

**(1993) 08 AP CK 0034**

**In the Andhra Pradesh High Court**

**Case No : Letters Patent Appeal No. 164 of 1985**

Abdul Latif Sahib and Others

APPELLANT

Vs

Shaik Dastagir Sahib and Others

RESPONDENT

**Date of Decision : 12-08-1993**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, 11  
Evidence Act, 1872 — Section 116  
Waqf Act, 1954 — Section 3(1), 55(2)

**Citation : (1993) 3 ALT 56 : (1993) 2 APLJ 169**

**Hon'ble Judges : M.N. Rao, J;B. Subhashan Reddy, J**

**Bench : Division Bench**

**Advocate : P.V.R. Sharma, for the Appellant; J.V. Suryanarayana, for Respondents 1 and 2 and M.V.S. Suresh Kumar, for the Respondent**

**Final Decision : Allowed**

## **Judgement**

M.N. Rao, J.—This letters patent appeal by defendants 1 to 18 in the suit is from the judgment of a learned single Judge in A.S.No. 475 of 1977 granting a preliminary decree in favour of the first plaintiff (respondent No. 1 herein) setting aside the judgment of the learned Subordinate Judge, Chirala in O.S.No. 48 of 1971 dismissing the suit.

2. Respondents 1 and 2 herein instituted the suit - O.S.No. 48 of 1971 -claiming 1/18th share in the suit properties as successors of their father -Mohammed Kasim - and in addition, the first plaintiff (respondent No. 1) also claimed 1/3rd share in the suit properties on the basis of a gift deed, Ex.A-1, dated 19-12-1938 executed by one Chettabi. In other words, they claimed division of the plaint schedule properties admeasuring Ac.80-54 cents into 18 shares and allotment of seven shares to them. The suit properties are situate in Ramanayapalem village, near Cherukuru, Chirala taluk, Ongole District.

3. In Fasli 1221 (1812), one Raja Venkata Krishna Rao granted an inam comprising the suit properties in favour of one of the ancestors of the parties to

the suit. In the Inam fair Register, Ex.B-2, it is mentioned in column No. 2 that the inam is for "devadayam". Column No. 8 says that the inam is "for the support of the mosque called Golconda Peer Mazjid, Cherukuru". Column No. 9 says it is a rent free inam and Column No. 10 mentions: "it is permanent so long as the mosque is efficiently maintained". The grantor's name is mentioned as Venkata Krishna Rao and the year of the grant as 1221 Fasli. The name of the original grantee is mentioned in Column No. 13 as "Golconda Peer Mazjid". Column No. 15 mentions: "Mir Zaver Mulla Hassan Ahmed, Manager of the Mosque in Inam Register of 1256". The name of the holder of the inam for the institution as on the date of the Inam Fair Register as mentioned in Column No. 16 is "Shaik Ali" aged 50 years and his place of residence as mentioned in Column No. 17 is "Cherukur, Krishna District". Column No. 18 which concerns with the relationship of the present owner with the original grantee or subsequent registered holders contains the following entry:

"Brothers ? ? ? - Not clear"

In Column No. 21, which bears the heading "grants", it is mentioned:

"To be confirmed and charged with 1/2 ? ? ? Not clear. Assessment compulsory enfranchised. 1/2 quit rent 12 Rupees."

The entries in the Inam Fair Register were made by the Deputy Collector on 2nd June, 1860

4. To understand the relationship of the parties, the following pedigree table will be helpful:

|                                                                             |       |       |  |  |                             |                      |                             |
|-----------------------------------------------------------------------------|-------|-------|--|--|-----------------------------|----------------------|-----------------------------|
|                                                                             |       |       |  |  |                             |                      | Hasan                       |
| Ahmed Mohammed Khaja Shaik Ali Subedar (original grantee)                   |       |       |  |  | Gafoor Ali                  |                      |                             |
|                                                                             |       |       |  |  |                             |                      | Hasan                       |
| Ahmed                                                                       | Mohd. | Khaja |  |  |                             |                      |                             |
|                                                                             |       |       |  |  |                             |                      |                             |
| Md. Hanif Md. Ali Hussain Gafur Ghalib Chand Nannnibi Fatimabi Khasim       |       |       |  |  |                             |                      |                             |
| =sailabi Khaja Bi Bi Ali= Bi Bi (Ist wife) (2nd Wife)                       |       |       |  |  | (D-1)                       | (D-7)                | (D-8) Bajthi                |
| (D-18)                                                                      |       |       |  |  | (D-16) Abusahib             |                      | (D-17)                      |
| Mastan= Abdul Fatimabi                                                      |       |       |  |  |                             | Mirabi Khader (D-24) | Dastagir Bijanbi     (D-19) |
| (D-22) (P-1) (P-2)                                                          |       |       |  |  |                             |                      |                             |
| Abdul Rabia Khatum Amir   Mahaboob Ghousebibi Latif Bi Bi Bi                |       |       |  |  | Bibi                        |                      |                             |
| (D-21) (D-2) (D-3) (D-3) (-6)                                               |       |       |  |  | (D-20)                      |                      |                             |
|                                                                             |       |       |  |  |                             |                      |                             |
|                                                                             |       |       |  |  | Md. Kasim Mirza Karim Munaf |                      |                             |
| Kaleshah Ansari Asmatunnisa @ Nanna Hayat (D-11) (D-12) (D-14) Bi (D-15) 5. |       |       |  |  |                             |                      |                             |

