
(1977) 04 MAD CK 0052
In the Madras High Court
Case No : W.A. No. 377 of 1976

Haji S.P.E.S. Mohamed Aboobacker

APPELLANT

Vs

The Tamil Nadu Wakf Board, Madras and Another

RESPONDENT

Date of Decision : 12-04-1977

Acts Referred:

Constitution of India, 1950 — Article 226(3)
Waqf Act, 1954 — Section 15(1), 15(2), 43(1)

Citation : AIR 1978 Mad 33 : (1977) 90 LW 572

Hon'ble Judges : Ramaprasada Rao, O.C.J.;Suryamurthy, J

Bench : Division Bench

Advocate : V. Shanmugham and Riaz Ali Khan, for the Appellant; M.A. Sathar Sayeed and S.M. Amjad Nainar, for the Respondent

Final Decision : Dismissed

Judgement

Ramaprasada Rao, Offg. C.J.

1. The appellant, not satisfied with the order of Mohan J. passed in W. P. 2808 of 1976. whereby he made certain interim directions and ultimately dismissed his writ petition, is the appellant before us. The admitted facts are that "Haji Pitchai Mohideen Rowther Wakf" was created by late Mohideen Rowther and it is common ground that the petitioner-appellant is the muthavalli of that wakf and is functioning in accordance with the terms of the deed of wakf. The petitioner claims that he was discharging his duties properly. One of the ordainments in the said wakf deed as per the intentions of the wakif was that an Arabic School Madarsa at Kayatar in Tirunelveli Dt., to propagate the Arabic language was to be maintained and education given to the students seeking for such benefits. Originally, to wit, during the year 1973, the Wakf Board which was in charge of the school, sought for a sum of Rs. 750 per month for the maintenance and upkeep of that Madarasa. In August 1974, they demanded a sum of Rs. 2,500 from the appellant who was admittedly in possession of both the moveables and immovables belonging to the wakf. No doubt there was no previous notice to the

Muthavalli about the proposed increase in the demand as above. The Muthavalli, therefore sought for reconsideration of the demand on the ground that it was excessive. Thereafter, it is said that as many as 18 charges were framed as against the appellant in connection with the alleged mal-administration of the wakf properties. It also transpires that on 26-4-1975, the Wakf Board reduced the demand to a sum of Rs. 1.500 equally without any enquiry or without any intimation to the petitioner. The petitioner-appellant would also allege that on 25-5-1975, there was a resolution where under the charges framed against him in 1974 were dropped. Finding that the Wakf Board was persisting in demanding from him a sum higher than a sum of Rs. 750 towards the maintenance of the Madarasa, the appellant filed O. S. 229 of 1976 on the file of the court of the District Munsif, Tiruchirapalli, and obtained an interim injunction restraining the Wakf Board from collecting any further amount towards the aforesaid avowed purpose over and above Rs. 750. Between the appellant and the Wakf Board several occasions arose when there were acute differences between them and it is unnecessary for us to consider them finally on 14-5-1976, the Wakf Board issued a notice setting out the charges which were by then and according to the Board pending as against the Muthavalli and also stating that the explanation given by him earlier was not satisfactory and bringing to the notice of the appellant that he has misappropriated wakf funds and failed to carry out the directions of the Wakf Board and called upon the appellant to show cause why the wakf should not be taken over under the direct management under the Tamil Nadu Wakf Board as contemplated u/s 43(1)(c) of the Wakf Act and as to why an Executive Officer should not be appointed for the better management of the wakf. The appellant has again submitted his explanation. But by a final order which is challenged in these writ proceedings dated 13-7-1976, the respondent Board in exercise of the powers conferred on them u/s 15(1) read with Sub-section (2) (c) and (o) of the Wakf Act, 1954. directed that the administration of the wakf would be taken over by the Wakf Board for a period of two years and an executive officer posted instead of the Muravalli. The appellant came to court challenging this order on two grounds; firstly his case was that no notice u/s 43(1)(c) of the Act was given and that the order, as it purports to have been made u/s 15(2) (c) and (o) of the Act is prima facie unenforceable, as no such order could be passed strictly under the above provisions expressly named in the order. In consequence of his first objection, the appellant also challenged the appointment of a Special Officer which according to him could only be done under certain other provisions of the Wakf Act. Mohan J. who heard the petition apparently was led by the emotional representations made on either side, whereas the appellant's case was that it was only an interim order which was made by the Board, the contention of the counsel for the Board was that it was a final order. On the assumption that it was an interim order, counsel for the appellant was emphatic that there was no such power in the Board to pass such interim orders of removal and, therefore, there is an error apparent in the record as well as in the order. Finding that the situation required an impartial approach and equitable treatment, the learned Judge gave certain interim directions to wit,

