

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE K. VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE T. R. RAVI

MONDAY, THE 14TH DAY OF SEPTEMBER 2020 / 23RD BHADRA, 1942

WP(C).No.18703 OF 2020(K)

PETITIONER:

NAJEEM
AGED 48 YEARS
S/O. KASIM KUNJU, NOUFAL MANZIL,
EDAMULACKAL P.O., ANCHAL,
PUNALUR TALUK, KOLLAM DISTRICT-691321.

BY ADVS.
SRI. MANU RAMACHANDRAN
SRI. M. KIRANLAL
SRI. R. RAJESH (VARKALA)
SRI. T. S. SARATH
SHRI. SAMEER M NAIR

RESPONDENTS:

- 1 THE KERALA STATE WAQF BOARD
HEAD OFFICE, V.I.P. ROAD,
KALOOR, KOCHI-682017,
REPRESENTED BY ITS CHIEF EXECUTIVE OFFICER.
- 2 THE CHIEF EXECUTIVE OFFICER,
KERALA STATE WAKF BOARD, HEAD OFFICE,
V.I.P. ROAD, KALOOR,
KOCHI-682017.
- 3 THE DIVISIONAL OFFICER,
DIVISIONAL OFFICE, KERALA STATE WAKF BOARD,
THIRUVANANTHAPURAM, ARTLEE COMFORT,
NALANDA ROAD, PMG,
VIKAS BHAVAN P.O.,
THIRUVANANTHAPURAM DISTRICT-695033.

4 THE EDAMULACKAL MUSLIM JAMA-ATH,
EDAMULACKAL P.O., ANCHAL, PUNALUR TALUK,
KOLLAM DISTRICT-691321,
REPRESENTED BY ITS PRESIDENT.

5 THE PRESIDENT,
THE EDAMULACKAL MUSLIM JAMA-ATH,
EDAMULACKAL P.O., ANCHAL,
PUNALUR TALUK, KOLLAM DISTRICT-691321.

6 THE SECRETARY,
THE EDAMULACKAL MUSLIM JAMA-ATH,
EDAMULACKAL P.O., ANCHAL,
PUNALUR TALUK, KOLLAM DISTRICT-691321.

R1-2 BY ADV. SHRI.T.K.SAIDALIKUTTY, SC, WAQF BOARD

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION
ON 14.09.2020, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

JUDGMENT

T.R.RAVI, J.

Heard Sri Manu Ramachandran on behalf of the petitioner and Sri T.K.Saidalikutty on behalf of the Waqf Board.

2. The petitioner is a member of the Edamulackal Muslim Jama-ath. He has approached this Court for the following reliefs.

“1) To call for records leading to Exhibit P1 and quash the same by issuing a writ of certiorari;

2) To issue a writ of mandamus, or any appropriate writ or direction directing the respondents 1 and 2 to consider and dispose Exhibit P3 complaint within a time frame fixed by this Hon'ble Court;

3) To issue a writ of mandamus, or any appropriate writ or direction staying the operation of Ext.P1 till the consideration and disposal of Ext.P3 complaint by the respondents 1 and 2.”

3. Ext.P1 is a communication from the 4th respondent Jama-ath to the petitioner whereby he has been informed that he is removed from the membership of the Jama-ath for a period of two years from 24.01.2020 to 23.01.2022 and that if he makes a fresh application after the said period of two years, he will be given

membership in the Jama-ath, if approved by the Jama-ath. Ext.P2 is an application submitted by the petitioner to the 4th respondent praying to reconsider the decision and to restore his membership in the Jama-ath. Exts.P3 and P4 are petitions said to have been filed before the Kerala Waqf Board and the Kerala Waqf Board Divisional Office, Thiruvananthapuram, respectively, wherein the prayer is to restore his membership. When the writ petition was taken up for hearing, the counsel for the petitioner submitted that his limited prayer is for a direction to the 1st respondent Board to consider and pass orders on Ext.P3.

4. According to the petitioner, it is the bounden duty of the 1st respondent Board, under Section 32 of the Waqf Act, to consider and pass orders on petitions in the nature of Ext.P3. In support of the contention that the Waqf Board has the power to consider and pass orders on such issues, the counsel for the petitioner relies on the decisions of this Court in **Basheer Haji v. Kerala Waqf Board** reported in [2007 (1) KLT 1039], **Attakkoya Thangal v. Union Territory of Lakshadweep** reported in [1987 (1) KLT 762] and **Rasheed A.P.A. v. N.N.Khalid Haji and another** reported in [2011 (3) KLT 421].

