

(2012) 04 AP CK 0099

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 4644 of 2011

The A.P. State Wakf Board

APPELLANT

Vs

Mir Qamar Hasan Razvi

RESPONDENT

Date of Decision : 13-04-2012

Acts Referred:

Waqf Act, 1995 — Section 42, 63, 64, 64(2), 64(3)

Citation : (2012) 4 ALD 126 : (2012) 3 ALT 791

Hon'ble Judges : K.G. Shankar, J

Bench : Single Bench

Advocate : Mir Masood Khan, Stating Counsel for Wakf Board, for the Appellant; M. Mehdi Hussain, for Sri. D. Prakash Reddy for the Respondent (Caveator), for the Respondent

Final Decision : Allowed

Judgement

K.G. Shankar

1. The Andhra Pradesh State Wakf Board (Wakf Board, for short), Hyderabad, represented by its Chief Executive Officer (CEO, for short) laid this revision questioning the order dated 03.10.2011 of the Andhra Pradesh State Wakf Tribunal (Wakf Tribunal, for short) u/s 83 (9) of the Wakf Act, 1995 (the Act, for short). The respondent laid O.A.No.13 of 2011 on the file of the Wakf Tribunal u/s.83 (2) of the Act to set aside the orders of the Wakf Board dated 07.06.2011 taking over the wakf institution by name Kohe-Imami-Zameen (AS) into its direct management by invoking Sec. 64 of the Act. The respondent also sought for a declaration that such an action on the part of the Wakf Board is illegal and contrary to Sections 42, 63, 64 and 70 of the Act. For the better appreciation of the controversy, it is desirable to state the rival contentions in considerable detail. I, therefore, propose to do so.

2. The case of the respondent is

a) Kohe-Imami-Zameen (AS) was an ancient wakf institute. It is situate in

Trimalghir Mandal spread over an extent of 300 acres comprising of several survey numbers.

b) The family of the respondent has been Mutawallies of the wakf since about nine generations. Sri Mir Mohammed Hassan, father of the respondent was appointed as Mutawalli by the Government in consultation with the Wakf Board. Sri Mir Mohammed Hassan discharged his duties as Mutawalli till his demise in 1996.

c) As the office of Mutawalli for the Wakf was hereditary in nature, the respondent laid a claim for the Mutawalliship over the wakf and submitted several applications to the Wakf Board to appoint him as Mutawalli.

d) As the Wakf Board did not take any action on his representation, the respondent filed Writ Petition No. 6136 of 2003 before this Court. This Court passed an order on 18.04.2003 to hold an enquiry and pass orders on the claim of the respondent. The Wakf Board conducted an enquiry. A report was submitted to the Wakf Board on 29.06.2003 that the Mutawalliship of the Wakf was hereditary in nature and that the respondent could be considered for the office of the Mutawalli of the Wakf.

e) The Wakf Board, however, postponed taking a decision for about five years and ultimately appointed the respondent as Mutawalli for a period of three years in exercise of the powers u/s.63 of the Act, through orders dated 04.06.2008. Curiously, when the order was gazetted on 03.07.2008, it was shown that the appointment of the respondent was for a period of one year only.

f) The respondent submitted another application to the Wakf Board on 22.11.2008 seeking an appointment u/s.42 of the Act. On 05.01.2009, the CEO of the Wakf Board issued proceedings appointing the respondent as Mutawalli of the Wakf u/s.42 of the Act. The appointment was gazetted on 02.04.2009.

g) While the respondent was discharging his duties as a hereditary Mutawalli, the Wakf Board appointed a Committee in 2009 to conduct ceremonies at the wakf for a period of three days. Albeit the respondent questioned the same before this Court through W.P.No. 15071 of 2009, the writ petition was dismissed as infructuous, since the appointment of the Committee was for a period of three days only.

h) The Wakf Board allegedly sent its Task Force to enquire into the conduct of the respondent, when the Wakf Board allegedly received a complaint against the respondent. The Task Force submitted a report that the respondent permitted labourers to reside in Sama Khana, raise a compound wall and allowed quarrying in the wakf land and that the respondent thus mis-conducted himself as a Mutawalli. On the basis of the report, the Wakf Board took over direct management of the wakf by invoking Section 64 of the Act.

i) The determination of the respondent as Mutawalli without notice and enquiry is violative of Section 64 of the Wakf Act. The respondent was appointed as

permanent Mutawalli u/s.42 of the Act and consequently, he cannot be removed without due process of law, as the appointment of the respondent was for life and not for a limited period.

