
(2011) 08 MAD CK 0312

In the Madras High Court

Case No : Writ Petition No"s. 15177 and 21750 of 2010, M.P. No"s. 1, 2 and 3 of 2010, C.R.P. (NPD) No. 3713 of 2010 and WP No"s. 15177 and 21750/10

Haji B.Pakkir Mohammed, President, Madrasha-E-Merajul-Uloom @ Islamia Kalvi Sangham

APPELLANT

Vs

The Secretary to Government, Department of Backward, Most Backward Classes and Minority Welfare, Govt. of Tamil Nadu and Others
Madrassa-e-Mazahirul-ul-Uloom @ Islamia Kalvi Sangam Society Vs I. Basheer Ahamed and Others

RESPONDENT

Date of Decision : 09-08-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Tamil Nadu Societies Registration Act, 1975 — Section 20
Waqf Act, 1995 — Section 3

Citation : (2011) 6 CTC 485 : (2011) 8 MLJ 158 : (2011) WritLR 787

Hon'ble Judges : T. Raja, J

Bench : Single Bench

Advocate : Haja Nazirudeen and A. Prabhakaran, for the Appellant; Haja Mohideen Gisthi, for R2 to R4 in both W.Ps., S.V. Duraisolaimalai, Additional Govt. Pleader. for R1 in both Wps and R11 in the CRP, T. Velumani, for R5 in WP.15177/10, V. Lakshmi Narayanan, for R10 in the CRP and R. Sankarappan, for R2, R3 and R5 to R9 in the CRP, for the Respondent

Final Decision : Dismissed

Judgement

T. Raja, J.—The writ Petitioner-Haji B.Pakkir Mohammed, whois the president of Madrassa-E-Merjul-Uloom @ IslamiaKalvi Sangam at Dharmapuri (hereinafter referred to as"Sangam"), has filed W.P. No. 21750 of 2010, questioningthe Resolution, dated 06.07.2010, of the Chairman ofthe Wakf Board, (communicated to the Petitioner on19.07.2010), whereby, the Application, dated31.05.2005, submitted by the Petitioner-Sangam, withthe claim that the Petitioner/sangam is not a wakf,came to be rejected, based on the earlier order/

Scheme framed by the Special Officer of the Tamil Nadu Wakf Board bearing R.C. No. 3598/85/B2/Dhar/85, dated 22.09.1992, whereby, the Islamia Kalvi sangam was amalgamated along with (a) Mohamed Ali Memorial Club, (b) Madrasa Mehrajul Uloom, and (c) Masjid-e-Bilal as one Single Wakf, called "Moulana Mohamed Ali Munnetra Sangam". Hence, both the proceedings, dated 06.07.2010 and 22.02.1992, are sought to be quashed.

In W.P. No. 15177 of 2010, the very same Petitioner challenges the proceedings of the Wakf Board, dated 29.04.2010, bearing Na.Ka. No. 3598/85A6/Dharmapuri (S. No. 12, Resolution No. 80/10) and the consequential proceedings, dated 03.06.2010, of the Chief Executive Officer, TN Wakf Board, in and by which the Board assumed direct Management of the Sangam as well as the other three wakfs in terms of what is provided u/s 65 of the Wakf Act, 1995, by appointing the Superintendent of Salem Wakf as the Administrative Officer and calling upon the erstwhile Managements including the Petitioner-Sangam to render the accounts, etc.

One Mr. D.S. Khalandar, Secretary of the Sangam/Society, has filed CRP (NPD) No. 3713 of 2010, seeking to set aside the judgment and decree, dated 23.03.2010, passed by the learned Principal Subordinate Judge, Krishnagiri, in W.O.S. No. 90 of 2006, whereby, the Plaintiff-Sangam's prayer to exclude it from the purview of wakf and to grant injunction, restraining the Wakf Board from interfering with the Management of the Sangam, was negatived.

2. Since the above two Writ Petitions and the Civil Revision Petition are interconnected and the issues arising therein need a common consideration, the cases are heard together and finally, disposed of by this Common Order.

3. Certain crucial facts necessary to understand the nature of issues arising in the cases are briefly detailed below, for better appreciation:

Mohammed Ali Memorial Club Wakf, Dharmapuri, a Surveyed and Notified Wakf vide Gazette Sl. No. 41 of Dharmapuri, was initially managed by a Committee headed by one Janab D.S. Naseer Ahamed. The land belonging to the said Wakf was leased out to the Petitioner-Sangam, a Society registered under the Societies Registration Act. On the leased land, the Society constructed shops and buildings and, there is also an Arabic College called Madrasa-e-Mehrajul Uloom under the management of the Society.

It is the case of the Sangam-Society that it was established with four objects viz., to impart religious education, found Madrasas, help the needy to pursue studies in Medicine and Engineering and to take part in cultural activities and, in order to achieve those objectives, the Society has been raising funds through subscription from its members, donation from philanthropists, rental income from the leasehold properties etc. It is the further case of the Sangam that the Society has a General Body, Executive Committee and Office Bearers and it is periodically submitting the Returns with the Registrar of the Co-operative Societies.