The grant is covered by two title deeds - Nos. 231 and 232 - for Ac.16-00 and Ac.64-80 cents of land respectively. The plaintiffs' case is that the plaintiff schedule properties were "personal grants in favour of Shaik Ali and his successors only burdened with performing "Muharram" festival in the private "chavidi" constructed by Shaik Ali at Cherukur." Shaik Ali had no children but he had two brothers - Hasan Ahmed and Mohammed Khaja Subedar. Hasan Ahmed

had no children and Mohammed Khaja Subedar had one son by name Gafoor Ali. The two sons of Gafoor Ali were Hasan Ahmed and Mohammed Khaja. Shaik Ali brought up a girl and got her married to one Mohiuddin, his brother-in-law. He also brought up Gafoor Ali, his elder brother's son. He nominated - during his life time - Gafoor Ali and Mohiuddin to perform Muharram at Cherukur from out of the income of the suit schedule properties and enjoy the rest of the income. Pentu Sahib was the son of Mohiuddin: after the death of Gafoor Ali, his two sons - Hasan Ahmed and Mohd. Khaja - and Pentu Sahib, son of Mohiuddin, enjoyed in three equal shares the income out of the plaint schedule lands contributing equally for the expenses of Muharram. After the death of Pentu Sahib, his son Peda Khaja succeeded to his share and after his death, his widow, Chettabi, Hasan Ahmed and Mohd. Khaja enjoyed the lands in three equal shares performing Muharram festival. They leased out the lands, borrowed monies in times of need and discharged the debts contracted for the purpose of celebrating Muharram. Hasan Ahmed died in 1938 surviving him the two plaintiffs (his grandchildren). Chettabi-it was claimed-brought up Mohd. Kasim, the father of the plaintiffs, and after Mohd. Kasim's death in 1932, the plaintiffs continued to stay with Chettabi taking care of her. She executed a gift deed dated 19-12-1938 in favour of the first plaintiff represented by his mother - Amir bi - as his guardian settling upon him her private property and also her 1/3rd share (Ac.26.84 cents) in the plaint schedule properties "being her joint undivided right". The plaintiffs, therefore, claimed in their own right a share in the plaint schedule properties as the grand-children of Hasan Ahmed, nephew of the original grantee - Shaik Ali - and in addition, the first plaintiff claimed 1/3rd share in the plaint schedule properties on the basis of the gift deed, Ex.A-1, executed by Chettabi.

6. The genealogy shows two branches - Hasan Ahmed's branch and Mohd. Khaja's branch. Defendants 19 to 24 represent the branch of Mohd. Khaja. The plaintiffs and defendants 1 to 18 represent the branch of Hasan Ahmed - the plaintiffs are the children of Mohd. Kasim, the eldest son of Hasan Ahmed and defendants 1 to 18 are the children and grand children of Hasan Ahmed. The other defendants are the legal representatives of some of the defendants who died subsequent to the institution of the suit. According to the plaintiffs, defendants 1 to 18 are entitled to 5/18th share and defendants 19 to 24 are entitled to 1/3rd share - being the share of Mohd. Khaja.

7. The 9th defendant alone filed the written statement. Except defendant Nos. 6, 9, 12, 14, 18 and 22, the rest of the defendants have adopted the written statement filed by the 9th defendant. The other defendants have not filed any written statement. The 9th defendant in his written statement admitted that the grant in favour of Shaik Ali - the original grantee - was "with respect to the suit properties and that the same are personal grants burdened with service to perform Moharrum etc." He denied the allegations that Shaik Ali brought up a girl and got her married to Mohiuddin, his brother-in-law, that Shaik Ali nominated Gafoor Ali and Mohiuddin to perform Moharrum and that after the death of Gafoor Ali, his sons and Pentu Sahib, the son of Mohiuddin, enjoyed the

properties in three equal shares. He asserted that Mohuiddin had nothing to do with the plaint schedule properties and contended that the plaintiffs' father, Mohd. Kasim died in 1932, eight years prior to the death of Hassan Ahmed - their grand father - in 1938 and, therefore, as children of the predeceased son of Hasan Ahmed, they are not entitled to any share in the plaint schedule properties. He alleged that Chettabi was never in possession of the suit properties and the so called gift deed, Ex.A-1, was not executed by her in a sound and disposing state of mind and so it is not valid. Chettabi was joined as an executant in the promissory notes and lease deeds because she had her own private property and so from her participation in the execution of the deeds, no rights would devolve upon the first plaintiff. Even though the first plaintiff was not a sharer, he and the other sharers belonging to the six branches divided the suit properties into seven shares and the lands falling to the five sharers were leased out (admeasuring Ac.57.53 cents) to one Palaparthi Rami Reddy, S/o Veera Reddy of Kothapalem under an agreement dated 4-5-1971.

