

(2005) 08 BOM CK 0011

In the Bombay High Court

Case No : Writ Petition No. 2320 of 1989

Mohd. Minhajuddin Qureshi through his LRs. Noor-UI-Habib
Qureshi and Others

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 29-08-2005

Acts Referred:

Bombay High Court (Appellate Side) Rules, 1960 — Rule 11
Constitution of India, 1950 — Article 226, 227
Waqf Act, 1995 — Section 25, 43, 43(1), 43(2), 43(4)

Citation : (2006) 1 ALLMR 225 : (2006) 2 BomCR 172 : (2006) 1 MhLj 163

Hon'ble Judges : A.B. Naik, J

Bench : Single Bench

Advocate : S.V. Gangapurwala, for the Appellant; R.R. Mane, AGP and Fatima Quazi, instructed by K.G. Khader, for the Respondent

Final Decision : Allowed

Judgement

A.B. Naik, J.—One Mohammed Minhajuddin Shaikh Habib Quareshi, by this petition, has challenged the judgment and order dated 1st February, 1989 passed by the Hon"ble Minister, Aukaf and Urban Development, Government of Maharashtra, dismissing appeal and confirming the order passed by respondent No. 2. In that appeal, the petitioner had challenged the order passed by the Administrator of the Marathwada Wakf Board/respondent No. 2 herein, on 7th April, 1984.

2. During pendency of this Writ Petition, the original writ petitioner Minhajuddin expired and his heirs and legal representatives, have filed an application for being substituted them as heirs and legal representatives and to bring them on record. That application was allowed by this Court on 28-1-2005. Now, the heirs of deceased petitioner are prosecuting this Petition.

3. The short controversy involved in this Petition is whether the order dated 7th April, 1984 passed by the Secretary, Marathwada Wakf Board Aurangabad as

approved by the Administrator can be called to be a legal and valid order of removal of deceased petitioner from the post of Mutawalli. The order purported to be passed u/s 43 of the Wakf Act, 1994 (29 of 1994) (hereinafter referred to as "the Act"). By the said order, the deceased petitioner who was working as "Mutawalli" of the Wakf "Kabristhan" his services were terminated forthwith. In normal circumstances, on the death of the original petitioner i.e. Mutawalli of the Wakf, the petition should have been dismissed as infructuous, but the deceased petitioner raised a contention that the post of Mutawalli of the Wakf in question being hereditary and the power of appointment of Mutawalli lies with the family members, the question has to be decided in order to avoid further litigation as the deceased was appointed as Mutawalli vide Resolution passed on 30th July, 1976 by the members of the family on account of death of the Mutawalli Janab Abdul Quadar Mohammed Hussain.

4. Before I proceed to record the submissions of the respective Advocates, I would like to record that this petition filed under Articles 226 and 227 of the Constitution of India, 1950 (in short "the Constitution"), was lodged in this Court on 24th April, 1989 and was circulated for urgent motion hearing on 12th September, 1989, on which date this Court issued notice to respondent No. 2. Then the petition was heard for motion hearing after service on the respondents on 31-1-1990 and as all the parties were duly represented by their respective Counsel, this Court upon hearing them, issued rule "nisi" and granted interim relief in terms of Prayer Clause (C). It is rather unfortunate that till this date, the respondents herein have not bothered to file any return to contest the petition. I have to proceed to hear the petition which has seen the light of the day after 16 years to reach for final hearing.

5. Hearing of this Writ Petition commenced yesterday and continued further today. Miss Fatima Quazi, learned Advocate representing respondent No. 2 requested for time to file reply, which is refused. The petition is listed for final hearing initially on 20th July, 2001 and continued to appear on Board subsequently once the petition was dismissed by this Court for non-appearance of the petitioner as at that time statement was made by the learned Advocate for the respondent No. 2 that the petitioner having died long back and his heirs are not brought on record, thus, it is abated. Accepting the statement, this Court on 15th April, 2004 dismissed the petition as abated, thereby discharging rule granted earlier and also vacating the interim relief granted on 31st March, 1990.

