
(2013) 08 MP CK 0238
In the Madhya Pradesh High Court
Case No : First Appeal No. 19 of 2000

Mazhar Ali and Others

APPELLANT

Vs

Idgah Intjamiya Committee Morar and Others

RESPONDENT

Date of Decision : 27-08-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23, Order 9 Rule 13, 11, 9, 96
Waqf Act, 1995 — Section 4, 5, 6, 7

Citation : (2013) 08 MP CK 0238

Hon'ble Judges : G.D. Saxena, J

Bench : Single Bench

Advocate : D.K. Katare and Mr. Arun Katare, for the Appellant; F.A. Shah, Advocate for Respondent No. 1 and Shri R.K. Soni, Advocate, for the Respondent

Judgement

G.D. Saxena, J.—This appeal u/s 96 of the CPC 1908 has been preferred by the appellants/plaintiffs against a judgment and decree dated 23rd December 1999 rendered in Civil Suit No. 263A/1994 by the Third Additional District Judge, Gwalior, dismissing thereby their suit for declaration of title and permanent injunction over the land comprised in Survey Nos. 2605, 2606, 2617 to 2619, 2638, 2639, 2641 to 2643, having total area of 5 Bighas 3 Biswas, situated at Gandhi Road, Morar. Aforesaid suit was instituted by the plaintiffs with further relief of declaration to nullify the judgment and decree dated 3rd January 1987 which was passed in Civil Suit No. 13A/1987 being hit by the principles of res judicata due to final decision of the previous litigation between the same parties and in regard to the same property in Civil Suit No. 294A/1972 vide judgment dated 9th August, 1974 in consequence of which the court competent confirmed the aforesaid decision by the judgment and decree dated 6th December, 1976 in Civil Appeal No. 5A/1976, preferred by opposite party. The facts necessary for the decision of the present appeal, in chronological way, are as follow:-

(a) That, Idgah and Mazar Saiyed Nasir Ali Shah Sahib through President and Secretary of Ahale Islam Muthakh Etman Intjamia Committee Morar earlier filed

a suit (Civil Suit No. 294-A/1972) against Manjur Ali for recovery of possession and removal from the post of caretaker of the property under dispute i.e. one mazar and one house adjacent to mazar comprising 5 bighas land of Edgah. The defendant admitted that he constructed the mazar of his grandfather Janab Saiyed Nasir Ali Shah and also constructed the adjacent house. He is, in his person maintaining the mazar and also maintaining the Eidgah from his own expenses and continuing in possession in the capacity of Sajjad-naseen-Aulad. He stated that other suit lands are his personal assets which are not connected with the mazar of his ancestral father. The aforesaid suit after trial was dismissed. Thereafter the appellants/plaintiffs, being aggrieved by the judgment and decree dated 9th August 1974, preferred the appeal (Civil Appeal No. 5A/1976) which after hearing the parties and considering their contentions and evidence as produced before the trial court, was dismissed by the appellate court by upholding the judgment and decree under consideration. The plaintiffs/appellants being aggrieved by the judgments and decree of both the trial court and appellate court filed second appeal (Second Appeal No. 49/1977) before this court. By order dated 24th August 1992, this court dismissed the second appeal as the appeal abated for want of bringing the legal representatives on record within limitation.

(b) That, the second round of litigation began on the suit filed by Idgah Intjamia Committee through President Iqbal Qureshi against Smt. Shahjahan Begam and another (Civil Suit No. 13A/1987) who were proceeded ex parte on 6th January 1988. Ultimately on 3rd January, 1989 the suit was decreed against the respondents and thereby declared that the lands under suit belonged to State which were allotted for maintenance and service of the Mazar and Idgah to the plaintiffs and by issuing permanent injunction the respondents/defendants were restrained from interfering into possession of the plaintiffs.

