(2004) 07 MAD CK 0001

In the Madras High Court

Case No : Writ Petition No. 23867 of 2002

O.M.S. Shaik Uduman Aalim Sahib — APPELLANT

Vs

The Tamil Nadu Wakf Board — RESPONDENT

Date of Decision : 21-07-2004

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2004) 07 MAD CK 0001

Hon'ble Judges : K.P. Sivasubramaniam, J

Bench : Single Bench

Advocate : G. Masilamani, for Mr. Mohamed Habeeb Raja, for the Appellant; Thyagarajan, for Mr. S.Y. Masood for R4 Mr. Zafarullah Khan for RR 1 to 3, for the Respondent

Final Decision : Allowed

Judgement

K.P. Sivasubramaniam, J.—The petitioner prays for Certiorarified Mandamus to call for the records of the first respondent''s order dated

23.4.2002 made in item No. 13 of 2002, to quash the same and to direct the first respondent Wakf Board to pass orders u/s 64 of the Wakf Act

1995 pursuant to the admission of the charges made by the fourth respondent in his reply dated 7.2.2002 to the notice dated 21.12.2001. The

fourth respondent is functioning as the Muthawalli of Naina Mohamed Peria Kutba Pallivasal, Kadayanallur by virtue of the order of the Wakf

Board dated 9.2.1985. There were certain specific complaints against him before the Wakf Board alleging mismanagement and misappropriation

of the funds and properties belonging to the Wakf. An enquiry was ordered to be conducted on the basis of a report of the third respondent dated

27.10.2001 finding that there were sufficient materials to initiate action against the fourth respondent. Ten charges were framed against the fourth respondent in and by the show cause notice dated 21.12.2001.

2. The fourth respondent submitted his explanation what is described in the Writ Petition as admission of almost all the charges. Notice of enquiry was given to both the petitioner and the fourth respondent to be heard on 29.1.2002. Subsequently, an enquiry was conducted and the Wakf Board by its order dated 23.4.2002 dismissed the complaint after observing that the Board reprimands and warns the fourth respondent to regulate his activities in accordance with the Wakf Act and Rules in order to ensure that there was no further allegation as regards the style and management of the Wakf by the fourth respondent and that with the reprimand, the Board closed the matter and dismissed the petition.

3. Aggrieved by the said order, the petitioner has approached this court contending that the action of the Board in letting off the fourth respondent even in the face of his own admissions was not in the interest of Wakf.

4. To appreciate the said contention and the denials thereon by the respondents, it is necessary to extract the charges and the explanation given by the fourth respondent. The following are the charges framed against him.

1) That the 4th Respondent has been selling the usufructs of the coconut trees standing on the Wakf land directly without properly leasing it out.

2) That the 4th Respondent has been keeping thousand of Rupees as cash in his hand without opening Bank Accounts in the Name of the Wakf.

3) That he has not shown Friday Jumma Collections in the Statement of Account of the Mosque.

4) That he has failed to maintain Statement of accounts for Ramzan Nonbu Kami contribution Receipts and expenses ect.,.

5) That he has been also acting as Pesh Imam and getting a sum of Rs. 500/- towards salary from the income of the Wakf.

6) That he has constructed three rooms on the Wakf Land without obtaining prior permission from the Wakf Board.

7) That he has not brought the income from Quarbani goat skins into the Mosque Statement of accounts.

8) That he has not submitted the Statement of Account for the year from 1972-73 to 77-78, 1980-81 to 1983-84, 1991-92, 1994-95 and 1998-99 to the Tamil Nadu Wakf Board as required u/s 46 of the Wakf Act

1995.

9) That he has failed to submit Budget Estimate for the year 2001 -2002 as required u/s 44 of the wakf Act.

10) That he had failed to remit contribution amounting to Rs. 1,825/- as required u/s 72 of the Wakf Act 1995.