6. Thereafter the heirs of the petitioner have submitted an application for substitution and setting aside abatement which was allowed by this Court, at that time also the Advocate for respondent No. 2 appeared, and petition stood restored still the respondents have not cared to file reply to contest the proceedings. As such, at the fag end of the proceeding request is being made, and if granted it will further delay the hearing of the petition, it is not possible or permissible for this Court to give an opportunity to the respondents to file reply. This Writ Petition is filed under Articles 226 and 227 of the Constitution.

Accordingly, the "Rule" was duly served on the respondents. The notice of the writ of summons calls upon the respondents to file reply by drawing the attention of the parties to the provisions of Rule 11 of Chapter XVII of the Bombay High Court (Appellate Side) Rules. It is to be noted that after the Writ Petition was restored, a fresh notice was again served on the respondents, still they did not chose to file any reply. For these reasons, it is not possible for me to accept the request of Miss Fatima Quazi, learned Advocate for R-2 for granting time to file reply. I have to proceed with the petition on the basis of averments made in the Petition proper and annexures thereto. I had permitted Miss Fatima Quazi even in absence of return to justify the order under challenge from the material on record, which she done with her best effort.

7. Shri S. V. Gangapurwala, learned Advocate appearing for the petitioners contended that the order passed by the Wakf Board Aurangabad is patently erroneous, without jurisdiction and, therefore, non-est. He contended that by Deed dated 12th October, 1965 a Wakf was created from that date property vests with the Wakf; the Wakeef made an application u/s 25 of the Act for registration of the Wakf, and accordingly, the Wakf came to be registered. On the basis of the documents which are annexed to the petition at Exh. "A", he emphasized that the members of the family are entitled to appoint Mutawalli for management of the said Wakf. He has also pointed out Clauses (5) and (14) of the application filed u/s 25 of the Act for registration of Wakf, which shows the name of trustees, Mutawalli and power to appoint Mutawalli for the management of the Wakf. He, therefore, submitted that Wakf being registered the appointment or removal of the Mutawalli rests solely with the members of the family as per the Wakf Deed and, as such, the Wakf Board, has no jurisdiction or authority to appoint or remove the Mutawalli of the Wakf. He pointed out that by the Wakf Deed, the Wakeef has kept the power of appointment or removal of Mutawalli with the members of the family for whom the Wakf is created. He submitted that the property dedicated was of ancestral Kabristhan i.e. burial ground and, as such, the Wakf Board or for that purpose the Administrator cannot assume the power of appointment and removal of the Mutawalli of the Wakf. He pointed out on the death of the then Mutawalli in 1976 the deceased petitioner was appointed/nominated as Mutawalli by the members of Wakif's family vide Resolution dated 30th July, 1976 (vide Exh."C") which is, in fact, accepted by the Wakf Board and thereafter till the order dated 7th April, 1984 he worked as Mutawalli of the Wakf and was removed from the post of Mutawalli by that order and the Wakf Officer was directed to act as Mutawalli until further orders. He submitted, such order cannot be passed in view of the Wakf Deed, which permitted the members of the family to appoint Mutawalli, as such, the order dated 7th April, 1984 is contrary to the provisions of Section 43 of the Act. He submitted that the order dated 7th April, 1984 was passed not by the Marathwada Wakf Board, but the Secretary, under colourable exercise of powers. He submitted that the petitioner by filing the appeal before the State Government challenging the order dated 7th April, 1984 u/s 43(4) of the Act, the

Appellate Authority, without giving any opportunity to the petitioner, has disposed of the appeal on the basis of the record, which was called. He, thus, submitted that the order passed by the Government confirming the order dated 7th April, 1984, is also bad in law and contrary to the principles of natural justice.

8. Shri Gangapurwala, learned Advocate submitted that no doubt, u/s 43 the Wakf Board has jurisdiction and authority to remove the Mutawalli or appoint new Mutawalli, provided that conditions enumerated in that section exist. The Wakf deed authorizes the Members of the family of the Wakif to appoint or remove Mutawalli as such, the Wakf Board under guise of the power vested in it u/s 43 of the Act cannot ignore the deed and appoint a Mutawalli to the Wakf at its whims, fancies. He submitted that as per the deed, the Mutawalli is to be appointed by succession i.e. hereditary.

