

(2007) 02 MAD CK 0067

In the Madras High Court

Case No : CRP (NPD) No. 1629 of 2006 and MP. No. 1 of 2006

Janab Dr. Hisamuddin Papa Saheb, Janab Khadeer Ahmed
Sahib, Janab Ameer Bin Obeid Sahib and Janab Kauser
Hussain papa Sahib

APPELLANT

Vs

E. Niyamathulla and Others

RESPONDENT

Date of Decision : 16-02-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92, 93
Constitution of India, 1950 — Article 226
WAKF (Amendment) Act, 1984 — Section 32, 32(1)
Waqf Act, 1954 — Section 15, 69(1)
Waqf Act, 1995 — Section 15, 3, 3(3), 32, 32(2)

Citation : (2007) 2 MLJ 1069

Hon'ble Judges : S. Ashok Kumar, J

Bench : Single Bench

Advocate : R. Gandhi, S.C. for K.V. Sundararajan, for the Appellant; S. Thiruvengadasamy, for WAKF Board, T.R. Rajagopalan, S.C. for M.L. Denis, for RR 1 and 4, V. Raghavachari, for R.3, M.S. Krishnan, for R.5, M.K. Hidayathullah, for RR 6 to 9, Jawad, for RR 10 and 13, Fathima Suthana, for R11 and V. Bhiman, for R.12, for the Respondent

Final Decision : Allowed

Judgement

S. Ashok Kumar, J.—This Civil Revision Petition is directed against the order of the learned Principal Judge, City Civil Court, Chennai in CMP. No. 2188 of 2003 in O.S. No. 63 of 1940.

2. The brief facts of the case is as follows:

One Fazilathunia Begum Sahiba D/o. Nawab Walaja on 30.1.1877 through a Will appointed her full brothers' sons namely 1) Mohammed Ameenken Hussain Khan bahadur 2) Khader Ali Khan Bahadur 3) Ghulam Hassan Ali Miyan 4) Ghulam Auzam Ali Miyan 5) Ghulam Jeelani Miyan and her own servants namely 6) Mohammed Namdar and 7) Mer Hussain Ali Khan Bahadur as Muthavallis of

the Trust and dedicated the lands mentioned thereunder, with the endowments of doing Fathkha Ceremonies during ten days of holding Mohamrram viz., (1) the Fathikha Ceremony (2) The Fathkha of Huzuruth Imam Hussain, the Martiyur of Kerbala and on 11th day of Safar (3) The Fathkha of Founder's deceased Mother Dowlathunnisa Begum and on 19th day of the month Zee Hajja and (4) The Fathikha of the Founders deceased brother Abu, Tuyrab Khan Bhadur Shujaeth Jung. In the Codicil executed by the founder on 2.2.1877 the founder had also added the Fathikha Ceremony of the founder herself to be continued by the seven trustees appointed by her. The trust was continued by the seven trustees. The Subordinate Judge of Chengalpattu was approached by the interested persons for framing a scheme for the said Trust and accordingly on 10.2.1941 the Subordinate Judge of Chengalpattu had framed a Scheme in the suit in O.S. No. 63 of 1940 and a Scheme Decree was passed. As per the Scheme Decree and also as per the Codicil 7 trustees namely Muthavallis shall be appointed for the management and administration of the Trust and three of them at least shall be from the family of the founder and the remaining four Muthavallis shall be appointed from among the applicants and adult residents of Saidapet and Madras and the term of each Muthavalli shall ordinarily be five years and the court can on proper reason remove any Muthavalli from the office before the said period of five years and appoint another person in his place. The Executive Muthavalli shall ordinarily hold office for a period of three years and be eligible for re election after the expiry of that period. By order dated 13.8.1999 the scheme stood pending on the Court of the learned Subordinate Judge, Chengalpattu was transferred to the file of the City Civil Court, Madras by an order made in Tr. MP. No. 7209 of 1999 by this Court.

3. The term of the erstwhile Muthavalli ended by 7.4.1999. One Niyamathulla, the first respondent in the CRP filed I.A. No. 218 of 2003 before the Principal Judge, City Civil Court, Chennai to appoint adequate number of Trustees as per the Terms and Conditions of the Scheme Decree dated 10.2.1941 in O.S. No. 63 of 1940. The said application was contested by the petitioners herein. However, on the instructions from the Principal Judge, City Civil Court, Madras, applications were invited by Advertisement in leading Dailies and in response to such advertisement 44 persons applied for the appointment as Executive Members. A personal hearing of the candidates was held by the Principal Judge and objections from all sides were also taken note of and documents relating to credentials, objections raised regarding appointment of Executive Members or Trustees was also considered. Since one of the candidate applied for the said post has been shown twice, the total number of Candidates was only 43. By a detailed order, the learned Principal Judge, City Civil Court, Chennai appointed the respondents 4 to 10 as Muthavallis for the Trust of the said Wakf. In his order, the learned Principal Judge, found fault with the petitioners on the ground that they did not inform the court for appointment of new Trustees after the period was expired and also on the ground that some of the properties have been leased out for a very low amount and the first petitioner himself has built a

Hospital in the Wakf property by leasing it in the name of his family members. Aggrieved over the said order, this CRP is filed.