(c) That, in third round of litigation, the plaintiffs/legal representatives of deceased Mansoor Ali filed the suit being C.S. No. 263A/1994 for declaring the judgment and decree dated 3rd January, 1989 as null and void being obtained by playing fraud and hit by the principles of res judicata due to earlier decision on the same subject in C.S. No. 294-A/72. The aforesaid C.S. No. 263-A/1994 was decided by the judgment and decree dated 23rd December 1999, by disallowing the prayer for granting such declaration and permanent injunction. In this way, the suit was dismissed. Being aggrieved by the judgment and decree dated 23rd December 1999 passed by the trial court, present appeal has been preferred by the appellants/plaintiffs.

(d) That, during litigations various proceedings between parties were filed and decided by various revenue tribunals and criminal courts.

2. The submissions put forth by the learned counsel appearing for the appellants in this case are that the learned trial judge did not decide the legal issue involved in the case that the plaintiffs in Civil Suit No. 13-A/1987 (Idgah Intjamiya Committee through President Iqbal Qureshi Vs. Mazar Ali and other) obtained the

judgment and decree dated 3rd January 1989 by playing fraud and collusion without considering the fact that in previous round of litigation in Civil Suit No. 294-A/1972, which stood decided vide judgment and decree dated 9th August 1974, the plaintiffs had virtually lost their case of declaration and injunction in respect of the suit lands against Mansur Ali and the First Appellate Court in Civil Appeal No. 5-A/1976 by judgment and decree dated 6th December 1976 confirmed the same judgment and decree of the trial court. Even before this court, Second Appeal No. 49/1977 preferred against the judgment and decree in Civil Appeal No. 5-A/1976 was dismissed by order dated 24th August 1992 as abated on account of death of respondent Manzoor Ali. So, the judgment and decree passed by the trial judge which was confirmed by the lower appellate court became final. As a consequence, the legal representatives of the deceased Manzoor Ali became owners of the property under dispute. Hence, the second suit (Civil Suit No. 13A/1987) for the same property filed by the other President and Secretary against the legal representatives of deceased Manzoor Ali is hit by the principles of res judicata and was not tenable. It is contended that once the ownership over the suit property was declared in favour of Manzoor Ali by the competent court having jurisdiction, same cannot be assailed after attaining finality up to the stage of this court. This being so, the contrary judgment between the same parties claiming same title on the same set of evidence is not permissible in law. Therefore, on the basis of above submissions, it is prayed that by allowing the appeal, the judgment and decree of the trial court may be set aside.

3. On the other hand, the submission of the learned counsel appearing for the respondent No. 1 is that the suit property in question belonged to the govt. and long back same was given for maintaining the Eidgah and Mazar, which was constructed on the disputed land. Same was mutated in Samwat 2032 (Year 1975) as "Eidgah Pukhta Bake Deh Haja Batmam Mujawar Mansur Ali son of Sher Ali." It is contended that the committee is looking after the affairs of the Eidgah for the persons who are having faith in Islam and doing worship on the festivals. It is denied by the respondent No. 1 that the lands under dispute were ancestral property of the plaintiffs and are not properties belonging to wakf. It is submitted that the judgment and decree dated 3rd January 1989 passed in Civil Suit No. 13A/1987 is having force against the plaintiffs and the same was not obtained by making fraud or collusion as alleged. Accordingly, it is prayed that by confirming the judgment and decree passed by the trial court, the appeal may be dismissed.

4. Similarly, the respondent No. 2 has opposed the prayer of the appellants and prayed for dismissal of the appeal.

5. In view of the aforesaid submissions following questions arise for consideration of this appeal:-

(i) Whether the second suit (Civil Suit No. 13A/1987) filed by Eidgah Intjamia Committee through President Iqbal Qureshi against Smt. Shahjahan Begum & another, which was decided ex-parte by judgment and decree dated 3rd January

1989 was hit on the principles of res judicata (Section 11 Code of C.P.C.), by previous suit (294-A/1972) filed by Idgah and Mazar Saiyed Nasir Ali Shah Sahib through President and Secretary of Ahale Islam Muthakh Etman Intjamia Committee Morar against Manjoor Ali, which attained finality by an order dated 24th August 1992 of this court?

(ii) Whether the plaintiffs of Civil Suit No. 13A/1987 obtained the judgment and decree by playing fraud?

