

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 24.07.2020

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

W.P(MD)No. 7661 of 2020

and

W.M.P.(MD)Nos.7156 & 7157 of 2020

Mr.M.Imam Hussain, Advocate ... Petitioner

Vs.

- 1.The Government of Tamil Nadu,
Rep. by its Secretary,
Backward Classes, Most Backward Classes and
Minorities Welfare Department,
Secretariat, Fort St. George,
Chennai.
 - 2.The Election Authority,
Principal Secretary to Government,
Minorities Welfare Department,
Secretariat, Chennai.
 - 3.The District Collector,
Madurai District, Madurai.
 - 4.Tamil Nadu Wakf Board,
Rep. by its Special Officer,
Jaffar SIRRANG Street,
Vallal Seethakadhi Nagar,
Chennai.
- ... Respondents

Prayer: Writ petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for records relating to the impugned notification issued by the second respondent dated 14.07.2020 and quash the same as illegal and consequently

direct the first respondent to nominate senior Muslim advocates to the Tamil Nadu Waqf Board in terms of proviso to Section 14(1)(b)(iii) of the Waqf Act 1995, within the time that may be stipulated by this Court.

For Petitioner : Mr.M.Mahaboob Athiff
For R-1 to R-3 : Mr.K.Chellapandian,
Additional Advocate General,
assisted by Mr.V.R.Shanmuganathan,
Special Government Pleader.
For R-4 : Mr. V.Lakshminarayanan

ORDER

“Waqf” means the permanent dedication by any person, of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable. To provide for the better administration of waqfs, the parliament enacted the Waqf Act, 1995 (hereinafter referred to as “the Act”). It provides for the establishment and constitution of Central Waqf Council by the Central Government. It also mandated the establishment of a Board of Waqf for each State and Union Territory. The Board is a body corporate having perpetual succession and a common seal. Section 14 of the Act sets out the composition of Board. It reads as follows :

“14.Composition of Board.—(1)The Board for a State and the [the National Capital Territory of Delhi] shall consist of—

a) a Chairperson;

(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 [auqafs] having an annual income of rupees 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;]

[(c)one person from amongst Muslims, who has professional experience in town planning or business management, social work, finance or revenue, agriculture and development activities, to be nominated by the State Government;

(d) one person each from amongst Muslims, to be nominated by the State Government from recognised scholars in Shia and Sunni Islamic Theology;

(e)one person from amongst Muslims, to be nominated by the State Government from amongst the officers of the State Government not below the rank of Joint Secretary to the State Government;]

[(1-A) No Minister of the Central Government or, as the case may be, a State Government, shall be elected or nominated as a member of the Board:

Provided that in case of a Union territory, the Board shall consist of not less than five and not more than seven members to be appointed by the Central Government from categories specified under sub-clauses (i) to (iv) of clause (b) or clauses (c) to (e) in sub-section (1):

Provided further that at least two Members appointed on the Board shall be women:

Provided also that in every case where the system of mutawalli exists, there shall be one mutawalli as the member of the Board.]

(2) Election of the members specified in clause (b) of sub-section (1) shall be held in accordance with the

system of proportional representation by means of a single transferable vote, in such manner as may be prescribed:

Provided that where the number of Muslim Members of Parliament, the State Legislature or the State Bar Council, as the case may be, is only one, such Muslim Member shall be declared to have been elected on the Board:

Provided further that where there are no Muslim Members in any of the categories mentioned in sub-clauses (i) to (iii) of clause (b) of sub-section (1) the ex-Muslim Members of Parliament, the State Legislature or ex-member of the State Bar Council, as the case may be, shall constitute the electoral college.

(3) Notwithstanding anything contained in this section, where the State Government is satisfied, for reasons to be recorded in writing, that it is not reasonably practicable to constitute an electoral college for any of the categories mentioned in sub-clauses (i) to (iii) of clause (b) of sub-section (1), the State Government may nominate such persons as the members of the Board as it deems fit.

(4) The number of elected members of the Board shall, at all times, be more than the nominated members of the Board except as provided under sub-section (3).

*(***)*

(6) In determining the number of Shia members or Sunni members of the Board, the State Government shall have regard to the number and value of Shia [auqafs] and Sunni [auqafs] to be administered by the Board and appointment of the members shall be made, so far as may be, in accordance with such determination.

