
(1983) 10 KL CK 0018
In the High Court Of Kerala
Case No : O.P. No. 7690 of 1983-A

Kerala Wakf Board and Another	Vs	APPELLANT
State of Kerala and Another		RESPONDENT

Date of Decision : 10-10-1983

Acts Referred:

Waqf Act, 1954 — Section 18, 63, 64, 64(1)

Citation : AIR 1984 Ker 57

Hon'ble Judges : T. Kochu Thommen, J

Bench : Single Bench

Advocate : Chandrasekharan and Chandrasekhara Menon, for the Appellant;
A.G. for Addl. and T.L. Viswanatha Ayyar, for the Respondent

Final Decision : Allowed

Judgement

T. Kochu Thommen, J.—The 1st petitioner is the Kerala Wakf Board (the "Board") and the 2nd petitioner is its Chairman, They challenging Ext. P21 order dated 29-8-1983 whereby the Board was superseded by the Govt. in purported exercise of its power u/s 64(1) of the Wakf Act, 1954 (the "Act") with effect from the date of publication of the notification in the Official Gazette. operative part of Ext. P21 reads :

"For the foregoing reasons the State Government is of opinion that the Board has persistently violated the duties imposed upon it and persistently abused its powers to the detriment of the Wakf Board. Therefore it is deemed necessary in the public interest and to protect the interest of the Board (Trust) to supersede the present members of the Board. Hence the Government in exercise of the powers conferred on them u/s 64(1) of the Wakf Act, 1954 do hereby supersede the Board with effect from the date of publication of this Notification in the Official Gazette and the Government further notify that during the period of supersession the administration of the Board would stand vested with the Government until the new Board is reconstituted by the Government in terms of the provisions of the aforesaid Act."

The notification has not been so far, published in the Gazette on account of the judgment of this Court- in O. P. No. 6581 of 1982 (Ext. P7) and the undertaking given by the Advocate-General in the present proceeding on 13-9-1983.

2. I shall briefly refer to the facts which have given rise to the impugned order. On 30-1-1982 V. M. Shamsuddin (additional respondent) filed a petition before the Government raising certain allegations against the Board. Those are the 15 allegations enumerated in Ext. P21. It is unnecessary to extract them here, for only 5 of them were ultimately dealt with by the Government pursuant to which the impugned order was made. Due opportunity was given to the Board by Exts. P3, P4 and P4(a) to submit its explanation and defence to the allegations made by Shamsuddin. The Board submitted detailed explanations by Exts. P5 and P6. In regard to 5 out of the 15 allegations, the Government came to the conclusion that there was substance in them. The Government is thus stated to have formed an opinion that "the Board has persistently violated the duties imposed upon it and persistently abused its powers to the detriment of the Wakf Board". It was on the basis of that opinion that the order of supersession is stated to have been made. The specific period of supersession has not been mentioned in the order except to say that it is to last until the new Board is reconstituted by the Government.

3. The present Board was constituted in 27-11-1980 and its members took office on 19-12-1980. It is stated that the 2nd petitioner is a member of the All India Muslim League, a party that opposes the Indian Union Muslim League which is a constituent of the State Government. It is alleged that Shamsuddin who is a supporter of the latter party filed his petition at its instance to discredit the 2nd petitioner and other members of the Board many of whom belong to one or other of the opposition parties. The petitioners allege that the impugned order was a mala fide exercise of power by the Government to dislodge the present members of the Board. However, in the course of arguments, counsel for the petitioners Shri Chandrasekharan fairly submitted that the petitioners had no case that the Revenue Secretary, who made Ext. P21 on behalf of the Government, entertained any personal ill-will, animosity or malice towards them. I would like to say that on a perusal of the relevant records, which have been placed before me by the Advocate-General, I am fully satisfied that the concerned officer who made Ext. P21 acted in utmost good faith and without the slightest personal ill-will or malice towards the petitioners. The question, however, is whether the impugned order is valid. An order is invalid if it is ultra vires either because of excess or abuse of power.

4. Before I deal with the allegations and the findings thereon, I shall briefly examine the general scheme of the Act with special emphasis on the power of the Government to supersede the Board. The Objects and Reasons of the Act are: "The management of Wakfs though it vests immediately in a mutawalli is a subject which requires the supervision of the State.," (Gazette of India 1952 Part II Section 2, page 285 -- AIR 21 549. The preamble of the Act calls it:

"An Act to provide for the better administration and supervision of Wakfs." The Board of Wakfs is established by the State Government as a body corporate having perpetual succession and a common seal with power to acquire, hold and transfer property (Section 9). The members of the Board are appointed by the State Government (Section 11). Section 15 which enumerates the functions of the Board says that the general superintendence of all Wakfs in a State shall vest in the Board. The Board has the duty to ensure that the Wakfs under its superintendence are properly maintained, controlled and administered and its income is duly applied to the objects and purposes for which the Wakfs were created or intended. In exercising its powers in respect of Wakf, the Board is expected to act in conformity with the directions of the Wakf, the purposes of the Wakf and the usage or custom of the Wakf sanctioned by the Muslim law. Section 15(2) which specifically enumerates the functions of the Board empowers it to issue necessary directions for the administration of the Wakfs and the utilisation of their surplus income, to settle schemes of management for a Wakf, to appoint and remove mutawallis, to administer the Wakf fund, and other acts which are necessary for the due control, maintenance and administration of the Wakfs. The Secretary of the Board who shall be a Muslim and who shall be its Chief Executive Officer under its control shall be appointed by the State Government in consultation with the Board (Section 21). The Board may appoint such other officers and servants as it may consider necessary (Section 21(3)). Section 22 permits the Board to delegate to its officers and servants such of its powers as it may deem necessary. Every Wakf created before or after the commencement of the Act shall be registered at the office of the Board. The Board shall maintain a register of Wakfs containing the relevant particulars enumerated u/s 26. The Board is competent to collect information regarding any property which it has reason to believe to be Wakf property. If any question arises whether a particular property is a Wakf property or not, the Board may make such enquiry as it deems necessary and decide the question (Section 27). The Board may direct a muta-walli to apply for the registration of a Wakf or to supply any information regarding a Wakf. It may cause the Wakf to be registered or may at any time amend the register of Wakfs (Section 28). The duties of a mutawalli are stated u/s 36 and they include his obligation to carry out the directions of the Board. Section 36A says that notwithstanding anything contained in the Wakf deed, as transfer of any immovable property of a Wakf by way of sale, gift, mortgage or exchange or lease shall be valid without the previous sanction of the Board, Section 36B empowers the Board to send a requisition to the Collector to take action for recovery of Wakf property transferred in contravention of Section 36A. Sections 42 - 45 confer wide discretionary power on the Board in the matter of appointment and removal of mutawallis. and assumption of direct management of certain Wakfs. Sections 46 - 53 are concerned with the financial powers of the Board. Sections 55 - 61 deal with judicial proceedings. Section 55 says that a suit to obtain any of the reliefs mentioned in Section 92 of the Code of Civil Procedure, 1908 relating to any Wakf may, notwithstanding anything to the contrary contained in that Section, be instituted by the Board without obtaining