5. The gist of the reply by the fourth respondent to the charges is as follows, charge-wise:

(i) As the coconut trees are scattered and situated in the grave yard, no one comes forward to take the trees on lease. The practice is only to pluck

coconuts in the presence of Jamathadars and sell the same in the market. The sales are accounted for. If the Board is of the opinion that the trees

have to be leased in auction, he is ready to do so.

(ii) There is no income for the Wakf except the meagre income by the Jumma Hundi Collection and donations from the worshippers. Though bank

account was opened, it was not operated since the income was very low. The total extent of the agricultural land was very small and the rent was

being collected by the petitioner himself. The respondent does not keep any cash in hand.

(iii) The Jumma Collection is also very low. The said collections are made to help the poor unmarried girls and as the amount is very low, they have

not been shown in the accounts.

(iv) The Wakf has nothing to do with the collection and the expenses relating to the Ramjan Nombu as it is done only by the Jamathadars and not

by the Wakf.

(v) He was acting as Pesh Imam even before he assumed charge as Muthawalli and he continued as such after becoming Muthawalli and he was

receiving only Rs. 500/- which was very much less than what is usually paid to any one who may be appointed as Pesh Imam.

(vi) Rooms have not been constructed with the Wakf funds but only by the donors at their own cost.

(vii) The Wakf does not derive any income from Qurbani goat skins and it is also collected only by Jamathadars.

(viii)The respondent was appointed only in 1985 and therefore, he was not responsible for the accounts prior to 1985. From 1986, he has been

submitting accounts.

(ix) Budget estimate for the year 2000-2001 was sent through the Wakf Inspector.

(x) The contribution of Rs. 1,825/- has already been paid.

6. The following are the charge-wise findings and conclusions by the Wakf Board after enquiry.

(i) No evidence to show any misappropriation or shortfall in the sale of coconuts.

(ii & iii) Though bank account has been opened, it was not being operated as the income of the Wakf depends on the Jumma Hundi Collection.

No evidence has been shown to establish that the collection had not been accounted for.

(iv) Ramjan Nombu Kanji is distributed only by the Jamathadars and not by the respondents.

(v) The Wakf does not derive large income and hence the respondent has been carrying out the religious duties of Pesh Imam by drawing a salary

of Rs. 50C/-. The Muthawalli can be advised to refrain from drawing any amount but to remove the Muthawalli for drawing very small amount

would be excessive and harsh.

(vi) Though constructions have been put up without prior permission which is illegal, the conduct does not warrant removal.

(vii) No evidence of sale of any Qurbani goat skins by the respondent.

(viii, ix & x) The respondent became Muthawalli only in the year 1986 and Area Committee states that the accounts were available and the

contributions had also been paid.

7. The Board has finally concluded that the petitioner and the fourth respondent are brothers and the complaint appears to be due to conflict of ego

between themselves and that the Board chose to reprimand and warn the respondent to regulate his activities in accordance with the Wakf Act and

the Rules and also see that there was no room for any further allegation as regards the style and management of the wakf by the respondent. It is

further stated that with the said reprimand the Board chose to close the matter and dismiss the petition as unsustainable.

8. Mr. G. Masilamani, learned Senior Counsel appearing for the petitioner contends that the explanation of the respondent himself amounted to

clear admission of most of the charges. Non-operation of the bank accounts, failure to account Hundi collections and donations are very serious in nature. Those items are also not brought into the accounts which are sufficient to hold that the respondent was misappropirating and he was unfit to

hold the post of Muthawalli. The fact that the accounts had not been submitted to the authorities periodically is also proved by a series of remarks

by the audit. Reference was made to the audit reports and the accounts submitted by the respondent to emphasise that the income does not include

either Hundi Collections or donations. It is further submitted that the Wakf Board had unfortunately chosen to gloss over each of he misconduct as

if they were very minor and insignificant, instead of enforcing proper administration of the Wakf.

9. Mr. R. Thyagarajan, learned Senior Counsel for the fourth respondent contends that the very complaint is the result of personal ill will of the

petitioner who is none other than the brother of the fourth respondent. In fact, the agricultural land of the Wakf was held on lease by the petitioner

himself and he was not rendering proper accounts to the Wakf, thus, resulting in loss of income to the Wakf and thus forcing the respondent to

move the Civil Court for recovery of the dues from the petitioner. The petitioner aggrieved by the legitimate action taken by the respondent, had

chosen to initiate frivolous complaints against the fourth respondent.