*(***)*

(8)Whenever the Board is constituted or reconstituted, the members of the Board present at a meeting convened for the purpose shall elect one from amongst themselves as the Chairperson of the Board.

(9) The members of the Board shall be appointed by the State Government by notification in the Official Gazette.”

Section 15 of the Act states that the members of the Board shall hold office for a term of five years.

2.The Tamil Nadu Waqf Board was reconstituted vide G.O (2D) No.24, Backward Classes, Most Backward Classes and Minorities Welfare (T1) Department, dated 10.10.2017. Since the number of elected members of the Board became less than the nominated members of the Board, the government vide G.O (Ms) No.58, dated 18.09.2019 superseded the Board. Section 99 of the Act mandates that supersession can last for a period not exceeding six months. The State Government may extend the same by another six months. But the period of continuous supersession shall not exceed more than a year. Since the extended period is to expire, the impugned notification dated 15.07.2020 was issued by the Election Authority/Principal Secretary to Government, Backward Classes, Most Backward Classes and Minorities Welfare Department under Rule 8 of the Tamil Nadu Waqf Board (Conduct of Election for Members) Rules, 1997. The Election Authority

has called upon the members of each of the following electoral colleges specified in column (2) of the table below to elect the number of members to the Tamil Nadu Waqf Board as specified in the corresponding entry in column (3) :

TABLE

Sl.No.	Name of the Electoral College	Number of seats to be filled up
(1)	(2)	(3)
1)	Muslim Members of Parliament from the State	2
2)	Muslim Members of the State Legislature	2
3)	Muslim Ex-Members of Bar Council of the State	2
4)	Mutawallis of the Waqfs having an annual income of rupees one lakh and above as specified under sub-rule(13) of Rule 2 of the Election Rules	2

The election programme notified that filing of nomination commences on 16th July, 2020 and that 30th July, 2020 will be the date for publishing of final list of contesting candidates and that 19th August, 2020 will be the date on which a poll shall, if necessary, be taken. A press release dated 14.07.2020 was also issued.

Case of the petitioner :

3.The writ petitioner who is a practicing lawyer challenges the impugned notification on the ground that it is contrary to the mandate set out in the proviso to Section 14(1)(b)(iii) of the Act. He points out that even in the year 2017, the Bar Council of Tamil Nadu did not have any Muslim member. Therefore, in terms of the aforesaid proviso, the Government appointed Tvl.M.Ajmal Khan, Senior Advocate and Tvl.A.Sirajudeen, Senior Advocate as members of the Board. This was questioned by two former members of the Bar Council in WP No.28569 of 2017. The Government justified the nomination of the two senior counsel.

4.The petitioner alleges that since the two senior counsel turned out to be thorns in the flesh of the corrupt administration, they were overlooked this time. Instead of nominating senior counsel, the government has chosen to treat the Muslim ex-members of the Bar Council of Tamil Nadu as the electoral college in respect of the category falling under Section 14(1)(b)(iii) of the Act. Since the impugned exercise of the respondents is ultra vires the Act and is also tainted by malice, he has chosen to knock the doors of this Court.

Stand of the respondents :

5.The respondents have filed counter affidavits opposing the prayer made in the writ petition. They question the very locus standi of the petitioner. They also allege that he has approached the court with unclean hands. The petitioner had earlier filed a public interest litigation before the Principal Seat on the same cause of action but he did not pursue it. There is no disclosure about the said filing in the affidavit filed in support of the present writ petition. The respondents point out that the writ petition is liable to be dismissed on the ground of non-joinder of necessary parties. They further contend that the writ petition is not maintainable as the election process has already commenced. It is their firm stand that the power of nomination can be invoked only when it is not reasonably practicable to constitute the electoral college. When there are no sitting members in the Bar Council of the State, the ex-members will constitute the electoral college. Only if there are no ex-members also, the government will have to nominate 'any senior Muslim advocate'. This expression cannot be confined to mean the designated senior counsel alone.