3. Opposing the claim of the respondent, the petitioner-Wakf Board contended:

a) The respondent laid O.S.No.26 of 1998 before the Tribunal for a declaration that he was Mutawalli of the Wakf. The suit was dismissed. No appeal was preferred from the suit. The respondent, therefore, cannot seek for a similar declaration directly or indirectly through the present application.

b) Indeed, the CEO of the Wakf Board appointed the respondent as Mutawalli for a period of one year with effect from 04.06.2003 by exercise of the powers vested u/s.63 of the Act. The respondent was not even the temporary Mutawalli after the expiry of the appointment period on 03.06.2009.

c) While things stood thus, the respondent filed W.P.No. 16064 of 2011 on the file of this Court when Jashan Committee was appointed. The appointment of the respondent as Mutawalli u/s.42 of the Act and gazetting the same were not done by the Board. The then CEO of the Board fabricated the documents to help the respondent, so much so, a complaint was lodged against the former CEO of the Wakf Board with Abids Police Station.

d) The respondent was indulging in nefarious activities like allowing labourers to stay in the Sama Khana, allowing the construction of a compound wall in the wakf property and allowing quarry in the wakf property and that the respondent is not fit to work as Mutawalli. The petitioner passed the impugned orders in this background by invoking Section 65 of the Act.

e) The father of the respondent by name Mir Mohd. Hasan was not a Mutavalli but was a Mutasaddi.

The respondent, therefore, is not entitled for declaration that he is the Mutavalli.

4. The respondent contended that he was appointed as Mutawalli for life u/s.42 of the Act and that he could not be removed from the same without invoking due process of law and without notice and explanation from the respondent. The petitioner on the other hand contended that the respondent was never appointed as Mutawalli u/s.42 of the Act, that the alleged orders dated 05.01.2009 gazetted on 02.04.2009 are spurious, that the respondent was appointed u/s.63 of the Act for a period of three years and that after the expiry of the three years period, the petitioner was justified in direct taking over the management of the institute.

5. The controversy in fact runs on a very narrow compass. The real question is whether the respondent was appointed a Mutawalli of the Wakf u/s.42 or Sec. 63 and in any event, whether the services of the respondent can be terminated without notice to the respondent and without explanation from the respondent.

6. Sri Mir Masood Khan, Learned Counsel for the petitioner/Wakf Board

contended that the appointment of the respondent as Mutawalli was for a period of one year only u/s.63 of the Act and that the respondent was never appointed as Mutawalli u/s.42 of the Act. He also submitted that the Wakf Board initiated action against the CEO who passed orders appointing the respondent as Mutawalli u/s.42 of the Act and that the complaint is sub judice before the competent court. The claim of the Learned Counsel for the petitioner is that the respondent does not possess any rights much less vested rights where the respondent was appointed for a period of one year only as a Mutawalli. He further submitted that the father of the respondent was appointed as Mutasaddi and not as a Mutawalli and that the respondent consequently cannot seek for appointment as a Mutawalli or as a Mutasaddi.

7. Sri D. Prakash Reddy, learned senior counsel for the respondent contradicted the claim of the petitioner and contended that the respondent indeed was appointed as Mutawalli u/s.42 of the Act and that such a Mutawalli can be removed by following due process envisaged by Sec.64 of the Act. He admitted that the respondent indeed was appointed as Mutawalli initially u/s.63 of the Act for a period of three years and that such an appointment stood merged with his appointment u/s.42 of the Act. As the functioning of the respondent as Mutawalli of the wakf was not on account of appointment u/s.63 of the Act, his services as Mutawalli do not end with the tenure of the appointment according to the learned senior counsel for the respondent.

8. I venture to repeat that as already pointed out the basic controversy is whether the appointment of the respondent was u/s.63 of the Act or u/s.42 of the Act.

