

**SUPREME COURT OF INDIA**

Maharashtra State Board of Wakfs

Vs.

Shaikh Yusuf Bhai Chawla

S.L.P.(C) Nos.31288-31290 of 2011

(Altamas Kabir and J. Chelameswar JJ.)

11.05.2012

**ORDER**

**ALTAMAS KABIR, J.**

1. These several Special Leave Petitions have been filed by the State of Maharashtra and other parties. While Special Leave Petition (C) Nos.31288-31290, Special Leave Petition (C) Nos.32129-32131 and Special Leave Petition (C) No.32636, all of 2011, have been fled by the Maharashtra State Board of Wakfs, Special Leave Petition (C) Nos.35196 and 35198 of 2011 have been filed by the Jamait Educational and Welfare Muslim Minority Education Society and Maharashtra Muslim LawyersForum.

2. The Special Leave Petitions are directed against the judgment and final order dated 21st September, 2011, passed by the Bombay High Court in Writ Petition No.2906 of 2004, Writ Petition No.357 of 2011 and Writ Petition (L) No.899 of 2011. The impugned judgment of the High Court in the aforesaid Writ Petitions is the outcome of the challenge to the formation of the Maharashtra State Board of Wakfs. As noticed by the High Court, the subject matter of all the Writ Petitions, and thereby of the Special Leave Petitions, relates to the challenge to the incorporation of the Maharashtra State Board of Wakfs and its impact upon the Wakfs created by persons professing Islam, but belonging to different sects.

3. The Petitioners in Writ Petition No.2906 of 2004 are Muslims belonging to the Shia Fatemi Ismaili Tyebia Sect of Islam and are Shia Muslims. The Petitioner Nos.1 to 3 in the said Writ Petition are trustees of Sir Adamji Peerbhoy Sanatorium established by a Scheme settled by the Bombay High Court by an order dated 16th

June, 1931 in Suit No.1560 of 1927. The said Trust is registered as a Public Trust under the Bombay Public Trusts Act. The Petitioner Nos.4 and 5 are trustees of the Anjuman- i-Null-Bazaar Chhabdi Bazar Niaz Hussein Charitable Trust, which is also registered as a Public Trust under the Bombay Trusts Act. The Petitioners in Writ Petition No.899 of 2011 are Dawoodi Bohra Muslims and claim to be Trustees of Noorbhoy Jeewanji Morishwalla Charity Trusts registered under the Bombay Public Trusts Act. The Petitioners in Writ Petition (L) No.357 of 2011 are Muslims belonging to the Shia Fatemi Ismaili Tyebia sect and are also trustees of Sir Adamji Peerbhoy Sanatorium, referred to hereinabove. The Petitioner in SLP (C) No.35196 of 2011 is a society registered under the Societies Registration Act, 1860. All the members of the Trust profess Islam and are persons interested in the affairs of the Wakf set in question by virtue of the provisions of Section 3(k) of the Wakf Act, 1995. Similarly, the Petitioners in SLP(C) No.35198 of 2011 are a group of Muslim lawyers who have formed a Forum and are also persons interested in the management of Wakf properties in terms of Section 3(k) of the Wakf Act, 1995.

4. The grievance of the Writ Petitioners in these five Writ Petitions is the same. The Petitioners in Writ Petition No.2906 of 2004 have challenged the notification dated 4th January, 2002, issued by the Government of Maharashtra and have also sought for a direction to the State Government to conduct a fresh survey of Wakfs in the State of Maharashtra. Their further challenge is to notification dated 13th November, 2003, issued by the Maharashtra State Board of Wakfs publishing the list of Wakfs in the State of Maharashtra.

5. In Writ Petition No.899 of 2001, the Petitioners have challenged the Circular dated 24th July, 2002, issued by the Charity Commissioner of the State of Maharashtra stating therein that in view of the provisions of Section 43 of the Wakf Act, 1995, the Wakfs which were registered as Public Trusts would cease to be governed by the provisions of the Public Trust Act. It is the case of the Writ Petitioners that because the establishment of the Maharashtra State Board of Wakfs by the notification dated 4th January, 2002, was itself invalid, they continued to be governed by the provisions of the Bombay Public Trusts Act.