the consent referred to therein. Much discretionary power is thus committed to the Board in the discharge of its statutory responsibilities.

5. The Board is, however, guided and controlled by the Government in various ways. The State Government enjoys wide discretionary power to compel the obedience of the Board. The State Government may, by notification in the official Gazette, remove the Chairman of the Board or any member thereof if he becomes disqualified or refuses to act or is incapable of acting or acts in a manner which the State Government considers to be prejudicial to the interest of the Wakfs, or fails, without excuse sufficient in the opinion of the Board, to attend three consecutive meetings of the Board (Section 18). Sections 62 and 63 respectively empower the Central and State Governments to issue certain directions to the Board. Section 62 enables the Central Government to issue directions for the guidance of the Board on questions of policy. Section 63 says:

"Subject to any directions on questions of policy issued u/s 62, the State Government may from time to time, give to the Board such general or special directions as the State Government thinks fit and in the performance of its functions, the Board shall comply with any such directions."

6. In addition to this power, the State Government is empowered to supersede the Board in certain circumstances. This power is contained in Section 64 in terms of which the impugned order is purported to have been made, It reads:

"64(1) If the State Government is of opinion that 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 State Government may, by notification in the Official Gazette, supersede the Board for such period as may be specified in the notification:

Provided that before issuing a notification under this sub-section, the State Government shall give a reasonable time to the Board to show cause why it should not be superseded and shall consider the explanations and objections, if any, of the Board.

(2) Upon the publication of a notification under Sub-section (1) superseding the Board.-

(a) all the members of the Board shall, as from the date of supersession, vacate their offices as such members;

(b) all the powers and duties which may, by or under the provisions of this Act be exercised or performed by or on behalf of the Board shall, during the period of supersession, be exercised and performed by such person or persons as the State Government may direct; and

(c) all property vested in the Board shall, during the period of supersession, vest in the State Government;

(3) On the expiration of the period of supersession specified in the notification

issued under Sub-section (1), the State Government may-

(a) extend the period of supersession for such further period as it may consider necessary; or

(b) reconstitute the Board in the manner provided in Section 10 and S. 11."

7. This Section which is subjective in form empowers the State Government to supersede the Board if it has formed the necessary opinion. Formation of the opinion is a condition precedent to the exercise of power u/s 64. Such opinion, although subjective, must nevertheless be reasonably founded upon grounds having a rational nexus with the objects sought to be achieved by the statute. See *The State of Bombay Vs. Atma Ram Sridhar Vaidya*,). As stated by Hidayatullah J. in *The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others*, "..... the formation of opinion is subjective but the existence of circumstances relevant to the inference as the sine qua non for action must be demonstrable." Otherwise it is open to the Court to infer that the Government either did not honestly form the opinion or that in forming it, it did not apply its mind to the relevant facts (*Rohtas Industries Vs. S.D. Agarwal and Others*, .)

8. The opinion must be based on the satisfaction that (a) the Board is unable to perform its statutory duty, or (b) it has persistently defaulted in the performance of its statutory duty or (c) it has exceeded its statutory powers, or (d" it has abused its statutory powers. This satisfaction giving rise to the opinion must be reasonably founded upon evidence. If no reasonable person would have, on the evidence, formed the opinion which the State Government did, such opinion must be disregarded as capricious, oppressive and unreasonable, and therefore, ultra vires.

9. The Section speaks of inability to perform or persistent default in the performance of duty. The Section seems to refer to them as failings of equal magnitude. This appears to be the significance of the two comas in the following part of the Section.

".....unable to perform, or has persistently made default in the performance of, the duty"

Inability to perform is a more or less permanent state either because of physical or mental infirmity or because of any other inhibiting circumstances. Persistent default in the performance of duty may not amount to inability to perform, which is a state of incapacity but it denotes a repeated failure to perform which is the result of conscious and deliberate omission to act. Neither is of a single act or moment, but of a series of acts or a duration of time. To be persistent is to continue steadfast against opposition; to continue steadily and firmly in some state, course of action, or pursuit especially in spite of opposition, remonstrance, etc. (*Corpus Juris Secundum* Vol. 70, page 686). Default means not doing what is reasonable under circumstances; not doing something which one ought to do,

having regard to the relations which one occupies towards the other persons in the transaction, (Corpus Juris Secundum Vol. 26, page 664). This shows that failure to perform the duties statutorily imposed on the Board must be constant and continuous, notwithstanding the opposition, warning, remonstrance, etc.

10. One or two isolated cases of failure to act will not amount to persistent default within the meaning of Section 64. Persistent failure to carry out the directions issued by the Central or State Government u/s 62 or Section 63 will attract the Section. Even a single act of disobedience of the direction may, added to certain continuing circumstances, depending upon the gravity of the matter, indicate persistence on the part of the defaulter.

