
(2014) 08 AHC CK 0036
In the Allahabad High Court
Case No : Writ C. No. 40148 of 2014

Hazi Aqeel Ahmad

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 05-08-2014

Acts Referred:

Waqf Act, 1995 — Section 110, 27, 32, 32(2)(g), 32(g)

Citation : (2015) 1 ALJ 243

Hon'ble Judges : Vivek Kumar Birla, J; Amreshwar Pratap Sahi, J

Bench : Division Bench

Advocate : Punit Kumar Gupta, Advocates for the Appellant; Bakhteyar Yusuf and Virendra Kumar, Advocates for the Respondent

Judgement

1. Heard Sri. Manish Goyal along with Sri. Punit Kumar Gupta for the petitioner, Sri. S.M.A. Kazmi, learned Senior Counsel and former Advocate General along with Sri. Y.K. Srivastava for the State of U.P., Sri. Mahboob Ahmad along with Sri. Bakhteyar Yusuf for the respondent Nos. 2, 3 and 4 and Sri. N.A. Khan, Advocate for the respondent No. 5. Learned counsel for the respondents do not propose to file any counter affidavits and urge that the matter be decided on the basis of the records itself.

2. The writ petition is being finally disposed of with the consent of the parties in view of the conclusions drawn hereinafter.

3. The petitioner has come up questioning the order passed by the Waqf Board under Sub-section (2) of Section 67 of the Waqf Act, 1995 (hereinafter referred to as the "Act"), whereby the petitioner Hazi Aqeel Ahmad, who is the Mutawalli of the Waqf has been removed, and the committee has been superseded and replaced with the installation of the respondent No. 5. The contention is that the order of the Board is not in conformity with Sub-section 2 of Section 67 of the Act, and therefore, the same deserves to be set aside.

4. A preliminary objection was raised by the respondents with regard to the

maintainability of the writ petition on the ground that such an order is clearly appealable under Sub-section (4) of Section 67 read with Section 83(2) of the Act, and therefore, the petition does not deserve to be entertained.

5. On this preliminary objection, the contention of Sri. Goyal is that the Act has been amended drastically by U.P. Act 27 of 2013. Accordingly the previous constitution of the Board has been altered as a result whereof with effect from the date of enforcement of the Act an appeal will lie to a tribunal constituted of three members, and not by one member as defined earlier. The averment categorically made in the petition is that no such tribunal of three members has been constituted, and as such, the plea of remedy of appeal as raised by the respondents cannot be availed of by the petitioner.

6. This factual position of the Tribunal not being constituted with three members could not be successfully disputed by the respondents, but they say that the same is in the process of constitution and is likely to be executed very soon.

7. In our considered opinion, if that is the factual position, then in view of the aforesaid fact that the tribunal, as contemplated under the new Act, has not been constituted, it would not be proper to dismiss the writ petition on the ground of alternative remedy.

8. The claim on merits as per the argument of Sri. Manish Goyal is to the effect, with the aid of the averments contained in paragraph 18 of the writ petition, that the Board has passed a resolution, which is only a conclusion without any reasons, and more particularly it has simply adopted the opinion of the Chairman who recorded the findings during hearing, as part of the order of the Board without giving opportunity to the petitioner to contest the same before the Board itself.

9. The argument, therefore, is that as per the provision of Sub-section (2) of Section 67 of the Act, it is the Board that ought to have given opportunity while proceeding to decide the issue and should not have proceeded to incorporate the solitary opinion of the Chairman of the Board.

10. In Reply to the said submission, Sri. Mahboob Ahmad has invited the attention of the Court to Section 27 of the 1995 Act to contend that the Board has powers to delegate its function to the authorities referred to therein, as in such matters, hearing is not physically possible by the entire Board simultaneously. The hearing has got to be conducted through either the Chairman or an individual member in each individual case. He, therefore, contends that this is a delegation not of the power of decision by the Board, but only for the purpose of recommending an opinion and allowing the aggrieved person an opportunity of hearing. He, therefore, submits that after issuance of a show cause notice as provided under Sub-section (2) of Section 67, an opportunity of hearing has been given to the petitioner by the Chairman who has tendered his opinion, and which has now formed the basis of the decision of the Board that has applied its mind to the said opinion of the Chairman. The

submission, therefore, of the respondents is that this procedure is protected under Section 27 read with Sub-section (2) of Section 67 of the Act and there is no infirmity in the process adopted for a fair hearing to the petitioner. They contend that in the absence of any violation of principles of natural justice or even otherwise prejudice having been caused to the petitioner the impugned order does not suffer from any such infirmity.

11. Sri. Kazmi additionally has urged that the petitioner is not remedy-less, inasmuch as, he has the remedy of approaching the tribunal in terms of Section 83(2) of the 1995 Act and in the circumstances it will not be appropriate to allow a second round of hearing in favour of an aggrieved person by the Board itself, when this requirement has already been satisfied without any objection by the petitioner before the Chairman himself. The contention, therefore, is that this requirement is sufficient to satisfy the principles of natural justice and in the absence of any violation of the provisions of the 1995 Act, the contention raised on behalf of the petitioner cannot be accepted.