5. Section 32 of the Act deals with the powers and

functions of the Board. A reading of the said Section would show that it does not confer any power on the Waqf Board to decide on the question of entitlement of a person to be a member of a Jama'ath. The power available under Section 32 is supervisory in nature and is concerning the administration of the Waqf. In **Basheer Haji (supra)**, a complaint was filed before the Waqf Board stating that the complainant has been ex-communicated by the petitioner in the writ petition and that religious services like Khatheeb and Mukri were not provided for his daughter's marriage. The Waqf Board acted on the complaint and made a declaration that the complainant is entitled to equal protection and assistance of the petitioner in the writ petition, such as providing of service of Khatheeb and Mukri for marriage, etc. as in the case of other members. In a challenge made to the above order, a learned Single Judge dismissed the writ petition holding that the Waqf Board has plenary powers over the Waqf on religious and other matters. The factual background on which the above judgment was rendered is clear from paragraph 3 of the judgment, which is extracted below.

"3. Neither before the Wakf Board nor before this court the petitioner was willing to concede that the second respondent was singled out, ousted or excommunicated. If there is any substance in the allegation of unislamic act by

the second respondent, it was open to the Jama-ath and Mahal members to take appropriate action. Therefore, without actual excommunication, the petitioner wants to keep the second respondent out of the Jama-ath. It is in this context the Wakf Board made a declaration that the second respondent is entitled to equal protection and assistance from the petitioner such as providing of service of Khatheeb and Mukri for marriage, etc. which are available to other members of the Jama-ath. In the circumstances, I am of the view that the declaration and direction issued by the Wakf Board vide Ext.P4 is perfectly in order.”

6. In the case on hand, Ext.P1 would disclose that Jama-ath had taken the decision to remove the petitioner from membership for the reason that he had entered the Mosque in an inebriated condition and abused the Ustad in the Mosque. Ext.P1 does not speak of any ex-communication as sought to be made out by the petitioner. In our opinion, the issue complained of by the petitioner is more in the nature of a civil dispute for which the remedy available to the petitioner is to approach the Waqf Tribunal and not the Waqf Board.

7. **Attakkoya Thangal (supra)**, is regarding the right to worship. In the said case, certain persons were ex-communicated by means of a resolution and it was declared that they will have no right to enter the Islamic Public Institutions such as Mosques,

Madrassas, etc. The said case did not arise from any proceedings before the Waqf Board, but arose out of orders passed by the Executive Magistrate, Androth. The learned Magistrate found that the resolutions passed, ex-communicating certain members, are illegal and void. A Learned Single Judge held that the Executive Magistrate has followed a wrong procedure and held that Section 145 of the Criminal Procedure Code will not be applicable to a dispute of that nature. Finally, in paragraph 23, this Court held that it is not permissible to deny the right of worship in a Mosque to any Muslim, whatever be the sect to which he belongs and that a person belonging to a particular sect cannot claim the right to hold separate congregation or separate call for prayer in a Mosque built by another sect. The Court held that the rights will be determined by the Imam of that Mosque. The said case also has no bearing on the facts of the case before us.

8. In **Rasheed A.P.A. (supra)**, which came up for consideration before a Division Bench of this Court, the question involved was whether the Waqf Board acting under Section 32 is an adjudicatory body and whether it can pass interim orders while acting in exercise of the powers under Section 32. It was a case where two interim orders issued by the Waqf Board were challenged

before the Waqf Tribunal. The first interim order restrained the respondents before the Board from conducting an election to the Managing Committee and the second interim order restrained the convening of the General Body from taking decisions in a General Body Meeting. It can thus be seen that there also the issue involved was not regarding the removal of a person from membership of the Jama-ath, by the Jama-ath. It would appear from the facts available before the Division Bench in the above-said case that the complaint was that persons eligible for membership were not being admitted to membership and the Society was arbitrarily proceeding to conduct an election to the governing body. Paragraphs 10 and 13 of the said judgment are extracted below;

