

(1982) 03 KL CK 0026
In the High Court Of Kerala
Case No : O.P. No. 4168 of 1979-K

Adam Aboobacker Sait

APPELLANT

Vs

Kerala Wakf Board and Others

RESPONDENT

Date of Decision : 26-03-1982

Acts Referred:

Waqf Act, 1954 — Section 15, 15(1), 15(2), 42, 43

Citation : AIR 1982 Ker 322

Hon'ble Judges : T. Kochu Thommen, J

Bench : Single Bench

Advocate : T.P. Kelu Nambiar, K.K. Abdurahiman, P.G. Rajagopalan and John Joseph, for the Appellant; K.M. Abdul Khader, K.A. Abdul Salam, V. Ramachandran (Vaikom) and T.C.N. Menon, for the Respondent

Judgement

T. Kochu Thommen, J.—The question which arises is whether or not the Board of Wakfs (the "Board") established under the Wakf Act, 1954 (the "Act") can adjudicate upon questions relating to the validity of appointment of a Managing Trustee of a mulawalli. The Board by the impugned order (Ext. P-4 dated 17-11-1979) upheld the contention of respondents 2 to 4 that the petitioner Adam Aboo-backer Sail was not qualified to be appointed as the Managing Trustee of the mutawalli. Accordingly the Board held that the appointment of the petitioner to that office was illegal. The Board further held that the 2nd respondent was eligible to be appointed as the Managing Trustee.

2. Challenging Ext. P-4. the petitioner's counsel Shri Kelu Nambiar submits that in the first place the Board had no jurisdiction to examine, the validity of appointment to the office of Managing Trustee and secondly the construction of the relevant provision of the instrument of wakf on the basis of which the Board reached its conclusion was wrong.

3. I shall first examine the question of jurisdiction. Appearing for the 2nd respondent, Shri K. P. G. Menon submits in his well prepared arguments that the Board is armed with sufficient statutory power to adjudicate upon rival claims for

appointment to the office of a mulawalli or the Managing Trustee of a mutawalli. Counsel refers to Sections 15, 42, 44 and 45 of the Act in support of his contention. Shri Menon is supported by counsel appearing for respondents 3 and 4. The Board's counsel submits that Ext. P-4 was made exclusively in terms of Section 15 (2) (o).

4. The petitioner was appointed purportedly in accordance with the directions contained in Ext. P-1, which is a will executed by Abdul Sathar Haji Moosa Sait on 25-2-1099 M. E. Clause 21 of Ext. P-1 refers to the appointment of a Managing Trustee from among persons mentioned thereunder. The petitioner and respondents 2 to 4 are descendants of the testator on the female line and belong to the class of persons qualified to be appointed as Managing Trustee provided the condition mentioned under Clause "1 is satisfied. The contention of respondents 2 to 4 before the Board was that Clause 21 stipulated that only the eldest and the ablest of the members of the class of qualified persons was entitled to be appointed to that office. The petitioner being not the eldest, was not, according to them qualified to be appointed. One of the contentions of the petitioner before the Board was that Clause 21 did not warrant the selection of the eldest and the ablest, but any person who was old enough and able enough among the class of qualified persons was entitled to be appointed as the Managing Trustee. The Board accepted the arguments of respondents 2 to 4.

5. The question decided by the Board is essentially of a civil nature relating to title to an office. The powers and functions of the Board are enumerated under various provisions of the Act. Some of these provisions indicate the nature and ambit of the Board's statutory power. Section 6 authorises the Board to institute a suit in a competent Civil Court for decision of questions concerning identity of wakf properties. This section merely gives the Board the locus standi before a Civil Court. Section 27 gives the Board power to decide, subject to adjudication by a competent Court, whether or not a particular property is wakf property or whether it is a Sunni wakf or a Shia wakf. Here again the power to decide on matters concerning ownership of property is only tentative and subject to the decision of the Court. The more important powers of the Board are contained in Section 15 and other provisions. Section 15, as considered by this Court in ILR (1976) Ker 419 confers only power of superintendence, and not managerial or ministerial powers, except in regard to settlement of schemes of management as provided under Clause (d) of Sub-section (2). Even this power is subject to the power of the Civil Court in the event of the settlement of the scheme by the Board being challenged. (Section 15(3)). Section 15 provides:

"15. (1) Subject to any rules that may be made under this Act, the general superintendence of all wakfs in a State shall vest in the Board established for the State; and it shall be the duty of the Board so to exercise its powers under this Act as to ensure that the wakfs under its superintendence are properly maintained, controlled and administered and the income thereof is duly applied to the objects and for the purposes for which such wakfs were created or

intended :

Provided that in exercising its powers under this Act in inspect of any wakf, the Board shall act in conformity with the directions of the wakif, the purposes of the wakf and any usage or custom of the wakf sanctioned by the Muslim law.