Objections to the maintainability overruled :

6.I carefully considered the rival contentions and went through the materials on record. I am not impressed with any of the preliminary

objections raised by the respondents. It is admitted that the petitioner earlier filed a public interest litigation on the same cause of action before the Principal Seat of this Court. But, it is beyond dispute that it was not even numbered. It was never listed before the court. The petitioner states that he had given a letter informing the Registry that he is moving the Madurai Bench and that the petition filed before the Principal Seat may be returned. It is true that the petitioner has not referred to it in the affidavit filed in support of the present writ petition. But the question is whether it will amount to suppression of a material fact. The Hon'ble Supreme Court in **S.J.S. Business Enterprises (P) Ltd. Vs. State of Bihar and Ors (2004) 7 SCC 166** held that the suppressed fact must be a material one in the sense that had it not been suppressed it would have had an effect on the merits of the case. It must be a matter which was material for the consideration of the Court, whatever view the Court may have taken. Applying the aforesaid test, I must hold that the petitioner cannot be non-suited on this ground.

7. It is true that elections should be conducted according to the time schedule and that all controversial matters and all disputes arising out of elections should be postponed till the elections are over. That is why, courts refrain from staying the election process once it has commenced. But, where questions going to the very root of the matter

are raised, the court would definitely be justified in taking up the main case for final hearing and examining the contentions raised. That is why, when the writ petition was listed for admission, I made it clear that I would not grant any interim order but take up the case for final hearing. The contention of the petitioner is that the impugned notification is not in consonance with the proviso to Section 14 (1) (b) (iii) of the Act. If the petitioner's contention turns out to be correct, the very holding of the election turns out to be illegal and without jurisdiction. I fail to understand why I should decline to adjudicate the same. The situation will be different if the controversy turns on facts. Then, certainly, the parties should be shown the door and asked to wait till the election process gets concluded. But, where pure questions of law are raised and they pertain to jurisdiction, it would be an abdication of judicial duty to refuse to entertain the challenge.

8. The contention of the standing counsel is that when the petitioner alleges mala fides and the outcome will have a bearing on the rights of the Muslim ex-members of the Bar Council, the concerned persons ought to have been impleaded as respondents. I do not find any merit in this objection. The petitioner is only contending that the entire process is tainted by malice in law. In that case, there is no need to implead any person individually. Likewise, there is no need to implead

the Muslim ex-members of the Bar Council. This is because, the challenge mounted by the petitioner is anchored on the interpretation of the statutory provision and nothing else. Of course, it would be open to the ex-members of the Bar Council to get themselves impleaded in these proceedings on the ground that they have interest in the subject matter. But the petitioner is not required to formally implead them on his own. I am also of the view that the locus standi of the petitioner to maintain this writ petition cannot be doubted since the petitioner is a practicing lawyer and a "person interested" within the meaning of Section 3(k) of the Act.

Issues arising for consideration :

9.The petitioner has raised the following two important questions of law :

(a)Whether the State Government is obliged to nominate any senior Muslim advocate from the State when the Bar Council of the State does not have a muslim member.

(b) Whether the expression "senior Muslim advocate" denotes a designated senior counsel.

The petitioner's counsel contended that the proviso to Section 14(1)(b) (iii) will kick in if there is no Muslim member of the Bar Council. It is true that the proviso employs the expression "the State Government... may

nominate”. But as held by the Hon'ble Supreme Court in the decision reported in **(1987) 1 SCC 213 (Ambica Quarry Works vs. State of Gujarat)**, the said enabling expression has to be construed as “shall” because the power is coupled with duty. He also relied on the decision of the High Court of Karnataka reported in **MANU/KA/5555/2018 (Asif Ali Shaikh Hussain vs. the State of Karnataka and ors)** as well as the order dated 12.11.2019 made in WP(MD)Nos.20085 and 20417 of 2019 to buttress his contention that the State Government is left with no other option but to nominate any senior Muslim advocate if there is no sitting Muslim member of the Bar Council. Great reliance was placed on the counter affidavit filed by the Government of Tamil Nadu in WP No.28569 of 2017 wherein the categorical stand of the Government was that Section 14(2) shall assume importance only when Section 14(1)(b)(iii) as a whole cannot be enforced for non-availability of Muslim members in the State Bar Council as well as non availability of senior Muslim advocates in the State. He strongly urged that the expression “any senior Muslim advocate” can only mean and refer to a designated senior advocate.

