

(2012) 01 AP CK 0029

In the Andhra Pradesh High Court

Case No : Writ Petition No. 23065 of 2009

Mohd. Mohsinuddin

APPELLANT

Vs

The Government of A.P. and Others

RESPONDENT

Date of Decision : 19-01-2012

Acts Referred:

Andhra Pradesh Wakf Rules, 1974 — Rule 24, 24(1)
Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, 151
Constitution of India, 1950 — Article 226
Waqf Act, 1954 — Section 3
Waqf Act, 1995 — Section 3, 44, 64(1), 70, 71

Citation : (2012) 3 ALD 114

Hon'ble Judges : Seshasayana Reddy, J

Bench : Single Bench

Advocate : Shah Alam and Mohd. Asifuddin, for the Appellant; M.A.K. Mukheed, Counsel Standing Counsel for A.P. State Wakf Board and Sri P. Gangaiah Naidu, for the Respondent

Final Decision : Dismissed

Judgement

Hon"ble Sri Justice B. Seshasayana Reddy

1. Jamia Masjid attached to Sunni Muslim Graveyard at Musheerabad is a registered Sunni Wakf Institution. One Mr. Mohd. Ali filed O.S. No. 1627 of 1977 on the file of V Assistant Judge, City Civil Court, Hyderabad, seeking a declaration that he is the hereditary Mutawalli of the Jamia Masjid, popularly known as Great Mosque, Musheerabad. The said suit came to be decreed on 10-12-1982 declaring Mohd. Ali as hereditary Mutawalli of Jamia Masjid. Pursuant to the judgment and decree of the civil Court, A.P. State Wakf Board appointed Mohd. Ali as Mutawalli of the Jamia Masjid, vide Proceedings No. H1/6/1/87, dated 30.03.1988. He died on 01-01-1991. His son Mohd. Nazeer Ali along with seven others initiated proceedings before the Joint Collector, Hyderabad District seeking his appointment as Mutawalli of Jamia Masjid in succession to Mohd. Ali. The Joint Collector dismissed the application for want of

jurisdiction. Mohd. Nazeer Ali applied for Towliath in place of his father for the Jamia Masjid. A.P. State Wakf Board under Proceedings No. 41/6/1/87, dated 17-10-1997 appointed Mohd. Nazeer Ali as temporary Mutawalli till the decision of Towliath. A committee came to be constituted by the A.P. State Wakf Board for managing the affairs of Jamia Masjid, vide proceedings No. 41/Hyd-111/K/05, dated 01.7.2005 for a period of two years and the said period came to be extended for a further period of two years. The third respondent filed O.A. No. 20 of 2005 on the file of A.P. Wakf Tribunal, Hyderabad assailing the action of the A.P. State Wakf Board in constituting the committee to manage the affairs of Jamia Masjid. He withdrew the OA consequent on the decision taken by the A.P. State Wakf Board not to extend the tenure of the committee and to appoint him as Mutawalli of Jamia Masjid. A memo came to be issued by the A.P. State Wakf Board on 12-4-2007 to that effect.

2. One Mohd. Khaja Baber, President of the Managing Committee submitted objection petition dated 23.4.2008 for the appointment of Mohd. Nazeer Ali as Mutawalli of the Jamia Masjid. A complaint came to be presented against Mohd. Nazeer Ali that he got alienated 91 square yards of Jamia Masjid through his mother Raheemunnisa Begum under an agreement of sale, dated 25-11-2003, for Rs. 3 lakhs. On the basis of the complaint, dated 17-11-2009, the 1st respondent issued proceedings, vide F/H1/6/1/87-Z/1 Suppl. dated 8-12-2009 appointing an Enquiry Officer. The Enquiry Officer framed three charges against Mohd. Nazeer Ali. Charge No. 1 is that he constructed a house and mulgies on the graveyard situated at premises bearing No. 14-4-836/2, Bholakpur, Musheerabad, Hyderabad. Charge No. 2 is that he alienated a piece of land admeasuring 91 square yards bearing Municipal No. 1-4-716, Bholakpur, Musheerabad, Hyderabad which is part of a jamia masjid. Charge No. 3 is that he collected rents from mulgies that are constructed in the graveyard comprising premises bearing No. 1-2-836/2 without the consent of A.P. State Wakf Board. Mohd. Nazeer Ali submitted explanation on 12-4-2010. The Enquiry Officer found charge No. 1 and Charge No. 3 as proved while negating the accusations levelled under charge No. 2. Accordingly, the enquiry officer submitted report on 30.6.2010. The A.P. State Wakf Board has not taken any action basing on the enquiry report.