9. Sec.64 of the Act enumerates as many as 11 circumstances in which a Mutawalli can be removed from his office. The expiry of the tenure of appointment is not one of these grounds. Sec.64 (2) to 64 (8) of the Act deal with the procedure to be followed to remove a Mutawalli. The provisions contemplate that the Mutawalli should be accorded a reasonable opportunity of being heard before removing the Mutawalli. This Court went further in Zaheer Ahmed Khan Vs. A.P. State Wakf Board, and held that a Mutawalli cannot even be suspended pending enquiry unless reasonable opportunity of hearing was accorded to such Mutawalli.

10. Sec.63 of the Act envisages that where there is no one who can be appointed as Mutawalli under the deed of the wakf or where the right of any person to act as a Mutawalli is disputed, the Wakf Board may appoint any person temporarily to act as Mutawalli for a specified period conditionally. Such appointment u/s.63 of the Act shall specify the period and conditions. In Shaik Ghouse Mohiuddin v. A.P. State Wakf Board AIR 2002 AP 342 a Mutawalli was appointed without mentioning the period of appointment. It may be noticed that Sec.64 does not deal with such cases of Mutawallis as referred to u/s.63 of the Act. In fact, Sec.64 of the Act commences with a non-obstante clause that a Mutawalli can be removed in accordance with Sec.64 of the Act, notwithstanding nothing

contained in any other law or even the deed of wakf.

11. Sec.64 (3) ordains that no action shall be taken against a Mutawalli unless an enquiry in the manner prescribed was held against the Mutawalli and a decision has been taken by 2/3rd majority of the members of the Wakf Board. A Mutawalli so removed can prefer an appeal from the order of removal to the Tribunal. The learned senior counsel for the petitioner contended that the respondent can file an appeal questioning the order dated 03.06.2011 of the Wakf Board by preferring an appeal u/s.64 (4) of the Act and that the application u/s.83 (2) of the Act before the Tribunal is not maintainable.

12. It may be noticed that the order passed on 07.06.2011 is not the removal of the respondent from the Mutawalliship. The order is that the respondent herein was appointed temporarily as Mutawalli of the wakf u/s.63 of the Act, that the period of appointment had already expired and that the Wakf Board was taking over the management of the wakf. Where the respondent was not removed under Sec.64 of the Act, the question of respondent invoking Sec.64 (4) of the Act would not arise. In such an event, there is no alternative for the respondent but to invoke Sec.83 (2) of the Act, which is a general and omnibus provision. I am afraid that the contention of the learned senior counsel that the very application by the respondent is not maintainable before the Tribunal and that the very application is liable to be dismissed cannot be countenanced in view of Sec.64 (4) and Sec.83 (2) of the Act. I agree with the contention of the Learned Counsel for the respondent that the O.A. as laid by the respondent herein is maintainable u/s.83 (2) of the Act.

13. It is the contention of the learned senior counsel that the respondent was never appointed u/s.42 of the Act. Sri D. Prakash Reddy, learned senior counsel drew my attention to the proceedings of the CEO of the petitioner dated 05.11.2003. In these proceedings, after recording that the respondent who was initially appointed as Mutawalli u/s.63 of the Act for Darga Hazarath Kohe-Imami-Zameen, it was further recorded that it was found that the respondent is a holder of hereditary rights of the wakf and that he was consequently appointed as Mutawalli u/s.42 of the Act. It is not as though the wording leads to an inference that the respondent was appointed as Mutawalli u/s.42 of the Act. The appointment was in categorical terms vide his proceedings dated 05.01.2009. The proceedings also bear the statement of the Wakf Board.

14. The learned standing counsel tried to show that the gazette notification was not issued in terms of the appointment. However, the respondent has shown that gazette notification was issued on 02.04.2009 that the respondent was appointed as a Mutawalli u/s.42 of the Act.

