

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on: 16.02.2024

Pronounced on: 29.02.2024

WP(C) No.2361/2022

c/w

WP(C) No.2117/2023

WP(C) No.2968/2022

WP(C) No.2361/2022

Traders Association Ziyarat Baba Reshi (RA) Tangmarg

Through:-

1. Mohammad Yousuf Sheikh (Age 60 years)- President
S/o Laal Sheikh, R/o Nambalnaal Tangmarg
Tehsil Tangmarg District Baramulla
2. Manzoor Ahmad Tantray (age 55 years)-General Secretary S/o
Abdul Gani Tantray R/o Chontipatri Tehsil Tangmarg District
Baramulla.
3. Ghulam Mohammad Reshi (age 52)-Vice President
S/o Abdul Gaffar Reshi
R/o Chontipatri Tehsil Tangmarg District Baramulla
4. Abdul Salam Sheikh (Age 58 years)-Secretary
S/o Laal Mohammad Sheikh
R/o Nambalnaal Tehsil Tangmarg District Baramulla
5. Abdul Ahad Sheikh (Age 56 years-Joint Secretary
S/o Ghulam Ahmad Sheikh
R/o Alpatri Babareshi Tehsil Tangmarg District Baramulla
6. Bashir Ahmad Khan (age 53 years-Member
S/o Ghulam Mohi-ud-Din Khan
R/o Chontipaptri Tehsl Tangmarg District Baramulla
All office Bearers of Traders Association Baba Reshi (RA)
Tangmarg and Shopkeepers/Kiosk owners of market Ziyarat
Sharief Baba REShi (RA) Market.

.....Petitioners(s)

V/s

1. Union Territory of J&K through Commissioner cum
Secretary to Govt. Revenue, Hajj & Auqaf Deptt.,

- Civil Secretariat, Srinagar.
2. Chairperson J&K Board for Muslim Specified Waqf and Waqf Properties, Zero Bridge, Srinagar.
 3. The Chief Executive Officer, J&K Board for Muslim Specified Waqf and Waqf Property Zero Bridge, Srinagar
 4. Executive Magistrate (Tehsildar) J&K Waqf Board, Srinagar
 5. Deputy Commissioner, Baramulla

...Respondent(s)

WP(C) No.2117/2023

1. Abdul Rashid Bhat (age 70 years)
S/o Abdul Ahad Bhat
R/o Mulabangil Tehsil Tangmarg District Baramulla
2. Mohammad Shafi Lone (Age 60 years)
S/o Wali Mohammad
R/o Waniloo Hajibal Tehsil Tangmarg District Baramulla
3. Ghulam Mohiddin Khan (Age 55 years)
S/o Sonauallah Khan
R/o Waripora Magam Tehsil Karhama District Baramulla
4. Mohammad Yasin Ganaie (Age 50 years)
S/o Ghulam Mohammad
R/o Gokhama Kunzer Tehsil Tangmarg District Baramulla
5. Ghulam Ahmad Lone (Age 70 years)
S/o Mohammad Subhan
R/o Waniloo Hajibal Tehsil Karhama District Baramulla
6. Nazir Ahmad Rather (Age 55 years)
S/o Mohammad Subhan Rather
R/o Namalnaar Babareshi Tehsil Tangmarg District Baramulla
7. Ghulam Ahmad Bhat (Age 60 years)
S/o Abdul Ahad
R/o Mulabangil Tehsil Tangmarg District Baramulla

8. Bashir Ahmad Bhat (Age 62 years)
S/o Abdul Ahmad
R/o Mulabangil Tehsil Tangmarg District Baramulla
9. Naseema Begum (Age 55 years)
W/o Ghulam Rasool Bhat
R/o Batapora Pattan Tehsil Pattan District Baramulla
10. Mohammad Yousuf War (Age 65 years)
S/o Abdul Gani
R/o Budipora Tangmarg Tehsil Tangmarg, District Baramulla
11. Khurshid Ahmad War (age 42 years)
S/o Abdul Ahad
R/o Budipora Tangmarg Tehsil Tangmarg District Baramulla
12. Abdul Hamid Kalas (Age 43 years)
S/o Ghulam Mohammad
R/o Kahwal Bulbulabad Baramulla District Baramulla
13. Wali Mohmmad Bhat (Age 68 years)
S/o Abdul Gani
R/o Mulabangil Tehsil Tangmarg District Baramulla
14. Abdul Majeed Lone (Age 50 years)
S/o Abdul Aziz
R/o Waniloo Tangmarg Tehsil Tangmarg District Baramulla
15. Mohammad Shafi Wani (Age 55 years)
S/o Ghulam Ahmad
R/o Wayil Pattan Tehsil Pattan District Baramulla.
.....Petitioner(s)