10. On the merits of the allegations, learned Senior Counsel contends that it was not possible to operate bank accounts as the income was very

small. The Hundi collections as well as the donations were very negligible and then and there distributed to the needy and poor in the presence of

Jamathadars and the Jamathadars had no complaints against the administration. As regards the coconut trees, no one was prepared to take them

on lease as they were in the midst of grave yard. There was no such lease of the coconut trees even before the respondent took over as

Muthawalli. With reference to the allegation of the receiving salary of Rs. 500/- as Pesh Imam, learned Senior Counsel contends that the

respondent was Pesh Imam even before he became Muthawalli and he continued to discharge the functions of Pesh Imam on lesser pay than what

was usually paid to the regularly employed Pesh Imam. There was no loss to the Wakf and the Wakf stood only to gain. As regards the accounts,

the Wakf was satisfied with the maintenance of the Accounts.

11. Learned Senior Counsel further contends that the Act provides for an

effective statutory remedy of Tribunal presided over by a Subordinate

Judge u/s 83 of the Wakf Act, 1995 and as the allegations and counter allegations relate to disputed questions of fact, the Writ Petition was liable

to be dismissed as not maintainable. Reliance is placed on the Judgment of a Division Bench of this Court in W.A. No. 1439 of 2002 dated

7.5.2002 -Sahni Hameed vs. The Tamil Nadu Wakf Board and others.

12. Learned Senior Counsel appearing for the Wakf Board while endorsing and adopting the submissions made by the learned Senior Counsel for

the respondent, also contends that the Wakf Board had taken note of the over all impact of the allegations which are only procedural in character

and did not pertain to any serious misconduct of moral turpitude or any positive evidence of misappropriation. As regards the receipt of Rs. 500/-

as remuneration, the fourth respondent had been directed not to do so in future. He would also deny the contention of the learned Senior Counsel

for the petitioner that the Board had no jurisdiction to award the punishment of reprimand or warning and contends that in terms of Section 70 of

the Act, the Board has ""the power to take such action thereon as it thinks fit"" which would include warning in cases where severe punishment was

not warranted.

13. I have considered the submissions of both sides. It is rather perplexing to see that the Wakf Board is not anxious to weed out

Muthawallies/Trustees who do not keep up and maintain the basic standards of duties and obligations of a trustee in respect of public properties

and instead adopt a soft attitude towards an erring trustee/Muthavalli.

14. Here is a case where the Muthawalli is accused of misappropriation, not maintaining proper accounts, not submitting the annual accounts to the

proper authority etc.,. The explanation submitted by the Muthawalli himself clearly admits some of the allegations and the findings of the Wakf

Board themselves endorse the position that the respondent was not discharging the duties in a proper manner. Though there are about ten charges

and some of the charges have been denied, the following charges have been held by the Wakf Board itself as substantiated. In respect of some

other charges, the conclusions of the Board cannot be sustained. It is sufficient to deal with such of those charges which are amply substantiated.

15. As regards the second charge, the admitted facts disclose that though the

bank account was opened, it was not operated by the respondent.

The excuse ,which is now given, namely, that the income was very low and therefore, the bank account was not operated is not at all acceptable.

For every year, there is considerable income under various items spread over for a period of 12 months. It is not a healthy practice for the trustee

to retain money in his hands even if it is a small amount without depositing them in the bank in the account of the Wakf. The said conduct on the

part of the Muthavalli is to say the least not responsible and reflects the casual manner with which the funds of the Wakf are being handled.

