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**(1997) 12 MAD CK 0153**  
**In the Madras High Court**

A.M.S. Mohamed Housuf

APPELLANT

Vs

Tamil Nadu Wakf Board and Ors

RESPONDENT

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**Date of Decision :** 03-12-1997

**Acts Referred:**

**Citation :** (1998) 1 LW 470 : (1998) 2 MLJ 78

**Hon'ble Judges :** E. Padmanabhan, J; E. Padmanaban, J

**Bench :** Division Bench

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### **Judgement**

E. Padmanaban, J.—S.A.No. 949 of 1984 has been preferred by the Tamil Nadu State Wakf Board (hereinafter referred to as the Wakf Board).

2. The Wakf Board instituted a suit O.S.No. 199 of 1982 on the file of the Principal Sub Court, Tirunelveli praying for declaration that the first schedule property belongs to Nagoor Shagul Hameed Darga Pallivasal Wakf and for recovery of possession of second scheduled property, besides for the relief of mesne profits. The second schedule property is a part of first schedule property.

3. Originally, the said suit was instituted on 21.6.1979 and numbered as O.S.No. 672 of 1979 on the file of the District Munsif court, Tirunelveli, and subsequently transferred to the file of the Subordinate Court, Tirunelveli. The said suit was decreed by the trial court by judgment and decree dated 28.1.1983, after contest.

4. The defendants in the said suit preferred appeal A.S.No. 31 of 1983 on the file of the District Court, Tirunelveli, which allowed the first appeal and set aside the judgment and decree of the trial court by a judgment and decree dated 21.11.1983. Being aggrieved, the Wakf Board preferred the present second appeal.

5. Pending the second appeal, the Wakf Board by proceedings dated 30.1.1988 ratified the sale of second schedule property in favour of the first defendant in the said suit executed by the defendants 2,3 and 4 in the said suit. As against the said proceedings of ratification of sale by the Wakf Board, one A.M.S.

Mohamed Yousuf has filed the present Writ Petition No. 2272 of 1988 praying for the issue of a writ of certiorari to call for and quash the proceedings of the first respondent being item No. III of 1987 bearing R.C.No. 6055/79/TNV dated 30.1.1988.

6. At the joint request of either parties to the second appeal and the writ petition, the second appeal and the writ petition were taken up and heard jointly. To the writ petition, the plaintiff in O.S.No. 199 of 1982 is impleaded as the first defendant, while defendants 1 to 5 in the said suit have been impleaded as respondents 2 to 6. As the issues involved relate to the same property between the same parties, this Court heard the second appeal and the writ petition jointly as per the orders of the Honourable the Chief Justice.

7. It would be proper to set out the pleadings in the suit.

8. The plaintiff Wakf Board is a body duly constituted under the Wakf Act (Act 29 of 1954). The general superintendence of the Wakfs in the State vests with the plaintiff Wakf Board and the Wakf Board is empowered to take measures to recover properties of various Wakfs. The suit first schedule property originally belonged to Anam Mohamed Mohideen Meeran and his two brothers namely Anam Sheik Madar f haraganar and Anam Kasim Tharaganar.

9. The said three brothers by an instrument dated 27.4.1983 dedicated the first schedule property for lighting expenses at Nagoor Shahul Harneed Andavar Tharga, The eldest of the three brothers was the first muthavalli. The first schedule property is a wakf property and it is inalienable in character.

10. After the eldest, the next two brothers become muthavalli. Subsequently, Anam Yousuf Tharaganar had become muthavalli and then Meeran Mohideen Tharaganar has become the huqdar. After the death of Meera Mohideen Tharaganar, the second defendant in the said suit and one Anam Kaja Mohideen, son of the third defendant and the husband of the fourth defendant were the muthavallis of the suit second schedule property, which is part of the first schedule property.

11. After the death of Anam Khaja Mohideen, defendants 2 to 5 in the said suit are the muthavallis and they have been conducting the charities out of the income from the first schedule property.

12. The Wakf Board has notified the Wakf and it has been notified in the Gazette as well. The defendants 2 to 5 have sold the second schedule property to the first defendant on 27.7.1978 without prior sanction of the Wakf Board, Such sale will not confer any right on the alienee the first defendant and it is not valid and binding upon the Wakf. The possession of the first defendant is unlawful and the first defendant made feverish attempts to construct buildings on the suit second schedule property. And hence the suit.

13. As already pointed out, the suit second schedule property is part of the suit first schedule property, and a declaration has been sought for in respect of the

entire first schedule property that it is a Wakf property and for recovery of possession of the second schedule property from the first defendant and for other consequential reliefs.

14. The first defendant filed a written statement and defendants 2 and 3 filed another written statement. The defence put forward by all the defendants are identical. The defendants have admitted that the suit property has been dedicated and the charities are being performed without fail. According to the defendants, in terms of the partition deed dated 27.4.1983, the defendants 2 to 5 got the second schedule property and they have been regularly performing lighting charities out of the income from the properties.

15. It is claimed that the Wakf is a private Wakf and the plaintiff's superintendence could be only with respect to performance of the charities. The suit second schedule property was not yielding substantial income, and it was not fit for punja cultivation, besides there was no water in the well on the second schedule property. Only about Rs. 30 was the annual income from that property and the land assessment for it was only Rs. 1.44 per half year and the municipal tax was Rs. 1.91 per half year.

16. The first defendant offered a good price for the suit second schedule property and required the defendants 2 to 5 to get sanction from the Wakf Board for the sale in its favour. The defendants 2 to 5 on 3.9.1975 applied for sanction to the plaintiff's Board for the purchase of better yielding property. The plaintiff received the said application on 22.9.1975 and by letter dated 16.10.1975, the plaintiff wanted particulars from defendants 2 to 5. Along with the letter, a pro forma for sanction under the Act was also sent by the plaintiff to the defendants 2 to 5, which was duly filled up and necessary particulars were furnished in the defendants letter dated 1.11.1995. But, no orders of sanction were forthcoming and hence, defendants 2 to 5 wrote to the plaintiff Board on 16.4.1976 intimating that if no written sanction was received within two months from that date, it would be presumed that necessary sanction was accorded and they will proceed on that basis.

