
(2003) 05 JH CK 0023
In the Jharkhand High Court
Case No : CWJC No. 12752 of 1999 (9)

Ali Akhtar Quadri

APPELLANT

Vs

State of Bihar (Now Jharkhand)

RESPONDENT

Date of Decision : 02-05-2003

Acts Referred:

Constitution of India, 1950 — Article 226
Waqf Act, 1995 — Section 27, 3, 64, 64(1)

Citation : (2003) 3 JCR 26

Hon'ble Judges : Vikramaditya Prasad, J

Bench : Single Bench

Advocate : N.N. Tiwary and Md. M. Khan, for the Appellant; P.K. Prasad, for the Respondent

Final Decision : Allowed

Judgement

Vikramaditya Prasad, J.—Annexure-2 by, which the petitioner, who was the Mutawalli of Shiekh Quadir Baksh Wakf Estate, Giridih, was removed from the post of Mutawalli on the ground of misappropriation of the income of the Wakf properties and in place of the petitioner, a Committee was constituted to work as Mutawalli, has been sought to be quashed in this writ petition. This order has been passed by the Chairman. Wakf Board, Patna, on 9.5.1998 and, according to the respondents, the same had been communicated by the Secretary of the Board.

2. The main ground for seeking the quashing of the impugned order is that the order was without jurisdiction as the Chairman had no legal authority to pass the same.

3. The aggrieved respondents appeared and contested the writ petition. According to the respondents, the petitioner has been rightly removed by the Chairman, who had the delegated power u/s 27 of the Wakf Act, 1995, and the order was communicated by the Secretary of the Board. The further contention raised by the learned counsel appearing on behalf of the aforesaid respondents is

that the order was passed in the year 1998 and as the removal was made u/s 64(1)(i) of the Act, the remedy available to the petitioner was to file an appeal u/s 64(4) of the Act and by not availing this remedy, the petitioner had come to this Court directly and as such, the writ petition was not maintainable on the date of its filing (this writ petition was filed in the year 1999 at Patna High Court and this had been received on transfer after creation of the High Court of Jharkhand).

4. Admittedly, the order has been passed by the Chairman because in the impugned order at its bottom reads as follows :--

"Signature-Illegible Chairman Wakf Board Patna 9.5.1998"

The main question to be answered is whether the impugned order is sustainable in law or whether it is in excess of the jurisdiction vested in the Chairman under the Act.

5. Section 64(1) reads as follows :--

"64. Removal of mutawalli.--(1) Notwithstanding anything contained in any other law or the deed of wakf, the Board may remove a mutawalli from this office, if such mutawalli...."

From the aforesaid provision, it is clear that it is the Board, which has the power to remove the mutawalli. Then the question arose what is the Board. The Board is defined u/s 3(c) of the Act as follows :--

"3(c) "Board "means a Board of Wakf established under Sub-section (1), or as the case may be, under Sub-section (2) of Section 13 and shall include a common Wakf Board established u/s 106."

Section 13 reads as follows :--

"13. Incorporation.--(1) With effect from such date as the State Government may, by notification in the official gazette, appoint in this behalf, there shall be established a Board of Wakfs under such name as may be specified in the notification.

(2) Notwithstanding anything contained in Sub-section (1), if the Shia Wakfs in any State constitute in number more than fifteen per cent of all the Wakfs in the State or if the income of the properties of the Shia Wakfs in the State constitutes more than fifteen per cent of the total income of properties of all the Wakfs in the State, State Government may, by notification in the official gazette, establish a Board of Wakfs each for Sunni Wakfs and for Shia Wakfs under such names as may be specified in the notification.

(3) The Board shall be a Body Corporate having perpetual succession and a common seal with power to acquire and hold property and to transfer any such property subject to such conditions and restrictions as may be prescribed and shall be the said name sue and be sued."