4. Mr. R. Gandhi, learned Senior Counsel appearing for the revision petitioner would strenuously contend that after enactment of the WAKF Act (Act 43 of 1995), the Civil Court's jurisdiction has been ousted and the Civil Court has no jurisdiction to deal with the Wakf properties. He further contended that unnecessary comments have been made against the first petitioner who has increased the income of the Wakf by leaps and bounds and has improved the Trust Properties.

5. Mr. V. Raghavachari, learned Counsel for the third respondent who impleaded himself, has strenuously contended that the City Civil court or for that matter any other court has no jurisdiction to deal with the property except the WAKF Board and the Tribunal constituted under the WAKF Act.

6. Per contra, Mr. T.R. Rajagopalan, learned Senior Counsel contended that the Wakf Act, 1995 has not removed the scheme suit u/s 92 CPC and therefore, the order of the learned Principal Judge, City Civil Court, Chennai is sustainable. He would further contend that the first petitioner being a Trustee should not have leased out the properties in the name of his family members. The above contentions were supported by Mr. M.S. Krsihnan, learned Counsel appearing for R-5 and also contended that what is not expressly barred by the Act can be taken as barred under the Civil Procedure Code.

7. Now let us first decide the legal question whether the Civil Court has got jurisdiction to deal with the WAKF properties?

8. Learned Counsel for the respondents would rely upon the judgment in Radhakrishna Rice Mill Company and Others Vs. Jumma Maseedh by its Muthavalli, , wherein a Division Bench held as follows:

29. There is another aspect of the matter touching on the issue. Even after the 1954 Act came to be enacted. Sections 92 and 93 of CPC continued to be available for the aggrieved persons to get Schemes framed in relation to religious institutions including wakfs. An attempt was made under Amendment Act 69 of 1984 to repeal Sections 92 and 93 of CPC by adding Item 3-A to Sub-section (1) of Section 69 of the 1954 Act. The date with reference from which that amendment was to come into force was not notified. The result is that Sections 92 and 93 continued to be applicable even in respect of wakfs covered by the provisions of the 1954 Act. The cumulative effect of these provisions is that the Schemes framed under Sections 92 and 93 of the CPC are in no way affected on account of enactment of 1954 Act. This discussion with reference to the provisions of 1954 Act is undertaken because applications were filed for appointment of Trustee/Mutawalli for the Mosque and the orders were passed when 1954 Act was in force. Even this doubt ceased to exist with the enactment of Wakf Act 1995 (for short "1995 Act). Section 32 of 1995 Act corresponds to Section 15 of 1954 Act. Sub-section (1) of Section 32 of 1985 Act reads as under:

32. Powers and functions of the Board:- (1) Subject to any rules that may be made under the Act, the general superintendence of all wakfs in a State shall vest in the Board established or the State; and it shall be the duty of the Board so to exercise its powers under this Act as to ensure that the wakfs under its superintendence are properly maintained, controlled and administered and the income thereof is duly applied to the objects and for the purposes for which such wakfs were created or intended.

Provided that in exercising its power under this Act in respect of any wakf, the Board shall act in conformity with the directions of the wakf, the purposes of the wakf and any usage or customs of the wakf sanctioned by the school of Muslim law to which the wakf belongs.

Explanation.- For the removal of doubts, it is hereby declared that in this sub-section "wakf" includes a wakf in relation to which any scheme has been made by any Court of law, whether before or after the commencement of the Act.

A reading of explanation would remove all the doubts as to whether the wakf in relation to which the Scheme has been made by the Court of law before or after the commencement of the Act in relation to that section. A seal of approval is accorded to the Scheme framed by a Court of Law in relation to wakfs whether before or after the commencement of the 1995 Act. One significant feature of this Act is that though separate machinery is provided for adjudication of disputes. Sections 92 and 93 of the CPC, for the repeal of which an abortive attempt was made in 1954 Act, are not repealed under this Act. Therefore, the Scheme framed in O.S. No. 113/13 shall continue to be operative in respect of the Mosque.

9. In 1996 (2) L.W. 788 (The Executive Committee of the Masjid E. Farkhunda and Ors. v. P.A.G. Hussain Moulana and Ors.), a Division Bench of this Court held thus:

8. It is next argued that the remedy of the 1st respondent is to move only the Wakf Board and he cannot approach the Civil Court for any relief. There is no merit in this contention also. It is contended that once the Wakf Board has notified the Trust as a Wakf, the provisions of the Scheme become ineffective and they are no longer in force. This contention was urged before the learned Judge also and he found that there was no substance in that contention. We agree with the view expressed by the learned Judge. It has been held repeatedly by this Court that the notification under Wakfs Act or the management of the day to day affairs of the Wakf Board will not in any way suspend or affect the operation of a Scheme decree passed by a civil court.