V/s

1. Union Territory of J&K through Commissioner cum
Secretary to Govt. Revenue, Hajj & Auqaf Deptt.,
Civil Secretariat, Srinagar.
2. Chairperson J&K Board for Muslim Specified Waqf and Waqf
Properties, Zero Bridge, Srinagar.

3. The Chief Executive Officer, J&K Board for Muslim Specified Waqaf and Waqf Property Zero Bridge, Srinagar
4. Executive Magistrate (Tehsldar) J&K Waqf Board, Srinagar
5. Deputy Commissioner, Baramulla

...Respondent(s)

WP(C) No.2968/2022

1. Firdous Ahmed Sheikh, aged 65 years
S/o Haji Ghulam Rasool Sheikh
R/o Naid Doori, Shri Bhat Alamgari Bazar Srinagar,
Shop No.10
2. Shameem Hussain Bhat, aged 61 years
S/o Ghulam nabi Bhat
R/o Drugjan, Dalgate Srinagar, Shop No.91
3. M/s Habib Sheikh and Sons
Through Abdul Salam Sheikh, aged 88 years
S/o Habibullah Sheikh R/o Hawal Srinagar
Shop No.73 and 78
4. Majeed & Co
Through its proprietor
Abdul Majeed Magloo, aged 75 years
S/o Mohammad Sidiq Magloo
R/o Mujahid Manzil Dalal Mohalla, Srinagar
R/P Nowgam Srinagar, Shop No.74
5. Sheikh Najeeb Ahmed, aged 65 years
S/o Haji Mohammad Shafi Sheikh
R/o Bishember Nagar, Khayam, Srinagar
Tenant of Hall
6. Nabil Riyaz, aged 35 years
S/o Riyaz Ahmed Shah
R/o Gulab Bagh, Srinagar
Room No.10-B
7. Haji Mohammad Shafi Sheikh
S/o Mohammad Ismaiel Sheikh
R/o Bishember Nagar, Munawar Abad, Srinagar
Through his son Najeeb Ahmed Sheikh, age 65 years

S/o Mohammad Shafi Shafi Sheikh
Room No.5 and 6

8. Mohammad Amin Shah
S/o Gul Shah
R/o Gulab Bagh, Srinagar
Through his son Riyaz Ahmed Shah, aged 65 years
R/o Gulab Bagh, Srinagar
Shop No.88, 89 and 90

.....Petitioners

Through:

Mr. N.A.Tabasum, Advocate with
Mr. Idrees Ahmad & Mr. Nayeem-ul-Haq,
Advocates in WP(C) Nos.2361/2022 & 2117/2023
Ms. Rehana Fayaz, Advocate with Mr. Agha
Faisal Ali, Advocate in WP(C) No.2968/2022

V/s

1. Union Territory of J&K through Commissioner/
Secretary to Govt. Revenue, Hajj & Auqaf, J&K
Civil Secretariat, Srinagar/Jammu.
2. Chief Executive Officer, J&K Waqaf Board, Zero Bridge,
Srinagar
3. Executive Magistrate (Tehsildar) J&K Waqf Board,
Zero Bridge, Srinagar

.....Respondents

Through:

Mr. M.I.Dar, Advcoate with
Mr. Ruaani Ahmad Baba & Ms. Sana Imam,
Advocates

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1. Since the issue raised in all these petitions was similar, as such, these petitions were heard together and are being disposed of by this common judgment.

2. The petitioners in all these petitions are in occupation of Waqf properties as licensees thereof and have essentially raised a dispute with regard to an arbitrary, irrational and exorbitant enhancement of monthly rent. The star argument of learned counsel appearing for the petitioners is that the Waqf Board being an instrumentality of the State is expected to act fairly and in public interest. The Waqf Board increased the rentals of the properties under occupation of the petitioners in ex-parte and without providing them an opportunity of being heard.

