IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.06.2024

CORAM

THE HON'BLE MR.JUSTICE V. LAKSHMINARAYANAN

C.R.P.No.219 of 2023
and C.M.P.No.1797 of 2023

The Masjid-e-Mamoor Committee
Represented by its Secretary
No.186, (Old No.166-168),
Angappa Naicken Street, Chennai-1. ... Petitioner

-Vs-

1.Hasan Moulana Dargah
represented by its Muthavalli
Mr.Habib Mohamed Tahir Bijli
Old No.113-A, New No.235
Linghi Chetty Street, Chennai-01.

2.Habib Mohamed Tahir Bijli
No.6/11, Thandava Murthy Street
Seven Wells, Chennai 600 001.

3. Tamil Nadu Waqf Board
Represented by its Chairman
No.1, Jaffer Syrang Street
Vallal Seethakathi Nagar
Chennai 600 001.

4.The Chief Executive Officer
Tamil Nadu Waqf Board
No.1, Jaffer Syrang Street
Vallal Seethakathi Nagar
Chennai 600 001. ... Respondents

Prayer : Civil Revision Petition under Article 227 of the Constitution of India to set aside the fair and decreetal order dated 23.12.2022 and made in O.A.No.57 of 2022 on the file of the Tamil Nadu Waqf Tribunal, Chennai.

For Petitioner : Mr.N.A.Nissar Ahmed, Senior Counsel for Mr.N.A.Nassir Hussain

For Respondents : Mr.T.Zaffarullah Khan - for R1 and R2
Mr.R.Abdul Mubeen - for R3 and R4

ORDER

This Civil Revision Petition arises against the order passed by the Tamil Nadu Waqf Tribunal in O.A.No.57 of 2022 dated 23.12.2022. O.A.No.57 of 2022 arose against the order passed by the Tamil Nadu Waqf Board on 01.06.2022.

2. The prayer that was sought for in the original application was to set aside the order of the Waqf Board and for a mandatory injunction directing the Waqf Board to recognize Janab Habib Mohamed Tahir Bijli (hereinafter referred to as 'Habib Mohamed') as the Mutawalli of the Hazrath Moulana Dargah situated at No.113A, New No.235, Linghi Chetty Street, Chennai-600 001 and for permanent injunction restraining the Masjid-e-Mamoor Committee from interfering with the peaceful management of the Hazrath Moulana Dargah which is being managed by Janab Habib Mohamed and for consequential orders.

3. Before I get into the the nitty-gritty of this revision, it would require

history of the institutions that are involved in the said litigation.

4. There exists a mosque in George Town in the name and style of Mamoor Mosque, today called as Masjid-e-Mamoor. This mosque was created by the Prince of Arcot several centuries ago. The then Prince of Arcot and his successors were the Mutawallis of the said institution. Alleging that there was mismanagement of the institutions under the management of Prince of Arcot, the Colonial Government brought about the Prince of Arcot Endowments Act of 1922. This Act was enacted for the purpose of providing better management of the charitable and religious endowments under the control of the Prince of Arcot in the then State of Madras. After the passing of the Tamil Nadu Adaptation of Laws Order of 1969, the State of Madras came to be substituted as State of Tamil Nadu. This Act covers several institutions in its Schedule. Schedule A of the Act relates to the list of properties which were in the then Trichinopoly District. Insofar as the properties in Madras were concerned, they were covered under Schedule B. The Mamoor Mosque is found in Schedule 'B' item 10 to the said Act. By virtue of this legislation, the administration of the charitable endowments fell under the power of the State of Tamil Nadu. A Scheme of management was devised under Schedule 'C' which continues to govern the institutions.

5. Sometime in the early 20th century, one Qutubul Akhtab Harzrath Hafiz

Quari Syed Habib Mohamed Hasan Qadiri Baghdadi Chishti (hereinafter referred as Hasan Moulana or Baghdadi Peer) was working as Imam of Mamoor mosque. He is believed by several persons, including the second respondent, as a Saint. He belonged to Qadiri Tareeqa and therefore had considerable followers in that tradition of Islam. I should add here that Masjid-e-Mamoor follows the Sunni School of Islam, to which Hasan Moulana belonged. His followers believed that he attained union with the Almighty on 04.02.1949 while he was at his temporary residence at Vaniyambadi. It was his wish that his mortal remains be interred within the precincts of Masjid-e-Mamoor. Therefore, the spiritual successor viz., Hakeem G.Abdul Hameed made a request to the management committee of Masjid-e-Mamoor that the mortal remains of Hasan Moulana be interred there. Respecting the wish of the Saint, the request of Hakeem G.Abdul Hameed was accepted and the mortal remains of Hasan Moula were interred within the precincts of Masjid-e-Mamoor. There were no issues between 1949 and 1959.

