

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.3603-3605 Of 2020

(arising out of SLP(C)Nos.10294-10296 of 2020)

The State of Tamil Nadu & Anr.

...APPELLANTS

VERSUS

K. FAZLUR RAHMAN & ANR.

...RESPONDENTS

J U D G M E N T

ASHOK BHUSHAN, J.

Leave granted.

2. These appeals have been filed against the common judgment of the High Court of Judicature at Madras dated 17.08.2020 in Writ Petition Nos.726 of 2020, 8377 of 2020 and 9557 of 2020. The Division Bench of the High Court by the impugned judgment has allowed Writ Petition Nos. 8377 and 9557 of 2020. The State of Tamil Nadu aggrieved by the impugned judgment has come up in these appeals.

3. The brief facts of the case to be noted for deciding these appeals are:

The Tamil Nadu Waqf Board is a statutory body governed by the Waqf Act, 1995. The term of earlier Waqf Board expired on 14.06.2017 and thereafter the State of Tamil Nadu reconstituted Tamil Nadu Waqf Board by order dated 10.10.2017. The Board constituted on 10.10.2017 consisted of 11 Muslim members to the following effect:

"Muslim Member of Parliament

Thiru A. Anwhar Raajhaa, M.P.

Muslim member of State Legislature

1. Thiru K.A.M. Muhammed Abubacker, M.L.A.
2. Thiru K.S. Masthan M.L.A.

Senior Muslim Advocates

1. Thiru A. Sirajudeen
2. Thiru M. Ajmal Khan

Mutawallis

1. Dr. Haja K. Majeed
2. Thiru Syed Ali Akbar

Person with professional experience

Thiru A. Tamilmahan Hussain

Recognized scholars Shia and Sunni Islamic
Theology

1. Tmt. Amatul Atifa, Scholar in Shia Islamic
Theology
2. Tmt. A.S. Fathima Muzaffer, Scholar in Sunni
Islamic Theology

State Government Nominee

Thiru M.A. Siddique, I.A.S.”

4. Two Senior Muslim Advocates as referred above were nominated by the State Government in exercise of power under proviso to Section 14(1)(b)(iii) of the Waqf Act, 1995. One Muslim Member of Parliament, two Muslim Members of State Legislature and two Mutawallis were elected members under Section 14(1)(b). The nomination of two Senior Muslim Advocates was challenged before the High

Court by a writ petition which was dismissed upholding the nomination.

5. The State Government issued a notification dated 18.09.2019 in exercise of power under Section 99(1) of the Waqf Act, 1995 (hereinafter referred to as the "Act, 1995") superseding the Waqf Board. The notification dated 18.09.2019 was issued after issuance of show cause notice to the 10 members of Waqf Board existing at that time. The membership of A. Anwhar Raajhaa, Member of Parliament ceased in May, 2019 reducing number of members as 10. The State Government was of the opinion that two Senior Advocates who were nominated as members under Section 14(1)(b)(iii) proviso cannot be treated as elected members hence the number of elected members are less than nominated members resultantly the Board is unable to perform its work as per the Waqf Act, 1995. The ground of supersession is mentioned in paragraph 8 of the notification 18.09.2019 which is to the following effect:

"8. And whereas, the Tamil Nadu Waqf Board has been called upon to show cause within 7 days

from the receipt of that notice as to why the Tamil Nadu Waqf Board should not be superseded by the State Government under Section 99 of the Waqf Act, 1995. Further it has also been mentioned therein that in case no reply is received within stipulated time, action will be pursued in accordance with law. The show cause notice was served to all the present 10 members of the Tamil Nadu Waqf Board. In response to the show cause notice, out of 10 members 4 members namely, Thiruvallargal K.A.M. Muhammed Abubacker, M.L.A., A.S. Fathima Muzaffer, Dr. Haja K. Majeed, Syed Ali Akbar, Members, Tamil Nadu Waqf Board alone have sent their replies to the Government. They have stated that the Senior Advocates nominated as Members can be considered as elected members and requested that the superseding process may be dropped. In this regard, the Government had already received legal opinion that the Senior Advocates can be considered as nominated members. In view of above, the elected members are less than the nominated members and the Board is unable to perform its functions as per the Waqf Act, 1995. Thiru A. Sirajudeed, member, Tamil Nadu Waqf Board without responding to the notice has submitted his resignation as a member of the Tamil Nadu Waqf Board, citing personal reasons vide his letter dated 09.09.2019."