(2) Without prejudice to the generality of the foregoing power, the functions of the Board shall be-

The section confers on the Board the power of superintendence over the administration of a wakf. But such power has to be exercised in consonance with the directions of the wakif, the purposes of the wakf and the usage or custom of the wakf. Without prejudice to the generality of the power conferred u/s 15 (1), Sub-section (2) enumerates the functions of the Board. Among them are the authority to issue directions for the administration of a wakf (Clause (c)), to appoint and remove mutawallis in accordance with the provisions of the Act (Clause (g)), to institute and defend suits and proceedings in a Court of law relating to a wakf (Clause (i)), or generally to do all such acts as may be necessary for the due control, maintenance and administration of a wakf (Clause (o)). All these powers and functions are entrusted with the Board to make sure that a wakf is maintained, controlled and administered and the income applied in consonance with the basic norms postulated in the Act. Section 15 does mention appointment and removal of mutawalli in accordance with the provisions of the Act, as one of the functions of the Board, but that function, as We shall see, is mentioned in the section only as an adjunct to what is stated in the other provisions containing the substantive power to exercise that function.

6. The proviso to Section 15 (I) is a significant and important guide to the nature and scope of the Board's powers and functions. This proviso, in my view, is a proviso to the entire Act, and not to one section alone, for its ambit is not confined to Section 15 (1), Whatever power or function the Board would exercise under the Act must be exercised in conformity with the directions of the wakif and the objects of the wakf, as well as the usage and custom of the wakf sanctioned by Muslim law. This is a basic norm which the Board has to bear in mind in the exercise of its statutory functions. It is with reference to this proviso that the provisions of the Act have to be understood,

7. Sections 15 and 42 confer upon the Board certain power of appointment. Sections 15 and 43 confer power of removal also upon the Board. Section 15 (2) (g) says :

"to appoint and remove mutawallis in accordance with the provisions of this Act." Section 42 reads :

"When there is a vacancy in the office of the mutawalli of a wakf and there is no one to be appointed under the terms of the deed of the wakf, or where the right of any person to act as mutawalli is disputed, the Board may appoint any person to act as mutawalli for such period and on such conditions as it may think fit."

These provisions, when considered in the light of the provisions of the instrument of the wakf, mean that subject to the overriding power of appointment conferred upon competent persons by the wakf, the Board has, for the purpose of effective superintendence of the administration of the wakf, the power to appoint mutawallis. This is not an absolute power, but it can be exercised subject to the restrictions and in the circumstances contemplated u/s 42, and with due regard to the effective administration of the wakf. Section 42 says that the power to appoint arises only where a vacancy cannot be filled either because of the absence of a qualified person or because the right of any such person is disputed. Power of appointment u/s 42 cannot arise if there is no vacancy. Section 42 is attracted if no qualified person is available to be appointed or if there is a dispute about the right of a person who is otherwise-qualified. This means that while a dispute is pending before a competent forum as regards the right of a qualified person, the Board may, in exercise of its power of superintendence, appoint a person to act as a mutawalli for a limited period and subject to such conditions as it may impose. The dispute may arise because of the rival claims of persons belonging to the class of qualified persons in terms of Clause 21. Shri K.P.G. Menon contends that, even without a vacancy, if the right of the person in office is disputed by any other person, the Board has the power to appoint a mutawalli by removing the one in office. This, according to counsel, is precisely what was done by the Board. I cannot agree that the Board has such a wide power. To remove the occupant of an office is a power which is basically of a civil nature and such power is normally vested in a Civil Court. If the intention of the legislature had been to confer wide power of removal upon the Board it would have been specifically stated. Moreover, Section 42 begins by saying "when there is a vacancy". The vacancy must exist as a condition precedent before Section 42 can be invoked. The vacancy cannot be created by the Board by removing the person in office otherwise than in terms of Section 43 read with Section 15 (2) (g). The Board has no case that the power u/s 43 had been invoked by it. None has such a case, Section 42 as such does not take in the power of removal. Section 42 operates when a vacancy in the office of mutawalli arises. It may arise either because of death, or resignation, or by reason of removal as provided under the Act. In all such cases Section 42 is meant to meet an emergency, and that too for a specified time and subject to such conditions as the Board may impose. If a vacancy arose and a qualified person was available to be appointed as a mutawalli and there was no dispute as to his right, then the Board would have no power to exercise at all u/s 42.

