

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****SPECIAL CIVIL APPLICATION NO. 3499 of 2013****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE RAJESH H.SHUKLA**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
  - 2 To be referred to the Reporter or not ?
  - 3 Whether their Lordships wish to see the fair copy of the judgment ?
  - 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
  - 5 Whether it is to be circulated to the civil judge ?
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MOHAMMADALI ABDUL RAHIM MOMIN TRUSTEE....Petitioner(s)

Versus

STATE OF GUJARAT & 3....Respondent(s)

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Appearance:

MR EE SAIYED, ADVOCATE for the Petitioner(s) No. 1

MR SIKANDER SAIYED, ADVOCATE for the Petitioner(s) No. 1

DS AFF.NOT FILED (N) for the Respondent(s) No. 2

MR L.R.PATHAN, ADVOCATE with

MR MA SAPA, ADVOCATE for the Respondent(s) No. 4

MR MANISH S SHAH, ADVOCATE for the Respondent(s) No. 1

MR VISHAL B MEHTA, ADVOCATE for the Respondent(s) No. 3

NOTICE SERVED BY DS for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE RAJESH H.SHUKLA**

**Date : 31/07/2013**

**ORAL JUDGMENT**

1. The present petition has been filed by the petitioner under Articles 14, 226 and 227 of the Constitution of India on the grounds stated in the petition for the following prayers:

*"24.A) Your Lordships may be pleased to kindly allow this application/petition by quashing and setting aside the Order passed by the Hon'ble Waqf Board dated 12.03.2013 passed on Change Entry No.448 of 2012 allowing the Suo-Motto addition of the name of the respondent no to 4 herein and further be pleased to allow the petitioner to take care of the Dargah as the Trustee.*

*B) Pending admission and final disposal of this petition Your Lordships may be further pleased to kindly stay the further proceedings, implementation & execution of the Hon'ble Waqf Board's Order dated 12.03.2013 passed on Change Entry No.448 of 2012.*

*C)Your Lordships may be further pleased to kindly direct the Hon'ble Waqf Board to delete name of the respondent no.4 as the Mutawalli (Trustee) of the said Trust with immediate effect which was passed by way of order dated 03.08.2012 since the addition of his name would amount to great hardships to the Said Dargah i.e. Valishah Pir Ni Dargah.*

*D) Any other further order/s or*

*relief/s that the Hon'ble Court deems just and proper in the interest of justice may kindly be granted."*

2. Heard Learned Advocate Shri Sikander Saiyed for the petitioner, learned Advocate Shri Manish Shah for the Respondent No.1 and learned Advocate Shri L.R. Pathan for the Respondent No.4.
3. Learned Advocate Shri Sikander Saiyed appearing for the petitioner has referred to the papers including the PTR produced at Annexure-A. He has also referred to the order passed by the Wakf Board produced at Annexure-F with regard to Change Report No.563/2011 and also another order passed by the Wakf Board, Gandhinagar regarding Change Report No.448/2012 and submitted that it is presented by the same person Shri Kamarali Gulammahamad Gandhi. He tried to submit that there is no authority or the jurisdiction with the Respondent Board to pass such order with regard to removal of Mutawalli. He has also referred to the list of the persons, who have stated to have given consent and submitted that the order passed is not only contrary to the PTR but even the provisions of the Wakf Act. He, therefore, submitted that as the order passed is contrary to the statutory provisions, the petition under Articles 226 and 227 would be maintainable. He has referred to alternative remedy by way of an appeal before the Tribunal provided under Section 83 of the Wakf Act. He

also referred to the order in detail and tried to submit that the Coordinate Bench of the High Court (Coram: S.R.Brahmbhatt, J.) in Special Civil Application No.12350 of 2011 and other allied matters has passed order dated 25.04.2012 considering this issue regarding scope of the discretion under Articles 226 and 227 by the High Court. He has also submitted that Section 64 refers to the removal of Mutawalli which has also been referred in this order of the High Court and therefore, present petition may be allowed considering the order passed in violation of rules of natural justice, the PTR and the provisions of the Wakf Act.