6. The period of Waqf Board was further extended by another six months upto 07.09.2020 by order dated 20.05.2020. The process for reconstituting the Waqf Board was initiated by order dated 14.07.2020. Writ Petition No.7661 of 2020 was filed challenging the order dated

14.07.2020. The writ petition was dismissed by a learned Single Judge of the High Court vide its judgment dated 24.07.2020 upholding the process of election initiated by order dated 14.07.2020. Writ Petition No. 8377 of 2020 (Syed Ali Akbar vs. State of Tamil Nadu) was filed questioning the order dated 18.09.2019 superseding the Board as well as order dated 12.05.2020. Syed Ali Akbar was elected member of the Board reconstituted on 10.10.2017 from the constituency of Mutawallis. Syed Ali Akbar filed another Writ Petition No.9557 of 2020 before the Madras High Court praying for issuances of writs for quashing the press release dated 09.06.2020 and consequential press release dated 14.07.2020. The respondent, K. Fazlur Rahman filed Writ Petition No.726 of 2020 challenging the Government order dated 18.09.2019 by way of Public Interest Litigation in which writ petition an interim order dated 18.03.2020 was passed by the High Court to the effect that any action taken during the interregnum shall be subject to the result of the writ petition. All the writ petitions were decided by the High Court by the common judgment dated 17.08.2020.

Although, the High Court held that supersession dated 18.09.2019 was not in accordance with law, however, the said order was set aside insofar as the election of two persons Syed Ali Akbar and Dr. Haja K. Majeed alone. In paragraphs 22 and 23 following was held by the High Court:

"22. For these reasons, we accordingly hold that the order passed by us including the observation made on the impugned order would be applicable to these two persons alone. We have also been told that the process is completed for all other constituencies except mutawalli constituency.

23. Accordingly, the impugned order of supersession in G.O.(Ms.) No.58 (Backward Class, Most Backward Class and Minorities Welfare (T1) Department) dated 18th September 2019 and the consequential orders stand set aside insofar as the election of two persons viz., Syed Ali Akbar and Dr. Haja K. Majeed alone are concerned. The writ petitions in W.P. Nos.8377 and 9557 of 2020 stand allowed accordingly."

7. As per the election programme issued on 14.07.2020, the date of polling was fixed on 19.08.2020. The schedule of dates for various stages of election to constitute the Tamil Nadu Waqf Board was published in the Tamil Nadu Government Gazette dated 15.07.2020. The High Court by

the impugned order dated 17.08.2020 had quashed the order dated 18.09.2019 insofar as two members of the Board of Mutawallis constituency are concerned, process for electing/nominating other members of the Board was untouched and was completed. In the SLP giving rise to these appeals, an interim order was passed on 28.08.2020 staying of the operation of the impugned judgment dated 17.08.2020. The counter-affidavit has been filed both by respondent No.1, K. Fazlur Rahman as well as Syed Ali Akbar, respondent No.2.

8. We have heard Shri C.S. Vaidhyanathan, Senior Advocate appearing for the appellant, Shri Ratnakar Dash, Senior Advocate appearing for respondent No.1 and Shri Mehmood Pracha, Advocate appearing for respondent No.2.

9. Shri C.S. Vaidhyanathan, learned senior counsel for the appellant submits that Section 14(4) of the Act, 1995 provides that elected members of the Board shall at, all time, be more than the nominated members of the Board. In May, 2019 the number of elected members became four with six nominated members, making the Board unable to perform

its functions. Therefore, in exercise of power under Section 99 of Act, 1995, the Board was superseded vide G.O. dated 18.09.2019. The State Government has rightly exercised the power under Section 99 and the Government formed the opinion that the Board is "unable to perform", hence the supersession was ordered. The supersession dated 18.09.2019 was extended by subsequent notification dated 16.03.2020. The Division Bench committed error in setting aside the notification dated 18.09.2019 partially. There can be no partial setting aside of the supersession order. The validity of the supersession order was upheld by the High Court in Writ Petition No.20417 of 2019 vide its judgment dated 12.11.2019. The supersession order was challenged by Syed Ali Akbar only in July, 2020 with delay and laches. The election process having once started could not have been interfered by the High Court. It is not disputed that there are only 10 members in the Board at the relevant time after Member of Parliament demitted office. The number of nominated members being more than the elected members the State had no option except to supersede the Board and start fresh