While so, on 16.03.1992, the Government of Tamil Nadu issued a Gazette Notification in G.O. No. 163, stating that the State Government had taken a policy decision to take over the management of the Tamil Nadu Wakf Board, and consequently, appointed a Special Officer for a period of one year and the said Special Officer went exhaustively examining the acts done by the previous Managements. In the matter of the Wakf in question, the Special Officer, after receiving representations from the Society, conducted a detailed enquiry and, after hearing the parties including the Office Bearers of the Society, ultimately passed the proceedings, dated 22.09.1992, in RC. No. 3598/B2/Dhar/85, amalgamating Mohammed Ali Memorial Club and Masjid-e-Bilal as well as the Madrasarun by the Society viz., Merjaul Uloom, and the Islamia Kalvi Sangam which is also run by the Society, together as one Single Wakf called "Moulana Mohammed Ali Munnetra Sangam" and accordingly, framed a Scheme and directed the said amalgamated Wakf to be registered with the Tamil Nadu Wakf Board. In accordance with the same, the Board constituted a General Body and selected a Committee headed by Janab J. Basheer Ahamed and approved the same.

Questioning the Scheme, dated 22.02.1992, a writ petition in W.P. No. 19202 of 1992 was filed by one S.P. Bava and another, and the said petition was dismissed by this Court on 11.02.2000 for want of prosecution.

One of the interested persons by name A. Mohammad Arab also filed a writ petition in W.P. No. 17457 of 1992, challenging the Scheme framed by the Special Officer and, this Court, by order dated 23.11.2000, declined to interfere with the scheme, however, permitted the Petitioner to institute a suit before the Tribunal and agitate his right in the manner known to law as provided u/s 32(3) of the Wakf Act, 1995.

The Petitioner-Sangam filed a suit in O.S. No. 6 of 2005 before the Wakf Board Tribunal (Sub Court), Krishnagiri, seeking to declare the Scheme as null and void and the said suit was dismissed for default. The Interlocutory Application filed to restore the suit was also returned for want of court fee in the Plaint. When such return was challenged before this Court by way of CRP (PD) No. 394 of 2005, by order dated 29.08.2006, the plea was negatived holding that the proper remedy open for the Sangam is to re-present the application after complying with the defects pointed out in the application.

On 31.05.2005, the Petitioner made a representation to the Wakf Board, seeking clarification and to conduct an enquiry u/s 40 and 70 of the Wakf Act. As the representation yielded No. outcome, a writ petition was filed in W.P. No. 19959 of 2005, wherein, by order dated 20.06.2005, this Court issued a direction to the Wakf Board to dispose of the representation within 12 weeks.

On 06.04.2006, based on the Scheme, dated 22.09.1992, the Wakf Board passed a Resolution to appoint a 9 Member Committee for the administration of the amalgamated wakf for a period of three years. Challenging the same, the Sangam filed W.P. No. 18240 of 2006 and, on 17.06.2006, obtained an order of interim

injunction in the Miscellaneous petition filed viz., M.P. No. 1 of 2006 in W.P.18240 of 2006. On 15.02.2010, the main Writ Petition came to be dismissed as infructuous as the tenure of the committee was over by efflux of time.

Another suit filed on behalf of the Society by one Sardar in W.O.S. No. 102 of 2005 on the file of the Principal Sub Judge, Krishnagiri, questioning the Scheme was dismissed on 23.03.2010.

By representation, dated 29.04.2010, the Petitioner addressed the Tamil Nadu Wakf Board, seeking necessary action on the earlier representation dated 31.05.2005.

By proceedings of the Board, dated 06.07.2010, the representation/application, dated 31.05.2005, of the Sangam/Society, seeking the Board to treat the Sangam and its properties as a separate entity totally different from the amalgamated wakf was considered in terms of the orders, dated 20.06.2005, passed in W.P. No. 19959 of 2005, and ultimately rejected, leading to filing of W.P. No. 21750 of 2010, questioning not only the proceedings dated 06.07.2010 but also the Scheme of the year 1992 said to have been framed on consent by all the parties including the Sangam. The proceedings of the Chief Executive Officer of the Board dated 03.06.2010 with the annexure proceedings, dated 29.04.2010, informing appointment of an Administrative Officer and seeking rendition of accounts from the Sangam before the said Officer, are challenged in W.P. No. 15177 of 2000.

The Society also filed W.O.S. No. 90 of 2006 before the Principal Subordinate Court, Krishnagiri, against the amalgamation and such suit having been dismissed on 23.03.2010, challenging the same, CRP(NPD) No. 3713 of 2010 came to be filed by the Secretary of the Society.

