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WP-5788-2012

IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE DEEPAK KHOT

ON THE 28th OF APRIL, 2026WRIT PETITION No. 5788 of 2012*SMT. KHALIDA BEE AND OTHERS**Versus**MADHYA PRADESH WAKF BOARDS AND OTHERS*

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Appearance:

*Shri Himanshu Mishra - Advocate through Video Conferencing and
Shri Bhanu Pratap Singh - Advocate for the petitioner.*

*Shri Utkarsh Agrawal and Shri Atul Khare - Advocates for respondent
No.1.*

*Ms. Sanjana Sahni and Shri Bhanu Pratap - Advocates for respondent
No.3 to 6.*

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ORDER

The present petition under Article 226 of the Constitution of India has been filed seeking following reliefs :

*i. To call for the record of proceedings of
No.300/Burha/2012/D.No.29/5/22 dated 07-03-2012.*

ii. To quash impugned order Annexure P/15 dated 07.03.2012.

2. The petitioner has challenged the legality, validity and jurisdiction of the impugned order dated 07.03.2012 Annexure P/15 passed by Chief Executive Officer, Madhya Pradesh Waqf Board, Bhopal.

3. It is contended by learned counsel for the petitioner that the land for



which the impugned order has been issued is the land of ownership of the petitioner which she had purchased through registered sale deed dated 20.12.2010 Annexure P/7 and 17.02.2011 Annexure P/8. It is further submitted that the land in question was recorded in the revenue records in the name of predecessor in title. It is submitted that from bare perusal of the order, it is crystal clear that the Waqf was recorded in respect of Survey No.290 for area 0.20 Hect. and Kabristan village Mohammadpura in Khasra No.292 having area 0.10 Hect. Rest of the area of the above survey numbers was recorded in the name of predecessor in title and on the basis of which the petitioner had purchased the land through registered sale deed. It is submitted that the CEO vide impugned order has communicated the decision of the Chairman of the Board that by invoking power under Section 41, the remaining land purchased by the petitioner through registered sale deed has been included in the Waqf already registered with smaller area of land. It is submitted that such communication by the CEO under Section 41 is without jurisdiction because under Section 41, the power vest with the Board. It is further submitted that as the order has not been passed by the Board, the order is without jurisdiction.

4. Further, it is submitted that as per Section 4, the preliminary survey has to be conducted by the State by notification appointing the Survey Commissioner. The said survey was required to be completed prior to issuance of notification under Section 4 of the Act of 1995, however, as no survey has been conducted and same has not been recorded, therefore, by the impugned order, exercising the power under section 41, area of land of the



same survey numbers, upon which Waqf is already registered, could not have been enhanced.

5. Per contra, learned counsel for the respondent Board submits that as the order has been passed on the dictate of the Chairman of the Board, therefore it should be treated to be order passed by the Board. However, it is further submitted that the petitioner is not in a position to say that whether the sanction of the Board has been taken or not. However, he could not point out from the record which has been uploaded on the ERP in regard to the impugned order that such sanction by the Board has been obtained or not. It is further submitted that under Section 41, the authorities have rightly exercised the power as in the year 1912-13, the revenue entires of land of Khasra No.124 and 139 was recorded as "*Purani Kabren Masjiden Kabristan*". The notification to the said effect was issued vide notification dated 25.08.1989. It is further submitted that if any person has to challenge the validity of the order passed under Section 41, then that person has to challenge it by filing a suit under Section 7 before the Tribunal. It is further submitted that once the property has been declared as Waqf, then the jurisdiction to de-notify vest with the Tribunal by filing suit.

6. Heard learned counsel for the parties and perused the record.

7. From perusal of notification Annexure P/1, it is transpired that the Waqf was recorded by way of notification in the year 1989 for two separate numbers which are in dispute, but for a limited area of 0.20 hectares and 0.10 hectares, respectively. For rest of the area, no notification has been shown to be issued, till date. Therefore, the primary objection in regard to declaration



of a Waqf by notification for which challenge can be made only by filing suit before the tribunal is misconceived because the notification was issued only for limited area and no other notification has been filed before this court. At the dictate of the Chairman, the order Annexure P/15 has been passed by the CEO exercising power under Section 41.

8. Section 41 of the Waqf Act, 1995, reads as under:

"41. Power to cause registration of Waqf and to amend register.—The Board may direct a Mutawalli to apply for the registration of a Waqf, or to supply any information regarding a Waqf or may itself cause the Waqf to be registered or may at any time amend the register of Waqf."

9. According to Section 41, the Board may direct a Mutawalli to apply for the registration of a Waqf or may itself cause the Waqf to be registered or may at any time amend the register of Waqf.

10 The basic question which has been agitated by the petitioner is that even if the order is to be passed under Section 41, it is to be passed by the Board and not by the Chairman.

11. The Board is defined in the definition Clause Section 3(c), as under.

(c) "Board" means a Board of [Waqf] established under sub-section (1), or as the case may be, under sub-section (2) of section 13 and shall include a common [Waqf] Board established under section 106.

12. According to definition, the Board established under sub-section (1) or as the case may be under sub-section (2) of section 13 or a common Waqf Board established under section 106.

