
(2016) 11 CAL CK 0024
In the Calcutta High Court
Case No : C.O. No. 888 of 2009

Farkhondeh Khanum

APPELLANT

Vs

Board of Wakfs, West Bengal

RESPONDENT

Date of Decision : 04-11-2016

Acts Referred:

Constitution of India, 1950 — Article 227

Waqf Act, 1954 — Section 6(k), Section 64(1)(j), Section 83(1), Section 83(2)

Citation : (2017) AIRCC 579 : (2017) 1 CalLT 125 : (2017) 1 ICC 338

Hon'ble Judges : Mr. Mir Dara Sheko, J.

Bench : Single Bench

Advocate : Mr. Sakti Nath Mukherjee, Senior Advocate, Mr. S.P. Roy Chowdhury, Senior Advocate, Mr. Ganesh Shrivastava, Mr. Soumya Bhattacharya, Advocates, for the Petitioner; Mr. Joydeep Kar, Senior Advocate, Mr. Md. Galib, Mr. Md. Hasanuz Zaman, Advocates, for the

Final Decision : Dismissed

Judgement

Mir Dara Sheko, J. - The application under Article 227 of the Constitution of India is filed by the petitioner assailing the order of removal of the petitioner and her mother Narges Khanum and her sister Mrs. Rokhsandeh Khanum from the post of Mutawalliship of the Wakf Estate namely "Mirza Ali Akbar Al-Al-Aulad Wakf" under Clauses (j) and (k) of Section 64(1) of the Wakf Act, 1955 pursuant to the resolution dated 16.10.2008 adopted by the Board of Wakfs.

2. Background of the matter, is that the father of the petitioner created the wakf specifying as to who would be the Mutawallis and how or by whom and in what mode such wakf property would have to be managed in taking action for its development.

3. One Ram Bilash Agarwal was chosen by the petitioner to develop the wakf property with approval of the Board of Wakf, but it had to be cancelled. For the 2nd time another Kamal Singh Baid was chosen for its developing under approval of the Board of wakf but the same also could not be materialised since Kamal

Singh Baid had no promoter licence. Therefore ultimately agreement between the petitioner and Kamal Singh Baid was terminated. Kamal Singh Baid thereafter attempted on and again at first in City Civil Court, then in the Civil Court at Sealdah, and lastly, in the High Court, to get the said agreement resumed, but could not succeed.

4. Though said Kamal Singh Baid became unsuccessful at his end to resume the agreement dated 05.12.2013 the Board of Wakf issued notice to the petitioner on 14.09.2007 to consider the said agreement. The petitioner, in her turn during hearing before the Board of Wakf questioned its jurisdiction to interfere with the affairs between the petitioner and Kamal Singh Baid, where she noticed the act of one of the Board members Mr. Ali Abbas Shirazi to deal with dual role with biasness. The petitioner alleged that during continuation of hearing before the Board of Wakf Mr. Shirazi once came down from the presiding chair of the Board of Wakf, and made submissions before the other Board members as the alleged constituted Attorney of Petitioner's mother Narges Khanum and sister Rokshandeh Khanum, and then again took seat to preside over the hearing by the Board.

5. Completing hearing in this process notice dated 22.11.2007 was issued asking the petitioner to show cause as to why the Managing Mutawalli as well as Joint Mutawallis would not be removed, against which reply was submitted by the petitioner before the Chief Executive Officer, Board of Wakf on 22.01.2008.

6. Enquiry was held at the office of Board of Wakf upon notice to the petitioner who was confronted with some letters, purported to have written by her mother, copies of which were not supplied to the petitioner. The petitioner contended that those letters were procured at the behest of aforesaid Mr. Abbas Ali Shirazi on misrepresentation upon the petitioner's mother and sister.

7. Hearing of the matter before the Wakf Board was fixed on 29.08.2008. On that day the hearing was adjourned on prayer of the petitioner with direction to hand over copies of unsupplied documents immediately to the petitioner and next date of hearing was fixed on 16.10.2008. Notice of such date of hearing was accordingly was served upon the petitioner on 29.9.2008. On the following day i.e. on 30.9.2008, the petitioner submitted an application to shift the date of such hearing till November 02, 2008, since her Advocate would not be available due to closure of High Court on account of puja vacation commencing from October 02, 2008. Said prayer of adjournment was rejected on 16.10.2008 and the Board of Wakf passed the resolution on that day which was confirmed in the next Board meeting dated 26.11.2008 with some rectification and amendment by which the petitioner being managing Mutawalli along with mother and sister were ordered to be removed from the her post of Mutawalliship under Section 64(1) Clauses (h), (i), (j) and (k) and the Wakf estate under reference was assumed under direct management of the Board of Wakf West Bengal under Section 65(1) of the Wakf Act, 1955 for a period of five years. Said order of removal was published on February 20, 2009 in the Kolkata Gazette Extraordinary Notification

No. 2572 which was communicated to the petitioner by letter dated 25.02.2009, by which, apart from removal from the office of Mutawallis of the Wakf Estate direction was given to deposit Rs. 69,38,566/- (Rupees sixty nine lakhs thirty eight thousand five hundred and sixty six) only plus the Board's contribution of Rs. 6,70,880/- (Rupees six lakhs seventy thousand eight hundred eighty) after deducting the amount she already paid to the Board as Wakf Contribution within a period of one month from the date of receipt of this order, and it was further ordered that in the event of her failure to comply with the same the Board would be constrained to initiate both Civil and Criminal Proceedings against her for realization of the said properties of the Mirza Ali Akbar Wakf Estate (E.C. No. 13853) and the CEO, Board of Wakfs, West Bengal would be authorised in that behalf U/S 64(7) of the Wakf Act 1955.

8. The petitioner preferred Appeal No. 3 before the Tribunal challenging the order of removal of her Mutawalliship passed on 16.10.2008 by the Board of Wakf invoking Section 64(1) Clauses (h) and (i) only , and simultaneously filed the instant application under Article 227 of the Constitution of India challenging the order under Clauses (j) and (k) of Section 64(1) of the Wakf Act, 1995 as the Clauses (j) and (k) are not appealable.

9. In the proceeding under Article 227 of the Constitution of India being C.O. No. 888 of 2009, the petitioner obtained interim order of status quo on 19.05.2009 which is set out hereunder:-

"Status quo as on today be maintained by the parties till two weeks after the re-opening of the Court after ensuing summer vacation", and said interim order still continues under order dated 18.06.2009, which is set out:- "The interim order which was passed earlier will continue till disposal of the application".

10. The opposite parties exercised affidavit in opposition, contending about bar of jurisdiction under Section 85 of the Wakf Act, 1995 in respect of the order impugned, and there being efficacious statutory remedy under Section 83(1) and (2) of the Wakf Act against the impugned order under Section 64(1) (j) & (k) before the same Tribunal, the C.O. is not maintainable for any interference by the High Court under Article 227 of the Constitution of India. Ground of non-joinder of party also is taken since Kamal Singh Baid is not made a party in this C.O.

11. Now taking note of the lis of the case, the points for decision are set out in the following manner:-

(i) Whether the order under challenge passed by the Board of Wakf is an order of a Court or Tribunal to invoke Article 227 of the Constitution of India?

(ii) If yes, whether the application under Article 227 of the Constitution of India is maintainable if there is efficacious remedy within the Wakf Act, 1995?

(iii) If yes, whether the decision making process in passing the order/resolution dated 16.10.2008, bearing decision of removal of the petitioner along with her

mother and sister from the Post of Mutawalliship in the impugned Wakf Estate requires interference?

12. Mr. Shaktinath Mukherjee learned Senior Advocate for the petitioner argues that the High Court is not a Civil Court within the meaning of Section 85 of the Wakf Act, 1995 and since likewise under Article 323A(d) of the Constitution of India, jurisdiction of the High Court has not been excluded by the Parliament from adjudicating any disputes or complaints relating to wakf, and though for adjudication of any disputes, complaints or offences, different tribunals, under Article 323B may be created, but it does not carry any provision for creation of Tribunal for wakf or Debattar related dispute. Submits that, not making of such provision does not mean that jurisdiction, or, the High Court's power of superintendence under Article 227 of the Constitution of India has been excluded merely due to setting up of Wakf Tribunal under Wakf Act 1995. Submits thereby that, until and unless the law making authority i.e. the Parliament is taking away jurisdiction of the High Court by enacting appropriate provision like Article 323A of the Constitution, the High Court is free to act in exercising under Article 227 of the Constitution of India, and even the Supreme Court cannot take away any such jurisdiction vested to the High Court by the Parliament under Article 227. Further submits that the impugned order has been issued for removal from Mutawalliship by the Board of Wakf under Section 64 (1) (h), (i), (j) and (k) of the Wakf Act 1995, of which only the clauses (h) and (i) of Section 64(1) being appealable the appeal has been preferred before the Tribunal challenging only those orders and since the orders of the Board under Clauses (j) and (k) of Section 64(1) of the Act are not appealable the instant application has been filed to invoke jurisdiction of this Court under Article 227 of the Constitution of India, as the orders, passed by the Board, with the process of issuing notice to any law breaker asking to show cause, then receiving the reply to said show cause notice, and thereafter consideration of materials finally in giving decision affecting the rights of the party, are to be deemed as a binding order said to have been passed by a Tribunal, though the Board of Wakf is not labelled as a Tribunal, and is not required to be so labelled. Mr. Mukherjee also draws attention to the Article 136 of the Constitution of India submitting that the High Court under Article 227 of the Constitution of India should equally entertain the order under challenge which has been passed by the Wakf Board as a body within the parameter of a Tribunal. Submits further, that even if, there is any efficacious remedy elsewhere, the petitioner cannot be deprived of, or, prevented from choosing the forum to challenge any illegal action of such Tribunal passed under (j) and (k) of Section 64(1) of the Act violating principles of natural justice, that too by rejecting prayer of adjournment and by not considering also the reply to show cause submitted by the petitioner.

