
(2011) 06 KL CK 0174
In the High Court Of Kerala
Case No : C.R.P. No's. 613 and 614 of 2010

Rasheed

APPELLANT

Vs

Khalid Haji

RESPONDENT

Date of Decision : 30-06-2011

Acts Referred:

Waqf Act, 1995 — Section 14, 32, 32(1), 32(2), 32(2)(c)

Citation : (2011) 3 KLT 421

Hon'ble Judges : R. Basant, J;K. Surendra Mohan, J

Bench : Division Bench

Advocate : T.H. Abdul Azeez and M. Isha, for the Appellant; A.A. Abul Hassan, Babu Karukapadath, M.A. Vaheeda Babu, Jagan George, K.A. Noushad and P.G. Pramod, for the Respondent

Final Decision : Allowed

Judgement

R. Basant, J.—Is the Wakf Board acting u/s 32 of the Wakf Act an adjudicatory body? Are the powers under Order 39 C.P.C available to the Wakf Board when it acts u/s 32? Can the Wakf Board pass interim orders while acting in exercise of its powers u/s 32? What are the powers of the Board when it acts u/s 32? These questions are raised for consideration before us.

2. These Revision Petitions are directed against a common order passed by the Wakf Tribunal. Proceedings were initiated before the Wakf Tribunal evidently u/s 83(2) of the Wakf Act challenging two separate orders passed by the Wakf Board. Both are described to be interim orders passed by the Wakf Board in an enquiry pending before it as E4-8360/07. The first impugned order dated 26/4/08 restrains the Respondents herein from conducting an election to the Managing Committee until further orders. The second impugned order restrains the 1st Respondent herein from convening a General Body Meeting on 22/6/08 and taking any decision in the said General Body Meeting. The Wakf Tribunal by the impugned orders set aside the orders.

3. A brief reference to vital facts may be essential. Thalassery Pazhaya Juma-th Palli is a very old Muslim Mosque in Thalassery. There is virtually no dispute that it is a Wakf. The Wakf owns properties. It is submitted at the Bar that the Wakf is of ancient origin and the affairs of the Wakf were being managed from time to time by responsible Muthavallies. While so, a society was formed under the Societies Registration Act. The Memorandum of Association and bye-laws of the society clearly reveal that the society was formed for the purpose of duly administering the Wakf. There is virtually no dispute before us that the Managing Committee of the society is now the Muthavaly in respect of the Wakf.

4. Enquiry u/s 70 of the Wakf Act is pending before the Wakf Board as E4-8360/07. We are not apprised of the details of the said enquiry. Suffice it to say that an enquiry u/s 70 of the Wakf Act is pending. It relates to the administration of the Wakf. It appears that a grievance was raised that persons eligible for membership in the society which is managing the Wakf are not being granted membership. The Petitioner herein claims to be a person professing Islam who hails from the locality. He has a permanent residence within the Mahal. According to him, he and many others like him are eligible for membership going by the bye laws of the society. They have not been given membership. Keeping all of them away from the society, the society was planning to conduct an election. The common Petitioner herein felt aggrieved by that conduct and therefore approached the Wakf Board with applications. The short grievance of the Petitioner is that persons eligible for membership are not being admitted to membership and the society is arbitrarily proceeding to conduct an election to the governing body. It was ncnce(sic) that an order - described to be an interim order was sought by the Petitioner initially by filing I.A. No. 61/08. In that application numbered as an I.A. in the pending proceedings u/s 70, the first impugned order was passed restraining the 1st Respondent from conducting election until further orders. While that order was in force, an attempt was made to convene a General Body Meeting and against that, I.A. No. 119/08 was filed by the very same Petitioner. That petition again was described as an I. A. in the main proceedings and the second impugned order restraining the first Defendant from convening a General Body meeting to be held on 22/6/08 was passed.

5. The first Respondent promptly approached the Wakf Tribunal with O.A. Nos. 11 and 12 of 2008 challenging these impugned orders. The Wakf Tribunal by the impugned common order took the view that the Wakf Board has no powers to pass any interim orders. It was further held that, at any rate, the impugned directions could not have been issued to a society registered under the Societies Registration Act.