process for constituting the Board. The validity of notification dated 15.07.2019 was upheld by the High Court in Writ Petition No.20085 of 2019 by its judgment dated 12.11.2019 which issue had become final. The writ petition proceedings initiated by the respondent is barred by constructive res judicata. The High Court vide impugned judgment violated the principles of comity of Court as different benches of the High Court had upheld the validity of the notification dated 15.07.2020. After the interim order passed by this Court on 28.08.2020, without prejudice to the outcome of the instant case, election was held on 09.09.2020 by secret ballot and the votes polled were counted on 10.09.2020. A. Abdul Rahman and M. Mohamed Basheer declared elected subject to further orders.

10. Shri Ratnakar Dash, learned senior counsel for respondent No.1 submits that provision of Section 14(4) was not violated since two Senior Advocates who have been nominated under Section 14(1)(b)(iii) proviso should have been declared as elected members in which case numbers of

elected members shall not be less than nominated members. Shri Dash submits that there was no ground for invoking Section 99 in the facts of the present case.

11. Shri Mehmood Pracha, learned counsel appearing for respondent No.2, submits that present was not the case where power under Section 99 could have been invoked. It is submitted that as per second proviso to Section 99(1) the power of the State Government can be exercised only when there is a prima facie evidence of financial irregularity, misconduct or violation of the provisions of this Act. It is submitted that the grounds given for supersession in the order dated 18.09.2019 are not covered by Section 99(1) especially second proviso. It is submitted that responsibility to constitute the Board is on the State Government hence it cannot take benefit of its own wrong. It was for the State to ensure that number of elected members is not less than the nominated members. It is submitted that State was obliged to ensure compliance of Section 14(4). He submits that under Section 14(2) in absence of any Muslim member of the

State Bar Council ex-members shall constitute the electoral college, hence election ought to be conducted under Section 14(1)(b)(iii). He submitted that nomination of two Senior Advocates under Section 14(1)(b)(iii) was void. It was State Government which had included two Senior Lawyers in the Board which cannot be said to be any violation committed by the Board. He submits that term of the members is five years which cannot be curtailed.

12. Shri C.S. Vaidhyathan, in his rejoinder affidavit, submits that there are no findings or allegation of any kind of mala fide on the part of the State Government which submission cannot be raised by the respondents in these appeals. He submits that the High Court ought not to have set aside the notification dated 18.09.2019.

13. We have considered the submissions of the learned counsel for the parties and perused the records.

14. We need to first consider the scheme of Section 14 of the Act, 1995 regarding constitution/Composition of

Board which provision is as follows:

"Section 14. Composition of Board.—(1) The Board for a State and 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, 3 [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 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 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;

(1A) 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).

....."

15. As noted above when the Board was constituted initially on 10.10.2017 there was one elected member under Section 14(1)(b)(i), two elected members under Section 14(1)(b)(ii) and two elected members under Section 14(1)(b)(iv). Thus, there were five elected members. The State Government had nominated two Senior Advocates under Section 14(1)(b)(iii) proviso, since, there was no Muslim member from the Bar Council of the State. Under Section 14(1)(c), (d) and (e) total four members were nominated. Initially the stand of the State was that two members nominated under Section 14(1)(b)

(iii) are to be treated as elected members, thus, due to which State claimed composition of Board in accordance with Section 14(4). On receipt of the legal advice that members under Section 14(1)(b)(iii) proviso cannot be treated as elected members of the Board, Government formed the opinion that number of elected members are less than nominated members. Consequently, proceeded to supersede the Board by notification dated 18.09.2019. The composition of Board as provided under Section 14 consists of both "elected" and "nominated members", wherever the words 'nominated members' have been used, there can be no circumstances that they can be treated as elected members. Section 14(4) which provides that number of elected members of the Board shall at, all times, be more than the nominated members of the Board, is subject to an exception which is provided in sub-Section (3). Sub-section (3) contemplates that 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. If nomination is made under Section 14(3), in such situation mandate of Section 14(4) shall not be applicable, thus, Section 14 itself contemplates situation where there may be more nominated members than the elected members.