13. Mr. Mukherjee in a gist, submits that since the Board of Wakf itself has determined the alleged liability of dues which was supposed to be determined by its Chief Executive Officer, as provided under Section 33 of the Wakf Act, against which order of the Chief Executive Officer, had the petitioner been aggrieved,

would have right of appeal under Section 33(4) of the Wakf Act, 1995, the procedure adopted for removal from Mutawalliship by the Board, without getting the alleged liability determined under Section 33 of the Act, is without jurisdiction. Therefore, the order under Section 64(1) (j) and (k) is a nullity and those two clauses are to be expunged from the order/resolution dated 16.10.2008. Relying on the case of Nazir Ahmed v. King Emperor reported in AIR 1936 Privy Council 253 Mr. Mukherjee submits that where a power is given to any authority to do certain thing or to take certain steps in a certain way or in a particular manner specified, the thing must have to be done in that manner, or not at all, since other methods of performance are necessarily forbidden.

14. Another fold of argument of Mr. Mukherjee is that, assuming, not admitting, the allegations labelled against the petitioner as true, the Board of Wakf assumed the management of Wakf Property for a period of five (5) years as per provision of Section 65 of the Act, and therefore the order impugned has lost its statutory force due to lapse of five years, and, even the Wakf Board is not entitled to get exclusion of the period on the plea that there was an order of status quo, since order of status quo would not stop running of the period of such five years.

15. Mr. Mukherjee to substantiate his arguments relies upon the decisions as follows:-

(1) Ziaul Haque and Others, v. Mahammadul Haque and Others reported in AIR 1954 (CAL) 149.

(2) Shri Kihota Hollohon v. Mr. Zachillhu & Ors. reported in AIR 1993 S.C. 412.

(3) All Party Hill Leaders" Conference Shillong v. Captain W.A. Sagma & Ors. reported in 1977(4) SCC 161.

(4) M/s. Upper India Publishing House Pvt. Ltd., Lucknow v. Commissioner of Income Tax, Lucknow reported AIR 1979 SC 1724.

(5) The Secretary of State represented by the Collector of South Arcot v. Mask & Co. Reported in 44 C.W.N 709 P.C.

(6) Porsad Kumar Mondal & Ors. v. The Commissioner of Krishnanagore Municipality & Ors. reported in 1978(1) CLJ 276.

(7) Union of India v. Raman Iron Foundry reported in AIR 1974 SC 1265.

(8) Shri Surendra Kumar Ray Chowdhury v. The Collector of Calcutta & Anr. 1985(1) CLJ 332.

(9) State of Karnataka v. Shree Rameshwara Rice Mills Thirthahalli reported in AIR 1987 SC 1359.

(10) Scotts (P) Ltd. & Ors. v. Corporation of Calcutta & Anr. reported in 79 CWN 883.

(11) R v. Thames Magistrates" Court, ex parte polemis reported in 1974(2) AER

1219.

(12) Rafiq & Anr. v. Munshilal & Anr. reported in AIR 1981 SC 1400.

(13) Mahanath Ram Das v. Ganga Das reported in AIR 1961 SC 882.

(14) A.V. Venkateswaran, Collector of Customs v. Ramchand Sobhraj Wadhwani & Anr. reported in AIR 1961 SC 1506(COL.B).

(15) Whirlpool Corporation v. Registrar of Trade Marks, Mumbai & Ors. reported in 1998(8) SCC 1.

(16) Modern Steel Industries v. State of U.P & Ors. reported in 2001(10) SCC 491.

(17) Harbanslal Sahnia & Anr. v. Indian Coil Corporation Ltd. & Ors. reported in 2003(2)SCC 107.

(18) Radhapada Jana v. Jnanendra Nath Bera & Anr. reported in 1978 C.W.N 379.

(19) Jnanendra Nath Bose v. Sushil Kumar Safui & Anr. reported in 80 C.W.N 250.

(20) Sree Balaji Nagar Residential Association v. State of Tamil Nadu & Ors. reported in 2015 (3) SCC 353.

(21) Institute of Chartered Accountants of India v. L.K Ratna & Ors. reported in 1986(4) SCC 537.

(22) Golam Mustapha & Anr. v. The Board of Wakf, West Bengal reported in 2016(3) CLJ (CAL) 106.

(23)Malay Kumar Bera v. Rabindra Nath Bera reported 1977(1) CLJ 92.

(24) Government of Andhra Pradesh & Ors. v. P. Laxmi Devi (SMT) reported in 2008 (4) SCC 720.

(25) State of Bihar v. Yogendra Singh Col. (Retd.) & Ors. reported AIR 1982 SC882.

(26) M/S. M. Laxmi & Co., v. Dr. Anant R. Deshpande & Anr. reported in AIR 1973 SC 171.

16. Mr. Joydeep Kar learned Senior Advocate representing the opposite parties in his turn argues that the order under challenge having not been passed either by a Court or Tribunal, and the Board of Wakf being neither a Court or a Tribunal the application under Article 227 of the Constitution of India is not maintainable. Further submits that in the proceeding under Article 227 of the Constitution of India since the orders of the Wakf Board containing the charges under Section 64(1) (j) and (k), which are portions of the composite order dated 16.10.2008 have been challenged, the same is not maintainable in view of Section 83(2) of the Wakf Act 1995.

17. Mr. Kar also relying on the principles of the Nazir Ahmad''s Case submits that

had there been any grievance of the petitioner she should have taken the shelter of the Wakf Tribunal where she has already availed of the remedy by filing appeal challenging the other appellable orders under Clauses 64(1), (h) and (i) passed by the Wakf Board by the same order dated 16.10.2008 with the same and similar text of pleadings, except paragraph 73, which is made relevant for the purpose of this proceeding. Submits thereby, that any finding on merit, if it is at all entertained, since may influence or prejudice the proceedings of appeal pending before the Tribunal, the instant application should also be held as not maintainable.

18. Inviting attention of the Court to Section 83(2) of the Wakf Act, 1995 Mr. Kar further submits that the petitioner should not be allowed to maintain two forums at a time and when it is only the Board of Wakf, which is competent under Section 64(1) to pass order of removal from Mutawalliship and when the aggrieved person is at liberty to approach the Tribunal challenging any such order of removal prior to approaching the High Court the instant application is not maintainable.

19. Submits thereby, that instead of complying the order of Board, rather choosing an inapplicable forum before the High Court on preferring appeal before the statutory forum, and obtaining order of status quo till disposal of this application preventing the Board from taking over possession of the wakf property to assume its charge in terms of Section 65 of the Act, the effect of the order dated 16.10.2008 cannot be said to have been lost its force due to lapse of five years by this time.

20. Mr. Kar further submits that grant of adjournment of hearing is discretionary to the adjudicating authority and the date of hearing was fixed in presence of the petitioner's learned Advocate in the nature of peremptory. Therefore, the refusal of prayer adjournment, or the alleged non-consideration of the petitioner's reply to the show cause notice, or the alleged bias activity of Mr. Shirazi, or other grounds might be considered on merit by the Tribunal, for which the petitioner already has taken step by preferring appeal, but the same are not liable to be considered in this proceeding which has been initiated parallely with the same pleadings without any departure except in paragraph 73 of the application.

21. Mr. Kar relied on the following decisions:-

(i) Jaswant Sugar Mills Ltd. Meerut v. Lakshmi Chand & Ors. reported in AIR 1963 Supreme Court 677.

(ii) Jai Singh & Ors. v. Municipal Corporation of Delhi & Another (2010) 9 Supreme Court Cases 385.

(iii) Jacky v. Tiny alias Antony & Ors. reported in (2014) 6 Supreme Court Cases 508.

(iv) K. S. Rashid and Son v. Income Tax Investigation Commission and Ors. reported in AIR 1954 S.C. 207(Vol. 41, C.N. 46).

(v) State Wakf Board, Madras v. Abdul Azeez Sahib & Ors. reported in AIR 1968 Madras 79.

(vi) Board of Wakf, West Bengal & another v. Anis Fatma Begum & another reported in (2010) 14 Supreme Court Cases 588 = (2011) W.B.L.R. (S.C.) 308.

(vii) Musst. Hazera Khatoon & Anr. v. The State of West Bengal & Anr. reported in W.P. No. 6923 (W) of 2011.

(viii) Khoja Sunnat Jamat & Anr. v. Board of Waqf, West Bengal & Ors. reported in W. P. 1330 of 2015.

(ix) Commissioner of Income Tax v. Chhabil Das Agarwal, (2014) 1 Supreme Court Cases 603.

(x) Nivedita Sharma v. Cellular Operators Association of India & Ors., (2011)14 Supreme Court Cases 337.

(xi) Sameer Suresh Gupta v. Rahul Kumar Agarwal, (2013) 9 Supreme Court Cases 374.

(xii) T.P. Vishnu Kumar v. Canara Bank (2013) 10 Supreme Court Cases 652.

(xiii) W.P. No. 6923(w) of 2011 Mr. Summit Kr. Ray & Mr. Najeemuddin Mutsuddi v. Mr. Khwaja A. Rahaman.

22. Let me first set out the pre-amended Section 85 of the Wakf Act, 1995 as then it was:-

Bar of jurisdiction of civil courts- No suit or other legal proceeding shall lie in any civil court in respect of any dispute, question or other matter relating to any wakf, wakf property or other matter which is required by or under this Act to be determined by a Tribunal.

After amending Section 85 the words "relevant court "and any other authority" are added after "Civil Court". For legible appraisal let me set out also the amended Section 85 as is enforced w.e.f. 1.11.2013:-

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

23. Although in view of arrangement in the expressions of language in the amended Section 85 of the Act, the bar of jurisdiction of Civil Court has been extended covering also "revenue court and any other authority", but whether the "High Court" would come within such expression of "any other authority" or not, scope of debate may be there. However the arrangement in the expressions in maintaining down words hierarchy of the forums where bar jurisdiction would apply, are mentioned as follows i.e. "Civil Court", then "revenue court" and lastly "any other authority", where the "Civil Court" has headed the list of forums at

the top obviously is under control of the High Court, which i.e. the High Court may not be therefore indicative to remain at the bottom of such hierarchy of forums to face bar of Section 85 of the Act. However I do not incline to stretch discussion on it further as in the case on hand admittedly old Section 85 of the Waqf Act, 1995 (unamended) would apply, and arguments are not made at the Bar on the basis of amended Section 85 of the Wakf Act, 1995.