4. Mr. Haja Naziruddin, learned Counsel appearing for the Society in all the cases, in an arduous attempt to establish the case and cause of the Society, at the first instance, would artfully submit that the Society, being a different and separate entity falling under the Societies Registration Act, its properties cannot be brought within the ambit of "Wakf" much less the Amalgamated Wakf-Moulana Muhammad Ali Munnetra Sangam for the simple reason that a Wakf is exclusively dedicated to Allah, the Almighty, forever and such characteristic can never be fitted to a Society or the properties connected thereto. Slyly, he endeavoured to make out a point that, at best, the Madrasa or Masjid, which is constructed and in existence for prayers and religious purposes, can alone be brought within the realm of wakf and not the Society itself and its other properties shown to be connected with the Wakf. Referring to Section 3(r) of the Wakf Act, he would argue that inasmuch as none of the ingredients in the said provision is established to be present in the case of the Society, it should be held that the Wakf Board can never have any supervisory power or control over the affairs or properties of the society. According to him, tenancy in respect of land substantiates the privity of land and tenant relationship between the Mohamed Ali Memorial Club Wakf and the Petitioner society respectively. Therefore, when the

private Society has nothing to do with the Wakf, the whole scheme, dated 22.09.1992, devised by the Special Officer, vainly stretching its brinks to envelope the Society, on the face of it, is not legally sustainable. Further, it is apparent that the mandatory procedure outlined in Sections 4, 5, 6 and 27 of the Act has not been scrupulously adhered to, which aspect also, goes to the root of the matter. In other words, unless and otherwise, as provided either by Old Wakf Act of the year 1954 or the New Act, 1995, survey & Notification under Sections-4, 5 & 6 are made, which course is mandatory, cause of action in filing a suit against such notification arose u/s 6 of the Act within one year from the date of publication of the list of wakf u/s 5(2) of the Act. In the present case, after framing of the scheme by the Special Officer, there was No. registration at all; therefore, the Petitioner-society can never be termed as a "wakf" within the definition as given in Section 3(r) of the Wakf Act, 1955.

4-A. Referring to a case law reported in Board of Muslim Wakfs, Rajasthan Vs. Radha Kishan and Others, , he submits that the Commissioner of Wakf is empowered to make a survey of existing Wakf and its properties and report to Government, whereupon, the state Government will publish the same in Gazette; whereas, in the present case, till date, such exercise was not taken up and the clubbed wakf was never notified even after the amalgamation.

4-B. Assailing the Scheme, dated 22.09.1992, the learned Counsel, by stating that the Petitioner is still entitled to challenge the original scheme itself, would comment that the same Scheme, after brought on record, was never acted upon. He relied upon a Judgment of the Apex Court in Tamil Nadu Wakf Board Vs. Hathija Ammal (Dead) by Lrs. etc. etc., wherein it has been held that whenever dispute arose whether the property is wakf property or not, the Board must follow the procedure as required u/s 4, 5, 6 and 27 of the Act and straight away, the Board cannot institute a suit for declaration, asserting title over the property. Since the Petitioner is a society duly registered under the Societies Registration Act and governed by its own by-laws, in terms of Section 20 of the TN Societies Registration Act, legal proceedings by or against the Petitioner-society is maintainable. Mohamed Ali Memorial Club was surveyed and it is a notified wakf in terms of Section 4, 5 and 6 of the Act and, in the land leased out by the Club to the Petitioner-society, buildings were constructed to run the office to fulfill the objects for which the Society was registered. Inasmuch as the Society is holding the leasehold interest in land on payment of monthly rent, at any rate, the rights could be determined only in the manner as contemplated u/s 111 of the Transfer of Property Act. Since admittedly, the Petitioner is not a wakf, dedicated permanently in the name of Allah, the Almighty, indisputably, none of the elements outlined in Section 3(r) of the Act, 1995, for constitution of a Wakf is present in the Petitioner/society. Therefore, it is again reiterated that the Scheme itself in creating an amalgamated wakf by pointlessly including the Petitioner-society as one of the wakfs is not legally sustainable and therefore, all the consequential proceedings that are under challenge in the writ petitions are liable to be quashed.

4-C. Coming to the Civil Revision Petition, wherein the order, dated 23.03.2010, passed by the Principal Sub Court in WOS No. 90 of 2006, in and by which, the Petitioner's prayer for declaration and interim injunction came to be rejected, it is submitted that the said order is liable to be interfered with on the sole ground that the trial court has miserably failed to understand the distinction between a Society registered under the Societies Registration Act and a Wakf governed by the Wakf Act.

5. Per contra, Mr. Haja Mohideen Gisthi, learned counsel appearing for the Respondents/Wakf Board in both the writ petitions, would submit that the writ petitions are liable to be dismissed at the threshold for the simple reasons that, as against the assumption of direct Management by the Wakf Board, the Petitioner, by way of Appeal u/s 65(2) of the Wakf Act, 1995, has already approached the State Government on 09.07.2010; therefore, the hastiness with which the Petitioner has approached this Court should be condemned severely and, even otherwise, the issues revolving around the Scheme, now sought to be raised before this Court, had already been decided not only in the civil proceedings with categorical findings both on factual and legal aspects but also in the earlier Writ Petition in W.P. No. 17457 of 1992, wherein, by order dated 23.11.2000, this Court had declined to interfere with the Scheme itself, and therefore, any endeavour by this Court to consider the case of the Petitioner would only amount to re-opening of the issue of amalgamation which was already settled in the respective earlier proceedings to which the Petitioner was also a party.