3. Mr. M.I.Dar, appearing on behalf of the Waqf Board takes strong exception to the maintainability of the petitions on the ground that State Waqf Board constituted under The Waqf Act, 1995 is neither a State nor any person or authority amenable to the writ jurisdiction vested in this Court under Article 226 of the Constitution of India.

4. Having heard learned counsel for the parties and regard being had to the preliminary objection raised by Mr. M.I.Dar to the maintainability of these petition, following preliminary issue was framed and taken up for consideration in the first instance:-

Whether the State Board of Auqaf constituted under Section 13 of the Waqf Act, 1995 [“the Act”] is amenable to the writ jurisdiction of this Court vested by Article 226 of the Constitution of India?

5. The issue raised before me shall not pose much difficulty as a Division Bench of this Court in the case of **Shafat Ahmad Khan and others v. State and others, JKJ 2016 (1) 433** has already considered the issue of maintainability of writ petition under Article 226 of the Constitution of India against the Waqf Board constituted under J&K Muslim Specified Waqfs and Specified Waqf Properties (Management Regulation) Act, 2004. The Division Bench after placing reliance on *Ajay Hasia v. Khauid Mujib Sehravardi, 1981 (1) SCC 722*; *Andi Mukta Sadguri Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V R Rudani, 1989 (2) SCC 69*; *Pareep Kumar Biswas v. Indian Institute of Chemical Biology, 2002 (5) SCC 111*; *Zee Telefilms Ltd. v. Union of India 2005(4) SCC 649* and *K.K. Saksena v. International Commission on Irrigation and Drainage, 2015 (4) SCC 670* come to the conclusion that the State Government did not have any deep and pervasive administrative control over the Waqf Board and was exercising merely regulatory control over the Board. It was, thus, opined that the Waqf Board was not falling in the definition of ‘other authority’ used in Article 226 of the Constitution. It further held that while dealing with the eviction of unauthorized occupants and demolition of unauthorized constructions on the Waqf property, the Board was not in strict sense discharging any public functions or public duty. It was, thus, concluded by the Division Bench that even if Waqf Board were to be held as “other authority” within the meaning of Article 226 of the Constitution of India, yet its decision regulating management

of the Waqf properties viz-a-viz a private individual would not involve public law element. The judgment in **K.K.Saksena** (supra) was strongly relied upon by the Division Bench. Shorn of unnecessary details and without tracing out the development of law on the point, suffice would it be to set out the conclusions drawn by the Division Bench of this Court in Shafat Ahmad Khan's case. For facility of reference, relevant extract from the judgment in **Shafat Ahmad Khan's** case (supra) is reproduced hereunder:-

“18. The legal position that emerges against above backdrop, may be summarized as under:-

- i. That definition of 'State' contained in Artl. 12 is for the purpose of application of provisions contained in part III of the Constitution.
- ii. Writ jurisdiction of High Court under Art. 226 is not limited to the Government or Authority which qualifies to be 'State' under Art. 12. Power extends to issue directions, orders or writs to “any person or Authority”.
- iii. The expression 'Authority' used in Art. 226 is to receive wider meaning than the meaning given to the same expression used in Art. 12 of the Constitution.
- iv. The term 'Authority' in Art. 12 means a body, performing public functions or public duty. The emphasis always being on the nature of duty imposed on such body, namely “public duty” to make it exigible to Art. 226 of the Constitution.
- v. That merely because the Government has power to depute an Officer(s), to be part of administrative set up, of an institution or body is not to be construed as 'pervasive administrative' control over the body. Regulatory power is always to be distinguished from administrative control.
- vi. Power to issue directions, orders or writs under Art. 226 is not limited to enforcement of fundamental rights, conferred by Part-III of the Constitution but also 'for any other purpose'.
- vii. Even if a body performing public duty is amenable to writ jurisdiction, all its decisions are not subject to judicial review. Only

those decisions which have public element therein can be judicial reviewed under writ jurisdiction.”