6. However, treating the institution as a separate institution where Hasan Moulana was interred, though it is a part of Masjid-e-Masoor, the Tamil Nadu Waqf Board issued a notice to Janab Hakeem G.Abdul Hameed in terms of Section 25 of the Waqf Act of 1954. Receiving a notice from the Waqf Board, the said Hakeem G.Abdul Hameed filed an application for registration of Waqf with the Tamil Nadu Waqf Board. I must add here, though the application had been made on the request of the Waqf Board, no records have been filed by either side to

demonstrate that appropriate enquiry under Section 25(7) of the Waqf Act of 1954 was conducted by the Board. Be that as it may, a separate registration number was granted to the place where the Saint was interred.

7. In and around 1983, one Janab A.Naiana Mohammed filed a suit on behalf of the Committee seeking for permanent injunction restraining Habibullah Sha, who is the successor of Janab Hakeem G.Abdul Hameed, from performing any religious function on the basis that he is the Mutawalli of Hasan Moulana Baghdadi Dargah. This suit was taken on file as O.S.No.343 of 1983. In this suit, the learned Judge came to a conclusion that as the suit does not relate to any of the functions of the Waqf Board, there is no necessity to implead the Waqf Board, but dismissed the suit after finding that Habibulla Sha was in the management of the Dargah. This judgment was rendered on 16.11.1992. The judgment and decree in O.S.No.343 of 1983 has become final and no appeal had been preferred therefrom.

8. While the suit was pending, taking note of the fact that a separate registration number was given, after a couple of decades have gone by, an application was made to the Tamil Nadu Waqf Board by the then Mutawalli of Mamoor mosque seeking for cancellation of the registration number. The Waqf Board issued a response to Janab J.M.Iqbal, who was the then Secretary of Masjid-e-Mamoor, that the Waqf Board cannot cancel the registration and they have to approach the Civil Court. The proceedings ended there as there were no records

before the Court to show that the Committee had filed a suit seeking for cancellation of the Registration.

9. For another period of two decades there seems to have been no interference with the activities that had been carried on in the tomb. A plea has been raised that the Masjid-e-Mamoor Committee have attempted to disturb the functioning of the Dargah by digging a borewell. But, nothing turned out of it finally and as on today, it is not in dispute that the tomb exists and certain religious activities are performed in connection with the celebration of the Urs of the Saint.

10. I should also add here that in connection with the income generated from the activities being carried on around the tomb, the Waqf Board had demanded payment of contribution and such demands were also satisfied by those in the management of the Dargah during the relevant period.

11. Janab Habibulla Sha who was managing the Dargah of the Baghdadi Peer passed away on 21.07.2020. On his demise, the second respondent herein viz., Habib Mohamed Tahir Bijli filed an application before the Tamilnadu Waqf Board which has given rise to the present litigation. In the said application, he informed the Tamilnadu Waqf Board that, " he had assumed the office of <u>Muthavalli and Sajjada Nasheen</u> of DARGAH-E-HAZRATH SYED HABEEB MOHAMMED HASAN MOUSANA BAGHDADI (RAH)". He wanted the Tamilnadu Waqf Board to recognize

him as Mutawalli of the institution in terms of Section 42 of the Waqf Act of 1995. The Waqf Board conducted an enquiry into this proceedings and held that there cannot be a Mutawalli for an institution (Dargah) within an institution (Mamoor mosque) already in existence and rejected the claim.

12. Aggrieved by the order of the Tamilnadu Waqf Board, the aforesaid proceedings before the Waqf Tribunal was initiated. Before the Tribunal, notice was ordered to the Tamilnadu Waqf Board as well as to the Committee. The second respondent viz., the Chief Executive Officer filed a counter, which was adopted by the Tamilnadu Waqf Board. Similarly, a counter was filed on behalf of the Committee by its Secretary Janab Amanullah. Opportunity was granted to both sides. They were permitted to mark their documents. Both sides did not enter the witness box. On behalf of the applicant, Exs.P1 to P31 were marked and on the side of the respondents Ex.R1 viz., the impugned resolution dated 01.06.2022 was alone filed.

