

D/L.26.  
May 21, 2024.  
MNS.

WPA No. 13765 of 2024

Syed Irfan Ali  
Vs.  
Union of India and others

Mr. Farooque Ali,  
Mr. Shahrukh Raja,  
Mr. Afsar Aoli,  
Mr. Raizan Md. Zafar

... for the petitioner.

Sk. Md. Galib,  
Mr. Abu Siddique Mallik

...for the Board of Wakf.

1. Affidavit-of-service filed in Court today be kept on record.
2. The petitioner challenges an order, whereby it was observed that having regard to the fact that when the question of Indian nationality of Syed Irfan Ali, the Mutawalli is involved and also considering the fact that for want of proper administration and management, a valuable waqf estate is being hampered, the name of the petitioner, "be expunged from the post of Mutawalli" in respect of Syed Maslehuddin Waqf Estate.
3. Learned counsel for the petitioner argues that no notice was given to the petitioner at the email address of the petitioner and on the learned Advocate, who was specifically authorized by the petitioner to represent him,

by the respondent authorities prior to taking such decision, thereby vitiating the decision itself.

4. Learned counsel for the petitioner submits that under Section 64 of the Waqf Act, 1995 (in short "1995 Act"), there is a provision for removal of a Mutawalli from his office on the grounds specifically mentioned therein. Since none of the grounds apply in the present case of the petitioner, the removal in the garb of expunging the name of the petitioner from the post of Mutawalli is vitiated in law.
5. In addition, it is submitted that Section 64(3) of 1995 Act clearly envisages a prior enquiry upon proper notice, which has not been given to the petitioner, which also vitiates the action impugned herein.
6. Learned counsel for the petitioner next argues on a more fundamental aspect of the matter. It is contended that the disqualification of a Mutawalli to hold such office in the event the Mutawalli is not a citizen of India was incorporated by way of the second Proviso to Clause (i) of Section 3 of the 1995 Act. The said proviso was inserted with effect from November 1, 2013 by an amendment to the said Act.

7. It is argued that no retrospective effect having been given to the said proviso, the right of mutawalliship of the petitioner, who has been a Mutawalli from much before the introduction of the amendment, cannot be taken away by virtue of such amendment.
8. It is also argued by learned counsel for the petitioner that the Legislature, in its wisdom, while introducing the 2013 amendment, did not incorporate the acquisition of foreign citizenship by a Mutawalli as a ground for removal.
9. At the inception, the petitioner was an Indian national and subsequently acquired a British citizenship during his mutawalliship.
10. There being no ground in law for removal on the premise of change of nationality, it is argued that the impugned removal of the petitioner from the post of Mutawali is bad in law and ought to be struck down.
11. Learned counsel appearing for the respondent authorities submits that the self-same issue is under consideration before other courts, where different matters are pending. It is submitted that extensive arguments have been made by the respondents in the said matters.

12. Be that as it may, this court insisted that learned counsel for the respondents address the issue on question of law, since it has fallen for consideration before this court at this juncture, irrespective of pendency of the other matters in that regard.

13. Upon the expression of such view by the Court, learned counsel for the respondents argues on the legal aspect that the introduction of the second proviso has to be taken retrospectively or retroactively.

14. It is contended that since the second proviso to Clause (i) of Section 3 of the 1995 Act disqualifies a person from Mutawalliship in the event the said person is not an Indian citizen, the said disqualification operates as and when the amendment came into force, that is, from November 1, 2013. As such, not being an Indian citizen any more, the petitioner cannot continue in the post of Mutawalli any further.

15. Insofar as the service of notice is concerned, learned counsel for the respondents argues that proper service was sought to be effected at the postal address given by the petitioner himself, but the envelope containing the said notice returned as unserved. Hence, it is submitted that presumption of correctness of service ought to be drawn by the court since

the notice was sent at the correct address given by the petitioner himself.

16. It is further argued by learned counsel for the respondent that this is not a case of removal from Mutawalliship under Section 64 of the 1995 Act and, as such, the rigours of Section 64 are not applicable.

17. It is pointed out that in the impugned decision, it was merely observed that the petitioner is expunged from the post of Mutawalli, thereby deeming disqualification of the Mutawalliship of the petitioner.

18. Thus, it is argued by the respondent authorities that the Board of Auqaf was justified in arriving at the impugned decision.

19. The arguments of the respondents regarding the rigours of Section 64 not being applicable cannot be accepted, since no provision of expunction from the post of Mutawalli is found within the four corners of the Statute.

20. The only provision under which a person could be removed from the office of Mutawalli is found in Section 64 of the Act, that too on the grounds enumerated therein. In whatsoever language the removal is couched, be it being expunged from the post of Mutawalli or something else, the removal remains a removal in the present case. The

intention of the Board of Wakf to remove the petitioner is also buttressed by the further observations in the impugned decision, that apart from the question of Indian nationality, the petitioner is guilty of want of proper administration and management for which a valuable waqf estate is being hampered, which can only be a ground of removal on merits and not automatic disqualification on the ground of Indian nationality being lost by the petitioner.