6. It is in the light of legal position succinctly summed up by the Division Bench, we need to examine various provisions of the Waqf Act, 1995. The Waqf Board constituted under Section 13 of the Act is undoubtedly a statutory authority. An authority constituted under a statute would not ipso facto come within the ambit of term “State” referable to Article 12 of the Constitution of India. It would not come within the scope of term “State” under Article 12 unless the authority concerned satisfies three tests laid down by the Supreme Court in the case of Pardeep Kumar Biswas (supra) i.e. the authority is financially, functionally and administratively controlled by the Government.

7. It is trite that the definition of State contained under Article 12 is for the purpose of its application to provisions contained in Part-III of the Constitution. Obviously, prerogative writs under Article 32 of the Constitution of India contained in Part-III of the Constitution shall be issued by the Hon’ble Supreme Court for enforcement of fundamental rights against the authorities comprehended in the term “State” as contained in Article 12 of the Constitution of India. The jurisdiction of High Court under Article 226 is an extraordinary jurisdiction and is not limited to the Government, its instrumentalities or an authority which qualifies to be a ‘State’ under Article 12 of the Constitution. The power of the High Court to issue writ, order or direction extends to ‘any person

or authority’ and the issuance of writ, order or direction under Article 226 is not only limited to the enforcement of fundamental rights but would lie even for any other purpose. The term ‘any other purpose’ contained in Article 226 of the Constitution of India is of course required to be construed *ejusdem generis*, meaning thereby, “any other purpose” would not be a private dispute between the parties but for enforcement or performance of a duty having public law element.

8. To better appreciate the controversy raised in these petitions, it would be appropriate to set out certain provisions contained in the Act, which for facility of reference are reproduced hereunder:-

Section 13 of the Act

“13. Incorporation.

(1) With effect from such date as the State Government may, by notification in the Official Gazette, appoint in this behalf, there shall be established a Board of ¹[Auqaf] under such name as may be specified in the notification:

Provided that in case where a Board of Waqf has not been established, as required under this sub-section, a Board of Waqf shall, without prejudice to the provisions of this Act or any other law for the time being in force, be established within six months from the date of commencement of the Wakf (Amendment) Act, 2013

(2) Notwithstanding anything contained in sub-section (1), if the Shia auqaf in any State constitute in number more than fifteen per cent. of all the auqaf in the State or if the income of the properties of the Shia auqaf in the State constitutes more than fifteen per cent of the total income of properties of all the auqaf in the State, the State Government may, by notification in the Official Gazette, establish a Board of Auqaf each for Sunni auqaf and for Shia auqaf under such names as may be specified in the notification.

(2A) Where a Board of Waqf is established under sub-section (2) of section 13, in the case of Shia waqf, the Members shall belong to the Shia Muslim and in the case of Sunni waqf, the Members shall belong to the Sunni Muslim.

(3) The Board shall be a body corporate having perpetual succession and a common seal with power to acquire and hold property and to transfer any such property subject to such conditions and restrictions as may be prescribed and shall by the said name sue and be sued.

Relevant extract of Section 14 of the Act is reproduced as under:-

“14. Composition of Board.---(1) The Board for a State and ²[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 auqaf having an annual income of rupees one lakh and above.

⁴[*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;

⁵[(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.”

Relevant extract of Section 32 of the Act reads thus:-

“32. Powers and functions of the Board.----(1) Subject to any rules that may be made under this Act, the general superintendence of all auqaf in a State shall vest in the Board established or the State; and it shall be the duty of the Board so to exercise its powers under this Act as to ensure that the auqaf under its superintendence are properly maintained, controlled and administered and the income thereof is duly applied to the objects and for the purposes for which such auqaf were created or intended:

Provided that in exercising its powers under this Act in respect of any waqf the Board shall act in conformity with the directions of the waqf, the purposes of the waqf and any usage or custom of the waqf sanctioned by the school of Muslim law to which the waqf belongs.

.....”

Section 56 of the Act is reproduced hereunder:-

“56. Restriction on power to grant lease of waqf property.--(1) A lease for any period exceeding thirty years] of any immovable property which is waqf property, shall, notwithstanding anything contained in the deed or instrument of waqf or in any other law for the time being in force, be void and of no effect:

Provided that a lease for any period up to thirty years may be made for Commercial activities, education or health purposes, with the

approval of the State Government, for such period and purposes as may be specified in the rules made by the Central Government:

Provided further that lease of any immovable waqf property, which is an agricultural land, for a period exceeding three years shall, notwithstanding anything contained in the deed or instrument of waqf or in any other law for the time being in force, be void and of no effect:

Provided also that before making lease of any waqf property, the Board shall publish the details of lease and invite bids in at least one leading national and regional news papers.