6. Arguments have been advanced by the learned Counsel for the Petitioner, learned Counsel for the first Respondent and learned standing counsel for the second Respondent. On the arguments advanced, the following points arise for determination:

i. Whether the Wakf Board has powers to pass interim orders.

ii. Whether such interim orders could be issued to the society like the first Respondent registered under the Societies Registration Act.

iii. Whether the nature of directions issued - not to conduct election and not to hold a general body meeting, are. within the jurisdictional competence of the Wakf Board u/s 32 of the Wakf Act.

iv. Whether the impugned orders are justifiable on merits.

7. Before the Wakf Tribunal, an argument, it appears, was advanced that in passing the impugned orders, the Wakf Board has powers under 0.39 of the Code of Civil Procedure. The Wakf Tribunal negated that contention. Before us, initially there was an attempt to support the theory that the Wakf Board is an adjudicatory authority and that in exercise of such powers of adjudication, interim orders can also be passed to make the initial conferment of substantive powers real and meaningful.

8. In the course of arguments, after discussions, it is not now seriously urged that the Wakf Board exercising powers u/s 32 of the Wakf Act must be reckoned as an adjudicatory authority. We are hence not persuaded to go into the question whether the Wakf Board reckoned as an adjudicatory authority has jurisdictional competence to issue the interim orders.

9. In this context, we take note of the provisions of Section 32 of the Wakf Act as also Ss. 70 and 71 of the Wakf Act. We need not strain very much to conclude that the powers u/s 32 of the wakf Act are in the nature of powers of superintendence to ensure that the Wakfs under the Board are properly maintained, controlled and administered and the income thereof is duly applied to the objects and for purposes for which such Wakfs are created and intended.

10. There can thus be no dispute that the powers u/s 32 are in the nature of powers of superintendence and such powers of superintendence are to be invoked to ensure that inter alia the Wakfs are "properly maintained, controlled and administered". The powers u/s 32 cannot hence be described to be adjudicatory powers. The nature of the body that is Wakf Board constituted u/s 14 of the Act must also convey eloquently, that read along with Section 32, the powers are not adjudicatory in nature. It is true that Ss. 70 and 72 deal with the manner in which the enquiry relating to administration of Wakf is to be conducted and the nature of the powers of the Board while conducting such enquiry. Our attention has been drawn to Section 71(2) which clothes the Wakf Board with certain powers of civil court for the purpose of enforcing attendance of witnesses and production of documents. At any rate, there is nothing in Sections 14, 32, 70 or 71 which can persuade us to conclude that the powers u/s 32 are adjudicatory in nature or that any dispute/lis between the parties can be resolved by the Wakf Board by resorting to such powers. In this context, the nature of relief which a person can claim u/s 83 before the Wakf Tribunal against an order passed by the Wakf Board is also of crucial relevance. What is important is that relief is available to an aggrieved person not in the form of an appeal. But

option is given to challenge the order by filing an application u/s 83(2). We are unable to find any incidents of the power of an adjudicatory authority in the powers of the Board u/s 32 of the Act.

11. But it cannot be lost sight of that, basically the powers u/s 32 are in the nature of the powers of superintendence in administration. A reading of Section 32 clearly shows that Section 32 does not make any distinction between final orders and interim orders. When the situation demands, Section 32 certainly empowers the Wakf Board to pass interim orders as well as final orders. There is nothing in the language of Section 32 which can limit the powers of the Board to pass only final orders and not interim orders. The sweep of the powers u/s 32(1) as further explained by Section 32(2), according to us, can leave no semblance of doubt in our minds that interim as well as final directions can be issued by the Board u/s 32. The first contention raised that the Board does not have competence to issue interim orders like the one issued in the impugned orders cannot therefore succeed. This point is answered against the first Respondent.

12. We then come to the question as to what is the nature and quality of the jurisdiction u/s 32. What sort of orders can be passed and what sort of orders cannot be passed u/s 32. It will be apposite in this context to extract Section 32(1) as well as Section 32(2)(c) and (o). We extract Ss. 32(1), 32(2)(c) and (o).