17. It is stated that no reply has been received from the plaintiff and thereafter, defendants 2 to 5 executed a deed of conveyance on 27.7.1978 in favour of the first defendant for a consideration of Rs. 16,000, which had to be paid directly to the vendor of the property in exchange for the suit second schedule property. The property so purchased is a nanja in two bits, the total extent being 96 cents and it is a double crop wet land and the annual income then from is about 20 kottahs of paddy and more.

18. According to the defendants, the transaction is beneficial to the Wakf and the sale is valid and binding on the plaintiff. The defendants contended that the suit is barred by promissory estoppel. Further it is pointed out that the plaintiff had sent notice to the defendants questioning the sale u/s 36-A of the Wakf Act and when the enquiry is pending, the said suit is not maintainable. The defendants

prayed for dismissal of the suit.

19. The plaintiff examined one Uthuman Mohideen as P. W.1, while defendant examined D.Ws. 1 to 3. The plaintiff marked Ex.A-1 and A-2, while the defendants marked Exs.B-1 to B-14. After consideration of oral and documentary evidence, learned Subordinate Judge held that the entire first schedule property is a Wakf property, that the sale of second schedule property in contravention of Section 36-A of the Wakf Act is invalid and not binding on the plaintiff, and that the suit is maintainable as well as granted a decree as prayed for.

20. Being aggrieved by judgment and decree of the trial court, defendants 1 to 5 preferred an appeal A.S.No. 31 of 1983 on the file of the District Court, Tirunelveli and contended that the Wakf Act does-not totally prohibit the alienation of the wakf properties, that Section 36-A of the Wakf Act invalidates transfer of immovable property of a wakf without obtaining previous sanction of the Board and in the present case, the defendants have applied for permission for sale and that there is a presumption of permission being granted by the plaintiff Wakf Board, as it had kept silent, that for violation of Section 36-A of the Wakf Act, action could be taken u/s 36-B of the Wakf Act and no civil suit is maintainable. It was further contended that the plaintiff cannot retain the property purchased with the sale proceeds of the Wakf property and also the property in dispute.

21. The first appellate court framed the following two points for consideration:

(i) Whether the impugned sale in favour of the first defendant by the defendants 2 to 5 is valid and binding on the plaintiff/respondent? and

(ii) Whether the suit is not maintainable as contended for and on behalf of the appellants?

22. The first appellate court by judgment dated 21.11.1983, answered the first point against the plaintiff/respondent and found that the sale of suit second schedule property is valid and binding on the plaintiff. Even in respect of second point, the first appellate court held that the suit as framed is not maintainable and answered the second point also against the plaintiff/respondent. Ultimately, the first appellate court allowed the appeal with costs and set aside the judgment and decree of the trial court, and the said suit stands dismissed with costs.

23. Being aggrieved, the plaintiff-Wakf Board, preferred the present second appeal.

24. On 26.10.1984, this Court framed the following substantial questions of law:

1. Is the sale under Ex.A-1, 1978 not liable to be set aside by reason of fact that previous sanction of the Board has not been obtained u/s 36-A of the Wakf Act, 1954?

2. Is the suit is not maintainable by reason of Section 36-B of the Act?

3. Is the finding of the lower appellate court that the sale is valid and binding, on the plaintiff for the reason that application u/s 36-A has not been disposed of by the Board, correct in law? and

4. Is the judgment of the lower appellate court especially by reason of the amending Act 34 of 1982 and Section 59-A of the Wakf Act, 1954 liable to be set aside?

25. While the second appeal is pending, the first defendant in the suit moved the plaintiff-Wakf Board for ratification of the sale deed dated 27.7.1978 executed and registered without sanction of the Wakf Board. The writ petitioner was the objector before the Wakf Board. The plaintiff-Wakf Board by proceedings dated 30.1.1988 in the Wakf Board Meeting, held on 30.1.1988, while overruling the objections raised by the objector and noting that the applicants had come forward to pay Rs. 50,000 as further consideration and also donate a sum of Rs. 25,000 to the Tamil Nadu Wakf Board Welfare Fund as consideration for ratification of the sale, ratified the sale deed dated 27.7.1978. Thus, the plaintiff Wakf Board resolved to ratify the sale of two acres and 11 cents comprised is S.F.No. 569/A, T.A.No. 3427 situate in Keelaveeraraghavapuram Village, Melapalayam, Palayamkottai in favour the applicants and also resolved to withdraw the Second Appeal No. 949 of 1984 pending on the file of the court.

26. Though the resolution has been passed, no action has been taken for withdrawal of the present second appeal.

27. The Writ petitioner filed the present writ petition challenging the resolution of the Wakf Board and its proceedings dated 30.1.1988 for the item No. III of 1987 bearing Rc.No. 6055/79/TNV.

28. In the writ petition, the petitioner mainly contended that the sale deed had been executed in favour of the first defendant in the suit by defendants 2 to 5 on 27.7.1988, when these defendants were not the muthavallis of the Wakf. It is further contended that without prior sanction, no sale of Wakf properties shall be effected and the sale deed dated 27.7.1978 is void. It is further contended that the ratification by the Wakf Board is without jurisdiction and under the provisions of the Wakf Act, ratification is impermissible. It is further contended that even assuming that the Wakf Board has got the power of ratification, the resolution had not been passed by two third (2/3) members of the Wakf Board and hence the proceedings dated 30.1.1988 is illegal and to be quashed.