(iii) Whether the law relating to wakf as Mahomedan Law and codified as The Wakf Act 1954, which stood repealed by The Wakf Act 1995 has ever application over the disputed questions involved, if so, the civil court has any jurisdiction to decide the suit in relation to wakf property?

(iv) Whether the Management Committee was looking after the affairs of the suit property, after the death of Mujawar/Mutwalli?

(v) Whether Mujawar/Mutwalli had a right over the wakf property for transfer and/or the right of Mujawar/Mutwalli is inheritable to his legal heirs?

6. Heard the learned counsel for the parties. Also perused the record of the trial court and the documents with the evidence in the light of the law covering the issue.

7. I may take up the contention of the learned counsel appearing for the appellants first for consideration that the subsequent suit is not maintainable being hit by the principles of res judicata as the issue raised in the subsequent suit was already considered at earlier point of time which attained finality.

11. Res judicata.-No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

8. A bare perusal of the provisions of Section 11 C.P.C. shows that in order to constitute res judicata, the following conditions must be satisfied-

(i) There must be two suits-one former suit and the other subsequent suit;

(ii) The court which decided the former suit must be competent to try the subsequent suit;

(iii) The matter directly and substantially in issue must be the same either actually or constructively in both the suits;

(iv) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the former suit;

(v) The parties to the suits or the parties under whom they or any of them claim

must be the same in both the suits;

(vi) The parties in both the suits must have litigated under the same title.

9. Now, coming to the present facts of this appeal, it emerges that till the decision of the second suit (Civil Suit No. 13A/1987) filed by the plaintiff Eidgah Intjamia Committee through President Iqbal Qureshi against Smt. Shahjahan Begum & another, decided on 3rd January, 1989, Second Appeal No. 49/1977 before this court arising out of the judgments and decrees in first C.S. No. 294-A/72, even on the date of 17th April 1989 in third round of litigation in Civil suit No. 263-A/1994 (Majhar Ali Vs. Eidgah Intjamia Committee & another) was pending which was dismissed on 24th August 1992, as abated on account of death of deceased respondent-Manzoor Ali. So, it is apparent that the first suit was sub-judiced in the aforesaid second appeal pending before this court between the same parties on the subject-matter of the property which could not get finality and, therefore, the principles of res-judicata would not apply to the subsequent suit because when an appeal lies, the finality of the decree on such appeal being taken is qualified by the appeal and the decree assailed in the appeal is not final in the sense that it will not form res judicata as between the same parties and it is the appellate judgment which will operate as res judicata and not the judgment of the trial court. At this juncture, it would be useful to refer the decision in the case of Saroja Vs. Chinnusamy (Dead) by L.Rs and Another, wherein the Hon. Apex Court in the same set of facts as in present case observed as follows:-

13. It is well settled that an ex parte decree is binding as a decree passed after contest on the person against whom such an ex parte decree has been passed. It is equally well settled that an ex parte decree would be so treated unless the party challenging the ex parte decree satisfies the court that such an ex parte decree has been obtained by fraud. Such being the position, we are unable to hold that Condition (iv) was not satisfied and accordingly it cannot be held that the principles of res judicata would not apply in the present case.

14. In the present case, admittedly, the appellant in her plaint had not made any case of fraud or collusion either against Kuppusamy or against the respondents herein. It is true that when the subsequent suit was filed, the ex parte decree in the former suit had not been passed and, admittedly it was passed during the pendency of the subsequent suit. But then it was open to the appellant to file an amendment of the plaint in the subsequent suit by introducing a case of fraud or collusion and by challenging the ex parte decree on the ground of fraud also although the ex parte decree was passed during the pendency of the subsequent suit. This, however, was not done by her. Therefore, in our view, since the appellant could not make out a case of fraud or collusion challenging the transaction by which she had purchased the suit property from Kuppusamy in the manner indicated above or, since, even the ex parte decree was also not challenged on the ground that Kuppusamy and Respondent 3 colluded amongst themselves and out of such collusion, Kuppusamy during the pendency of the

former suit sold out the suit property to the appellant, it is not open to the court to hold that the said ex parte decree would not operate as res judicata on the ground that the transaction between Kuppusamy and the appellant in respect of the suit property was a fraudulent one.

