

(2016) 11 KL CK 0059

In the High Court Of Kerala

Case No : Writ Petition (C) No. 32102 of 2016 (K)

T.A. Ahammed Kabeer

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 22-11-2016

Acts Referred:

Constitution of India, 1950 — Article 174(2)(b), Article 226
Representation of the People Act, 1951 — Section 73(b)
Waqf Act, 1995 — Section 14

Citation : (2017) 1 CivilLJ 872 : (2017) 1 ILRKerala 312 : (2017) 1 KerLJ 206 : (2016) 4 KLT 824

Hon'ble Judges : Mr. V. Chitambaresh and Mr. Anil K. Narendran, JJ.

Bench : Division Bench

Advocate : Sri. K. Shibili Naha, SC, Kerala State WAKF Board, Sri. R. Harishankar (Amicus Curiae), Advocate, for the Respondent No. 4; Sri K.K. Ravindranath, Addl. Advocate General, Sri P.K. Vijayamohanan, Sr. GP to AG, for the Respondent Nos. 1 to 3; Sri T. Krishna

Final Decision : Dismissed

Judgement

V. Chitambaresh, J. - Is the term of Muslim Members of the State Legislature as a Member of the Wakf Board of the State co-terminus with the dissolution or expiry of the State Legislative Assembly ?

2. Ext.P6 order of the State Government appointing a Returning Officer for the conduct of election to the Wakf Board of the State from the Muslim Members of the State Legislature is impugned. The petitioner was so elected from the Muslim Members of the 13th Kerala Legislative Assembly by Ext.P1 notification of the State dated 20.10.2014. It is the case of the petitioner that he is entitled to hold office as a Member of the Wakf Board of the State for the full term of five years. The petitioner points out that his full term runs from 20.10.2014 to 19.10.2019 referring to Section 15 of the Wakf Act, 1995 ["the Act" for short]. The petitioner asserts that his term cannot be cut short and that Ext.P6 order appointing a Returning Officer for the conduct of election is illegal and liable to be quashed.

3. The State Government points out that the petitioner was elected from the Muslim Members of the 13th Kerala Legislative Assembly which was dissolved by Ext.P3 notification of the Governor dated 20.5.2016. The petitioner has of course been re-elected and has become a Muslim Member of the 14th Kerala Legislative Assembly constituted by Ext.P4 notification of the Election Commission dated 20.5.2016. The petitioner has in the interregnum ceased to be a Member of the State Legislature and deemed to have vacated the office of the Member of the Wakf Board of the State in law. The petitioner has again to be re-elected from the electoral college comprising of the Muslim Members of the 14th Kerala Legislative Assembly for him to remain as a Member of the Wakf Board of the State.

4. We heard Mr. T. Krishnanunni, Senior Advocate on behalf of the petitioner, Mr. K.K. Ravindranath, Additional Advocate General, Mr. P.K. Vijaya Mohanan, Senior Government Pleader, Mr. K. Shibili Naha, Standing Counsel for the Kerala State Wakf Board and Mr. R. Harishankar, Advocate as amicus curiae.

5. The composition of the Wakf Board for a State is as per Section 14 of the Act as amended by the Wakf (Amendment) Act, 2013 and the relevant part is extracted herein below :-

"14. Composition of Board :- (1) The Board for a State and the National Capital Territory of Delhi shall consist of-

(a) x x x x

(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) Muslim Members of Parliament from the State or, as the case may be, the National Capital Territory of Delhi,

(ii) Muslim Members of the State Legislature,

(iii) Muslim Members of the Bar Council of the concerned State or Union territory :

Provided that in case there is no Muslim member of the Bar Council of a State or a Union Territory, the State Government or the Union territory administration, as the case may be, may nominate any senior Muslim advocate from that State or the Union territory, and

(iv) mutawallis of the auqaf having an annual income of rupee one lakh and above ;

Explanation I - For the removal of doubts, it is hereby declared that the members from categories mentioned in sub-clauses (i) to (iv) shall be elected from the electoral college constituted for each category.

Explanation II - For the removal of doubts it is hereby declared that in case a Muslim member ceases to be a Member of Parliament from the State or National

Capital Territory of Delhi as referred to in sub-clause (i) of clause (b) or ceases to be a Member of the State Legislative Assembly as required under sub-clause (ii) of clause (b) such member shall be deemed to have vacated the office of the member of the Board for the State or National Capital Territory of Delhi, as the case may be, from the date from which such member ceased to be a Member of Parliament from the State or National Capital Territory of Delhi, or a Member of the State Legislative Assembly, as the case may be."

(emphasis supplied)

The Government of Kerala has framed the Kerala Wakf Rules, 1996 ["the Rules" for short] in exercise of the powers conferred under Section 109 of the Act and the relevant part is extracted herein below :-

8.Composition of the Kerala Wakf Board :- The Kerala Wakf Board shall consist of the following members, namely:-

(a) two members to be elected in accordance with the system of proportional representation by means of single transferable vote from each of the electoral colleges consisting of -

(i) Muslim Members of the State Legislature.