11. The Section further speaks of excess of abuse of power either of which makes the act ultra vires and constitutes a ground for supersession. Power is exceeded where the repository of power nets outside the four corners of the statute or where he has abused it. To abuse power is to exceed power, but the converse is not necessarily true. "In a word, the only question is, Has the power been exceeded? Abuse is only one form of excess." (per Lord Macnaghten. *East Fremantle Corporation v. Annois* (1902) AC 213. "..... while the abuse of a discretionary power can almost always be regarded as ultra vires, an action which is ultra vires is not always the abuse of a discretionary power" (per Forbes, J., *Pickwell v. Camden London Borough Council* (1983) 1 All ER 602. An act is ultra vires either because the Board has acted in excess of its power in the narrow sense, or because it has abused its power by acting in bad faith or for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness. Power is exercised in bad faith where its repository is motivated by personal animosity towards those who are directly affected by its exercise. Power is no less abused even when it is exercised in good faith, but for an unauthorised purpose or on irrelevant grounds, etc. As stated by Lord Macnaghten in *Westminster Corporation v. London and North Western Railway* (1905) AC 426

"..... It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first."

Lord Lindley in the same case observes (Pages 439-440) :

"Where a person is authorised by statute or by the common law to do what, apart from such authority, would be unlawful, e.g., to commit a trespass, and the authority is conferred for some distinct and definite purpose, and is abused by being used for some other and different purpose, the person abusing it is treated as a wrong-doer from the first, and not only as a wrong-doer in respect of what can be proved to have been an excess of his authority. It is presumed against him that the abuse of his authority shows an intention from the first to commit

an unlawful act under colour of a lawful authority....."

12. The word "persistently" in Section 64 precedes immediately the words "made default in the performance of the duty imposed on it by or under this Act." In my view that word must also generally guide the construction of the words "or has exceeded, or abused its powers", as otherwise it would mean that one single act of excess or abuse of power, however insignificant or technical, can subject the Board to the drastic punishment of supersession. Such intention cannot be reasonably attributed to the legislature. Section 18 empowers the Government to remove the Chairman or any member of the Board in certain circumstances and Section 63 to give certain directions. The legislature would not have intended that, notwithstanding these powers, the Government should ordinarily resort to the drastic remedy of superseding the Board for a single act of excess or abuse of power. To impute reasonable intention to the legislature, as one must necessarily do in construing legislation, one has to understand the expression "persistently" in Section 64 to apply not only to default in the performance of duty, which is an act of omission, but also, except in certain extreme and exceptional cases, to acts of commission such as excess or abuse of power. A single act of commission in excess or abuse of power, which in consequence and gravity can be equated to inability to perform, or persistent default in the performance of duty, by reason of its continuing impact, may, visit upon the Board the extreme penalty, of supersession. But this must be an extreme case of flagrant violation of the legal obligation of the Board.

13. The Section provides for an effective opportunity being given to the Board before a notification is issued under it. The notification must specify the period of supersession. Upon the expiry of that period the State Government may either extend it for a further period or it may reconstitute the Board as provided under Sections 10 and 11. It cannot leave the period of supersession indefinite by not specifying the duration. An order saying "until such further time as the Board is reconstituted" will not satisfy the Section, for it would obviate the need for a proper application of the mind of the Government as to the specific period of supersession.

14. Section 67 gives the State Government the power to make rules. Section 68 says that the Board may, with the previous sanction of the State Government, make Regulations not inconsistent with the Act or the Rules. The rule-making power of the Government includes the power to prescribe the terms and conditions of service of the Secretary of the Board who is the Chief Executive Officer (Section 67(2)(d)). Section 68(2) enumerates the matters in respect of which Regulations can be made. They include subjects like procedure and conduct of business at the meetings of the Board and terms and conditions of service of the officers and servants of the Board.

15. This is the general scheme of the Act. This shows that as a body corporate with power to acquire, hold and transfer property; to carry out the various functions enumerated u/s 15 and other provisions; to appoint such officers and

servants as it may consider necessary; to delegate such of its powers and duties as it may deem necessary; to take effective measures to recover properties transferred in contravention of the Act; and, to take such other measures as may be necessary to carry out the objects and purposes of the Act, the Board enjoys, subject to such restrictions as are imposed under the statute, a wide discretion in the performance of its statutory duties and responsibilities. As a creature of the statute, the Board has all those powers which are expressly given to it under the statute or which are necessarily and properly required for carrying into effect the purposes of its incorporation, or which may be fairly regarded as incidental to, or consequential upon, those things which the legislature has authorised it to do. (See the principle stated in Halsbury's Laws of England, 4th Edn., Vol. 9, para 1333). As seen in the Statement of Objects and Reasons, the Board is established as an instrumentality of the State for supervision of the management of the Wakf. The life of a Board is intended to run its normal course, and every member thereof, his normal term, except where power is lawfully exercised by the Government u/s 18 or Section 64, This is the legislative intent which must be borne in mind in exercising power under the statute. It is against this background that one has to look at the allegations found against the Board.

15. The 5 allegations and the findings thereon :

(a) Reinstatement of p. Junas, Peon and P. A. Hussain, Clerk; Hussain and Junas had been dismissed by the previous Board. Hussain and Junas requested the present Board to reconsider their case as they contended that their dismissal was unjustified. Their request was enquired into by Izzuddin on behalf of the Board. He submitted a report recommending reinstatement of both Hussain and Junas. The report was considered by the Board and it decided that those two persons should be reinstated on condition that they would withdraw their Writ Petitions challenging the orders of dismissal (O. P. No. 8060/80 and O. P. No. 3025/80). On the withdrawal of those two petitions, they were reinstated. The Government in the impugned order came to the conclusion that the Board ought not to have reconsidered the dismissal of Hussain and Junas as the Board was not competent to entertain appeals against the decisions of the previous Board and in any case the appeals were entertained beyond the three months provided for appeals under Regulation 27 of the Regulations made u/s 68(2)(e) of the Act. It is significant that, apart from this finding of excess of power, there is no finding that the decision of the Board was made for any extraneous reason or unauthorised purpose. Although at the end of the discussion concerning this matter the Government says "Therefore it is to be construed that there was an abuse of power while reinstating Shri Hussain and Junas", that conclusion is based on the finding that the Board exceeded its power in so far as it entertained appeals which it had no power to hear. This is a clear case of finding of excess of power in the narrow sense, i.e. the Board dealt with a matter which the statute did not authorise it to deal with; and not that it abused its power. Seen in this light, the question is whether the Government rightly held that the Board exceeded its power,