10. Also in Ramadhar Shrivastava Vs. Bhagwandas, the Hon. Apex Court facing the same situation observed as under:-

20. The Court observed: (SCC p. 249, para 16)

16. The rule of res judicata incorporated in Section 11 of the CPC (CPC) prohibits the court from trying an issue which "has been directly and substantially in issue in a former suit between the same parties", and has been heard and finally decided by that court. It is the decision on an issue, and not a mere finding on any incidental question to reach such decision, which operates as res judicata. It is not correct to say that the party has no right of appeal against such a decision on an issue though the suit was ultimately recorded as dismissed.

21. In our opinion, the learned counsel for the appellant is also right in submitting that the rule of constructive res judicata applies to the present case. The expression "matter in issue" u/s 11 of the Code of Civil Procedure, 1908 connotes the matter directly and substantially in issue actually or constructively. A matter is actually in issue when it is in issue directly and substantially and a competent court decides it on merits. A matter is constructively in issue when it "might and ought" to have been made a ground of defence or attack in the former suit. Explanation IV to Section 11 of the Code by a deeming provision lays down that any matter which "might and ought" to have been made a ground of defence or attack in the former suit, but which has not been made a ground of defence or attack, shall be deemed to have been a matter directly and substantially in issue in such suit.

22. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter, that should be taken to be the same thing as if the matter had been actually controverted and decided.

11. It is further noted that in the second round of litigation in Civil Suit No. 13A/1987 filed by Eidgah Intjamia Committee against Smt. Shahjahan Begum & another, i.e., legal heirs of deceased Mansoor Ali, the defendants did not appear and they did not choose to file written statement and contest the suit. Eventually, the suit was decreed ex-parte against the defendants and declaration was granted in favour of the plaintiff Eidgah Intjamia Committee. The suit land having total area of 11 Rakba 5 bighas and 3 biswas was granted by the State to the plaintiff for performing worship and maintenance of Eidgah with permanent injunction against the defendants. Again the defendants did not challenge the finding of the trial court by way of proceedings under Order IX Rule 13 of C.P.C. nor did they file an appeal before the court having jurisdiction. That being so, the ex parte decree passed in the subsequent suit had attained finality.

12. On going to the facts of the instant case as came out from the pleadings and the evidence brought on record before the trial court, it appears that plaintiffs/appellants except the facts of prior litigation between the parties and that the appeal was pending before this court could not be able to show as to how the respondent played a fraud with them. The burden of pleading all facts in relation of the subsequent development of the suit property should be raised and proved by the evidence in trial of second suit or the defendants/owners of the property should challenge the finding to set aside ex parte judgment and decree dated 3rd January 1989 under Order IX Rule 13 C.P.C. or in appeal before the court competent. Unless the plaintiffs of the present case, i.e., owners of the disputed property successfully proved that a fraud was played in obtaining the ex parte decree dated 3rd January 1989 with the court having jurisdiction, the judgment dated 3rd January 1989 shall have valid effect against the parties to the suit.

13. Thus, from perusal of the judgment under appeal, it is gathered that the property in dispute was at first instance was recorded in the name of "Eidgah Pukhta Bake Deh Haja Batmam Mujabir Mansoor Ali son of Shamsheer Ali." Mazar constructed at Survey No. 2605 was in the memory of Saiyad Nasir Ali Shah, who was grandfather of Mansoor Ali and the deceased Mansoor Ali was self-appointed as "Mutwalli" of the Holi place. It is also clear that during the pendency of the second suit, as per order dated 24th August 1992, Second Appeal No. 49/1977 was dismissed. Consequently, the judgment and decree dated 9th August 1974 passed in Civil Suit No. 294-A/1972 of the trial court and the judgment and decree dated 6th December 1976 passed in Civil appeal No. 5-A/1976 by the lower appellate court got finality after dismissal of the second appeal by this court. On the other hand in Civil suit No. 13-A/87, the trial judge by judgment and decree dated 3rd January 1989, decreed the suit and declared the title of the Committee over the disputed land and also issued the permanent injunction over the land under dispute. Thus, two contrary decisions passed by the courts having jurisdiction over the disputed lands were having force.