12. On the merits of the claim, learned counsel for the parties have raised their various submissions relating to the show cause and the reply to it submitted by the petitioner.

13. Having considered the aforesaid submissions, the only area that requires to be answered is the issue of giving an opportunity of hearing to the aggrieved person by the Board itself at the time of taking of the decision. From the facts aforesaid, we find that the Board had issued a show cause notice but hearing had not been conducted by itself which fact remains undisputed.

14. The Chairman formed an opinion on the basis of a hearing and the reply submitted by the petitioner and thereafter tendered his recommendation before the Board for acceptance vide communication dated 24.02.2014, a copy whereof has been annexed as Annexure 9 to the writ petition. It is this report which has been adopted by the Board in its resolution as part of the order.

15. In our considered opinion when the Chairman tendered recommendations on 24.02.2014 he has proceeded to observe that this was done after hearing the parties and the decision is being reserved. This clearly indicates that before giving any decision, the Board itself did not hear the matter or give any opportunity to the petitioner to contest whatever was opinionated by the Chairman. In our opinion, such opportunity deserves to be afforded to the petitioner by the Board before proceeding to pass the final resolution. The report as submitted by the Chairman is a material subject to scrutiny both by the petitioner and the Board after giving opportunity of hearing which has not been done. Consequently, we find that the Board has recorded its finding without such opportunity to the petitioner, and therefore, the impugned order of the Board dated 12.06.2014 and consequential Office Memorandum dated 8th July, 2014 are liable to be quashed.

16. The reason for the aforesaid conclusion is that as in the present case, in

matters of removal of a Mutwalli, the provisions of Section 32(g) are attracted which is subject excluded for the purpose of delegation under Section 27 of the Act that clearly mandates that the power of the Board cannot be delegated in respect of such a decision to be taken by the Board. Section 27 and Section 32(2) (g) are extracted hereinunder:--

"27. Delegation of powers by Board.-The Board may, by a general or special order in writing, delegate to the Chairperson, any other member, the Chief Executive Officer 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, except the powers and functions of the Board mentioned under clauses (e), (d), (g) and (j) of sub-section (2) of section 32 and Section 110.

32. Powers and functions of the Board.

(1).....

(2) Without prejudice to the generality of the foregoing power, the functions of the Board shall be--

(g) to appoint and remove mutawallis in accordance with the provisions of this Act;"

17. In view of this clear legislative mandate the Board cannot delegate its powers of taking a decision in relation to the removal of a Mutwalli.

18. If that is the mandate of law then hearing by a single Member or the Chairman and a decision by the Board has to be preceded by an opportunity of hearing. The reason is that the opinion of a single Member or the Chairman is only to facilitate and collect information to form the gist of the consideration by the Board. The actual mind has to be applied by the Board and for that the aggrieved person has to know about the said opinion of the Chairman or individual Member who has carried out the process of hearing.

19. The power therefore to delegate the hearing process does not mean to abdicate it at the stage of decision and the Board does not get denuded of its power to form an opinion after hearing the aggrieved person on the recommendation of such a single Member or the Chairman giving a recommendation. In our opinion one who has to decide has also to hear, as the delegator does not have the power to delegate the right to decide, and the delegatee namely the Chairman or the individual Member cannot assume the powers which is not conferred on them by the statute.

20. The respondents contend that there is no delegation of the right of decision by the Board. Their argument may be correct but they also concede that the power to decide is with the Board. In the instant case, what appears to have been done is that the Chairman while individually hearing the matter has reserved orders and has formed an opinion for removal of the Mutwalli.

21. To our mind, such an opinion does not become a decision ipso facto. In such a situation, while adopting such an opinion, whether the opinion is correct or incorrect is a matter which should be allowed to be debated and commented upon by the aggrieved person before actual decision is pronounced by the Board. This hearing can be permitted either oral or by inviting an objection before the decision is taken by the Board. As such an opinion, not being the decision in itself, still remains only a material available for the decision making body.

22. The other argument of Sri. Kazmi that such issues can be raised in appeal is no doubt true, inasmuch as, the Appellate Authority also has co-extensive powers. But in the instant case as noted above the Tribunal has not been constituted, and that forum is not available to the petitioner at present.

23. Apart from this, it is also a matter of correct procedure being adopted and not a matter of convenience.

24. In the circumstances, the argument of Sri. Kazmi on the facts of the present case on this issue cannot be accepted. The writ petition is allowed. The impugned order of the Board dated 12.06.2014 and the consequential Office Memorandum dated 8th July, 2014 are hereby quashed with a direction to the Board to give one opportunity of hearing to the petitioner and then pass appropriate orders in accordance with law within a month from the date of production of a certified copy of this order. It shall be open to the petitioner to file his objections to the report of the Chairman.