16. As regards the Charge No. 3 regarding no accounting of Hundi Collection, the explanation offered is that the amount was very low and it was

distributed to poor girls then and there and that in future, he would maintain proper accounts. That this explanation should have been accepted by

the Wakf Board is rather shocking. A perusal of accounts show that there is absolutely no reference to the Hundi Collection in the income

statement. It is rather very unfortunate and a matter of serious regret that the Board should have stated that at the time when the inspection was

carried out, the jumma collections had been accounted for, thereby ignoring the very admission of the Muthawalli himself. I have also perused the

statement of income and expenditure filed in the typed set of papers for the years 1986-1987 to 1999-2000 and there is absolutely no reference to

the Hundi collections or the donations.

17. As regards the charge No. 5, the action of the Muthawalli in appointing himself as Pesh Imam and receiving Rs. 500/- as salary is again

opposed to the basic tenets of any one in the position of a trustee of a public institution/Trust. The reason that otherwise, the Wakf has to pay a

heavy salary for appointing any other Pesh Imam is stated only to be rejected. The Board though realised that the action of the Muthawalli was

highly irregular and indefensible, would however state that he could be advised to refrain from drawing any benefit out of the Wakf. Such

observation itself amounts to agreeing that the action of the Muthawalli was improper. The sum of Rs. 500/- is not a small amount for a Wakf,

which is stated to be receiving only a very low and meagre income, not even requiring accounting of hundi and donation collections and unworthy

of being deposited in the bank.

18. As regards the Charge No. 6, it is admitted that constructions have been put up without permission of the appropriate authority.

19. Charge Nos. 8, 9 and 10 relating to the accounts, were dealt with together by the Wakf Board and disposed of with the only observation that

the Muthawalli had taken over only in 1986 and that the inspection discloses that the contribution had been paid. Thus, the charges have not been

considered with the seriousness with which they have to be dealt with. As regards the charge No. 8 relating to non-submission of accounts from

1972 to 1999, it is true that the respondent took over only in 1986. But the fact remains that he did not send the accounts for the periods after he

had taken over also. Several such irregularities have been pointed out in the respective audit report for each year. In the report relating to the year

1988-1989 it is stated that the budget proposals have not been sent for prior approval and that the list of employees have not been approved. No

agreement has been executed for the lease of agricultural lands and that the other records as required under statute are not maintained. In the

report for the year 1994-1995 also, it is stated that the budget proposals have not been sent for approval and a sum of Rs. 27,000/- towards

paddy seeds have not been recovered. It is further stated that the statement of assets and the accounts of income have not been furnished and

approval for the appointment of the staff have not been obtained. In the report relating to the period from 1988 to 1999, it is stated that the very

same defects as pointed out in the earlier years continue to subsist and have not been rectified and that no steps have been taken in maintaining the

records and accounts as required.

20. Inspite of those defects having been pointed out in the audit report, during all the years, the Wakf Board had chosen to ignore the same. The

facts already stated above will also show that even though several defects have been pointed out even in the report for the year 1988-89, the

fourth respondent did not bother to rectify the same and even, thereafter, as could be seen from the report relating to 1994-1995 and 1998 to

1999. The fact that the fourth respondent has explained under charge No. 10 that the collection had been subsequently deposited by him, cannot

absolve the seriousness of his misconduct. A perusal of the above analysis shows that the affairs of the Wakf have not been conducted in the manner in which a trust requires to be administered and that the fourth respondent is guilty of several series of misconducts, such as not maintaining

a bank account, retaining the funds of the Wakf with himself, not bringing into account the collection of donations and Hundi, receiving

remuneration himself as Pesh Imam, putting up construction without the approval of the Board, not maintaining proper accounts and books inspite

of repeated objections by the audit etc... It is rather unfortunate that the Wakf Board, which should not spare any effort to weed out such persons

who are not only incompetent and more so persons mismanaging the Wakf properties and acting as Muthawallis, instead pleads for such persons

and characterizes every one of the misconduct as a minor misconduct and not warranting removal. Even some of the admitted charges such as

non-accounting of the hundi and donation collections and the defects pointed out in the Audit Report are glossed over and a wrong finding is given

as though accounts are available, which is contrary to even the admitted facts. The series of proved and admitted facts against the fourth

respondent renders him unfit to be continued as Muthawalli and the manner in which the Wakf Board had dealt with the issue amounts to clear

error on the face of record and failure to perform its statutory duties in a proper manner.

