

(2011) 11 OHC CK 0011
In the Orissa High Court
Case No : Writ Petition (C) No. 8140 of 2011

S.K. Samsur and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 01-11-2011

Acts Referred:

Orissa State Wakf Board (Conduct of Election) Rules, 1997 — Rule 2(1)
Waqf Act, 1995 — Section 13, 14, 14(1), 3, 99(1)

Citation : (2011) 11 OHC CK 0011

Hon'ble Judges : V. Gopala Gowda, C.J.; B.N. Mahapatra, J

Bench : Division Bench

Advocate : Adam Ali Khan and S.K. Mohanty, for the Appellant; R.K. Mohapatra, Govt. Advocate, M/s. Irshat. Kd. Fayaz and R.R. Behera, (for O.P. No. 2), for the Respondent

Judgement

V. Gopala Gowda, C.J.—The petitioners are the citizens of India belonging to Muslim community who are appointed as Members of Orissa Board of Wakf vide notification dated 21.11.2005 (Annexure-1) and, therefore, interested in the Wakf institutions within the definition and scope of section 3(i) of the Wakf Act, 1995 (for short "the Act") have filed this writ petition praying for issue of a writ of certiorari to quash the notice under Annexure-6 and direct to allow the Board as formed vide notification dated 22.11.2005 (Annexure-1), to function till a new Board is constituted as per sections 13 and 14 of the Act and for such further order/direction as deemed fit and proper in the circumstances of the case. The brief facts and rival contentions urged in this writ petition are stated in this judgment for the purpose of appreciating the same and answering the contentious issue that would arise for our consideration.

2. The Orissa Board of Wakf (for short "the Board") was constituted vide Law Department notification published in the Orissa Gazette on 22.11.2005 vide Annexure-1. Eleven persons were appointed by the State Government under different categories u/s 14 of the Act. As per provision u/s 14 of the Act, Haji Md. Ayub Khan, M.L.A. was elected as the Chairman of the Board. The election of

said Haji Md. Ayub Khan, Chairman of the Board was challenged before the Hon''ble Lokpal, Orissa, Bhubaneswar on the ground that Mr. Haji Md. Ayub Khan and Mr. Md. Rafique, M.L.As. were nominated not in accordance with the Wakf Act and the Rules. It is further stated that as per law the State Government should have requested the Assembly Secretary to hold election among the Muslim members of the legislative Assembly (M.L.As.) to elect from those Muslim members at least one and not more than two to the Orissa Board of Wakfs. But the election of the Chairman was challenged because the State Government directly nominated two M.L.As. to the Board illegally. After about one year of the election of the Chairman, the Hon''ble Lokpal observed and directed that the State Government has to choose directly one or two M.L.As. from among the Muslim M.L.As. to the Board and declared the nomination/selection of two M.L.As. to the Board by the State Government, as illegal. Further the State Government was directed to request the Assembly Secretariat to conduct election among the Muslim M.L.As. as one or two M.L.As. must represent the Board by adopting due procedure of election. Therefore, Mr. Khan, the Chairman of the Board was removed.

3. It is further contended that in the meantime Sk. Salimuddin Mohammad, a member of the Board has passed away in the month of March, 2009. The post of Chairman including the post of Member held by late Sk. Salimuddin Mohammad remained vacant. The Chief Executive Officer suggested the name of Haji Sidique Ali of Balasore district for nomination as Member of the Board in place of Sk. Salimuddin. It is alleged that Mr. S. Osatullah (P. No. 2) who was appointed as Chairman of the Board has been working for the interest of his personal gain. The other members of the Board have expressed their dissatisfaction over his malfunctioning. Even O.P. No. 2 is trying to create trouble in the smooth management of different wakf properties for his personal gain. He has even influenced to change the decisions taken in the Board meeting and manipulated the record and the proceedings, which was never decided in the meeting. The Members of Board have written to the Chairman and Chief Executive Officer mentioning therein how the proceedings of the meeting were tampered by second opposite party and not recorded on the basis of decision taken in the meeting. It is stated that O.P. No. 2 is holding the office which is a public office and that it was held by a usurper without legal authority for the reason that the statute provided certain qualification for the post and the O.P. No. 2 is not qualified as per the statute. Therefore, sought for a remedy. He has challenged the appointment of O.P. No. 2 seeking to issue a writ of Quo Warranto placing reliance upon a leading decision in the case of *The University of Mysore and Another Vs. C.D. Govinda Rao and Another*, .