the appellant was asked to deposit a sum of Rs. 4,000 on or before 30-10-1976, and after such deposit, the Wakf Board should frame specific charges for the removal of the appellant after due enquiry and in accordance with the provisions of the Act. With these observations, the writ petition was dismissed.

2. Mr. Shanmugham, learned counsel for the appellant, in the opening of the case made out that the order which is challenged in these proceedings is not one which could be passed by the Board in exercise of any known powers under the Wakf Act and as such an order is not well within the periphery of the powers of the Board it is unsustainable. In consequence he challenged the appointment of the Executive Officer, who would naturally and virtually remove him from office. The contention of Mr. Sathar Sayeed learned counsel for the Board is that the order is a final one and in the purported exercise of power statutorily vested in the Board under the provisions of the Act. It, therefore, became necessary for us to examine in some detail as to whether the order passed and challenged before us is one which could have been passed at all and if so, was it passed in exercise of the statutory power vested in the Board,

3. Section 15 of the Wakf Act 1954, speaks of the functions of the Board. Whilst enumerating the various situations under which the Wakf Board could act, and expressly stating that the general superintendence of all wakfs in a State shall vest in the Board and the duty of the Board is to exercise its powers under the Act so 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, the enactment provided specifically express powers and vested such powers in the Board. To this purpose, Sub-clause (2) (g) of Section 15 of the Muslim Wakf Act provides that without prejudice to the generality of the foregoing powers, the functions of the Board shall be to give directions for the administration of Wakfs to appoint and remove muthavallis in accordance with the provisions of the Act (and lastly, generally for the due control and maintenance and administration of the Wakf). We are not concerned with the sub-clause regarding the other expressive powers provided for in Sub-clause (2) of Section 15. Section 43 is complementary to Section 15 and it reads thus--

"43. Removal of Muthavallis -- (1) Notwithstanding anything contained in any other Law or the deed of wakf, the Board may remove a mutavalli from his office if such mutavalli -- (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; (c) misappropriations 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 mutavalli; 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 to act as a mutavalli 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 mutavalli of the wakf property.....

(4-A) A mutavalli who is aggrieved by an order passed under any of the Clause (c) to (e) of Sub-section (1) or under Sub-section (2) may, within one month from the date of the receipt by him of the order, appeal against the order to the State Government and the decision of the State Government on such appeal shall be final and shall not be questioned in any Court of law."

We are not extracting the entire Section 43, as it is not necessary. Suffice it however to say that Section 43(1) Sub-clauses (a), (b), (c), (d) and (e) enumerate the situations and conditions under which the Wakf Board could exercise its powers to remove the mutavalli. In ordinary legal parlance therefore Section 43(1) could be understood as the processual section whereas Section 15(1) and (2) deals with the substantive provision regarding the appointment and removal of mutavallis. If, therefore, Section 43(1) (a) to (e) are to be understood as dealing with the various situations whereunder the Board could remove a mutavalli after due enquiry, then it follows that if a person is aggrieved by an order passed under one or the other of the Sub-clauses in Sub-section (1) or under Sub-section (2) of Section 15 (with which we are not concerned in the instant case) he may within one month from the date of receipt by him of the order, appeal against the same to the State Government. In the above background the contention of Mr. Shanmugham has to be considered.