16. It is the State Government which is to establish a Board as per composition provided under Section 14. Section 14(4) is a provision which incorporates democratic principles in constitution of the Board. The Legislature contemplates that Board is to be run by majority of elected members which is to ensure democratic principle and make the voice of elected representatives a determining factor in the decisions of the Board.

17. From the facts as noted above, there can be no dispute that at the time when the Board issued show cause notice as well as notification dated 18.09.2019, the number of elected members was less than the number of nominated members. The provision of Section 14(4) which

mandates that number of elected members of the Board shall at, all times, be more than the nominated members of the Board is a provision compliance of which has to be ensured by the State which is authorised to constitute the Board. While constituting the Board, the State Government has to be conscious of the fact that the composition of Board shall be such which may fulfill the objectives enshrined in Section 14(4). The State Government when makes nomination of two Senior Advocates under Section 14(1)(b)(iii), the said nomination was bound to have adverse effect on requirement of Section 14(4). While constituting the Board as per Section 14, the State has to keep in mind the principles and objectives as enshrined in Section 14(4) and constitution of Board shall be such as to give effect to the democratic principle which is to guide the Board in its functions.

18. In this context, we may also notice a Division Bench judgment of Madras High Court in **M.H. Jawahirullah and others vs. Government of Tamil Nadu and others, (2013) 3**

MLJ 688, where the Madras High Court has correctly noticed the legislative intendment while constituting the Board under Section 14 of the Act. Following observation had been made in paragraph 27:

"27.....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. The only exception is Section 14(3). In Section 14(3), the Government is given discretion to exercise power to nominate such persons as members of the Board."

19. After noticing the scheme of Section 14 now we come to Section 99 which has been invoked by the Government in superseding the Board constituted on 10.10.2017. Section 99 of the Act, 1995 provides:

"Section 99. Power to supersede Board.—(1)
If the State Government is of opinion that the Board is unable to perform or has persistently made default in the performance of, the duty imposed on it by or under this Act or has

exceeded or abused its powers, or has wilfully and without sufficient cause failed to comply with any direction issued by the Central Government under section 96 or the State Government under section 97, or if the State Government is satisfied on consideration of any report submitted after annual inspection, that the Board's continuance is likely to be injurious to the interests of the auqaf in the State, the State Government may, by notification in the Official Gazette, supersede the Board for a period not exceeding six months:

Provided that before issuing a notification under this sub-section, the State Government shall give a reasonable time to the Board to show cause why it should not be superseded and shall consider the explanations and objections, if any, of the Board:

Provided further that the power of the State Government under this section shall not be exercised unless there is a prima facie evidence of financial irregularity, misconduct or violation of the provisions of this Act.

(2).....

(3)....."

20. Section 99 (1) provides that if the State Government is of opinion that the Board is unable to perform or has persistently made default in the performance of, the duty imposed on it by or under this Act or has exceeded or

abused its powers, or has wilfully and without sufficient cause failed to comply with any direction issued by the Central Government under Section 96 or the State Government under Section 97, or if the State Government is satisfied on consideration of any report submitted after annual inspection, that the Board's continuance is likely to be injurious to the interests of the auqaf in the State, the Government may supersede the Board. The ground for superseding the Board in the notification dated 18.09.2019 is that Board is **unable to perform** which is due to the fact that number of nominated members has become more than elected members.

21. Learned counsel for respondent No.2 has given emphasis on second proviso to Section 99(1) which reads: "Provided further that the power of the State Government under this section shall not be exercised unless there is a prima facie evidence of financial irregularity, misconduct or violation of the provisions of this Act". The expression **unable to perform** is an expression of wide import. We may look into the scheme of supersession as

contained in Section 99. The supersession is based on some action, inaction, omission or misconduct of the Board. The Act, 1995 enumerates various powers and functions of the Board. When the Board is constituted it is entitled to exercise its powers and functions as enumerated in various Sections including Sections 32, 38, 39, 41, 48 and 53, etc. Section 22 is a clause which saves proceedings of the Board from invalidity due to reason only of the existence of any vacancy or any defect in the constitution. Section 22 is as follows:

"Section 22. Vacancies, etc., not to invalidate proceedings of the Board.—No act or proceeding of the Board shall be invalid by reason only of the existence of any vacancy amongst its member or any defect in the constitution thereof."