16. The power to appoint by necessary implication includes the power to dismiss. Section 21(3) empowers the Board, to appoint such officers and servants as it may consider necessary. It is by virtue of this power read with Section 68(2)(e) that Regulations were made in regard to the terms and conditions of service of the officers and servants of the Board. These Regulations include provisions for disciplinary action and the procedure for such action. Regulation 24 empowers the Chief Executive Officer to impose the punishment of censure and fine not exceeding Rs. 10/-. Regulation 25 provides for appeal to the Board through its Chairman against any order made by the Chief Executive Officer, such as a punishment imposed by him under Regulation 24 or action taken by him for discharge or reversion on the abolition of a post in terms of Regulations 15 to 17. The Regulations do not mention the authority competent to dismiss an employee. While Regulation 18 says that an appeal against an order of discharge or reversion will lie to the same authority that is competent to entertain an appeal against an order of dismissal, which is that authority is not slated. If the Board alone has the power to dismiss, there can be no appeal from the Board to the Board. Regulation 22 speaks of the procedure to make an order of dismissal, but it does not name the authority competent to impose that punishment. In the absence of any specific reference to the authority, it has to be presumed that, being the appointing authority, the Board alone is competent to impose the punishment of dismissal. In fact it was the previous Board that imposed the punishment of dismissal upon Hussain and Junas. What the present Board did was to review its own earlier decision p -- no matter what label was adopted to describe it -- and not to sit in appeal over its own decision. The power to impose a punishment implies the power to review that order. Just as the power of appointment necessarily implies the power to dismiss, it also implies that the authority competent to dismiss can review that finding. That is a power implied under the statute. The procedure for such review is not mentioned in the Regulations. The Regulations do not in fact deal with review. The power must, therefore, be exercised reasonably and fairly, which implies that the authority competent to review must, on a proper request made by the persons affected by the order of dismissal, reconsider the question fairly and, fully and reach such decision as it deems correct and proper and in the best interest of the administration of the Wakf. Whether or not it will entertain a request for review is a matter entirely in the discretion, and any application for review is bound to be rejected unless it is made within reasonable time and on good grounds. This is the general principle of review by the competent authority unless of course Rules or Regulations are specifically made guiding the power in a particular fashion. In the absence of any specific Regulations or Rules, it is open to the Board, being the ultimate authority under the Act in respect of the terms and conditions of service of its officers and servants, other than the Secretary who is the Chief Executive Officer, to exercise the power of review in a manner that is not inconsistent with the general interest of the administration of the Wakf. The Government has no case that the Board acted without due regard to this general Interest or that it sought to gain an ulterior purpose or to subserve an

extraneous end. That the Board had the necessary power to review and there was no restraint on that power under the Statute or Rules or Regulations, and that, as an appointing authority, it did what it thought was right in reconsidering an earlier decision was not understood or appreciated by the Government. The Government thus failed to take into account the relevant facts and circumstances and allowed itself to be misguided as to law. That was a total failure of application of the mind to the relevant question. The Government also failed to appreciate that the review petitions were allowed upon a proper consideration of the reports submitted by Izzuddin (Exts. P8 and P9). It has to be noticed in this connection that the reference in Ext. P21 to sub judice was totally misconceived, for there was no objection in law for the withdrawal of the Writ Petitions as a part of the settlement of the matter out of Court. The inference drawn by the Government as to abuse of power on the part of the Board was an error of law caused by asking itself the wrong questions,

(b) & (c) Creation of new posts and appointment of unqualified persons: A post for a Malayalam Confidential Assistant was created by the Board consequent upon its decision dated 13-3-198] to change over to Malayalam for the purpose of its business and general administration. Pursuant to that decision a Malayalam typist was appointed in August, 1981. There was only one applicant having the required qualification. However, he was at the time of his appointment under-aged being short of 99 days to complete the required minimum age of 25 years. But for that infirmity, the appointment was perfectly valid, for the candidate had all the requisite qualifications, and he was urgently needed because of the decision to change over to Malayalam. In view of the fact that Malayalam typists were not readily available in the State at that time and since the applicant was the only person with the required qualification, the Board bona fide believed that 99 days was not too long a period to overlook in regard to the minimum age. Regulation 2 (i) of the Regulations made u/s 68(2)(e) of the Act provided :

"No person who is below 25 and above 49 years and does not possess the required educational qualification shall be appointed, to any post included in the superior service under the Board;....." This provision was amended in 1972 and again in 1975 to relax the age requirement. The amendment of 1975 states:

"Provided further that when services of any other duly qualified persons with good administrative experience are required the Board may relax the age rule."

(emphasis supplied)

This amendment received the approval of the Government on 31-5-1975 (Sec GO (MS) No. 516/75/RD). This shows that the Board had the power to relax the age rule when it required any person with good administrative experience. The administrative experience referred to in the amended provision in respect of a Malayalam typist can only mean experience in typing" in that language. Since the Board bona fide, believed that appointment of a Malayalam typist was essential for the better administration of the Board in view of its earlier decision,

and since the applicant was the only person with the necessary qualification and experience, he was appointed. This was a due exercise of power within, its statutory competence. Ext. P21. shows that the Government did not take into account the amended Regulation giving, the Board the power to relax the age rule. There is no finding that the appointment of a Malayalam typist was not required for the better administration of the Board. Nor is there a finding that the person appointed was not qualified except in regard to the fact that he was under-aged by 99 days at the time of his appointment. There is also no finding that the person appointed was in any manner connected with the Chairman or the members of the Board or that the Board for an ulterior purpose or in bad faith. In fact there is no clear finding in Ext." P21 as regards the Malayalam , typist, except for a vague reference , to the appointment of an underaged person. The genuine need felt by the Board consequent upon its decision about the change of language, which was duly " communicated to the Government, and the power which the Board enjoyed as a result of the amendment of 1975 had not been considered. This" shows that the Government failed to apply its mind to the relevant facts and circumstances,