14. On considering the specific features of the case, though it appeared that the property in dispute was property belonging to the ancestral of the plaintiffs, but it is not disputed by either of the parties that the Mazar was constructed in the memory of Saiyad Nasir Ali Shah, grandfather and Eidgah was also constructed on the part of the disputed land by grandfather and granduncle or father of the plaintiffs. Though, no document which it has reason to believe to be wakf property in relation to the disputed land is produced or proved by the parties, certified copy of P/II Revenue Record (Khasra entries for Five years) clearly postulates that such property was entered in the name of "Eidgah Pukhta Bake Deh Haja Batmam Mujawar Mansur Ali son of Sher Ali", which continued for many years. Father of the plaintiffs was Mutwalli of the wakf property, i.e., mazar and Eidgah situated on the part of the land in dispute. It is also appeared that the suit lands were Government lands and were allotted for management of Mazar and Eidgah to the Intajamia Committee. In such circumstances, the learned courts-below while deciding all civil suits pending between the parties

ought to have discussed the principles of Mohmedan Law which govern the present case and codified law relating to Wakf. For decision of this appeal, the discussions on Mohmedan Law relating to Wakf would be necessary. Hence, help is taken from the authority Mulla's Principles of Mohmedan Law (Eighteen Edition) edited by M. Hidatullah former Chief Justice of the land to ascertain the dispute over the ownership on property in question.

Object of Wakf

The object of wakf for which the wakf may be created must be one recognized by Mohmedan law as "religious pious or charitable" A wakf may be created in favour of the settlor's family children and descendants.

Grant to Idgah (16) A durgah or shrine of a pir which has long been held in veneration by the public may be the valid objects of wakf. (Section 178).

Form of Wakf

Form of wakf may be either verbally or in writing. It is not necessary in order to constitute a wakf, that the term "walf" should be used in the grant, if from that the general nature of the grant itself such a dedication can be inferred. Where it is not clear whether constitutes a wakf the statements and conduct of the grantee and his successors and the method in which the property has been treated, are circumstances which though not conclusive, are worthy of consideration. (Section 183). If land has been used from time immemorial for a religious purpose e.g. for a mosque or a burial ground or for maintenance of a mosque, then the land is by user wakf although there is no evidence of an express dedication. (Section 188).

Alienation of Wakf Property and right of Mutawalli

Wakf property cannot be alienated except in the cases mentioned in Sections 207 and 208. (Section 193) A mutawalli has no power, without the permission of the court, to mortgage, sell, or exchange wakf property or any part thereof, unless he is expressly empowered by the deed of walf to do so (Section 207). A mutawalli has no power to grant a lease of wakf property, if it be agricultural land for a term exceeding three years, and if non-agricultural, for a term exceeding one years-(a) unless he has been expressly authorised by the deed of wakf to do so; (b) or where he has no such authority, unless he has obtained the leave of the court to do so; such leave may be granted even if the founder has expressly prohibited a lease for a longer term. (Section 208).

Under Mohmedan Law the moment a wakf is created all rights of property pass out of the wakif and vest in the almighty. The mutawalli has no right in the property belonging to the wakf; the property is not vested in him, and he is merely a superintendent or manager. (Section 202).