13. From perusal of Section 13 of the Act, it is found that Waqf can be incorporated with effect from such date by the State Government by



notification in the official gazette.

14. Section 14 of the Act, reads as under :

"14. Composition of Board.—(1) The Board for a State and the Union 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 Union Territory of Delhi;

(ii) Muslim Members of the State Legislature;

(iii) Muslim members of the Bar Council of the State; and

(iv) Mutawallis of the wakfs having an annual income of rupees one lakh and above;

(c) one and not more than two members to be nominated by the State Government representing eminent Muslim organizations;

(d) one and not more than two members to be nominated by the State Government, each from recognised scholars in Islamic Theology;

(e) an officer of the State Government not below the rank of Deputy Secretary.

(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).

(5) Where there are Shia wakfs but no separate Shia Waqfs Board exists, at least one of the members from the categories listed in sub-section (1), shall be a Shia Muslim.

(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 waqf and Sunni waqf to be administered by the Board and appointment of the members shall be made, so far as may be, in accordance with such determination.

(7) In the case of the Union territory other than Delhi, the Board shall consist of not less than three and not more than five members to be appointed by the Central Government from amongst the categories of persons specified in sub-section (1);



Provided that there shall be one mutawalli as the member of the Board.

(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.

15. From bare perusal of the provision of law, it is clear that the Board consist of several members which have been prescribed in the composition of Board, therefore, the order communicating the dictate of the Chairman of the Board cannot be said to be an order passed by the Board. The order has been said to be passed by the Chairman which has been communicated by the Chief Executive Officer.

16. From perusal of the record of the Board, it is found that an application has been submitted by the private respondent to record the remaining land of the survey numbers as Waqf property. On the said application, note sheet has been written and signed by various authorities. Vide note-sheet dated 01.03.2012, the sanction of the Chairman has been obtained and finally vide note-sheet dated 26.05.2012, it is observed that by the orders of the Chairman, same shall be recorded as a Waqf property and thereafter, the order dated 07.03.2012 communicating the decision of the Chairman has been issued.

17. From bare perusal of the order and the note-sheets, it is found that such order was passed at the dictate of the Chairman and not by the Board and therefore, the order was not passed in consonance of the provisions of Section 41 of the Act, therefore, in the considered opinion of this Court, is without jurisdiction.

18. The contention in regard to that if the Waqf is registered is



required to be challenged by filing a suit is concerned, it is found by the Court that the order by which the area of the Waqf has been enhanced by invoking power under Section 41, is without jurisdiction, therefore, for challenging an order without jurisdiction, suit is not required to be filed. The order passed without jurisdiction is void ab initio can be set-aside under Article 226 of the Constitution of India.

19. This Court under Article 226 of the Constitution of India can declare the order passed without authority and without jurisdiction as void ab initio. The power conferred under Article 226 of the Constitution of India is unfettered and it cannot be subject to restriction on the ground that there is an alternative remedy. However, considering the fact that as the order is without jurisdiction, therefore, such restriction is not applicable in the present case in hand.

20. Hon'ble Apex Court in the case of *Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai (1998) 8 SCC 1* has held as under :

"14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still



hold the field."

21. Learned counsel for the respondent has relied upon the judgment of the Hon'ble Apex Court in the case of *Rashid Wali Beg vs. Farid Pindari & others (2022) 4 SCC 414*.

22. The judgment relied by the counsel for the respondent is in the field that if any dispute, question or other matters relating to a Waqf and relating to a Waqf property arise, that can be challenged before the tribunal under Section 83(1) has got no relevance with the facts of the present case in hand as this Court has already observed that the order which has been passed by CEO on the dictate of the Chairman is without jurisdiction. Therefore, it cannot be said to be a dispute in regard to the Waqf or Waqf property. It is the order which is nullity from the very inception. Therefore, the guideline issued by the Hon'ble Apex Court is not applicable in the present case in hand. The Hon'ble Apex Court has delineated the categories in which suit, application or appeal before the Tribunal can be filed. No restrictions to entertain constitutional remedy has been laid.

23. It is also found that for registration of Waqf the State has to issue a notification appointing the Survey Officer and by preparing list which is to be taken into consideration by the Board under Section 4 and 5.

24. As it is revealed from the impugned order as well as notification Annexure P/1 that the notification was issued only in respect of the survey numbers containing smaller area of the land, then, such notification can be amended by subsequent notification, that too, by applying the principle of Section 4 within the time prescribed in the Act. If such notification has not been issued by the State Government, then the Board cannot adopt a different



method by invoking powers under Section 41 to declare or register the land to be a Waqf property. Therefore, in the light of Section 4 also, the order impugned is without jurisdiction.

25. It is also transpired during the course of arguments that a suit has been filed by the respondents No.3 to 6 raising the dispute in regard to the land in question to be declared as a Waqf property before the Tribunal, however, it is submitted by counsel for the petitioner that such suit has been stayed by the High Court in a Revision after rejection of the application filed under Order 7 Rule 11 of CPC. Be that as it may.

26. The parties are free to agitate their matters before the tribunal as per the mandate of the statute.

27. The impugned order dated 07.03.2012 Annexure P/15 is hereby quashed. Accordingly, the petition is allowed.

(DEEPAK KHOT)
JUDGE

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