24. However, there cannot remain any second view that the power with jurisdiction vested by the Constitution of India to the High Court can be curtailed or taken away unless special provision, putting embargo, or otherwise, is made in the Constitution itself with regard to any matter like the provisions made in Article 323A and 323B of the Constitution. Therefore the High Court also in view of the judgment in the cases of Radhapada Jana (supra) and Jnanendra Nath Bose (supra) being not a Civil Court I hold that Section 85 of Waqf Act is not a bar to entertain a legal proceeding relating to wakf, by the High Court, if it is found otherwise maintainable in law during discussion hereafter. Therefore, the portion from the decision reported in 44 CWN 709 at page 716, as referred to, becomes redundant to discuss elaborately where it was held, "It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

25. I accept also the argument of Mr. Mukherjee on the proposition to construe the meaning as to what "Civil Courts" are meant thereby. The relevant portion of paragraph 14 from the case of Jnanendra Nath Bose & Ors. (supra) may give clear understanding as to what are the Civil Courts and why the High Court is not a Civil Court, which is set out.:-

Paragraph 14:- It is common in this Province to refer to Civil Courts as distinct from the High Court. Thus, there are "Civil Court" holidays quite distinct from "High Court" holidays. Clause 16 of the Letters Patent of 1865 provides that:

The High Court shall be a Court of Appeal from the Civil Courts (capitals) of the Bengal Division of the Presidency of Fort William and from all other Courts subject to its superintendence.

That clearly recognises Civil Courts as a class of Courts of Civil jurisdiction separate from and subordinate to, the High Court. The Bengal, Agra and Assam Civil Courts Act, 1887, which repealed the Bengal Civil Courts Act, 1861 provides in Section 3 that:

There shall be the following classes of Civil Courts under this Act: (1) the Court of the District Judge; (2) the Court of the Additional District Judge; (3) the Court of Subordinate Judge; and (4) the Court of the Munsif.

26. The High Court also in the case of Radhapada Jana (supra) relying on the judgment of the case of Jnanendra Nath Bose & Ors. (supra) laid down the law by holding, "Relying on this Bench decision I have no hesitation to say that the Civil Court does not include the High Court....."

Therefore, Section 85 of the Wakf Act, 1995 is held to be not a bar for the High Court to attend any grievance of any aggrieved person relating to wakf property, provided it is maintainable within the scope of Article 227 of the Constitution of India.

27. However, through umpty number of judicial pronouncements the scope of exercising jurisdiction by the High Court under Article 227 of the Constitution of India has been established. Amongst the judgment cited at the Bar some relevant parts from paragraph 13 of the judgment in the case of Jacky (supra) reported in (2014) 6 Supreme Court Cases 508 where also a passage from the case of Jai Singh v. MCD reported in (2010) 9 Supreme Court Cases 385 was taken into account is set out to ventilate once again the unfettered constitutional jurisdiction of the High Court for interfering with the matter to examine whether the decision making process is done in the manner it is to be done:-

"Undoubtedly the High Court, under this article, has the jurisdiction to ensure that all subordinate courts as well as statutory or quasi-judicial tribunals, exercise the powers vested in them, within the bounds of their authority. The High Court has the power and the jurisdiction to ensure that they act in accordance with the well-established principles of law. The High Court is vested with the powers of superintendence and/or judicial revision, even in matters where no revision or appeal lies to the High Court. The jurisdiction under this article is, in some ways, wider than the power and jurisdiction under Article 226 of the Constitution of India. It is, however, well to remember the well-known adage that greater the power, greater the care and caution in exercise thereof. The High Court is, therefore, expected to exercise such wide powers with great care, caution and circumspection. The exercise of jurisdiction must be within the well-recognised constraints. It cannot be exercised like a "bull in a china shop", to correct all errors of judgment of a court, or tribunal, acting within the limits of its jurisdiction. This correctional jurisdiction can be exercised in cases where orders have been passed in grave dereliction of duty or in flagrant abuse of fundamental principles of law or justice."

28. In exercise of such an unfettered power of superintendence this Court therefore requires to examine the subject dispute "within the wellrecognised constraints" provided, there is departure at arriving at the decision making process in violation of the principle as held in the judgment of Nazir Ahmad v. King Emperor (supra), which still holds the field to remember and remind always that, "the rule which applies is a different, and not less well recognised rule, namely, that where a power is given to do a certain thing in a certain way, the thing must be done in that way, or, not at all". Article 227 of the Constitution has empowered this Court with the power of superintendence over, "all Courts and

Tribunals within its territorial jurisdiction, meaning thereby, order/orders of "all Courts and Tribunals" are subject to superintendence of this Court if there is departure from the decision making process, and for other legal reason, provided there is no efficacious remedy against any such order/orders of the "Courts or Tribunals".

29. In view of arguments, made at the Bar it is to be answered, whether the order under challenge under Section 64(1) (j) & (k) passed by the Wakf Board can be said to be an order of a Tribunal or not. I do incline here to cite some relevant portions, as referred to, from the Judgment of the case of *Kihota Hollohon v. Zachilhu* (supra) *M/s. Upper India Publishing House Pvt. Ltd.* (supra) and *All Party Hill Leaders Conference Shillong* (supra) upon which Mr. Mukherjee has relied to submit that the order under challenge passed by the Board of Wakf is said to have been passed by an authority in the nature of a Tribunal.

(a) *Khiota Hollohon v. Zachilhu*:-

Paragraph 40:- Where there is a lis an affirmation by one party and denial by another ? and the dispute necessarily involves a decision on the rights and obligations of the parties to it and the authority is called upon to decide it, there is an exercise of judicial power. That authority is called a Tribunal, if it does not have all the trappings of a Court.

Paragraph 41:- If the adjudicatory authority is a tribunal, as indeed we have held it to be, why, then, should its scope be so limited? The finality clause in paragraph 6 does not completely exclude the jurisdiction of the Courts under Articles 136, 226 and 227 of the Constitution. But it does have the effect of limiting the scope of the jurisdiction. The principle that is applied by the Courts is that in spite of a finality clause it is open to the Court to examine whether the action of the authority under challenge is ultra vires the powers conferred on the said authority. Such an action can be ultra vires for the reason that it is in contravention of a mandatory provision of the law conferring on the authority the power to take such an action. It will also be ultra vires the powers conferred on the authority if it is vitiated by mala fides or is colourable exercise of power based on extraneous and irrelevant considerations.

(b) In the case of *M/s. Upper India Publishing House Pvt. Ltd., Lucknow v. Commissioner of Income-tax, Lucknow* (supra) it also appears that although the settlement Commission was not in the category of Tribunals but taking note of the act and action held by the Settlement Commission in that case the Supreme Court held those acts to have been done by an authority in the nature of tribunal. The relevant portions from paragraphs 47 and 49 are set out:-

Paragraph 47:- The short question, then, is whether the Settlement Commission cannot come within the category of "Tribunals". To clinch the issue, Section 245L declares all proceedings before the Settlement Commission to be judicial proceedings. We have hardly any doubt that it is a tribunal. Its powers are considerable; its determination affects the rights of parties; its obligations are

quasi-judicial; the orders it makes at every stage have tremendous impact on the rights and liabilities of parties. When a body is created by statute and clothed with authority to determine rights and duties of parties and to impose pains and penalties on them it satisfies the test laid down in Associated Cement Co. Case (1965) 2 SCR 366.....The main and basic test, however, is whether the adjudicating power which a particular authority is empowered to exercise, has been conferred on it by a statute and can be described as a part of the State's inherent power exercised in discharging its judicial function."

Paragraph 49:- "The Settlement Commission exercises many powers which affect, for good or otherwise, the rights of the parties before it and vests in it powers to grant immunity from prosecution and penalty, to investigate into many matters and to enjoy conclusiveness regarding its orders or settlement. In short, Settlement Commissions are Tribunals."

(c) In the case of All Party Hill Leaders" Conference, Shillong v. Captain W.W. Sangma and Ors. (supra) question arose whether the Election Commission would come within the meaning of "Tribunal or not" for maintainability of an appeal before the Supreme Court under Article 136 of the Constitution of India. Answer to such query has been laid down in Paragraphs 42 and 43 of said judgment which is set out hereunder:-

Paragraph 42:- Thus the position that emerges from the above discussion is that the Commission is created under the Constitution and is invested under the law with not only administrative powers but also with certain judicial power of the State, however fractional it may be. The Commission exclusively resolves disputes, inter alia, between rival parties with regard to claims for being a recognised political party for the purpose of the electoral symbol.

Paragraph 43:- We are, therefore, clearly of opinion that the Commission fulfils the essential tests of a tribunal and falls squarely within the ambit of Article 136(1) of the Constitution. The preliminary objection is, therefore, overruled.

30. Mr. Mukherjee, aided with the aforesaid citations also refers to Article 136 of the Constitution of India to impress upon that even if a party is not vested with statutory right to approach the Court to exercise Court's unfettered discretionary power, nonetheless, the Court is not powerless to interfere to eradicate injustice. Article 136 of the Constitution has vested therefore to the Supreme Court with the extra-ordinary jurisdiction in granting "special leave" where there is also question of law involving public importance or existence of some decision made by any Court or Tribunal which shocks the conscience of the Court.

31. As it appears, both the Articles 136 and 227 of the Constitution of India, except barring clauses, are invocable virtually in any case to interfere with the order made by any Court or tribunal, and the Supreme Court where in its discretion may grant special leave. From the judgment in the case of Jaswant Sugar Mills Ltd. v. Lakshmi Chand and Others (supra) it appears that the Regional Conciliation Officer exercising authority under Clause 29 of the U.P.