32. Powers and functions of the Board.-- (1) Subject to any rules that may be made under this Act, the general superintendence of all Wakfs in a State shall vest in the Board established for the State; and it shall be the duty of the Board so to exercise its powers under this Act as to ensure that the Wakfs under its superintendence are properly maintained, controlled and administered and the income thereof is duly applied to the objects and for the purposes for which such Wakfs were created or intended:

Provided that in exercising its powers under this Act in respect of any Wakf, the Board shall act in conformity with the directions of the Wakf, the purposes of the Wakf and any usages or custom of the Wakf sanctioned by the school of Muslim law to which the Wakf belongs.

(2) Without prejudice to the generality of the foregoing power, the functions of the Board shall be-

(a) to maintain a record containing information relating to the origin, income, object and beneficiaries of every Wakf;

(b) to ensure that the income and other property of Wakfs are applied to the objects and for the purposes for which such Wakfs were intended or created;

(c) to give directions for the administration of Wakfs;

(d) to settle schemes of management for a Wakf:

Provided that no such settlement shall be made without giving the parties

affected an opportunity of being heard;

(e) to direct-

(i) the utilisation of the surplus income of a Wakf consistent with the objects of a Wakf;

(ii) in what manner the income of a Wakf, the objects of which are not evident from any written instrument, shall be utilized;

(iii) in any case where any object of Wakf has ceased to exist or has become incapable of achievement, that so much of the income of the Wakf as was previously applied to that object shall be applied to any other object, which shall be similar, or nearly similar to the original object or for the benefit of the poor or for the purpose of promotion of knowledge and learning in the Muslim Community:

Provided that no direction shall be given under this clause without giving the parties affected, an opportunity of being heard.

Explanation:-For the purposes of this clause, the powers of the Board shall be exercised-

(i) in the case of a Sunni Wakf, by the Sunni members of the Board only; and

(ii) in the case of a Shia Wakf, by the Shia members of the Board only;

Provided that where having regard to the number of the Sunni or Shia members in the Board and other circumstances, it appears to the Board that the power should not be exercised by such members only, it may co-opt such other Muslims being Sunni's or Shias, as the case may be, as it thinks fit, to be temporary members of the Board for exercising its powers under this clause;

(f) to scrutinise and approve the budgets submitted by mutawallis and to arrange for auditing of account of Wakfs:

(g) to appoint and remove mutawallis in accordance with the provisions of this Act;

(h) to take measures for the recovery of lost properties of any Wakf;

(i) to institute and defend suits and proceedings relating to Wakfs;

(j) to sanction any transfer of immovable property of a Wakf by way of sale, gift, mortgage, exchange or lease, in accordance with the provisions of this Act:

Provided that no such sanction shall be given unless at least two-thirds of the members of the Board vote in favour of such transaction;

(k) to administer the Wakf Fund;

(1) to call for such returns, statistics, accounts and other information from the mutawallis with respect to the Wakf property as the Board may, from time to

time, require;

(m) to inspect, or cause inspection of, Wakf properties, accounts, records or deeds and documents relating thereto;

(n) to investigate and determine the nature and extent of Wakf and Wakf property, and to cause, whenever necessary, a survey of such Wakf property;

(o) generally do all such acts as may be necessary for the control, maintenance and administration of Wakfs".

13. We repeat that the powers u/s 32 are powers of superintendence. Such powers are to be exercised primarily to ensure that the Wakfs are properly maintained, controlled and administered. This is very clear from Section 32(I). S. 32(2)(c) clearly suggests that the Wakf Board has powers to give directions for the administration of the Wakf. Sub-clause (o) shows that the Board has powers to do such acts as may be necessary for the control, maintenance and administration of the Wakf.