13. The Waqf Tribunal came to a conclusion that the Waqf Board has recognized the tomb as a separate institution by acquiescence and had further held, since the Masjid-e-Mamoor had not preferred any appeal as against the proceedings in O.S.No.343 of 1983 nor had challenged the order dated 08.03.1990, whereby the application filed in W.A.No.19 of 1987 was dismissed, it came to a conclusion that the respondents 1 and 2 before it are entitled to the relief sought

for and therefore decreed the original application as prayed for.

14. Aggrieved by the said judgment and decree, a civil revision petition has been filed only by the Committee and not by the Waqf Board. However, during the course of arguments before me, Mr.Abdul Mubeen supported the submissions of Mr.Nissar Ahmed, learned Senior Counsel appearing on behalf of Mr.Nassir Hussain.

15. I heard this matter on 07.06.2024 and today. On behalf of the petitioner Mr.Nissar Ahmed, Senior Counsel was heard, on behalf of the contesting respondent I heard Mr.Zaffarullah Khan and Mr.Hussain Afroze. Mr.Abdul Mubeen appeared for the Tamilnadu Waqf Board.

16. The following are the submissions of Mr.Nissar Ahmed.

(a) There cannot be a Waqf within a Waqf.

(b) The registration of the tomb as Dargah by the Tamilnadu Waqf Board will not grant any right to be applicants.

(c) The relationship between Janab Habib Mohamed Tahir Bijli and the previous Mutawalli had been denied and that had not been proved in a manner known to law.

(d) That the respondents 1 and 2 had not produced any document to show that they had been performing the Urs over the tomb of

Baghdadi Peer and therefore the mandatory injunction requires interference.

(e) The deed of appointment that is being relied upon by the respondents is nothing but a deed of relinquishment and since there has been no proof let in by the respondents 1 and 2, the application ought not to have been allowed.

(f) The suit in O.S.No.343 of 1983 is only a suit for permanent injunction and the dismissal thereof would not grant any right to the defendant or his successors.

(g) The proforma that has been filed by the respondents 1 and 2 to state that in the column relating to rule of succession, it has been specifically stated NIL and therefore no claim can be made by the second respondent.

17. Mr.Abdul Mubeen, while adopting this argument would further point out that the Wasiyat relied upon by the applicant had not been produced before the Court and even assuming that the deed of relinquishment is true and genuine, all that it would disclose is that the Baghdadi Peer had only wished that his mortal remains to be interred in the premises of Masjid-e-Mamoor and he had no right or interest in the institution to claim that it be created as a separate Waqf.

18. Mr.Zaffarullah Khan appearing for the respondents 1 and 2 would raise a preliminary objection that being a revision under the provisions of the Waqf Act,

1995 in terms of proviso to Section 83(9), this Court cannot re-appreciate the evidence in the matter and he would state that the revision is not maintainable. He would submit that right from 1949, the institution has been in existence and to question its validity today is hopelessly barred by virtue of the provisions of the Waqf Act. He would add that, by virtue of the notice that had been issued by the Tamilnadu Waqf Board under Ex.P1 and the acknowledgment granted under Ex.P2 and the issuance of the proforma, the existence of the institution and the performance of religious, temporal as well as spiritual activities thereon stood established.

19. He would further submit that right from 1959 till 1983, there had been no dispute and this had been recognized by the Court in its judgment in O.S.No.343 of 1983. Opportunity had been granted to the institution to challenge the recognition of the institution and yet Masjid-e-Mamoor did not lift a little finger towards the same and it cannot raise a contra plea before the Court today. He would also state that since the resolution of the Waqf Board dated 01.06.2022 is contrary to its notice dated 09.07.1959 and the registration dated 23.07.1959, no exception can be taken to the order of the Waqf Tribunal and he would plead that this revision deserves dismissal.