8. Based on the pleadings, the learned trial Judge raised appropriate issues and after considering the entire evidence - both oral and documentary -dismissed the suit holding that the suit properties are endowed properties, the predecessors in interest of the plaintiffs and others acted as Mujavirs and treated the properties as belonging to "peerlu" and, therefore, proprietary rights could not be claimed. The learned trial Judge also observed that no evidence was adduced by the plaintiffs to establish that their predecessors-in-interest enjoyed the suit property or the income therefrom in their personal right. The prior partition pleaded by the 9th defendant was held to be not true. Although the gift deed, Ex.A-1, was found to be true, in view of the finding that the plaintiffs have no personal rights in the suit properties, the gift deed was held to be of no consequence in so far as the suit properties were concerned.

9. On appeal, a learned single Judge of this court held that the suit properties are the "personal inam property granted to Shaik Ali in 1860 and the opinion expressed by the trial Court that the suit property was the public trust property was wrong". In arriving at this conclusion, the learned single Judge relied upon two documents - Exs.X-1 and X-2, judgment in O.S.No. 24 of 1962 on the file of the Sub-Court, Bapatla and the judgment of this Court in A.S.No. 410 of 1975 affirming the same respectively. As the documentary evidence disclosed that Chettabi was in the management of the suit properties to the extent of 1/3rd, the gift deed, Ex.A-1, executed by her was held to be valid and binding. As the plaintiffs' father had pre-deceased their grand-father, they could not claim any share on that basis. But as the gift deed was held to be true and binding, the learned Judge granted a decree to the extent of 1/3rd of the plaint schedule properties "covered by the gift deed Ex. A-1 in favour of the first plaintiff alone. Hence this letters patent appeal by defendants 1 to 18.

10. D-25 to D-29 are the legal representatives of the seventh defendant. D-28 was respondent No. 27 in the first appeal. After his death, his legal

representatives were brought on record in the letters patent appeal. Defendant No. 28 died surviving him his widow, three sons and one daughter. One of his sons - Shaik Dad Bude - filed C.M.P.No. 20025 of 1992 for impleading him as the third respondent in the letters patent appeal and that application was ordered by a Division Bench of this Court on 28-1-1993 observing:

"Shaik Dad Bude in his individual capacity is impleaded as a party respondent in L.P.A. No. 164 of 1985".

11. Sri P.V.R. Sharma, learned counsel for the appellants has argued that the suit for partition was not maintainable since the suit schedule properties constitute service inam, which cannot be alienated by the service holders. The gift deed, Ex. A-1, executed by Chettabi also was invalid since she was a stranger to the family and even if there was evidence to show that she was in the management of the family to the extent of her alleged 1/3rd share, there could not have been a valid gift of inam land.

12. Sri M.V.S. Suresh Kumar, learned counsel for the third respondent, supporting the arguments advanced by Sri Sharma, learned counsel for the appellants, has urged that the fact that the defendants also had pleaded in their written statement that the suit properties were personal inams is of no consequence. The evidence brought on record firmly establishes that the suit properties were inams granted in favour of an institution and, therefore, they could not be partitioned. The earlier litigation between the parties allegedly dealing with the nature of the suit properties could not be construed as *res judicata* since those suits were not representative suits and permission of the court to sue in a representative capacity was not obtained.

13. Controverting these contentions, Sri J.V. Suryanarayana Rao, learned counsel for respondents 1 and 2 (plaintiffs), has contended that the earlier four judgments in relation to the suit properties - the copies of which were brought on record beginning from the year 1911 in the form of Exs. A-42, A-43, A-48 and X-1 - unmistakeably establish the fact that the suit properties were only personal properties burdened with service and even if those decisions were wrong, still, the principle of *res judicata* applies and so the view taken by the learned single Judge in the first appeal does not warrant any interference. There is also overwhelming documentary evidence clearly indicating that Chettabi, in her own right, was in enjoyment to the extent of 1/3rd of the suit schedule properties and so the gift deed, Ex.A-1, executed by her in favour of the first plaintiff is a valid document. There is no absolute prohibition, under Muslim Law/for a woman to be a Muthawalli or Mujavir; it depends upon the nature of duties to be performed. Muslim Law does not preclude a woman from performing Moharrum. In some of the documents executed by the Muzavirs -the plaintiffs and their predecessors-in-interest - The suit lands were described as patta lands.

14. The first question for our consideration is whether the suit properties are liable to partition? The answer to this question depends upon the nature of the

properties - whether they are inam properties and if so, whether they were in favour of an individual or an institution?