Governor under Sections 3 and 8 of the U.P. Industrial Disputes Act taking note of investigation report, suggesting dismissal for guilt of all the workmen for causing "sabotage and slow-down strike" granted permission for dismissal of only eleven workers, since rest fifty two were mere "passive participants". Against said order of the conciliation officer the company preferred appeal before Labour Appellate Tribunal, Lucknow. The Labour Appellate Tribunal rejected said appeal of the Company on the ground that the order under challenge passed by the conciliation officer is neither of a Court nor of a tribunal. Point arose before the Full Bench comprising of five judges headed by the then Hon"ble Chief Justice of India whether act and action of said Reconciliation Officer was of an authority in the nature of Tribunal or not?, and what are the criterias to accept an authority to have been acted as Tribunal?

32. In the case in hand the Board of Wakf with authority under Section 64(1) passed the impugned resolution dated 16.10.2008, penultimate portions from which are set out:-

"From the facts and circumstances stated as above, the Hon"ble Board Members are convinced that the managing Mutawalli of the Waqf Estate of Mirza Ali Akbar, (E. C. No. 13853), Mrs. Farkhondeh Khanum lost her all legal and moral competence to continue as the Mutawallia of the said wakf Estate for her gross misconduct illegalities and the violation of the specific mandates of the Waqf Deed and her mother and sister taking no interest in the said Waqf Estate for last 20 (twenty) years and are not being the Indian Citizens and residing respectively at U.K. and U.S.A., cannot also be entrusted with the managements of the instant valuable income generating waqf estate as its Mutawallis.

Hence, it is unanimously resolved that the managing Mutawallia Mrs. Farkhondeh Khanum of Mirza Ali Akbar Wakf Estate under E.C. No. 13853 and her mother Mrs. Narguess Khanum and her sister Mrs. Rokhshandeh Khanum are removed from the post of Mutawalliship of the Waqf Estate under Section 64 of the Waqf Act, 1995 and the Board of Wakfs, West Bengal take the said Wakf Estate under its Direct Management under Section 65(i) of the said Wakf Act."

33. I find that the parameters of an authority to become a Tribunal must have the character of a judicial adjudication. The acts of the Board in the case in hand, exercising authority to invite show cause notice receipt of the same, casting obligation to give opportunity of hearing and thereafter passing of impugned resolution affecting rights of the petitioner, her mother and sister, whether do come within said parameters? Some relevant portions from the case of Jaswant Sugar Mills Ltd. Meerut v. Lakshmi Chand and Others (supra) may indicate its answer. Paragraphs 11, 15, 18 & 19 therefrom are set out:-

Paragraph 11 :- Question whether a decision is judicial or is purely administrative, often arises when jurisdiction of the superior courts to issue writs of certiorari is invoked. Often the line of distinction between decisions judicial and administrative is thin: but the principles for ascertaining the true character

of the decisions are well-settled. A judicial decision is not always the act of a judge or a tribunal invested with power to determine questions of law or fact: it must however be the act of a body or authority invested by law with authority to determine questions or disputes affecting the rights of citizens and under a duty to act judicially. A judicial decision always postulates the existence of a duty laid upon the authority to act judicially. Administrative authorities are often invested with authority or power to determine questions, which affect the rights of citizens. The authority may have to invite objections to the course of action proposed by him, he may be under a duty to hear the objects and his decision may seriously affect the rights of citizens but required to act judicially, his decision will be executive or administrative. Legal authority to determine questions affecting the rights of citizens, does not make the determination judicial it is the duty to act judicially which invests it with that character. What distinguishes an act judicial from administrative is therefore the duty imposed upon the authority to act judicially. Mukherjea J. In the Province of Bombay v. K. S. Advani, 1950 SCR 621 : (AIR 1950 SC 222) observed at p. 670 (of SCR) : (at pp. 239- 240 of AIR) "there cannot indeed be a judicial act, which does not create or impose obligations" but an act, is not necessarily judicial because if affects the rights of subjects. Every judicial act presupposes the application of judicial process. There is well marked distinction between forming a personal or private opinion about a matter, and determining it judicially. In the performance of an executive act, the authority has certainly to apply his mind to the materials before him; but the opinion he forms is a purely subjective matter which depends entirely upon this state of mind. It is of course necessary that he must act in good faith and if it is established that he was not influenced by any extraneous consideration, there is nothing further to be said about it. In a judicial proceeding, on the other hand the process or method of application is different. "The judicial process involves the application of a body of rules or principles by the technique of a particular psychological method", vide Robson's Justice and Administrative Law p. 33.

Paragraph 15 :- But every decision or order by an authority under a duty to act judicially is not subject to appeal to this Court. Under Article 136, an appeal lies to this Court from adjudications of courts and tribunals only. Adjudication of a court or tribunal must doubtless be judicial; but every authority which by its constitution or authority specially conferred upon it is required to act judicially, is not necessarily a tribunal for the purpose of Article 136. A tribunal, adjudication whereof is subject to appeal, must beside being under a duty to act judicially, be a body invested with the judicial power of the State.

Paragraph 18 :- The essential characteristics of a "tribunal" within the meaning of Article 136 were examined by Mahajan J., in the Bharat Bank Ltd. v. Employees of Bharat Bank Ltd., 1950 SCR 459: (AIR 1950 SC 188) and it was observed that, "tribunals which do not derive authority from the sovereign power cannot fall within the ambit of Article 136. The condition precedent for bringing a tribunal within the ambit of Article 136 is that it should be constituted by the

State. Again a tribunal would be outside the ambit of Article 136 if it is not invested with any part of the judicial functions of the State but discharges purely administrative or executive duties". This view was adopted by the Court in *Durga Shankar Mehta v. Raghuraj Singh*, 1955-1 SCR 267: (AIR 1945 SC 520), where Mukherjee J., observed:

"it is now well settled by the majority decision of this Court in the case of 1950 SCR 459: (AIR 1950 SC 188) that the expression "Tribunal" as used in Article 136 does not mean the same thing as "Court" but includes, within its ambit, all adjudicating bodies, provided they are constituted by the State and were invested with judicial as distinguished from purely administrative or executive functions."

Paragraph 19 :- The duty to act judicially imposed upon an authority by statute does not necessarily clothe the authority with the judicial power of the State. Even administrative or executive authorities are often by virtue of their constitution, required to act judicially in dealing with question affecting the rights of citizens. Boards of Revenue, Customs Authorities, Motor Vehicles Authorities, Income-tax and Sales-tax Officers are illustrations prima facie of such administrative authorities, who though under a duty to act judicially, either by the express provision of the statutes constituting them or by the rules framed thereunder or by the implication either of the statutes or the powers conferred upon them are still not delegates of the judicial power of the State. Their primary function is administrative and not judicial. In deciding whether an authority required to act judicially when dealing with matters affecting rights of citizens may be the principal incident is the investiture of the "trappings of a Court" ? such as authority to determine matters in cases initiated by parties, sitting in public, power to compel them on oath, duty to follow fundamental rules of evidence (though not the strict rules of the Evidence Act), provision for imposing sanctions by way of imprisonment, fine, damages or mandatory or prohibitory orders to enforce obedience to their commands.

34. Therefore I find that, there must be "trappings of a Court", if, any authority is to be captioned as a Tribunal. A decision of such a Tribunal is final and binding upon the parties, if it is not varied, modified or set aside through the available appellate or higher forum. Under the Wakf Act 1995, which has been amended from time to time, the Board of Wakf virtually has been provided with so many managerial powers with authority to look after, for protection and betterment of the Wakf property in the State, and even in necessity the Board of Wakf can sue or proceed with criminal complaint against the wrongdoer in appropriate Court. Such act and activity of the Board of Wakf can be tested before the Tribunal as defined within Section 3(q) of the Act notified under Section 83(1), Constitution of which shall be as per Section 83(4) of the Act. Whereas the composition of a Board of Wakf in the State shall be in accordance with Section 14 of the Act. Therefore I hold that there cannot be any Tribunal within a Tribunal within the scheme of the Wakf Act 1995, when the statute did not so give birth to, or, did

never sanction existence of any other authority as a Tribunal in terms of any of its activity other than the authority as defined only under Section 3(q) and constituted under Section 83(1), for the purposes of the Act. Therefore the portion of paragraph 19 as referred to from the case of P.K. Mandal v. Commissioner Krishnagore Municipality (supra) is not applicable in the case. Rather the principle laid down in paragraph 12 in the case of Scotts (p) Ltd. and others (supra) supports the above contention that the Board of Wakf being a statutory body has no power to do anything unless any power, so to be exercised, is conferred by the statute. Section 64(1) of the Act is one likewise authority, though not a Tribunal, vested jurisdiction to the Board of Wakf for removal of Mutawalli from the office relating to Wakf property on either of its Clauses(a) to (k). This removal, as done allegedly in this case following Section 64(3) of the Act, is subject to the provisions laid down in Section 64 (8) read with Section 65 (1) of the Act. Therefore the measure taken under Section 64 (1) by the Board of Wakf is not punitive for all time to come, rather a corrective measure for a limited period, since the Mutawalli, so ordered to be removed, is not barred for reappointment as Mutawalli relating to the Wakf property, provided said disqualified Mutawalli intends reappointment, and is found eligible by the Board after a period of five years of removal from the office of Mutawalliship. Amongst the Clauses (h), (i), (j) and (k) of Section 64(1) of the Act the Clause (h) relates to arrears in respect of any sum held due by the mutawalli to the Wakf, and Clause (i) relates to neglect etc. "in respect of any money or other wakf property", whereas, the Clauses (j) and (k) relate to other flaws if committed by the Mutawalli. Therefore the petitioner having preferred appeal already before the efficacious authority, i.e. the Tribunal, challenging the order of the Board passed under Clauses (h) and (i), and, Clauses (j) and (k) as challenged before this Court, being related to malafide conduct of the Mutawalli the cases of Union of India v. Raman Iron Foundry (supra), Sri Surendra Kumar Ray Chowdhury v. The Collector of Calcutta & Ors (supra) and State of Karnataka v. Shree Rameshawara Rice Mills Tirthahali (supra) are not applicable in this case, since this Court is not hearing the appeal.