9. Per contra, Miss Fatima Quazi, instructed by Shri K. G. Khader, learned Advocate for respondent No. 2 submitted that the deceased petitioner or for that purpose, his heirs have no locus standi to challenge the orders passed by the Wakf Board and confirmed by the State Government in appeal. She submitted that the deceased petitioner claimed the Mutawalliship being hereditary office, but under the Maharashtra Law hereditary Office of Mutawalli is not at all recognized. She, therefore, submitted that the appointment of the petitioner as Mutawalli was only for two years and on expiry of the said term of two years from the date of appointment. As the term of Mutawalli has come to an end, by efflux of time, the order of removal came to be passed on 7th April, 1984. Therefore, she submitted that the deceased petitioner or his heirs cannot claim the Mutawalliship of the said Wakf. She pointed out from the order dated 7th April, 1984 that the Committee which appointed deceased-petitioner as Mutawalli was itself for two years and on completion of two years, neither the Committee nor the deceased petitioner can claim any right over Mutawalliship. Therefore, she submitted that the orders passed by the Wakf Board and the State Government, are required to be confirmed. She submitted that neither the Wakf Deed nor the application filed u/s 25 of the Act, provide for the mode of appointment of Mutawalli and, as such, Mutawalli for the said Wakf has to be appointed by the Wakf Board by exercising the powers and authority conferred to it by Section 43 of the Act. The learned Advocate for respondent/Wakf Board, to substantiate her contention has placed reliance on para No. 206 of the Principles of Mahomedan Law by Sir Dinshaw Mulla (19th Edition) and contended that the Mahomedan Law does not recognize any right of inheritance to the office of Mutawalli, as such, the basis of the contention of the petitioner required to be rejected. She brought to my notice the judgment of the Lahore High Court reported in AIR 1930 Lah 728 and contended that the Office of Mutawalli is not hereditary and succession thereto is governed by certain well established rules and principles of Mahomedan Law. She tried to justify the order dated 7th April, 1984 by making submission that deceased petitioner has leased out the property of the Wakf, that to without prior permission of the Board. Therefore, she submitted that for this unauthorized act by deceased petitioner, was removed

from the post of Mutawalli. Though I recorded this contention of the learned Advocate; but it is not necessary for me to ponder on that point any more as the order dated 7th April, 1984 is not passed for this reason and if the provisions of the Wakf Act, 1954 are considered, more particularly Sections 43,44 and 45, a Mutawalli can be removed by the Board on the allegations of mismanagement etc, only after due enquiry against that Mutawalli as there is nothing on record to indicate before passing the order dated 7th April, 1984 any enquiry was conducted against the deceased petitioner. Thus, oral submission of Miss Quazi about the act of leasing out the property by deceased petitioner cannot be accepted as there is nothing on record to substantiate this contention. Therefore, I have to consider the submission of Shri Gangapurwala, learned Advocate, who has challenged the order dated 7th April, 1984 on the ground of colourable exercise of powers by the Secretary or for that purpose Marathwada Wakf Board, assuming the powers u/s 43 of the Act.

10. Shri Gangapurwala, learned Advocate for petitioners, pointed out that the order is passed by the Secretary and not by the Board, as such, the order is passed by unauthorized person to reply this contention. Miss Fatima Quazi, learned Advocate for the Board has pointed out from the order that when the order was passed, the Marathwada Wakf Board was under the supervision and control of the Administrator who was appointed by the Government to manage the affairs of the Marathwada Wakf Board and the Administrator has approved the order prepared by the Secretary of Marathwada Wakf Board. This contention of Miss Quazi, learned Advocate is required to be accepted as I had noticed that the Administrator has approved the order which is also signed by the Administrator and the Secretary. Therefore, the contention of Shri Gangapurwala that the Secretary passed the order on the facts of this case cannot be accepted, hence it stood rejected, nothing will turn of this aspect, nonetheless the question has to be considered by this Court in this petition is whether the Board or, for that purpose, the Administrator can remove Mutawalli on the grounds stated in the order.