15. What the learned standing counsel for the petitioner would appear to contend is that the Wakf Board never authorize its CEO to appoint the respondent as Mutawalli u/s.42 of the Act, that for the reasons best known and perhaps for extraneous reasons, the then CEO of the Wakf Board issued the proceedings

dated 05.01.2009 and that the proceedings appointing the respondent as Mutawalli u/s.42 of the Act are not sustainable. The learned standing counsel indeed referred to Sec.42 of the Act and pointed out that the question of appointment u/s.42 would not arise. This aspect shall be considered later. Suffice it to notice that it is the case of the petitioner that the appointment of the respondent as Mutawalli u/s.42 of the Act is not accepted by the Wakf Board and that the order, therefore, is not binding on the petitioner.

16. The learned senior counsel for the respondent placed reliance upon M.B. Ratnam and Others Vs. Revenue Divisional Officer and Others, The Division Bench of this Court held in this case in para 80:

The law is thus very clear that even a void order continues in de facto operation and the same can be ignored by an aggrieved person at his own risk and peril. Even such void orders continue to hold the field and have the effect in law like all other lawful orders until the same is set aside in a properly instituted proceedings at the instance of an aggrieved person. Even a void order cannot be whisked away. Individuals cannot be permitted to disobey and disregard decisions presuming them as void decisions. Such a course if permitted may amount to taking law into ones, own hands. Rule of law and administration of justice processes would be in peril resulting in chaos.

He submitted that the claim of the petitioner that he is not bound by the proceedings dated 05.01.2009 is against the principles of rule of law and that so long as the proceedings hold sway, the respondent shall be deemed to have been appointed u/s.42 of the Act.

17. The petitioner cannot now turn round and claim that the proceedings dated 05.01.2009 were never issued by the Wakf Board. The CEO issued the proceedings on behalf of the Wakf Board. The CEO (perhaps the then CEO) passed orders on 05.01.2009 appointing the respondent as Mutawalli u/s.42 of the Act. If the petitioner considers that such an order cannot be passed, it is entitled to take steps to unsettle the order. The Wakf Board, however, cannot merely refuse to recognize the order and contend that the respondent is not the incumbent Mutawalli.

18. The learned standing counsel for the petitioner submits that as the order appointing the respondent u/s.42 of the Act was on account of mischief and on account of extraneous consideration by the CEO and that the present CEO in fact lodged a complaint against CEO who passed orders dated 05.01.2009. It would appear that the then CEO approached this Court for quashment of the First Information Report lodged by the present CEO and would appear to have obtained orders of suspension of the operation of the FIR. Indeed, the complaint has not been quashed as on today. Merely, the operation of the complaint stood suspended. However, assuming that the then CEO is found guilty and is convicted for issuing an order against the directions and interest of the Wakf Board and against the provisions of the Act, it does not however, stall the operation of the

proceedings merely because the author of the proceedings stood convicted for issuing the proceedings. The proceedings dated 05.01.2009 stand valid unless set aside. It would appear that the petitioner has not taken any legal steps for setting aside of the order dated 05.01.2009. No notice was issued even to the respondent that the order dated 05.01.2009 appointing the respondent as Mutawalli u/s.42 of the Act was being set aside. Consequently, the order dated 05.01.2009 stands in the record book.

Implications of Sec.42 of the Act:

19. Now, the primary question is whether the order dated 05.01.2009 appointing the respondent as Mutawalli is valid or otherwise. Sec.42 of the Act reads:

42. Change in the management of wakfs to be notified:-- (1) In the case of any change in the management of a registered wakf due to the death or retirement or removal of the mutawalli, the incoming mutawalli shall forthwith, and any other person may notify the change to the Board.

20. Sec.42 of the Act does not speak about appointment of any person as Mutawalli. While Sec.63 of the Act deals with appointment of a Mutawalli for a fixed period. Sec.42 of the Act deals with information by the Mutawalli about his taking over as Mutawalli. It is the contention of the learned standing counsel that the very question in appointing the respondent as Mutawalli u/s.42 of the Act is not sustainable, as the question of appointing anybody u/s.42 of the Act simply does not arise. He submitted that the proceedings dated 05.01.2009 appointing the respondent as Mutawalli u/s.42 of the Act is non est, as there is no provision for appointing any person as Mutawalli u/s.42 of the Act.