A lease for a period of one year but not exceeding thirty years of immovable property which is waqf property shall, notwithstanding anything contained in the deed or instrument of waqf or in any other law for the time being in force, be void and of no effect unless it is made with the previous sanction of the Board.

(3) The Board shall, in granting sanction for lease or renewal thereof under this section review the terms and conditions on which the lease is proposed to be granted or renewed and make its approval subject to the revision of such terms and conditions in such manner as it may direct:

Provided that the Board shall immediately intimate the State Government regarding a lease for any period exceeding three years of any waqf property and thereafter it may become effective after the expiry of forty-five days from the date on which the Board intimates the State Government.

(4) Every rule made by the Central Government under this section shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days, which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.”

Section 77 of the Act reads thus:-

“77. Waqf Fund.--(1) All moneys received or realised by the Board under this Act and all other moneys received as donations, benefactions or grants by the Board shall form a fund to be called the Waqf Fund.

(2) All moneys received by the Board, as donations, benefactions and grants shall be deposited and accounted for under a separate sub-head.

(3) Subject to any rules that may be made by the State Government in this behalf, the Waqf Fund shall be under the control of the Board, so, however, that the Waqf Fund under the control of common Waqf

Board shall be subject to rules, if any, made in this behalf by the Central Government.

(4) The Waqf Fund shall be applied to--

(a) repayment of any loan incurred under section 75 and payment of interest thereon;

(b) payment of the cost of audit of the Waqf Fund and the accounts of auqaf;

(c) payment of the salary and allowances to the officers and staff of the Board;

(d) payment of traveling allowances to the Chairperson, members, of the Board;

(e) payment of all expenses incurred by the Board in the performance of the duties imposed, and the exercise of the powers conferred, by or under this Act;

(f) payment of all expenses incurred by the Board for the discharge of any obligation imposed on it by or under any law for the time being in force.

³ [(g) payment of maintenance to Muslim women as ordered by a court of competent jurisdiction under the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (25 of 1986).

(5) If any balance remains after meeting the expenditure referred to in sub-section (4), the Board may use any portion of such balance for the preservation and protection of waqf properties or for such other purposes as it may deem fit.”

9. Scanning through different provisions of the Act, particularly, the provisions contained in Chapter IV makes it abundantly clear that no doubt the Board of Auqaf constituted by the State Government under Section 13 of the Act is a statutory body but the same is not under direct, deep, and pervasive control of the Government. It may be clarified that so far as Union Territory is concerned, the Board of Auqaf is constituted by the Central Government from the categories specified under Subsection (1)(b)(i) to (iv) of Section 14 of the Act or Subsections (1)(c) to (e) of Section 14 of the Act.

10. In terms of Section 32 of the Act, general superintendent of Auqaf in a State vests with the Board and it is the duty of the Board to

exercise its power under the Act to ensure that Auqaf under its superintendence are properly managed, controlled or administered and the income generated therefrom is duly applied to achieve the objects and the purposes for which the Auqaf had been created.

11. Under Section 77 of the Act, a Waqf Fund is created which consists of all moneys received or realized by the Board under the Act as also of other moneys received as donations, benefactions or grants by the Board. As is provided under Subsection (3) of Section 77 of the Act, subject to any rules that may be made by the State Government in this behalf, the Waqf fund is placed under the control of the Board. Under Section 56 of the Act, grant of lease of Waqf property is regulated. Power to lease out the Waqf property, subject to the restraint contained in Section 56 of the Act read with Waqf Properties Lease Rules, 2014, vests with the Board of Auqaf.

12. Viewed from any angle, the Act does not vest in the Central Government or State Government a deep and pervasive financial, functional and administrative control and that being the position, the Board of Auqaf, despite being a statutory body constituted under the Act, may not qualify to be 'State' as contained under Article 12 of the Constitution of India. Aside, the function of the Board of Auqaf entering into lease agreements with private individuals in respect of Waqf properties is more of a commercial/contractual nature rather than a public function. The arrangement between the Board of Auqaf and the

lessees aimed at utilization of Waqf properties for generating funds to be applied to achieve the objects and purposes of the creation of Waqf is more or less commercial in nature and, therefore, lacks public law element. Although, as discussed above, the Board of Auqaf does not fall within the definition of term 'State' contained in Article 12 of the Constitution of India, yet a writ under Article 226 of the Constitution of India would lie if it is found that the Board is performing public functions and the impugned action taken by it involves a public law element in it.