10. In Mohammad Ghouse Sahib and Others Vs. Muhammad Kuthubudin Sahib and Others, , the Hon"ble Supreme Court laid down as follows:

CMP It is true that while the Wakf Act came into force in the State of Tamil Nadu in 1956, the decree framing the scheme for the Wakf was passed in 1961 but

that does not render the decree void and unenforceable. As we said, this suit had been instituted prior to the coming into force of the Wakf Act. Section 55 of the Wakf Act shows that suits u/s 92 of CPC continue to be maintainable even after the passing of the Act, except that the consent of the Board has to be obtained for the institution of such a suit if the suit is filed by some person other than the Board. Section 57(1) provides that in every suit or proceeding relating to tile to wakf property or the right of a Mutawalli, the Court shall issue notice to the Board at the cost of the party instituting such suit or proceeding. Section 57(3) however provides that in the absence of the notice under Sub section (1) any decree or order passed in the suit or proceedings hall be declared void, if the Board within one month of its coming to know of such suit or proceeding applies to the Court in this behalf. Section 59 however provides that in any suit or proceeding in respect of Wakf or any Wakf property by or against a stranger to the Wakf or any other person, the Board may appear and plead as a party to the suit or proceeding. These provisions make it clear that a suit u/s 92 CPC instituted prior to the coming into force of the Wakf Act does not abate on the coming into force of the Act. On the other hand the Court is required to issue notice of such a suit to the board and in the absence of a notice it would be open to the Board to have the decree declared void within one month of the Boar''s knowledge of the decree.

11. In Palani Muslim Dharmaparipalana Sangam through its Office Bearers v. T.N. Wakf Board through its Secretary, Madras 88 L.W. 2 this Court held thus:

The power of general superintendence of the Wakf Board cannot be said to extent t the extent of nullifying or ignoring or superseding a scheme for the administration of the Wakf framed and settled by a decree of court. So long as the decree of the court is in existence, and so long as it has not been modified or set aside or reversed by any procedure known to the law, the Wakf Board has no jurisdiction whatever to sweep it away or to ignore it, and to act contrary to the terms of the scheme in the purported exercise of its power of general superintendence u/s 15 of the Wakf Act.

12. In Syed Peer Shah Mohideen Kadiri v. Tamil Nadu Wakf Board, by its Secretary 89 L.W. 108 a learned Judge of this Court again reiterated thus:

When a Scheme has been framed by a Civil Court prior to the passing of the Wakf Act, then it shall prevail and shall be taken as the basis by the Wakf Board for administering a particular Wakf for which that scheme has been framed. It is open to the Wakf Board to apply to the Civil Court for modifying the scheme if an occasion or necessity arises. But, it cannot on its own volition or through the intervention of the Courts substitute itself in the place of the Civil Court and take upon itself the authorship of that scheme. Once the scheme has been framed prior to the Act, it is only the Civil Court which can modify it and it can do so when it is called upon by the Wakf Board.

13. From the judgments cited above, it is the case of the respondents that a

Scheme Suit is maintainable in a Civil Court notwithstanding the introduction of Wakf Act, 1995. Per contra, Mr. R.Gandhi, learned senior counsel appearing for the petitioners and Mr. V. Raghavachari, learned Counsel for the third respondent who has been impleaded himself in this CRP would contend that under the WAKF Act 1995, as per the explanation to Section 32, the Civil Court's jurisdiction has been taken away by the new Act. Both of them further contended that Section 85 is a bar of jurisdiction to civil court with regard to any matter relating to Wakf properties.

14. In 2006 (1) L.W 803 (P.M. Venkatachalapathy and Anr. v. Syed Anwar and Ors.), this Court held as follows:

10. ...After coming into force of the Wakf Act 1995 (01.01.1996), all proceeding including the suit relating to an Wakf property or other matter shall be determined only by the Wakf Tribunal. u/s 85 of the Wakf Act, jurisdiction of th4 civil court is barred. Section 85 reads:

85. Bar of Jurisdiction to 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.

Thus the Civil Courts would not have jurisdiction either to entertain the suit or continue the suits if any pending before it and the same shall be deemed to be transferred to the Wakf Tribunal.

11. Section 83 of the Act deals with constitution of the Tribunals. As per Section 83(1) of the Act, only the Tribunal has the jurisdiction to determine any dispute, question or other mater relating to the Wakf of Wakf Property under the Act....

15. In 2005 (I) L.W.676 (Salam Khan v. The Tamil Nadu Wakf Board and Ors.) speaking for the Division Bench, Markandey Katju, Chief Justice, as His Lordship then was, held as follows:

2. In our opinion, all matters pertaining to Wakfs should be filed in the first instance before the Wakf Tribunal constituted u/s 83 of the Wakf Act, 1995 and should not be entertained by this Court straight- way under Article 226 of the Constitution of India.

3. It may be mentioned that the Wakf Act, 1995 is a recent parliamentary statute which has constituted a special Tribunal for deciding disputes relating to Wakfs. The obvious purpose of constituting such a Tribunal was that a lot of petitions relating to Wakfs were being filed in the Courts in India and they were occupying a lot of time of all the Courts in the country, which resulted in increase in pendency of cases in the Courts. Hence, a special Tribunal has been constituted for deciding such matters.