4. Learned Advocate Shri L.R.Pathan for appearing for Respondent No.4 has referred to the PTR produced at Annexure-A and submitted that it provides the manner of appointment of the successor in place of trustee or the manager and it is specifically provided that Momin from Lilajpur Maholla, and for second trustee, it would be the representative of Sunni Jamat Momin from Kazi Tekra Maholla, eligible for the appointment. He submitted that the appointment of the Respondent No.4 on the ground of fact that he belongs to Siya Sect is nowhere raised and in any case the petition under Articles 226 and 227 would not be entertained, in view of the specific provisions providing for alternative remedy by way of an appeal under Section 83 of the Wakf

Act. He referred to the provisions of Section 83 of the Wakf Act for that purpose and submitted that if there is any grievance it could be considered by the Tribunal. He also submitted that again it refers to examination of the relevant facts which may not be considered under Articles 226 and 227 of the Constitution of India and the Tribunal may, on the basis of further material, can pass appropriate order, and therefore, the present petition may not be entertained. He submitted that Section 64 of the Wakf Act has no application, as it only refers to removal of Mutawalli, where there is some mischief.

5. Learned Advocate Shri Manish Shah appearing for the Respondent No.1 has referred to the affidavit-in-reply and submitted that the Wakf Act specifically provides for an alternative remedy as provided under Section 83 of the Act. He, therefore, submitted that when the Statute provides for an alternative remedy before the Tribunal constituted under the Act, it is desirable and necessary that party may exhaust such remedy before approaching the High Court and therefore the Court may not entertain the present petition.

6. In rejoinder, learned Advocate Shri Saiyed referred to the papers and reiterated the submissions and submitted that though there is an

alternative remedy provided under Section 83 of the Act, the Tribunal has no powers to grant stay and therefore, the present petition has been filed. He again reiterated and referred to the order of the High Court (Coram: S.R.Brahmbhatt, J.) passed in Special Civil Application No.12350 of 2011 and other allied dated 25.04.2012

7. Learned Advocate Shri Pathan for the Respondent No.4 has also referred to the order of the High Court (Coram: Anant S. Dave, J.) passed in Special Civil Application No.8479 of 2013 dated 23.07.2013 and submitted that the petition has not been entertained in view of Section 83 of the Wakf Act and therefore, the present petition may not be entertained.

8. In view of these rival submissions and having regard to the different aspects with regard to appointment of successor trustee or the manager as referred in Annexure-A, requires closer scrutiny of the papers with regard to manner and method of the appointment of the successor. As it has been submitted by learned Advocate Shri Pathan that the constitution or the PTR be provided for this aspect and there is no constitution of Vilash Pir Ni Dargagh and, if the PTR which has been produced at Annexure-A is considered, it provides about the manner of the appointment. He submitted that it does not provide the person from Siya Sect and it cannot

be appointed. Therefore, these are the issues which require examination based on the record and both the Change Report Nos.563/2011 and 448/2012, which require to be considered with reference to the constitution of the trust, the PTR. This Court may not incline to entertain such disputes when there is specific alternative remedy by way of an appeal provided under Section 83 of the Wakf Act.

9. It is well accepted that when the Statute provides for an alternative remedy, normally the party should be directed to exhaust such remedy before resorting to extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India. Further, it requires detailed examination of the record, and some kind of the disputes on the facts, it would be desirable that the Tribunal may consider the same issue on the basis of material, after hearing both the sides. Therefore, the present petition cannot be entertained with regard to similar view has been expressed by the High Court (Coram: Anant S. Dave, J.) while passing the order in Special Civil Application No.8479 of 2013 dated 23.07.2013. Therefore, present petition deserves to be dismissed and accordingly stands dismissed. Notice is discharged. The order of status quo shall stand vacated.

10. After the order was dictated, learned Advocate Shri Sikander Saiyed for the petitioner has requested that since there is an order of status quo, which may be extended for further period to avail alternative remedy by way of an appeal before the Appellate Authority.

In the circumstances, the interest of justice would be served if the request is granted, as prayed for. Therefore, the order of status quo, granted earlier, shall continue till **19<sup>th</sup> August, 2013.**

**(RAJESH H.SHUKLA, J.)**

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