21. Both the learned counsel appearing for the respondents contended that an alternative remedy was provided u/s 83 of the Act and that the

above Writ Petition was not maintainable. It is true that, this Court would refuse to entertain and grant any relief to parties in the face of existence

of an alternative remedy. More so, when the alternative remedy thus constituted u/s 83 of the Act is a Tribunal presided over by a Judicial Officer.

But the admitted facts themselves and the peculiar facts and circumstances disclose that the decision of the Wakf Board is perverse and not at all

sustainable in the face of the very admissions by the fourth respondent. It would be an unnecessary exercise to drive the petitioner to go before the

Tribunal. The very explanations submitted by the fourth respondent are sufficient to hold that he cannot be continued as the Muthawalli and it

would be against the interest of Wakf to permit him to administer the Wakf. It is settled proposition that the existence of an alternative remedy is

not a bar for the jurisdiction of this Court under Article 226 of the Constitution of India but only a self-restraint which is not warranted in this case.

In appropriate cases, this Court exercises its power wherever the necessity to avail the alternative remedy is found to be unnecessary in the

circumstances of the case, and the Court is not expected to close its eyes even in a case of this type.

22. Learned Counsel representing both the respondents also contended that the very complaint by the petitioner was motivated and that in fact, the

agricultural properties belonging to the Wakf were held under the control of the petitioner himself and he was responsible for the non-collection of

the rental amount and that there are proceedings against him. Therefore, according to the learned counsel, the very complaint is motivated and the

conduct of the petitioner himself would render him unfit to question the authority of the fourth respondent. I am unable to sustain the said contention

also. No relief is being granted in favour of the petitioner and there is no prayer that the petitioner should be declared as Muthawalli. He is not a

rival contender and if there is any application from the petitioner to be appointed as Muthawalli. it is certainly open to the Wakf Board to consider

his claims on merits and not to appoint him on the basis of relevant facts and circumstances if he is found to be unfit to be appointed. The Wakf

should also pursue action before the Civil Court against him strictly if he is also guilty of any commission or omission. Assuming that he is a tainted

person, the Court cannot ignore and throw-out the complaint against the fourth respondent only on the ground that the petitioner is also unfit to be

a Muthavalli/Trustee. The administration of the trust has to be properly conducted and the Court as the ultimate guardian of public trusts, has to

bear in mind the ultimate benefit to the trust instead of ignoring the proved charges against the fourth respondent and letting him off to continue as

Muthawalli only on the ground that the petitioner is also alleged to be unfit to be a Muthawalli or that the complaint was motivated. The issue in this

Writ Petition is not as regards whether the petitioner is a good person or not. Therefore, I do not find any basis in the said objection also.

23. The power of the Wakf Board to act u/s 64 of Act 43 of 1995 is coupled with a duty to act and exercise its jurisdiction in a proper manner

and order the removal of the Muthavalli if he is guilty of any of the misconduct enlisted thereunder. Though a Muthavalli may not be classified as a

Trustee in the sense as generally understood, namely he may not enjoy the wider powers of a Trustee and has to act only with the permission of the

Board, the fiduciary nature of the functioning of a Muthavalli is no less onerous as that of a Trustee. He holds the position of a moral and legal head

of the Wakf and should act in a manner to inspire absolute confidence in the minds of donors, devotees etc.,. The proved charges indicate that he

is guilty of at least the misconduct, enlisted under Sub-Section (1) of Section 64 under clauses (i), (j) and (k). There is thus a failure on the part of

the Board to exercise the power vested on it u/s 64. With the result, this Writ Petition is allowed and the orders of the Wakf Board are set aside.

The Wakf Board is directed to pass orders u/s 64 removing the fourth respondent from the office of the Muthavalli and to take over the

administration of the Wakf by itself and carry on its administration forthwith and to take steps to appoint a new Muthavalli in accordance with law.

No costs.