4. Section 83(1) of the Wakf Act 1995 states,

83. Constitution of Tribunals, etc.- (1) The State Government shall, by

notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a Wakf or Wakf property under this Act and define the local limits and jurisdiction under this Act of each of such tribunals.

5. Section 84 of the Act states,

84. Tribunal to hold proceedings expeditiously and to furnish to the parties copies of its decision - Whenever an application is made to a Tribunal for the determination of any dispute, question or other matter relating to a Wakf or Wakf property it shall hold its proceedings as expeditiously as possible and shall as soon as practicable on the conclusion of the hearing of such matter give its decision in writing and furnish a copy of such decision to each of the parties to the dispute.

6. Thus, the Wakf Tribunal can decide all disputes, questions or other matters relating to a Wakf or Wakf property. The words "any dispute, question or other matters relating to a Wakf or Wakf property" are, in our opinion, words of very wide connotation. Any dispute, question or other matters whatsoever and in whatever manner which arises relating to a Wakf or Wakf property can be decided by the Wakf Tribunal. The word "Wakf" has been defined in Section 3(r) of the Wakf Act, 1995 and hence once the property is found to be a Wakf property as defined in Section 3(r), then any dispute, question or other matter relating to it should be agitated before the Wakf Tribunal. It is not proper for this Court to straightway entertain writ petitions relating to a Wakf or Wakf property when there is a special Tribunal constituted for this purpose.

16. In 2005 (2) L.W. 615 (Mukram Sherif v. Moinudeen Sheriff and Anr.) speaking for the Division Bench, Markandey Katju, Chief Justice, as His Lordship then was, affirming his earlier view has held as follows:

2. It has been held by a Division Bench of this Court, to which one of us (Markandey katju, Chief Justice) was a party, in W.A. No. 23445 of 2000 and W.P. Nos. 12710 and 15945 of 2000 (Salam Khan v. The Tamil Nadu Wakf Board), decided on 31.1.2005 reported in 2005 (1) Lw.676 that all disputes relating to wakf should be filed in the first instance before the Wakf Tribunal, constituted u/s 83 of the Wakf Act, 1995 and the writ petitions should not be entertained directly by this Court under Article 226 of the Constitution as there is alternative remedy. Against the aforesaid judgment of the Division Bench of this Court, a SLP viz., SLP (C.) No. 4156 of 2005, was filed in the Supreme Court and the said SLP was dismissed.

17. It is pertinent to note that AIR 2000 Madras 231 which was relied upon by the respondents was delivered by Justice D.Murugesan, J., But my learned Brother while sitting along with the then Chief Justice in 2005 (1) L.W 676, cited supra, has changed his view and has taken the stand that any dispute whatsoever in whatever manner which arises relating to wakf property shall be decided by Wakf Tribunal.

18. In *V.S.B. Sikkandar Vs. K.M. Khader Gani and The Tamil Nadu State Wakf Board*, a Division Bench of this Court has held as follows:

5.2. As pointed out by the learned Counsel appearing for the Wakf Board, Section 83(1) of the Act provides for the constitution of the Tribunals for determination of any dispute, question or other matters relating to a wakf or wakf property under the Act and also defines the local limits and jurisdiction for each of such Tribunals. As per Section 83(4) of the Act, the 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, and as per Section 83(5) of the Act, the Tribunal shall be deemed to be a Civil court and shall have the same powers as may be exercised by a Civil court under the CPC while trying a suit or executing a decree or order.

5.3. In view of the constitution of such Tribunals, Section 85 bars the jurisdiction of the Civil Courts, which reads as follows:

85. 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.

That apart, Section 90 contemplates notice of suits, etc., by Courts, which reads as follows:

90. Notice of suits, etc., by Courts. - (1) In every suit or proceeding relating to a title to or possession of a wakf property or the right of a mutawalli or beneficiary, the Court or Tribunal shall issue notice to the Board at the cost of the party instituting such suit or proceeding.

(2) Whenever any wakf property is notified for sale in execution of a decree of a Civil Court or for the recovery of any revenue, cess, rates or taxes due to the Government or any local authority, notice shall be given to the Board by the Court, Collector or other person under whose order the sale is notified.

(3) In the absence of a notice under Sub-section (1), any decree or order passed in the suit or proceeding shall be declared void, if the Board, within one month of its coming to know of such suit or proceeding, applies to the Court in this behalf.

(4) In the absence of a notice under Sub-section (2), the sale shall be declared void, if the Board, within one month of its coming to know of the sale, applies in this behalf to the Court or other authority under whose order the sale was held.

5.4. Section 92 of the Act makes it mandatory that the Board should be a party to a suit or proceeding, which reads thus:

92. Board to be party to suit or proceeding. - In any suit or proceeding in respect of a wakf or any wakf property, the Board may appear and plead as a party to the suit or proceeding.