35. Mr. Mukherjee argues that the resolution bearing the directions of the Board dated 16.10.2008 has lost its force since the Board cannot assume direct management of the Wakf for a period not exceeding five years in aggregate, and even the order of status quo dated 19.05.2009 does not stop running of said period of five years. Though attempt was made during arguments showing taking over possession of the Wakf property by the Board of Wakf, but I failed to take cognizance of the same since the document was not placed with proper application to the knowledge of the respondents or giving opportunity of its rebuttal. Be that as it may, as a resultant effect of the order under challenge, unless set aside modified or made otherwise, charge of the subject Wakf cannot remain in limbo. Expression of Section 65(1) of the Act indicates that in either of the given eventualities the Board may assume direct management of the Wakf for such period or period not exceeding five years in the aggregate. There is

nothing on record as to whether the petitioner had applied or not before the Board for reappointment as Mutawalli under Section 64(8) of the Act. Section 63 of the Act also has empowered the Wakf Board to appoint Mutawalli in either of the eventualities mentioned therein. The purpose is one and only, so that the office of the Mutawalli of a Wakf does not lie vacant in any situation. Therefore cumulative effect on harmonious reading of Sections 65(1), 64(8) and 63 of the Wakf Act has misplaced the argument that order under challenge has lost its force due to lapse of five years, as is argued on the basis of the decision reported in (2015) 3 Supreme Court Cases 353 which was a case relating to payment of award under Land Acquisition Act, which has no semblance with the respective provisions made under Wakf Act 1995.

36. The judgment in the case of All Party Hill Leaders" Conference Shilong v. Captain W. A. Sangma & Ors. (supra) relied on by Mr. Mukherjee is delivered by three Judges Bench has also taken note of the judgment of aforesaid five Judges Constitutional Bench delivered in Jaswant Sugar Mills Ltd. Meerut (supra). Paragraphs 24 & 25 from the case of All Party Hill Leaders" Conference Shillong are accordingly set out:-

Paragraph 24:- The basic principle laid down in the Bharat Bank (supra) has not been departed from by this Court and has been reiterated in several later decisions (see J.K. Iron and Steel Co. Ltd., Kanpur v. The Iron and Steel Mazdoor Union, Kanpur : M/s. Harinagar Sugar Mills Ltd. v. Shyam Sundar Jhunjhunwala" : Jaswant Sugar Mills Ltd., Meerut v. Lakshmidhanda; The Engineering Mazdoor Sabha v. The Hind Cycles Ltd., Bombay ; and Associated Cement Companies Ltd. v. P.N. Sharma).

Paragraph 25:- From a conspectus of the above decisions it will be seen that several tests have been laid down by this Court to determine whether a particular body or authority is a tribunal within the ambit of Article 136. The tests are not exhaustive in all cases. It is also well-settled that all the tests laid down may not be present in a given case. While some tests may be present others may be lacking. It is, however, absolutely necessary that the authority in order to come within the ambit of Article 136(1) as tribunal must be constituted by the State and invested with unfailing one while some of the other tests may or may not be present at the same time.

In the case of All Party Hill Leaders" Conference Shilong (supra) as it reveals from paragraph 42, it has been held that the " Election Commission" is created under the Constitution vested with not only administrative power, but also with certain judicial power of the State, however fraction it may be, and, since the Commission exclusively resolves disputes, inter alia, between rival parties with regard to claims for being a recognised political party for the purpose of the electoral symbol, the Election Commission is held as Tribunal as it has fulfilled its essential tests. In the case in hand the Board of Wakf considers whether removal of Mutawalli to be necessitated within either of the Clauses under Section 64(1) of the Wakf Act following provision laid down under Section 64(3) of the Act.

Therefore question of resolving disputes between rival parties is absent in Section 64(1) of the Act since there is no "trappings of a Court".

37. Further the case of *Kihota Hollohon v. Mr. Zachillu & Ors.* (supra) is of no help to the petitioner, since in that cited case the power to resolve disputes within Lok Sabha is a judicial power and the Speaker/Chairman while exercising powers and discharging function under the Tenth Schedule as Tribunal adjudicating rights and obligations their decision in the capacity are amenable to judicial review (quoted from paragraph 42).

38. To justify the impugned resolution of the Wakf Board allegedly as an order of a Tribunal, Mr. Mukherjee relied also on the judgment of Division Bench of this Court delivered in the case of *Ziaul Haque & Ors. v. Mahammadul Haque & Ors.* reported in AIR 1954 Calcutta 149(supra). At that relevant time there was Commissioner of Wakfs and there was no existence of Tribunal to deal with any dispute of wakf property. In the cited case the Commissioner of Wakf selecting only one of the six joint Mutawallis to be the managing Mutawalli excluded others and that was challenged under Article 227 of the Constitution. Point of maintainability was raised and it was answered in the following manner in paragraph 5.

Paragraph 5:- Mr. Nausher Ali, appearing for the Commissioner of Wakfs has raised a preliminary point to the effect that the order made by the Commissioner in the present case is not subject to the superintendence of this Court under Article 227 of the Constitution. We cannot accept this contention as sound. The procedure followed by the Commissioner indicated that heas a tribunal; on 3.12.48 he issued a notice upon the mutawallis to show cause why the machinery of law should not be set in motion against them on their failure to comply with certain requisitions made by him. Cause was shown by two applications dated 1.2.49 and 19.10.49. Thereafter the Commissioner heard lawyers who appeared for Opposite party No. 1 on 29.6.53 and passed his order on 11.7.53 after considering the materials which were placed before him. Moreover the rights with which the Commissioner was dealing are essential ingredients of mutawalliship. The right to manage the Waqf is in our opinion the very essence of the right of a mutawalli. Therefore we hold that the Commissioner in the present case acted as a tribunal both as regard the procedure followed and the subjectmatter of the dispute before him.

By the aforesaid observation the Division Bench of this Court observing the procedure followed by the Commissioner though in that peculiar fact of the case was pleased to caption said Act as of a Tribunal, but in view of the decision of the Five Judges Constitutional Bench (AIR 1963 Supreme Court 677, supra) I distinguished the same as no longer a good law also for some other reasons mentioned hereunder:-

a. The then Section 27 deals with the powers and duties of the Commissioner and the Board. Sub-section (1) of Section 27 would deal with the functions of the

Commissioner and sub-section (2) with the function of the Board. Clause (c) of sub-section (1) had authorised the Commissioner to give "directions for the proper administration of Wakfs" and clause (e) of sub-section (1) empowered him generally to do all such acts as would be necessary for the due control, maintenance and administration of wakfs.

b. The expression made therein did not include a judicial determination of the rights of Mutawallis to take part in the management of the estate but included directions as to submission of accounts, payment of debts and allowances and the like.

c. By the order challenged therein, the Commissioner of Wakfs had selected one of the six joint mutawallis to be the managing mutawalli in exclusion of others. The effect of this selection was to deprive the other mutawallis of their right to participate in the day to day administration of the wakf and to vest solely and exclusively in one.

d. The Bench was very much alive to the necessity of taking effective steps for the proper administration of the Wakf and appreciated thereby the then anxiety of the Commissioner of Wakfs to act for the best interests of the estate, but held ultimately that in making the order challenged the Commissioner of Wakf had exceeded the powers conferred on him by Section 27(1) of the Bengal Wakf Act.

e. Bengal Wakf Act (13 of 1934) was prevalent empowering the Commissioner of Wakf to act at that time while there was no separate Forum like Tribunal, which has come into existence with its structural unit only after coming of the new Wakf Act, 1995 into force w.e.f. 01.01.1996.

39. In view of above, the judgment of Five Judges Constitutional Bench reported in AIR 1963 Supreme Court 677 (Supra) which has been considered again in (1977)4 Supreme Court Cases 161 relating to the case of All Party Leaders' Conference Shillong (supra), the Board of Wakf, acting within Section 64(1) of the Wakf Act 1995, is in want of "trappings of a Court". Therefore, Article 227 of the Constitution of India having no provision to grant any special leave likewise Article 136 of the Constitution of India, this Court cannot entertain the impugned resolution of the Board of Wakf within the scope of Article 227 of the Constitution of India since the impugned resolution was not passed either by a Court or a Tribunal. On the contrary, under the Wakf Act, 1995 there is Tribunal within the meaning of Section 3(q) where even the Wakf Board also can sue or can be sued. Section 83(4) of the Act provides, "Every Tribunal shall consist of one person who shall be a member of the State Judicial Service, holding a rank, not below that of a District, Sessions or Civil Judge, class-I....." .

Therefore, under Wakf Act unless there is any other authority to act as Tribunal within the meaning of Section 3(q) constituted by the State Government under Section 83(1) of the Act, the Board of Wakf in action of either of the Clauses under Section 64(1) of the Act cannot be a separate, or any other Tribunal, since there is no judicial adjudication through "trappings of a Court". In the case in

hand as such there was no proceeding pending between two parties initiated at the behest of a third party for its adjudication. Rather by the meeting of the Wakf Board following the practise and procedure laid down under Section 64(3) of the Act resolved the item No. 12 of the agendas on the basis of available records placed by the office by fixing date for opportunity of hearing to the petitioner. Therefore the case of Whirlpool Corporation v. Register of Trade Marks, Mumbai (supra) for the reasons, as already discussed above, is distinguished not to designate the impugned act and action of the Board as of a Tribunal to invoke scope of Article 227 of the Constitution of India.

40. In the sequence it is pertinent to mention that there is a gulf of difference between maintainability and entertainability of any subject in dispute. Any subject-matter, in view of its features, may be entertain able, but for other legal reasons may not be maintainable. In other way, if at the root any subject-matter is found not maintainable then question of its anymore entertainability does not arise.

However, though in view of above discussions the impugned resolution is now held by me to be not entertain able within the scope of Article 227 of the Constitution, let me now analyse the arguments made at the bar on maintainability of the application. Mr. Mukherjee argues that without complying Section 33 of the Act the impugned resolution to invoke Clauses (j) & (k) is without jurisdiction. Whereas, Mr. Kar supporting the Act of the Board, in the manner it was done, replies that efficacious remedy being available in the Act the application is not maintainable. To apprise the arguments and to answer to the Lis, let me first traverse within the provisions of the Act by which the Chief Executive Officer, Tribunal, Board of Wakf has been created by the Wakf Act, 1995 (by repealing previous provisions) specifying duties and powers vested respectively.