20. I have heard the counsel, perused through the records and have applied my mind to the facts of the case.

Scope of revision under the Waqf Act, 1995

21. I am taking up the preliminary objection raised by Mr.Zaffarulla Khan first. Under the Waqf Act of 1995, the order and judgment of the Waqf Tribunal is given the status of the decree of a civil court. However, the Act itself, in order to curtail unnecessary ligation, has taken away the right of a litigant to file a regular appeal against the said decree. Since a litigant must not be left without remedy, the Parliament had decided to provide the power of revision to the High Court. This is in terms of Section 83(9) proviso of the Waqf Act, 1995. Under the said provision, this Court, under the power of revision, has the jurisdiction not only to set aside the order of the Waqf Tribunal but also to modify or reverse the same if it comes to the conclusion that the order is perverse. Perversity can be in terms of appreciation of law or in appreciation of facts. A Constitution Bench of the Supreme Court in **Hindustan Petroleum Corporation Limited (Vs) Dilbahar Singh (2014) 9 SCC 78** had an occasion to deal with the scope of revision under Section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act. I am referring to this provision because, the words under Section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act of 1960 are in *pari materia* with Section 83(9) proviso of the Waqf Act of 1995. The Bench held that the power of revision under Section 25 is not as wide as an appeal under Section 96 of the C.P.C. and it is not as restricted as the scope of revision under Section 115 of the C.P.C. In case

there is an error in the legality, propriety or otherwise of the order, the High Court under Section 83(9) is entitled to interfere with the same and pass appropriate orders as the case requires. Therefore, I conclude that this Court has the jurisdiction to deal with the order of the Tribunal. Keeping this proposition in mind, I shall now approach the impugned order.

Waqf once created cannot be later retracted

22. It is a fundamental principle of Islamic law that once a Waqf is created it is always a Waqf. Insofar as institutions of mosque is concerned, it is given a separate status under the Sunni law. In order for creation of a mosque, the Hanafi School of Law which governs this part of the State declares that it is sufficient that the Waqif step out of the building, which he has created as a mosque and give a public declaration that the property belongs to the Almighty Allah and on and from the time of his declaration, it shall be used as a house of prayer. On such declaration, the legal effect is the declarant / Waqif loses his title and the title vests with the Almighty.

23. There is no dispute that the history of the civil revision petitioner viz., Masjid-e-Mamoor would show that this institution had been created by the then Prince of Arcot and he dedicated the property as a mosque. The institution continued as such under the management of the Prince of Arcot from the time of its dedication till 1923. From the time of its dedication till 1923, the Prince of Arcot

had been its Mutawalli. After 1923, when the Prince of Arcot Endowments Act came into force, the Prince of Arcot in office continued to be the Mutawalli, but his power of administration alone is restricted by the scheme of administration that has been brought under Schedule 'C' of the Prince of Arcot Endowments Act of 1923. To put it otherwise, the unbridled power that the Prince of Arcot enjoyed as Mutawalli over the institutions found under Schedule 'A' and 'B' of the Prince of Arcot Endowments Act of 1923 came to be guided by virtue of the Scheme framed under Schedule 'C' of the said Act. I need not reinvent the wheel because the principle I had set forth above has been laid down by a binding judgment of a Division Bench of this Court in **H.H.Prince of Arcot Endowments -vs- Tamilnadu Waqf Board (2006) 4 Law Weekly 479.** Therefore, there cannot be any dispute that the mosque that was created centuries ago and dedicated for public worship, continues to exist as on today.

<u>The Managing Committee is not empowered to modify the original grant</u>

24. Now turning to the institution that had been created as the Dargah-e-Hasan-Moulana, which had been in existence prior to 04.02.1949, a perusal of the deed of relinquishment that had been filed under Ex.P5 would show that the followers of Baghdadi Peer had approached the then Chairman and Members of the Masjid-e-Mamoor Committee and sought for a **<u>permission</u>** to intern the mortal remains of the Baghdadi Peer within the premises of the mosque.

25. There were two reasons for which such a request was made. The first reason being that the Baghdadi Peer himself had been working as an Imam in the

mosque and he had also expressed a wish that he be buried within the mosque. The Committee decided to honour this request and permitted the burial of the body of Baghdadi Peer within its premises. This document under Ex.P.5 would make it clear that it was only under the permission granted by the Committee that the body was buried. The Committee which granted permission on 04.02.1949 was well aware that the construction of tomb is permanent in status. Secondly, even during the relevant point of time, the Baghdadi Peer was highly respected amongst his followers. In fact, it is only on account of this fact that he was respected and had a large following, the Committee seems to have permitted the burial of the Saint within the precincts of the mosque. When the then Committee has taken a view that a permanent structure can come up within the four corners of the mosque, the subsequent committee cannot take a view that it can dispense with the tomb and interfere with the possession of those managing the tomb. It is one thing to say that the tomb itself is not a Waqf and yet another thing to say that the tomb should not exist.