Section 93 again prohibits the power to compromise a suit by or against mutawallis without the sanction of the Board, which reads thus:

93. Bar to compromise of suits by or against mutawallis. - No suit or proceeding in any Court by or against the mutawalli of a wakf relating to title to wakf property or the rights of the mutawalli shall be compromised without the sanction of the Board.

5.5. A harmonious construction of the above relevant provisions of the Act, makes it clear that after 1.1.96, the Civil Court, viz., the Principal Sub Court, Nagapattinam District, was ceased to have jurisdiction to try the present suit, viz., O.S. No. 192 of 1993 and pass judgment and decree thereon, either decreeing the suit as prayed for or dismissing the same. Hence, in our considered opinion, of course, without going into the merits of the claims of either parties and the findings of the Court below thereon, we find that the learned Subordinate Judge, Nagapattinam, has committed an error in law, apparent on the face of record, for having tried the suit and dismissed the same after 1.1.96, in view of the bar u/s 85 of the Act and therefore, the same is a nullity in the eye of law.

6. The above view of ours, is also supported by the judgment of a Division Bench of this Court dated 31.1.2005 in the case of Salam Khan v. The Tamil Nadu Wakf Board and Ors. 2005-1-L.W.676....

19. In Syed Moinudeen v. The Tamil Nadu Wakf Board reported in 1998 I L.W. 134, a Division Bench of this Court while dealing with Section 92 of the CPC held as follows:

The first and foremost requirement under unamended Sec. 92, is that the sanction from the Advocate General must have been obtained. As rightly pointed out by learned senior counsel for the appellants, the purpose of the sanction from the Advocate General is to prevent frivolous suits being filed in respect of the trusts relating to religious or charitable objects. Whatever may be the purpose, the Judgments cited above clearly indicate that unless the requirements of Section 92 of the CPC are strictly followed, the suit cannot be deemed to be the suit u/s 92 of the Code of Civil Procedure. Whatever be the nature of relief and even accepting the stand of the counsel for respondent, no decree can be deemed to be a decree u/s 92 of the Code of Civil Procedure, unless the requirements of Section 92 of the CPC have been followed.

20. In Aliyathammada Beethathabiyyapura Pookoya Haji Vs. Pattakkal Cheriyaakoya and Others, , a Division Bench of the Kerala High Court held as follows:

6...Apex Court in Dhulabhai and Others Vs. The State of Madhya Pradesh and Another, laid down certain principles regarding the exclusion of jurisdiction of civil Court. Principles laid down by the Apex Court which are relevant to us is stated as follows:

(1) Where the statute gives a finality to the orders of the special tribunals the civil courts jurisdiction must be held to be excluded if there is adequate remedy to do what the civil court would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the Court an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court. Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes unnecessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the Tribunals so constituted, and whether remedies normally associated with actions in civil Courts are prescribed by the said statute or not.

(3) An exclusion of jurisdiction of the Civil Court is not readily to be interfered unless the conditions above set down apply.

We may examine the scope of Sections 83 and 85 and the related provisions in the light of the above mentioned principles. Section 85 is extracted below for easy reference:

85. 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.

Section 85 stipulates that no suit or other legal proceedings shall lie in any Civil Court in respect of any dispute, question or other matter relating to any Wakf, Wakf property. This is the first limb of Section 85. The Second limb is that no suit or other legal proceedings shall lie in any civil court in respect of any dispute, question or other matter which is required by or under this Act to be determined by a Tribunal. In the first limb of Section 85 we see the words "or other matters relating to" and in the 2nd limb of Section 85 also we find the words "or other matter which is required". In other words, in the first limb the emphasis is on the words "relating to" and in the second limb the emphasis is on the words "required by". The Wakf Act has conferred powers on the Tribunal to resolve various disputes by way of appeals and applications. Sections 6, 7, 3(3), 54(4) etc., confers powers on the Tribunal to entertain suits. Section 6 and Section 7 deals with disputes as to whether a particular property is a Wakf, whether it is a Shia Wakf or Sunni Wakf. Section 32(2)(d) enables the Wakf board to settle schemes of management of a Wakf and if any person who is interested in the Wakf or affected by the settlement or direction may institute a suit before the

Tribunal. Section 54 deals with removal of encroachment from the "Wakf property. Any person aggrieved by the order passed by the Chief Executive Officer could institute a suit before the Tribunal".

21. Therefore, from the judgments referred to above, it is clear that an abortive attempt was made in the Wakf Act, 1984 to remove Section 92 of the Code of Civil Procedure, but the same was not notified. But subsequently by introducing Act 43 of 1995, explanation for Section 32 was inserted to the effect that a "wakf includes any wakf relation to which any scheme has been made by any court of law, whether before or after the commencement of this Act." Section 32(2)(d) deals with settlement of schemes of management for a wakf and how a scheme should be settled is further explained in the proviso.