13. Obviously, as it has emerged from the discussion made above, neither the Board of Auqaf, constituted by the Central Government or Government of Jammu & Kashmir while issuing orders, directions or notices regulating the lease of properties vested in it to private individual(s) for generating funds, performs any public function/duty nor such order, direction or notice involves any public law element.

14. For the aforesaid reason, no writ under Article 226 of the Constitution of India would lie against the Board of Auqaf at the instance of lessees or persons in occupation of the Waqf properties, that too, for the enforcement of private rights arising out of the lease agreement(s) entered into or to be entered into by the parties.

15. Before I close, I deem it in place to refer to a recent judgment of the Supreme Court in the case of **St. Mary's Education Society and another vs. Rejendra Prasad Bargava and others, 2022 SCC Online SC 1091**. The Supreme Court after surveying the law on the subject summed up its conclusion in para 69 which is set out below:

“69. We may sum up our final conclusions as under:

- (a) An application under Article 226 of the Constitution is maintainable against a person or a body discharging public duties or public functions. The public duty cast may be either statutory or otherwise and where it is otherwise, the body or the person must be shown to owe that duty or obligation to the public involving the public law element. Similarly, for ascertaining the discharge of public function, it must be established that the body or the person was seeking to achieve the same for the collective benefit of the public or a section of it and the authority to do so must be accepted by the public.
- (b) Even if it be assumed that an educational institution is imparting public duty, the act complained of must have a direct nexus with the discharge of public duty. It is indisputably a public law action which confers a right upon the aggrieved to invoke the extraordinary writ jurisdiction under Article 226 for a prerogative writ. Individual wrongs or breach of mutual contracts without having any public element as its integral part cannot be rectified through a writ petition under Article 226. Wherever Courts have intervened in their exercise of jurisdiction under Article 226, either the service conditions were regulated by the statutory provisions or the employer had the status of “State” within the expansive definition under Article 12 or it was found that the action complained of has public law element.

- (c) It must be consequently held that while a body may be discharging a public function or performing a public duty and thus its actions becoming amenable to judicial review by a Constitutional Court, its employees would not have the right to invoke the powers of the High Court conferred by Article 226 in respect of matter relating to service where they are not governed or controlled by the statutory provisions. An educational institution may perform myriad functions touching various facets of public life and in the societal sphere. While such of those functions as would fall within the domain of a "public function" or "public duty" be undisputedly open to challenge and scrutiny under Article 226 of the Constitution, the actions or decisions taken solely within the confines of an ordinary contract of service, having no statutory force or backing, cannot be recognised as being amenable to challenge under Article 226 of the Constitution. In the absence of the service conditions being controlled or governed by statutory provisions, the matter would remain in the realm of an ordinary contract of service.
- (d) Even if it be perceived that imparting education by private unaided the school is a public duty within the expanded expression of the term, an employee of a nonteaching staff engaged by the school for the purpose of its administration or internal management is only an agency created by it. It is immaterial whether "A" or "B" is employed by school to discharge that duty. In any case, the terms of employment of contract between a school and nonteaching staff cannot and should not be construed to be an inseparable part of the obligation to impart education. This is particularly in respect to the disciplinary proceedings that may be initiated against a particular employee. It is only where the removal of an employee of nonteaching staff is regulated by some statutory provisions, its violation by the employer in contravention of law may be interfered by the court. But such interference will be on the ground of breach of law and not on the basis of interference in discharge of public duty.

- (e) From the pleadings in the original writ petition, it is apparent that no element of any public law is agitated or otherwise made out. In other words, the action challenged has no public element and writ of mandamus cannot be issued as the action was essentially of a private character.

16. In view of the discussion made above, I have come to a definite conclusion that the Board of Auqaf constituted under Section 13 and 14 of the Act is not amenable to the jurisdiction vested in this Court under Article 226 of the Constitution of India, more so when action impugned neither emanates from the discharge of public function by the Board of Auqaf nor does it involve a public law element.