11. The petitioner has annexed the copies of the Wakfnama dated 12th October, 1965 and the Resolution passed by the Members of the family in the meeting held on 30th July, 1976 appointing deceased petitioner as Mutawalli. The Wakf was created for the first time on 12th October, 1965 and the application for registration of Wakf was filed on the same day as required by Section 25 of the Act. It is not disputed that on submission of the application by the Wakeef, the Wakf was accordingly registered with the Board. The application for registration inter alia refers to the names of the trustees, Mutawalli and mode of their appointment etc. of the Wakf. In column No. (4) of the said application the following aspect is stated; (as stated in the Annexure)

4. Previously Gulam Ahmed Tara Saheb was it's Manager and Mutawalli. After that now Abdul Kadar s/o Mohammad Hussain is Mutawalli and this is (appointment) from the members of the family. This Kabristan is since the

ancestor's time."

12. This Clause No. 4 in the deed, the above-said contention of Shri Gangapurwala, is to be considered in proper perspective, it goes to show that the Mutawalli was being appointed by the members of the family, which is amply proved and established vide Resolution dated 30th July, 1976 to which there is no challenge at all and the Mutawalli appointed is from the family. According to the Wakeef, the Kabristhan is the subject-matter of Wakf, which is ancestral one. Clause (5) of the application reads thus :

5. As per procedure and custom, the members of the family are the managers and Mutawalli on whose behalf Abdul Kadar is (appointed)."

13. The application further disclosed that the expenses of the Wakf regarding management and registration etc. are to be borne by the members of the family.

14. In column No. 14 relating to "other details" the following statement is made :

11. Other details :

The land which is wakf for burial i.e. for this ancestral Kabristan, its management and tawliat is vested in (and will) members of the family. They on their own behalf will be entitled to appoint Nigrankar Mutawalli and also to remove him if found necessary will have no personal right. For plans of increase of income better management and power of income and expenditure will be entitled by vested in the family members.

(emphasis supplied)

15. Thus, from reading the above clauses in the application for Registration of Wakf u/s 25 of the Act, it is clear that the deceased petitioner from 31st July, 1976 till the order dated 7th April, 1984 was passed, was the Mutawalli of the Wakf. This aspect borne by the record, the contention of Ms. Quazi that the appointment of deceased petitioner was only for two years, required to be rejected. Thus, with this aspect borne by the record, now I have to find out whether and under what circumstances Mutawalli can be removed by the Wakf Board. Section 43 of the Act provides for removal of Mutawalli, which reads thus :

43(1): Notwithstanding anything contained in any other law or the deed of wakf, the Board may remove a mutawalli from his office if such mutawalli

(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; or

(c) misappropriates 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 mutawalli; 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 (or any person or authority not being a Court of law) to act as a mutawalli 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 committed to act as the mutawalli of the Wakf property.

(3) For the removal of doubts, it is hereby declared that the removal of a person from the office of the mutawalli shall not affect his personal rights, if any, in respect of the wakf property either as a beneficiary or in any other capacity or his rights, if any, as a Sajjadanashin.

(4) No action shall be taken by the Board under Sub-section (1) or Sub-section (2), unless it has held an enquiry into the matter in the prescribed manner and the decision has been taken by a majority of not less than three-fourths of the members of the Board.

16. Section 43A which was inserted by Act No. 34/1964 permits the Board to assume the management of the Wakf provided the conditions enumerated u/s 43A are complied with. Sections 44 and 45 of the Act provides for procedure for an enquiry against the Mutawalli before his removal by the Board from the post of Mutawalli. Section 45 Sub-section (2) authorized the Board while conducting enquiry, it shall have the same powers as vested in the Civil Court under Code of Civil Procedure. Therefore, reading of these provision, in my judgment, the Board gets power to remove the Mutawalli provided the statutory requirements contained in Sections 43 to 45 are attracted and satisfied. Thus, the order dated 7th April, 1984 of removal of Mutawalli passed by the Board without following the mandatory provisions contained in Section 43(4) read with Section 45 is wholly illegal and non-est. Thus, on this count the impugned order is required to be set aside.