22. The importance of the Wakf Board is detailed in the various sections of the Act. The Wakf Board has the power of general superintendence of all over the Wakfs in the State and it has got power to ensure that the Wakfs under its superintendence are properly controlled managed and income thereof are used for the objects for which purpose it was created or intended. u/s 50 any Muthavalli of any Wakf is bound to carry out the directions of the Wakf Board, to furnish returns and supply all of such information or particulars as may be from time to time required and other acts which is lawfully required to do. Alienation of any wakf property without sanction of the Board is void. u/s 63, the Wakf Board has power to appoint Muthavallis and u/s 64 the Board has power to remove a Muthavalli from his office. u/s 65, if in case where no suitable person are available for appointment as a Muthavalli for a wakf or where the Board is satisfied for reasons to be recorded by it in writing, that the filling up of the vacancy in the office of the Muthawalli is prejudicial to the interests of the wakf, the Board may, by notification in the official Gazette, assume direct management of the wakf for such period or periods, not exceeding five years in the aggregate, as may be specified in the notification.

23. u/s 66 even the State Government can exercise the powers of the Wakf Board in consultation with the Wakf Board before exercising such powers. u/s 69 of the Wakf Act the Board on its own motion or on the application of not less than 5 persons interested in the Wakf can frame a scheme for their proper administration of the wakf. u/s 90 of the Act, a notice is required to be given to the Board in every suit or proceeding relating to a title to or possession of a wakf property or the right of a Muthavalli or beneficiary, the Court or Tribunal shall issue notice to the board at the cost of the party instituting such suit or proceeding. Sub Section (3) of Section 90 reads as follows:

(3) In the absence of a notice under Sub Section (1), any decree or order passed in the suit or proceeding shall be declared void, if the Board, within one month of its coming to know of such suit or proceeding applies to the Court in this behalf.

24. The descriptions of the Sections made above, would clearly show the powers of the Board. Thus, any person aggrieved over the orders and decision of the

Board may approach the Tribunal constituted under the Wakf Act, 1995. The Act has cleared all the doubts with regard to the maintenance of wakf properties by giving explanation to Section 32 of the Act. All the Wakf properties in the State vest with the Wakf Board and it is for the Board to decide as to how the properties should be managed and by whom they should be managed. Any person not satisfied with the order of the Board can approach only the Tribunal constituted under the Act and not the Civil Court as held by various decisions mentioned above.

25. Further, in this case, as per Clause 15 of the Scheme, the Court may give direction for the proper working of the Scheme suo moto or on the application of one or more Muthawallis or two or more persons having interest in the wakf. The first respondent who filed the petition was not a Muthavalli at the relevant point of time. He alone filed the petition which is against Clause 15 of the Scheme itself. Further the advertisement inviting application of the trusteeship was not made in the proper manner. As per the scheme, apart from at least three trustees from the family of the founder, other musalmans residing at Saidapet, Madras also can apply. But the particular words Muslims residing within Saidapet or Madras is not found in the advertisement which resulted even filing of applications by Five Hindus applying for the said post.

26. The learned Counsels for the respondents would contend that the first petitioner Janab Dr.Hissamuddin Papa Sahib has leased the trust property to his family members and other leases were also only for a pittance. Per contra, Mr. R.Gandhi, learned Senior Counsel would submit that the lease was ordered in M.P. No. 2 of 1956 in O.S. No. 63 of 1940 by the learned Subordinate Judge, Chengalpattu and by the resolution passed unanimously by the Board of Trustees at the meeting held on 25.2.1973. Therefore it is clear that the lease was for 50 years and when the property was originally leased to the family members of the first petitioner, the first petitioner should have been a minor aged 3 years. Though the impugned order passed by the learned Principal Judge would state that the property is 300 grounds, the actual extent of the property is 101.6 grounds, out of which, the mosque cum burial ground occupies 35 grounds and the property leased out is 66.6 grounds to various persons.

27. Mr. R. Gandhi, learned Senior Counsel would like to repel the contention of the respondents that the lease amount was for a pittance. He would submit that from 1956 to 1996 December donations collected from lessees was only Rs. 3,333/= whereas after the first petitioner assuming office from January 1997 till date the donations collected from lessees is Rs. 55,19,542/=. The rental advance collected from lessees since 1956 to 1996 is only Rs. 12,333/=:, whereas from January 1997 to December 2001 the rental advance collected is Rs. 4,65,266/= and from January 2002 to December 2006 it is Rs. 3,65,994/=:.

28. Further in CMP. No. 2188 of 2003, the then Principal Judge of the Civil Court has observed that though there is some allegations levelled by the petitioner against the present Muthavallis with regard to the management of the trust, this

Court finds perceptible growth of the trust immediately after the present Muthavallis under the leadership of the Executive Muthavalli took charge of their office. Mr. R.Gandhi, learned Senior Counsel appearing for the first petitioner has also produced some voluminous records to show that he is doing social service activities, about which we are not concerned.

29. As already held, the Wakf Board is given with all the powers to decide as to who should manage the Wakf property and how it should be managed. The Wakf Board has got powers to appoint or remove Muthavallis. Therefore, after introduction of Wakf Act, 1995 (Act 43 of 1995), the Civil Court has lost its jurisdiction and it is for the Wakf Board to decide about the management of its properties. Any person aggrieved by the order of the Board can apply to the Tribunal specially constituted under the Act.