3. Mohd. Mohsinuddin filed W.P. No. 23065 of 2009 seeking mandamus declaring the Resolution No. 488 of 2009 dated 20-10-2009 passed by the A.P. State Wakf Board appointing Mohd. Nazeer Ali as Mutawalli as arbitrary and illegal.

4. Mohd. Salahuddin filed W.P. No. 19379 of 2010 seeking mandamus declaring the inaction of A.P. State Wakf Board pursuant to the enquiry report dated 30-6-2010 against Mohd. Nazeer Ali as illegal and unconstitutional. Mohd. Nazeer Ali filed W.P. No. 18278 of 2010 seeking a mandamus declaring resolution No. 556, dated 5-12-2009 and proceeding F/H1/87/2/1 Suppl., dated 8.12.2009 appointing Munwar Ali as enquiry officer u/s 71 of the Wakf Act, 1995 (for short, "the Act") as illegal and arbitrary. A further declaration has been sought for that

the representation dated 17-11-2009 submitted by Mohd. Mohsinuddin is not in accordance with Section 70 of the Act and thus the action initiated on the said representation is illegal. Subsequently, he filed W.P.M.P. No. 10397 of 2011 under Order VI Rule 17 read with Section 151 CPC and got the relief amended. The amended relief reads as hereunder:-

It is therefore prayed that this Hon''ble Court may be pleased to issue an order or direction, more particularly, a writ of Mandamus, declaring the resolution No. 556 dated 5.12.2009 and the proceedings vide F. No. H1/6/1/87/Z-1/Supply dated 8.12.2009, appointing the 3rd respondent as Enquiry Officer u/s 71 of the Act, as illegal, arbitrary and in utter violation of Sections 70 and 71 of the Wakf Act and also declare the very representation of the 4th respondent dated 17.11.2009 is not in accordance with Section 70 of the Act and the allegations made do not relate to mis-management of affairs of subject wakf institution and further declare the consequential notice of the 3rd respondent vide F. No. H1/6/1/87/Suppl/Zone-1 dated 22.2.2010 as illegal and redundant, and further declare the enquiry report dated 30.6.2010 submitted by the 3rd respondent as illegal, untenable and against the provisions of A.P. Wakf Act, 1995 and pass such other order or orders as this Hon''ble Court may deem fit and proper in the circumstances of the case.

5. As the core issue in all the three writ petitions is as to appointment of Mutawalli for Jamia Masjid, all the three writ petitions are heard together and they are being disposed of by this common order.

6. The parties here-in-after be referred to as they are arrayed in W.P. No. 23065 of 2009. Mohd. Mohsinuddin is the petitioner; the Government of Andhra Pradesh, rep. by its Principal Secretary, Ministry of Welfare and Wakf Department, Hyderabad; the Chief Executive Officer, A.P. State Wakf Board, Hyderabad and Mohd. Nazeer Ali are the respondents 1 to 3 respectively in the writ petition.

7. Heard Sri Shah Alam, learned counsel appearing for the writ petitioner; Sri M.A.K.Mukheed, learned Standing Counsel for A.P. State Wakf Board appearing for the 2nd respondent and Sri P.Gangaiah Naidu, learned Senior Counsel appearing for the 3rd respondent.

8. Learned counsel appearing for the petitioner submits that the 3rd respondent has been facing enquiry for mis-management of the affairs of the Jamia Masjid and properties attached to it and that without waiting for the out come of the enquiry, appointment of the 3rd respondent as Mutawalli is not in the interest of Jamia Masjid. A further submission has been made that a person to be appointed as Mutawalli should possess sterling quality, character and integrity and as the 3rd respondent lacks integrity because of his involvement in mis-management of the affairs of the Jamia Masjid and properties attached to it, he does not deserve for appointment as Mutawalli. He would also submit that the affairs of the Jamia Masjid are being carried out by the managing committee appointed by the A.P.

