

(2014) 03 KAR CK 0028

In the Karnataka High Court

Case No : Writ Appeal Nos. 237, 238, 296 and 297/2014

Moulana Syed Mohammed Ibrahim

APPELLANT

Vs

The State of Karnataka

RESPONDENT

Date of Decision : 28-03-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Waqf Act, 1995 — Section 14, 14(1), 14(1)(c), 14(9), 15

Citation : (2014) 3 AKR 346 : (2014) ILR 2661 : (2014) 6 KarLJ 408 : (2014) 3 KCCR 2440

Hon'ble Judges : D.H. Waghela, C.J.; B.V. Nagarathna, J

Bench : Division Bench

Advocate : Prabhuling K. Navadgi, Poonam Patil, in Writ Appeal Nos. 237 and 297/2014, Sri M.R. Naik, Sr. Counsel and Sri. Syed Imran, Advocate in Writ Appeal Nos. 238 and 296/2014, Advocate for the Appellant; A.S. Ponnanna, PRL. GA for R. 1 and 2, Sri. D.N. Nanjunda Reddy, Sr. Counsel, Sri. B.A. Belliappa, Advocate for C/R-6 in Writ Appeal Nos. 237 and 297/2014 and for C/R7 in Writ Appeal Nos. 238 and 296/2014 and Smt. S.R. Anuradha, Advocate for R3 in Writ Appeal Nos. 238 and 296/2014, Advocate for the Respondent

Final Decision : Partly Allowed

Judgement

B.V. Nagarathna, J.—These appeals arise out of the order of learned Single Judge dated 08.01.2014 passed in WP Nos. 43392-43393/2011. In those writ petitions, the original petitioners had challenged appointment and nomination of respondent Nos. 4 to 6 as members of the Karnataka State Board of Wakfs (for short "the Board") by Notification dated 20.08.2011 issued by the State of Karnataka, in exercise of powers conferred u/s 14(9) of the Wakf Act, 1995 (for short "the Act") read with Rule 32 of the Karnataka Wakf Rules, 1997 (for short "the Rules"). The appointment was for a period of five years as stipulated u/s 15 of the Act.

2. The petitions were initially filed as a public interest litigation. Preliminary objection with regard to maintainability of the petitions as a public interest

litigation was raised, and by order dated 13.03.2012 a Division Bench of this Court over-ruled that objection. Thereafter, by order dated 08.01.2013 another Division Bench of this Court held that any citizen could invoke the writ jurisdiction for a writ of quo warranto with regard to appointment to a public office in violation of the provisions, but also held that as the petitions pertained to only one particular section of the community and not public at large, the petition was not maintainable as a public interest litigation. In that view of the matter the petitions were ordered to be listed before learned Single Judge having roster. Thereafter, the petitions were heard by learned Single Judge and by the impugned order, the nominations of respondent Nos. 5 and 6 were invalidated. A direction was also issued to reconsider the names of respondent Nos. 5 and 6 under amended Section 14 of the Act, as during the pendency of petitions Amendment Act 27 of 2013 had come in to force. The said order is assailed in these petitions.

3. We have heard learned senior counsel and other counsel for the appellants and learned senior counsel assisted by other counsel for the respondents.

4. At the out set, it was submitted that learned Single Judge had quashed the nominations of respondent Nos. 5 and 6 based on his perusal of file bearing No. MWD 237 WES 2011 and that the said file which was submitted to learned Single Judge did not contain the file No. dated 20.08.2011 and therefore, learned Single Judge did not have an opportunity to consider the relevant material before quashing the nominations of respondent Nos. 5 and 6. It was also contended that when the petitions were filed as a public interest litigation and thereafter converted into private interest litigation, necessary amendments were not made by the petitioners. As a result, the petitioner was not entitled to any relief. It was also pointed out that another WP No. 33441/2011 was also filed by the original petitioners and the disposal of that petition on 11.12.2013 was not brought to the notice of learned Single Judge who passed the impugned order. The next contention was that the nomination being for a period of five years from 20.08.2011 and with long passage of time, at this stage the nominations could not have been quashed. It was, lastly, contended that learned Single Judge, while quashing the nominations, could not have directed consideration of the case of respondent Nos. 5 and 6 under amended Section 14 of the Act, as the amended provision would not apply to respondent Nos. 5 and 6, and therefore consideration under the amended provisions is a nullity. On the basis of these contentions, learned counsel for the appellants sought setting aside of the impugned order.

5. Per contra, learned senior counsel appearing for the original petitioners and learned Principal Government Advocate appearing for the State, supported the order of learned Single Judge and contended that there is no merit in these appeals.

