

(2002) 09 PAT CK 0079
In the Patna High Court
Case No : C.W.J.C. No. 13932 of 2001

Ghulam Mohsin Jafri

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 05-09-2002

Acts Referred:

Waqf Act, 1954 — Section 12, 64(1)
Waqf Act, 1995 — Section 14

Citation : (2002) 3 BLJR 2123 : (2002) 4 PLJR 264

Hon'ble Judges : Aftab Alam, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Aftab Alam, J.—This writ petition is filed, challenging the notification dated 3.10.2001 (Annexure 1) by which the State Government constituted the Shia Waqf Board ("the Board", hereinafter) and nominated its members as provided u/s 14 of the Waqf Act, 1995 (hereinafter, the 1995 Act").

2. This case has a brief history and in order to understand the matter clearly, it will be useful to take note of a few antecedent facts. The last Board which was ale to complete a full term was constituted by the State Government by notification, dated 1.10.1992, issued under the Waqf Act, 1954 (hereinafter the 1954 Act). By this notification the petitioner was nominated as one of the members and he later became the Chairman of the Board. u/s 12 of the 1954 Act the members of the Board would hold office of a term of five years. Hence, on expiry of this period, the State Government reconstituted the Board and nominated its members by notification dated 31.12.1997 issued u/s 64(1) of the 1954 Act. In this notification too, the petitioner was named as one of the members. But he did not accept his nomination and Respondent No. 3 was elected as the Chairman of the Board by the rest of the members.

3. The petitioner then filed CWJC No. 814 of 1998 challenging the notification, dated 31.12.1997 on the ground that it was issued under a non-existent

provision. It was contended that the 1995 Act had come into force with effect from 1.1.1996 and as a consequence the 1954 Act stood repealed from that date by virtue of Section 112(1) of the 1995 Act. Thus, on 31.12.1997, the date on which the notification was issued the 1954 Act was no longer in existence having been repealed by the 1995 Act. The State Government and Respondent No. 3 disputed this position and maintained that the 1995 Act was yet to come into force, atleast in so far as the State of Bihar was concerned.

4. A learned Single Judge of this Court accepted the petitioner's contention and allowed the writ petition by judgment and order, dated 10.3.1999, reported in 1999 (1) PUR 907. The judgment in CWJC No. 814 of 1998 quashed the notification, dated 31.12.1997 and directed the members of the Board nominated by that notification to vacate their respective offices. The learned Single Judge gave further directions to the State Government to constitute a new Board in terms of the provisions of the 1995 Act without any undue delay and to appoint a Special Officer to carry on the functions of the Board till such time as a new Board could be formed under the 1995 Act.

5. The State Government seems to have accepted the legal position declared in the judgment. In any event, it did not file an appeal against the judgment of the learned Single Judge. But respondent No. 3, the Board and some other members affected by that judgment took the matter in appeal. Against the judgment and order, dated 10.3.1999, allowing CWJC No. 814 of 1998, respondent No. 3 filed L.P.A. No. 315 of 1999 on 15.3.1999 (to which appeals filed by others were later made analogous). And by order, dated 23.3.1999 passed in L.P.A. No. 315 of 1999 a division bench of the Court stayed the operation of the order of the learned Single Judge. The interim order of stay was reaffirmed on 19.4.1999 and was directed to continue until further orders. The appeal was finally committed for hearing on 22.7.1999 and it remains pending before this Court.

6. At the same time the petitioner filed a contempt petition being MJC No. 900 of 1999 for initiating a proceeding contempt against certain officials of the State Government, for disobeying the directions given by the learned Single Judge in the judgment and order, dated 10.3.1999. The stay granted in LPA No. 315 of 1999 took the sting out of this contempt petition. It lay dormant on the list without any material orders being passed on it when yesterday, while the hearing in the writ petition in hand was still in progress, it was withdrawn on a prayer made by the Counsel for the petitioner.