Resolving the Questions :

10.Let me take up the second question first. Section 16 of the Advocates Act, 1961 states that there shall be two classes of

advocates, namely, senior advocates and other advocates. An advocate may with his consent be designated as senior advocate if the Supreme Court or a High Court is of the opinion that by virtue of his ability, standing at the Bar or special knowledge or experience in law he is deserving of such distinction. The proviso to Section 14 (1)(b)(iii) of the Act speaks of “any senior Muslim advocate”. Shri.V.Lakshminarayanan, the learned standing counsel for the Board points out that even though Rule 4(5) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995 employs the expression “eminent Senior Advocate”, the Hon'ble First Bench of this Court in WP(MD)No.8172 of 2008 dated 25.02.2020 interpreted the expression as follows :

“10.....the words “eminent Senior Advocate” occurring in Rule 4(5) of the 1995 Rules, in our considered opinion, is not a synonym of the definition of a Senior Advocate as contained in the Advocates Act 1961. A Lawyer having ample years of practice with a substantial expertise in the field of criminal law can be considered to be eminent even if he is not a designated Senior Advocate under the 1961 Act. The purpose therefore, is to make available the best of the legal brain that can be easily made available for the purpose of conducting a trial of a special nature as per the provisions of the 1995 Rules.”

The argument of the standing counsel is that the proviso on hand does not even talk of “senior advocate”. It refers to only “any senior Muslim advocate”.

11.I fully agree with the stand of the Standing Counsel. The expression “Senior Advocate” may comprise two words. But they are like siamese twins. They cannot be separated. Makakavi Kalidasa in Vagarthaviva sampruktau sloka sings that Lord Parameshvara and Goddess Parvathi remain combined in themselves as speech and meaning. But the proviso relied on by the petitioner contains the expression “any senior Muslim advocate”. The word “advocate” is qualified by the adjective “Muslim”. This adjective stands in between the words 'senior' and 'advocate'. The legislature has not used the expression “Muslim senior advocate”. Courts have to give effect to legislative intent and not play the game of scrabble. It can therefore only mean the senior among the Muslim advocates. It cannot be confined to the Muslim advocates designated as senior advocates under the Advocates Act, 1961. Since the expression “senior” has been used, the basic criteria set out in the Madras High Court Designation of Senior Advocates Rules, 2020 cannot be lost sight of. Therefore, while nominating under the aforesaid proviso any senior Muslim advocate, the choice has to be confined to those advocates who have completed 45

years of age and are ordinarily practicing in the High Court or the Subordinates Court or the Tribunals for not less than ten years preceding the date of consideration for nomination. If a narrow construction as contended by the learned counsel for the petitioner is accepted, that would mean the government will not be able to tap the services of a large number of persons. Even according to the learned counsel for the petitioner, there are only four designated Muslim senior advocates in the State of Tamil Nadu. While designation as a Senior Counsel is an acknowledgment of the calibre of the person so designated, non-designation does not necessarily imply lack of professional competence. Shri.N.G.R.Prasad is a doyen of the labour Bar. Shri.N.Vijayaraghavan's mastery of insurance law is well known. And Shri.V.Raghavachari is there. I can multiply instances. Their stature is no less because they have not been designated. Of course, the politics of designation is an interesting subject by itself !

सत्यमेव जयते

12.It may not be out of place to refer to the discussion that took place in the Constituent Assembly with regard to the qualification of the members of the Advisory Board to deal with preventive detention.

Sir.Alladi Krishnaswami Ayyar spoke thus :

“The tribunal is to consist of people who are qualified to be judges of the High Court. Are we to say that a retired judge is eligible, but not a distinguished

member of the Bar who might not have a chance of becoming a Judge of the High Court is eligible for a place in that Court ? If there is sufficient public spirit, I have no doubt members of the Bar who might have retired from the Bar or who might not have occupied the position of judges are eligible to be members of such tribunals, and it cannot be said that a person simply because he has not occupied a position of a judge is not good enough to be a member of the tribunal or to take a dispassionate view of the situation. Therefore, normally speaking, the tribunal will consist of people who were judges or people who are fit to be judges, and people of high character. And after all, there are judges and judges, The one reason why we say that that it is better to have judges is that they have security of tenure; they occupy a particular place in society and they are accustomed to deal with cases from a detached point of view and it is better to have these people as members of the tribunal.