29. The writ petitioner further contended that the market value of the property conveyed under the sale deed dated 27.7.1978 is more than Rs. 20,00,000, that it is a property, which falls within the municipal limits and it is a valuable house site and that the sale is not in the interest of the Wakf.

30. The writ petitioner further contended that the resolution of the Wakf Board is liable to be quashed as arbitrary, in excess of jurisdiction, as it runs counter to the provisions of the Wakf Act.

31. The writ petition and the second appeal were ordered to be heard jointly. The points for consideration in the second appeal and in the writ petition are:

(i) Whether the sale deed Ex.A-1 executed without prior sanction of the Wakf Board is void and liable to be set aside?

(ii) Whether the suit as framed is not maintainable by reason of Section 36-B of the Wakf Act? (iii) Whether the sale by the defendants 2 to 5 in favour of the first defendant is valid for failure to dispose of the application for sanction submitted u/s 36-A?

(iv) Whether the judgment of the lower appellate court especially by reason of the Amendment Act 34 of 1982 and Section 59-A of the Wakf Act is liable to be set aside?

(v) Whether the ratification of the conveyance under Ex.A-1 dated 27.7.1978 is valid in law and whether the Wakf Board has got the power to ratify the alienation by defendants 2 to 5 who are not muthavallis on the date of alienation? and (vi) Whether the resolution passed by the Wakf Act dated 30.1.1988 ratifying the action of defendants 2 to 5 has been passed validly in terms of Section 15(2)(j) of the Wakf Act and whether, a valid procedure had been adopted by the Wakf Board before according sanction?

(vii) Whether in any event, the alienation under Ex.A-1 is beneficial to the Wakf and whether the said alienation of defendants 2 to 5 is for the benefit of the Wakf? and

(viii) To what relief?

32. Before proceeding further, it is to be pointed out that the second appeal is still pending and no memo of withdrawal has been filed by the Wakf Board. As such, the second appeal and the writ petition have to be considered on merits by this Court. The points as framed will be considered, which would give a disposal of the second appeal as well the writ petition. The contentions are interconnected to a certain extent. Hence with the consent of both parties, the second appeal as well as the writ petition be disposed of by a common judgment.

33. It is admitted by every one connected with this proceeding that the suit property is a Wakf property and there is no controversy in this respect. It is also admitted that on the date of alienation of Ex.A-1 dated 27.7.1978, the executants Anam Shahul Hameed, Nagoor Nooral Beevi, Nagoor Meeral Beevi Mohamed Beevi were not the muthavallis nor they have been appointed as such by the Wakf Board. The said four persons claiming to be huqdar executed Ex.A-1 deed of conveyance in favour of the first defendant, a partnership firm.

34. It is also admitted that the alienation of Wakf property under Ex.A-1 dated 27.7.1978 was without the prior sanction or approval of the Wakf Board. It is to be pointed out that an application had been submitted on 23.9.1975 by defendants 2 to 5 to the Wakf Board for permission, but the application proceeds

as if it is in respect of their private property, permission is being sought for. Subsequently also, a notice had been sent on behalf of defendants 2 to 5 through their counsel wherein it was sought to be suggested that the Wakf is a private Wakf. All these claims of the defendants have been given up in the course of the proceedings and it has been admitted that the suit property is a Wakf property and that alienation without prior sanction of the Wakf Board is void.

35. Only by proceedings dated 17.4.1980, Shahul Hameed has been recognized as muthavalli for a period of two years and there is no dispute in this respect. Further, when there was a proposal and then the Wakf Board was moved by the first defendant for ratification of the alienation dated 27.7.1978 under Ex.A-1, W.P.No. 12767 of 1987 was filed on the file of this Court praying for the issue of a writ of prohibition prohibiting the Wakf Board from ratifying such a sale transaction.

36. This Court directed the petitioner to raise all the objections before the Wakf Board, which is yet to consider the ratification applied for by the first defendant.

37. In the writ petition, the resolution passed by the Wakf Board on 30.1.1988 is being challenged. On the date when ratification was approved by the Wakf Board by the impugned resolution, the second appeal is pending on the file of this Court and the said second appeal is being disposed of by this common judgment.

38. The Wakf Board succeeded before the trial court, but lost before the first appellate court and a second appeal has been preferred raising substantial questions of law. It is useful to refer to the material portion of the impugned resolution of the Wakf Board, which would disclose as to what are the materials and circumstances, which the Wakf Board has taken into consideration for passing the impugned resolution ratifying the sale deed Ex.A-1.

It is seen from the records that the sale consideration of Rs. 16,000 was appropriated by the huqdars but utilised for purchase of nanjai lands measuring 96 cents for the purpose of the charity. The objector's contention is that the market value of the Wakf property sold to the petitioners is now worth Rs. 20,00,000 and whereas the wet lands purchased from the sale consideration are useless. The learned Counsel has produced a xerox copy of sale deed dated 27.2.1987 whereby an extent of 2.16 sq.ft. of land in T.S.No. 13427 in Melapalayam Taluk was sold for a sum of Rs. 26,460, According to the learned Counsel, the value of the Wakf land which was sold will work out to nearly Rs. 20,00,000. The sale of the Wakf property had taken place on 27.7.1978. The sale deed now produced by the objectors' counsel is dated 22.7.1987. The value of the immovable properties had started galloping in upward direction only after 1980. We cannot compare the market value of the land in 1987 with that of the value of the land in 1978. From a reading of the sale deed dated 27.2.1987 produced by the objectors, it is seen that the land in question has been converted into house sites and sold in plots. Such being the case, we cannot come to a conclusion that the sale of the lands in 1978 was for gross under

value. We have also to take into account that the lands which were purchased for the Wakf from the sale consideration of the Wakf lands would have also appreciated in value.