15. The term "inam" is an Arabic word which literally means a "gift"; it is a beneficial grant. The sovereigns in India did not claim anything more than a share in the produce of the cultivated lands and their right only consisted in their power to collect a share of the produce. ".....when the State makes a grant in favour of individuals or religious or charitable institutions, the presumption is that it intends to convey only its right to the grantee, which is the right to receive the royal share of the produce" and the rights of other persons in the soil, like permanent tenants and of persons holding previous grants remain unaffected although those rights are not expressly reserved. See Land Tenures in Madras by Sundararaja Iyengar pp.95 to 97.1 Even in the last century, it was recognised by the courts that inams are "alienations of the royal share in the produce of land i.e., of land revenue, than grants of land although in popular parlance, occasionally so called". Therefore, the grantee of an inam is prima facie entitled only to land revenue i.e., "melwaram". But in respect of unoccupied waste lands, sometimes both melwaram and kudiwaram rights also were granted as inam. In the absence of express words in the grant conferring ownership, no presumption can be drawn that the grant comprised ownership also. There are various kinds of inams - personal grants made in favour of individuals for their personal benefit, grants made in favour of a community (like Agraharams in favour of Brahmins), grants made in favour of particular Brahmin families (Shrotrium), grants made for particular purposes or for service rendered by the grantee, grants in favour of village officers and village artisans, grants in favour of institutions and grants for religious services. In the case of grants for performance of religious services, the right of resumption for non-performance of the duties vests in the Government but not in the religious institution. In the case of service grants, they can be resumed when the necessity for their continuance no longer exists and in the case of grants for religious or charitable purposes or for the purpose of public utility, the resumption can only be when the conditions of the grant are not fulfilled. When inams were granted, the Crown reserved its reversionary rights and enacted Regulation IV of 1831. That reversionary right, the Crown wanted to give up by levying annual quit rent and accordingly rules were framed in 1859 for enfranchising the inam grants. An Inam Commissioner was appointed to sell the reversionary rights of the Crown and issue title deeds to the inamdars in proof of such enfranchisement. The holder of an enfranchised inam holds his lands only subject to payment of the quit rent. The enfranchisement did not operate "as a resumption and regrant nor altered the nature of the property in the hands of the grantee". See Sundararaja Iyengar Op. Cit. pp.172 and 173. A grant is different from a "patta". The land covered by a patta is liable to revision at each annual settlement called "Jamabandi". A holder of a patta enjoys both melwaram and kudiwaram rights. A registered pattedar can alienate, sell, sublet or mortgage, bequeath or otherwise dispose of the whole or any portion of his holding. See Sundararaja Iyengar Op.

Cit. p.60. But, an inamdar has no such power of disposition.

16. Although, in the plaint, it was averred that the suit lands were covered by two title deeds - Nos. 231 and 232 dated 23-6-1860 - granted in favour of Shaik Ali, the younger brother of Hasan Ahmed and Mohd. Khaja Subedar, the same were not produced. Before us, in the letters patent appeal, a miscellaneous petition - C.M.P. No. 7258 of 1993 - was filed on behalf of the third respondent to receive as additional evidence, certified copies of the two title deeds and a xerox copy of Andhra Pradesh Gazette-Part II dated 28-6-1962. The predecessor in interest of the third respondent was a party to the suit. No reasons are mentioned why these documents were not produced before the trial Court. They are not necessary to enable this Court to pronounce judgment nor do we see any substantial reason to admit additional evidence at this stage. The application is, therefore, dismissed.

17. Ex.B-1 is the certified copy of the inam statement filed during the inams enquiry before Mr. Taylor, the Inam Commissioner. It mentions that the "sanad" was given 100 years back for the purpose of celebrations, offerings and for burning of lamps to the "peers". The sanad holder and enjoyer was mentioned as the "peers". Two mujavars - Ali Saheb and Gaffar Ali - affixed their thumb impressions to show that the contents of the statement were got written correctly. It also contains the signatures of two mediators. Ex.B-2 is the Inam Fair Register showing that the inam was a rent free and enfranchised one Its contents have already been adverted to by us supra. It clearly shows that the inam was given for "devadayam" and that the grant was for the support of the mosque "Golconda Peer Mazjid, Cherukur". Column No. 10 says that the "grant is permanent so long as the mosque is efficiently maintained". The name of the original grantee as mentioned in Column No. 13 is "Golconda Peer Mazjid". Shaik Ali's name was mentioned in Column No. 16 as the occupant of the inam as on the date of the Inam Fair Register. Column No. 21 mentions the opinion of the Deputy Collector - the inam should be confirmed and charged with 1/2 assessment compulsory, quit rent 12 rupees - which is indicative of the fact that the inam was enfranchised. Column No. 22 contains the decision of the Commissioner to the effect that the inam was confirmed. These relevant entries in the Inam Fair Register unmistakably and unequivocally point out that the inam was for a religious purpose (devadayam) and the grantee was an institution - Golconda Peer Mazjid; Shaik Ali was the person on whom lay the burden of rendering service. The Inam Fair Register also says that Hasan Ahmed, the brother of Shaik Ali, was the Manager of the Mosque and their relationship also finds a place in Column No. 18. There is absolutely no indication in the Inam Fair Register that the inam was a personal grant to Shaik Ali or any of his brothers. They are not shown as the grantees. Even Column No. 21, which contains the opinion of the Deputy Collector, merely mentions that the inam is to be confirmed and charged with 1/2 assessment compulsory. The only condition imposed in Column No. 10 is that the inam is a permanent one so long as the mosque is efficiently maintained.