7. As noted above, the State Government seems to have accepted the legal position declared by the learned single Judge that the 1995 Act had come into force in this State, as in the rest of the country, and the 1954 Act was thus no longer in existence. In accordance with this position the State Government issued notification dated 3.10.2001 constituting a new Board and nominating its members u/s 14 of the 1995 Act. In this notification, it was stated that as the framing of the rules under the 1995 Act was likely to take some time and as in the absence of the relevant rules, it was not possible to constitute the Board

under Sub-sections (1) and (2), the nomination of the members of the Board was being made in terms of Sub-section (3) of Section 14 of the Act. It was further stated in para 3 the notification that the Board so constituted shall have a life of five years or till the formation of a new Board after the framing of the rules, whichever being earlier.

8. The petitioner then filed (on 16.10.2001) the present writ petition challenging the notification dated 3.10.2001. By order dated 6.12.29001 passed in this case the effect of the order (sic. notification), dated 3.10.2001 was directed to remain in abeyance until further orders from this Court. Here it is ironical to note that though the petitioner had fought his battle in CWJC No. 814 of 1998 on the plea that the formation of the Board under the 1954 Act was bad because the 1995 Act had already come into force and though he had also filed a contempt petition alleging that the State Government was not giving effect to the directions of the learned single Judge, when the State Government did form the Board under the 1995 Act he chose to assail that too on the ground, amongst others that the action of the State Government informing the Board under the 1995 Act was in derogation of the stay order passed in LPA No. 315 of 1999. it is all the more ironical that on this ground the petitioner was able to obtain an interim order of stay against the notification, dated 3.10.2001.

9. As things stand at present, the position can be summed up as follows. As a result of the interim order of stay passed in this case was against the notification dated 3.10.2001 the earlier Board formed under notification dated 31.12.1997 would stand restored with Respondent No. 3 as its Chairman, by virtue of the order passed by the division bench in LPA No. 315 of 1999, staying the operation of the order of learned single Judge. It may be added here that in case the present writ petition succeeds and the latest notification dated 3.10.2001 is held to be invalid and inoperative or even in case that notification is held in abeyance on the basis of an interim order passed by this Court or for any other reasons, the appeals against the judgment and order passed by the learned single Judge in CWJC No. 814 of 1998 would assume full relevance and the interim order of stay passed in the appeal would restore the earlier Board formed under the notification dated 31.12.1997. if, on the other hand, this writ petition fails and the legality and validity of the notification dated 3.10.2001 is upheld, then the latest notification would hold the field, superseding the earlier notification, dated 31.12.1997 and in that event the appeals would be rendered infructuous.

10. Before proceeding now to examine the petitioner's challenge to the notification, dated 3.10.2001, it needs to be kept in mind that the Waqf is a very important institution for the Muslims. The importance of the waqf is not only religious but collectively Waqf are of great value in the social, cultural, educational and economic lives of the Muslims. A good administration of the waqf therefore, is a matter of no small concern. For a proper administration of the Waqf, a need was felt for an apex body for co-ordination superintendence and control over the affairs of Waqfs, which as individual units remain under the

management of their respective Mutawallies. Having regard to its nature and functions the Board has been envisaged as a body Corporate with perpetual succession (See Section 9(2) of the 1954 Act and Section "13 of the 1995 Act). A Board therefore, unless superseded (by Section 64 of the 1954 Act or by Section 99 of the 1995 Act) would continue in the eye of law as the one and same body. Though the language used in successive notifications issued by the State Government suggests that a new Board was being constituted/reconstituted by that notification, that is simply due to a misconception of the correct legal position and is to be simply ignored. It is, thus, to be seen that a void in place of the Board is neither desirable from the point of view of practicality nor it is permissible under the law.

11. The petitioner's challenge to the notification dated 3.10.2001 is to be examined in the light of the facts and circumstances and the legal position stated above.

12. Mr. Ram Balak Mahto, learned senior Counsel appearing in support of this writ petition assailed the notification purely on legal issues. He scrupulously refrained from making any personal attack on Respondent No. 3, though the writ petition contained allegations against him of a personal nature. Mr. Mahto opened his case by stating that the notification dated 3.10.2001 was not published in the official Gazette and therefore, it must be held to be inoperative in terms of Sub-section (9) of Section 14 of the Act. Section 14(9) of the 1995 Act reads as follows:

The members of the Board shall be appointed by the State Government by notification in the official Gazette.