State Wakf Board and as of now, there is no vacancy of Mutawalli, in which case, there is no need of appointing the 3rd respondent-Mohd.Nazeer Ali as Mutawalli of Jamia Masjid. The learned counsel took me to the proceedings, dated 08.06.2008, issued by the Chief Executive Officer, A.P. State Wakf Board, Hyderabad, whereunder Sri Shaik Shamsuddin came to be appointed as enquiry officer to conduct enquiry u/s 71 of the Act, on the objection petition, dated 23.04.2008. In support of his submissions, reliance has been placed on the following decisions:

- (1) Sirajul Haq Khan and Others Vs. The Sunni Central Board of Waqf, U.P. and Others,
- (2) Syed Mohd. Salie Labbai (Dead) by L.Rs. and Others Vs. Mohd. Hanifa (Dead) by L. Rs. and Others,
- (3) State of Karnataka Vs. Muniyalla,
- (4) Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others,
- (5) B.S.E. Brokers Forum, Bombay and Others etc. Vs. Securities and Exchange Board of India and Others etc.,
- (6) Vikram Singh Junior High School Vs. The District Magistrate (Fin and Rev) and Others,
- (7) N. Kannadasan Vs. Ajoy Khose and Others,
- (8) Godrej Sara Lee Ltd. Vs. Asst. Commissioner (AA) and Another,
- (9) V.V.V.R.K. Yachandra Bahadur Varu Vs. The Andhra Pradesh Wakf Board, Hyderabad and Another,
- (10) Shaik Ghouse Mohiuddin Vs. Andhra Pradesh State Wakf Board and Others,
- (11) The Kerala Wakf Board, Ernakulam v. Alam Aboobacker Sait & Ors. AIR 1987 KE 176
- (12) Jeet Mohammed Vs. Jatinder Kaur and Another,
- (13) Jainulaludden v. Jainulaludden 1981 MLJR 332

9. In Siraj-ul-Haq Khan's case (supra), the Supreme Court held that any person interested in a wakf must mean any person interested in what is held to be a wakf.

10. In Syed Mohd. Salie Labbai's case (supra), the Supreme Court held that as regards the right to act as Imam, Mahomedan Law does not favour the hereditary right of being Imam because an Imam must possess certain special qualities and certain special knowledge of the scriptures before he can be allowed to lead the prayers.

11. In State of Karnataka v. Muniyalla's case (3 supra), the Supreme Court held

that mere recital of a wrong provision of law does not have the effect of invalidating an order which is otherwise within the power of the authority making it.

12. In Whirlpool Corporation's case (4 supra), the Supreme Court held that availability of alternative remedy would not operate as a bar for maintainability of the writ petition under Article 226 of the Constitution of India for at least in three contingencies viz., 1) where the writ petition has been filed for the enforcement of any of the Fundamental Rights; 2) where there has been a violation of the principle of natural justice; 3) where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. Much emphasis has been laid by the learned counsel on paras.14 and 15 of the cited judgment, which read as hereunder:

14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".

13. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a Writ Petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order of proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point put to cut down this circle of forensic Whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

13. In B.S.E. Brokers' Forum's case (5 supra), the Supreme Court held that omission or error in mentioning correct provision of law by itself would not denude the power of the authority to take action so long as the same is traceable to a statutory power governing such action.

14. In Vikram Singh Junior High School's case (6 supra), the Supreme Court held that mere quoting wrong provision of the statute for exercising power would not invalidate the order passed by the authority.

15. In N.Kannadasan's case (7 supra), the Supreme Court held that when appointment is contrary to the rules, a writ of quo-warranto lies.

16. In Godrej Sara Lee Ltd.'s case (8 supra), the Supreme Court held that if the

order of the statutory authority questioned on the ground of lack of jurisdiction, alternative remedy is not a bar for maintaining the writ petition under Article 226 of the Constitution of India.

17. In VVVRK Yachandra Bahadur Varu's case (9 supra), it has been held by this Court that the definition of the person interested in a wakf as defined in Section 3(h) of the Act includes any person who has a right to worship or right to perform any religious rite in any religious institution or to participate in any religious institution.

18. In Shaik Ghouse Mohiuddin's case (10 supra), it has been held by this Court that the wakf board while appointing any person as Mutawalli, has to specify the period and non-specification of the period vitiates the very appointment itself.

19. In The Kerala Wakf Board, Ernakulam's case (11 supra), it has been held by the Kerala High Court that the power of appointment can be exercised only when there is a vacancy in the office of mutawalli of a wakf.

20. In Jeet Mohammed's case (12 supra), it has been held by the Himachal Pradesh High Court that any person who profess Islam is a person interested in the management of wakf and he can raise dispute before the Wakf Tribunal that such property is being frittered away or being sold against intention of creator of Wakf.