17. Having noticed the abovesaid statutory provisions and the contents of the application for registration, in my judgment, the right to appoint and removal of Mutawalli rests with the family, that authority or power cannot be abdicated by the Board, by itself as in the present case, it is not demonstrated by the Board that it has followed the procedure to remove the deceased petitioner as Mutawalli of the Wakf by conducting enquiry against him as Section 43 begins with non-obstante clause. Thus the Board can remove the Mutawalli only on conducting an enquiry by levelling the charges against the Mutawalli, otherwise not. Thus, if the Deed of Wakf makes a provision or procedure to appoint, remove the Mutawalli, the appointment or removal has to be done in the manner provided by the Deed and the Board definitely has the power to remove a Mutawalli only in the matter provided under Sections 43, 44 and 45 of the Act. The present case did not come

under the purview of Section 43 of the Act. Miss Quazi, learned Advocate is right when she contended that the Mahomedan Law does not recognize any hereditary office of Mutawalli. She placed reliance on the following passage i.e. para 206 of Principles of Mahomedan law, which reads thus :

206. Office of Mutawalli not hereditary. -- The Mahomedan law does not recognize any right of inheritance to the office of mutawalli. But the Office may become hereditary by custom, in which case the custom should be followed."

18. By reading the above paragraph it is evident that the Mahomedan Law does not recognize any right of inheritance to the Office of Mutawalli but the Office may become hereditary by custom in which case the custom should be followed. Looking to the various clauses of the application for registration of Wakf filed on 12th October, 1965 one thing is apparent that the Wakeef has recognized that the Mutawalli be appointed as per the procedure and custom from the members of the family, which fact is established by the petitioner by producing resolution dated 31-7-1976 at Exh."C". Thus, the deed recognizes the appointment of Mutawalli by the members as per their choice. The judgment of the Lahore High Court which is relied on by Miss Fatima Quazi, no doubt, supports her contention that the office of Mutawalli is not hereditary but nonetheless, considering this aspect as well as para No. 206 (quoted above), which goes to establish that Mahomedan law does not recognizes that Office of Mutawalli being hereditary one, but it does accept that it may become hereditary by custom, which is to be followed if one read column 5 and 14 together with Exh. "C" which is indicative of the fact that Mutawalli is to be appointed as per the custom. The view which I am taking gets support from the judgment of this Court in the case of Mohd. Haji Haroon Kadwani In re. reported in AIR 1935 Bom. 254. This Court has considered the question of appointment of trustees to the Wakf. This Court also reiterated the principle that the Mutawalli have no hereditary right but nonetheless this Court has observed.

...I think the Muslim law does not dread the management of wakfs being retained in the family of the wakif. It disapproves of the introduction of an outsider in the administration at least of such a trust as is before me, unless the members of the wakif's family show their unfitness to be trustees. I take this opportunity however of observing that though descendants of the wakif are favoured by the Court, when appointing a mutawalli, this does not mean that they have a hereditary right to be mutawallis.

19. Thus while appointing a Mutawalli, the descendants of the Mutawalli will be as far as possible be favoured. In case at hand, the Board under the guise of its power u/s 43 has directed the Wakf officer to manage the Wakf, which in my judgment, is per se bad and illegal. Thus, there is no difficulty to accept the contention of Shri Gangapurwala that the appointment of Mutawalli is as per the custom of the family and always the preference is to be given to the member of the family while appointing Mutawalli. As such, looking to the Wakf deed dated 12th October, 1965 the family member do get the right to appoint a Mutawalli

which may be from the family of Mutawalli.

20. Therefore, considering the above aspects in right perspective, the impugned orders passed by the Secretary and approved by the Administrator of the Wakf Board removing the deceased petitioner as Mutawalli cannot sustain as this order is passed in defiance of the mandatory provisions of Section 43 read with Sections 44 and 45 of the Act. In my judgment, therefore, removing of the deceased petitioner from Mutawalliship and further directing the Wakf Officer to act as such, goes contrary to the Section 43 of the Act and the judgment of this Court in Mohd. Haji Haroon (supra). In my judgment, the order dated 7th April, 1984 as confirmed by the State Government on 18-2-1989 (passed on 1-2-1989 : signed on 18-2-1989) is rather indefensible. Accordingly both the orders are set aside by issuing a writ of certiorari. Petition is allowed, Rule is made absolute in terms of prayer Clause "B". Parties to bear their own cost.

21. As the original petitioner is dead, now the question for his successor was required to be considered by the members of the family by nominating or appointing any person as per the custom. Shri Gangapurwala, learned Advocate stated that as this Court has granted interim relief and interim relief was continued and during the pendency of this petition petitioner is dead and members have now appointed Noor Ul Ansar s/o Late Minhajuddin as Mutawalli. As such, he may continue to hold the office of Mutawalli as it is.