

(2019) 04 UK CK 0132

In the Uttarakhand High Court

Case No : Writ Petition (M/S) No. 2417 Of 2011

Haji Naseem Ahmad

APPELLANT

Vs

Uttarakhand Wakf Board & Others

RESPONDENT

Date of Decision : 25-04-2019

Acts Referred:

Waqf Act, 1995 — Section 64, 64(1), 64(3), 67(2), 83, 83(3)
Code Of Civil Procedure, 1908 — Section 83(8)
Limitation Act, 1963 & mdash; Section 14
Constitution Of India, 1950 — Article 226

Citation : (2019) 04 UK CK 0132

Hon'ble Judges : Sharad Kumar Sharma, J

Bench : Single Bench

Advocate : T.A. Khan, Aditya Kumar Arya, D. Barthwal

Final Decision : Dismissed

Judgement

Sharad Kumar Sharma, J

1. This case was taken up yesterday and it was argued by the advocate on record Mr. Aditya Kumar Arya for quite a long time. The court posed a query as to how the writ petition would be maintainable against the impugned order dated 04.11.2011 when it involves a question of appointment of respondent no. 4 as Mutwalli of the Waqf No. 8, Pithoragarh, because the said controversy would fall to be within the ambit of the provision as contained under Section 83 of the Waqf Act, which provides for approaching the Tribunal for redressal of the grievance pertaining to induction, continuance, or removal of a person from the office of Mutwalli of a Waqf. Section 83 reads as under:

"83. Constitution of Tribunals, etc.-

(1) The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a wakf or wakf property under this Act and

define the local limits and jurisdiction under this Act of each of such Tribunals.

(2) Any mutawalli person interested in a wakf or any other person aggrieved by an order made under this Act, or rules made thereunder, may make an application within the time specified in this Act or where no such time has been specified, within such time as may be prescribed, to the Tribunal for the determination of any dispute, question or other matter relating to the wakf.

(3) Where any application made under sub-section (1) relates to any wakf property which falls within the territorial limits of the jurisdiction of two or more Tribunals, such application may be made to the Tribunal within the local limits of whose jurisdiction the mutawalli or any one of the mutawallis of the wakf actually and voluntarily resides, carries on business or personally works for gain, and, where any such application is made to the Tribunal aforesaid, the other Tribunal or Tribunals having jurisdiction shall not entertain any application for the determination of such dispute, question or other matter:

Provided that the State Government may, if it is of opinion that it is expedient in the interest of the wakf or any other person interested in the wakf or the wakf property to transfer such application to any other Tribunal having jurisdiction for the determination of the dispute, question or other matter relating to such wakf or wakf property, transfer such application to any other Tribunal having jurisdiction, and, on such transfer, the Tribunal to which the application is so transferred shall deal with the application from the stage which was reached before the Tribunal from which the application has been so transferred, except where the Tribunal is of opinion that it is necessary in the interests of justice to deal with the application afresh.

(4) Every Tribunal shall consist of -

(a) one person, who shall be a member of the State Judicial Service holding a rank, not below that of a District, Sessions or Civil Judge, Class I, who shall be the Chairman;

(b) one person, who shall be an officer from the State Civil Services equivalent in rank to that of the Additional District Magistrate, Member;

(c) one person having knowledge of Muslim law and jurisprudence, Member, and the appointment of every such person may be made either by name or by designation.

(4A) The terms and conditions of appointment including the salaries and allowances payable to the Chairman and other members other than persons appointed as ex officio member shall be such as may be prescribed.

(5) The Tribunal shall be deemed to be a civil court and shall have the same powers as may be exercised by a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, or executing a decree or order.

(6) Notwithstanding anything contained in the Code of Civil Procedure, 1908 (5

of 1908), the Tribunal shall follow such procedure as may be prescribed.

(7) The decision of the Tribunal shall be final and binding upon the parties to the application and it shall have the force of a decree made by a civil court.

(8) The execution of any decision of the Tribunal shall be made by the civil court to which such decision is sent for execution in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

(9) No appeal shall lie against any decision or order whether interim or otherwise, given or made by the Tribunal:

Provided that a High Court may, on its own motion or on the application of the Board or any person aggrieved, call for and examine the records relating to any dispute, question or other matter which has been determined by the Tribunal for the purpose of satisfying itself as to the correctness, legality or propriety of such determination and may confirm, reverse or modify such determination or pass such other order as it may think fit."

2. The learned counsel for the petitioner after arguing for sometime and then had requested that the matter to be posted today. Today yet again when the matter was taken up a request has been made for keeping the matter in the revised call. The court declined the said request and proceeded to hear the counsel for the parties on the merits of the writ petition.

3. Brief facts as apparent on record are that, the present writ petition has been preferred by the petitioner being aggrieved against an order passed by respondent no. 2 as contained in Annexure No. 2 to the writ petition, i.e. dated 04.11.2011, which was passed as a consequence of compliance of the order passed by this court in earlier Writ Petition No. 265 of 2011 (M/S) 'Haji Naseem Ahmad vs. Uttarakhand Waqf Board & Others', which was disposed of on 3.08.2011 with the following directions:

"Learned counsel for respondent has no objection if the petition is allowed and liberty be given to the petitioner for hearing.

Having heard learned counsel for the parties and in view of Section 64(3) of the Waqf Act, 1995, the writ petition is allowed and impugned order dated 02.02.2011 (annexure no. 1 to the writ petition) is set aside. Respondent no. 2 shall pass order, afresh, after giving reasonable opportunity of hearing to the petitioner."

4. The petitioner was heard and after hearing the Chief Executive Officer, has passed the impugned order dated 04.11.2011, under challenged in the writ petition, by virtue of which the petitioner was removed from the office of Mutwalli and in his place respondent no. 4 has been inducted as Mutwalli of Wakf No. 8 i.e. Zama Masjid at Pithoragarh.