4. No doubt, it is common ground that the order which is challenged in these proceedings recites only Section 15(1) read with Sub-section (2) (c) and (o) of the Muslims Wakfs Act. Though in view of the show cause notice which was the foundation for the later action resulting in the challenged order referable to Section 43(a)(1) of the Wakf Act, the order in question, no doubt, does not make any specific reference to any other Sub-section of Section 15 of the Wakf Act. Taking advantage of such an omission, it is contended by Mr. Shanmugham, that this order is unenforceable, as it does not come within the frame work of power envisaged in Section 43 of the Act. We have already stated in our preface that it is Section 15 which vests the statutory power in the Board to appoint or remove mutavallis and Section 43 provides the process and the methodology by which such removal could be effected. No doubt, it cannot be challenged that unless the Wakf Board is able to bring the alleged misconduct of the mutavalli within the framework of various Sub-clauses in Section 43(1), it would not be in order to remove him at all. But that is beside the point. What is urged is that the absence of a reference to Section 15(2)(g) and Section 43(1) of the Act makes the challenged order inoperative and ineffective. We are unable to agree. It is by now well established that a misquotation of the section or the omission to quote a provision of law in a notice or an order would not make the notice or the order

unenforceable and much less illegal. It is not the form but the substance that should prevail in such situations. Viewing the question in this perspective, we have no hesitation in stating that the substance of the order which is challenged before us is that the appellant is sought to be removed by the Wakf Board by reason of the challenged order and that the Executive Officer is being posted instead. The mere non-quotation or non-reference to Section 15(2)(g) or Section 43(1) of the Act would not make the order itself inoperative in the eye of law. We, therefore, understand the order as one passed within the frame work of the authority. The question is whether in these circumstances and in the light of our conclusion, the order of Mohan, J. is sustainable. As we have understood, the order, as a final order and not as an interim order as suggested before the learned Judge and before us, we are of the view that this is a case in which interim directions alone would not suffice and it would not be a proper exercise of power by the Board within the meaning of either Section 15(2) or Section 15(1) of the Act. The Wakf Board is no doubt expected to maintain, control and administer the wakf property and for this purpose it takes such action as is necessary. In a case where they have framed certain charges which are still under enquiry (this fact is disputed by the appellant), power is vested in the Board u/s 15(2)(g) of the Act to appoint and remove mutavallis, but in accordance with the provisions of the Act. Finding this situation. Mr. Shanmugham proceeds to say that the procedure prescribed u/s 43(1) has not been followed and he has not been fully heard and the principles of natural justice have been violated. It may be true. But the order having been passed by the Board in exercise of statutory power cannot lightly be set aside without a further probe into it on merits. The appellant as such had an opportunity to challenge the same on facts by approaching the State Government u/s 43(4-A) already excerpted. The appellant has not availed himself of that alternative remedy. The only order, therefore, that we could pass in this writ appeal after the passing of the 42nd amendment of the Constitution is as follows.

5. Mr. Shanmugham is aware that after the 42nd amendment no writ petition for the redress of any injury referred in Article 226 of the Constitution as amended shall be entertained if any other remedy for such redress is provided for by or under any other law for the time being in force. In the very Act, under which the challenged order was passed, there is a remedy which is available to the appellant. Undoubtedly, therefore, this is an alternative remedy which he could avail himself. He did not do so. The Constitution makes it clear that if such an alternative remedy is not availed of no writ petition under Article 226 shall be entertained. On this ground, therefore, we are not inclined to give relief to the appellant.

6. The writ appeal is dismissed. The appellant however is given a month's time from today to prefer the appeal to the State Government and it is expected that the authorities prescribed under the Act to hear such appeals would not take the technical objection that the petition is beyond time as provided for in Section 43(4-A) of the Act. We expect the Government Pleader who is fortunately here

would give the necessary assistance.

There will be no order as to costs.