(ii) Mutawallis of the Wakfs having an annual income of rupees one lakh and above.

(emphasis supplied)

Explanation I and Explanation II have been inserted to Section 14(1)(b) of the Act on amendment by Act 27 of 2013 with effect from 1.11.2013 for the purpose of removal of doubts only.

6. The continuance in the Wakf Board of the State by one who has ceased to be a Member of the State Legislature by the expiry of the term had come up for consideration earlier. Section 14 of the Act had not been amended at that time and this Court in Kutty Haji P.K.M. v. State and others [2008 (3) KLT 1004] observed as follows :-

"24.Therefore, we are of the view that when one Muslim member of the Legislative Assembly is elected as the member of the Wakf Board, he will have to continue in office for five years in the absence of a specific provision that when he ceases to be a member of the Legislative Assembly, automatically his membership in the Wakf Board also will cease and this Court cannot fill the allowed gap and the Legislature is free to add such a clause in the Wakf Act if it is really needed. But it is not for the Court to fill up the gaps imagining the intention of the Legislature."

(emphasis supplied)

Similar opinion was expressed by the Full Bench of the High Court of Andhra Pradesh in order dated 23.11.2012 in the case titled Shaik Fareed v. The

Government of Andhra Pradesh [2013 (1) ALD 464].

7. It is precisely to bring clarity and for the removal of doubts have Explanation I and Explanation II been incorporated by way of amendment to Section 14(1)(b) of the Act. Explanation I declares that the Members from the categories mentioned in sub-clauses (i) to (iv) shall be elected from the electoral college constituted for each category. The categories mentioned in sub-clauses (i) to (iv) in Section 14(1) (b) of the Act take in Muslim Members of the State Legislature also. Explanation II declares that a Muslim Member shall be deemed to have vacated the office of the Member of the Wakf Board from the date from which he ceases to be a Member of the category. Therefore the petitioner is deemed to have vacated the office of the Member of the Wakf Board of the State from the date he has ceased to be a Member of the State Legislature. The cessation of the Membership from the State Legislature has obviously occurred when the 13th Kerala Legislative Assembly was dissolved on 20.10.2016 by the Governor. The fact that the petitioner was re-elected as a Member of the 14th Kerala Legislative Assembly is of no avail to continue as a Member of the Wakf Board. The petitioner has again to be elected from the electoral college consisting of the Muslim Members of the 14th Kerala Legislative Assembly for such continuance.

8. We may in this context advert to the case titled in the matter of Special Reference No. 1 of 2002 [(2002) 8 SCC 237] wherein the Constitution Bench of the Supreme Court observed as follows :-

"Dissolution ends the life of the Legislature and brings an end to all business. The entire chain of sittings and sessions gets broken and there is no next session or the first sitting of the next session after the House itself has ceased to exist. Dissolution of Legislative Assembly ends the representative capacity of Legislatures and terminates the responsibility of the cabinet to the members of the Lok Sabha or the Legislative Assembly, as the case may be."

(emphasis supplied)

The petitioner cannot for a moment contend that he had not ceased to be a Member of the State Legislature when the 13th Kerala Legislative Assembly was dissolved putting an end to his representative capacity.

9. Could the 14th Kerala Legislative Assembly have been constituted even before the dissolution of the 13th Kerala Legislative Assembly is the next question to be considered by us. Certain passages from the book "How India votes, Election Laws, Practice and Procedure" by V.S. Rama Devi and S.K. Mendiratta are really illuminating. V.S. Rama Devi was the Chief Election Commissioner of India and S.K. Mendiratta was the Consultant to the Election Commission of India who have authored the book. The passages are extracted below :-

"Prior to 1967, lame duck sessions of Parliament used to be held with the old House of the People even after almost all the results of the general elections to constitute new House were available. Now, by convention, the existing house is

dissolved as soon as the new house is in a position to be constituted on the completion of the general election, so that a new Government may be installed on the basis of the verdict given by the electorate at the general election and Parliament convened with the new House of the People.....

If a general election has been held for constituting a new State Legislative Assembly to replace the existing Assembly on the expiration of its normal duration of five years, the new Assembly can be constituted as soon as may be after the completion of the general election. Likewise, the new Assembly can be brought into existence, if the earlier assembly already stands dissolved by the Governor under Article 174(2)(b) and the State has not been placed under President's Rule in terms of Article 356

Though the due constitution of the new assembly will not affect the normal life of the existing assembly, the new assembly is generally constituted after the dissolution of the existing assembly. A healthy convention has been developed, of late, whereby the existing assembly is prematurely dissolved as soon as the general election is complete and the Election Commission is in a position to constitute the new assembly. As a matter of fact, in almost all cases, the notification of the Governor dissolving the old assembly and the notification of the Election Commission constituting the new assembly are published in the same issue of the official state gazette, one after the other.