Incidents attached to the creation of Waqf under Hanafi School of Law

26. In order to create a Waqf, there must be a permanent dedication by a person professing Islam of a property of which he is the owner and only thereafter a Waqf is created. After the institution of mosque had been created, the Waqif himself loses the right, title and interest over the property as the property is permanently tied down and the title passes from the Waqif to that of the Almighty

Allah. This proposition of Islamic law was reiterated by the Supreme Court in the case of **Ahmed G.H.Ariff -Vs- Commissioner of Wealth Tax (AIR 1971 SC 1691).** Once the title has been divested from the Waqif, there is no question of the Waqif retaining the power to revoke the creation of the institution **(Sayyed Ali -vs- Andhra Pradesh Waqf Board, Hyderabad, AIR 1998 SC 972)**. I must add here that I am conscious that I am dealing only with the Sunni institution of Hanafi School of law and I am not laying down the rules for any other institution followed by the members of Islam.

27. In this case, centuries ago, the title had vested with the Almighty Allah and the institution viz., Masjid-e-Mamoor was formed. As stated by me, once a Waqif himself does not have title, the subsequent management of the committee nor the disciples viz., the viz., the Mureeds do not have the right to create a separate institution within the institution. This is because, once it is a Waqf it is always a Waqf and a Mutawalli cannot be given the same status as that of a Waqif unless and until the Waqf deed gives him such status and in this case the Waqf Nama has not been produced. Therefore, the permission that has been granted by the Committee members in 04.02.1949 cannot be treated as creation of a new Waqf.

<u>Mere registration cannot conclusively establish the creation of a Waqf</u>

28. Now turning to the application dated 09.07.1959 made under Section 25

of the Waqf Act of 1954, the notice reads that the Chairman of the Tamilnadu Waqf Board had issued a notice calling upon the person in the management of Baghdadi Peer Dargah to register the property in terms of Section 25. In obedience to the said notice, the person in management also filed an application on 23.07.1959 and the Waqf itself had been registered on the very same day as is clear from the proforma. I have to see whether this registration amounts to recognition of a Waqf. The Registration is done either by way of a survey under Section 4 and 5 of the Waqf Act which is done by the Survey Commissioner or if it had been left out in this survey, by way of an application under Section 25. By mere filing of an application, there cannot be a creation of a Waqf. Section 25(7) of the Waqf Act, 1954 contemplates upon the Board to conduct an enquiry to find out the genuineness of the application. Prior to passing an order under Section 25(7), the Waqf Board should have heard any person who would be aggrieved by any registration thereof. A perusal of the dates in this particular case would show that on 09.07.1959, notice had been issued by Tamilnadu Waqf Board to the person who is in the management of Baghdadi Peer Dargah and an application was filed in response thereof on 23.07.1959 and immediately on the same day, the registration seems to have taken place. In other words, an application had been called for, filed and registration had been done. There is no evidence before the Court, let in either by the respondents or by the Waqf Board itself, that the registration was preceded by an enquiry as contemplated under Section 25(7) of the Act. If an act has to be done in a particular way, then it has to be done in that way only and in no other way, is the settled position.

Waqf Board is incompetent to create a new Waqf

29. If I were to concede that the registration means the creation of a new Waqf, I feel it will pave way to an order contrary to the Waqf Act of 1954 as well as the Waqf Act of 1995. The Waqf Board is only a statutory body created by the virtue of a notification issued under the Waqf Act of 1954 or 1995, for the purpose of management of the institutions. The Waqf Board merely takes care of the temporal matters and does not have rights to dictate as to how the spiritual matters have to be carried on. This is not a stray observation, but is relevant because the Waqf Board has power to appoint Mutawalli, but for an institution like Dargah it cannot appoint Sajjadanashin because Sajjadanashin is a post of the spiritual head of the institution, who succeeds to the said post by virtue of the wishes of Mureeds or disciples of the Peer. However, if Sajjadanashin is in control of any property, he is treated as Mutawalli for the purpose of the Waqf Act. The manner of instructions that he gives to the disciples of the Peer cannot be a matter of interference by the Waqf Board. The Waqf Board neither has the power under the Waqf Act, 1954 or Waqf Act, 1995 to carve out properties from the existing Waqfs and create new Waqfs. This is because the Waqf Board is an artificial person and cannot be said to be a person professing Islam. Under Islamic law, it requires a living person to create a Waqf and an artificial person which is the creation of the legal fiction cannot create any such institution. Further, unless and until a person has ownership and control over a property, he/she cannot create a Waqf. It is a