5. The arguments as extended by the learned counsel for the petitioner is that in the earlier phase of litigation before this Court, was to the effect that while

passing an order dated 02.02.2011 having the same consequence of removal of petitioner from office of Mutwalli of the Waqf, which is yet again intended by the impugned order under challenge before this Court, was bad on the ground that there was a non-compliance of Section 64 of the Act, whereby under sub-section (3) of Section 64 was alleged to have not been complied with. Consequently, with the consent extended by the respondents' counsel at that point of time the writ petition was allowed and the impugned order was quashed in view of the provisions contained under Section 64(3) and the matter was remitted back to the Chief Executive Officer, i.e. respondent no. 2, to pass a fresh order after providing an opportunity of hearing to the petitioner.

6. In compliance of the judgment dated 03.08.2011 the matter revived back and as a consequence thereto due to the revival of the position of the petitioner he was noticed by the respondent no. 2 by issuance of show cause notice dated 20.08.2011, and as per record in compliance of the provisions contained under sub-section (2) of Section 67 of the Wakf Act, and in the said show cause notice as many as 11 grounds was taken up as to be the foundation for taking of an action against the petitioner for his removal from the office of Mutwalli. On consideration of the grounds taken apart from the fact that it contained various allegations, which required and involved appreciation of evidence, which would not be gone into by the writ courts, more particularly, when the Act itself has constituted a competent Tribunal to deal with the issue and set of allegations.

7. The petitioner after the receipt of the notice dated 20.08.2011 had responded back and submitted his reply on 21.11.2011, before the Chief Executive Officer, i.e. respondent no. 2, and he further contends that in support of his reply as extended by him, he had also submitted the affidavits of as many as 232 persons belonging to the muslim community supporting his case so as to enable him to continue to occupy the office of the Mutwalli of Waqf No. 8, Pithoragarh.

8. The respondent after considering the reply extended and considering the set of allegations which has been leveled against the petitioner as detailed in the show cause notice of 20.08.2011 the Chief Executive Officer has proceeded to pass the order impugned dated 4.11.2011 by virtue of which the petitioner has been removed from the office of the Mutwalli, yet again it maintained the intention and purpose of the earlier order dated 02.02.2011, but this time after providing of an opportunity of hearing petitioner was removed from the office of Mutwalli and respondent no. 4 was inducted as Mutwalli.

9. Initially when the writ petition was being argued before this Court an argument was extended by the learned counsel for the petitioner that the action impugned happens to be in violation of the provisions contained under Section 64(3) of the Wakf Act. Consequently, there was an interim order passed on 17.11.2011. For better elucidation the provisions contained under Section 64(3) is quoted hereunder:

"(3) No action shall be taken by the Board under sub-section (1), unless it has

held an inquiry into the matter in a prescribed manner and the decision has been taken by a majority of not less than two-thirds of the members of the Board.

(4) A mutawalli who is aggrieved by an order passed under any of the clauses (c) to (i) of sub-section (1), may, within one month from the date of the receipt by him of the order, appeal against the order to the Tribunal and the decision of the Tribunal on such appeal shall be final."

10. The issue pertaining to the continuance of Mutwalli in his office as sought to be argued on the basis of the non-compliance of Section 64(3), itself in its sub-section (4) provides that if any action is taken against the Mutwalli occupying the office, and in particular, when the contention as alleged is based on non-compliance of sub-section (3) of Section 64, then consequently the petitioner would simultaneously be bound by the provisions contained under sub-section (4) of Section 64 of the Act of 1995, which contemplates that the Mutwalli if at all, if he is aggrieved by any action which is taken under sub-section (1) of Section 64, which provides for a removal of Mutwalli from his office he has a remedy to approach the Tribunal within a period of one month from the date of passing of an order by way of preferring of an Appeal as contemplated under Section 83 of the Act.

11. Looking to the reasons, which has been given in the show cause notice and the response given therein it would include scrutiny pertaining to the set of allegations and its justification for removal of the petitioner from his office as Mutwalli, this Court is of the view that it cannot be evidenced by this Court while exercising its powers under Article 226 of the Constitution of India cannot adopt the power and status of Tribunal. More particularly, when the statute being conscious of the scope of investigation required for the purposes of removal of Mutwalli under Section 64, it has to be agitated before the Tribunal by way of filing of an Appeal provided under Section 83 of the Act, wherein, the entire action would be falling within the purview of the procedure prescribed therein of leading evidence for the reason that under sub-section (8) of Section 83 the Tribunal has been defined to be a Civil Court and the decision of which and its execution would be governed by the provisions of the Civil Procedure Code. Section 83 (8) is quoted hereunder:

"83. Constitution of Tribunals, etc.-

(8) The execution of any decision of the Tribunal shall be made by the civil court to which such decision is sent for execution in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908)."

12. In view of the aforesaid since the impugned order has an affect of removal of the petitioner from the office of the Mutwalli and the petitioner himself has pleaded non-compliance of Section 64. In that eventuality, he was also simultaneously bound by subsequent provision contained under sub-section (4) of Section 64, which provides for preferring of an Appeal under Section 83 of the Act.

13. In view of the aforesaid, this writ petition would not be maintainable and the same is, accordingly, dismissed with the liberty open to the petitioner to approach before the Wakf Tribunal and Wakf Tribunal would take into consideration the impact of the provisions of Section 14 of the Limitation Act in accordance with law.

14. Subject to above liberty to file appeal under Section 83 of the Act, the writ petition is dismissed on the ground of availability of an effective statutory alternative remedy to the petitioner. The interim order granted earlier in the writ petition on 17.11.2011 would stand vacated.

15. However, there would be no order as to cost.