18. The trial Court committed an error in holding that the inam was a personal grant burdened with service. The crucial entry in Column No. 13 that Golconda Peer Mazjid was the original grantee was not noticed by the trial Court.

19. The learned single Judge also has not taken into account the entries in the Inam Fair Register and his conclusion: "I hold that the suit property is personal inam property granted to Shaik Ali in 1860 and that the only question is as to who is entitled to share in the said property" is contrary to the evidence on record. This finding almost obliterates the basic difference between "personal property" and "inam".

20. Entries in the Inam Fair Register are entitled to great weight. According to the Privy Council in *Arunachalam v. Venkatachalapathi* AIR 1919 P.C. 62 at 65:

"It is true that the making of this (inam) Register was for the ultimate purpose of determining whether or not the lands were tax-free. But it must not be forgotten that the preparation of this register was a great act of State, and its preparation and contents were the subject of much consideration under elaborately detailed reports and minutes. It is to be remembered that the Inam Commissioners through their officials made enquiry on the spot, heard evidence and examined documents, and with regard to each individual property, the Government was put in possession not only of the conclusion come to as to whether the land was tax-free, but of a statement of the history and tenure of the property itself. While their Lordships do not doubt that such a report would not displace actual and authentic evidence in individual cases, yet the Board, when such is not available, cannot fail to attach the utmost importance as part of the history of the property, to the information set forth in the Inam Register."

In *Hindu R.E. Board v. Koteswara* AIR 1937 Mad 852 at 855, a Division Bench of the Madras High Court expressed the opinion:

".....having regard to the scheme of the (inam) register, the most decisive entries are those appearing in Cols.13 to 16, for, it is here that provision is made for the entering of the name of the grantee, as shown in the relevant ancient records at different stages from the date of the grant to the date of the preparation of the register - this period covering in some cases more than a century."

The Division Bench held that if the entry in the Inam Fair Register contains the words "to be confirmed to the party so long as he continues the performance of the services" it indicates that the grant was a personal one. But it would not be so if the words used are "to be confirmed so long as the service is performed". This distinction was approved by the Supreme Court in *Nanduri Yogananda Lakshminarasimhachari and Others Vs. Sri Agastheswaraswamivaru*, . Even in a case where Column No. 13 of the Inam Fair Register was silent, but the other entries indicated that the inam was for devadayam and for the celebration of the festival of peerlu and the recommendation of the Deputy Collector in Column No. 21 was to the effect that the inam "can be confirmed permanently so long as the

festivals are celebrated", a Division Bench of this Court in Mannam Thirupathi Swamy v. A.P. Wakf Board 1985 (2) APLJ 250 has recorded a finding that the grant is not a personal grant but a service grant made for the purpose of celebration of Peerlu at Ongole. The inam in question before the Division Bench was a grant given by a Hindu Raja for performance of Mohurram festival.

21. The definition of "Wakf" u/s 3(1) of the Wakf Act, prior to the Amendment Act 69 of 1984, was in the following terms:

"Section 3(1): Wakf means the permanent dedication by a person professing Islam of any moveable or Immovable property for any purpose recognised by the Muslim Law as pious, religious or charitable and includes:

(i) a wakf by user,

(ii) grants (including mashrut-ul-khidmaat) for any purpose recognized by the Muslim Law as pious, religious or charitable.

(iii) xxxx".

By Act 69 of 1984, the words "or any other person" were inserted after the words "by a person professing Islam". The Division Bench held that the inclusive definition contained in sub-clause (ii) "embraces grants made by ancient rulers or Crown grants", the reasoning being:

"Section 3(1) of the Act in its main definition embodied the principle that the dedicator must profess Islam. However, the enlarged definition in respect of grants which are inam grants has dispensed with the same as those grants are not made by ordinary individuals but sovereign authority, as such grants must necessarily involve concession of a cist either totally or partially. Further such grants can be made only by rulers. Hence we see that the very purpose of the enlarged definition will be defeated if the wakfs governed by Clause (ii) have to satisfy the main definition also."

22. The contention that since an inam could be resumed by the State, there was no permanent dedication and as such it could not be construed to be wakf was rejected by the Division Bench drawing support from the decisions in Vidya Varuthithirtha v. Balu Swami Ayyar ILR 47 Mad 31, Public Prosecutor v. Mayandi Konan, 1907 M LT 54 and AIR 1927 113 (Oudh) and the opinion of Tyabji in his Treatise on Muslim Law, Fourth Edition at page 502 which was to the effect that if the Government grants are clearly for maintaining a charitable institution, the wakf will be established. The overriding effect of Section 3 of the Government Grants Act, 1895 is in the following terms:

"All provisions, restrictions, conditions and limitations over contained in any such grant or transfer as aforesaid shall be valid and take effect according to their tenor any rule of law, statute or enactment of the Legislature to the contrary notwithstanding."

23. Another Division Bench of this Court in Andhra Pradesh Wakf Board,

Hyderabad Vs. S. Syed Ali Mulla and Others, expressed the view:

"Once there is proof of dedication for the support of a dargah, it makes no difference whether such dedication was made by a person profession Islam or by any person professing any other religion."