30. In Paragraph 18 of the order, the learned Principal Judge, City Civil Court, Chennai has observed as follows:

18. The women candidates who appeared for the interview are applicant Nos. 15, 31 to 35. Applicant No. 15 is a holder of Doctorate decree in Urdu and Tamil language. She is working in Queen Marys College as the Head of the Department of Urdu language. The said applicant may not find time to attend to the trust works. The other applicants namely 31 to 35 are observing Ghosha and they are all innocent women and they are not aware of properties and the administration of trust. Therefore, it is not feasible for selecting the applicants 31 to 35. Since applicant No. 15 cannot devote time for the trust and its administration and therefore, applicant No. 15 cannot also be appointed for the trusteeship of the trust. The remaining candidates in the family contestants are now 15 and the general contestants are 13.

31. As far as the above finding is concerned, I totally disagree. The above paragraph only shows the gender bias on the part of the learned Principal Judge. It is pertinent to note that only a Women Lawyer cum politician was the Chairman of the Wakf Board till recently. Even now, another practicing women lawyer is the Chairman of the Wakf Committee. Muslim women have been the Prime Ministers of the neighbouring countries which were earlier part of our Country. These are days when independence of women and women entrepreneurship is being encouraged. Even in the matter of employment, administration and politics specific quota is allotted to them. The applicant No. 15 is the holder of doctorate in Urdu and Tamil Language and working as Head of the Department of Urdu language in the Queen Marys College, Chennai. But she has been denied the opportunity of being a Trustee on the grounds that she is a women and also that she cannot devote much time. When practicing lawyers and Doctors are able to devote time, for the appointment of Trusteeship, a Professor and Head of the Department can very well allot sufficient time to look into the affairs of the Trust. The contention by some of the candidates and also the finding of the learned Principal Judge that "Ghosha women" should not be appointed cannot be sustained. Being Ghosha women, it is neither a

disqualification, nor a bar for being appointed as a Muthavalli or Trustee of a Wakf.

32. Learned Senior Counsel appearing for the first petitioner has highlighted several points to show that the allegations made against him are baseless. It is contended that the lease amounts were fixed way back in 1956 for a period of 25 years. The lands in favour of the family of the first petitioner is about 8.5 grounds and most of them have been leased to his parents way back in 1956 when the first petitioner was only 3 years old. Learned senior counsel further contended that the learned Principal Judge failed to see that in the previous period between 1956 to 1981, the rent collection was only Rs. 893/= per month and thereafter was Rs. 9298/= per month till 1996, whereas the present Muthavalli from 1997 till 2006 has increased it to Rs. 76,263/= per month as on date. It is also alleged that the learned Principal Judge failed to see that at the end of 50 years of lease the Trust would have collected Rs. 12,37,27,920/=. The allegation that he is collecting huge amount by letting to lease to a car company MPL Car Ltd., and G.T.Reddy which belong to 3rd parties, purchased by them in the court auction from the debt recovering tribunal. But, these lands do not form part of the Trust properties. A 12 feet passage alone has been leased out to them after collecting adequate donation and monthly lease rents.

33. It is also contended by the learned Senior Counsel for the first petitioner that out of seven persons of the Trustees, three persons are having leasehold rights of land in their favour and also of their respective parents. Since this Court is not directly appointing the Trustees, this Court is not inclined to go into the details of merits and demerits of each of the candidates and it is for the Wakf Board to peruse the details and merits of each candidate.

34. Learned Senior Counsel for the first petitioner also gave the list of various developmental activities carried out in the Mosque and in the Wakf Property by the first petitioner. But, these are the issues which have to be dealt within the four corners of the Wakf Act as has been held by the Hon'ble Supreme Court in M.P. Wakf Board v. Subhasan Shah reported in AIR 2006 SCW 5540. Though the scheme decree can be construed as the Wakf deed, after introduction of the Wakf Act, 1995, the powers of the Scheme Court shall stand transferred to the Wakf Board and its decisions can be challenged before the Wakf Tribunal.

35. Notice was also given to the Wakf Board. The learned Counsel appearing for the Wakf Board would contend that no Notice was given to the Board in the proceedings before the Civil Court and would further contend that whether a civil court is barred from hearing a dispute over Wakf is a grey area in which no definite decision has been taken and would further submit that the Wakf Board will abide by the decision of this Court.