13. Though this statement was not made in the main writ petition, a supplementary affidavit was filed on behalf of the petitioner in course of arguments on 20.8.2002 in which it was stated that to the best of the petitioner's knowledge the notification was not published in the official Gazette.

14. At that stage the hearing of the case was adjourned on the prayer made by the State Counsel who wanted some time to verify the statement being made on behalf of the petitioner.

15. The petitioner's averment was correct to the extent that the notification was not published in the Gazette till 20.8.2002. But on the next date, the State Counsel produced before the Court the official Gazette dated 22.8.2002 in which the notification dated 3.10.2001 was duly published,. Mr. Mahto was, thus, deprived of his main ground of challenge to that notification.

16. Faced with this position, Mr. Mahto submitted that in terms of the notification dated 3.10.2001 the Board can only be deemed to have come into existence on 22.8.2002 when the notification was published in the gazette and hence, all actions of the Board before 22.8.2002, including the election of Respondent No. 3 as its Chairman must be held to be no nest, invalid and inoperative. He went to

the extent of submitting that the counter-affidavit filed by Respondent No. 3 in which he described himself as the Chairman of the Board was, therefore, liable to be rejected.

17. In this regard Mr. Mahto further submitted that even publication in the official Gazette was not sufficient and the notification after its publication in the official Gazette was also required to be given wide circulation and only then it could become operative and enforceable. In support of his submission he relied upon a bench decision of the Court in *M/s. Mc Dowell & Co. v. State of Bihar and Ors.* 2000 (3) PUR 475.

18. The decision in *M/s. Mc Dowell & Company* does not seem to have any application to the facts of this case. In *M/s. McDowell*, the issue of non-publication of the Government notification in the gazette came up for consideration in terms of Section 92 of the Bihar Excise Act which is materially different from Section 14(9) of the 1995 Act. Section 92 of the Excise Act expressly lays down that the rules and notifications shall have effect only after those are published in the official Gazette.

19. Mr. S.S. Nayar Husain, learned Counsel appearing for the Waqf Board countered Mr. Mahto's submission by pointing out that Sub-section (9) of Section 14 simply stated that the members of the Board would appointed by the State Government by notification in the Official Gazette. The provision did not stipulate that the appointment will be effective from the date the notification was published in the Official Gazette. According to Mr. Husain, once the publication was made in the Official Gazette, the appointment would relate back to the date of the issuance of the notification.

20. But to me this whole issue does not appears to be very relevant and, therefore, I do not propose to make any pronouncement on the question whether the appointment of the members of the Board shall commence from the date of the publication of the notification in the Official Gazette or from the date of the notification itself, once it was published in the Gazette.

21. To my mind any argument that the notification, dated 3.10.2001 was inoperative before its publication in the Official Gazette on 22.8.2002 will not take the petitioner anywhere. In any event, the notification was in abeyance and inoperative by virtue of the interim order passed in this case on 6.12.2001. But as shown above that would have the effect of restoring the earlier Board formed under the notification dated 31.12.1997 on the basis of the order of stay passed by the division bench against the order of the learned Single Judge.

22. And, therefore, I am of the considered view that the legality and validity of the notification dated 3.10.2001 has to be considered after its publication in the official gazette on 22.8.2002 without adverting to the question of its being operative or inoperative prior to that date.

23. Having arrived at this sage and having put aside all the unnecessary and

misleading details of the case the only argument on behalf of the petitioner that remains to be considered relates to the use of Sub-section (3) by the State Government for issuance of the notification instead of Sub-sections (1) and (2) of Section 14 of the 1995 Act. Mr. Mahto submitted that the action of the State Government in nominating the members of the Board under Sub-section (3), instead of forming Board in terms of Sub-sections (1) and (2) of Section 14 was a fraud on exercise of its power. According to Mr. Mahto the State Government wanted to pick up its favourites and to place them as members of the Board and it was for that reason alone that instead of following the normal procedure provided under Sub-sections (1) and (2) of Section 14, resort was taken to the exceptional provision u/s 14(3) of the 1995 Act.

24. At this stage, it will be useful to take a look at Sub-sections (1) to (3) of Section 14 of the 1995 Act which are as follows:

14. Composition of Board.-(1) The Board for a State and the Union Territory of Delhi shall consist:

(a) a Chairperson;

(b) one and not more than two members, as the State Government may think fit, to be elected for each of the electoral colleges consisting.