6. The entire controversy centers on the constitution and composition of the Board. Section 14 of the Act which relates to the nomination of respondent Nos.

5 and 6 to the Board reads as under;

14. Composition of Board.

(1) The Board for a State and the National Capital Territory of Delhi shall consist of-

(a) a Chairperson;

(b) one and not more than two members, as the State Government may think fit, to be elected from each of the electoral colleges consisting of-

(i) xxx xxx xxx

(ii) xxx xxx xxx

(iii) Muslim Members of the Bar Council of the State, and

(iv) xxx xxx xxx

(c) one and not more than two members to be nominated by the State Government representing eminent Muslim organisations;

(d) one and not more than two members to be nominated by the State Government, each from recognised scholars in Islamic Theology;

xxx xxx xxx xxx xxx xxx

(5) Where there are Shia wakfs but no separate Shia Wakfs Board exists, at least one of the members from the categories listed in sub-section (1), shall be a Shia Muslim.

xxx xxx xxx xxx xxx xxx

(8) Whenever the Board is constituted or re-constituted, the members of the Board present at a meeting convened for the purpose shall elect one from amongst themselves as the Chairperson of the Board.

(9) The members of the Board shall be appointed by, the State Government by notification in the Official Gazette.

7. u/s 15 of the Act, the nomination is for a period of five years. Sub-section (9) of Section 14 states that the members of the Board shall be appointed by the state Government by notification in the Official Gazette. Under sub-section (1) of Section 14 as far as respondent Nos. 5 and 6 are concerned, they have been nominated under clauses (c) and (d). Respondent No. 5 has been nominated as a person representing eminent Muslim organisations, while respondent No. 6 has been nominated by the State Government as being a recognized scholar in Islamic Theology. Having regard to the contents of Section 14, it is noted that the nominations have to be made by the State Government and in the instant case, it is made by the Chief Minister, which has to be by exercising his administrative discretion.

8. In the matter of exercise of discretion, where there is improper exercise of discretion, law has classified it as one, being an abuse of discretion and two, non-exercise of discretion. Where there is exercise of power by taking into consideration irrelevant consideration or leaving out relevant consideration; where there is a mixed consideration; abuse of discretion is stated to have taken place. Sometimes there can be a mala fide exercise of power, use of power for a collateral purpose or colorable exercise of power. In the matter of non-exercise of discretion, there can be cases where the authority which has power to exercise discretion abdicates its authority or it acts under the dictation of someone else or under influence of some other authority who is not concerned with the subject or there can be a simple case of total lack of exercise of discretion. In such an event, exercise of discretion is illegal which can be challenged successfully by way of judicial review. Having regard to the material placed on record as well as on perusal of original records submitted by learned Principal Government Advocate the validity of nomination of respondent Nos. 5 and 6 could be examined.

9. We have perused the original records in this case, as has been done by learned Single Judge. In paragraph 25 of the impugned judgment, learned Single Judge has noted that it was on the recommendation of the then State President of Bharatiya Janata Party - Karnataka, made by a letter dated 19.08.2011 to the then Hon"ble Chief Minister, that five persons were nominated to the Board including respondent Nos. 5 and 6. It was only on that basis that on the very next day i.e. 20.08.2011, the Notification was issued. Therefore, learned Single Judge has come to the conclusion in the instant case that there was neither independent exercise of discretion nor an independent application of mind by the then Chief Minister and that the nominations made were illegal.

10. We have perused those documents and in order to demonstrate the said aspects, it would be useful to extract the letter dated 19.08.2011 written by Sri. K.S. Eshwarappa, State President, Bharatiya Janata Party - Karnataka to the then Chief Minister, Sri. D.V. Sadananda Gowda.

The English translation is as under:

That letter was written on 19.08.2011 by way of a recommendation made to the Chief Minister. On the very next date i.e. 20.08.2011, impugned Notification was issued on the basis of a note-"Tippani" which is numbered as and which is part of the original file perused by us.