The present convention therefore is to dissolve the existing Assembly prematurely as soon as the general election is complete and the Election Commission "is in a position" to constitute the new Assembly.

10. Ext.P3 notification of the Governor dissolving the old Assembly and Ext.P4 notification of the Election Commission constituting the new Assembly are published one after the other. The fact that the notifications are published in the same issue of the official State gazette on 20.5.2016 is indicative that the convention has been followed. The petitioner will cease to be a member of the State Legislature even if there is a difference of a split of a second between the notifications afore mentioned. Further inputs as regards the notification constituting the new Assembly are absent since the Election Commission has not been made a party to this writ petition. Of course the duration of the 13th Kerala Legislative Assembly reckoned from the date appointed for its first meeting expired only on 30.5.2016. We are conscious that the 13th Kerala Legislative Assembly can function for its full term notwithstanding the constitution of the 14th Kerala Legislative Assembly on 20.5.2016. This is by virtue of Section 73(b) of the Representation of the People Act, 1951 saving the duration of the State Legislative Assembly and is extracted below :

"73.Publication of results of elections to the House of the People and the State Legislative Assemblies and of names of persons nominated thereto - Where a general election is held for the purpose of constituting a new House of People or a new State Legislative Assembly, there shall be notified by the Election

Commission in the Official Gazette, as soon as may be after the results of the elections in all the constituencies other than these in which the poll could not be taken for any reason on the date originally fixed under clause (d) of section 30 or for which the time for completion of the election has been extended under the provisions of section 153 have been declared by the returning officer under the provisions of section 53 or, as the case may be, section 66, the names of the members elected for those constituencies and upon the issue of such notification that House or Assembly shall be deemed to be duly constituted :

Provided that the issue of such notification shall not be deemed -

(a) to preclude -

(i) the taking of the poll and the completion of the election in any Parliamentary or Assembly constituency of constituencies in which the poll could not be taken for any reason on the date originally fixed under clause (d) of section 30 ; or

(ii) the completion of the election in any Parliamentary or Assembly constituency or constituencies for which time has been extended under the provisions of section 153 ; or

(b) to affect the duration of the House of the People or the State Legislative Assembly, if any functioning immediately before the issue of the said notification."

(emphasis supplied)

True that the 14th Kerala Legislative Assembly is deemed to have been duly constituted on the publication of Ext.P4 notification of the Election Commission under Section 73 of the aforesaid Act. The impact of such a notification has been elaborately discussed in *Pashupati Nath Sukul and others v. Nem Chandra Jain and others* [(1984) 2 SCC 404]. The declaration of the results of the election would have been earlier even though the 14th Kerala Legislative Assembly was constituted by Ext.P4 notification. The oath or affirmation by a Member of the Legislative Assembly as per Article 188 of the Constitution of India is only for taking part in the business of the House. There is nothing to show that Ext.P4 notification of the Election Commission preceded Ext.P3 notification of the Governor although of the same date.

11. Ext.P3 notification of the Governor dissolving the 13th Kerala Legislative Assembly issued under Article 174(2)(b) of the Constitution of India was published as No. 962. Ext.P4 notification of the Election Commission constituting the 14th Kerala Legislative Assembly was published as No. 963 pointing out that one was after the other. There is nothing to indicate that the constitution of the 14th Kerala Legislative Assembly preceded the dissolution of the 13th Kerala Legislative Assembly. The petitioner has therefore ceased to be a Member of the State Legislature in the interregnum resulting in his vacation of the office of the Member of the Wakf Board. That the above is the purport and import of the insertion of Explanation I and Explanation II to Section 14(1)(b) of the Act is evident from the Legislative Brief of the Wakf (Amendment) Bill, 2010. The Bill

states that Members are to be elected from the electoral college of each category, "MPs and MLAs to hold office on ex-officio basis" which has given shape to Section 14 of the Act as amended. The term "ex-officio" means by virtue of the authority implied by office which in the instant case is the authority as a Member of the State Legislature. The petitioner loses his right in the office of the Member of the Wakf Board for the State the moment he loses authority as a Member of the State Legislature.

12. The electoral college consisting of the Muslim Members of the 14th Kerala Legislative Assembly has an opportunity to elect their representative to the Wakf Board of the State. The petitioner is free to stake his claim to be so elected since he is fortunate enough to be a Muslim Member of the 14th Kerala Legislative Assembly also. The State is perfectly within their rights to conduct an election and to appoint a Returning Officer for the purpose as per Rule 9(1) of the Rules by Ext.P6 order. The contention that the petitioner is entitled to be a Member of the Wakf Board of the State uninterruptedly till 19.10.2019 cannot be countenanced in law.

13. We record our deep appreciation for the efforts taken by Mr. R. Harishankar, Advocate who ably assisted the Court as amicus curiae with reference to the statutory provisions.

The Writ Petition is dismissed. No costs.