17. It is further stated that the Board appointed one Soopy for a period of 3 months on a monthly remuneration " of " Rs. 1,000/- as an investigator with effect from 1-5-1981 to enquire into cases if unregistered Wakfs. Soopy is a former M.L.A. He is conversant with matters relating to Wakfs. However, he was 51 years of age at the time of his appointment and it is alleged that he did not have the necessary qualifications. It is stated that he had not even passed the. S. S. L. C. The Board appointed him not as a regular officer or employee under the Rules, or Regulations, but for the specific purpose of investigating the, existence of unregistered Wakfs, and that too for a very limited period. His appointment was purely ad hoc. That he, was over-aged as per the Regulations was itself not a hindrance, for the Board had the power to relax the age rule. The fact that he did not have sufficient educational qualification was overlooked by the Board for the reason that he was a man of considerable experience as a former legislator and was, as a Muslim leader, particularly competent to conduct the investigation with which he was entrusted. Whether or not that was justified in the circumstances was a matter for the Board in the exercise of its discretion to decide. If the discretion was exercised without good faith or for an ulterior purpose, that would be a question which would become relevant for the purpose of Section 63 or Section 64. But there is no finding that the Board acted in bad faith. There is no finding that the Board appointed Soopy by reason of extraneous consideration or for an inadmissible purpose. The only finding is that the appointment was irregular in so far as the Regulations were overlooked and it was not in the interest of the Board. It is not stated why it was not in the interest of the Board. In the absence of any finding of mala fide on the part of the Board, and the Board having the necessary authority and discretion in conducting the investigation with which Soopy was entrusted., it cannot be reasonably stated that the appointment was not in the interest of the Board. The finding that it was

irregular is based on the fact that he did not have the requisite qualification under the Regulations. If the appointment is seen as purely ad hoc for a short period, could it be stated that this was an appointment under the Regulations? The contention of the Board was that this was not an appointment under the Regulations, but only a special contract appointment for a specific purpose. That contention was not considered by the Government. The Government also did not apply its mind to the question whether or not the Board had the power to relax the age rule in the light of the amendment of 1975.

18. It is also stated that the Malaya-lam typist and Soopy were appointed without calling for applications by prior advertisement or intimation to the Employment Exchange. At no time in the past was it the practice of the present Board or its predecessors to do so. Every time an appointment was made, It was communicated to the Government. At no time did the Government tell the present or the earlier Boards that they should have advertised the vacancy or intimated to the Employment Exchange. The case of the Board is that it did not have the machinery to handle the large number of applications which would be received in the event of advertisement or intimation to the Employment Exchange, This aspect of the matter was not considered by the Government. If for this reason alone a charge of nepotism were to be found against the present Board, that finding would be equally applicable to the earlier Boards. However, there is no such finding. The Government did not consider the question in the light of the explanation given by the Board, Even if the Board technically erred, that was a matter for correction by appropriate direction u/s 63. But the two instances of appointment cannot by themselves be regarded as of any significance to attract Section 64. In any case the appointment of Soopy was not a matter which required advertisement, for that was not a regular appointment in terms of the Regulations, but only a contract appointment for a specific purpose for a short period of three months. That appointment was once extended by another three months and then the Board decided not to grant any further extension. Soopy thus ceased to work for the Board.

19. In this connection it has to be noticed that the Regulations do not provide for advertisement or intimation to the Employment Exchange in respect of any post. There is no specific statutory fetter of any kind on the power of the Board in this respect and no direction or order of the Government making advertisement or intimation to the Employment Exchange a necessary condition for appointment to a post under the Board has been brought to my notice. As the unfettered appointing authority the Board chose its own procedure, and in the absence of any finding of nepotism or other malpractice, the Board cannot be found fault with for what it did in good faith and in the discharge of its statutory duty.

20. In the circumstances, the only irregularity that can be alleged against the Board is that Soopy did not have the, necessary educational qualification. Age did not stand in the way either for Soopy or for the Matayalam typist, because the Board had the power to relax it. As for Soopy, whether a pass in S. S. L. C.

was necessary, in view of the nature of his appointment, was not considered by the Government. In any case whether a single irregularity of that kind was grave enough to attract Section 64 was itself a question to which the Government did not apply its mind. That was a fundamental question which the Government ought to have considered before passing the order. The Government, however, proceeded on the wrong basis that the default or abuse was persistent. In all these matters the Government misdirected its mind by asking itself the wrong questions.

(d) Power delegated to the Legal Adviser : It is found that the Board "misused" its power by delegating its power u/s 36B to its Legal Adviser. There is no finding that the delegation was in bad faith or for an ulterior or unauthorised purpose. Apart from saying that the Board's action was a "misuse" of power, the reason for so saying it is nowhere stated. All that is stated is that power u/s 36B could be delegated only to persons mentioned u/s 22, namely, the Chairman or any other member or the Secretary or any other officer or servant of the Board, and not to a Legal Adviser, who is not an officer. There is no allegation or finding that the power u/s 36B is not capable of delegation.

21. The power was delegated on 20-8-1981 by means of a notification which reads:

"In order to expedite the enquiries regarding unauthorised alienations of Wakf properties, the Kerala Wakf Board exercising its powers u/s 22 of the Wakf Act 29 of 1954, hereby delegate to Advocate Shri P. S. Usuph, the Legal Adviser of the Board, the powers of the Kerala Wakf Board to Hold enquiries contemplated u/s 36-B of the Wakf Act, 29 of 1954. He shall submit his findings to the Board in the matter of unauthorised alienations of Wakf properties.

In conducting the proceedings as per this delegation, the Legal Adviser shall be assisted by the Investigation Wing of the Wakf Board in particular and all other officers of the Board in general.

The Secretary, Kerala Wakf Board is hereby directed to publish this order in the Gazette and a copy of the same affixed on the Notice Board of the Board's office as laid down in Rule 18 of the Kerala Wakf Rules, 1966."

This notification duly published in the Official Gazette dated 8th September, 1981 was or ought to have been known to the Government. Yet no question was asked by the Government. No direction was issued u/s 63. That question never assumed any importance or occurred to the Government until Shamsuddin made his complaint on 30-1-1982. The notification shows that the power delegated to the Legal Adviser was merely to conduct an enquiry with the assistance of the Board's staff and submit his findings to the Board in the matter of unauthorised alienation of Wakf properties. The decision to act on the basis of the satisfaction postulated u/s 36B continued to remain with the Board and it was not delegated. The Board did not abdicate its substantive power of decision-making when it delegated the power to conduct an enquiry. Section 36B postulates an enquiry

before a decision is taken. It reads:

"36B (1) If the Board is satisfied after making an inquiry in such manner as may be prescribed, that any immovable property of a wakf entered as such in the register of wakfs maintained u/s 26, has been transferred without the previous sanction of the Board in contravention of the provisions of Section 36A, it may send a requisition to the Collector within whose jurisdiction the property is situate to obtain and deliver possession of the property to it."