22. That in event there is vacancy in the Board or any defect thereof, the proceedings or act of the Board are not to be invalidated which has been saved by Section 22. Thus, when the initially Board was constituted on 10.10.2017, the objective as enshrined in Section 14 was

not fulfilled even in the initial constitution, the Board has been superseded not due to any action, inaction or omission and misconduct on the part of the Board rather due to number of elected members becoming less than to the nominated members. The order dated 18.09.2019 spells out the reason for supersession, i.e., A. Anwhar Raajhaa, Member of Parliament whose term came to end in May, 2019, other members of the Board as constituted on 10.10.2017 were same, thus, the circumstance which has been taken as ground for supersession of the Board was not any action of the Board. The event of cessation of membership of an elected member is not under control of the Board. It was the duty of the State Government to constitute the Board as per the objectives enshrined in Section 14(4). The State Government has ample power to conduct election for the members as enumerated in Section 14(i)(b), (i) to (iv).

23. In the facts of the present case, the State Government could have very well complied with objective of Section 14(4) by conducting an election for members

under Section 14(1)(b)(iii) by permitting nominated members to continue till the election is held. The State has further option to exercise power under Section 14(3) in event State was satisfied 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 could have then nominated under Section 14(3) which nomination shall have overriding effect on the objective of Section 14(4) since sub-section (3) begins with non obstante clause "Notwithstanding anything contained in this section,". The obligation on the State Government to constitute the Board in accordance with Section 14 keeping in view the objective under Section 14(4) was both right and duty of the State and any lapse therein cannot be a ground for superseding the Board.

24. We may also notice the objective and purpose of the second proviso to Section 99 which has been inserted by Act 27 of 2013. Second proviso contains an injunction that the power of the State Government shall not be

exercised unless there is a prima facie evidence of financial irregularity, misconduct or violation of the provisions of the Act. The present is not a case of any allegation of any financial irregularity or misconduct on the part of the Board. The proviso is sought to be explained by Shri C.S. Vaidhyanathan relying on the "violation of the provisions of this Act".

25. The word 'violation' is defined in the Black's Law Dictionary Tenth Edition to the following effect:

"An infraction or breach of the law; a transgression. The act of breaking or dishonoring the law; the contravention of a right or duty."

26. The second proviso has to be read in conjunction with the main provision. The second proviso contains further restriction on the power of State Government to supersede the Board, i.e., unless there is prima facie evidence. There can be no dispute that prima facie evidence of financial irregularity, misconduct has to be prima facie financial irregularity or misconduct by the

Board which is sought to be superseded. The third expression that is "violation" of the provisions of this Act has also to be read in the same manner that is violation of the provisions of this Act by actions of the Board. We, thus, are also of the opinion that in view of the legislative intendment as contained in second provision to Section 99, present was not a case where State could have exercised its power of supersession of the Board. In view of the foregoing discussion, we are satisfied that the High Court did not commit any error in holding supersession as contrary to law.

27. Now, we also need to consider the submission of Shri Vaidhyanathan that the High Court ought not to have set aside the notification partially insofar as two elected members of the Mutawalli category only. It is to be noted that the High Court had categorically held that supersession order is not sustainable in law but after holding that, the High Court had moulded the relief in the facts of the present case and subsequent events which had taken place. Two writ petitions being Writ Petition

No.8377 and 9557 of 2020 which have been allowed by the High Court were filed by Syed Ali Akbar who was elected member from the Mutawalli category. Since, only one category petitioners were before the High Court, it confined the relief to that category. We need not dwell into the question any further since before us there is no further challenge on behalf of the writ petitioners that supersession order ought to have been set aside in toto. It is State which has come in the appeals against the judgment of the High Court which has partially set aside the notification dated 18.09.2019 for Mutawalli category only. The High Court has not interfered with the fresh constitution of the Board by election and nomination of other categories except the category under Section 14(1)(b)(iv). In view of the foregoing discussion, we, thus, upheld the order of the High Court.

28. In result, the fresh election of two members in category under Section 14(1)(b)(iv) held in the year 2020 shall become non est and Syed Ali Akbar and Dr. Haja K. Majeed shall continue to occupy their office till their

normal tenure of five years from 10.10.2017.

29. All the appeals are dismissed.

.....J.
(ASHOK BHUSHAN)

.....J.
(R. SUBHASH REDDY)

.....J.
(M.R. SHAH)

NEW DELHI,
November 03, 2020.