Appointment of Mutawalli

The founder of a wakf may appoint himself, or his children and descendants or

any person even a female to be mutawalli of a wakf property. But where the mutawalli has to perform religious duties or spiritual duties which cannot be performed by a female a mujawar of a dargah or a imam in a mosque cannot be appointed as such. (Section 203). The founder of the wakf has power to appoint the first mutawalli and to lay down a scheme for administration of the trust and for succession to the office of mutawalli. He may nominate the succession by name or indicate the class together with their qualification from whom the mutawalli may be appointed and may invest the mutawalli with power to nominate a successor after his death or relinquishment of office. (Section 204(1)). If any person appointed as mutawalli dies or refuses to act in the trust or is removed by the Court or if the office of a mutawalli otherwise becomes vacant, and there is no provision in the deed of wakf regarding succession to the office, a new mutawalli may be appointed? (a) by the founder of the wakf (b) by his executor (c) if there is no the mutawalli for the time being may subject to the provision of Section 205 below, appoint a successor on his deathbed; (d) if no such appointment is made, the court may appoint a mutawalli. In making such appointment (1) the court should not disregard the direction of the founder except for manifest benefit of the endowment (2) the court should not appoint a stranger, so long as there is any member of the founder's family in existence qualified to hold the office. The office of Mutawalli is not transferable nor hereditary. (Section 206, 214). Mutawalli is entitled to get the remuneration fixed or residue of the income of the wakf property after defraying the expenses necessary for maintenance of the wakf but not exceed one tenth of the income of the wakf property. (Section 210).

Removal of Mutawalli

The Mutawalli can be removed by the court (Section 213).

15. Now, the relevant provisions of the Wakf Act 1995 and repealed Wakf Act 1954, which were applicable to the wakfs by that time relating to the dispute over the ownership on property in question, being relevant are reproduced below:-

16. Section 6 of the Wakf Act 1995 and contemporary provisions in Section 6 of the Wakf Act 1954 are as under:-

6. Disputes regarding wakfs.--(1) If any question arises whether a particular property specified as wakf property in the list of wakfs is wakf property or not or whether a wakf specified in such list is a Shia wakf or Sunni wakf, the Board or the mutawalli of the wakf or any person interested therein may institute a suit in a Tribunal for the decision of the question and the decision of the Tribunal in respect of such matter shall be final:

Provided that no such suit shall be entertained by the Tribunal after the expiry of one year from the date of the publication of the list of wakfs.

Explanation.-For the purposes of this section and Section 7, the expression "any

person interested therein", shall, in relation to any property specified as wakf property in the list of wakfs published after the commencement of this Act, shall include also every person who, though not interested in the wakf concerned, is interested in such property and to whom a reasonable opportunity had been afforded to represent his case by notice served on him in that behalf during the course of the relevant inquiry u/s 4.

(2) Notwithstanding anything contained in subsection (1), no proceeding under this Act in respect of any wakf shall be stayed by reason only of the pendency of any such suit or of any appeal or other proceeding arising out of such suit.

(3) The Survey Commissioner shall not be made a party to any suit under subsection (1) and no suit, prosecution or other legal proceeding shall lie against him in respect of anything which is in good faith done or intended to be done in pursuance of this Act or any rules made thereunder.

(4) The list of wakfs shall, unless it is modified in pursuance of a decision or the Tribunal under sub-section (1), be final and conclusive.

(5) On and from the commencement of this Act in a State, no suit or other legal proceeding shall be instituted or commenced in a court in that State in relation to any question referred to in sub-section (1).

Relevant similar provision in the Wakf Act 1954 is as follows:-

6. Disputes regarding wakfs.-(1) If any question arises [whether a particular property specified as wakf property in a list of wakfs published under sub-section (2) of Section 5 is wakf property or not or whether a wakf specified in such list is a Shia wakf or Sunni wakf], the Board or the mutawalli of the wakf or any person interested therein may institute a suit in a civil court of competent jurisdiction for the decision of the question and the decision of the civil court in respect of such matter shall be final:

Provided that no such suit shall be entertained by the civil court after the expiry of one year from the date of the publication of the list of wakfs under sub-section (2) of Section 5:

[Provided further that in the case of the list of wakfs relating to any part of the State and published or purporting to have been published before the commencement of the Wakf (Amendment) Act, 1969, such suit may be entertained by the civil court within the period of one year from such commencement.]

[Explanation.-For the purposes of this section and Section 6-A, the expression "any person interested therein", occurring in sub-section (1) of this section and in sub-section (1) of Section 6-A, shall, in relation to any property specified as wakf property in a list of wakfs published, under sub-section (2) of Section 5, after the commencement of the Wakf (Amendment) Act, 1984, shall include also every person who, though not interested in the wakf concerned, is interested in

such property and to whom a reasonable opportunity had been afforded to represent his case by notice served on him in than behalf during the course of the relevant inquiry u/s 4.]