(i) Muslim Members of Parliament from the State or, as the case may be the Union Territory of Delhi.

(ii) Muslim Members of the State Legislature.

(iii) Muslim Members of the Bar Council of the State, and

(iv) Mutawallis of the waqfs having an annual income of rupees one lakh and above;

(c) one and not more than two members to be nominated, by the State Government representing eminent Muslim Organizations;

(d) one and not more than two members to be nominated by the State Government, each from recognized scholars in Islamic Theology;

(e) an officer or the State Government not below the rank of Deputy Secretary.

(2) Election of the members specified in Clause (b) of Sub-section (1) shall be held in accordance with the system of proportional representation by means of a single transferable vote, in such manner as may be prescribed:

Provided that where the number of Muslim Members of Parliament, the State Legislature or the State Bar Council, as the case may be, is only one, such Muslim Member shall be described to have been elected on the Board:

Provided further that where there are no Muslim Members in any of the categories mentioned in Sub-clauses (i) to (iii) of Clause (b) of Sub-section (1),

the ex-Muslim Members of Parliament, the State Legislature or ex-member of the State Bar Council, as the case may be, shall constitute the electoral college.

(3) Notwithstanding anything contained in this section, where the State Government is satisfied for reason to be recorded in writing, that it is not reasonably practicable to constitute an electoral college for any of the categories mentioned in Sub-clauses (1) to (iii) of Clause (b) of Sub-section (1), the State Government may nominate such persons as the members of the Board as it deems fit.

25. It is to be Seen that hi terms of Sub-clauses (i) to (iii) of Clause (b) of Sub-section (1) of Section 14, one or two members for the Bard are to be elected from an electoral college consisting of Muslim members in different institutions, viz., (i) Parliament, (ii) State Legislature and (iii) Bar Council of the State; under Sub-clause (iv) member(s) is/are to be elected from amongst Muiawallis of waqf having an annual income of rupees one lakh or more. Sub-section (2) of Section 14 provides that the election of the members of the Board must be held in such manner as may be prescribed. Section 109 of the 1995 Act empowers the State Government to make rules, by notification in the official Gazette, inter alia with respect to the manner of election of members of the Board under Sub-section (2) of Section 1426.

It is the case of the State Government that though it had taken up the framing of rules under the 1995 Act, the finalization of the rules was likely to take some time ; that it was not desirable to leave the Board under a Special Officer for Long and hence, recourse was taken to Sub-section (3) of Section 14 which was incorporated in the Act precisely for meeting such eventualities.

27. The petitioner however feels otherwise and Mr. Mahto strongly argued that that might have been the position in the case of the Sunni Waqf Board but the provisions of Sub-clauses (f) to (iv) of Clause (b) of Section 14(1) would pose no problem for constituting the Shia Waqf Board. According to the petitioner, in each of the categories in Sub-clauses (i) to (iv) there was only one Shia member, and therefore, the single member from each category could be nominated in terms of the proviso to Sub-section (2) of Section 14.

28. In this regard Mr, Bakshi SRP Sinha, Advocate on record for the petitioner made a reference to para 18 of the petitioner's reply to the counter-affidavit filed by Respondent No. 3. There it is stated that in the legislative Council of the State there was only one Shia member; the present Legislative Assembly did not have any Shia member and there is only one Shia gentleman who is a former member of the Assembly. With respect to Sub-clause (iv) it is stated that the State Government had in its possession the list of Motawailis of the Waqfs having an annual income of Rs. 1 lakh and above. But there is no reference to any Muslim member of Parliament from the State or any Muslim member of the State Bar Council as provided in Sub-clauses (i) and (iii) respectively.

29. On these facts, it is highly unreasonable for the petitioners insist that the

State Government was obliged to form the Board under Sub-sections (1) and (2) of Section 14 and the notification issued u/s 14(3) was a colourable exercise of power. In the first place the petitioner does not even show that there was a single Shia member available for categories under Sub-clauses (i) and (iii). Secondly, the entire submission of the petitioner is based on the premise that the electoral college for constituting the Shia Waqf Board must exclusively consist of only Shia members for the four categories provided under Sub-clauses (i) to (iv). To suggest that for constituting the Shia Waqf Board the electoral collage in the four categories under Sub-clauses (i) to (iv) must exclusively consist of Shias may be a possible or even the more probable view. But it cannot be said to be the only possible view, having regard to the plain language of the selection.