14. A contention is raised that the society is not the Wakf. It only administers the Wakf. A perusal of the Memorandum of Association and bye laws of the society reveals that primarily the society was formed for the maintenance, management and administration of the Wakf. Its very name is Thalassery Pazhaya Jamaath Pally Paripalana Sangam. The aims and objects available in the Memorandum of Association as also Clause-2 of the byelaws clearly reveal that the primary purpose of the society is to maintain, manage and administer the Wakf. The Wakf has to be properly nurtured. Its purposes have to be achieved and with the excess funds generated certain activities are also prescribed. The learned Counsel for the first Respondent attempts to advance an argument that the purpose of the society is not merely administration of the Wakf and it has other purposes also. This contention must fall to the ground when we carefully go through the aims and objects of the society as revealed from the Memorandum of Association and bye laws. The mere fact that out of the excess funds generated, certain other incidental activities like running a workshop (thozhilsala), library etc. is also authorised in the Memorandum and Byelaws, cannot in any way detract against the irrefutable interference that the purpose of the society that is only to maintain, manage and administer the Wakf. The learned Counsel for the first Respondent argues that even assuming that Section 32 would clothe the Board with powers to issue such directions that are necessary for the proper maintenance, control and administration of the Wakf, such powers cannot extend to issue of directions regarding the manner of functioning of the society, that is the mutawalli in this case. The counsel advances an argument that the Societies Registration Act is a self contained Code in itself and the Wakf Board invoking its powers u/s 32 cannot interfere with the administration of the society registered under the Societies Registration Act.

15. We find this attempt to distinguish between the powers of the Board to issue

directions for administration of the Wakf and powers to issue directions in administration of the Society/mutawalli to be artificial. We have already taken note of the fact that the society has come into existence only for the purpose of maintaining, managing and administering the Wakf. In that situation, a direction u/s 32 can certainly carry within its sweep, directions regarding proper conduct of the society vis a vis the affairs of the Wakf. We find no semblance of doubt that such direction can be issued to the society also. in respect of administration of the Wakf. Merely because the society is a body corporate having a seal and perpetual succession, it cannot contend and it cannot be held that the powers u/s 32 of the Wakf Act will not extend to the affairs of a society constituted primarily or solely for the purpose of administration of the Wakf. It is also important to note that no specific statutory provision is available under the Societies Registration Act to deal with the specific situation that is complained of in the instant case. The grievance is that members eligible for membership are not being admitted to membership and that election is proposed to be conducted without and before such persons are admitted to membership. The Societies Registration Act does not provide for any relief. The aggrieved party will necessarily have to go to a civil court with such a grievance, if it were held that the Wakf Board has no jurisdiction.

16. In these circumstances, we are of the opinion that the language of Sections 32(1) and (2) must persuade us to hold that powers to issue directions to the Wakf would include the power to issue directions to the society administering the Wakf also, if there be a need to issue any such directions. The status of the muttawalli as a society/committee registered under the Societies Registration Act cannot in these circumstances affect the powers of the Board u/s 32. The second question is thus answered in favour of the Petitioner.

17. Thirdly it is contended that the powers u/s 32 cannot clothe the Board with powers to issue directions as to when the General Body can be convened or when an election is to be held. The counsel's argument is that the Wakf Board cannot question the constitution of the body administering the Wakf.

18. The learned Counsel for the 1st Respondent relying on the decision in *Adam Aboobacker Sait v. Kerala Wakf Board* (1982 KLT 823) and *A.S.H. Sait Dharmasthapanam v. Kerala Wakf Board* (1976 KLT SN 19 Case No. 43) and *Kerala Wakf Board v. Alain A. Sait* (1987 (1) KLT 313) contends that the scope of directions to be issued u/s 32 is very limited. The learned Counsel for the Petitioner and the 2nd Respondent, on the contrary, contend that the powers of the Board are plenary relying on *Basheer Haji v. Kerala Wakf Board* (2007 (1) KLT 1039). The question to be considered hence is about the scope of the jurisdiction of the Wakf Board to issue directions u/s 32 of the Act.

19. To answer this question, we are of the opinion that the specific issue raised will have to be considered. We do not want to lay down any general proposition that directions u/s 32 can be issued in respect of all matters relating to the societies in all cases. The learned Counsel points out that several industrial

establishments have set apart certain properties to be used as mosques. The internal arrangements made by such industrial houses about the manner in which such land is to be administered etc. cannot be interfered with by the Wakf Board in exercise of its powers u/s 32, contends the learned Counsel. We need only mention that we have to specifically look at the nature of the directions and the objects which the directions have to achieve before deciding whether a particular direction issued by the Board u/s 32 is justified or not.