6. In line with the above submission, Mr. V. Lakshmi Narayanan, learned Counsel appearing for the Wakf Board/R10 in the Civil Revision Petition, would submit that the Petitioner has no locus standi to seek for a declaration in their favour in the light of the clear fact that the Scheme was not a one passed behind the back of the Petitioner Sangam. He took up the Scheme to highlight that it was only after the consent of both sides including the Society, the Scheme was framed to amalgamate the two wings of the Petitioner-society viz., Madrasa-e-Mehrajul Uloom and Islamia Kalvi Sangam along with Mohammed Ali Memorial Club and Masjid-e-Bilal, as a single wakf called "Moulana Muhammad Ali Munnetra Sangam". When the consent expressed by the Petitioner-society for implementation of the scheme is borne out by records and also apparent from the very Scheme itself, hardly one can contend that the Scheme will not bind the society. He points out that the Writ Petition filed in WP No. 19202 of 1992 by one Bawa, questioning the Scheme, came to be dismissed for non-prosecution. In the subsequent writ petition filed by one A. Moahmmed Arab in W.P. No. 17457 of 1992, the plea to interfere with the Scheme came to be negated by order dated 23.11.2000, however, in the light of Section 32(3) of the Act, 1955 which provides that where the Board has settled any scheme of management under Clause (d) or given any direction under Clause (3) of Sub-section (2), any person interested in the wakf or affected by such settlement or direction may institute a suit in a Tribunal for setting aside such settlement or directions and the decision of the Tribunal thereon shall be final, liberty was granted to the Petitioner to institute

a suit before the Tribunal and agitate his right in a manner known to law. But, the Petitioner did not immediately act upon the liberty granted by this Court on 23.11.2000 to approach the Wakf Tribunal under Section 32(3) of the Act. The suit filed in O.S. No. 6 of 2005 was dismissed and the restoration application was also returned for want of court fee in the plaint. The said return challenged by way of CRP PD No. 394 of 2005 also came to be dismissed. Another suit filed by one Sardar, challenging the Scheme, in WOS No. 102 of 2005 on the file of Principal Sub Court, Krishnagiri, also ended in dismissal by judgment dated 23.03.2010 on clear and sound reasonings. The order, dated 23.03.2010, passed in WOS No. 90 of 2006, challenged by the Sangam in the Civil Revision Petition, is also based on clear-cut findings on both factual and legal aspects which do not call for any interference. Hence, the prayer of the Sangam does not deserve any consideration at all.

7. Heard Mr. S.V. Duraisolaimalai, learned Additional Government Pleader appearing for the official Respondents, and Mr. T. Velumani and Mr. R. Sankarappan, learned Counsels appearing for the rest of the Respondents.

8. This Court carefully considered the rival submissions advanced on either side. The crucial issues required to be dealt with are,

a) whether the Petitioner-Sangam is justified in challenging the Scheme, dated 22.09.1992, which came into existence only subsequent to the consent, also given by the members of the Petitioner-Sangam itself and their Counsel before the Special Officer of the Wakf Board, and the consequential proceedings arising therefrom?

b) when the validity of the Scheme itself has been decided in favour of the Wakf Board in a couple of litigations before the Civil Court and a definite finding on facts and legal aspects having been given, upholding the validity of the scheme; and in W.P. No. 17457 of 1997 also, while deciding the validity of the scheme, this Court declined to accept the plea of the sangam, whether the principles of res judicata operate against the Petitioner so as to reject their case in the present Writ Petitions?

c) whether the writ petitions are maintainable having regard to pendency of the statutory appeal filed by the Society before the Government for a decision on similar issue?

d) Even otherwise, whether the sangam can legally withhold and retain the administration of the properties which are part and parcel of a Wakf, dedicated exclusively and perpetually for the sake of Allah, the Almighty, on the wispy ground that once the wakf property given under lease is used for a particular purpose by a Society registered under the Societies Registration Act, such property would lose its original character and would forever remain with the lessee/society?

e) Whether the general law viz., Societies Registration Act, will over-ride the

special legislation-Wakf Act in the matters relating to administration, supervision and management of wakf properties.

9. At the first instance, it is useful to refer to Section 3(r) of the Wakf Act, 1955, defining the term "wakf" thus:

" wakf" means the permanent dedication by a person professing Islam, of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes-

(i) a wakf by user but such wakf shall not cease to be a wakf by reason only of the user having ceased irrespective of the period of such cesser;

(ii) " grants", including mashrut-ul-khidmat for any purpose recognised by the Muslim law as pious, religious or charitable; and

(iii) a wakf-alal-aulad to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable, and "wakf" means any Person making such dedication;

A mere reading of the above provision makes it clear that the dedication of the movable or immovable property made by a Muslim for a religious, pious or charitable purpose should be permanent and perpetual in character. As regards maintenance of wakfs, duty is obligated on the Wakf Board, particularly in terms of Section 32 to ensure that the wakfs under its superintendence are properly maintained, controlled and administered and the income thereof is duly applied to the object and for the purpose for which such wakfs were created or intended.

10. In regard to the above issues, it would be of much relevance to look at the background in which the scheme came to be framed.