11. On a comparison of letter dated 19.08.2011, which is stated to be in the form of a recommendation and the note (Tippani) dated 20.08.2011, as well as the impugned notification which was issued on the very same day, as per the notings seen in the file No. MWD 237 WES 2011 particularly noting Nos. 66 to 76, it can be inferred that the recommendation made by letter dated 19.08.2011 was the basis for issuance of the impugned notification on the very next day. The note which is called as "Tippani" does not speak of any other material which has

been considered by the then Chief Minister before directing issuance of the Notification while making nominations of respondent Nos. 5 and 6. Having regard to the aforesaid material, we find that in the instant case there has been a total non-exercise of discretion by the then Chief Minister before the nominations of respondent Nos. 5 and 6 were made. Therefore, learned Single Judge was right in quashing those nominations on the aforesaid basis. An authority does not exercise discretion when it passes an order mechanically and without application of mind to the facts and circumstances before it. Such a situation arises when the authority relies on other persons and fails to take a view in the matter. In such an event, the authority entrusted with discretion acts in a casual manner and without due care and caution while exercising discretion. When there is non-application of mind, the decision is vitiated. Where a decision must be taken on the subject matter as per government policy, there must be an application of mind to the pertinent matters. Sometimes an authority in whom discretion is vested would leave it to be exercised by subordinates and others not connected with the exercise of discretion. Such a situation is called abdication of function. This happens when the authority entrusted with discretion acts mechanically on the recommendation made by someone else. This is precisely what has happened in the instant case.

12. However, learned senior counsel appearing for the appellants has brought to our notice the judgment of Division Bench of this Court in the case of *Mir Saifulla and another v. State of Karnataka and others* in WP Nos. 34002-34003/1998 and connected matters disposed of on 01.06.2001. In that case also, the controversy was with regard to respondent Nos. 5 and 6 therein being recognized scholars in Islamic theology who were sought to be nominated to the Wakf Board. The Division Bench at paragraph No. 7 noted as follows;

7. Before entering into a discussion on the crucial aspects of controversy, it is necessary to highlight one significant aspect. It does not appear from the record that the state Government had obtained any material to satisfy itself that the objective criteria laid down in clauses (c) and (d) of sub-section (1) of Section 14 have been fulfilled by the respondents concerned. The extreme contention of the State Government that nomination could be made under clauses (c) and (d) on the basis of pure subjective satisfaction cannot be accepted. It is not for the State Government to pick and choose anyone on the basis of hearsay or guesswork as representatives of eminent Muslim organisations and recognised scholars in Islamic Theology. In our view such an absolute power is not confided to the State Government. The State Government must be reasonably satisfied that the Member sought to be nominated is a representative of an eminent Muslim organization in the case of clause (c) and in the case of clause (D) that the proposed Member is a recognised scholar in Islamic Theology. The satisfaction in this regard cannot be reached at the whim and fancy of the State Government and without ascertainment of material facts. When an issue is raised, the State Government must be able to demonstrate before the court that there was material before it to treat the proposed appointees as falling within

clauses (c) and (d). The adequacy or sufficiency of the material, which formed the basis for reaching the satisfaction as to the fulfillment of the pre-qualification criteria laid down in clauses (c) and (d), cannot of course be gone into by the Court in exercise of its power of judicial review under Article 226. But, where there is no material at all or where the material available to the State Government does not reasonably or even prima facie point to the conclusion that the proposed nominees fall within the description contained in clauses (c) and (d), the State Government cannot nominate such persons under clauses (c) and (d). In such a case, the resort to power u/s 14(9) read with Section 14(1)(c) and (d) would be arbitrary and vitiated by legal mala fides. The State Government cannot choose to exercise the power so as to virtually circumvent the requirement of the relevant clauses of Section 14(1) read with the other allied provisions. It is in this background, we have to view the legality and propriety of the orders passed by the State Government nominating respondents 3 to 6 to the State Board for Wakfs, as Members thereof. As already stated, there is no material on record on the basis of which the satisfaction could have been reached by the State Government. The only material which finds place in the record is the recommendation made by the two Members of the Council of Ministers and the Chairman of the State Minorities Commission, which was sent to the Hon'ble Chief Minister through a letter dated 25.5.1998 addressed by the Minister for Small Scale Industries and the same was approved by the Hon'ble Chief Minister. The names of Members to be nominated from each category mentioned in Section 14(1) were specified therein. Under the category of two eminent Muslim Organisations, the name of the third respondent, his address and designation as Vice-Chairman of Kallerawaan Charitable Trust, Gulbarga, has been mentioned. So also, the fourth respondent's name, address and designation, i.e., Hon. Secretary, Millat Education Society, Davanagere, has been mentioned. Under the category of recognised scholars in Islamic Theology (Sunni and Shia), the names of Respondents 5 and 6 and their addresses are mentioned. No other details are found in the letter. No reports were called for from the concerned Authorities and no other enquiries were made to ascertain whether the Members whose names were recommended satisfied the criteria laid down in clauses (c) and (d) the power was thus exercised in a casual manner merely on the basis of recommendation of the aforementioned persons. A bald recommendation unsubstantiated by any material in support thereof and not followed by any verification should not have been the basis for the impugned Government Order. In the absence of at least prima facie material to enable the Government to record its satisfaction vis-?-vis the objective criteria laid down in the Section, the impugned decision cannot be justified in law. In our considered view, it is a clear case of non-application of mind to the relevant criteria laid down in clauses (c) and (d) of Section 14(1) and an instance of arbitrary exercise of statutory power vested with the Government. In the normal course, we would have directed the entire process of appointment of Members from categories (c) and (d) to be reopened and a fresh exercise to be undertaken to nominate the Members. But, on account of long passage of time from the date of appointment, we are not