You need not put an embargo on people who may take an impartial view of the question, who may be guided by principles of justice and fair play, from being members of this tribunal, because they never happened to be Judges. I believe there is a sufficient number of people in this country who are fit to be in the tribunal other than Judges or people who are retired Judges. Imagine a man like Sir Tej Bahadur Sapru being alive and he being ineligible to be a member of the tribunal. I would have welcomed him as a member of the tribunal. The other day, Mr. Venkatarama Sastri was a member

of the Board. A leading member of the Bar, who has occupied the position of Advocate General, he was a member of a Board which was constituted in Madras. He sat along with Judges who are much junior to him and possibly who could have sat under him and learnt some bit of law when they were at the Bar. Under those circumstances, we need not introduce a cast-iron provision to the effect that the members shall be only judges.....“

These sage observations can by analogy be applied to the case on hand also. Respectfully following the law laid down by the Hon'ble First Bench in Mallika, I hold that the expression “any senior Muslim advocate” occurring in the proviso to Section 14(1)(b)(iii) of the Act cannot be confined to designated senior counsel.

13. Now let me come to the first issue. It is true that a plain reading of Section 14(1)(b)(iii) leads one to conclude that this category of electoral college will consist of the Muslim members of the Bar Council and in case there is no such member, the Government may nominate any senior Muslim advocate. But that would be too narrow an approach. Unlike horses, judges cannot afford to have blinkered vision. As held by the Hon'ble Supreme Court in *O.P.Singla vs. Union of India* [(1984) 4 SCC 450], “when a rule or a section is a part of an integral scheme, it should not be considered or construed in isolation. One must

have regard to the scheme of the fasciculus of the relevant rules or sections in order to determine the true meaning of any one or more of them. An isolated consideration of a provision leads to the risk of some other inter-related provision becoming otiose or devoid of meaning.”

14.As rightly emphasized by Shri.V.Lakshminarayanan, the learned standing counsel for the Waqf Board, accepting the contention of the petitioner would render the second proviso to Section 14(2) of the Act otiose. The effect of the said proviso is that if there are no sitting members, the ex-members shall constitute the electoral college. It is relevant to take note of Rule 2 (7) of the Tamil Nadu Waqf Board (Conduct of Election for Members) Rules, 1997 which defines electoral roll as follows :

“(7) “Electoral Roll” means list of members of each of the following electoral colleges enumerated under clause (b) of sub-section (1) of section 14 of the Act :-

- (i)Members of Parliament;
- (ii)Members of the State Legislature;
- (iii)Members of the State Bar Council;
- (iv)Mutawallis.

Provided that where there are no Muslim members in any of the categories mentioned in items (i) to (iii) above, the electoral roll shall consist of the ex-members of respective electoral college as specified

in the second proviso to sub-section (2) of section 14 of the Act.”

The respondent authorities have merely acted pursuant to the aforesaid mandate set out in the statutory rules.

15. The learned counsel for the petitioner repeatedly harped on the fact that the proviso to Section 14(1)(b)(iii) was introduced by way of amendment in the year 2013. But the court has to factor in Explanation (I) to Section 14(1)(b)(i) to (iv) which was also inserted by the very same Amending Act 27 of 2013. The Explanation (I) reads as follows :

“[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.”

The Hon'ble Supreme Court in **New Okhla Industrial Development Authority Vs. Chief Commissioner of Income Tax and Ors, (2018) 9 SCC 351**, explaining the manner in which an Explanation has to be understood, interpreted and applied held as follows :

“52. For interpreting an explanation this Court in S.Sundaram Pillai and Ors. v. V.R. Pattabiraman and Ors, 1985 (1) SCC 591, laid down in paragraphs 47 and 53 as follows:

“47. Swarup in Legislation and Interpretation very aptly sums up the scope and

effect of an Explanation thus:

Sometimes an Explanation is appended to stress upon a particular thing which ordinarily would not appear clearly from the provisions of the section. The proper function of an Explanation is to make plain or elucidate what is enacted in the substantive provision and not to add or subtract from it. Thus an Explanation does not either restrict or extend the enacting part; it does not enlarge or narrow down the scope of the original Section that it is supposed to explain.... The Explanation must be interpreted according to its own tenor; that it is meant to explain and not vice versa. (pp. 297-98)

53. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is-

(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the

Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same.”