The enquiry is to be conducted in such manner as may be proscribed. Rule 23 of the Kerate Wakf Rules, 1966 made by the Government u/s 67 provides that the enquiry u/s 36B (I) has to follow the same procedure as that which is prescribed for enquiry u/s 45(1). That enquiry is prescribed by Rule 25. It is the power to hold the enquiry that was delegated to the Legal Adviser and not to take the decision contemplated u/s 36B; that is, the decision to send a requisition to the Collector. Such decision could be taken only by the Board upon a proper satisfaction. But It was open to the Board to form an opinion by satisfying itself as to the necessary facts ascertained by means of an enquiry contemplated under the Rule. In the circumstances, what was delegated u/s 36B was not the substantive power to decide, but the fact-finding function which relates to the procedure by which the Board ultimately decides.

22. The Board has ample power u/s 22 to delegate any of its powers and duties to any officer or servant. Section 22 reads:

"22, The Board may, by a general or special order in writing, delegate to the Chairman or any other member or to the Secretary or any other officer or servant of the Board or any committee thereof, subject to such conditions and limitations (if any) as may be specified in the order, such of its powers and duties under this Act as it may deem necessary."

It cannot be said that the Board did not bona fide believe that the Legal Adviser was an officer. The Board was in fact led to believe that he was an officer. This is clear from Ext. P17 dated 13-8-1970 which is a letter from the Secretary to the Government to the Secretary to the Board. This reads:

No. 33824/F3/74/RD Revenue (F) Department, Trivandrum, 13-8-1975.

From

The Secretary to Government

To

The Secretary, Kerala Wakf Board, Ernakulam, Cochin-11.

Sir,

Sub: Establishment-Kerala Wakf Board Appointment of Legal Adviser-ratification-regarding.

Ref: Your letter No. H.2433/74-5 dated 29-6-1974.

I am to invite your attention to the letter cited. u/s 21(3) of the Wakf Act, the Board is competent to appoint any officer other than the Secretary and servants as it may consider necessary for the efficient performance of its functions. The person holding the office of the Legal Adviser is also an Officer like holder of any other office. There is no reason why he should be treated otherwise. The Legal Adviser therefore comes under the said category of officers whom the Board can directly appoint. As such no Government sanction is required in this case.

Yours faithfully,

Sd/-

(A. S. Prabhakara Panicker)

Under Secretary

For Secretary to Government."

In the light of this letter, it is not open to the Government to say that the Board was not justified in thinking, that the Legal Adviser was an officer of the Board. The question is not whether the Legal Adviser is beyond doubt an officer of the Board that may be debatable point but whether the Board exceeded or abused its power in treating him as such. The Board acted honestly there is no case that it did not on the basis of the advice received from the Government about the status of the Legal Adviser. The Board was entitled to presume that the Government advised it honestly and correctly. It was open to the Government on further consideration, to vary or cancel Ext. P17, But it did not do so. It has therefore to be presumed that the Board acted in due and proper exercise of its power. In any event, in the light of the fact that the Government led the Board to believe that the Legal Adviser was an officer of the Board, the act of delegation of power to such a person even if wrong in law could not reasonably form a ground to supersede the Board. To have taken that ground into consideration was grossly unreasonable on the part of the Government. The Government thus acted on irrelevant consideration and -misdirected itself in law.

(e) Decision to purchase property at Calicut: The allegation of Shamsuddin was that the Board decided to purchase landed properties for a sum of Rs. 7 lakhs without the previous sanction of the Government. The amount has been grossly exaggerated by Shamsuddin. Ext. P18 is the decision of the Board embodied in its resolution dated 30-6-1981. It says that the Board resolved to purchase 8 cents and 59 sq. ft. of property in Sy. No. 63/1A-1B for a total consideration of Rs. 2,29,500/- and it further resolved, to request the Government for sanction to release a sum of Rs. 2,25,000/- lying idle in the Board's Fixed Deposit accounts with the State Bank of Travancore, Ernakulam and the Syndicate Bank, Ernakulam. Ext. P19 dated 12-10-1981 is the order of the Government reading;

"Sanction, under Sub-rule 15 or Rule 32 of the Kerala Wakf Rules, 1966, is

accorded to Kerala Wakf Board to utilise the fixed deposits amounting to Rupees 2,25,000/- in the State Bank of Travancore and the Syndicate Bank, Ernakulam, for making payment of the value of 8 cent and 59 sq...ft. of land comprised in. Survey No. 63/1A of _Kerala Amsom of Kozhikode Taluk situated within Calicut Corporation."

This shows that the Board's resolution was duly communicated to the Government and the Government gave its sanction for the withdrawal of the deposits specifically for the purpose of purchas-"ing 8 cents and 59 sq. ft. of land in Sy No. 63/1A. However the resolution of the Board was not implemented as it dropped the proposal, and the property was not purchased. The only case of the Government against the Board is that it resolved to purchase the property without the previous sanction of the Government, and not that it purchased any property or incurred any expenditure for the purpose. The very fact that the Board made a request to the Government on the basis of its resolution is stated to be a violation of Section 48, which says: . "48. Wakf Fund. --(1) All monies received or realised) by the Board under this Act and all other monies received as donations, benefactions or grants by the Board shall form a fund to be called the Wakf Fund.

(1A) All monies received by the Board as donations, benefactions and grants shall be deposited and accounted for under a separate sub-head. (2) Subject to any rules that may be made by the State Government in this behalf, the Wakf Fund shall be under the control of the Board.

(3) The Wakf Fund shall be applied to -

(a) to (e)

(4) If any balance remains after meeting the expenditure referred to in Subsection (3), the Board may use any portion of such balance for the preservation and protection of Wakf properties or for such other purposes as it may deem fit."