20. In the instant case as stated earlier, it is an ancient Wakf. Documents by which initial dedication has been made have not been laid before us. It is not disputed that Wakf exists and is now being administered by the society incorporated under the Memorandum of Association and bye laws. All muslims of the mahal are entitled to participate in the administration of the Wakf, it is urged. They have the right to elect members to the committee. The precise grievance raised is that eligible members are being denied membership in the society thereby frustrating the rights of Muslims in the mahal who are entitled to administer the Wakf as a member of the society under the Memorandum of Association and byelaws. As to who is entitled for membership, we have clear stipulation in bylaw- 4. All persons professing Islam subject to stipulations regarding age, payment of membership etc., are entitled to be members. The crux of the grievance in this case is that such persons eligible for membership of the society and consequently eligible to have a say in the administration of the Wakf are being denied their rights. It is to meet this situation of improper administration of the Wakf resulting from denial of membership to such eligible members of the community that grievance is raised soliciting issue of directions u/s 32. Considering the nature of the grievance and the nature of the directions, we are certainly of the opinion that the Board has powers in itself u/s 32 to ensure that membership is granted to all eligible Muslim beneficiaries within the mahal and election of the muttawalli is conducted only after such admission of members. Going by the nature of the grievance and the nature of the objects sought to be achieved, we are of the opinion that the Board certainly has powers u/s 32 to insist that eligible members are admitted to membership and a proper election is conducted in the society to elect the managing committee. The third point raised is also in these circumstances answered against the first Respondent.

21. Fourthly and lastly it is contended that the nature of the directions issued are not justifiable. We do not think it necessary to delve deeper into the question whether a direction to convene a general body on 22.6.2008 is valid or not. That date is already over and certainly a fresh meeting will have to be called. It is sufficient, if we rivet our pointed attention to the direction in the other impugned order that no election should be held.

22. We find merit in the contention of the learned Counsel for the first Respondent. Such a blanket direction unlimited to any point of time would be detrimental to the interests of the Wakf as the present managing committee will continue endlessly. We certainly find merit in that submission of the learned

Counsel for the first Respondent. We find that the submission by the counsel for the 1st Respondent is fair because if no election is conducted, it is the present managing committee which will continue for ever. The first Respondent wants a proper election to be conducted, so that a fresh managing committee can be elected. We are hence of the opinion that the blanket direction placing embargo on the conduct of election unlimited by time is not justified.

23. In this context our attention has been drawn to a subsequent direction issued by the Wakf Board which is stated be pending now in challenge before the Wakf Tribunal. A copy of that order of the Wakf Board dated 30th October, 2010 has been placed before us. Under that order, a returning officer is appointed by the Wakf Board with specific directions to him to do the following aims: i. Call for membership application, ii. To prepare the voters list, and iii. To schedule the election as per the bylaw.

24. Inasmuch as such a direction has been issued, we are of the opinion that the challenge raised against the impugned direction on the ground that it is general without specification of time pales into insignificance.

25. Though not satisfied that the general direction unlimited by time that no election should be conducted is proper, we are satisfied that issue of appropriate direction or modification of the impugned direction shall serve the ends of justice. We are satisfied that appropriate directions can be issued.

26. We are in these circumstances satisfied that these Revision Petitions can be allowed and appropriate further directions can be issued.

27. In the result:

a. These Revision Petitions are allowed.

b. The impugned orders of the Wakf Tribunal are set aside.

c. The order dated 26th April, 2008 passed by the Wakf Board is upheld with the modification that the first Respondent must forthwith:

(i) Consider all applications received for membership received by it on or before 15th August, 2011.

(ii) Take a decision on such application for membership within a period of one month from that date.

(iii) Prepare a voters list of eligible members to vote in the election to the managing committee within a further period of 30 days from the date of that decision.

(iv) Conduct election to the managing committee of the society in accordance with bye laws within a further period of one month from the date of publication of the voters list.

(v) We make it clear that these directions shall be without prejudice to the powers of the Wakf Board or the Wakf Tribunal to issue appropriate directions/orders from time to time, if their intervention is found necessary to give effect to the above directions.