The Board has now lost in the appeal and the second appeal is pending in the High Court. In case the Board does not succeed in the High Court, it will be a loss to the Wakf. But, the petitioners have now come forward to pay a sum of Rs. 50,000 as further consideration and also donate a sum of Rs. 25,000 to the Tamil Nadu Wakf Board Welfare Fund as consideration for ratification of the sale.

The District Judge in paragraph 16 of his judgment dated 21.11.1983 in A.S.No. 31 of 1983 has commented upon the conduct of the Wakf Board in keeping a petition for permission to sell the land pending alarmingly for a period of three years without giving disposal in one way or the other. Such conduct of the Board has compelled learned District Judge to award costs against the Wakf Board while allowing the appeal.

Taking the above facts and circumstances, we are of the opinion that the sale deed dated 27.7.1978 in favour of the petitioners has to be ratified in the interest of the Wakf. The petitioners have deposited a sum of Rs. 50,000 as additional consideration and also a sum of Rs. 25,000 as donation to the Tamil Nadu Wakf Board Welfare Fund. We therefore, resolve to ratify the sale of the extent of two acres and 11 cents comprised in S.F.No. 569/A, T.S.No. 3027 situate in Keelaveeraraghavapuram village, Melapalayam, Palayamkottai in favour of the petitioners.

39. While ratifying Ex.A-1 sale deed, the Wakf Board has taken into consideration the payment of additional consideration of Rs. 50,000 and a sum of Rs. 25,000 as donation to the Wakf Board Welfare Fund, which are the material considerations which weighed with the first respondent-Wakf Board in the writ petition.

40. The first appellate court, while allowing the first appeal and reversing the judgment and decree of the trial court, had taken upon itself to decide as to whether the alienation is in the interest of the Wakf and whether the alienation is valid and binding. In my considered view, the said two questions will not arise at all nor the court could go into these questions or aspects of the matter.

41. The reliance placed on P.S. Abdul Kadir Vs. The Mahlarathul Kadiria Sabha Kayalpatnam, and Ganapathy Naicker and Another Vs. The Special Officer for Wakfs, , as rightly pointed out by the counsel for the petitioner can neither be appreciated nor be sustained. This aspect of the matter will be discussed later.

42. Further, the first appellate court had proceeded as if there is evidence to support the alienation on the basis of legal necessity and benefit of the Wakf. In that view, the first appellate court had held that the suit as framed is not maintainable. The first appellate court had also concluded that the suit for possession of the Wakf property will not lie. The first appellate court made



certain comments with respect to the non-disposal of the application for sanction and had taken the same as one of the reasons to justify the alienation made under Ex.A-1. The entire approach of the first appellate court is contrary to law and the first appellate court had decided the first appeal as if it has got all the powers including the powers of the Wakf Board to decide the validity of the alienation.

43. The judgment and decree of the first appellate court, in my considered view is not only illegal, but a misdirection, as it had taken into consideration facts, which are not relevant and which have no bearing on the issues raised before it. In this respect, this Court will discuss this aspect of the matter along with other issues.

44. In terms of the provisions of the Wakf Act, the sale deed Ex.A-1 is void and there is no escape. Section 36-A of the Wakf Act, 1954 declares that notwithstanding anything contained in the Wakf deed, any sale or hypothecation of immovable property, which is Wakf property shall be void, unless it is effected with prior sanction of the Board.

45. The learned Counsel appearing" for either side admit that Section 36-A was in force on the date of execution of Ex.A-1 and only on that basis, submissions have been made. The terminology employed by the legislature in .Section 36-A of the Wakf Act is mandatory and without prior sanction of the Wakf Board, the alienation is void. It is further admitted that Ex.A-1 sale deed is void, as no prior sanction of the Wakf Board has been secured.

46. Sub-section (2) of Section 36-A enables the Wakf Board to sanction alienation or hypothecation of Wakf properties if such transaction is necessary or beneficial to the Wakf or consistent with the objects of the Wakf and the consideration thereof is reasonable and adequate, besides it has been further prescribed that the sale of any property sanctioned by the Wakf Board shall be subject to confirmation by the Board within such time as may be prescribed.

47. Further, the amount realised by the sale of Wakf property shall be utilised or invested by the mutawallis subject to the approval of the Board. In the present matter, there has been neither prior sanction nor attempt to justify the sale and all attempts justifying the same by the first appellate court runs counter to the provisions of the Wakf Act. The approach of the first appellate court that court is a guardian of all the trust properties including the Wakf property and it could go into the question as to whether the alienation is for the benefit of the Wakf, in my considered view is not correct, as after the statutory enactment and when the Wakf Board had been constituted for this purpose, the authority of the civil court in this respect to go into these issues is either taken away or no longer available.

48. Learned counsel for the Wakf Board as well as for the first defendant incidentally contended that the alienation is void and it could be ratified by the Wakf Board as well as by the courts. Learned counsel relied upon the Division

Bench judgment in P.S. Abdul Kadir Vs. The Mahlarathul Kadiria Sabha Kayalpatnam, as well as P.S. Abdul Kadir Vs. The Mahlarathul Kadiria Sabha Kayalpatnam, , a Division Bench of this Court held that court can give sanction with retrospective effect and also held that an alienation by a mutawalli could be sanctioned retrospectively by a court. The Division Bench held thus:

Ameer Ali in his text book, has summarised the result of the authorities thus:

the general result of the authorities seems to be that the Wakf (mutawlli?) may lawfully change the Wakf property, in other words, alter the investment provided he has reserved, at the time of dedication, power to that effect. Otherwise, no alteration can be effected without the leave of the Kazi or Judge, who has the power to authorise a change of investment whenever he considers it beneficial for the Wakf. No doubt, the sanction of the Kazi contemplated in these texts is sanction prior to the transaction. But we entirely agree with the learned Judges of the Calcutta High Court that no difference should be made between antecedent and subsequent sanction of the court which now takes the place of the Kazi. The learned Advocate for the respondent contended that on the evidence it could not be said that the transaction is justified, because the state of the building was not bad as to render it thoroughly useless, that even if repairs were needed much money was not necessary and there were surplus funds at the disposal of the Mahlara for the execution of the repairs. We were taken through the evidence on the point. But, learned Counsel for the respondent was unable to persuade us to come to a conclusion different from that of the learned trial Judge. We concur with the learned judge who had the opportunity of seeing and listening to the witnesses, in his estimate of the oral evidence, namely that the evidence on the side of the defendant is far superior to and deserves better credit than that of the plaintiff's witnesses. We also agree with him" that the price fetched by the sale to the defendant was adequate and that the Mahlara had no surplus funds from which the building could be repaired and that the building was in need of extensive repairs which could not be effected with a small amount. The learned Judge was of the opinion that the transaction was beneficial to the Mahlara (see para 47), but he thought as the transaction was not strictly necessary it was impossible for him to validate it retrospectively. We think otherwise. On the facts and in the circumstances above narrated it was clearly beneficial to the Mahlara that the Kayalpatnam property should be disposed of and the proceeds of the sale invested in a more remunerative property. Admittedly, the Tuticorin property brought more income to the trust. The case was eminently fit for the exercise of the power of the court to grant retrospective sanction. We accordingly give the necessary sanction to the transaction.

49. Following the said Division Bench judgment, this Court in Ganapathy Naicker and Another Vs. The Special Officer for Wakfs, , held that it is open to the mortgagees to apply subsequently to the Board for according sanction and if the mortgagees fail to obtain such sanction, then the provisions of Section 36-B of the Wakf Act will come into operation. While considering the scope of Section 36-

A, the learned judge held thus:

It is common ground that though the Act came into force in 1964 and the two transactions in questions were in 1965 and 1968, previous sanction of the Board was not obtained. The contention of the learned Counsel for the petitioners is that by this amendment, all that was intended was to accord statutory recognition to the provisions of Mohammadan Law by which before the transfer of Wakf property could be made, sanction of the Court should be obtained. In a case in which the sanction of the court was not obtained before actual transfer, a Division Bench of this Court has held in P.S. Abdul Kadir Vs. The Mahlarathul Kadiria Sabha Kayalpatnam, , that the sanction can be obtained subsequent to the transaction on valid grounds. I agree with the contention of the learned Counsel for the petitioners that the intention of the Legislature was to condify the provisions of the Mohammadan Law before the amendment in Section 36-A. In this view, it is open to the petitioners to apply to the Board for sanction regarding the two alienations. If the petitioners fail to obtain such sanction then the provisions u/s 36-B will come into operation. It is also admitted that the procedure u/s 36-B(2) had not been complied with in that notice has not been given to the petitioners. In the circumstances, the proper order to make is to allow the petitions and direct the petitioners to apply to the Board for sanction. It is for the Board to consider the circumstances and grant sanction or refuse to grant it. In the event of the Board refusing to grant the sanction, the Board will be at liberty to take proceedings u/s 36-B. The petitioners are granted two months time from this date for moving the Board for sanction u/s 36-A.

50. Ultimately the learned Judge had directed the mortgagee to apply to the Wakf Board to consider the circumstances and grant sanction or refuse to grant it. Section 36-A, as it stood, on the date of hypothecation in the above quoted case had been taken note of and the decision had been rendered. Section 36-A as well as Section 36-B of the Wakf Act had been amended subsequently. The entire question is no longer res integra and a Division bench of this Court in Tamil Nadu Wakf Board represented by its Secretary, etc. v. S.A. Sayed Masood, etc. (1995)2 L. W. 308 had occasion to consider the very same issue. But the earlier judgment of Division Bench in P.S. Abdul Kadir Vs. The Mahlarathul Kadiria Sabha Kayalpatnam, had not been cited, but the principle laid down therein had been taken into consideration. The latter Division Bench had also considered the question as to maintainability of the suit, with respect to which the first appellate court had held that the suit is not maintainable in the present case, while the Division bench in (1995)2 L. W. 308 had analysed the case and held that the suit is maintainable and the jurisdiction of the civil court had not been taken away. The Division Bench had held thus:

It is on the above settled principles of law, this Court has to decide whether the suit filed by the appellant was maintainable. Section 36-B of the Wakf Act was duly incorporated in the Wakf Act in 1964. There is no provision in the enactment which bars the jurisdiction of civil court from entertaining a civil suit. Again,

Section 36-B of the Wakf Act gives only an option to the Board, to make a requisition to the Collector for getting possession. It is not compulsory that the Board should exercise the option for getting the possession. The right to recover the property, either trespassed or unauthorisedly alienated, is common law right. That right is not conferred for the first time or taken away by any of the provisions of the statute. In this connection, Section 15(2)(h) and (i) of the Wakf Act is also relevant. The Board is given the power to take measures to recover lost properties and also to institute and defend suits and proceedings in a Court of Law relating to Wakfs. The preamble of the Act also is only to provide better management and supervision of the Wakfs. In matters regarding administration and supervision, filing of suit is also one of the powers to be exercised, which is specifically provided under the Act. In this connection, it is also worthwhile to note that Section 59 of the Act enables the Board to appear and plead in a suit filed by another person regarding Wakf property. If in a suit by a stranger, the Wakf Board can appear and plead as a party to the suit, there is no reason why the same right cannot be exercised by the Board itself in a civil suit filed by itself. The right to recover property is not for the first time created by the statute. It is a Common Law right. Section 36-B of the Wakf Act is only a summary procedure. Complicated questions of law and fact cannot be agitated before the Collector. The exhaustive remedy through a civil court is not taken away by virtue of Section 36-B of the Wakf Act.