8. Section 43 to which no reference has been made by counsel for respondent 2 to 4 cannot be overlooked in this context, for, that is the provision which deals with the power of removal. Although Section 15 (2) (g) refers to removal as a function of the Board to be exercised in accordance with the provisions of the Act, the specific and substantial provision containing this power is Section 43. This section says :

"43. (1) Notwithstanding anything contained in any other law or the deed of

wakf, the Board may remove a mutawalli from his office if such mutawalli -

(a) has been convicted more than once of an offence punishable u/s 41; or

(b) has been convicted of an offence of criminal breach of trust or any other offence involving moral turpitude; or

(c) misappropriates or deals improperly with the properties of the wakf; or

(d) is of unsound mind or is suffering from other mental or physical defect or infirmity which would render him unfit to perform the functions and discharge the duties of a mutawalli; or

(e) has failed to pay, without reasonable excuse, for two consecutive years, the contribution payable by him u/s 46,

(2) Where a committee is appointed by the Board or any person or authority not being a Court of law to act as a mutawalli for managing or administering any wakf property and the committee, in the opinion of the Board, is unable to perform, or has persistently made default in the performance of, the duty imposed on it by or under this Act or has exceeded or abused its powers, the Board may supersede the committee and appoint any other person or committee to act as the mutawalli of the wakf property.

These are the only circumstances in which the power of removal can be exercised by the Board. An enquiry is contemplated u/s 43 (4) before a decision is taken by the Board under Sub-section (1) or (2) of that section. The Board can act under these sub-sections only if the decision is taken by a majority of not less than three-fourths of its members. Such decision in respect of a mutawalli coming under Clauses (c) to (e) of Sub-section (1) or under Sub-section (2) of Section 43 is subject to an appeal to the State Government whose decision shall be final. It has to be noticed that u/s 43 (2) it is open to the Board to appoint a person or a committee in supersession of a committee which the Board had already appointed. The superseded committee must necessarily have been a committee appointed u/s 42 read with Sections 43 and 15 (2) (g). (See Section 3 (f) which defines "mutawalli" to include a committee). Section 43-A gives the Board power to assume direct management in the event of no suitable person being available to act as a mutawalli in the circumstances referred to in Sections 42 and 43 (2). I refer to these provisions for the purpose of showing that the power of removal and appointment is strictly restricted to the circumstances mentioned thereunder. The question of removal arises only in cases falling u/s 43 and none other. It is to the power contained in this substantive provision that the Board's function of removal mentioned u/s 15 (2) (g) has to be related. Section 43 can arise only in case of misconduct or mismanagement or mental or physical defect or infirmity or the need to supersede a committee appointed u/s 42 read with Section 15 (2) (g).

9. Section 44 deals with the power of the Board to take action in the event of mismanagement. It reads :

"Any person interested in a wakf may make an application to the Board supported by an affidavit to institute an inquiry relating to the administration of the wakf and if the Board is satisfied that there are reasonable grounds for believing that the affairs of the wakf are being mismanaged, it shall take such action thereon as it thinks fit."

This is one of the circumstances in which the Board may exercise its power of removal by virtue of Section 43 read with Section 15 (2) (g). Section 43 (1) (c) speaks of :

"misappropriates or Heals improperly with the properties of the wakf."

This involves mismanagement which may call for the extreme remedy of removal for which the Board has the power. Mismanagement was one of the allegations against the petitioner. Fortunately for the petitioner that allegation was rejected by the Board and the petitioner was completely exonerated of it. Accordingly no circumstance existed before the Board to exercise the power of removal.

10. Shri K. P. G. Menon refers to Section 45 and submits that the Board may on application or suo motu hold an enquiry and take such action as it thinks fit. This section reads :

"The Board may either on an application received u/s 44 or on its own motion,

(a) hold an inquiry in such manner as may be prescribed: or

(b) authorise any person in this behalf to hold an inquiry, into any matter relating to a wakf and take such action as it thinks fit.

(2) for the purposes of any inquiry under this Act. the Board or any person authorised by it in this behalf shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 for enforcing the attendance of witnesses and production of documents."