6. The Petitioners in Writ Petition No.357 of 2011, have challenged the notification issued by the State of Maharashtra on 20th October, 2010, for re-survey of the Wakfs in the State of Maharashtra. They also sought a direction that the Charity Commissioner should continue to supervise the working of the Trusts of which they are trustees.

7. After the Wakf Act, 1995, which came into force on 1st January, 1996, was enacted, the State Government issued a notification on 1st December, 1997, in exercise of its powers under Sub-Section (1) of Section 4 of the Wakf Act, 1995, whereby the State Government appointed :- a) Settlement Commissioner and Director of Land Records, Maharashtra State, Pune, to be Survey Commissioner of Wakfs; and b) Additional Commissioners of Konkan, Nashik, Pune, Nagpur, Amravati and Aurangabad Revenue Divisions to be Additional Survey Commissioners, for the purpose of making a survey of Wakfs existing on the 1st day of January, 1996 in the State of Maharashtra.

8. On 4th January, 2002, the Government of Maharashtra, by a notification of even date, in exercise of powers conferred by Section 14 of the Wakf Act, 1995, established a Board by the name of The Maharashtra State Board of Wakfs with its headquarters at Aurangabad. The Government nominated four persons to be members of the State Board, namely:-

- a) Shri Khan Yusuf Sarwar, Member of Parliament (Rajya Sabha);
- b) Smt. Shabana Azmi, Member of Parliament (Rajya Sabha);
- c) Shri Harun Aadam Solkar, Muslim Ex-member of the Bar Council of the State; and d) Shri Chand Pasha Inamdar, Member of Muslim Organisation;

Thus, by the aforesaid Notification, a Wakf Board was established for the entire State of Maharashtra with its headquarters at Aurangabad and four persons were named in the Notification as members of the said Board.

9. Pursuant to the notification dated 1st December, 1997, the officers appointed to conduct the survey, submitted a report to the State Government on 31st January, 2002. Thereafter, other members were appointed to the Wakf Board by different notifications. On 24th July, 2003, the Charity Commissioner of the State of Maharashtra issued a circular directing his office not to exercise powers under the Bombay Public Trusts Act or to deal with any of the Muslim Public Trusts. The said circular mentioned that according to Section 43 of the Wakf Act, 1995, a Wakf registered as a Public Trust should not be administered or governed under the Bombay Public Trusts Act. Several Writ Petitions were filed challenging the establishment of the Board and also challenging its constitution and appointment of various persons as its members. Objections were also filed in Court challenging the circular issued by the Charity Commissioner. On 13th November, 2003, the Wakf

Board published a list of Wakfs treating Muslim Public Trusts in Maharashtra and Suburban districts of Maharashtra as Wakfs.

10. Several Writ Petitions were filed challenging the list of Wakfs prepared by the Wakf Board which came to be heard by the Bombay High Court, which set aside the notification dated 4th January, 2002, as also the list of Wakfs prepared and published by the Maharashtra State Wakf Board on 13th November, 2003. The Survey Officers appointed by notification dated 20th October, 2010, were directed to take into consideration representations, if any, made by the Petitioners and other similarly situated persons connected with the Muslim Wakfs, including the list prepared by the Committee constituted by the State Government under the chairmanship of the Charity Commissioner. The Survey Officers were also given the option to take into consideration any list of Wakfs, if prepared under the Act of 1954. The crucial direction which appears to have adversely affected the special leave petitioners is the direction that until a new Board or Boards was incorporated under the Wakf Act, 1995, and the Board started functioning in accordance with the provisions of the Wakf Act, the provisions of the Bombay Public Trusts Act would apply to such Muslim Public Trusts as are registered under the Bombay Public Trusts Act. The High Court made it clear that although the notification dated 4th January, 2002, had been set aside, none of the actions taken or orders passed by the Wakf Board constituted by the notification dated 4th January, 2002, had been challenged or set aside by virtue of the said order. By the impugned order, the State of Maharashtra was given the liberty to take steps to make such interim arrangements, as may be advised, to monitor and supervise the Wakf properties and other related aspects under the Wakf Act. It was also stipulated that the decision and/or action already taken, including the pending disputes and litigations would be governed by the Wakf Act, 1995.