. . .On the basis of the above said decision, it can safely be held that the contention based on Section 36-B of the Wakf Act that the appellant's suit is barred u/s 9, CPC has only to be rejected and we do so.

The very same Division Bench also had occasion to consider the effect of Section 36-A of the Wakf Act and held thus:

When the sanction is subject to conditions, and when the conditions are violated, in law there cannot be a sanction at all, which is a precondition for effecting the sale. Section 36-A of the Wakf Act reads thus:

Section 36-A Alienation of the wakf property without sanction of Board to be void: (1) Notwithstanding anything contained in the Wakf deed, any gift, sale exchange or hypothecation of any immovable property, which is wakf property, shall be void unless such gift, sale, exchange or hypothecation is effected with the prior sanction of the Board.

(2) xxxxx (omitted) xxxxx

According to the learned Counsel for the appellant once Section 36-A of the Wakf Act has not been complied with, no transaction by the first defendant is valid. Section 36-A of the Act is a statutory condition, and if the same is violated, there cannot be a valid transaction, and the plaintiff can sue for possession ignoring the documents purported to have been executed by the first defendant.

51. The earlier judgment of the Division Bench in P.S. Abdul Kadir Vs. The

Mahlarathul Kadiria Sabha Kayalpatnam, no longer holds good in view of the later Division bench judgment and in view of the subsequent statutory enactment, namely the Wakf Act 34 of 1954 and also in view of the judgment of this Court in Tamil Nadu Wakf Board represented by its Secretary, etc. v. S.A. Sayed Masood, etc. (1995)2 L W. 308 , which is binding on this Court. The conclusion of the first appellate court, as already pointed out, runs counter to the decision of the recent pronouncement of this Court. When the Wakf Act provides that any alienation without prior sanction is void and the statutory provision provides for the particular course and mandatorily provides the contingencies and the consequences, jurisdiction of the civil court is no longer available to go into the transaction to test as to whether the transaction is bona fide or whether the transaction was in the interest of the wakfs.

52. As pointed out by the Division Bench in Tamil Nadu Wakf Board represented by its Secretary, etc. v. S.A. Sayeed Masood, etc. (1995)2 L.W. 308, the civil court's jurisdiction is also not barred and the view taken by the first appellate court in this respect is also contrary to law.

53. The next question that requires to be considered is whether the impugned resolution of the Wakf Board ratifying the alienation under Ex.A-1 is valid and whether the Wakf Board has the authority to ratify the same. Whether the Wakf Board had taken into consideration the interest of Wakfs before passing the impugned resolution, if it held that the wakf Board has not the authority to ratify?

54. Before taking up the issue for consideration, it is to be noted that the earlier judgment of the Division Bench in P.S. Abdul Kadir Vs. The Mahlarathul Kadiria Sabha Kayalpatnam, is a case where the Division Bench of this Court held that there could be retrospective sanction and it has not been held that such an alienation could be ratified. There is difference between such a retrospective sanction and the ratification. Which had been ordered by the Wakf Board in the present case.

55. The impugned order of the Wakf Board is being challenged on the ground that,

(i) A civil suit already instituted by the Wakf Board with respect to the same property challenging the alienation as void and seeking for declaration and recovery of possession is pending in second appeal.

(ii) The resolution passed by the Wakf Board is invalid, as it did not have the requested coram on the date when the Wakf Board met.

(iii) There could be no ratification of Ex. A-1, which is void and which had been effected by a third party and by utter strangers on the date of alienation, (iv) The Wakf Board had taken into consideration the interest of the Wakfs in question in ratifying the alienation of Ex.A-1 and

(v) The contribution to wakf welfare Fund could not be a valid consideration for ratification of the Wakf property?

56. Learned counsel for the writ petitioner relied upon the judgment of the Supreme Court reported in *Mulamchand Vs. State of Madhya Pradesh*, and contended that when the alienation itself is void, no question of ratification arises nor it could, be ratified. Learned counsel also drew the attention of this Court to the following passage.

It is now well-established that where a contract between the Dominion of India and a private individual is not in the form required by Section 175(3) of the Government of India Act, 1935, it was void and could not be endorsed and therefore the Dominion of India cannot be sued by a private individual for breach of such a contract (see the decision in *Seth Bikhraj Jaipuria Vs. Union of India (UOI)*, . It was stated in that case that u/s 175(3) of the Government of India Act, 1935, the contracts had (a) to be expressed to be made by the Governor General, (b) to be executed on behalf of the Governor - General and (c) to be executed by Officers duly appointed in that behalf and in such manner as the Governor-General directed or authorised. The evidence in the case showed that the contracts were not expressed to be made by the Governor-General and were not executed on his behalf. It was held by this Court that the provisions of Section 175(3) were mandatory and the contracts were therefore void and not binding on the Union of India, which was not liable for damages for breach of the contracts. The same principle was reiterated by this Court in a later case: *State of West Bengal v. M.S.B.K. Mondal and Sons* (1962)1 S.C.R. (Supp.) 876. The principle is that the provisions of Section 175(3) of the Government of India Act, 1935 or the corresponding provisions of Article 299( 1) of the Constitution of India are mandatory in character and the contravention of these provisions nullifies the contracts and makes them void. There is no question of estoppel or ratification in such a case. The reason is that the provision of Section 175(3) of the Government of India Act and the corresponding provisions of Article 299(1) of the Constitution have not been enacted for the sake of mere form but they have been enacted for safeguarding the Government against unauthorised contracts. The provisions are embodied in Section 175(3) of the Government of India Act and Article 299(1).of the Constitution on the ground of public policy - on the ground of protection of general public - and these formalities cannot be waived or dispensed with. If the plea of the respondent regarding estoppel or ratification is admitted that would mean in effect the repeal of an important constitutional provision intended for the protection of the general public. That is why the plea of estoppel or ratification cannot be permitted in such a case.