The Government of Tamil Nadu, by an Extraordinary Gazette Notification, dated 16.03.1992, noted that the Tamil Nadu Wakf Board was unable to perform and persistently made default in the performance of the duties on it by the Wakf Act and that the then members of the Wakf Board had committed serious irregularities in the management of the properties under the control of the Board. Considering the continuation of the then Board as detrimental to the interest and objects of the wakfs, the Government took a policy decision to take over the Board and, in order to secure proper management, appointed a Special Officer who was given the powers to perform the duties and functions of the Board for a prescribed period. In respect of Mohamed Ali Memorial Club Wakf, Dharmapuri, which is admittedly, a Notified Wakf (vide G.S. No. 41 of Dharmapuri District) from whom the Sangam took the land on lease to run Madrasa-e-Mehrajul Uloom and to construct buildings for commercial purposes, the Special Officer had to consider a rival claim over the management of the Mohammed Ali Memorial Club Wakf and the Madrasa. In the proceedings conducted by the Special Officer, the other side made it clear that the wakf properties enjoyed under lease by the Society should be clearly identified in its original form, and ultimately, both sides submitted their respective draft schemes and consented for clubbing of the

Madrassa and the Kalvi Sangam of the Society with Mohammed Ali Memorial Club and Masjid-e-Bilal, together as "Moulana Mohamed Ali Munnetra Sangam". The relevant portion of the proceedings dated, 22.09.1992 in RC.3598/B2/Dhar/85, depicting the fact that the Society consented for passing of the Scheme, is appropriate to be quoted below:

... The draft scheme submitted by the other party Janab S.P. Bava Sahib was received on 7.9.92. Both the draft schemes submitted by the both the parties were examined on 22.9.92 in the presence of the respective counsels and their parties. Both the counsels have agreed to have all the wakfs namely 1) Mohamed Ali Memorial Club, 2) Madrasa Mehrazul Uloom, 3) Masjid-e-Bilal and 4) Islamia Kalvi Sangamas one single Wakf in the name of "Moulana Mohamed Ali Munetra Sangam".

The scheme will be in force from 22.9.92 and the wakf and all the properties of all the above wakfs should be registered with the Tamil Nadu Wakf board in the name of "Moulana Mohamed Ali Munetra Sangam", Dharmapuri as agreed by both the parties and their counsels before the special officer, Tamil Nadu Wakf Board, Madras.

It could be seen that, Bava Sahib, contrarily filed W.P. No. 19202 of 1992 questioning the Scheme despite his consent and assent for the Scheme before the Special Officer, as noted above. Anyhow, the proceedings of the Special Officer would make it clear that the Society/opponent also agreed for the amalgamation of the wakfs.

Interestingly, when the Scheme framed with consent, came to be questioned before the Civil Court and the question was deeply gone into in WOS Nos. 102 of 2005 filed by Sardar on behalf of the Society, a consenting party to the Scheme before the Special Officer, as well as in W.O.S. No. 90 of 2006 filed by the Secretary of the Society, the Sub Court categorically held that, in terms of Section 3(r) of the Wakf Act, 1955, once a Wakf is always a Wakf and it cannot be altered and further, the wakf once created cannot be ceased as a wakf. As to the earlier suits filed questioning the Scheme and the actual characteristic of the property sought to be retained by the Society and on the disputed fact regarding the consent accorded for the scheme by the Society itself (Plaintiff before the trial court), the trial court, in W.O.S. No. 102 of 2005, held and commented as follows:

... those who objected the scheme preferred separate suits O.S.37/01 O.S.142/01 O.S.6/05. All the suits have been ended in dismissal. Now the next batch legal battle by this Plaintiff in individual capacity as O.S.102/05 and another suit by another Secretary in O.S. No. 90/06. THE BASIC and PRIMARY WAKF IS THE MOHAMMED ALI MEMORIAL CLUB THAT ITSELF WAS RECOGNISED AS A WAKF and IT WAS NOTIFIED IN THE OFFICIAL GAZETTE. THE PLAINTIFF HIMSELF ADMITTED THE SAME IN PARA No. 5 of THE PLAINT. But he has stated that the above wakf was registered under the Societies Registration Act in the year 1972.

As per the Section 3 of the Wakf Act once wakf is always wakf. It cannot be revoked, it cannot be altered and also the wakf once created cannot be ceased as a wakf. THE ENTIRE OTHER THREE WAKFS ALSO CREATED IN THE PRIMARY WAKF PROPERTY. HENCE DURING ENQUIRY ALL THE MEMBERS ADMITTED TO FORM A NEW SCHEME FOR EFFECTIVE ADMINISTRATION. These are the previous history of the so called society. But the Plaintiff completely suppressing the above said fact come this Court with prayer for declaration and injunction....

Even regarding the maintainability of the suit in question itself, the following observation was made:

... As per Section 85 of the Wakf Act 1995, the civil court is barred to grant the relief prayed for by the Plaintiff. The only course open to the Plaintiff is to agitate the matter before the wakf Tribunal u/s 32 Clause 3 of the wakf Act. Hence the suit is as framed is not maintainable as per Section 85 of the wakf Act 1995 and the Plaintiff is also has No. locus standi in his individual capacity to file the suit...

From the above order of the Court below, many crucial aspects come to light viz.,

- a) Three earlier suits filed in the first round of legal battle, questioning the Scheme, were dismissed.
- b) Admission of the society about the nature and character of the properties in being part and parcel of the nucleus-wakf was recorded based on facts and evidence.
- c) Even the case of the society itself before the civil court was that the property in question is originally a wakf property.
- d) Not only the properties leased out to the Society but also the Club and the Masjid are the part and parcel of the wakf.
- e) Further, all the parties including the Society admitted to form a new scheme effective (dated 22.09.1992) administration of for the amalgamated wakf.
- f) the Society was guilty suppression of facts before court.