A Division Bench of this Court in L.P.A. No. 5 of 1970 held that even a non-Muslim can create a wakf. The entries in the Inam Fair Register considered by the Division Bench in the aforesaid case bear closer similarity to the entries in the Inam Fair Register in question. In that case, the Inam Fair Register described the grant as "devadayam" for the celebration of the festival of Peerlu at Ongole and Column No. 21 incorporated the words "the inam can be confirmed permanently so long as the service is performed". The grant was made in favour of one Mashum Shah stating: "this inam is confirmed to you and to your successors tax-free to be held without interference so long as the conditions of the grant are duly fulfilled". Holding that the property was wakf property but not personal property, the Division Bench held:

"It is, therefore, not a personal grant in the sense that it will be inheritable according to Muslim law but is a wakf, and Mashum Shah and his successors are nominated as Mutawallis."

The Division Bench after examining the concept of "wakf", and its meaning in Islamic Law stated the legal position as to the nature of the wakf property:

"What is plain is that the motive in wakf is usually religious and its foundation endowed in perpetuity. In the eye of the law, the wakf property belongs to God and as such the dedication is both permanent and irrevocable. The property is detained or immobilised and no further transfers can be effected. The wakf property cannot thus be alienated by human beings for their own purposes. The wakf property is not alienable is the general rule."

The Division Bench also ruled that a Muthawalli is only a Manager or a Superintendent of the property and is not a trustee and that the wakf property does not best in him; it belongs to the Almighty God. The performance of Moharrum is done by a Muthawalli but not by a Muzavir and that can be performed by women also. On the question as to how succession is regulated in respect of wakf property, the view expressed by the Division Bench was:

"Once it is found that it is a wakf property and the position of Mashum Shah and his successors is that of Muthawalli, then the succession to that office shall be governed by the rules prescribed by the dedicator in the grant. Since it is not a private property of Mashum Shah and his successors, the principles of Muhammadan Law applicable to succession of such private property are not applicable to the succession of a Muthawalliship."

In view of the foregoing, we hold that the suit properties were inam grants in favour of the institution - Golconda Peer Mazjid. They were not personal grants but they constitute a valid wakf. Being inam grants in favour of the institution,

Shaik Ali and his successors were only Managers but not trustees. The suit properties, therefore, were not liable to partition.

24. One important contention urged before us concerns the application of the principle of *res judicata*. The earliest litigation commenced in the year 1911. Ex.A.42 is the copy of the judgment in O.S.No. 1386 of 1911 dated 19-12-1912 rendered by the Principal District Munsif, Bapatla. That suit was instituted by 24 Muslims of Cherukur village to establish their right to offer prayers in the mosque situated at Cherukur and so they prayed for a permanent injunction to restrain the defendants from obstructing them from going and offering prayers in the mosque. Hasan Ahmed and Mohammed Khaja, sons of Gafoor Ali - one of the brothers of Shaik Ali whose name is mentioned in Ex.B-2 Inam Fair Register - and Chettabi are three of the defendants. The suit was dismissed holding that it was the result of enmity and that the inam has nothing to do with the plaint schedule building. This judgment was affirmed on appeal by the Additional Temporary Subordinate Judge, Guntur in A.S.No. 135 of 1913 (Ex.A-48). Both these judgments have no relevance so far as the suit schedule properties are concerned. Whether the suit properties are inams or personal grants in favour of Shaik Ali was not in issue in the said litigation. Ex.A-43 is the certified copy of the plaint in O.S.No. 509 of 1920 on the file of the District Munsif's Court, Bapatla. It was instituted by Chettabi, Khaja Sahib and Hussain Ahmed against 12 defendants and two of them were plaintiffs in O.S.No. 1386 of 1911. The relief sought for was a permanent injunction restraining the defendants from running a Mohammaden School in the compound of the Peerla Panja (also referred to as mosque) mentioned in the schedule to the plaint. Ex.A-49 is the written statement filed in that suit. Ex.A-46 is the deposition of Mohammed Khaja Sahib - plaintiff No. 2 in that suit. Ex.A-45 is the certified copy of the judgment. The "Panja" referred to in that suit is the Golconda Peer Mazjid (mentioned in Column No. 8 of Ex.B-2, Inam Fair Register). Issue No. 2 in that suit was whether the plaintiffs were entitled to pray for an injunction restraining the defendants from holding a school. While discussing that issue, the learned Additional District Munsif recorded a finding: "It is not clear whether the Panja is a private or public endowment. Government have granted some lands for the celebration of the festival. So it must be taken that this is a public endowment." A decree for permanent injunction was accordingly granted restraining the defendants from using the suit building as a Mohammaden School or for any other purpose inconsistent with its being a Peerla Panja. The judgment thus declares that "Golconda Peer Mazjid," the grantee of the plaint schedule properties in question, is a public building and any activity inconsistent with its being a peerla panja was forbidden in the premises.