21. The learned Standing Counsel for the petitioner claimed that the order dated 05.01.2009 appointing the respondent as Mutavalli u/s.42 of the Act is bad and is not enforceable where the very order appointed the respondent as Mutavalli instead of recognizing the respondent as Mutavalli, if the Wakf Board intended to hold that the respondent is the hereditary Mutavalli and his possession as Mutavalli is permanent. Curiously, instead of recognizing the respondent as Mutavalli, the CEO of the Wakf Board appointed the respondent as Mutavalli u/s.42 of the Act. The relevant portion of the appointment order reads:

Keeping in view of all this facts and after the keen consideration of the records and File of the appointment U/s 63 of the Wakf Act 1995 the Board come to a conclusion that the Muthavalli of the Dargah Hazrath Kohe-E-imam-E-Zamin Mir Qamaar Hassan Razvi S/o Late Mir Mohammed Hassan Razvi is an Hereditary right holder of the Institution.

Accordingly Sri Mir Qamar Hassan Razvi s/o. Late Mir Mohammed Hassan Razvi is hereby appointed as MUTHAVALLI of the Subject Institution U/s 42 of Wakf Act, 1995 with immediate effect with a direction to safeguard the Wakf property attached to the institution and render; service to Dargah without any complaint from the public as per the procedure which is being followed.

22. Thus, through the orders dated 05.01.2009 the respondent was appointed as Mutavalli of the Wakf Board. When the respondent was appointed as Mutavalli through the orders, the question of recognizing the respondent as Mutavalli u/s.42 of the Act would not arise.

23. It may be noticed that the learned Standing Counsel for the petitioner contended that the Wakf Board never intended to appoint the respondent as Mutavalli u/s.42 of the Act, that the then CEO of the Wakf Board passed the orders dated 05.01.2009 for extraneous reasons and that the Wakf Board is not bound by such orders. In view of M.B. Ratnam, the petitioner is not entitled to take such a stand. At the same time, the question is whether the view of M.B. Ratnam is in respect of every proceeding or order or would it be confined to orders issued by competent authority. It can be culled out from the view as expressed by the Division Bench in M.B. Ratnam that void orders indeed can be used as a shield. At the same time, the Division Bench did not hold that such orders would also operate as a sword. If the Wakf Board had initiated legal proceedings against the respondent, perhaps, the respondents could have used the order dated 05.01.2009 as a shield. The respondent himself cannot hold the order dated 05.01.2009 as a weapon to counter the proceedings of the Wakf Board dated 07.04.2011 under which management of the Wakf was assumed by the Board. Further, the orders passed on 05.01.2009 are void ab initio, as the question of making any appointment u/s.42 of the Act does not arise. Consequently, the respondent cannot claim that he was appointed as permanent Mutavalli u/s.42 of the Act and that he can be removed only after due enquiry.

24. The very appointment of the respondent u/s.42 of the Act is impermissible. There cannot be any appointment u/s.42 of the Act. The respondent, therefore, cannot claim that he has been holding possession of Mutavalli of the Wakf u/s.42 of the Act. In the absence of this situation, it can be considered that the respondent was appointed as Mutavalli u/s.63 of the Act only for a period of three years. When the period of three years from the date of the appointment on 04.06.2008 had expired, the petitioner was justified in taking over the Wakf by exercise of the powers u/s.65 of the Act.

25. The learned Presiding Officer of the Tribunal proceeded on the assumption that the appointment of the petitioner through orders dated 05.01.2009 cannot be questioned by the Wakf Board and consequently held that the virtual removal of the respondent by the Wakf Board taking over the management is not sustainable. Where the very appointment of the respondent is non est in view of the language deployed by Sec.42 of the Act, the alleged appointment of the respondent as Mutavalli u/s.42 of the Act through orders dated 05.01.2009 is not sustainable. In that view of the matter, the taking over of the management of the Wakf by the Board is justified. The Tribunal, consequently, was not correct in allowing O.A.No.13 of 2011 in favour of the respondent herein. The Civil Revision Petition, accordingly, is allowed. The judgment and decree in O.A.No.13 of 2011 on the file of the Tribunal suffers from patent error of law and is accordingly set

aside. There shall be no order as to costs.