57. The maxim "*omnis rati habitio retrotrahitur et mandato priori aequiparatur* (Co. Litt.207 a). A subsequent ratification has a retrospective effect and is equivalent to a prior command is of very wide amplitude. But, as a general rule, a subsequent ratification and adoption by a person of what has been all done in his name as or on his behalf but without his authority, could be ratified by a subsequent adoption and exercise of such ratification, which is retrospective and it is equivalent to his previous command.

58. The principal limitation to the doctrine that a person can, by ratifying another's act render that act his own, in law, lies in the rule that a person cannot be said in law to ratify another's act. unless that other, in doing the act purported, or assumed, or intended to do it as such person's agent and this rule applies equally whether the doctrine of ratification is invoked to enable a person to take the benefit of an act, or to render him liable therefore as a principal or to justify an act as done by lawful authority.

59. Assuming that what applies to ratification in a contract applies to a ratification in the present case, this Court holds that there cannot be a ratification of a void transaction; further the alienation under Ex.A-1 had not been effected as the agent of the Wakf Board or purporting to act as its agent. The executants of Ex.A-1 claimed the office of huqdar and purported to represent the wakfs. But definitely no such authority, on the date when Ex.A-1 was executed could be inferred or vested on the executants of Ex.A-1. The alienation is not by the mutawallis, as obviously Anam Shahul Hammed has been appointed as the mutawalli only on 17.4.1980, while the alienation was on 27.7.1978. The other executants of Ex.A-1 sale deed were never appointed as the mutawallis.

60. As held by the Supreme Court in *Mulamchand Vs. State of Madhya Pradesh*, , there could be no ratification of a void transaction. The provisions of the Wakf Board as was in force on the date of Ex.A-1 and on the date of impugned resolution of the Wakf Board have to be given effect to, as those provisions are mandatory. There could be no ratification under Ex.A-1, which is void from its inception.

61. Assuming that there could be a ratification as sought to be made out by the counsel for the Wakf Board as well as the first defendant in the suit, this Court has to consider as to whether the impugned resolution is valid in law and whether the procedure prescribed in this behalf has been followed also, has to be gone into. As was already pointed out, in *P.S. Abdul Kadir Vs. The Mahlarathul Kadiria Sabha Kayalpatnam*, , what this Court held was a retrospective sanction and not a ratification and the Division Bench was very much aware of the distinction of a transaction which is void and which cannot be ratified, but held that there could be a retrospective sanction. The aspect of the matter was lost sight of by the Wakf Board, while ratifying the sale deed under Ex.A-1.

62. The provision of Section 36-A is mandatory and when the statutory provision provides that the alienation is void, there is no escape and neither the court nor the Wakf Board could go to the rescue of alienee of a transaction, which is void. As already pointed out, the impugned order is not a retrospective sanction, but it is a ratification, hence it is invalid.

63. However, even assuming that there could be a ratification, this Court has to decide as to whether the ratification is valid in the present case. Section 36(A)(2) of the Wakf Act, which was subsequently amended enables the Wakf Board to accord sanction for alienations or encumbrance of Wakf property. Rule 5 of the

wakf Rules framed by the State of Tamil Nadu in exercise of powers conferred u/s 67 of the Wakf Act prescribes the conditions and restrictions subject to which the Board may transfer Wakf property. Rule 5 of the Wakf Rules, which is relevant reads thus:

5. Conditions and Restriction subject to which the Board may transfer Wakf property. 1. An application for sanction u/s 36-A shall be submitted by a muthavalli to the Board and shall contain the following particulars and such other particulars as the Board may consider necessary:

(a) Nature of the proposed transaction:

(b) Correct description of the properties relating to the transaction with information regarding the survey number, extent and boundaries, and ward number and door number also in the case of properties within the limits of Municipalities or the Corporation of Madras.

(c) The revenues assessed on the properties relating the proposed transaction by way of land revenue, cess, quit rent, ground rent, property tax and the like.

(d) Any encumbrances to which the properties relating to the proposed transaction are subject.

(e) If the proposal is for mortgage, the amount for which the properties are proposed to be mortgaged and the nature of the mortgage.

(f) If the proposal is for sale or lease, the probable price or the rental, as the case may be, that is expected.

2. The Board, shall on receipt of an application referred to in Sub-rule (1) from the Muthavalli or on its own initiative in the case of properties of any wakf directly managed by it, publish in the Tamil Nadu Government Gazette a notice of the proposed transaction with the particulars referred to in Sub-Rule (1) above.

3. A notice published under Sub-Rule (2) shall contain sufficient details of the transaction and shall specify a reasonable time, not being less than thirty days from the day of publication of the notice within which objections or suggestions may be sent. A copy of the notice shall be affixed on the notice Board of the office of the Board and on any conspicuous place in which the property is situated. Such publication shall be deemed to be sufficient intimation to the persons having interest in the property forming the subject matter of the proposed transaction.

4. All objections or suggestions, received in respect of the proposed transaction shall be duly considered by the Board before passing order thereon, if necessary, after holding an enquiry in which case a reasonable notice of not less than seven full days shall be given to the parties concerned. A copy of the order sanctioning sale gift, mortgage or exchange or lease for a term exceeding three years in the case of agricultural land and one year, in the case of non-agricultural land or building, shall in addition to being communicated to the Muthavalli and person



having interest, if any, who appeared in the proceedings, be published in the manner laid down in Sub-Rule (2).