11. As far as Writ Petition (L) No.357 of 2011 is concerned, the Division Bench clarified that by the judgment in question it had not considered the reliefs claimed with regard to the list of Wakfs dated 13th December, 2004.

Accordingly, the Petitioners were given the liberty either to file a fresh petition claiming such relief, or to claim the said relief in other pending matters.

12. It is these directions issued by the Division Bench of the Bombay High Court which have led to the filing of the present Special Leave Petitions.

13. One of the facets of the dispute, which was thrown up during the hearing regarding continuance of the interim order in a modified form is the creation of Wakfs under the Muslim law and the creation of Trusts by persons professing the Muslim faith, which were not in the nature of Wakfs, but in the nature of English Trusts.

14. Prior to the enactment of the Wakf Act, 1995, the Central Wakf Act, 1954, was in force, but did not apply to some of the States which had Special Acts of their own, such as Uttar Pradesh, West Bengal, parts of Gujarat and Maharashtra and some of the North-Eastern States. The said States continued to be governed by their own Special statutes, which provided for the administration of Wakfs in their respective States. To do away with the disparity of the law relating to Wakfs in different States, the Central Government enacted a uniform law to govern all Wakfs in the country, which led to the enactment of the Wakf Act, 1995, whereby all other laws in force in any stage corresponding to the said Act, stood repealed.

15. The judgment and order of the High Court having been challenged in these various Special Leave Petitions, on 29th November, 2011, when the matters were taken up, we had directed notices to issue in the different Special Leave Petitions and in the meantime directed that the stay granted by the High Court on 21st September, 2011, in respect of its judgment, would remain operative.

16. Thereafter, these matters have been taken up to consider whether such interim order of stay should be allowed to continue, but in a modified manner on account of the fact that by staying the operation of the final judgment, the interim orders passed by the High Court were revived, thereby rendering the stay order meaningless.

17. While considering the three sets of Special Leave Petitions, Special Leave Petition (Civil) Nos.32129-32131 of 2011, filed by the State of Maharashtra, were taken up for consideration first.

18. Appearing for the Petitioner State of Maharashtra, Mr. Rohinton Nariman, learned Solicitor General for India, submitted that the only thing which was required to be considered for a decision as to whether the interim order shall continue, was whether a prima facie case had been made out for grant of interim injunction to preserve the status quo ante which prevailed before the coming into operation of the Wakf Act, 1995. Mr. Nariman urged that the provisions of the Wakf Act, 1954, and the Bombay Public Trusts Act, in relation to Wakf properties, stood repealed by virtue of Section 112 of the 1995 Act. Mr. Nariman

submitted that Section 112 of the 1995 Act, which dealt with repeal and savings, clearly indicated that if immediately before the commencement of the Act in any State, there was in force in that State any law which corresponded with the 1995 Act, that corresponding law would stand repealed. The learned A.S.G. submitted that in the instant case, the corresponding law to the Wakf Act, 1995, when it came into force, was the Maharashtra Wakf Act and the provisions of the Bombay Public Trusts Act which became ineffective on account of the provisions of Section 112(3) of the 1995 Act. With the repeal of the said two provisions, it was for the Board of Wakfs established under the 1995 Act to continue in management of the Wakf properties and the judgment of the High Court setting aside the establishment of Board could not resurrect the authority of the Charity Commissioner over such properties. In fact, after the promulgation of the Wakf Act, 1995, the Charity Commissioner ceased to have any control over Muslim Wakfs, even if they had been registered with the Charity Commissioner as Public Trusts. Mr. Nariman submitted that at this interim stage only a prima facie view has to be taken as to whether the interim order passed by this Court was to be continued, pending the hearing of the Special Leave Petitions.

19. On the other hand, Dr. Rajiv Dhawan, Senior Advocate, and other learned counsel who appeared for some of the Respondents, urged that the learned Solicitor General had not made any submission with regard to the balance of convenience and inconvenience and only confined himself to the question of whether a prima facie case has been made out for continuance of such interim injunction. Learned counsel submitted that the matter had already been dealt with earlier and the order which was passed on 30th November, 2011, continuing the stay granted by the Bombay High Court on 21st September, 2011, was based on consent. Furthermore, only three of the parties had appeared before this Court. It was further submitted that although there were several sales transactions involved which were to be considered by the Charity Commissioner, only three of the parties were before the Court and the parties which were also likely to be affected by any order passed in these matters should also be given an opportunity of hearing, particularly because the prayer which had been asked for by way of interim relief was in fact the main relief itself. It was urged that till 4th January, 2002, when the Board came into existence under the 1995 Act, there was no Wakf Board and even the Board created at a later stage was wholly illegal.