41. Under Section 3(d) of the Waqf Act, 1995, "Chief Executive Officer means the Chief Executive Officer appointed under sub-section (1) of Section 23". Such appointment however is made by the State Government, but from the panel of two names suggested by the Board in the process as indicated under Section 23(1) of the Act. According to Section 23(3), such a Chief Executive Officer, "shall be ex officio secretary of the Board and shall be under the Administrative Control of the Board".

42. I find from the resolution under challenge that, with reference to E.C. No. 13853 item No. 12 of the agenda, "to consider the prayer of removal of Mutawallia in respect of Ali Akbar W/E", was resolved in the Board's meeting recording some punitive decisions towards the action to be taken against the petitioner her mother and sister, and by giving certain directions upon the Chief Executive Officer of the Board, which is set out hereunder:-

"Hence, it is unanimously resolved that the managing Mutawallia Mrs. Farkhondeh Khanum of Mirza Ali Akbar Wakf Estate under E.C. No. 13853 and

her mother Mrs. Narguess Khanum and her sister Mrs. Rokhshandeh Khanum are removed from the post of Mutawalliship of the Waqf Estate under Section 64 of the Waqf Act, 1995 and the Board of Wakfs, West Bengal take the said Wakf Estate under its Direct Management under Section 65(i) of the said Wakf Act."

Thus the erstwhile Mutawalli of the Wakf Estate is directed to deposit Rs. 69,38,566/- (Rupees sixty nine lakhs thirty eight thousand five hundred and sixty six) only plus the Board's contribution of Rs, 6,70,880/- (Rupees six lakhs seventy thousand eight hundred eighty) after deducting from the amount she has already paid to the Board as its Wakf Contribution within a period of one month from the date of receipt of this order and in the event of her failure to comply with the same the Board would be constrained to initiate both Civil and Criminal Proceedings against her for the realization of the said properties of the Mirza Ali Akbar Wakf Estate (E.C. No. 13853) to the CEO, Board of Wakfs, West Bengal who be authorised in this behalf U/S 64(7) of the Wakf Act 1955.

The Chief Executive Officer of the Board of Wakfs, West Bengal to intimate all concerned persons about the instant decision of the Board of Wakfs, West Bengal in respect of the aforesaid Wakf Estate and its properties and the concerned Police Station be also informed so that the erstwhile Mutawalli can not destroy or damage the property of the wakf estate from now on and henceforth the Board of Wakfs, West Bengal would take all necessary steps for the realization of all the arrears and the current income of the Wakf Estate.

43. Either of the steps under Section 64(1) of the act, of course, is not actionable unless there is an inquiry as laid down under Section 64(3) of the Waqf Act, 1955. It is pertinent to mention that the Waqf Act, 1995 has come into force on an from January 1, 1996 with the repealing provision under Section 112 by repealing the earlier Waqf Act, 1954, with the only saving Clause laid down under Section 112(2) of the Waqf Act, 1995 which is set out hereunder:-

Section 112(2) :- "Notwithstanding such repeal, anything done or any action taken under the said Acts shall be deemed to have been done or taken under the corresponding provisions of this Act."

44. Now I find from such new Act that Section 64 has empowered the Board to remove a Mutawalli from the office of the Waqf if such Mutawalli is found disqualified within either of the Clauses (a) to (k) of Section 64(1), out of which under Section 64(4) of the Act the Clauses (c) to (i) only are appealable and not the rest. But action under either of the clauses (a) to (k) by the Board for removal of Mutawallis is subject to the inquiry under Section 64(3) of the Act in the prescribed manner, followed by the decision of a majority of Board members not less than two-third of it.

45. The question now arises what would be the "Prescribed Manner". The Central Act itself though did not prescribe such rules, but by enacting Section 109 therein empowered the State Government to make rules to carry out the purposes of this Act, other than those of Chapter-III. It appears thereby that the

State Government, in exercise of the power conferred by Section 109 of the Waqf Act, 1995, framed the West Bengal Waqf Rules 2001 making it enforceable by publishing in the Kolkata Gazette dated June 20, 2001. I do now incline to set out the Rule 17 of West Bengal Waqf Rules 2001 which has indicated the prescribed manner of inquiry:-

Manner of inquiry related to removal of mutawalli:- For the purpose of sub-section (3) of Section 64 the Board shall cause an inquiry to be made by a member, or an officer, or the Board duly authorised by it. The member or the officer, as the case may be, making the inquiry shall give the mutawalli an opportunity of being heard after having at least seven days notice to him.

Mr. Mukherjee basing upon a few lines from Garner's Administrative Law and also S. A. DE Smith constitutional and administrative law submits that the jurisdiction of the Superior Court is not readily and lightly to be excluded by phrases of the kind mentioned in regulation in question. Since the Waqf Act with its rules are one kind of delegated legislation Mr. Mukherjee submits that, "one would not expect to see delegated legislation afforded special statutory protection save in highly exceptional circumstances (3rd Edition at Page 341)", and about jurisdiction of this Court Mr. Mukherjee cites also a few lines from Garner's Administrative Law 2nd Edition at page 141 which is set out hereunder:-

"The Privy Council considered that the regulation in question was clearly related to the purposes specified, and was therefore not ultra vires, but the implication followed that review by the courts was not excluded, in spite of the apparent wide terms of the statutory power, so as to prevent them from examining a particular exercise of that power and ensuring that it fell within the purposes of the enabling statute.

The jurisdiction of the superior courts is therefore not readily or lightly to be excluded by phrases of the kind here mentioned, and the courts will be zealous to exercise their powers of judicial review. Where, however, Parliament has conferred an administrative discretion on a Minister or agency, it seems that the courts are almost equally ready to acknowledge themselves defeated, and to admit that they then have no review powers."

At the same breath it is cited, "The difficulty here is to recognise the cases in which the courts will say Parliament has conferred an unfettered discretion on the administrative agency, and to distinguish them from the cases where the agency will be expected to exercise its discretion in accordance with standards, prescribed in the statute or implied by the Court".

Therefore, the principle laid down in the case of Nazir Ahmed (supra) again comes into play. Had there been the proceedings in the manner it ought to have been done following the provisions of Act and rules, then, within the jurisdiction under Article 227 of the Constitution of India there would be nothing to interfere with the same, if subsequent forum is available to test it on merit, and if such forum available within the statute it is not exhausted, or alternatively, the

outcome of the proceedings does not come within the five exceptions as held in the case of Commissioner of Income Tax & Ors. v. Chhabil Dass Agarwal (supra), the High Court cannot invoke its jurisdiction under Article 227 of the Constitution of India.

46. I took note that the Fulltime Chief Executive Officer, so appointed under Section 23(1) of the Act shall remain under administrative control of the Board as its ex officio Secretary under Section 23(3) of the Act. But, unless provided anywhere in the Act to act in any independent jurisdiction, the Chief Executive Officer, even if wants to act within Section 33(1), he may so do it, but, "with the prior approval of the Board". Section 33(4) thereafter provides scope in favour of the Mutawallis or the person aggrieved to prefer "appeal" against the determination made under Section 33(3) of the Act by the Chief Executive Officer before the "Tribunal". Further, the legal step, if is to be taken by the Chief Executive Officer either under Section 34 or 35 of the Act, subject to order of the Tribunal, if any, he may have to proceed with it again "with the approval of the Board". Therefore I find that the "inquiry" to be held under Section 64(3) following the Rule 17 of the West Bengal Waqf Rules 2001 for the purpose of removal of Mutawallis under Section 64(1) under either of the Clauses (a) to (k) has no bearing, semblance or relevance with the "inspection" to be done by the Chief Executive Officer under Section 33 of the Act. As it has been quoted already, Rule 17 of the West Bengal Wakf Rules, 2001 provides "inquiry" with reference to Section 64(3) of the Act and not with reference to any "inspection" to be done by the Chief Executive Officer under Section 33 of the Act. The term "inquiry" relates to fact finding having both direct and indirect significance depending on the context. When the Statute says that "inquiry" is condition precedent to take any action under either of the Clauses of Section 64(1) of the Wakf Act then one cannot be allowed to substract said word "inquiry" therefrom by supplementing a new word like "inspection". To explicit myself more legibly, I hold that the term "inspection", to be conducted by the Chief Executive Officer under Section 33 of the Act is not sine qua non for passing resolution by the Board for removal of Mutawalliship under Section 64(1) of the Act. I find both the terms "inquiry" and "inspection" are meant for its applicability in two complete different fields, one having no relevance with the other.

47. To analyse further I find that Rule 17 (supra) provides that the "Board shall cause an inquiry", may be also by a member or officer, so authorised, after giving opportunity of being heard. Whereas, every action, to be desired under Section 33 of the Act, it is to be taken "with the prior approval of the Board", which relates to recovery of amount, assessment of the dues, or restoration of possession of any waqf property etc., but does not relate to removal of Mutawallis from his office. I find that any such order, if passed by the Chief Executive Officer under Section 33, itself is appealable before the Tribunal under Section 33(4) of the Act, whereas the action of the Board under Clauses (c) to (i) of Section 64 (1) are appealable under Section 64(4) of the Act, and, for the rest Clauses Section 83(2) of the Act may apply. Therefore, Rule 17 (supra) in no way

is repugnant to the Central Act.

48. On the other hand, the Chief Executive Officer enjoys also some exclusive power under Section 26 of the Act, which has not been clogged by any of the Rules 2001, and even the Chief Executive Officer is not bound to act or to implement a resolution of the Board in either of the eventualities as laid down under Section 26 of the Act which is set out: ?

