

(1987) 01 KL CK 0017
In the High Court Of Kerala
Case No : W.A. No. 538 of 1982

The Kerala Wakf Board, Ernakulam

APPELLANT

Vs

Alam Aboobacker Sait and Others

RESPONDENT

Date of Decision : 27-01-1987

Acts Referred:

Waqf Act, 1954 — Section 15, 3, 42, 43

Citation : AIR 1987 Ker 176 : (1987) 1 ILR (Ker) 673

Hon'ble Judges : V.S. Malimath, C.J.;V. Bhaskaran Nambiar, J

Bench : Division Bench

Advocate : T.R. Govinda Warriyar and P.S. Usuph, for the Appellant; T.N. Abdul Asyies, K.A. Abdul Salam, T.P. Kelu Nambiar and P.G. Rajagopalan, for the Respondent

Final Decision : Dismissed

Judgement

Malimath, C.J.—This appeal is against the judgment of the learned single Judge in O. P. No. 4168 of 1979, by the Kerala Wakf Board. A Wakf has been created under the Will dt. 25-2-1099, Ext. PI, executed by Abdul Sathar Haji Moosa Sait. The stipulation regarding appointment of Mutawalli described as the managing trustee is that the grand-son of the testator Moosa shall be entitled to be the Mutawalli and after him, his male children and in the absence of such children of the testator's daughters and grand-daughters, being the sisters of the said Moosa. There is also a stipulation to the effect that the person to be appointed as Mutawalli should be a person of maturity and ability. Consequent upon the occurrence of the vacancy the petitioner in the original petition Adam Aboobacker Sait was appointed as the managing trustee at the meeting of the Board of Trustees held on 11-2-1978. In pursuance of the said order he has been functioning as the managing trustee. When such was the position, it appears that an allegation was made to the Wakf Board by the respondents 2 to 4 in the original petition that the appointment made by the Board of Trustees is not proper and that it is the second respondent in the original petition, Abdul Kareem

Abdul Sathar Sait, who should have been appointed as the Mutawalli in accordance with the terms and intention of the Wakf. The Wakf Board enquired into the matter and passed an order as per Ext. P-4 on the 17th of Nov., 1979. The Board held that as between the contesting parties it is Abdul Kareem Abdul Sathar Sait that is eligible and entitled to be appointed as a managing trustee-Mutawalli and that the appointment made by the Board of Trustees is not legal and proper. It is the said decision that was challenged by Adam Aboobacker Sait in O.P. No. 4168 of 1979. The learned single Judge has by judgment dt. 26-3-1982 allowed the original petition and quashed the decision of the Wakf Board, Ext. P-4, holding that the Wakf Board had no jurisdiction to decide the dispute. It is the said decision that is challenged in this appeal by the Wakf Board.

2. The learned single Judge has taken the view that the power to appoint Mutawallis of the Wakf Board can only be traced to Section 42 of the Wakf Act, 1954 but that the said provision does not confer power on the Wakf Board to decide the dispute when there is contest between rival parties for being appointed as the Mutawalli and that the power of appointment cannot be exercised under the said provision unless there is a vacancy.

3. It was contended by Sri. Wanyar, learned counsel for the appellant, that the view taken by the learned single Judge is not right. It was submitted that the Wakf Board has been conferred power by Section 15 of the Act of the general superintendence of all wakfs to ensure that the wakfs under its superintendence are properly maintained controlled and administered and that the income thereof is duly applied to the objects and for the purposes for which the wakfs have been established. He invited our attention to Section 15(2)(g) of the Act which confers power on the Wakf Board to appoint and remove the mutawallis in accordance with the provisions of the Act. He submitted that it is in the light of the functions that have been entrusted on the Wakf Board as is clear from Section 15 of the Act that we should construe the provisions of Section 42 of the Act which have been invoked in this case. He submitted that on a proper construction of Section 42 it would be reasonable to hold that the Wakf Board has the power of rendering a decision if there is a dispute in regard to the right to be appointed as a mutawalli and to make a proper appointment if the appointment already made is not in accordance with the terms of the Wakf.

4. Section 42 of the Act which calls for construction in this case may be set out as follows ;

"When there is a vacancy in the office of the mutawalli of a wakf and there is no one to be appointed under the terms of the deed of the Wakf, or where the right of any person to act as mutawalli is disputed, the Board may appoint any person to act as mutawalli for such period and on such condition as it may think fit."