The stand of the Government is that the power under Sub-section (4) of Section 46 does not include the power to purchase property. I do not see why. Section 9(2) gives the Board the power to acquire and hold property. That is a wide power which includes the power to purchase property. Section 48 enables the Board to invest the balance amounts at its disposal for the preservation and protection of Wakf property or for such other purposes as it may deem fit. These and other provisions in the Act leave no doubt that if the Board bona fide believed that at a time of inflation properties purchased out of the funds lying idle at its disposal would better subserve the interests of the administration and management of Wakfs, and the preservation and protection of Wakf properties, it was perfectly proper for the Board to have resolved, as it did, to purchase the properties. It was not a clandestine or surreptitious act. Its decision was duly communicated to the Govt. and the approval of the Government for the withdrawal of the deposits for the specific purpose was duly obtained. In the

circumstances, on a technical interpretation of Section 48, to hold that the Board exceeded its power was not justifiable, particularly when the Government by its approval under Ext. P19 encouraged the Board to do what it resolved to do. This is all the more so because the Board did not withdraw the money or purchase the land as it dropped the proposal. The only wrong which the Board is alleged to have committed is not the act of purchasing the property by misusing its funds and thus committing breach of trust, but the mere act of thinking that it should purchase the property. It is for its thoughts, and not for its action, that the Board is now sought to be punished. One cannot imagine a more capricious and illegal exercise of power by the Government. It is such callousness and unreasonableness with which power is abused that Lord Lindley has in mind when he says: "....., the person abusing it is treated as a wrong-doer from the first, and not only as a wrong-doer in respect of what can be proved to have been an excess of his authority. It is presumed against him that the abuse of his authority shows an intention from the first to commit an unlawful act under colour of a lawful authority" : (1905) AC 426.

23. To sum up, the Government asked itself the wrong questions and misdirected its mind on all the allegations. The only irregularity that emerges from Ext. P21 is the appointment of Soopy for a short period despite the fact that he did not have the necessary qualification. I see no other irregularity. Whatever be the legal effect of this technical irregularity, this finding seems to be only peg on which the Government can hang its decision to supersede. All other findings, when properly analysed, vanish into thin air.

24. Whether or not one reads Section 64 to give the Government the power to supersede even on the basis of a single act of excess or abuse of power, however insignificant such act may be, fact remains that Ext. P21, which was made on the basis of adverse findings on five of the fifteen allegations levelled against the Board, now stands reduced to the position of being supported precariously by one single finding. This destroys the substratum of the impugned order, for, the opinion of the Government giving rise to the order is no longer founded on the grounds stated: namely, "the Board has persistently violated the duties imposed upon it and persistently abused its powers".

25. Apart from all this, Ext P21, 191 the face of it, shows that the Government has not carefully read, or acted in accordance with Section 64. Para 7 which is the operative part of the order says:

".....the State Government is of opinion that the Board has persistently violated the duties imposed upon it....."

The expression "violated the duties" is foreign to the Section. "Violate" is wider than "default". Violation can be an act of commission which is positive or of omission which is negative. To violate is to injure, transgress, infringe, break, contravene, act contrary to or to disobey or to disregard (Webster Universal Dictionary). What the Section speaks of is "persistently made default in the

performance of the duty...". That is an act solely of omission and not commission. It is a persistent failure to perform the duty, and not a positive act of transgression. The use of the expression "violated" in the place of "default" indicates that the Section was not carefully examined before the opinion was formed. But there is a more glaring misconception of or non-compliance with the Section. Supersession is ordered to commence with effect from the date of publication of the notification without specifying the exact period for which the supersession is to last. All that the order says is "..... and the Government further notify that during the period of supersession the administration of the Board would stand vested with the Government until the new Board is reconstituted by the Government" This implies that the supersession is to last as long as it takes the Government to re-constitute the new Board. That is not what Section 64 says. Sub-section (1) specifically says: "..... supersede the Board for such period as may be specified) in the notification," This shows that the period must be precisely stated. Clause (a) of Sub-section (2) provides, that all the members of the Board shall, as from the date of supersession, vacate their offices as such members, and clause (b) thereof provides that all the powers and duties which may be exercised or performed by the Board shall, during the period of supersession, be exercised and performed by such person or persons as the State Government may direct. Clause (c) of Sub-section (2) says that all property vested in the Board shall, during the period of supersession, vest in the State Government. Sub-section (3) says that, on the expiry of the period of supersession as specified in the notification, the State Government should either extend the period of supersession for such further period as it may consider necessary or reconstitute the Board. This shows that the Government must apply its mind first as to the period of supersession and then upon the expiry of that period it must further apply its mind to the question as to whether or not a further extension should be granted or the Board should be reconstituted. This requirement of application of the mind to the question of the period of supersession is a safeguard against abuse of power. The order betrays lack of application of the mind to the essential ingredients of the Section.

26. Section 64, aa I have stated, is an extreme remedy. The legislative intent is to let the Board function without interruption for its full term, subject to the power of the State Government to control the administration by means of rules made u/s 67 and by the directions which it is competent to issue u/s 63. The State Government has also the power to give previous sanction for the Regulations made by the Board. Apart from such power of control, Section 18 gives the State Government the power of removal in certain cases. It is only when such remedies are not effective and the circumstances are such that the State Government, on a proper consideration, has formed the opinion that supersession of the Board is necessary and unavoidable on the grounds stated u/s 64, recourse to that drastic power shall be had. Even when the State Government has decided to supersede the Board, it must do so only for a limited period of time and not, as it has done in the present case, for an indefinite period

by merely stating that the supersession will last until a new Board is reconstituted. This, I think, is a serious infirmity in the order.

27. An order made u/s 64 is quasi-judicial in character affecting civil rights. The effect of the impugned order is to prematurely terminate the term of office of the members by casting upon them a stigma that they are guilty of persistent default (or, as the order says, persistent violation) of duties and that they exceeded and abused their powers. The Section postulates that no such order shall be made until the Government has formed an opinion which, as stated above, has to be reasonably based on relevant matters and strictly in terms of the Section. Any deviation from what the Section has prescribed by asking itself the wrong questions or taking into account irrelevant matters will be an error going to the root of the jurisdiction. As stated by Lord Pearce in *Anisminic Ltd. v. Foreign Compensation Commission* (1969) AC 147 an authority invested with power of this nature "..... may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction....."