16.Explanation (I) to Section 14(1)(b) (i) to (iv) has to be construed in the manner laid down above. It states that members from categories mentioned in sub-clause (i) to (iv) shall be elected from the electoral college constituted for each category. It employs the expression “shall be elected”. We are now concerned with category (iii). As far as this category is concerned, the electoral college will comprise the sitting Muslim members of the Bar Council of the State of Tamil Nadu. Probably the law makers foresaw that introduction of the proviso to Section 14(1)(b)(iii) may cause doubt and hence they chose to add the Explanation simultaneously for removal of doubts. If there is no sitting member, the electoral college will consist of Muslim ex-members of the Bar Council of Tamil Nadu. This position is made clear by Rule 2(7) of the Tamil Nadu Waqf Board (Conduct of Election for Members) Rules, 1997. Election is therefore mandatory in the first place. Only if the electoral college cannot be constituted either way, the State government has to fall back on the power of nomination and as

already held the zone of consideration need not be confined to designated Senior Counsel.

17.The petitioner's counsel strongly urged that the State Government does not have any discretion at all. The proviso to Section 14(1)(b)(iii) will kick in if there are no sitting members. I have to necessarily reject this contention because accepting the same will render the second proviso to Section 14(2) of the Act otiose. Of course, it would have made better drafting sense if the proviso to Section 14(1)(b)(iii) had been placed after the second proviso to Section 14(2) of the Act. But a clumsy arrangement of the Section cannot come in the way of the Court correctly construing the provision.

18.As pointed out by Shri.V.Lakshminarayanan, I can derive guidance from Section 14(3) of the Act also, though it opens with a non obstante clause. It states that the State Government may nominate all the members of the Board only if it is not reasonably practicable to constitute an electoral college for any of the categories mentioned in sub-clauses (i) to (iii) of clause (b) of sub-section (1) of Section 14 of the Act. From this, one can safely conclude that only if there are no sitting or ex-members of the Bar Council, the Government may invoke the proviso to Section 14(1)(b)(iii) of the Act.

19.The issue can be approached from yet another angle. If there is no sitting member in the Bar Council and the State Government is obliged to go in for nomination, that would mean giving a go-bye to the electoral college comprising the Muslim ex-members of the Bar Council. The Hon'ble Division Bench of the Madras High Court in the decision reported in **(2013) 3 MLJ 688 (M.H.Jawahirullah vs. Government of Tamil Nadu)** specifically observed as under :

“the desire to have popular representation on Wakf Board can be gathered from Section 14 (2), which prescribes electoral college and election. Primacy given to democratic process of administration and supervision in Wakf Board Management is apparent. In fact, the Statement of Objects and reasons shows this composition and election is an important feature of the Wakf Act. Since the intention of the Legislature is to have democratic process of administration and supervision in Wakf Board Management, the State cannot avoid election and resort to nomination arbitrarily.”

We are a democratic republic. The democratic process must permeate everywhere. When the statute provides for a democratic machinery, it is that which must be preferred and not the process of nomination.

20.The contention that the State Government has shifted its stand has only to be stated to be rejected. It is a fundamental principle of law that there can be no estoppel against statute. Any court will interpret a statutory provision in the light of the overall scheme and the settled principles of interpretation. It cannot be guided by the stand taken in counter affidavits filed in earlier litigations. The Government itself is not so bound. I cannot help remarking that the stand taken by the first respondent in WP No.28569 of 2017 is patently erroneous.

Result :

21.Thus, both the questions of law raised in this writ petition are answered as follows :

(a)When the Bar Council of the State does not have a Muslim member, the electoral college will not fall vacant. It will then comprise the Muslim ex-members of the Bar Council. Only if there are no Muslim sitting or ex-members of the Bar Council and it is not possible to constitute the electoral college, the Government may nominate any senior Muslim advocate from the State to fill up the category contemplated by Section 14(1)(b)(iii) of the Act.

(b)The expression “any senior Muslim advocate” occurring in the proviso to Section 14(1)(b)(iii) of the Act is not confined to

designated senior counsel. It also includes those Muslim advocates who are 45 years of age and who are in practice for not less than 10 years preceding the date of consideration for nomination.

22.The impugned election notification issued by the second respondent is in consonance with the statutory scheme set out in the Waqf Act, 1995 r/w the Tamil Nadu Waqf Board (Conduct of Election for Members) Rules, 1997. There is no merit in this writ petition. It stands dismissed. Consequently, connected miscellaneous petitions also stand dismissed. There shall be no order as to costs.

Postscript :

23.While dictating the order in the open court, I felt that I need not go into the second question raised by the petitioner's counsel. However, while finalizing the draft, I felt interest of justice will be better served if both the questions which were raised by the petitioner and also fully argued by his counsel are answered.