fundamental principle of islamic law that Waqf should be permanent in character. This presupposes that the person creating the Waqf or the Waqif is the owner. The Waqf Board, merely exercising superintendence over the Waqf property, cannot become the owner of the Waqf properties. As correctly pointed out by the Allahabad High Court in **Masihuddin -vs- Ballabh Das (1912) 35 All 68,** a property cannot be made as a Waqf if the Waqif does not own the same. Therefore, the registration of the tomb of the Baghdadi Peer by the Waqf Board cannot result in creation of a Waqf.

30. This is a piquant situation because the Waqf Board has seen the existence of the institution for more than 50 years which is not a Waqf. Fortunately, the issue can be resolved by virtue of the Act. Masjid-e-Mamoor itself is a Waqf and within the precincts the mortal remains of a Saint has been buried. Islamic law demands high respect to the remains of any deceased, let alone the remains of a person considered as a Saint by his followers. When such is the respect that is given to a tomb, then by the mere fact that the institution is not a Waqf does not give a right to the Committee members to roughshod over it. I will decide more on this at the time of conclusion.

31. A Waqif in case he reserves that right under the Waqf Nama to deal with it, he can create such a separate institution. The original Prince of Arcot having

dedicated it as a mosque could not have himself created such an institution pursuant to the registration of the Waqf Board dated 23.07.1959.

<u>An institution cannot be recognized as Waqf by virtue of acquiescence</u>

32. Turning to the next point that the Waqf Board had recognized the institution by virtue of acquiescence, I am afraid I am not in agreement with the Waqf Tribunal. Acquiescence is a principle developed in equity where a person stands by and watches the right being interfered by another and does not do anything contra to such actions. Therefore, it requires a person who has a right over the property to stand by and watch actions being taken on it against its interest. Waqf Board is not the owner of the property belonging to the Auqafs. Perhaps the only property it is an owner of is No.1, Jaffer Syrang Street, Vallal Seethakkathi Nagar, Chennai. Therefore, it is not the owner but at best a Superintendent of properties. The question of acquiescence will not arise here. In fact, acquiescence will not apply against the institution Masjid-e-Mamoor because the requirement of Section 25(7) of the Waqf Act, 1954 had not been followed. If notice had been issued to the institution I am sure that they would have protested against the same. This is because Islamic law had remained unchanged from the time it has commenced till today. Therefore, the order of the Waqf Tribunal that by virtue of registration there is a creation of a Waqf by acquiescence does not arise.

<u>The Office of the Manager of Tomb is not hereditary in nature</u>

33. Insofar as the argument of Mr.Nissar Ahmed that Ex.P5 is only a deed of

relinquishment and not a deed of appointment is concerned, a perusal of Ex.P.5 would show that the then Manager of the tomb viz., Hakeem G Abdul Hameed had claimed that he was acting as a Mutawalli for Dargah-e-Hasan Moulana and due to old age had relinquished his office in favour Janab Habibulla Sha. A perusal of the document would show that apart from the duties that had been laid on the office of a person managing the tomb, it was also directed in terms of Clause 13 of the said deed that the Mutawalli had to draw his successor in office in the Tareeqa of Hazrat Hasan Moulana and for conducting Urs. Therefore, I would conclude that this is not only a document by which the then manager of the tomb viz., Hakeem G Abdul Hameed had relinquished his office due to his old age, but also a direction as to how a successor should be appointed. Though it is titled as a deed of relinquishment, it was entered into as such in order to give guidance to the successors in office as to how they should appoint their successors. This becomes relevant because it is not by virtue of hereditary succession that the second respondent viz., Habib Mohamed Tahir Bijli claims his right of management of the tomb, but by virtue of being drawn from the Tareeqa of Hazrat Hasan Moulana. Hence, the argument that since relationship between the Saint and the present second respondent had not been proved, he cannot claim a right has to fall to the ground. I would answer this point in favour of the second respondent and hold that he and after him the successor in office, who are drawn from the Tareeqa of Hazrat Hasan Moulana, will be entitled to manage the tomb and spiritual activities connected therewith.