4. Challenging the appointment of O.P.No.2, W.P.(C) No. 3533 of 2010 was filed before this Court which is pending after issuance of notice. While the matter stood thus, to accommodate O.P. No. 2, O.P. No. 1 issued another notification bearing No. 1397 dt.21.12.2010 in exercise of its power under clause (b) of sub-section (2) of section 99 of the Act. According to the petitioner, the said

notification is non-est in the eye of law as during the existence of the Board no individual can be appointed as an Administrator by substituting the entire body of the Board. The said provision u/s 99(2)(b) of the Act was applied by opposite party No. 1 without application of mind and no allegation was there against the Board Members. No enquiry was made against them. Simply the impugned notification was issued and substituted by one person whose initial appointment is also under challenge before this Court in the above referred writ petition. The State Government has not taken any step to constitute a new Board, either before expiry of the tenure of the Board or immediately after the term of the Board expired, though recommendations from different organization/institutions were made to the opposite party No. 1. The O.P. No. 2 took forcible charge of the office of the Board as "Administrator" not allowing the other members of the Board to function. He is having close connection with the Government officials and he has again started his malicious activities by taking illegal actions against the persons and institution who did not succumb to his illegal demands. Certain illegal actions referred to in the writ petition, have not been referred herein as the same are not required for the purpose of considering the prayers sought for in this writ petition.

5. The ground of attack of the impugned notification is the appointment of O.P. No. 2 as an "Administrator". When his appointment as a Chairperson of the Board was challenged, he is not competent to be appointed and when the writ petition is filed for issuing a writ of Quo-warranto is pending before this Court, the State Government has exercised its power without appointing Returning Officer to conduct election as required u/s 14 of the Act to constitute the Board immediately after its expiry. Therefore, the appointment of O.P. No. 2 is illegal and his appointment beyond the period of six months as provided under sub-section (1) of section 99 of the Act without there being extension of that period, as provided under sub-section (3) of section 99 of the Act, being per se illegal, the same is liable to be quashed.

6. Counter-affidavit has been filed by O.P.No.1 justifying notification for the reason that the Board which was constituted vide notification dated 22.11.2005 was for a period of five years. O.P. No. 2 in the year 2009 was nominated as Member of the Board consequent upon death of a Member and he was elected as Chairman by the Board and continued till expiry of the term of that Board. O.P. No. 2 is senior IAS officer and has worked in different administrative capacities under the Government of Orissa. The term of the Board expired in November, 2010. Pending constitution of the Board, the State Government appointed O.P.No.2 as the person to perform all the functions of the Board. Therefore, there is absolutely no illegality in issuing the notification vide Annexure-6 as alleged by the petitioners. It is further stated that there is no provision under the Act to allow the Board to function even after expiry of the term of office. Therefore, the second prayer made by the petitioners to allow the Board to function till a new Board is constituted by the State Government, is not permissible in law and the said relief cannot be granted by this Court in exercise of its writ jurisdiction that

would be contrary to law. It is further stated that allegations made by the petitioners against O.P. No. 2 have no basis and the same are denied. It is further stated that O.P. No. 1 has already appointed Election Officer as per office order No. 6487 dated 11.7.2011 (Annexure-A/1 of the counter-affidavit of the State) for conducting election of the Members of the Board and since the said Election Officer has already started the election process and taken steps to constitute the Board, and the appointment of O.P. No. 2 being in consonance with the provision of the Act, the same need not be interfered with by this Court at this stage.

7. O.P. No. 2 has filed the statement of counter today by way of affidavit along with Annexures A & B. He has contended that sub-section (1) of section 99 is not attracted to the facts of the case as the Board was not superseded before completion of the term of five years. Therefore, the appointment of an Administrator for a period of six months stipulated under the aforesaid provision, is not applicable to the facts situation of the present case. Further it is contended that as per Annexure-4, the allegation by O.P. No. 4 that Chairman tampered, erased and caused omission in resolution in item nos.1 & 22, are all false. All the resolutions are placed, heard, discussed and finally decision taken thereon, were reduced to writing in presence of Chairman and Members of the Board and after the same were read over to them, Members have signed the same. None of the Members of the Board have made allegations regarding tampering, erasing and omissions as alleged against O.P.No.2 by the petitioners. It is further stated that a reply has been given to O.P. No. 4 vide Annexure-A, on the allegation of tampering etc. made in the resolution. Therefore, he had prayed for dismissal of the writ petition. It is urged by the Learned Counsel for O.P. No. 2 that the petitioners have no locus standi to challenge the impugned notification.

8. With reference to the abovesaid rival legal contentions, the following points would arise for consideration :

- (i) whether the petitioners have locus standi to file this writ petition ?
- (ii) whether the impugned notification issued under sub-section (2) of section 99 of the Wakf Act by the State Government appointing the opposite party No. 2 as an administrator, beyond the period of six months, is permissible in law without there being extension of the period as provided u/s 99(3)(a) of the Act ?
- (iii) whether the petitioners are entitled to continue as the Members of the Board of Wakf beyond the term fixed in the impugned notification dated 22.11.2005 ?
- (iv) what order ?