inclined to adopt that course. Instead the more appropriate and just course would be to examine whether on the basis of the pleadings and the material placed before the Court, there is a reasonable ground to form the opinion that the respondents concerned fall within the description contained in clauses (c) and (d) as the case may be, of Section 14(1). If there is no material before the Court which could induce a reasonable body of persons to reach the satisfaction as regards the fulfillment of the criteria laid down in clauses (c) and (d) or if a reasonable doubt is created as regards the reliability of such material, the appropriate course would be to set aside the appointment and to direct reconsideration of the matter. The jurisdiction vested in the Court under Article 226 of the Constitution being discretionary and meant to advance the cause of justice is flexible enough to adopt such a course contemplated by this Court.

13. However, the Division Bench stated in that case that in the normal course, the Court would not have undertaken an exercise to consider as to whether there were supporting material placed to come to a conclusion that respondent Nos. 5 and 6 therein were indeed recognized scholars in Islamic Theology. In that case, exercising jurisdiction under Article 226 of the Constitution, the Division Bench went into that question and ultimately allowed the writ petitions. But here in the instant case, the facts are different. The controversy is not as to whether respondent Nos. 5 and 6 possessed the qualifications or were eligible as prescribed u/s 14 or not. It is the manner in which discretion has been exercised by the administrative authority that was considered by learned Single Judge. We find that learned Single Judge has rightly come to the conclusion that there was an abdication in the exercise of discretion by the authority. Learned Single Judge has not gone into the question as to whether there was any material on which the impugned nomination could have been sustained or whether the Chief Minister had derived a subjective satisfaction in a right manner or not on the available material on the eligibility of respondent Nos. 5 and 6 to be nominated to the Board. The entire controversy focused on the fact that the then Chief Minister simply accepted the recommendation made by the then Party President by his letter dated 19.08.2011 which did not make apparent any consideration of the names from the point of view of their eligibility to be nominated to the Board and without going into any other aspect of the matter, had issued the notification. In that view of the matter, we do not think that this Court could undertake an exercise of considering whether respondent Nos. 5 and 6 indeed had the qualification and eligibility to be nominated to the Board. The instant case is not whether the appointing authority had derived subjective satisfaction based on the available material. Rather it is a case of total non-application of mind by the then Chief Minister before making the impugned nomination. The nomination based on the recommendation of the then Party President is an instance of non-exercise of discretion by the Chief Minister who was the authority to nominate eligible persons on the Board. Therefore, that judgment is not applicable to the present case.

14. While dismissing the writ petition assailing the nomination made to the Board

in WP No. 22437/2005 by order dated 07.11.2005, the only observation made by another Division Bench is that the State Government must be presumed to have acted in a bona fide manner while nominating the members of the Board. In the instant case, such a presumption would not arise at all or even if it arose, it has been rebutted, from the records. Therefore, the order of learned Single Judge on these aspects of the matter would have to be affirmed.

15. One more contention that was raised on behalf of the appellant was with regard to contradiction in the directions issued by learned Single Judge in the operative portion of the order wherein it was stated that respondent No. 1, i.e. State of Karnataka had to consider the name of respondent Nos. 5 and 6 afresh. While doing so, learned Single Judge directed that it had to be in terms of amended Section 14 as, by then, Amendment Act 27/2013 had been enforced and Section 14 had been amended. The contention is that if the amended provision is to be applied, then respondent No. 5 cannot be considered at all and that in place of respondent No. 6, a fresh nomination has been issued about which we do not express any opinion in this matter. It is also contended that since the direction has been given pursuant to the quashing of the nominations of respondent Nos. 5 and 6, the provision as prevailed when the nominations were initially made must be applied. There is considerable force in that contention and therefore, we modify the operative portion of the impugned order of learned Single Judge by directing respondent No. 1 to consider the nomination of respondent No. 5 in terms of Section 14 as it stood prior to the amendment made in the year 2013. It is needless to observe that when such a consideration is made, it should be in accordance with law. Thus, the appeals are allowed in part to the extent mentioned supra. Parties to bear their respective cost.