25. Ex.X-1 is the certified copy of the judgment in O.S.No. 24 of 1962 on the file of the Subordinate Judge, Bapatla, Ex.X-2 is the certified copy of the judgment rendered by a Division Bench of this court in A.S.No. 410 of 1975 affirming Ex.X-1. Both these documents were brought on record as additional evidence at the stage of the first appeal before the learned single Judge. The five plaintiffs in

O.S.No. 24 of 1962 sought a decree for framing a scheme for appointment of trustees and vesting of the suit properties in the trustees to be appointed and providing necessary directions for efficient management and control of the Trust properties. The suit was instituted after obtaining written permission of the Wakf Board u/s 55 of the Wakfs Act, 1954. Defendant No. 8 in that suit is the Muslim Wakf Board, Hyderabad but it did not file any written statement. Defendants 5 and 7 are defendant No. 19 and plaintiff No. 1 respectively in the suit from out of which the present letters patent appeal has arisen.

26. The learned Subordinate Judge, considering the entries in the Inam Fair Register, the recitals in the two title deeds and following a Division Bench judgment of this court in Sri Vallabharaja Swami Varu v. D. Hanumacharyulu, 1968 (1) An.W.R. 242, held:

"the suit properties were granted as personal inams in favour of Shaik Ali, the ancestor of the defendants, subject to the condition of performing Mohurram festival."

He also held that the Wakf Board, which was impleaded as the 8th defendant, remained ex parte and that the registration of the suit properties as Wakf properties was without notice to the defendants and, therefore, the registration was in violation of Sub-clause (7) of Section 25 of the Wakf Act. In conclusion, it was held by the learned Judge that the Teerla Chavidi" was not a public trust, that the suit lands were not endowed for a public institution and did not constitute public trust and that the decision in A.S.No. 135 of 1913 on the file of the Subordinate Judge's Court, Guntur, operates as res judicata regarding the nature of Teerla Chavidi". As already stated, this judgment was affirmed by this court in A.S.No. 410 of 1975 on the ground that the legal representatives of all the deceased defendants were not brought on record and as the case of all the defendants was one, viz., that the suit properties were not wakf properties but private properties, any contrary finding in the absence of all the defendants would lead to inconsistent decrees.

27. While advertng to the entries in the Inam Fair Register, the learned Subordinate Judge observed: "In Column No. 13 referring to the name of the original grantee, it is stated that the name of the original grantee is not known". This is factually incorrect and contrary to the record. It is understandable how such an observation could be made by the learned Judge when Column No. 13 of the Inam Fair Register clearly mentions the name of the grantee as "Golconda Peer Mazjid". The decision of this court in Sri Vallabharaja Swami Varu "s case, 1968 (1) An.W.R. 242 is an authority for the proposition that unless the grant is made in favour of the deity or the Manager for the time being as representing the temple, it cannot be considered as a grant to the deity, even though the inam is described as "devadayam", but such a description merely indicates that it is for a religious purpose. Where the inam clearly mentions an institution as the grantee, this decision has no application. Unfortunately, before the Division Bench, in the appeal, these aspects were not canvassed and as already stated,

the appeal was dismissed on the technical ground that the legal representatives of all the deceased defendants were not brought on record.

28. It is true that even a wrong decision constitutes *res judicata*. But so far as Exs. X-1 and X-2 are concerned, in our view, they do not constitute *res judicata*. It is essential that the plea of *res judicata* should be properly raised and it is imperative to identify the subjects in dispute in the subsequent litigation with those in the previous litigation. In O.S.No. 24 of 1962 - Ex.X-1 - the relief claimed was entirely different from the present one. The former suit (Ex.X-1) was laid on the premise that the suit properties were public trust properties and they were mismanaged and the relief prayed was for framing a scheme to manage the properties. The permission sought u/s 92 of the CPC was negatived by the Advocate-General and so, the plaintiffs, after obtaining permission u/s 55 (2) of the Wakfs Act, laid the suit -O.S.No. 24 of 1962 (Ex.X-1). The subject matter of Ex.X-1 did not pertain to the inam or the nature thereof. Further, all the necessary parties were not impleaded in O.S.No. 24 of 1962; the State, in whom the title vested, not being a party to that litigation, no declaration could be given in respect of the nature of the inam. That suit also was not laid in a representative capacity; the permission of the court, a mandatory requirement, was not obtained. The permission granted by the Wakf Board u/s 55 (2) is of no consequence as the same would not be a substitute for the mandatory provisions contained in Order I, Rule 8 of the Code of Civil Procedure. That an inam cannot be treated as a private property and that properties covered by inam grants and wakfs cannot be alienated and Mutawallis and Mujavars are only Managers but not trustees are settled legal principles. For a decree to be binding on the entire public, not only the subject should be same but specific permission should be obtained from the court and these vital requirements are totally absent in Ex.X-1. We, therefore, hold that the finding in Ex.X-1, as affirmed in Ex.X-2, does not constitute *res judicata*. The plaintiffs in the present suit were conscious of this lacuna in Ex.X-1 and, therefore, they have not taken, advisedly, the plea of *res judicata* and there was neither an issue nor adjudication in that regard.