Therefore, in the light of the clear and categorical findings on the nature of the property and the fact that the properties enjoyed by the Society can never be detached from the nucleus/wakf, the Society has No. case to succeed at all.

11. Moreover, apart from the fact that the issues having already been decided in favour of the Wakf Board by the Civil Court, this Court also, while deciding W.P. No. 17457 of 1992, filed by one Mohammed

Arab, questioning the Scheme dated 22.09.1992, declined to interfere with the scheme holding that the only course available to the Petitioner was to approach the Tribunal u/s 32(3) of the Wakf Act. Therefore, despite the adjudication at the hands of the Civil Court as well as this Court on the core issue, the Petitioner has very boldly approached this Court to challenge the very Scheme itself and the consequential proceedings arising there-from. When it is established beyond doubt

that the Scheme itself has been framed only based on the consent of the Society to go for amalgamation of the wakfs and various crucial issues which have direct bearing on the matter-in-issue having been canvassed and decided already, it is very unfortunate that the Society has very daringly approached this Court and the vain exercise taken upon is nothing but an abuse of process of court. Therefore, there is no difficulty for this Court to hold that the writ petitions are struck by the principles of res judicata and even on merits, they deserve dismissal. The settled legal position is that a judicial decision is deemed final when it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution, and is absolute, complete, and certain, and when it is not lawfully subject to subsequent rescission, review or modification by the Judicial Forum which pronounced it *Ram Chandra Singh Vs. Savitri Devi and Others*, . Emphasising the point, in *Swamy Atmananda and Others Vs. Sri Ramakrishna Tapovanam and Others*, , the Apex Court observed thus:

The object and purport of principle of res judicata as contained in Section 11 of the Code of Civil Procedure is to uphold the rule of conclusiveness of judgment, as to the points decided earlier of fact, or of law, or of fact and law, in every subsequent suit between the same parties. Once the matter which was the subject-matter of lis stood determined by a competent court, no party thereafter can be permitted to reopen it in a subsequent litigation. Such a rule was brought into the statute book with a view to bring the litigation to an end so that the other side may not be put to harassment.

The principle of res judicata envisages that a judgment of court of concurrent jurisdiction directly upon the point would create a bar as regards a plea between the same parties upon some other matter directly in question in another court, where the said plea seeks to raise afresh the very point that was determined in the earlier judgment.

In the same line, in *Pandit Ishwardas Vs. State of Madhya Pradesh and Others*, , the Apex Court held thus:

In order to sustain the plea of res judicata it is not necessary that all the parties to the two litigations must be common. All that is necessary is that the issue should be between the same parties or between parties under whom they or any of them claim.

Applicability of the principles of res judicata to writ proceedings as well, the Apex Court, in *Devilal v. Sales Tax Officer* (1965 AIR 1150), ruled thus:

As we have already mentioned, though the courts dealing with the questions of the infringement of fundamental rights must consistently endeavor to sustain the said rights and should strike down their unconstitutional invasion, it would not be right to ignore the principle of res judicata altogether in dealing with writ petitions filed by citizens alleging the contravention of their fundamental rights.

Further, in K.A. Paul and Others Vs. Taluk Land Board, Alathur and Others, , it is categorically held that the principle of res judicata is also applicable to the writ proceedings. In the present writ petitions also, since the core issue has already been decided by this Court as stated already, undoubtedly, they are struck by operation of the principles of res judicata.

12. Moreover, there is also another embargo in entertaining the writ petitions, for, admittedly, the Petitioner-society has already filed an appeal under Section 65(2) of the Wakf Act as against one of the impugned orders, dated 29.04.2010. In this regard, it is pertinent to point out that, in a matter relating to wakf, where parties resorted to writ jurisdiction instead of approaching the Wakf Tribunal, the First Bench of this Court, in its decision in I. Salam Khan Vs. The Tamil Nadu Wakf Board and Others, , deprecated such practice by observing thus:

7. No. doubt, alternative remedy is not an absolute bar to the filing of writ petitions, but at the same time it is well settled that writ jurisdiction is discretionary jurisdiction and when there is an alternative remedy, ordinarily a party must resort to that remedy first before approaching this Court. Entertaining writ petitions straight away without insisting that a party should first avail of the alternative remedy is an over liberal approach which has caused immense difficulties to the High Courts in the country because they have added to the huge arrears. The Courts have already become overburdened by this over liberal approach instead of following the settled legal principle that a writ petition should ordinarily be dismissed if there is an alternative remedy. The High Courts in India are already tottering and reeling under the burden of massive arrears which have flooded the dockets of the Court, and such kind of over liberal approach has only multiplied this problem manifold. If this approach is further continued a time will surely come when the High Courts will find it impossible to function. All this has happened because unfortunately some Courts have departed from well-settled legal principles.

In the same line, again, the First Bench rejected the Writ Appeal vide decision reported in Mukram Sherif Vs. Moinudeen Sheriff and The Tamil Nadu Wakf Board, . That being so, coming to the present case, the Petitioner society, going a step ahead, not only resorted to the remedy provided under the Statute but at the same time also approached this Court invoking its writ jurisdiction, which practice should never be encouraged. Therefore, on this ground also, the writ petitions are liable to be rejected.