Dismissal of O.S.No.343 of 1983 does not recognize the Manager of tomb as Mutawalli of the tomb

34. Turning to the suit in O.S.No.343 of 1983, I have to say that this did pose a difficult situation for him. This is because the suit had been presented for permanent injunction restraining the then Manager of the tomb as not to represent himself as Mutawalli. The suit had been dismissed and no appeal had been preferred therefrom. A suit for permanent injunction is a suit in *personam*. It relates only to cause of action that arose at the time of presentation thereof. A perusal of the plaint as well as the judgment would show that the Court had come to a categorical conclusion that Urs and other connected ceremonies had been performed by Habibulla Sha during his life time. However, I should recollect that the decree of the Court cannot create a right which does not exist in a person. I can however read the judgment in order to substantiate the case of Habib Mohamed Tahir Bijli that there is a tomb within the precincts of the mosque over which Urs had been performed for years and on. At the same time, I cannot put the decree against the civil revision petitioner to state that there exists a Waqf institution. I would hold that while the decree in O.S.No.343 of 1983 on the file of the City Civil Court, Chennai recognizes the tomb and spiritual and religious activities performed thereon, it cannot read it to state that it creates an institution of Waqf called Hasan Moulana Baghdadi Dargah Waqf.

Proforma is not indicative of the Sajjadanashin rights

35. Now I turn to the next argument that, since the proforma shows that

there is no Mutawalli to the institution as per the application made on 23.07.1959, the present second respondent is not entitled to claim a right. This argument fails to deal with the special institutions created which exists in Islam called Sufi institutions. Sufi is a tradition known in South East Asia, whereby a person who is held as a Saint teaches the manner and training to his disciples to reach the Almighty. He gives instructions as to how to live in the present life so that they get the benefit hereafter. In such an institution, there exists a concept called Silsila or Chain. Silsila means chain that exists from the Peer to the Mureed and Mureed himself becomes a Peer either during the lifetime of his Peer or succeed to his office. This is entirely a spiritual institution and as pointed above, the Waqf Board has no control over the same.

36. In this regard, it is pertinent to note the judgment of the Bombay High Court in **Maule Shah -vs- Ghane Shah (1938) 40 Bom.LR 1071**, wherein the Bombay High Court had an opportunity to deal with the secular nature of the office of Mutawalli and the spiritual functions performed by the Sajjadanashin. A reading of the judgment makes it clear that the office of Sajjadanashin contrary to the office of Mutawalli is a spiritual office with certain spiritual functions to perform. Though, as has been pointed out by this Court in the previous paragraphs, Hasan Moulana Baghdadi Dargah is not a Waqf, one cannot rule out the spiritual and religious activities performed thereon. Therefore, the absence of Mutawalli cannot imply that the institution must be devoid of a Sajjadanashin. The Waqf Board and

a Committee appointed / recognized by it, like the civil revision petitioner being entrusted with only matters of administration and general superintendence over the Waqf, cannot interfere in the spiritual functions of the said institution.

37. Further, on the date on which the registration was made on 23.07.1959, the applicant could not have predicted as to who his successor would have been. Successors to an institution like Qadri Tareeqa or Chisti Tareeqa are elected or selected by the disciples after the previous Peer leaves this transient mortal abode. I have to read the proforma in the light of the institution which has been dealt with by it. I conclude that the fact that there is no rule of succession does not make a difference because the succession would arise only when the Mureeds or disciples meet after the passing away of the previous Peer.

A Wasiyat cannot be construed to mean Waqf-bil-Wasiyat

38. Insofar as the argument of Mr.Abdul Mubeen that the Wasiyat had not been produced and therefore they are not entitled to make a claim is concerned, I would have to conclude the Wasiyat in Islamic law is a will or wish of a person. Imam or Baghdadi Peer had only wished that he be buried within the precincts of Masjid-e-Mamoor. By no stretch of imagination that this Wasiyat can be treated either as Waqf-bil-Wasiyat, which means creation of a Waqf by means of a will. When the Imam / Baghdadi Peer was only a servant of the institution viz., Masjid-e-

Mamoor, he could not have created a Waqf by virtue of the Wasiyat.

