nadu Wakf Board as to the availability of effective and alternative remedy before the Wakf Tribunal, as rightly held by the learned Single



Judge, the entire issue herein hinges on the implementation of the order passed by the Division Bench of this Court in W.A.(MD)Nos.865 & 866 of 2016, dated 22.03.2018 and since the order impugned in the writ petition was contrary to the specific direction issued by the Division Bench, the Writ Court entertained the writ petition and the same, in our opinion, does not warrant any interference.

11. Under these circumstances and in view of the orders passed by this Court in W.A.(MD)No.848 of 1986 and W.A.(MD)Nos.865 & 866 of 2016, we are of the view that the Writ Court has rightly allowed the writ petition and there is no reason to interfere with the orders passed in W.P.(MD)No.16615 of 2018. Accordingly, both the writ appeals are dismissed.

Sd/-

Assistant Registrar (CO)

// True Copy //

Sub Assistant Registrar

+1 CC to M/s.V.RAGHAVACHARI, Advocate (SR-93949[F] dated 23/10/2019)

+1 CC to M/s.NIRANJAN.S.KUMAR, Advocate (SR-94185[F] dated 24/10/2019)

+2 CC to M/s.VEERA ASSOCIATES, Advocate SR NOS-94285 & 94286

judgment made in
W.A. (MD) Nos.1468 & 1707 of 2018
and
C.M.P. (MD) Nos.10364 & 12425 of 2018
23.10.2019

GK
MS/13-11-2019/9P.5C