13. Even otherwise, coming to the shifty argument of the learned Counsel appearing for the Petitioner that at best, the Mosque/Madrassa alone can be excluded from the society, however, its other assets though originally belonged to Mohammed Ali Memorial Club-wakf, should not be brought within the purview of the amalgamated wakf, it is settled law that once a property is dedicated to the Almighty under Muslim law as a Wakf to serve the religion and poor, the character of such property can never be altered otherwise, for, such dedication is not bound by time as it is perpetual. Hence, as I held above, once a wakf

is always a wakf and it cannot be altered ever. Admittedly, the leased out land belonged to the Wakf. After noticing mismanagement of the Wakf Board at the relevant time, the State Government, in an effort to correct the state of affairs and to retrieve the wakf properties being mishandled, appointed a special officer, who, after due enquiry, framed a scheme based on the consent and agreement of all the parties for clubbing together all the 4 wakfs which form part of the Madrasa and Kalvi Sangam run by the Society on the Wakf Land. Therefore, what was brought back within the realm of the Wakf was a part of the nucleus and not a new property which was exclusively owned by the Society. May be, the Society might have done improvements over the land. But, those aspects cannot be now gone into, for the simple reason that only after delving into the same in the enquiry, the Special Officer framed the Scheme on agreement by the Society also. When part of a wakf property was directed to be retrieved with other components for better administration of the wakf and for which endeavour, the Society also agreed by accepting the Scheme, as reflected in the proceedings, it is too late in the day to contend that they did not agree for such course and they are entitled to have superintendence and control over a property which, in law, should be dealt with exclusively by the Wakf Board alone.

14. Another contention raised by the learned counsel for the Petitioner is that the order passed by the Special Officer for registration with the Board having not been complied with, the Petitioner-society cannot be termed as Wakf within the meaning of Section 3(r) of the Wakf Act. The said contention does not find any force in the light of a decision of the Karnataka High Court reported in AIR 1986 Kar 12, wherein, while considering an identical issue, it was held thus:

A Masjid or Mosque is a place of worship of God and it is not capable of human ownership or possession. It belongs to God and is dedicated to His Worship. Thus a Masjid or Mosque is Wakf as defined in the Act whether it is registered or not. It is the bounden duty of the authority exercising power under Sections 4 and 5 of the Act to enlist Mosque or Masjid as Wakf and it is also the duty of the Board to register a Mosque or Masjid as Wakf. That being so, it is not possible to hold that Jamia Masjid in question cannot be considered to be the Wakf coming under the purview of the Act, because it is not registered.

.... Even though the Masjid in question is not registered as Wakf under Chap. IV of the Act, and is not entered either in the Register of Wakfs or in the list of Wakfs or Wakf properties, it being a wakf as defined in the Act, it comes under the purview of the Act and consequently under the superintendence and control of the Board. It is always open to the Board to register such Wakfs and enter them in the register of wakfs. Thus, the 1st point is answered against the Petitioner.

(Emphasis Supplied)

Therefore, failure to have the wakf registered as provided under the Act does not vitiate the Scheme, dt. 22.09.1992, since the same came to be effected with the consent of all the parties including the Society.

15. Coming to the operation of the SocietiesRegistration Act and that of Wakf Act, it must behighlighted that the former confines itself to theInstitutions referred to therein while the latter, onthe other hand, is an Act to provide for betteradministration and supervision of movable and immovableproperties dedicated permanently to serve the religionand the needy. In other words, the Wakf Act being aSpecial Legislation, it ousts the applicability of thegeneral law particularly in the matters relating toadministration, supervision, management and controlover wakf properties. Therefore, the Petitioner cannottake shelter under the provisions of the SocietiesRegistration Act to illegally gain control over theproperties dedicated in perpetuity as Wakf in the nameof the Almighty.

16. Coming to the Civil Revision Petition,learned Counsel for the Petitioner vehemently arguedthat the impugned order, dated 23.03.2010, passed bythe Principle Sub Judge, Krishnagiri, in WOS No. 90 of2006, is liable to be interfered with as the TrialCourt grossly erred in overlooking the just case of theSangam that it is a separate entity under the SocietiesRegistration Act and therefore, the properties managedby it can never be termed to be wakf properties.

17. Even though the Civil Revision Petition isliable to be dismissed on various grounds, suffice itfor this Court to advert to one vital ground.

The suit in question ie., WOS No. 90 of 2006 wasfiled without even issuing the mandatory "pre-suitnotice" as contemplated u/s 89 of the WakfAct, 1995. Such mandatory compliance having beenconveniently given a go-bye, resulting in a fataldefect, the suit itself cannot be maintained on file.The provision makes it clear that it imposes upon every civil Court a statutory and unqualified obligation to dismiss the suit if there is non compliance of that provision. A close reading of Section 89 of the Wakf Act, 1995 corresponding to Section 56 in the old Act, to the effect,

