

A.F.R.**Court No. - 93****Case :-** APPLICATION U/S 482 No. - 18824 of 2023**Applicant :-** Abu Talib Husain And Another**Opposite Party :-** State of U.P. and Another**Counsel for Applicant :-** Ashfaq Ahmed Ansari**Counsel for Opposite Party :-** G.A.**Hon'ble Arun Kumar Singh Deshwal,J.**

1. Heard Sri Ashfaq Ahmad Ansari, learned counsel for the applicants and learned AGA for the State.

2. The present 482 Cr.P.C. application has been filed to quash the the entire proceedings of Case No.1618 of 2022, State Vs. Abu Talib Husain including chargesheet no.190/22 dated 09.08.2022 arising out of Case Crime No.163 of 2022, under Sections-323, 504, 506, 354 I.P.C., Police Station-Kotwali Nagar, District- Saharanpur as well as summoning order dated 3.9.2022 passed by learned Additional Chief Judicial Magistrate, Saharanpur and (Case No.1740 of 2022) is pending before the learned Ist Additional Civil Judge (Jr. Div)/Judicial Magistrate, Saharanpur.

3. Contention of learned counsel for the applicants is that the impugned FIR was lodged and charge-sheet was filed after conducting investigation on which cognizance was also taken by the Court but as per Section-101 of Wakf Act, 1995 (hereinafter referred to as the 'Act, 1995'), *mutawalli* of wakf would be deemed to be a public servant within the meaning of Section-21 of Indian Penal Code, 1860 (hereinafter referred to as the 'IPC'). Applicant no.1 is *mutawalli* of wakf Karbala, Nai Basti, Behat Road, Saharanpur, therefore, as per Section-197 Cr.P.C.,

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cognizance is bad by the Court because no sanction from appropriate Government was taken before taking such cognizance. It is further submitted that applicant no.2 is father of applicant no.1 and also assisted the applicant no.1 in discharge of public duty. In support of his contention, learned counsel for the applicants also relied upon the judgement dated **07.09.1993** of Punjab and Haryana High Court reported in **1994 CRI.L.J. 1465 (Tara Singh Retd. Sub-Registrar Vs. The Saggal Co-operative Agricultural Service Society Ltd.)** in which it was observed that prosecution of Sub-Registrar is illegal without sanction from Government as he is public servant.

4. On the other hand, learned AGA has opposed the above submission and submitted that Section-101 of the Act, 1995 is a deeming provision for the discharge of duty and Section-197 Cr.P.C. is applicable only on public servant who cannot be removed without sanction of the State Government whereas for the removal of applicant no.1, sanction of State Government is not required and Section-197 Cr.P.C. is not applicable in the present case.

5. Considering the submission of learned counsel for the applicant as well as learned AGA for the State, the sole question arises if the *mutawalli* was deemed to be public servant under Section-101 of the Act, 1995, then merely because he is deemed to be public servant is also entitled to protection under Section-197 Cr.P.C. For detailed analysis of this issue, Section-101 of the Act, 1995 is being quoted as below:

"101. Survey Commissioner, members and officers of the Board deemed to be public servants.— (1) The Survey Commissioner, members of the Board, every officer, every auditor of the Board and every other person duly appointed to discharge any duties imposed on him by this Act or any

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rule or order made thereunder, shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code (45 of 1860).

(2) Every mutawalli of a wakf, every member of managing committee, whether constituted by the Board or under any deed of wakf, every Executive Officer and every person holding any office in a wakf shall also be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code (45 of 1860)."

6. From perusal of the above section of the Act, 1995, it appears that not only *mutawalli* of wakf but every member of Managing Committee of wakf are also deemed to be a public servant within the meaning of Section-21 IPC. But despite the above deeming provision *mutawalli* can be removed by the wakf board as per Section-64 of the Act, 1995. Section 64 of the Act, 1995 is quoted as below:

"64. Removal of mutawalli.— (1) Notwithstanding anything contained in any other law or the deed of wakf, the Board may remove a mutawalli from his office if such mutawalli—

(a) has been convicted more than once of an offence punishable under section 61; or

(b) has been convicted of any offence of criminal breach of trust or any other offence involving moral turpitude, and such conviction has not been reversed and he has not been granted full pardon with respect to such offence; or

(c) is of unsound mind or is suffering from other mental or physical defect or infirmity which would render him unfit to perform the functions and discharge the duties of a mutawalli; or

(d) is an undischarged insolvent; or

(e) is proved to be addicted to drinking liquor or other spirituous preparations, or is addicted to the taking of any narcotic drugs; or

(f) is employed as a paid legal practitioner on behalf of, or against, the wakf; or

(g) has failed, without reasonable excuse, to maintain regular accounts for two consecutive years or has failed to submit, in two consecutive years, the yearly statement of accounts, as required by sub-section (2) of section 46; or

(h) is interested, directly or indirectly, in a subsisting lease in respect of any wakf property, or in any contract made with, or any work being done for, the wakf or is in arrears in respect of any sum due by him to such wakf; or

(i) continuously neglects his duties or commits any misfeasance, malfeasance, misapplication of funds or breach of trust in relation to the wakf or in respect of any money

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or other wakf property; or

(j) wilfully and persistently disobeys the lawful orders made by the Central Government, State Government, Board under any provision of this Act or rule or order made thereunder;

(k) misappropriates or fraudulently deals with the property of the wakf.

(2) The removal of a person from the office of the mutawalli shall not affect his personal rights, if any, in respect of the wakf property either as a beneficiary or in any other capacity or his right, if any, as a sajjadanashin.