On a plain construction of Section 42 it appears to us that power has been conferred on the Wakf Board to appoint any person to act as the mutawalli under the two situations specified in the section. The first is when there is no one to be

appointed under the terms of the deed of the wakf and the second is where the right of any person to act as mutawalli is disputed. But it appears to us that the power of appointment can be exercised only when there is a vacancy in the office of the mutawalli of a wakf. The expression "when there is a vacancy in the office of the mutawalli of a wakf applies to both types of situations viz., there being no one to be appointed under the terms of the deed of the wakf and where the right of any person to act as mutawalli is disputed. On a plain reading of Section 42 of the Act it appears that the power to appointment can be exercised only when there is a vacancy. It is an enabling provision which entitles the Wakf Board to step in when there is vacuum, there being none to look after the affairs of the Wakf as a mutawalli. It is also necessary to note that the power conferred by Section 42 is not to appoint a person as the mutawalli but to appoint a person to act as the mutawalli. The stipulation that such appointment shall be made for such period and on such condition as it may think fit also suggests that it is not the regular appointment of a mutawalli that is contemplated by Section 42 of the Act.

5. It is necessary to point out that Section 42 in terms does not expressly empower the Wakf Board to remove a person who has already been appointed as a mutawalli or who has been functioning as a de facto mutawalli. It was sought to be contended that such a power must be implied in the power conferred by Section 42 of the Act. If it was thought necessary to confer power of removal for the purpose of giving effect to the appointment to be made u/s 42, express provisions would have been made to that effect in Section 42 itself. Even assuming for the sake of argument that an appointment is made u/s 42 as contended by the learned counsel for the appellant that it has the legal effect of removing a person who is already functioning as a mutawalli, the question of enforcing such an order would arise. We do not find any provision in the Act which enables the Wakf Board to enforce the order by removing the person who has been functioning as a mutawalli in order to give effect to the order of appointment made by the Wakf Board u/s 42 of the Act, We find by contrast express provision having been made in Sub-section (3) of Section 43 of the Act for enforcing the order of removal that the Wakf Board is competent to make under Sub-section (1) or (2) of Section 43 of the Act. The said Sub-section (5) of Section 43 provides that where a Mutawalli has been removed from his office under Sub-section (1) or Sub-section (2), the Board may, by order, direct the mutawalli to deliver possession of the wakf property to the Board or any officer thereof duly authorised in this behalf or to any person or committee appointed to act as the mutawalli of the Wakf properly; and the order of the Board shall be deemed to be a decree of Civil Court and shall be executed by the Civil Court as if it had passed the decree. It is therefore clear that if the order of the Wakf Board removing the mutawalli under Sub-section (1) or (2) of Section 43 is not obeyed, the said order can be deemed to be a decree of a Civil Court and executed as such. But there is no such provision for enforcing the order made u/s 42 if the same is construed as an order empowering the Wakf Board to remove

a person wrongly appointed or wrongly in occupation of the office of the mutawalli. The power under Sub-section (5) of Section 43 cannot be invoked in such circumstances as the power can be invoked only in cases where removal is brought about by invoking Sub-section (1) or (2) of Section 43 of the Act. The removal that can be implied from Section 42, as contended by learned counsel for appellant, can by no stretch of imagination be brought about under Sub-section (1) or (2) of Section 43. Hence the provision in Sub-section (5) of Section 43 cannot be made use of for the purpose of removing the person already in office as a mutawalli for the purpose of giving effect to the order of appointment made u/s 42 of the Act. The Legislature would not have conferred power of removal without giving adequate power or making adequate provision for enforcing such an order as has been done in Sub-section (5) of Section 43. This is another reason for us to come to the conclusion that the power conferred by Section 42 of the Ad does not empower the Wakf Board to remove a person who is already functioning as a mutawalli. It is necessary to point out that the expression "mutawalli" as defined in Section 3(f) of the Act includes any person appointed in accordance with the Wakf deed and also includes any person for the time being managing or administering any wakf property as such. Therefore any person who is in de facto management of the Wakf properties is also a mutawalli as defined in Section 3(f) of the Act. Absence of power to remove the de facto mutawalli in Section 42 of the Act strengthens the inference that the power of appointment can only be exercised when there is a vacuum, there being no person functioning either as de jure or de facto mutawalli. We have therefore no hesitation in agreeing with the view taken by the learned single Judge that the power of appointment conferred by Section 42 can only be exercised when there is a vacancy. As in this case there was no vacancy, the Board of Trustees having already appointed the person who was functioning as mutawalli, the Board could not exercise its power of appointment u/s 42 of the Act. The learned single Judge, in our opinion, is right in taking the view that any aggrieved party can get his rights established in an appropriate civil suit to claim the office of mutawalli in accordance with the terms of the Wakf.

For the reasons stated above this appeal fails and is dismissed. No costs.