64. Sub-Rules (2) and (3) of Rule 5 of the Wakf Rules provides for publication of notice of the proposed transaction, and the manner of publication as well as mode of publication has been prescribed. In this respect, it has to be pointed out that Sub Rules (2) and (3) of Rule 5 of the Wakf Rules has not been followed by the Wakf Board, as there has been no publication of the proposed action, before transferring the wakf property even assuming that the ratification is considered to be a fresh act of alienation. The failure to follow Sub-Rules (2) and (3) of Rule 5 of the Wakf Rules is fatal.

65. Further, in terms of Sub-section (2)(j) of Section 15 of the Wakf Act, the sanction for alienation of immovable property of a wakf has to be effected at lease by two-thirds (2/3) of the members of the Board voting in favour of such transaction. Sub-section (2)(j) of Section 15 of the Wakf Act reads thus:

To sanction in accordance with the Muslim law, any transfer of immovable property of a Wakf by way of sale, gift, mortgage, exchange (or lease in accordance with the provisions of this Act) provided that no such sanction shall be given unless at least two thirds of the members of the Board vote in favour of such transaction.

66. In the present case, it is being contended that the impugned resolution has not been passed with the requisite majority. On the other hand it is being contended that excluding the vacancy and excluding those who have failed to attend, the resolution had been passed by two thirds majority which would satisfy the requirement of Section 15(2)(j) of the Wakf Act. This cannot be accepted, as the statutory provisions provides that no such sanction shall be given unless at least two-thirds (2/3) of the members of the Board vote in favour of such transaction, which would mean, all the members of the Board and not two-thirds (2/3) of those who were present. Such argument of the counsel for the Wakf Board cannot be sustained.

67. As already held, Section 36-A, of the Wakf Act is mandatory and has to be adhered to scrupulously . Rules have been framed to safeguard the Wakf Property and Rule 5 of the Wakf Rules is also mandatory. There has been violation of Sub-Rules (2) and (3) of Rule 5 of the Wakf Rules, as there has been no publication in the present case, and publication had not been placed before this Court. The procedure prescribed u/s 36-A is also mandatory and a mandatory duty has been cast on the Board to comply with the procedure prescribed under the Act as well as the Rules.

68. The non-compliance of the said statutory provisions renders the impugned action of the Board illegal and in excess of jurisdiction and therefore, it is void. In this respect, it is to be pointed out that Section 36-A of th Wakf Act and Rule 5 of the Wakf rules are mandatory and they have to be adhered. The non-compliance of the mandatory provision is fatal to the impugned proceedings. Hence, the

action of the Board is illegal void and in excess of jurisdiction.

69. Further, it is. that the Wakf Board is the controlling authority of all the Wakfs in the State, but having rightly instituted the suit and when the second appeal is pending, the Wakf Board had chosen to ratify the sale deed Ex.A-1. Admittedly, the alienee came forward to pay Rs. 50,000 to the Wakf in question as additional consideration, besides paying Rs. 25,000 to the Wakf Board Welfare Fund. Thus, the very action of the first defendant in coming forward to pay Rs. 25,000 would show that the consideration paid by the first defendant for Ex.A-1 sale deed is not the actual consideration or real consideration. Hence, the transaction is not in the interest of the Wakfs as there is evidence to show that the property is very valuable.

70. The payment of Rs. 25,000 to the Wakf Board Welfare Fund also had influenced the Wakf Board in deciding , where the alienation in question is not, in the interest of the Wakf As such, the donation to the Wakf Board Welfare fund cannot be a reason at all to hold that the transaction is a bona fide transaction and it is in the interest of the Wakf. Thus, payment of Rs. 25,000 to the Wakf Board Welfare Fund is a primary consideration, which had weighed the members of the Wakf Board, while passing a resolution and the said aspect of the matter definitely had influenced the minds of the members of the Wakf Board.

71. In law, the Wakf Board and the members of the Wakf Board being placed in the position of trustees have to act in a manner fitting to the office or authority held and they should not have taken into consideration the aspects, which are not relevant nor it is in the interest of the Wakfs in question. The primary duty of the wakf Board is to administer, supervise and control the Wakfs in the State and the supervision should always satisfy the parameters and the expected manner in which the responsible office or authority held is discharged, as guardians of all wakfs in the State.

72. Further, even if alienation is sanctioned, the procedure prescribed under Sub-section (2) of Section 36-A is required to be followed, which would also indicate that there cannot be a ratification of the transaction, when the transaction itself is void and if such a void transaction is ratified, definitely, the provisions of Section 36-A of the Wakf Act, and in particular Sub-sec (2) of Section 36-A cannot be complied with.

73. For all these reasons this Court holds that the impugned resolution is invalid, in excess of jurisdiction and void; it is true that the first defendant, while purchasing the property had subsequently effected developments and he had in turn laid out the land into plots and had also either put up construction or disposed of the same, but no materials or details have been placed before this Court in this respect.

74. However, it is for the Wakf Board to consider afresh any request with a proper proposal for fresh sanction and such a sanction should be only in the interest of the Wakfs in question.

75. In the result, this Court answers the points as follows:

(i) Ex.A-1 sale is void and the Wakf Board is entitled to recover the Wakf properties.

(ii) The suit is maintainable.

(iii) The non-disposal of application submitted by defendants 2 to 5 is of no consequence, as there cannot be a deemed sanction or approval.

(iv) The judgment of the lower appellate court is set aside.

(v) The ratification of the alienation dated 27.7.1978 is invalid and without jurisdiction.

(vi) The resolution dated 30.1.1998 is invalid and inoperative and

(vii) The alienation of the Wakf property is neither beneficial to the Wakf nor it is bona fide action nor the alienation could be held to be in the interest of the Wakf in question.

76. In the circumstances, the writ petition is allowed and the impugned proceedings are quashed. The second appeal is allowed. The judgment and decree of the first appellate court is set aside and the judgment and decree of the trial court is restored. No costs.