36. In his book "The Law of WAKFS, an Analytical and Critical Study, Justice S.A. Kader, a retired Judge of this High Court has discussed the effect of explanation to Section 32 of the Wakf Act as follows:

Page 159-160:-....In *Syed Pershah v. Tamil Nadu Wakf Board* 1976 (89) LW. 708 it was held by the High Court of Madras that where a scheme had been framed by a Civil Court prior to the Wakf Act, then it shall prevail and it shall be taken as the basis by the Wakf Board for administering the wakf for which the scheme had been framed and it was open to the Wakf Board to be in charge of the day to day administration and management of the Wakf, such as appointment of trustees in accordance with the scheme. This decision was followed by another learned Single Judge of the madras high Court in *T.S. Yusuf and Others Vs. Tamil Nadu Wakf Board*, the learned Judge held that u/s 15 of the Wakf Act 1954 (now Section 32), the board had the power to appoint trustees in accordance with the scheme framed by the Court. In *Amjadulla Siddiqui and Another Vs. Mirza Nizamuddin Baig and Others*, a bench of the High Court of Andhra Pradesh has held that there is no provision in the Wakf Act 1954 which expressly says that the scheme framed by the Court u/s 92 of the CPC prior to the coming into force of the Act, shall cease to be operative on the coming into force of the Act, nor is there any provision which says that wherever such schemes confer certain powers or cast certain duties upon the Court, such powers and duties shall be exercised and performed by the Wakf Board. According to the learned Judges, the Act did not nullify, obliterate or affect in any manner the schemes framed by the Court but it was always open to the Boar to apply for modification of the existing scheme. Their Lordship dissented from the judgment of High Court of Madras in *C.S. Peeran Sahib Vs. The State Wakf Board*, and approved the judgment of M.M. Ismail, J., (as he then was) in *Palani Muslim Dhamaparipalana Sangam v. Tamil Nadu Wakf board* (1975) 1 MLJ 201. In *A.M. Mohideen Packker v. Tamil Nadu Wakf Board* 1983 TNLJ 418 the High Court of Madras held that there was no proviso in the Wakf Act for the Board to interfere with the administration of wakfs which are controlled and administered under the schemes of a civil court.

It is in this state of conflict of judicial option, the Explanation was introduced in Section 15 of the Act 29 of 1954 by the Amendment Act 69 of 1984 for removal of doubts. Unfortunately, the amendment was not given effect to and remained a dead letter. The present Wakf Act 1995 which came into force on 1.1.1996 has given life to this Explanation. The Explanation has set at rest the controversy and has brought within the administrative control of the Board any wakf in respect of which any scheme has been framed by any court of law before or after the commencement of this Act. But that does not mean that the Board can ignore, supersede or throw overboard the schemes framed by the Court. The Board has to take the scheme as the basis and exercise its powers in accordance with the provisions of the scheme. If the Board feels it necessary, it can amend or alter the scheme after due notice to the mutawalli and other persons interested in the wakf and after due enquiry, subject to an appeal to the Tribunal and revision to the High Court under Sub sections (2) and (9) of Section 83 of this Act.

I may now refer to two recent Bench decisions of the High Court of Madras rendered after the coming into force of the Wakf Act 1995. They are:

(1) The Executive Committee of the Majid-e-Farkhunda rep. By its Mutawalli v. P.A.G Hussain Moulana 1996 (2) LW 788 and

(2) Syed Moinuddin v. Tamil Nadu Wakf Board (1998) (1) W 134

In the first of these cases the management of Sidani Bibi and Masthan Owlia Durga and Makkan Trust was governed by a scheme framed by the High Court of Madras on 27.4.1954 in C.S. No. 43 of 1951. In Application No. 2230 of 1996 the learned Single Judge of the High Court of Madras in the original side by his order dated 10.7.1996 appointed the first respondent in the appeal before the bench as Trustee as per the scheme decree. The appeal was against this order. It was contended that the remedy of the first respondent was to move only the Wakf Board for appointing him as Mutawalli. The Bench consisting of Srinivasan, J., (then of the High Court Madras) and S.S. Subramani, J., after referring to several decisions held that the notification under Wakf Act or the management of the day to day affairs of the Wakf, will not in any way suspend or affect the operation of the scheme passed by a Civil Court, upheld the appointment and dismissed the appeal. Though this judgment has been rendered on 1.8.1996 it seems that the attention of the learned Judges has not been invited to the Wakf Act 1995 which came into force on 1.1.1996. had the Wakf Act 1995 and this Explanation in Section 32 been brought to the notice of their Lordships, I am persuaded, that their decision would have been otherwise....

37. In the facts and circumstances of the case, and in view of the clear position of law, the Wakf Board is directed to make necessary advertisements in one of the leading English Daily and two leading Tamil Dailies circulated in Chennai city and Saidapet Taluk calling for applications from the interested persons belonging to Muslim community residing at Madras or Saidapet Taluk to be appointed as Trustees and shall give fair opportunity to all such applicants including those who have already applied before the Principal Judge, City Civil Court, Chennai despite their being selected or rejected, and take a decision by conducting a detailed enquiry in respect of the merits and demerits of the candidates which will suit to the best interest of the Wakf. Till then, the status quo prevailing as on date will be continued.

38. With the above directions, this CRP is allowed setting aside the order of the learned Principal Judge, City Civil Court, Chennai made in CMP. No. 2188 of 2003 in O.S. No. 63 of 1940. The Wakf Board which was not a party in the lower court proceedings is directed to exercise its powers by appointing Trustees for the proper and efficient management of the Trust as indicated above. Consequently, connected M.P. No. 1 of 2006 is closed. No costs.