17. Having held that the writ petitions are not maintainable, I deem it appropriate to deal with the argument of learned counsel for the parties that in the absence of Constitution of Tribunal in the Union Territory of Jammu & Kashmir under Section 83 of the Act and non-availability of remedy under Article 226 of the Constitution of India, the petitioners would be rendered remediless. It is argued that in terms of Section 85 of the Act, jurisdiction of civil Courts, revenue Courts and any other authority is completely barred.

18. Before I embark upon the discussion on the issue, I deem it appropriate to set out relevant extract of Section 83 and Section 85 in its entirety. Relevant extract of Section 83 of the Act reads thus:-

“83. Constitution of Tribunals, etc.—(1) The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may

think fit, for the determination of any dispute, question or other matter relating to a waqf or waqf property, eviction of a tenant or determination of rights and obligations of the lessor and the lessee of such property, under this Act and define the local limits and jurisdiction of such Tribunals.
.....”

Section 85 of the Act is reproduced hereunder:-

“85. Bar of jurisdiction of civil courts.—No suit or other legal proceeding shall lie in any civil court, revenue court and any other authority in respect of any dispute, question or other matter relating to any waqf, waqf property or other matter which is required by or under this Act to be determined by a Tribunal.”

19. From a careful reading of Subsection (1) of Section 83 of the Act, it clearly comes out that each State Government which would include Union Territory as well is put under an obligation to constitute one or more Tribunals, as it may think fit, by issuing notification in the Official Gazette. The word “shall” used in respect of constitution of Tribunal or Tribunals is mandatory in nature. It further comes out that the Tribunal/Tribunals so constituted by the Government of State or Union Territory shall have jurisdiction to determine any dispute, question or other matter relating to a waqf or waqf property, eviction of a tenant or determination of rights and obligations of the lessor and the lessee of such property under this Act. Obviously, the dispute raised in these petitions falls within the determination of Tribunal. As is apparent from a reading of Section 85 of the Act, no Civil Court, Revenue Court and any other authority shall have jurisdiction to entertain any suit or other legal proceeding in respect of any dispute, question or other matter

relating to any waqf property as also the matter which is required by or under the Act to be determined by the Tribunal.

20. In view of the clear legal position emerging from a reading of Sections 83 and 85 of the Act, this Court has no option but to agree with the learned counsel appearing for the petitioners that in the event these writ petitions are not entertained, the petitioners would be rendered remediless.

21. Much was said about the power and jurisdiction of this Court to entertain the writ petition despite availability of an alternative remedy provided under the Statute. Suffice it to say the question of relegating the parties to an alternative remedy or entertaining of a petition under Article 226 despite availability of statutory alternative remedy would arise only when this Court has jurisdiction to entertain the writ petition. Had this Court come to a conclusion that writ petition challenging the impugned action of the Board of Auqaf was amenable to writ jurisdiction, certainly it would not have relegated the petitioners to the remedy before the Tribunal for the simple reason that the Tribunal does not exist.

22. In view of the foregoing and being aware that dismissal of these writ petitions on the ground of maintainability under Article 226 of the Constitution of India would in the present circumstances render the petitioners remediless, this Court cannot entertain these petitions and

exercise jurisdiction not vested in it. However, having regard to the predicament faced by the petitioners or may be faced by similarly situated persons in future, I deem it appropriate to remind the Government of the Union Territory of its statutory duty enjoined on it under Section 83 of the Act and to take requisite steps for constitution of one or more Tribunals, as it may think fit, so that persons aggrieved are not rendered remediless.

23. In the premises, writ petitions are held not maintainable and the same are, accordingly, dismissed. However, while dismissing the writ petitions and taking note of the chaotic situation created due to non constitution of the Tribunal or Tribunals, a direction is issued to the Government of Union Territory to constitute one or more Tribunals, as it may think fit, in terms of Section 83 of the Act within a period of two months from the date of this judgment. Till the Government constitutes Tribunal/Tribunals in terms of Section 83 of the Act, there shall be status quo with regard to the subject matter of these writ petitions.

(Sanjeev Kumar)
Judge

SRINAGAR
29.02.2024
Vinod, PS

Whether the order is speaking : Yes
Whether the order is reportable: Yes