21. The petitioner, as evident from the annexures to the writ petition which have not been disputed by the respondents, had disclosed two additional addresses than his physical postal address. The first was that the petitioner had authorized a particular learned Advocate to represent him, who was conspicuously not served any notice before the impugned decision being passed. Secondly, the petitioner had provided an email address as well, which was not resorted to by the Board of Wakf before taking the impugned decision.

22. Having not taken recourse to any of the alternative addresses given by the petitioner, the impugned decision is also bad on the ground of non-service of proper notice, since

a notice is not meant to be served as a mere technicality but for the purpose of satisfying the principle of natural justice, *audi alterem partem*. A notice is intended to give proper right of hearing to a person and an opportunity to defend himself, which was not given in the present case. The myopic action of the Board of Auqaf in serving the petitioner only at his physical postal address is not sufficient to satisfy the conscience of the court that adequate opportunity was given to the petitioner before passing the impugned order.

23. Insofar as the ground of lack of proper administration and management is concerned, I do not find any prior enquiry or reflection of any assessment on such count in the impugned decision.

24. The mere fact that the petitioner has acquired a British citizenship cannot automatically result in the Board of Auqaf to hold that such acquisition of citizenship of a foreign country automatically disqualifies the petitioner from administration and management of the waqf property and that it can automatically be inferred that the petitioner is guilty of lack of proper administration and management.

25. One can very well acquire a foreign nationality and yet be diligent in the administration of the waqf estate as a Mutawalli.

26. Insofar as the ground of acquisition of a foreign nationality is concerned, the petitioner is perfectly justified in making his arguments. The second proviso to Clause (i) of Section 3 of the 1955 Act clearly takes away the vested right of a person to an office, which is a valid legal right within the contemplation of Section 9 of the Code of Civil Procedure as well as Section 34 of the Specific Relief Act, 1963.

27. Although the said right is not one of enjoyment but of service, it remains a legal right to an office all the same and it is well-settled that a substantive right cannot be taken away by giving retrospective effect to an amendment.

28. In the present case, the second proviso to Clause (i) does not specify as to whether it is retrospective in operation. In the absence of any such clear mention therein, no retrospectivity or retroactivity can be deemed in the interpretation of such a provision, which not only curtails but takes away altogether the valuable accrued right of a person to serve as a Mutawalli, which is the right to an office.

29. Hence, the only logical conclusion and mode of interpretation of the second proviso is that

the same takes effect prospectively on and from November 1, 2013.

30. Since the petitioner was a Mutawalli of the concerned estate since long before that, the Mutawallship of the petitioner cannot be said to be effaced automatically by introduction of such amendment.

31. Another valid argument made by the learned counsel for the petitioner is that the Legislature, notably, introduced several amendments in the 1995 Act in the year 2013. Although the 2013 Act, which introduces the second proviso to Clause (i) of Section 3 of the 1995 Act, also introduced certain amendments to Section 64 itself, it is conspicuous that the ground of acquisition of a foreign nationality was not inserted as a ground for removal of a person from Mutawallship in Section 64 by the said amendment. Such absence is more speaking than any positive assertion.

32. The Legislature has expressed its intention clearly in deliberately abstaining from introducing acquisition of foreign nationality as a ground of disqualification or removal of a person from Mutawallship in Section 64 of the said Act.

33. Apart from Section 64, there is no other provision for removal of a person from the post of Mutawalli within the four corners of the Statute and as such, in the absence of the ground of acquisition of foreign nationality in the said provision, it cannot be said that there was any occasion for the Board of Wakf to remove the petitioner from Mutawalliship on certain frivolous allegations and on the premise that the petitioner has acquired a British nationality or has ceased to be an Indian national.

34. A restriction cannot be read into the amended section which has not been introduced by the Legislature itself. Mutawalliship relates not only to the mundane but also to the spiritual aspect of the conduct of business regarding a waqf estate and cannot be restricted to a particular country or an ilk. As such, what the Statute did not intend nor did the Legislature do, cannot be imputed by the Court while interpreting the Statute.

35. In view of the above observations, I find that the very premise of the impugned decision in expunging the petitioner from the post of Mutawalli on the ground of loss of Indian citizenship, is invalid in the eye of law and cannot be accepted.

36. As to the other ground of removal under Section 64, in view of the stand taken by the respondents themselves that it was not the removal under the said Section, as well as no such ground having been enquired into or decided on merits in the impugned decision, it cannot be said that there was any valid ground whatsoever for expunction of the petitioner from the post of Mutawalli, as done in the impugned order.

37. Accordingly, WPA No. 13765 of 2024 is allowed on contest, thereby setting aside the impugned decision dated February 29, 2024 whereby the petitioner was held to be expunged from the post of Mutwalli of Syed Maslehuddin Wakf Estate. The petitioner, accordingly, stands reinstated as Mutawalli of Syed Maslehuddin Wakf Estate with immediate effect.

38. After the order is passed, learned counsel for the respondents prays for stay of operation of the above order.

39. Since arguable questions are involved, in order to enable the respondents to test the decision in appeal, stay of operation of the above order is granted till June 15, 2024.

40. There will be no order as to costs

41. Urgent photostat certified copies of this order,  
if applied for, be made available to the parties  
upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)