

(1994) 09 MP CK 0042
In the Madhya Pradesh High Court
Case No : M.P. No. 681/91

Haji Moosakhan and Another

APPELLANT

Vs

M.P. Wakf Board and Others

RESPONDENT

Date of Decision : 07-09-1994

Acts Referred:

Waqf Act, 1954 — Section 3, 43

Citation : AIR 1995 MP 50 : (1995) 40 MPLJ 463 : (1995) MPLJ 463

Hon'ble Judges : A.R. Tiwari, J

Bench : Single Bench

Advocate : M.A. Khan and Z.A. Khan, for the Appellant; G.M. Chaphekar and M.A. Bohara, for the Respondent

Final Decision : Dismissed

Judgement

A.R. Tiwari, J.

Briefly stated, the facts of the case are that petitioner No. 1 was appointed in 1982 as Mutawalli of Malwa Mill Masjid, Indore. The Committee, consisting of the petitioners and 9 others, named as "Committee Intizamia Wakf Masjid, "Malwa Mill" was constituted as per Annexures A and A/1. The petitioner No. 1 was the President and petitioner No. 2 was the Secretary/Treasurer of this Committee. The Committee was constituted for fixed term expiring on 19-5-1990. The respondent No. 1 on 13-3-1991 (Annexures B and B/1) appointed another ad hoc Committee and directed the petitioners to handover, the charge to the Committee by order dated 24-3-1991 (Annexure C, C/I). Aggrieved by the aforesaid order (Annex. B) and consequent -- direction for handing over the charge, the petitioners have filed this writ petition seeking quashment of the order (Annex. B) passed by the respondent No. 1 in favour of respondents No. 2 to 9.

Respondent No. 1 has filed return. Respondents No. 2 to 7 have also filed return opposing the reliefs contained in the petition.

The petitioners also filed IA No. 4682/ 92 seeking amendment in the petition. Without formal order on amendment parties are also heard on this application.

I have heard both the sides.

The learned counsel for the petitioners questioned the validity of the order (Annexure B) on the linchpin of the undernoted grounds -

(a) Petitioners, as office bearers, continued to manage and administer Wakf and Wakf property from 20-5-1990 (after expiry of date 19-5-1990 as fixed in Annexure A) to 13-3-1991 (date of appointment of Committee vide Annexure B) i.e. after 10 months and as such were "mutawalli" in terms of Section 3(f) of (The) Wakf Act, 1954 (for short, "Act") on the date of passing of the aforesaid order. This being so, they could have been removed only on one or more clauses as contained in Section 43 of the Act after proper inquiry in terms of Section 43(4) of the Act.

(b) The order Annexure B is void as having been passed in derogation of legal rights conferred u/s 3(f) of the Act and in violation of Section 43(4) of the Act.

(c) There is no question of another Committee without steps for REMOVAL on proper grounds and conclusion and without existence of vacancy as much.

(d) IA No. 4682/92 evidences the recognition of the petitioners as mutawalli even after 19-5-1990. Reliance is placed on AIR 1979 Patna 103 -- Haji Sayed Mohammad Hus-sain v. State of Bihar.

The learned counsel for the respondents dubbed the aforesaid grounds as non-meritorious and contended as under:--

(a) Rights automatically stood terminated on 19-5-1990 as a result of fixed term in the order Annexure A and interregnum till 13-3-1991 yielded no legal rights in terms of Section 3(f) of the Act. As petitioners were NOT Mutawalli on the date of the constitution of ad hoc Committee by order (Annexure B), there was no need to remove and resort to Section 43(4) of the Act. The order Annexure A is not impugned and as such the petitioner cannot escape consequences flowing from it.

(b) The order is valid. Petitioners possessed no legal rights to litigate and impugne Annex. B.

(c) It is futile to slip under Section 43 of the Act.

(d) There is no question of recognition. Position continued in compliance of order of "status quo as regards office" passed by this Court on 12-4-1991. The aforesaid did not apply to the case on hand.

It seems apt to quote the provisions relied upon :--

Section 3(1) provides as under:--

"Mutawalli" means any person appointed either verbally or under any deed or

instrument by which a wakf has been created or by a competent authority to be the mutawalli of a wakf and includes any person who is a mutawalli of a wakf by virtue of any custom or who is al naibmutawalli, khadim, mejawar, sajjadanishin, amin. or other person appointed by a mutawalli to perform the duties of a mutawalli and save as otherwise provided, in this Act, any person. Committee or Corporation for the time being managing or administering any wakf or wakf property;

Provided that no member of a Committee or Corporation shall be deemed to be a mutawalli unless such member in an office bearer of such Committee or Corporation."

Section 43(4) prescribes as under :--"No action shall be taken by the Board under Sub-section (1) unless it has held an inquiry into the matter in the prescribed manner and the decision has been taken by a majority of not less than (two thirds) of the members of the Board".

Petitioners have staked their claim on the expression "any person, Committee or Corporation for the time being managing or administering any wakf or wakf property" employed in Section 3(f) of the Act. This was inserted by Section 3(ii) (b) of Wakf Amendment Act, 1964 (34 of 1964), The words preceding this expression are "save as otherwise provided in this Act." In order to appreciate this, it is necessary to see whether Act provided any "otherwise" position putting fetter on later situation ? This brings me to Section 42 of the Act which contains as under:

"42. Power to appoint mutawallis in certain cases -- 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."