(2) Notwithstanding anything contained in subsection (1), no proceeding under this Act in respect of any wakf shall be stayed by reason only of the pendency of any such suit or of any appeal or other proceeding arising out of such suit.

(3) The [Survey Commissioner] shall not be made a party to any suit under subsection (1) and no suit, prosecution or other legal proceeding shall lie against him in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules made thereunder.

(4) The list of wakfs published under subsection (2) of Section 5 shall, unless it is modified in pursuance of a decision of the civil court under sub-section (1), be final and conclusive.

[(5) On and from the commencement of the Wakf (Amendment) Act, 1984 in a State, no suit or other legal proceeding shall be instituted or commenced in a civil court in that State in relation to any question referred to in sub-section (1).]

Section 7 of The Wakf Act 1995 and Section 6A of The wakf Act 1954 are as follows:-

7. Power of Tribunal to determine disputes regarding wakfs.-(1) If, after the commencement of this Act, any question arises, whether a particular property specified as wakf property in a list of wakfs is wakf property or not, or whether a wakf specified in such list is a Shia wakf or a Sunni wakf, the Board or the mutawalli of the wakf, or any person interested therein, may apply to the Tribunal having jurisdiction in relation to such property, for the decision of the question and the decision of the Tribunal thereon shall be final:

Provided that-

(a) in the case of the list of wakfs relating to any part of the State and published after the commencement of this Act no such application shall be entertained after the expiry of one year from the date of publication of the list of wakfs; and

(b) in the case of the list of wakfs relating to any part of the State and published at any time within a period of one year immediately preceding the commencement of this Act, such an application may be entertained by Tribunal within the period of one year from such commencement:

Provided further that where any such question has been heard and finally decided by a civil court in a suit instituted before such commencement, the Tribunal shall not re-open such question.

(2) Except where the Tribunal has no jurisdiction by reason of the provisions of subsection (5), no proceeding under this section in respect of any wakf shall be stayed by any court, tribunal or other authority by reason only of the pendency

of any suit, application or appeal or other proceeding arising out of any such suit, application, appeal or other proceeding.

(3) The Chief Executive Officer shall not be made a party to any application under subsection (1).

(4) The list of wakfs and where any such list is modified in pursuance of a decision of the Tribunal under sub-section (1), the list as so modified, shall be final.

(5) The Tribunal shall not have jurisdiction to determine any matter which is the subject-matter of any suit or proceeding instituted or commenced in a civil court under sub-section (1) of Section 6, before the commencement of this Act or which is the subject-matter of any appeal from the decree passed before such commencement in any such suit or proceeding or of any application for revision or review arising out of such suit, proceeding or appeal, as the case may be.

Similar provision in The wakf Act 1954 contained in Section 6A is as follows:-

6-A. power of tribunal to determine disputes regarding wakfs.--(1) If, after the commencement of the wakf (Amendment) Act, 1984, any question arises whether the particular property specified as wakf property in a list of wakfs published under sub-section (2) of section 5 is wakf property or not, or whether a wakf specified in such list is a Shia wakf or a Sunni wakf, the Board of the mutawalli of the wakf, or any person interested therein, may apply to the tribunal having jurisdiction in relation to such property, for the decision of the question and the decision of the tribunal in respect of such matter shall be final:

Provided that-

(a) in the case list of wakfs relating to any part of the State and published or purporting to have been published after the commencement of the wakfs (Amendment) Act, 1984, no such application shall be entertained after the expiry of one year from the date of publication of the list of Wakfs under sub-section (2) of section 5; and

(b) in the case of list of wakfs relating to any part of the State and published or purporting to have been published at any time within a period of one year immediately preceding the commencement of the Wakf (Amendment) Act, 1984 such an application may be entertained by the tribunal within the period of one year from such commencement:

Provided after that where any such question has been heard and finally decided by a civil court in a suit instituted before such commencement, the Tribunal shall not be reopen such question.

(2) Except where the Tribunal has no jurisdiction by reason of the provision of subsection (5) no proceeding under this section in respect of any wakf shall be stayed by any court, tribunal or other authority by reason of the pendency of any suit, application or of any appeal or other proceeding arising out of any such suit,

application, appeal or other proceeding.