39. A reading of Ex.P5 would lead me to a conclusion that the Wasiyat was that he wanted to be buried in the institution in which he had served. Today, Waqf Board cannot question the Wasiyat because as early as 04.02.1949 this Wasiyat was placed before the Committee and the Committee had agreed to the same. It is not in dispute that giving effect to the Wasiyat, the Saint was also buried within the precincts of the mosque. That having been done, after the passage of nearly 75 years, it is not open to the Waqf Board to question the Wasiyat. The Waqf Board was not even in existence when the Wasiyat was made on 04.02.1949. Therefore, the Wasiyat has to be interpreted to mean that the Saint wanted to be buried in the precincts of the institution and that having been honoured, it falls as a duty of the present Committee and their successors to continue to accord the same respect and not disturb the spiritual activities connected therewith.

<u>Appointment of Mutawalli presupposes the existence of a Waqf</u>

40. This takes me to the last point as to whether there can be a mandatory injunction by the Waqf Tribunal directing the Waqf Board to appoint a person as Mutawalli. I have concluded that there cannot be a Waqf within the existing Waqf ant therefore, the direction given by the Waqf Tribunal is otiose. The existence of Mutawalli presupposes a Waqf institution. When the institution itself has not been created, there cannot be a creation of office to deal with non-existing institution.

41. Though I have held that the institution is not a separate Waqf, I am convinced that the Waqf Board has been collecting contribution from the said institution. Mr.Zaffarullah Khan states that in terms of the Waqf Act, he has been submitting the annual budget to the Waqf Board and the Waqf Board has also been collecting the contribution which has been substantiated by Ex.P.31. A contribution can be levied only on a Waqf. That not existing here, the payment does not lend any assistance.

42. Since Janab Habib Mohamed Tahir Bijli has been recognized as the Sajjadanashin, he shall also furnish a copy of the accounts to the Masjid-e-Mamoor, which shall include the said expenditure in its accounts prior to submission to the Board. The same procedure shall be followed for the budgets also. The tomb not being a separate Waqf, the Board cannot levy contribution on it.

Decision

35. In the light of the above discussion, while setting aside the order passed in O.A.No.57 of 2022 dated 23.12.2022, I pass the following directions:

(a) The civil revision petitioner viz., Masjid-e-Mamoor Committee and its successors in office will not disturb the tomb of Baghdadi Peer, which exists within its institution.

(b) The Committee shall permit the present Sajjadanashin and his successors of the Qadri Tareeqa of the Baghdadi Peer to perform all religious and spiritual activities in connection with their School in and around the tomb of Baghdadi Peer.

(c) The Committee shall maintain the tomb without any disturbance. It shall not prevent the performance of Fathias near the tomb of Baghdadi Peer nor shall prevent persons to have access to the tomb.

(d) Insofar as Urs is concerned, the Sajjadanashin of the Qadri Tareeqa who is taking care of the tomb shall make an application for the performance of the Urs within 30 days prior to the performance of the Urs and the Committee shall not reject the same.

(e) I make it clear that the Management of the certified Waqf viz., Masjid-e-Mamoor shall continue with the management of office, but it shall not interfere with the existence of the tomb and the places in and around the tomb and also the spiritual activities carried on over the tomb of Baghdadi Peer.

(f) Mr.Nissar Ahmed, learned Senior Counsel states that his client shall file an affidavit before this Court together with the resolution of the

Committee to the effect that they will not interfere with the spiritual activities and Urs that are being performed around the tomb of Baghdadi Peer.

(g) The Hundial and other collections with respect to the Dargah-e-Hasan Moulana viz., the tomb of Baghdadi Peer will be retained by the person in office or Sajjadanashin or any nominee thereof. He shall furnish the accounts to the Committee of Masjid-e-Mamoor as stated above.

36. With the above directions, the Civil Revision Petition is Allowed and the order of the Tamil Nadu Waqf Tribunal dated 23.12.2022 in O.A.No.57 of 2022 is set aside. No costs. Consequently, connected miscellaneous petition is closed.

11.06.2024
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Index : Yes/No
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To

The Tamil Nadu Waqf Tribunal
Chennai.

V. LAKSHMINARAYANAN, J.

KST

C.R.P. No.219 of 2023

11.06.2024