Powers of Chief Executive Officer in respect of orders or resolutions of Board. ? where the Chief Executive Officer considers that an order or resolution passed by the Board-

(a) has not been passed in accordance with the law; or

(b) is in excess of or is an abuse of the powers conferred on the board by or under this Act or by any other law; or

(c) if implemented, is likely to-

(i) Cause financial loss to the Board or to the concerned (waqf) or to the (auqaf) generally; or

(ii) Led to a riot or breach of peace; or

(iii) Cause danger to human life, health or safety; or

(d) is not beneficial to the Board or to any (waqf) or to (aquaf) generally,"

Rather, in either of the eventualities the Chief Executive Officer may, if the circumstance so necessitates, "before implementing such order or resolution may place the matter before the Board for its reconsideration and, if such order or resolution is not confirmed by a majority of vote of the members present and voting after such reconsideration, can refer the matter to the State Government along with his objections to the order or resolution, and the decision of the State Government thereon shall be final."

49. So I find that being empowered by Section 26 of the Waqf Act, 1995 the Chief Executive Officer is entitled even to bypass the Waqf Tribunal and send his notes of objections, if any, against the Board's resolution directly to the State Government, where decision of the State Government is final, and, in the matter of taking such action, if so requires, he need not take any approval of the Board, though statuswise under Section 23(3) of the Act the Chief Executive Officer, "shall be under the administrative control of the Board". In the case in hand as I noticed, the Chief Executive Officer did not take any step against the impugned resolution dated 16.10.2008 of the Board of Waqf under Section 26 of the Act, rather has implemented the same on taking consequential steps. It is evident that the resolution of the Board of Waqf bearing the resolution of removal of Mutawalliship and other directions relating to the subject waqf were published in Kolkata Gazette dated February 6, 2009 in the name of the Chief Executive Officer of the Board of Waqf, which was also communicated by letter dated

February 23, 2009 addressed to the petitioner by the Chief Executive Officer of the Board of Waqf.

50. This is an established principle of law that a party is not entitled to argue beyond pleadings which would be followed by evidence. In challenging the impugned resolution dated 16.10.2008 the petitioner in the application under Article 227 of the Constitution of India has taken as many as 30 grounds. But any of those grounds does not contend that the impugned resolution was bad or was passed without authority since there was no order of the Chief Executive Officer under Section 33 of the Act. Mr. Mukherjee on the score relies on the judgment of the Single Bench of this Court presided by Mr. Justice Chittatosh Mookerjee then was, in the case of Malay Kumar Bera v. Rabindranath Bera reported in 1977(1) CLJ 92 (supra). The cited case relates to right of pre-emption, where within the peculiar fact and circumstances this Court taking suo motu cognizance issued rule asking the parties to show-cause why the appellate order of learned District Judge in Miscellaneous Appeal should not be set aside. In the case in hand at the very outset, as already held, entertainability of the impugned resolution within scope of Article 227 is found at stake, since the resolution is not accepted as an order passed either by a Court or a Tribunal. Further, upto now I did not find any procedural lapses in passing said resolution by the Board, for which any cognizance, far to speak of suo motu, requires to be taken. On the contrary, I find that Section 64(1) of the Act has given authoritative jurisdiction to the Board of Waqf to remove Mutawallis from the office on either of the grounds laid down therein, of course, after following the rules and the manner laid down under Section 64(3) of the Act. Thus I find existence of Section 64(1) and Section 33 with two separate identity in the Act, one being neither complementary, nor co-related to the other, rather both are found to act on different fields altogether independently.

51. Now I may look forward as to how far the scope of superintendence under Article 227 upon the impugned act of the Board of wakf may be applied, or, whether at all to be applied having regard to availability of any exceptional circumstance. The Supreme Court in the case of Commissioner of Income Tax & Ors. v. Chhabil Dass Agarwal reported in (2014) 1 Supreme Court Cases 603 (supra) like before has laid down the law in determining the constitutional remedy, though under Article 226 of the Constitution of India, the recognised exceptions are squarely applicable in exercising also the power of superintendence of the High Court under Article 227 of Constitution of India. Paragraph 15 from the case of Commissioner of Income Tax (supra) accordingly is set out:-

Paragraph 15:- Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has restored to invoke the provisions which are repealed, or when an order has been passed in

total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case, Titaghur Paper Mills case and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

52. Previous to this, amongst many others, in the case of Nivedita Sharma v. Cellular Operators Association of India & Ors. reported in (2011) 14 Supreme Court Cases 337, in determining maintainability of applications under Articles 226 and 227 of the Constitution of India the Supreme Court laid down the law from where I do incline to set out some portions from paragraph 12 and 13, which may be relevant for the purpose of this case:-

Paragraph 12:- "In Thansingh Nathmal v. Supdt. of Taxes this Court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed: (AIR p.1423, para7)

"7....The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."

Paragraph 13:- In Titaghor paper Mills Co. Ltd. v. State of Orissa this Court observed (SCC pp. 440-441, para 11)

"11....It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. In Wolverhampton New Waterworks Co. v. Hawkesford in the following passage: (ER P. 495)

"... There are three classes of cases in which a liability may be established founded upon a statute.... But there is a third class viz. Where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. ...The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

53. It is evident that assailing the resolution of the Board passed under Clauses (h) and (i) of Section 64(1) of the Act the petitioner has preferred appeal before the Waqf Tribunal, and with the identical pleadings except some changes in paragraph 73, the instant application under Article 227 of the Constitution of India, as shown by Mr. Kar, has been filed before this Court challenging the resolution passed by the Board covering Clauses (j) and (k) of Section 64(1) of the Wakf Act, 1995 on the plea that there is no appeal against those clauses. The order/resolution dated 16.10.2008, however, is the one and composite.

54. I find that the impugned resolution has been passed by the Board of waqf within its jurisdiction vested under Section 64(1) of the Act, and whether it is good, bad, indifferent in view of the facts and circumstances, available thereto, is now subject to appeal in respect the appealable clauses, for which the petitioner already has taken step before the Tribunal. It is obvious that this Court in exercising jurisdiction under Article 227 shall not examine the merit of the decision of the Board based on the facts, examined by the Board following the relevant Rule under the West Bengal Wakf Rules, 2001 which has also been implemented by the Chief Executive Officer instead of invoking the provisions vested on him under Section 26 of the Act. Alternatively, apart from other observations held so far, when the merit of the instant application does not fall under either of the exceptions laid down by the Supreme Court in the case of Commissioner of Income Tax (supra) , then Section 83(2) of the Waqf Act, 1995 is the answer against maintainability, or, otherwise, of the application. To elucidate the scope of Article 227 of the Constitution of India some relevant portions from the case of Sameer Suresh Gupta v. Rahul Kumar Agarwal (supra) where one paragraph from the case of Shalini Shyam Shetty v. Rajendar Sarkar Patil also quoted is set out:-

Paragraph 7:-

"(a) A petition under Article 226 of the Constitution is different from a petition under Article 227. The mode of exercise of power by the High Court under these two articles is also different.

(b) In any event, a petition under Article 227 cannot be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is substantially different from the history of conferment of the power of superintendence on the High Courts under Article 227

.....

(c) High Courts cannot, at the drop of a hat, in exercise of its power of superintendence under Article 227 of the Constitution, interfere with the orders of tribunals or courts inferior to it. Nor can it, in exercise of this power, act as a court of appeal over the orders of the court or tribunal subordinate to it. In cases where an alternative statutory mode of redressal, has been provided, that would also operate as a restrain on the exercise of this power by the High Court.

(d) The parameters of interference by High Courts in exercise of their power of superintendence have been repeatedly laid down by this Court. In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in *Waryam Singh* and the principles in *Waryam Singh* have been repeatedly followed by subsequent Constitution Benches and various other decisions of this Court.

(e) According to the ratio in *Waryam Singh*, followed in subsequent case, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and courts subordinate to it, "within the bounds of their authority."

(f) In order to ensure that law is followed by such tribunals and courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested them.

(g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of the tribunals and courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice has been flouted.

(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.

(i) The High Court's power of superintendence under Article 227 cannot be curtailed by any statute. It has been declared a part of the basic structure of the Constitution by the Constitution Bench of this Court in *L. Chandra Kumar v. Union of India* and therefore abridgment by a constitutional amendment is also very doubtful.

(j) It may be true that a statutory amendment of a rather cognate provision, like Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Article 227. At the same time, it must be remembered that such statutory amendment does not correspondingly expand the High Court's jurisdiction of superintendence under Article 227.

(k) The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised suo motu.

(l) On a proper appreciation of the wide and unfettered power of the High Court under Article 227, it transpires that the main object of this article is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.

(m) The object of superintendence, both administrative and judicial is to

maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. The power of interference under this article is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and courts subordinate to the High Court.

(n) This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in the administration of justice in the larger public interest whereas Article 226 is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.

(o) An improper and a frequent exercise of this power will be counterproductive and will divest this extraordinary power of its strength and vitality."

55. For discussing the issue on effect of not availing of efficacious statutory remedy by the petitioner let me now set out together Section 64(4) and Section 83(2) of the Waqf Act, 1995:-

Section 64(4):- "A mutawalli who is aggrieved by an order passed under any of the clauses (c) to (i) of sub-section (1), may, within one month from the date of the receipt by him of the order, appeal against the order to the Tribunal and the decision of the Tribunal on such appeal shall be final."

Section 83(2):- "Any mutawalli or person interested in a (waqf) of any other person aggrieved by an order made under this Act, or rules made thereunder, may make an application within the time specified in this Act or where no such time has been specified, within such time as may be prescribed, to the Tribunal for the determination of any dispute, question or other matter relating to the (waqf)."

The words "relating to" as those, relate to waqf, have great significance, as have been elucidated in AIR 1968 Madras 79 (supra) from which relevant part from paragraph 8 is set out:-

".....There is ample judicial authority for the view that such words as "relating to" or "in relation to" are words of comprehensiveness which might both have direct significance as well as an indirect significance depending on the context....."