24.I must also mention that the petitioner's counsel Mr.M.Mahaboob Athiff not only exhibited forensic brilliance but also excellent manners. Let me put it in context. “Entha Muddo entha sogaso” is a melodious Kriti of Thyagaraja. A You-Tube listener

commented that the opening rendition of the song by Dr.Balamuralikrishna was incorrect. This invited a harsh response from another who while maintaining that Dr.Balamuralikrishna's pronunciation cannot be faulted added tongue-in-cheek that the critic was accustomed to the defective pronunciation of the Telugu Kritis by Tamil singers. During the course of this hearing many such verbal volleys and acidic barbs were hurled at the petitioner's counsel. But, they could elicit only a generous smile and nothing beyond. Since earlier in the day, in another case there was acrimonious and vituperative exchange of words between counsel, the conduct of Mr.Mahaboob Athiff was such a pleasant contrast that I felt that I should acknowledge.

24.07.2020

Index : Yes / No
Internet : Yes/ No
skm

Note : 1.Issue order copy within one day after the same received by the Court Officers Section.

2.In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

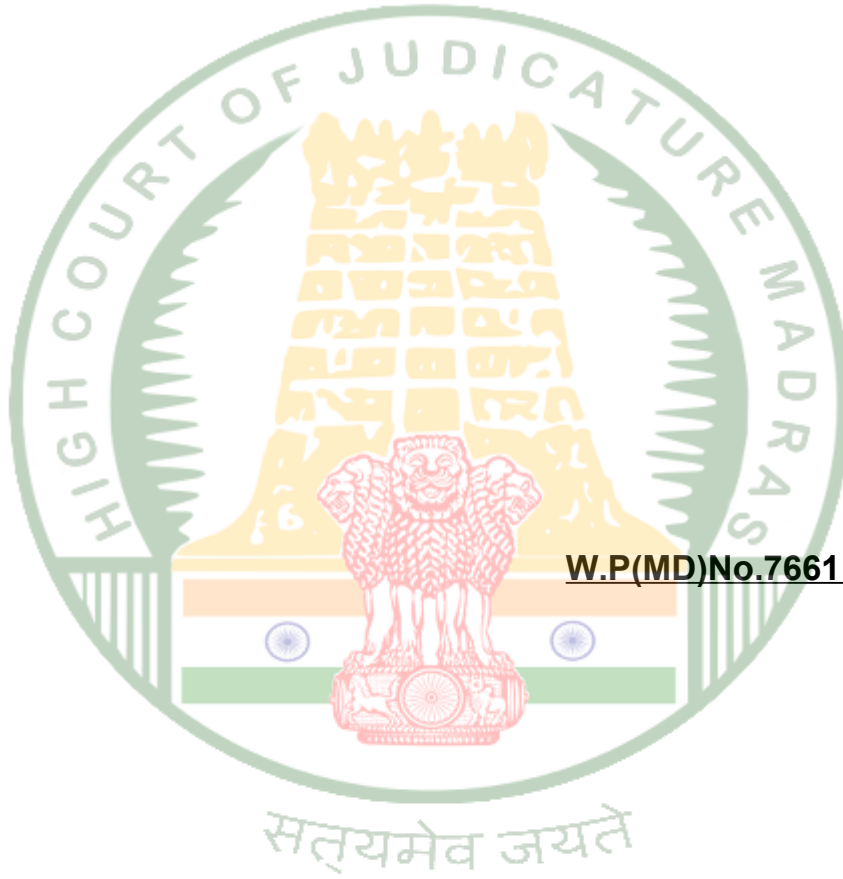
1. The Secretary, Government of Tamil Nadu,
Backward Classes, Most Backward Classes and
Minorities Welfare Department,
Secretariat, Fort St. George, Chennai.
2. The Election Authority, Principal Secretary to Government,
Minorities Welfare Department,
Secretariat, Chennai.
3. The District Collector, Madurai District, Madurai.
4. The Special Officer, Tamil Nadu Wakf Board,
Jaffar Sिरrang Street,
Vallal Seethakadhi Nagar, Chennai.



WEB COPY

G.R.SWAMINATHAN, J.

skm



W.P(MD)No.7661 of 2020

WEB COPY

24.07.2020