28. Section 64 has conferred wide discretionary power upon the State Government. But the power is not unfettered. Discretion, says Coke, is "a science or understanding to discern between falsity and truth, between right and wrong, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections"; (as quoted in *de Smith's Judicial Review of Administrative Action*, 4th Edn., p. 280). A repository of discretionary power must act according to the rules of reason and justice, and not according to his private opinion. He must act according to law and not humour. His discretion must not be arbitrary, vague and fanciful, but legal and regular.

29. An order u/s 64 can not be sustained if the Government has acted on no evidence; or if it has come to a decision to which on the evidence it could not reasonably come; or if it has gone wrong in the construction of the statute; or if it has taken into account matters which it ought not to have taken into account, or vice versa; or if it has otherwise gone wrong in law: See the principle stated by Lord Denning in *Ashbridge Investments Ltd. v. Minister of Housing and Local Government* (1965) 1 WLC 1320. "No evidence" does not mean total absence of evidence. It covers a case where the evidence taken as a whole is not reasonably capable of supporting the finding; No finding is sustainable if it is "so unreasonable that no reasonable authority could ever have come to it"; per Lord Greene, M. R., *Picture Houses v. Wednesbury Corporation* (1947) 2 All ER 680. Such exercise of power is perverse, capricious and oppressive and is, therefore, ultra vires (See *Chertsey U. D. C. v. Mixnam's Properties* (1964) 2 All ER 627. In *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* (1976) 3 WLR 641 Lord Willberforce, referring to Section 68 of the Education Act, 1944, (U. K.) observes :

"The section is framed in a "subjective" form -- if the Secretary of State "is

satisfied". This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections of this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the Court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge."

See also *Secretary of State for Employment v. ASLEF* (No. 2) (1972) 2 QB 455; *Bracegirdle v. Oxley* (1947) 1 ALL ER 126; *Pickwell v. Camden London Borough Council* (1983) 1 All ER 602; *Bromley London Borough Council v. Greater London Council* (1982) 1 All ER 129 per Lord Denning at p. 135, per Lord Wilberforce, p. 154-155; *Padfield v. Minister of Agriculture, Fisheries and Food* (1968) AC 997; *Hex v. Board of Education* (1910) 2 KB 165.

30, Where the statute has conferred discretionary power on the Government, as u/s 64, the courts do not substitute their opinion for that of the Government, but will interfere on such grounds as that the Government has acted outside its powers, or upon an incorrect basis of law or fact or has otherwise allowed its discretion to run counter to the policy and objects of the Act -- see *Padfield* (supra), 1030. In the present case the Government was not merely exercising a discretion, but it was reviewing the action of another public body which itself has discretionary powers and duties under the Act. Although it is open to the Government to closely scrutinise the actions of the Board to make sure that it stays within the four corners of the statute, the Government must at the same time bear in mind what the Board is empowered to do under the Act. See the observation of Lord Wilberforce in *Tameside Metropolitan Borough* (supra) at 665. A narrow and technical construction of the legal provisions without due regard to the discretion vested in the Board and the functions and responsibilities which it is empowered to discharge is to ignore the legislative intent and to misdirect oneself in law. There may be circumstances where differences of the policy may arise between the Board and the Government. In such cases it is open to the Central Government to issue directions on questions of policy and also to the State Government to issue such general or special directions as it thinks fit. Disobedience of the lawful directions issued by the Government may attract the section and call for supersession. But before that power is exercised, the Government has to satisfy itself that the action of the Board is such that it cannot be allowed to continue without doing violence to the concerned public interest in protection of which the Board has been set up under the statute. Where the Government has been influenced by reasons which ought not to have weighed with it, or has otherwise acted unreasonably, it has failed to properly exercise its discretion. As stated by Lord Greene in *Associated Provincial*

Picture. Houses Ltd. v. Wednesbury Corporation (1947) 2 All ER 680 the task of the Court is not to decide what it thinks is reasonable but to decide whether the order made by the Government is one which no reasonable authority acting within the four corners of its jurisdiction could have made. Lord Hailsham LC refers to this aspect; "The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law." (1982) 3 All ER 141.

31. The impugned order is a glaring example of discretionary power being exercised by the Government without due regard to the matters relevant to Section 64, and by misdirecting itself in law. Except for the appointment of Soopy who did not have the requisite educational qualification, no reasonable authority could have, on the basis of the evidence, stated that the Board exceeded its power. Whether it was the rein-statement of Hussain and Junas or the appointment of an under-aged typist, or an over-aged Soopy, or the delegation of power to the Legal Adviser to conduct the enquiry u/s 36B, or the decision to purchase the property which it did not purchase, although the Government's approval was obtained, in all these cases, the Board acted within its power; and, there is no finding that the Board abused its power by exercising it for unauthorised purposes. As for Soopy's lack of educational qualification, the Government did not apply its mind to the Board's contention that that was not an appointment in terms of the Regulations, but a short-term appointment for a specific purpose under a special contract in exercise of the Board's general power of appointment. Soopy's special qualification is that he was once a legislator with considerable knowledge of men and matters. There is no finding that the Board did not act in good faith, A technical breach of the Regulation as it probably was: was that an act which, standing alone, attracted Section 64?. Would a reasonable authority invested with the powers and apprised of the facts, as the Government is, have thought it so? I think not. No reasonable authority could possibly have reacted in the same fashion. Assuming that a single act of excess is serious enough to attract Section 64, even then, the order, being the result of the Government's cumulative thinking on all the five allegations on the basis of totally irrelevant circumstances and misconstruction of the legal provisions, is vitiated by such infirmity that one aspect of it alone cannot be sustained by severing it from the rest. An act. on the basis of which the section will be attracted must be an act which is grave and glaring enough to appeal to a reasonable authority as warranting supersession, The impugned order has been made on the mistaken assumption that the Board persistently violated its duties and persistently abused its power. This misconceived assumption has eroded the very basis of the order. I have no doubt that the officer who made the order on behalf of the Government acted in good faith. But the order is unsustainable. It is wrong in law and unsupported by evidence. It is grossly unreasonable, unjust and oppressive. It is therefore ultra vires the power of the Government Accordingly I declare Ext. P21 to be null and void and of no effect. It is quashed. The Original Petition is allowed There will be no order as to costs.