89. Notice of suits by parties against the Board--No suit shall be instituted against the Board in respect of any act purporting to be done by it in pursuance of this Act or of any rules made thereunder, until the expiration of two months next after notice in writing has been delivered to, or left at, the office of the Board, stating the cause of action, the name, description and place of residence of the Plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

would go to show that the provision beginning in a negative sense with the wordings "no suit shall be instituted" is imperative in character regarding issuance of notice of suits. Admittedly, the Petitioner never issued the notice as contemplated in the Wakf Act to set the law in motion. If a suit had been instituted without complying with such vital mandatory requirement, the court would only reject the plaint under Order 7 Rule 11 Code of Civil Procedure. In this regard, it is relevant to quote below the following passage from the ruling reported in Rahmath Bi v. State Wakf Board (AIR 1982 Madras 202):

7. In Sree Raja Venkata Rangiah Appa Rao Bahadur and Another Vs. The

Secretary of State for India in Council and Others, , SundaramChetty J. had occasion to consider this question and the learned judge pointed out that the suit instituted without issuing a notice u/s 80 C.P. C. is not maintainable and affirmed the orders of the courts below rejecting the plaint on the ground that notice under Section 80 C.P. C. was not given. In doing, so, the learned Judge pointed out that it is no longer a matter of discretion of the court to hold in favour of the maintainability of a suit in spite of the non-compliance with some of the requisites of Section 80 C.P. C. and that such defects if found to exist, should result in the rejection of the plaint as a whole. Therein, the view has also been expressed that non-compliance with the requisites of Section 80 Code of Civil Procedure would be covered by O. 7 Rule 11 (d) Code of Civil Procedure. This view was affirmed in (Sree Rajah) Venkata Rengiah Appa Rao Bahadur and Others Vs. Secy. of State and Others, . A similar view has also been expressed by the Calcutta High Court in Jagadish Chandra Deo Vs. Debendra Prosad Bagchi Bahadur and Others, , which had also approved of the view of the Division Bench of the Allahabad High Court in Bachchu Singh v. Secretary of State, ILR (1903) 25 All 187. In Pallariseti Gotilingam v. State of Andhra Pradesh, a suit had been instituted without a proper notice under Section 80 C.P. C. and the Plaintiff prayed for permission to withdraw that suit with liberty to file a fresh suit and that application was dismissed by the District Munsif holding that it was a fatal defect and not a formal defect. In considering the correctness of that order, it was pointed out that when it is discovered that there is a non-compliance with the mandatory provision under Sec. 80 C.P. C. the proper course would be to reject the plaint. This course had also been approved of by the Supreme Court of India in Gangappa Gurupadappa Gugwad Gulbarga Vs. Rachawwa Gugwad and Others, . Mitter J. speaking for the court observed at p. 446 thus--

No doubt it would be open for a court not to decide all the issues which may arise on the pleadings before it if it finds that the plaint on the face of it is barred by any law. If for instance the Plaintiff's cause of action is against a Government and the plaint does not show that notice u/s 80 C.P. C. claiming relief was served in terms of the said section, it would be the duty of the court to reject the plaint recording an order to that effect with reasons for the order. In such a case, the court should not embark upon a trial of all the issues involved and such rejection would not preclude the Plaintiff from presenting a fresh plaint in respect of the same cause of action.

18. Cases where suits have been instituted without the issue of a notice in accordance with Section 80 Code of Civil Procedure. or section 56 of the Wakf Act, as in the instant case, would thus be causes which would fall under Order 7 Rule 11 (d) CPC. Reading of the plaint in the suits instituted by the Petitioners would disclose that an act of the Wakf Board is challenged in the course of the suits without having given the requisite notice under Sec. 56 of the Wakf Act and on the face of it, even on the statements in the plaints, the suits appear to be barred by the provisions of the Wakf Act. It is also necessary to refer to O. 7 Rule 13 C.P. C. which declares that the rejection of the plaint on any of the

grounds under 0. 7 Rule 11 C. p. C. would not preclude the Plaintiff from presenting a fresh plaint in respect of the same cause of action. In view of this safeguard which has been provided, No. prejudice whatever will be caused to the Petitioners by rejection of the plaints presented before the court below without issuing a notice under Section 56 of the Wakf Act. "

In a recent decision reported in 2010 (4) CTC 516 (The Secretary, Tamil Nadu Wakf Board v. Kancheepuram Oili Mohamed-Pettai Labbai Jumma Masjid), this Court categorically held that pre-suit notice is a condition precedent and any defect of want of notice goes to the root of the matter and such defect cannot be viewed lightly, and it was concluded that the suit against the Wakf Board in respect of any act purported to be done by it in pursuance of the Act or Rules framed thereunder is barred unless proper notice is served on the Board before filing of suit. Inasmuch as there is a gross violation of what is mandated under Section-89 of the Act, the suit itself is rendered nugatory.

18. While dealing with the suit, the trial court recorded the prevaricating evidence of the society's witness regarding the consent given by them for acceptance of the Scheme. On a careful examination of the Judgment of the Trial Court, this Court is of the view that, before negating the case of the society, all relevant aspects have been deeply delved into and conclusions on facts and law have been reached on the basis of evidence and sound reasoning and therefore, there is No. scope for interference.

19. In the light of the foregoing discussion, this Court does not find any valid reason or ground whatsoever to grant the prayers sought for and consequently, both the writ petitions as well as the civil revision petition fail and they are dismissed. No. costs. Connected Miscellaneous Petitions are closed.