20. The main thrust of the submissions made on behalf of the respondents was that the circular issued by the Charity Commissioner relinquishing its authority over the Trusts created by Muslims, did not attract the provisions of the Wakf Act, 1995, which dealt with Wakf properties only and was not, therefore, entrusted with the

jurisdiction over such Wakfs. It was also submitted that the Bifurcation Committee which had been created for the purpose of separating Wakfs from Trusts and Shia and Sunni Wakfs, was an extra-legal Committee which was not contemplated under the provisions of the Wakf Act. According to Dr. Dhawan, the classification of Wakfs as Shia or Sunni or any dispute regarding whether a Wakf is existing or not, could only be decided by the Wakf Tribunal under Sections 6 and 7 or by the Wakf Board under Section 40 of the Wakf Act, 1995.

21. On 4th September, 2008, the State of Maharashtra issued a notice appointing 7 members to the Board, but the said notification was struck down by the Bombay High Court and the strength of the Board of Wakfs was reduced to four members. This was followed by a notification issued by the Wakf Board on 23rd February, 2008, cancelling its corrigendum notification dated 5th May, 2005, seeking to amend the list of Wakfs dated 13th November, 2003, thereby retaining its control over the said Wakf estates indicated in the first list published earlier. Dr. Dhawan urged that once the order passed was agreed to by the parties, there could be no further question of passing any interim order to stay the effect of the order of the High Court passed on 21st September, 2011.

22. Dr. Dhawan urged that since the survey of the Wakfs and the various denominations in respect thereof, was yet to be completed, and even the Board of Wakfs had not been properly constituted in accordance with Sections 13 and 14 of the 1995 Act, the provisions of Section 22 of the Act, which provides that no act or proceeding of the Board shall be invalid by reason only of the existence of any vacancy amongst its members or any defect in the constitution thereof, would not be attracted. Learned counsel submitted that Section 22 of the Act would come into operation only after the Board had been duly constituted but not when the Board was yet to be constituted. It was submitted that since the Wakf Board had not been constituted fully, the list of Wakfs published by it cannot be accepted or relied upon. It was submitted that the interim order passed by the High Court did not require any interference in these proceedings even at the interim stage.

23. Mr. Salve, learned senior counsel appearing for the Respondents Nos. 1,2 and 3 in SLP (C) No. 31288 of 2011, submitted that during the pendency of the Special Leave Petition in this Court, Wakf properties should not be permitted to be alienated by either the Board of Wakfs or the Charity Commissioner, though, as far as Public Trusts are concerned, they should not be treated as Wakfs, since the genesis of their existence was not under the law relating to Wakfs, but as English Trusts which are governed by the Indian Trusts Act.

24. Referring to paragraph 13 of the Special Leave Petition in SLP(C)Nos.31288-31290 of 2011, Mr. Salve submitted that the power to establish a Board of Wakfs was vested in the State Government under Section 13 of the Wakf Act, 1995 and Sub-Section (2) thereof lays down the manner in which the power is to be exercised by the State Government. Mr. Salve pointed out that this provision provided for the appointment of two Boards, one, a Sunni Board and the other, a Shia Board, depending on the number of Wakfs belonging to the two denominations. Accordingly, one would have to wait till a survey, as contemplated under Section 4 of the Wakf Act, 1995, was completed. Mr. Salve submitted that it would, therefore, be best to preserve the status quo until a final decision was taken in the Special Leave proceedings.

25. Mr. Y.H. Muchhala, learned Senior Advocate, who appeared for Anjuman- i-Islam, adopted the submissions made by Mr. P.P. Rao, Dr. Dhawan and Mr. Salve, but submitted that in the absence of a validly constituted Board of Wakfs, the Wakf Act, 1995, could not be said to have come into force in Maharashtra which continued to be governed by the State Government. Mr. Muchhala urged that for the purpose of management of the Wakfs within the State of Maharashtra, the system of management prevailing prior to the enactment of the 1995 Act would continue to remain in operation.