30. Moreover, even assuming that there was only one Shia member available in each category under Sub-clauses (i) to (iv), still the State Government may legitimately and reasonably take the decision to first frame the rules and to then simultaneously constitute both the Sunni and the Shia Waqf Boards.

31. It is not to be lost sight of that the exercise for formation of the Board under the 1995 Act was taking place in the State for the first time, in fact, the State Government was even oblivious of the fact that the 1995 Act had come into force with effect from 1.1.1998 and woke up from slumber only after the judgment, dated 10.3.1999 passed in CWJC No. 814 of 1998. Thus it would naturally take some time in framing the rules in order to make the Act work smoothly and without any difficulty. If in those circumstances the State Government took the decision to constitute at least the first Board in terms of Sub-section (3) of Section 14 of the Act it can hardly be accused of committing a fraud on the exercise of power. In fact I fail to see a more appropriate use of Sub-section (3) of Section 14 of the 1995 Act.

32. In course of hearing of this Act, Mr. S.J. Rahman, Government Pleader No. VII informed the Court that the process of making the rules was in its last stages and the rules were likely to be finalized shortly where after a new Board would be constituted in terms of Section 14(1) and (2) without any difficulty.

33. In these facts and circumstances, am unable to accept Mr. Mahto's submission that the action of the State Government in forming the Board u/s 14(3) amounted to a fraud on exercise of its powers.

34. Mr. Mahto next submitted that the formation of the Board under the impugned notification suffered from malice in law and the notification was issued in derogation of the interim stay granted by the division bench in LPA No. 315 of 1999. Mr. Mahto submitted that by the decision in CWJC No. 314 of 1998, the learned single Judge had set aside the notification, dated 31.12.1997 and had directed all persons appointed as members of the Board by that notification to vacate their respective offices. The State Government used Section 14(3) of the 1995 Act for nominating the same persons as members of the new Board and in doing so the State Government clearly overreached the order of this Court.

35 The statement that the same persons have been nominated as members of the Board under the notification dated 3.10.2001 does not appear to be correct. In fact, only two members out of eleven are common in the notifications dated 31.12.1997 and 3.10.2001. There is, therefore, no question of the State Government over reaching the order of this Court

36. Moreover, I am unable to follow the submission advanced on behalf of the petitioner that the notification, dated 3.10.2001 was in conflict with the stay granted by the division bench in LPA No. 315 of 1999. It is understandable that Respondent No. 3 or any of the members of the earlier Board constituted by the notification dated 31.12.1997 might raise such a grievance but the petitioner can hardly be heard on the grievance that the impugned notification was in conflict with the order of stay granted by the division bench. As noted above, it has been the petitioner's consistent endeavour to get the 1995 Act implemented and the impugned notification by the State Government has been issued under that Act. I therefore, see no substance in the Submission that the impugned notification was issued in derogation of the stay order passed by the division bench in the LPA filed by Respondent No. 3.

37. Before concluding, it may be noted that Mr. S.S. Nayar Husain appearing for the Board seriously questioned the maintainability of this writ petition and submitted that the petitioner had no locus to challenge the notification, dated 3.10.2001. Mr. S.J. Rahman, Government Pleader No. VII Similarly tried to justify the actions taken by the Board prior to the publication of the notification in the official gazette on 22.8.2002 by invoking the defacto doctrine.

38. I do not propose to discuss either the question of the petitioner's locus or the defacto doctrine relied upon by Mr. Rahman because on the first issue, I come to find that the petitioner has no case on merits and there is no substance in this challenge to the notification dated 3.10.2001. I also do not; purpose to consider the submission made by Mr. Rahman because as shown above, to me it appears that the issue regarding the date from which the notification became operative is not quite relevant for the present.

39. In the light of the discussions made above, I find no merit or substance in this writ petition. It is accordingly dismissed but with no order as to costs.