This section was construed by the Andhra Pradesh High Court to mean that the inquiry contemplated thereunder is only in matters falling u/s 44 viz.. mismanagement. (See Wakf Board, Hyderabad and Another Vs. Parvathi Bai and Another, The Court emphasised the fact that the application referred to in Section 45 is the one that is presented u/s 44. For that reason the Court said that the suo motu power conferred on the Board u/s 45 is only in respect of what is stated in Section 44. The enquiry contemplated u/s 45 does not seem to relate to Section 43. except in respect of mismanagement, because Section 43 contains a specific provision for enquiry. (See Sub-section (4)). It would appear that only to the extent that mismanagement is taken in by Clause (c) of Section 43 (1), which has to be related to Section 44, can the enquiry mentioned u/s 45 relate to a matter arising u/s 43.

In an enquiry conducted u/s 45 relating to mismanagement, the restriction mentioned u/s 43 (4) regarding quorum is absent Nor would it seem that an "action" taken u/s 44, on the basis of an enquiry u/s 45, can be challenged

before the Government in appeal in terms of Section 43 (4). Such construction of Sections 43 (4), 44 and 45 seems to result in a conflict when a decision is taken in regard to mismanagement. However in the absence of any finding of mismanagement. I do not pursue the point further. Whether or not Section 45 is strictly limited to matters of mismanagement -- a point on which I do not express a final view -- neither Section 45 nor Section 44 independently permits the Board to exercise the power of removal except upon a finding of mismanagement and by recourse to the power u/s 43.

In the present case, in the light of the clear finding of total absence of mismanagement on the part of the petitioner, no question of removal in exercise of power u/s 44 or Section 45 arises. Nor does it arise u/s 15 (2) (g), for the reason that Section 15 (2) (g) can be attracted only in matters filing u/s 43 or Section 44. Not can Section 15 (2) (o) give the Board power of removal, except in matters where removal is permitted under the aforesaid provisions. Clause (o) is a general provision, more in the nature of a residuary power, but limited by the principle of *ejusdem generis* to matters specified therein, viz., control, maintenance and administration of wakfs. This provision therefore, as contended by the Board's counsel, does not independently give the Board any substantive power of removal. I am fortified in my conclusion by the views expressed on this point by this Court as well as by the High Courts of Andhra Pradesh, Mysore and Rajasthan. See *Abdul Sathar Haji Moosa Sait Dharmasthapanam v. The Kerala Wakf Board* ILR (1976) Ker 419; *Wakf Board, Hyderabad and Another Vs. Parvathi Bai and Another*, *Corporation of the City of Bangalore v. Mysore State Board or Wakfs* AIR 1973 Mys 189; *Radhakishan and Another Vs. State of Rajasthan and Others*,

11. In my judgment the Board's power to appoint or remove a muawalli is strictly limited to the special circumstances mentioned under Sections 42 and 43 read with Sections 15, 44 and 45. These circumstances do not exist in the present case. Section 43 was not invoked. The power of appointment or removal does not therefore arise. The Board has no power under the Act to adjudicate upon title to office. Exhibit P4, in so far as it has held that the appointment of the petitioner as Managing Trustee was invalid and that the 2nd respondent was the person entitled to be appointed to that office, is unsustainable and is liable to be quashed.

12. The question whether the petitioner was rightly appointed as the Managing Trustee of the mutawalli is a matter for the Civil Court to pronounce upon. The answer would depend upon the construction of the provisions of the instrument of wakf. The canons of construction are well recognised : See *Gnanambal Ammal Vs. T. Raju Ayyar and Others*, ; *N. Kasturi Vs. D. Ponnammal and Others*, and *Pearey Lal Vs. Rameshwar Das*, It is for the Civil Court to consider the meaning and the effect of the relevant provisions according to the principles of construction. If it is permissible to rely upon extrinsic evidence of surrounding circumstances, it is" for persons who participate in the proceedings before that

Court to adduce the necessary evidence. These are matters, which in their very nature, no forum other than a Civil Court is ordinarily competent to examine.

13. I do not express any view on the correctness or otherwise of the opinion expressed by the Board on the interpretation of Clause 21 and other provisions of Ext. P1. These are matters which are outside the power of the Board and therefore whatever has been said by the Board has to be ignored by the Civil Court in the event of it being called upon to adjudicate the question. With this observation I quash Ext. P4 in so far as it has pronounced upon the validity of the appointment of the petitioner as the Managing Trustee.

The O. P. is allowed in the above terms. No costs.