21. In Jainulaludden v. Jainulaludden's case (13 supra), the Madras High Court has held that the word "person interested in a wakf" appearing in Section 3(h) of the Wakf Act, 1954, apart from stating that a person interested in a wakf means any person who is certified to receive any pecuniary benefits, also states that it means any person who is entitled to other benefits from the wakf. The expression "person who is entitled to receive other benefits from the wakf" is of the widest connotation, and there is neither reason nor principle to restrict the scope of that expression only to certain types of benefits analogous to pecuniary benefits. Whenever a benefit is reserved for the public in general without restricting the persons who will be entitled to participate therein either with reference to the age, or with reference to the social status, any person who will fall within the particular category of the persons for whom the benefit is reserved will be a person entitled to receive that benefit as of right and such a person will certainly be entitled to invoke the jurisdiction of a body like the Wakf Board u/s 44 of the Act.

22. Per contra, Sri P.Gangaiah Naidu, learned senior counsel appearing for the 3rd respondent contends that the very application filed by the petitioner against the 3rd respondent seeking enquiry is not in accordance with Rule 24 of the Andhra Pradesh Wakf Rules, 2000, (for short, "the Rules, 2000") and therefore, the enquiry report is non est in law, in which case, no further action is permissible by the A.P. State Wakf Board on such invalid enquiry report. Learned senior counsel took me to Rule 24 of the Rules, 2000, extensively. For better appreciation, I may refer Rule 24 of the Rules, 2000, which reads as hereunder:

24. Procedure for Instituting Enquiries:-(1)(a) No application for inquiry relating to administration of the Wakf u/s 70 shall be admitted by the Wakf Board, unless a fee of Rs. 50/- is deposited in the Wakf Board Treasury through a challan, crossed bank draft, or crossed postal certificate.

(b) No application for inquiry shall be entertained unless supported by an affidavit accompanied with copies equal to the number of respondents plus two extra copies.

(c) The parties to the proceedings shall deposit in cash in the office of the Board, fee at the rate of rupees ten per respondent or witness for summons and notices and rupees thirty for summoning documents.

(d) In addition to the fee prescribed above the party summoning the witnesses shall bear the date of such witnesses fixed by the Board, and shall deposit the same in advance with the office of the Board.

(2) Notice of inquiry shall be sent by Registered Post, Acknowledgement Due at least fifteen days before the date fixed for the inquiry, to the parties concerned specifying the date, hour and place fixed for holding such inquiry.

(3) A copy of the notice shall be fixed on the notice board of the office of the Board and in any other conspicuous place in any locality in which the property is situated such affixture shall be deemed to be sufficient service.

(4) All persons who appear in response to the notice may, within the time fixed in the notice or within such further time as may be granted file written statements.

(5) Any party to the proceedings shall have a right to appear in person or through Counsel.

(6) The inquiry shall be summary and the Inquiry Officer shall record the Memo of Evidence.

(7) The Board or any person authorised in this behalf while holding an inquiry shall have the same powers as are vested in a Civil Court under Orders XXXIX and XL of the Code of Civil Procedure, 1908 in respect of the following matters, namely:

(i) temporary injunctions and interlocutory orders;

(ii) appointment of Receiver for management of the property which is the subject-matter of the enquiry; and

(iii) appointment of a Commissioner for the purpose of this rule;

(8) The provisions of the Code of Civil Procedure, 1908, and rules thereunder shall apply, as far as practicable to the appearance of pleaders, and to affidavit production of documents examination of affidavits, filing of exhibits issue of commission, return documents and pronouncement of judgment.

23. Learned senior counsel would further contend that the charges levelled against the 3rd respondent are baseless since the Mulgies were allegedly constructed in the year 1984, much prior to the 3rd respondent being appointed as Muthawalli. The very initiation of enquiry at the instance of the persons, who are no other than the encroachers of the wakf property, cannot be sustained. Even otherwise, the enquiry has been conducted in utter violation of Rule 24 of the Rules, 2000 and therefore, the enquiry proceedings are ab initio void. Since Rule 24 of the Rules, 2000, prescribes the procedure for conducting the enquiries, the authority has to follow the said procedure and any report submitted by the enquiry officer in deviation of the procedure does not deserve any consideration. A further contention has been advanced by the learned senior counsel that the petitioner has a statutory remedy u/s 83 of the Act, in which case, the writ petition filed by the petitioner under Article 226 of the Constitution of India is liable to be dismissed. In a way, his contention is that the petitioner has to approach the Wakf Tribunal u/s 83 of the Act. Learned senior counsel would contend that the Chief Executive Officer cannot appoint an enquiry officer on his own accord and therefore, proceedings, dated 08.12.2009, appointing Sri Munawar Ali, is beyond his competency and consequently, report submitted by Sri Munawar Ali, needs no consideration. He would further contend that the Executive Officer/Special Officer of the A.P. State Wakf Board earlier appointed one Dr. Shamsuddin as Enquiry Officer and the said enquiry officer submitted report, in which case, appointing the second enquiry officer on the basis of self-same allegations is contrary to the provisions of the Act as well as the rules framed thereunder. In support of his submissions, reliance has been placed on the following decisions:

- (1) Allauddin Charities and Zakath Wakf Vs. Hameed Ali and Others,
- (2) Sannepalli Nageswar Rao and Another Vs. District Collector, Khammam and Others,
- (3) Madrasa Ahle Sunnath Bahrul Uloom Vs. State of Andhra Pradesh and Others,
- (4) Zaheer Ahmed Khan Vs. Chief Executive Officer, A.P. State Wakf Board and Others,
- (5) Intezami Committee Mazid E. Osmania v. A.P. State Wakf Board 1996 (2) ALD 661
- (6) Md. Saleem Ur Rahman Vs. A.P. State Wakf Board and Others,

24. Learned Standing Counsel for Wakf Board appearing for the 2nd respondent submits that the question of following the procedure laid down under Sections 70 and 71 of the Act and Rule 24 of the Rules, 2000, would arise only if the proceedings relate to removal of Mutawali u/s 64(1) of the Act, but not in a case of conducting enquiry on the allegations of mis-management of the affairs of the Wakf. He would further submit that the services of earlier enquiry officer came to be terminated even before submitting the enquiry report and it necessitated the

appointment of Mr. Munwar Ali as the enquiry officer on 08.12.2008.

25. Though the third respondent pleaded that Sri Shaik Shamshuddin conducted enquiry and filed report, no material has been placed on record to substantiate the same. Therefore, the contention advanced by the 3rd respondent that Mr. Munwar Ali cannot be appointed as enquiry officer for the self same enquiry has no merit.

26. It is not in dispute that the petitioner has statutory remedy as provided u/s 83(1) of the Act to approach the Tribunal constituted under the Act for redressal of his grievance. However, availability of statutory remedy is not a bar in case of where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. None of the above three exceptional circumstances is made out by the petitioner to avoid the statutory remedy provided to him. It is well settled that before a Writ Court exercises its public law jurisdiction, it would insist, as a general rule, that alternative remedies available under the statutes be first taken recourse to unless strong reasons exist therefor. Therefore, the writ petition filed by the petitioner questioning the appointment of the 3rd respondent as Muthawalli of Jamia Masjid without availing the statutory remedy is not maintainable.

27. Coming to the writ petition filed by the 3rd respondent i.e., W.P. No. 18278 of 2010 questioning the enquiry report, the principal contention is that the application presented by the petitioner is not in accordance with the Rule 24(1) of the Rules, 2000. The issue is no more res integra in view of the decision of this Court in K.M. Safiullah Vs. A.P. State Wakf Board and Others, , wherein it has been held that the question of following the procedure laid down under Sections 70 and 71 and Rule 24 of the Rules, 2000, would arise only if the proceedings relate to removal of the Mutawalli u/s 64(1) of the Act, and not in case of enquiries constituted on the complaints of mis-management of the affairs of the wakf by the Mutawalli. Since the enquiry report is yet to be accepted by the Board, it is too early to examine the validity of the findings recorded by the enquiry officer. The 3rd respondent (petitioner in W.P. No. 18278 of 2010) has a right to make written submissions on the enquiry report. The Board has to necessarily consider the written submissions before accepting the enquiry report. With the above observation, W.P. No. 18278 of 2010 filed by the 3rd respondent can be disposed of.

28. Since the Wakf Board has to consider the enquiry report after receipt of the written submissions of the 3rd respondent (petitioner in W.P. No. 18278 of 2010), the relief sought for in W.P. No. 19379 of 2010 cannot be allowed. In the result, W.P. No. 23065 of 2009 is disposed of reserving liberty to the petitioner to avail the statutory remedy provided u/s 83(1) of the Act. No costs.

W.P. No. 18278 of 2010 is disposed of reserving liberty to the petitioner to make

written submissions on the enquiry report and thereupon, the Wakf Board has to consider the said written submissions and pass appropriate orders. No costs.

W.P. No. 19379 of 2010 is dismissed. No costs.