“10. There can thus be no dispute that the powers under Section 32 are in the nature of powers of superintendence and such powers of superintendence are to be invoked to ensure that interalia the Wakfs are “properly maintained, controlled and administered”. The powers under Section 32 cannot hence be described to be adjudicatory powers. The nature of the body that is Wakf Board constituted under Section 14 of the Act must also convey eloquently, that read along with Section 32, the powers are not adjudicatory in nature. It is true that Sections 70 and 72 deal with the manner in which the enquiry relating to administration of Wakf is to be conducted and the nature of the powers of the

Board while conducting such enquiry. Our attention has been drawn to Section 71(2) which clothes the Wakf Board with certain powers of civil court for the purpose of enforcing attendance of witnesses and production of documents. At any rate, there is nothing in Sections 14, 32, 70 or 71 which can persuade us to conclude that the powers under Section 32 are adjudicatory in nature or that any dispute/lis between the parties can be resolved by the Wakf Board by resorting to such powers. In this context, the nature of relief which a person can claim under Section 83 before the Wakf Tribunal against an order passed by the Wakf Board is also of crucial relevance. What is important is that relief is available to an aggrieved person not in the form of an appeal. But option is given to challenge the order by filing an application under Section 83(2). We are unable to find any incidents of the power of an adjudicatory authority in the powers of the Board under Section 32 of the Act.

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13. We repeat that the powers under Section 32 are powers of superintendence. Such powers are to be exercised primarily to ensure that the Wakfs are properly maintained, controlled and administered. This is very clear from Section 32(1). Section 32(2)(c) clearly suggests that the Wakf Board has powers to give directions for the administration of the Wakf. Sub clause (o) shows that the Board has powers to do such acts as may be necessary for the control, maintenance and administration of the Wakf."

9. The above observations clearly show that the Division Bench was of opinion that powers under Section 32 are not

adjudicatory. In the said case also, this Court decided only regarding the right of membership of persons and their right to vote in the election. The said decision also will not help the petitioner in any way to contend for a position that the issues raised in his complaints can be decided by the Waqf Board. On the other hand, the judgment of the Division Bench will actually work against the petitioner, since the court specifically said that the power is not adjudicatory.

10. The contention raised in the writ petition that the petitioner has a right to offer worship in a Mosque will have to be considered in a properly instituted civil suit. Since the Tribunal constituted under the Waqf Act has powers to deal with any disputes relating to Waqf, we are of the considered opinion that such disputes should necessarily be determined in an adjudicatory process before the Waqf Tribunal. There is no doubt that generally, every Mohammedan is entitled to enter a Mosque dedicated to God. This Court in the decision in **Pathanamthitta Majillissae Islamiya v. Shaik Mohammed** reported in **[AIR 1963 Kerala 49]** has held that the right to offer prayers in a Mosque is a legal right for the disturbance for which a Muslim is entitled to seek relief in a court of law. The above decision has been cited with approval

by a Division Bench of the Allahabad High Court in the decision in **Shah Abdu Bagi and others v. State of Uttar Pradesh and others** reported in **[AIR 1988 Allahabad 1]**. As such, there can be no doubt regarding the proposition that the petitioner is entitled to approach a court of law if there is a disturbance to his legal right of offering prayers in a Mosque. It would be then open to the said court of law to consider whether the disturbance is legally justifiable. We do not think that the petitioner should be allowed to by-pass a court of law and approach the Waqf Board for a decision on such a dispute. The writ petition is hence dismissed. The dismissal of the writ petition will not in any way prejudice the right of the petitioner to approach the Waqf Tribunal for appropriate reliefs.

Sd/-

K. VINOD CHANDRAN
JUDGE

Sd/-

T.R. RAVI
JUDGE

APPENDIX

PETITIONER'S EXHIBITS:

- EXHIBIT P1 THE TRUE COPY OF THE ORDER DATED 24.1.2020
ISSUED BY THE 4TH RESPONDENT TO THE PETITIONER.
- EXHIBIT P2 THE TRUE COPY OF THE REPRESENTATION DATED
26.2.2020 GIVEN TO THE RESPONDENT 4 TO 6 ALONG
WITH POSTAL RECEIPT.
- EXHIBIT P3 THE TRUE COPY OF THE COMPLAINT DATED 8.9.2020
PREFERRED BEFORE THE 1ST RESPONDENT ALONG WITH
TRUE PRINT OUT EMAIL.
- EXHIBIT P4 THE TRUE COPY OF THE COMPLAINT DATED 8.9.2020
PREFERRED BEFORE THE 3RD RESPONDENT ALONG WITH
TRUE PRINT OUT EMAIL.