26. Having considered the submissions made on behalf of the respective parties, we are restricting ourselves at this interim stage to the broad outlines of the case made out by the respective parties and whether, in the background of the facts disclosed, the stay granted by the Bombay High Court on 21st September, 2011 should continue in a modified form.

27. Broadly speaking, the grievance of the Petitioners in these Special Leave Petitions is with regard to the vesting of powers of management and supervision of Muslim Wakf estates in Maharashtra in the Charity Commissioner by virtue of the impugned order of the High Court.

Undoubtedly, the Wakf Board was constituted under the provisions of the Wakf Act, 1995, but not at full strength as envisaged in Sections 13 and 14 of the aforesaid Act. Whatever may be the reason, the factual position is that today there is no properly constituted Board of Wakfs functioning in the State of Maharashtra. At the same time, the administration of Wakfs in Maharashtra cannot be kept in vacuum. The Bombay High Court did what it thought best to ensure that there was no vacuum in the administration of Wakf properties in Maharashtra by directing that till such time the Board

was properly constituted, the Charity Commissioner would continue to administer the Muslim Wakf properties, including English Trust properties, which had already been registered as Trust properties with the Charity Commissioner under the Bombay Public Trusts Act. As a corollary, the list of Wakfs published by the truncated Board of Wakfs was also set aside by the Bombay High Court. The question is whether the Bombay High Court had the jurisdiction to make such orders in the writ jurisdiction and particularly to vest the management of all Wakf properties in the Charity Commissioner in view of the provisions of Section 112 and in particular Sub- Section (3) thereof of the Wakf Act, 1995.

28. Section 112 concerns repeal and savings. By virtue of the said provision, the 1954 Wakf Act and the 1984 Wakf (Amendment) Act were repealed. Sub-Section (3) specifically provides as follows:-

112. Repeal and Savings.

(1) xxx xxx xxx (2) xxx xxx xxx (3) If immediately before the commencement of this Act, in any State, there is in force in that State, any law which corresponds to this Act, that corresponding law shall stand repealed. Although, it cannot be said that the Bombay Public Trusts Act was a corresponding law and, therefore, stood repealed, it cannot also be said that the same would be applicable to Wakf properties which were not in the nature of public charities. There is a vast difference between Muslim Wakfs and Trusts created by Muslims. The basic difference is that Wakf properties are dedicated to God and the Wakif or dedicator, does not retain any title over the Wakf properties. As far as Trusts are concerned, the properties are not vested in God. Some of the objects of such Trusts are for running charitable organisations such as hospitals, shelter homes, orphanages and charitable dispensaries, which acts, though recognized as pious, do not divest the author of the Trust from the title of the properties in the Trust, unless he relinquishes such title in favour of the Trust or the Trustees. At times, the dividing line between Public Trusts and Wakfs may be thin, but the main factor always is that while Wakf properties vest in God Almighty, the Trust properties do not vest in God and the trustees in terms of Deed of Trust are entitled to deal with the same for the benefit of the Trust and its beneficiaries.

29. In the present case, the difference between Trusts and Wakfs appear to have been overlooked and the High Court has passed orders without taking into

consideration the fact that the Charity Commissioner would not ordinarily have any jurisdiction to manage the Wakf properties.

30. In these circumstances, in our view, it would be in the interest of all concerned to maintain the status quo and to restrain all those in management of the Wakf properties from alienating and/or encumbering the Wakf properties during the pendency of the proceedings before this Court.

The order of the High Court staying the operation of its judgment has led to the revival of interim orders which have rendered such stay otiose. The said order of stay cannot also be continued during the pendency of these proceedings in its present form.

31. Accordingly, at this stage, we direct that in relation to Wakf properties, as distinct from Trusts created by Muslims, all concerned, including the Charity Commissioner, Mumbai, shall not permit any of the persons in management of such Wakf properties to either encumber or alienate any of the properties under their management, till a decision is rendered in the pending Special Leave Petitions.