(3) No action shall be taken by the Board under sub-section (1), unless it has held an inquiry into the matter in a prescribed manner and the decision has been taken by a majority of not less than two-thirds of the members of the Board.

(4) A mutawalli who is aggrieved by an order passed under any of the clauses (c) to (i) of sub-section (1), may, within one month from the date of the receipt by him of the order, appeal against the order to the Tribunal and the decision of the Tribunal on such appeal shall be final.

(5) Where any inquiry under sub-section (3) is proposed, or commenced, against any mutawalli, the Board may, if it is of opinion that it is necessary so to do in the interest of the wakf, by an order suspend such mutawalli until the conclusion of the inquiry:

Provided that no suspension for a period exceeding ten days shall be made except after giving the mutawalli a reasonable opportunity of being heard against the proposed action.

(6) Where any appeal is filed by the mutawalli to the Tribunal under sub-section (4), the Board may make an application to the Tribunal for the appointment of a receiver to manage the wakf pending the decision of the appeal, and where such an application is made, the Tribunal shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), appoint a suitable person as receiver to manage the wakf and direct the receiver so appointed to ensure that the customary or religious rights of the mutawalli and of the wakf are safeguarded.

(7) Where a mutawalli has been removed from his office under sub-section (1), the Board may, by order, direct the mutawalli to deliver possession of the wakf property to the Board or any officer duly authorised in this behalf or to any person or committee appointed to act as the mutawalli of the wakf property.

(8) A mutawalli of a wakf removed from his office under this section shall not be eligible for re-appointment as a mutawalli of that wakf for a period of five years from the date of such removal."

7. For applicability of Section-197 Cr.P.C., following three

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conditions must be satisfied:

(a) accused is a public servant;

(b) that the public servant can be removed from the post by or with the sanction either of Central or the State Government as the case may be;

(c) the act giving rise to the alleged offence had been committed by the public servant in the actual or purported discharge of his duty.

8. Section-197 Cr.P.C. is being quoted as below:

"197. Prosecution of Judges and public servants.—(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction save as otherwise provided in the Lokpal and Lokayuktas Act, 2013.

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government; (b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government:

Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" were substituted.

Explanation.—For the removal of doubts it is hereby declared that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under section 166A, section 166B, section 354, section 354A, section 354B, section 354C, section 354D, section 370, section 375, section 376, section 376A, section 376AB, section 376C, section 376D, section 376DA, section 376DB or section 509 of the Indian Penal Code (45 of 1860)

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

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(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

(3A) Notwithstanding anything contained in sub-section (3), no court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.

(3B) Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991 (43 of 1991), receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the court to take cognizance thereon.

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held."

9. Therefore, for applicability of Section-197 Cr.P.C. even for the person who are deemed to be servant under any statute other than IPC, he must be removable by or with the sanction of Central or the State Government. Hon'ble Apex Court in the case of **Manish Trivedi Vs. State of Rajasthan reported in (2014) 14 SCC 420** observed that if any act creates a legal fiction to a particular category of employee by adopting the condition of Section-197 Cr.P.C. then those employees are entitled to get the protection of Section-197 Cr.P.C. In the above mentioned judgement, Section-87 of Rajasthan Municipalities Act, 1959 created legal fiction that members of municipal board will be deemed to be public servant as per Section-

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21 IPC but the word 'Government' mentioned in Section-197 Cr.P.C. was deemed to be substituted by municipal board and for that reason member of municipal board Rajasthan was declared as public servant for the purpose of Section-197 Cr.P.C. Paragraph no.14 of the **Manish Trivedi Vs. State of Rajasthan (supra)** is being reproduced as under:

"14. Section 87 of the Rajasthan Municipalities Act, 1959 makes every Member to be public servant within the meaning of Section 21 of the Indian Penal Code, 1860 and the same reads as follows:

***"87. Members etc., to be deemed public servants.-**(1) Every member, officer or servant, and every lessee of the levy of any municipal tax, and every servant or other employee of any such lessee shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code, 1860 (Central Act 45 of 1860).*

(2) The word "Government" in the definition of "legal remuneration" in Section 161 of that Code shall, for the purposes of sub-section (1) of this section, be deemed to include a municipal board."

From a plain reading of the aforesaid provision it is evident that by the aforesaid section the legislature has created a fiction that every Member shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code. It is well settled that the legislature is competent to create a legal fiction. A deeming provision is enacted for the purpose of assuming the existence of a fact which does not really exist. When the legislature creates a legal fiction, the court has to ascertain for what purpose the fiction is created and after ascertaining this, to assume all those facts and consequences which are incidental or inevitable corollaries for giving effect to the fiction. In our opinion, the legislature, while enacting Section 87 has, thus, created a legal fiction for the purpose of assuming that the Members, otherwise, may not be public servants within the meaning of Section 21 of the Indian Penal Code but shall be assumed to be so in view of the legal fiction so created. In view of the aforesaid, there is no escape from the conclusion that the appellant is a public servant within the meaning of Section 21 of the Indian Penal Code."

10. In the present case, though by a deeming provision of Section-101 of the Act, 1995 *mutawalli* was declared as public servant but to satisfy the second condition of Section-197 Cr.P.C., the word 'Government' was not replaced by wakf board, therefore, despite the fact that *mutawalli* was declared to be public servant by Section-

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101 of the Act, 1995. All condition for applicability of Section-197 Cr.P.C. are not fulfilled, **therefore *mutawalli* of wakf board despite being deemed to be a public servant are not entitled to protection under Section-197 Cr.P.C.**

11. With the aforesaid observations, the present application is **rejected**.

Order Date :- 22.8.2023

S.Chaurasia