The Board, as composed u/s 10 of the Act, has the power to appoint in case of vacancy, any person to act as a mutawalli "for such period and on such conditions as it may think fit". The order Annexure A thus rested on this power and prescribed the period of three years. The last portion of definition, residuary on the basis of management or administration, is required to be understood in the light of the expression "save as otherwise provided in this Act". The provision and permissibility of fixed term u/s 42 of the Act is the position "otherwise" provided in the Act and as such the inclusive part is luculently controlled by aforesaid provision eclipsing the generality and exhibiting specificity.

Law does not permit that unequals should be treated equally. There are two modes of causing vacancy. One if the period, as fixed u/s 42 of the Act, expires.

Two if Mutawalli incurs disqualification on any of the clauses as enumerated u/s 43(1) of the Act and is removed after holding inquiry and deciding by majority of not less than two thirds of the members of the Board in terms of Section 43(4) of

the Act. It is not disputed that order Annex. A was for a fixed term i.e. 3 years in terms of Section 42 of the Act. There is no occasion to remove a person who ceases to have any right on expiry of the period in terms of Section 42. Section 43 would have got attracted only if petitioners were to be removed prior to 19-5-1990 on permissible accusation. Law is to be seen on talking terms with justice.

The case on hand is thus demons-trably covered by the former, as noted in para 10 above, whereas the ground of attack is structured on the letter. This then declares the debility. Vacancy is authomatic when appointment is regulated by Section 42 of the Act. Evidently, as noted above, there is no question of removal or recourse to clause of Section 43(1) or course of Section 43(4) of the Act, in such cases.

The grievance for whatever worth, was required to be placed before respondent No. 1 which had the power to go into question as to who was rightful mutawalii (1969) 2 Mad LJ 556. Resort to writ jurisdiction under Art. 226 is premature and not proper. Mohammed Mohideen Vs. State Wakf Board and Others, Lord Wright pulled the blankers off our eyes when he observed in 1935 in Holdsworth club -

"The truth is that the Court decides the question in accordance with what seems to be just or reasonable in its eyes. The judge finds in himself the criterion of what is reasonable."

The purpose of judicial review is to examine whether there is any flaw or fault in decision making process. In State of Uttar Pradesh and Others Vs. Maharaja Dharmander Prasad Singh and Others, it is held as under at Page 1010:--

"Judicial review under Article 226 cannot be converted into an appeal. Judicial review is directed, not against the decision, but is confined to the examination of the decision making -- process. When the issues raised in judicial review is whether a decision is vitiated by taking into account irrelevant, or neglecting to take into account of relevant factors or is so manifestly unreasonable that no reasonable authority, entrusted with the power in question could reasonably have such a decision, the judicial review of the decision making process includes examination, as a matter of law, of the relevance of the factors."

On parity of point, it may be seen that u/s 111(a) of the Transfer of Property Act, 1882, lease determines by efflux of the time limited thereby. In Firm Sardarilal Vishwanath and Others Vs. Pritam Singh, it is ruled that

"If the lease of Immovable property determines in any one of the modes prescribed u/s 111 T. P. Act, the contract of lease comes to an end and the landlord can exercise his right of re-entry".

Now when "efflux of time" causes cessation of lease and yields right of re-entry, the same principle of law is pronounced by Section 42 of the Act.

It is strange indeed to find the surge of an urge to stick to the office contrary to

period fixed in Annexure A and despite cessation of right by efflux of time. The appointment and assignment were accepted on the basis of order Annexure A. This is a curious feature of entry and exit. The same door which gets one "in" can get him "out". It is futile and inutile to contend the opposite of it. The right and responsibility are regulated by Section 42 of the Act and order Annexure A and it is indeed improper to seek shelter under last line of Section 3(f) or procedure of Section 43(4) of the Act and find fault with Annex. B when there is none.

The Division Bench of this Court in M.P. No. 2605/90 Om Enterprises v. State of M.P. and connected 39 other petitions, decided by common order on 4-8-1994, disapproved of attempt to go back on commitment. It held that

"The petitioners were aware of the impugned conditions before they offered their bids. The necessary information was announced also before the auction. They offered the bids with their eyes open, and they were fully conscious of the impugned conditions and their responsibilities in the matter. They cannot now seek to go back on their commitment."

Shakespeare, through his Macbeth, observed that "The attempt and not the deed confounds us". Charles De Gaulle held that "Deliberation is the work of many men, action of one alone". The decision of Patna High Court is unhelpful to the petitioners and grounds as chronicled in para 5 above, are in-sentient and irrelevant. IA No. 4682/92 does not improve the position.

Action of respondent No. 1 is thus found to be on firm foundation and deserves to be permitted to prevail. The order Annexure B is thus legal, valid and tenable in law. The period fixed therein is required to be computed from the date of obtaining charge. The order of stay put its operation under "eclipse". The order Annex. B is absolute in its terms, absolute in intent and is absolute in effect. The exercise of the petitioners is thus inept and insipid. Annex. A foins the plea. I, therefore, hold that petitioners ceased to be Mutawallis after 19-5-1990 and operated thereafter only as "caretakers" till constitution of new Committee. Section 3(f) or Section 43 thus does not benefit them.

In the circumstances, impugnement is held to be illogical and impuissant. The OMEGA then is that this petition should perish.

In this view, this petition is dismissed without costs. The interim order of stay thus stands vacated. Security cost shall be refunded to the petitioners after due verification.