56. Now by harmonious reading of the provisions of law dealt with hereinbefore I hold that the observations of the Supreme Court in the case of Board of Waqf, West Bengal and Another v. Anis Fatma are to be followed not in the manner of advisory nature but in mandatory nature, unless jurisdiction under Article 227 of the Constitution of India is invokable within either of the five exceptions, set out above. Otherwise there would be violation in the scheme of such special statute namely Wakf Act, 1995 brought anew by amendment after amendment by

deleting previous Wakf Act. Had there been no remedy in the Act for the aggrieved person, against the impugned orders, obviously the scope could have been otherwise. It is evident that the petitioner has already availed of remedy by preferring appeal against part of the resolution in question before the Tribunal where also she could have filed application under Section 83(2) of the Act against the rest clauses ventilating her grievance before the same authority. Paragraph 4 from the judgment delivered by four Judges' Bench presided by the then Hon'ble Chief Justice in the case of K.S. Rashid & Son v. Income Tax Investigation Commission & Ors. reported in AIR 1954 Supreme Court 207 is set out:-

For purposes of this case it is enough to state that the remedy provided for in Article 226 of the Constitution is a discretionary remedy and the High Court has always the discretion to refuse or grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. So far as the present case is concerned, it has been brought to our notice that the appellants before us have already availed themselves of the remedy provided for in section 8(5) of the Investigation Commission Act and that a reference has been made to the High Court of Allahabad in terms of that provision which is awaiting decision. In these circumstances, we think that it would not be proper to allow the appellants to invoke the discretionary jurisdiction under Article 226 of the Constitution at the present stage, and on this ground alone.

57. Therefore, the orders under Clauses (j) and (k) of Section 64(1) of the Act are not appealable under Section 64(4) of the Act. But when the petitioner already preferred appeal before the Waqf Tribunal challenging part of the order of the Board involving the Clauses (h) and (i) of Section 64(1) of the Act, the petitioner should not be allowed simultaneously to choose the forum of High Court under Article 227 of the Constitution on the plea that there is no appeal against the rest part of the order of the Board passed under Section 64(1). On this issue the case of Board of Waqf, West Bengal & Another v. Anis Fatma & Another (supra) does not favour the petitioner's case. Because over the same set of facts the petitioner has already chosen the right forum in preferring appeal before the "Tribunal", and when there is same efficacious remedy available to the petitioner to submit "an application" under Section 83(2) in respect of the non-appealable clauses viz. (j) and (k) relating to the same set of facts connected with the subject wakf considered by the Board of Waqf, Article 227 of the Constitution of India does not permit the Court to answer the point of maintainability in the affirmative. In the context some relevant portions from paragraph 4 from the case of K.S. Rashid & Son v. Income Tax Investigation Commission & Ors (Five Judges Bench, supra) is set out:-

".....the High Court relies upon the ordinary rule of construction that where the legislature has passed a new statute giving a new remedy, the remedy is the only one which could be pursued....."

In the case of Jai Singh & Ors. v. Municipal Corporation of Delhi & Another

(supra) in paragraph 35 it has been held, "proceedings under Article 227 can be initiated in the absence of availability of an alternative remedy."

58. Following the decision of the Board of Wakf, West Bengal v. Anis Fatma this Court in W.P. No. 6923(W) of 2011 in the case of Mr. Summit Kr. Ray & Mr. Najeemddin Mutsuddi v. Mr. Khwaja A. Rahaman, held,

"....The remedy available under Section 83 of the Wakf Act, 1995 is not an alternative to Article 226 remedy. It is just one other remedy falling within the genus other remedies, only a species whereof is an alternative remedy. Two remedies are alternatives to one another when the aggrieved person has a right to choose the one or the other...."

Another judgment of this Court delivered on March 2, 2016, in W.P. No. 1330 of 2015 in the case of Khoja Sunnat Jamat & Another v. Board of Wakf stands in the same row indicating that where efficacious remedy is available in the statute, the High Court ought to have remained within well recognised constraints to restrain itself from exercising its extra-ordinary jurisdiction. In the case in hand I did not find any procedural illegality causing perversity in the order necessitating interference under Article 227 of the Constitution of India.

59. It is evident that the Board had rejected the prayer of the adjournment of the petitioner and Mr. Mukherjee argues that even the reply, submitted by the petitioner against the show cause notice served upon her, was not considered by the Board in passing the impugned order which has caused violation of natural justice. The fact, sequence and circumstances of Queen's Bench Decision reported in (1974) 2 All England Law Reports 1219, being not identical to the fact and sequence of rejection of adjournment in the case on hand by the Wakf Board, is of no assistance to the petitioner. Similarly, the case of Lajpal Rai & Ors. v. State of Punjab & Ors. being related to power of High Court, to be exercised with discretion appropriately is also held to be of no help to meet grievance of the petitioner in the matter of rejection of prayer for adjournment of hearing, which at best may be considered by the efficacious authority on merit, had there been any prejudice, suffered by the petitioner due to rejection of prayer of adjournment submitted on behalf of the petitioner to shift the date of hearing which was fixed as per-emptory in nature. From the copy of the Resolution Book bearing impugned order it reveals that on the previous date of hearing as was fixed on August 28, 2008 granting adjournment of the petitioner the next date of hearing fixed on 16th October, 2008 was of the pre-emptory nature. However, further prayer to shift said date of hearing as was submitted on September 30, 2008 on the ground of non-availability of learned Advocate was rejected, and after concluding the hearing the Item No. 12 of the Agenda was resolved by the Board. Although grant or rejection of prayer of adjournment of hearing is discretionary, but whether by rejection of such prayer of adjournment of the petitioner or due to non-consideration of reply allegedly submitted by the petitioner whether prejudice was caused in resolving the agenda on merit, the same would be subject to appeal pending before the Tribunal, and the High Court

is not supposed to interfere with the same. Therefore, as the resolution bearing clauses (j) and (k) under Section 64(1) of the Wakf Act does not suffer from procedural lapses and it has been passed by the Board of Wakf within its jurisdiction getting it resolved by the majority members i.e. of more than two-third members of the Board following the practise and procedure and since the impugned resolution is now liable to be tested on merit on being challenged before the Tribunal set up in the State to be presided by a Judicial Officer of the rank of District Judge, question of striking out those two non-appealable clauses i.e. Clauses (j) and (k) within the scope of Article 227 of the Constitution of India does not arise since the petitioner could have made application also before the Tribunal under Section 83(2) of the Act, which is an enabling provision for determination of any dispute.

I refrained to offer any observation for non-joinder of Kamal Singh Baid as a party since no argument is made at Bar on the score, and the same also does not stand on the way to determine maintainability of the application on some other aspects.

60. In view of above appreciation of law and observations made by me the application under Article 227 of the Constitution of India is now held not maintainable in law for the following reasons:-

(a) The resolution under challenge being not an order either of a Court or Tribunal, is not entertain able under Article 227 of the Constitution of India and therefore the application is not maintainable,

(b) There is no procedural lapses and the orders under challenge, as passed by a majority of not less than two-third of the members, on the available facts and circumstances, may be tested only through efficacious forum, where also the question of prejudice, as is urged by the petitioner, could have been adjudicated on merit.

(c) the resolution under challenge was passed following the provisions of Wakf Act and page 5 of said resolution indicates, ".....an enquiry was made by the Hon'ble Board Member under Section 64 (3) of the Wakf Act, 1995 which confirmed the mismanagement of the Wakf Estate by the Managing Mutawalli.....". This finding of fact can be adjudicated on merit only through the Tribunal before moving the High Court.

(d) The petitioner having interest in the waqf being aggrieved by the order of the Board under Clauses (j) and (k) of Section 64(1) of the Act, could have also filed application to the Tribunal under Section 83(2) of the Act "for the determination of any dispute".

(e) Cause of action at the root of the impugned resolution bearing directions was for "removal from Mutawalliship". Therefore, for the self-same cause of action two proceedings, not only in two different dimensions, but also before two authorities, including the efficacious forum, are not maintainable to avoid every

likelihood of divergent decisions.

(f) Pleadings of appeal preferred before the Tribunal and of the application under Article 227 are almost the same and similar, except some changes in paragraph 73 of the application which is made relevant only for the purpose of the instant proceeding, the challenge against the composite resolution bearing the directions on consideration of the same facts and circumstances is not entertain able at a time by two forums.

(g) Had the application been filed by the petitioner simultaneously with her appeal before the Tribunal, in turn the Tribunal could have adjudicated the entire order dated 16.10.2008 on merit within its authoritative jurisdiction vested under sub-section (5) of Section 83, and therefore the application suffers from the point of maintainability.

(h) Rejection of prayer for adjourning the date of peremptory hearing, or non-consideration of alleged reply to show cause do not come under either of the five exceptions as adumbrated in the case of Commissioner of Income Tax v. Chhabil Dass Agarwal (supra), which i.e. the refusal to adjourn or alleged denial of consideration of alleged reply to show cause at best may be considered by the Tribunal on merit, on being approached.

(i) Scope of entertaining any dispute, question or other matter, relating to wakf is to be determined first by the Tribunal which thereafter i.e. after exhausting efficacious remedy, may come up before this Court under sub-section (9) of Section 83 of the Waqf Act, 1995, and thereby the application being pre-mature is also not maintainable.

61. Before parting from the case I do incline to mention that to exercise power of extra-ordinary jurisdiction within Article 226 or Article 227 of the Constitution of India the court in one hand enjoys unfettered power as Constitutional authority but on the other hand it exercises the same within well-recognised self-restrained constraints not to overlap the efficacious authorities unless the act and action under challenge do come within the scope of interference, as discussed hereinbefore in details. Therefore all other cases, cited at the bar, are not individually dealt with though have no identity with the facts and circumstances of this case, still the principles enunciated therein, to my view, have now become academic without having any quarrel or joining any new issue thereto, but either of those is of no legal assistance to the petitioner to get all the above observations altered to eliminate or even minimise the grievance ventilated by the petitioner in the application in the name of judicial review. Consequently there is no scope to examine the grounds urged in the application on merit or to keep such application any more alive before this Court to answer point no. (iii), since point Nos. (i) and (ii) have been answered against the petitioner.

62. However, it is made clear that the efficacious authority in adjudicating pending proceeding on this subject dispute on merit shall neither be swayed nor

be influenced in any way by any observation of this Court made hereinbefore.

63. Thus the application under Article 227 of the Constitution of India fails and the C.O. No. 888 of 2009 stands dismissed. Order of status quo as was passed by the court stands vacated.

No order as to costs.

Urgent Xerox certified copy be supplied if applied for.