From the aforesaid provision, it is clear that the Board has to be constituted by the notification of the State Government to be notified in the official gazette. Thus, the Board itself is a creation of the State. Under section, the constitution of the Board has been defined along with many other members and a Chair-person. Thus, Chairperson is none other than one of the Members of the Board so constituted by the Government. Section 27 of the Act reads as follows :--

"27. Delegation of powers by the Board.--The Board may, by a general or special order in writing, delegate to the Chairperson, any other member, the Secretary or any other officer or servant of the Board or any area committee, subject to such conditions and limitations as may be specified in the said order, such of its powers and duties under this Act, as it may deem necessary."

From this provision, it is clear that the Board is empowered to delegate its power upon a number of persons, namely : (i) Chairperson or any other person even to the Secretary or other officers, (ii) that delegation can be made by an order in writing, (iii) the delegation may be either general or specific and (iv) delegation will indicate the conditions and limitations, while exercising such delegation. Thus, unless there is a resolution of the Board in writing with regard to the delegation of the power on the Chairperson, the Chairperson cannot take a decision on behalf of the Board, that is to say that the delegation of power in the manner provided in the aforesaid section is a must.

6. The Bihar State Sunni Wakf Board through its Secretary, Chairman of the said Board and the Secretary of the said Board and the local committee, Giridih, had been made respondents in this writ petition. They are respondent Nos. 2 to 5. They have not appeared. Therefore, notice was directed to be issued on them with a specific direction to show whether or not the Chairperson has been delegated with the power. The notices through registered cover were sent to them by the petitioner as per their affidavit filed on 22.1.2003, which shows that the registered notices were sent on 16.1.2003, but even after expiry of 30 days, none of these respondents made appearance. Therefore, this matter is being heard ex parte against them and since they have not come with any resolution to show that delegation was made on the Chairperson, it has to be taken as admitted that no such delegation was made upon the Chairperson. If the Chairperson had not been delegated, then the question of passing the order u/s 64 of the Act did not arise. Section 64 is an exclusive power, the order impugned is without jurisdiction.

7. The learned counsel appearing for the respondents argued that since the Secretary has issued the impugned letter, it will have to be presumed that the Secretary was acting under the direction of the Board and consequently this is a decision of the Board.

8. I have already said that the impugned letter has been signed by the Chairman, but nowhere in the impugned letter, it is written that by the order of the Board, the Chairman is signing it. The Secretary is that Chief Executive

Officer, no doubt and u/s 27 of the Act, the above power can also be delegated upon him, but he can only communicate the orders and do the things, which are under his jurisdiction as contained in Section 25 and 26 where it provides for "subject to the provisions of this Act and of the rules made thereunder and the directions of the Board, functions of the Chief Executive Officer shall include....". Thus, this Executive Officer has to act under the direction of the Board and if there is no such direction, issuance of such order, even though passed by the Chairperson, does not become either the order of the Board or a resolution adopted by the Board. In this context, the learned counsel appearing for the respondent, relying upon a decision of a learned Single Judge of this Court rendered in CWJC No. 4323/1998, said that since the order was communicated by the Chief Executive Officer (Secretary), it will be deemed to have been made by the Board. I beg to humbly differ from the aforesaid view because mere communication of the order by the Secretary, the Chief Executive Officer, cannot become the resolution of the Board.

9. Coming to the question that the appeal should have been filed and in absence of that, the writ petition was not maintainable, I am of the view that if the alternative remedy is there, as a general rule, the petitioner must seek the same prescribed under the Act, but if that has not been done, then it does not mean that it cannot be entertained. In various cases, the Apex Court has said that the writ petition can be maintainable if there is an inherent lack of jurisdiction in passing the impugned order. In this case, as there has been inherent lack of jurisdiction in passing the impugned order, the writ petition can be maintained even if an alternative remedy was not availed by the petitioner. Consequently, I find merit in this writ and quash the impugned order. The writ petition is allowed with all consequences.