9. The aforesaid points are required to be answered in the following manner for the following reasons.

10. The first point is answered in favour of the petitioners for the following reasons.

11. It is an undisputed fact that the petitioners are the Members of the Muslim community. They were appointed as Members of the Board vide notification dated 22.11.2005 (Annexure-1) and, therefore, they are interested in the affairs of the institution of Wakf within the definition and scope of section 3(i) of the Act. In this view of the matter, the contention raised on behalf of O.P. No. 2 is wholly untenable in law. The same is liable to be rejected and is accordingly rejected. We hold that the petitioners have locus standi as they were the Members of the erstwhile Board and they belong to the Muslim community and they have got interest in the better functioning of the institution of the Wakf in the larger interest of the persons of the Muslim community in the State.

Answer to point nos. (ii) and (iii) :

12. The undisputed fact is that the term of office of the Members of the Board constituted by O.P. No. 1 in exercise of power u/s 13 read with section 14 of the Act is for five years. Before expiry of the term or immediately after expiry of the term of the Members of the Board, the election was not held by the State Government by appointing Election Officer. There is no provision that the Members of the Board which was constituted for a term of five years shall continue till the election is held and new Board is reconstituted. Therefore, the State Government has got the power under sub-sections (1) and (2) of section 99 to appoint an Administrator to the Wakf Board to see that the administration and functioning of the Board is carried on till the Board is reconstituted as per sections 13 & 14 of the Act. In the instant case, the contention urged on behalf of the O.P. No. 2 is that the stipulated period of six months under subsection (1) of section 99 of the Act is not attracted since the State Government has exercised its power u/s 99(2) of the Act. Therefore, interpretation of six months as stipulated under sub-section (1) of section 99 of the Act is not applicable in respect of the person, who is appointed as an Administrator under sub-section (2) of section 99 of the Act. As could be seen from section 99(3)(a), the period of six months can be extended by the State Government if, within that period, election is not held to reconstitute the Board. Therefore, a cumulative reading of the provisions of sections 99(1) and 99(3)(a) makes it very clear that the period of appointment of an Administrator shall supersede the Board or expiry of the term of the Board which was constituted under the provisions of the Act. Therefore, the term of office of Administrator shall not continue for more than six months unless the same is extended by the State Government in exercise of its power u/s 99(3)(a) of the Act after the initial period of six months expires.

13. In the impugned notification, the notified period of appointment of O.P. No. 2 as an Administrator, is until further orders, which is not permissible in law. The period of appointment of an Administrator must be for a specific period of six months. Therefore, the impugned notification appointing O.P. No. 2 as Administrator of the Board until further orders is wholly unsustainable in law as the same is without authority of law on the part of O.P. No. 1. Therefore, the same is liable to be quashed for the reason that the appointment of

Administrator vide notification dated 21.12.2010 which is beyond six months and there is no order of extension after expiry of six months period from the date of appointment of O.P. No. 2. In this view of the matter, the impugned notification (Annexure-6) is liable to be quashed and is accordingly quashed. Accordingly answered the point No. (ii) in favour of the petitioners. Since we have quashed the notification, the earlier Board Members constituted as per Annexure-1 who are proforma opposite parties impleaded as O.P. Nos.3 to 9, cannot be permitted to function as the Board Members after expiry of five years period. Therefore, the third point is answered against the petitioners and the petition in this regard, is rejected.

Answer to point No. (iv) :

Mr. Mohapatra, learned Government Advocate placing reliance on Annexure-A/1 of the counter-affidavit, submitted that the State Government has nominated Sri Rama Krushna Nanda, Secretary L.R.C.-cum-Additional Secretary to Government of Orissa, Law Department under clause (e) of sub-rule (1) of rule-2 of the Orissa State Wakf Board (Conduct of Election) Rules, 1997, as Election Officer to do any act and to perform any function in connection with the conduct of election under the said rules for the category specified under sub-clause (ii) and (iv) of clause (b) of sub-section (1) of section 14 of the Act. The Election Officer shall see that the election is completed as expeditiously as possible but not later than four weeks from today. During this period, it is open for the O.P. No. 1 to appoint such officer as an Administrator to manage the affairs of the Board while exercising his power, if the case of O.P. No. 2 is to be considered, O.P. No. 1 shall take into consideration all the allegations made against him in the writ petition.

With the aforesaid observations and directions, the writ petition is partly allowed in the above terms and direction to the opposite party No. 1.