29. The next question for our consideration is: whether the gift deed, Ex.A-1, executed by Chettabi is valid? As regards the truth of the execution of the gift deed, Ex.A-1, there is little doubt. The finding as to its genuineness was not questioned before us. We do not find any merit in the contention that under Muslim Law, there is an absolute bar for women to function as Mujavars or Mutawallis. We have already referred to the Division Bench judgment of this court in L.P.A.No. 5 of 1970 wherein it was held that a Muslim woman is competent to perform Moharrum. It, therefore, follows that Chettabi did not suffer from any legal disability to function as a Mutawalli. But the more important aspect is: whether, in law, she was entitled to execute a gift deed in respect of inam properties. Our answer is emphatically in the negative. The right of Chettabi as a Mutawalli or Muzavir was only to manage the properties to the extent of her 1/3rd share. The inam was not a personal grant but one in favour of the institution. Even in respect of personal grants burdened with service, the

grantees or their descendants had no power to alienate. The wakf properties which are vested in God Almighty could not be sold by a Mutawalli or Muzavar as held by this court in L.P.A.No. 5 of 1970, adverted to supra. Further, u/s 6(d) of the Transfer of Property Act, an interest in property restricted in its enjoyment to the owner personally, cannot be transferred by him. Inam lands - both granted in favour of an institution or personal grants burdened with service - cannot be alienated.

30. There is, no doubt, documentary evidence in the form of promissory notes and lease deeds executed by the three branches and the kabuliatnamas executed by the lessees - Exs.A-4, A-31, A-39, A-38, A-33 A-34, A-18, A-16, A-17 and A-15 - wherein, at some places, a reference was made that the suit lands are patta lands. As the documents relating to leases and kabuliatnamas are inter-parties, any recitals therein describing the Managers of the inam as owners cannot be decisive of the nature of the property. Further, for exercising rights under a lease, the lessor need not be the owner and a non-owner like the manager as in the instant case, a mortgagee with possession and any other person with possession even without title can lease out the properties and for that reason, he cannot be treated as the owner. At the best, the recitals in the lease-deeds and kabuliatnamas raise an estoppel against the tenant u/s 116 of the Evidence Act, but do not operate as estoppel against any other person.

31. One of the arguments advanced by Sri J.V. Suryanarayana Rao, learned counsel for respondents 1 and 2 (plaintiffs), is that the defednats should not be permitted to take the plea that the suit properties are not liable to partition since they have taken a specific stand in the written statement that they were personal grants burdened with service. Although we find, prima facie, force in this contention, but on a closer examination, we are not inclined to agree. It is, no doubt, true that the defendants have taken a plea in their written statement that the suit lands were personal inam grants burdened with service. But in proof of such an assertion, the evidence adduced by them clearly establishes that the suit lands constitute inam grants granted in favour of an institution. Even though the learned trial Judge has wrongly held that the suit lands were personal grants burdened with service, the conclusion recorded by him that they are not liable to partition is correct. Whether the grant is in favour of an institution or in favour of a person burdened with service in either case it is inalienable. The statement made by the defendants in ignorance of the true position as regards the nature of their relations with the suit lands, in our view, cannot be a valid reason preventing this court from examining the nature of the suit properties. As observed by the Privy Council in Venkatapathi v. Venkatanarasimha, AIR 1936 P.C. 264 at 268:

"It sometimes happens that persons make statements which serve their purpose or proceed upon ignorance of the true postition; and it is not their statements, but their relations with the estate, which should be taken into consideration in determining the issue."

No doubt, it is a general rule that no relief should be granted if it is not founded on the pleadings. But as observed by the Supreme Court in Bhagwati Prasad Vs. Shri Chandramaul, :

".....where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case."

When the suit in question was for partition, necessarily the question would arise, either directly or indirectly, as to whether the properties were liable to partition and in such an enquiry, examination of the nature of the properties would become inevitable.

32. It is admitted by all the learned counsel appearing in this L.P.A., that five sons of Hasan Mohammed and two sons of Mohammed Khaja had been rendering the service to the institution concerned complying with the conditions of the grant. In fact, succession perstripes cannot be claimed and more so, in the instant case, as the above 7 persons had been jointly rendering service they are entitled to share the profits of the lands in question in seven equal shares subject to the condition of rendering service to the institution.

33. For the foregoing reasons, we hold that:

(1) The plaint schedule properties are inam lands granted in favour of the institution - Golconda Peer Mazjid - and the successors of Shaik Ali were only entitled to be in possession the suit properties and enjoy the same in the proportion mentioned above subject to their rendering services in accordance with the entries made in the Inam Fair Register, Ex.B-2;

(2) The suit properties are not liable to partition;

(3) The earlier judgments relating to the suit lands do not constitute res judicata; and

(4) The gift deed, Ex.A-1, executed by Chettabi, although true, is not valid.

34. The letters patent appeal is accordingly allowed, the judgment and decree granted by the learned single Judge in A.S.No. 475 of 1977 is set aside and the decree of the trial court dismissing the suit - O.S.No. 48 of 1971 - is sustained, although for different reasons. No costs.