(3) The wakf commissioner shall not be made a party of any application under sub-section (1).

(4) The list of wakf published under subsection (2) of section 5, and where any such list is modified in pursuance of a decision of the Tribunal under sub-section (1), the list as so modified, shall be final.

(5) The Tribunal shall not have jurisdiction to determine any matter which is the subject-matter of any suit or proceeding instituted or commenced in a civil court under sub-section (1) of section 6, before the commencement of the Wakf (Amendment) Act, 1984, or which is the subject matter of any appeal from the decree passed before such commencement in any such suit or proceeding or of any application for revision or review arising out of such suit, proceeding or appeal, as the case may be.

17. Now, provisions regarding decision taken in the matter pertaining to wakf property are reproduced below from both the Acts:-

40. Decision if a property is wakf property.--(1) The Board may itself collect information regarding any property which it has reason to believe to be wakf property and if any question arises whether a particular property is wakf property or not or whether a wakf is a Sunni wakf or a Shia wakf it may, after making such inquiry as it may deem fit, decide the question.

(2) The decision of the Board on a question under sub-section (1) shall, unless revoked or modified by the Tribunal, be final.

(3) Where the Board has any reason to believe that any property of any trust or society registered in pursuance of the Indian Trusts Act, 1882 (2 of 1882) or under the Societies Registration Act, 1860 (21 of 1860) or under any other Act, is wakf property, the Board may notwithstanding anything contained in such Act, hold an inquiry in regard to such property and if after such inquiry the Board is satisfied that such property is wakf property, call upon the trust or society, as the case may be, either to register such property under this Act as wakf property or show cause why such property should not be so registered:

Provided that in all such cases, notice of the action proposed to be taken under this subsection shall be given to the authority by whom the trust or society had been registered.

(4) The Board shall, after duly considering such cause as may be shown in pursuance of notice issued under sub-section (3), pass such orders as it may think fit and the order so made by the Board, shall be final, unless it is revoked or modified by a Tribunal.

18. The similar provisions are mentioned in Section 27 of The Wakf Act 1954 is as follows:-

27. Decision if a property is wakf property.-(1) The Board may itself collect information regarding any property which it has reason to believe to be wakf property and if any question arises whether a particular property is wakf property or not or whether a wakf is a Sunni wakf or a Shia wakf, it may, after making such inquiry as it may deem fit, decide the question.

(2) The decision of the Board on any question under sub-section (1) shall, unless revoked or modified by a civil court of competent jurisdiction, be final.

(3) Where the Board has any reason to believe that, any property of any trust or society registered in pursuance of the Indian Trusts Act, 1882 (2 of 1882) or under the Societies Registration Act, 1860 (21 of 1860) or under any other Act, is wakf property, the Board may notwithstanding anything contained in such Act, hold an inquiry, in regard to such property, and if after such inquiry, the Board is satisfied that such property is wakf property, call upon the trust or society, as the case may be, either to register such property under this Act as wakf property or show cause why such property should not be so registered:

Provided that in all such cases, notice of the action proposed to be taken under this subsection shall be given to the authority by whom the trust or society had been registered.

(4) The Board shall, after duly considering such cause as may be shown in pursuance of notice issued under sub-section (3), pass such orders as it may think fit and the order so made by the Board, shall be final, unless it is revoked or modified by a civil court of competent jurisdiction.

19. Further, section 41 of The Wakf Act 1995 and Section 28 of The Wakf Act 1954 are as follows:-

41. Power to cause registration of wakf and to amend register.--The Board may direct a mutawalli to apply for the registration of a wakf, or to supply any information regarding a wakf or may itself cause the wakf to be registered or may at any time amend the register of wakfs.

28. Power to cause registration of wakf and to amend register.--The Board may direct a mutawalli to apply for the registration of a wakf, or to supply any information regarding a wakf or may itself cause the wakf to be registered or may at any time amend the register of wakfs.

20. Now, section 83 which provides for constitution of the Tribunal by the State Govt. for deciding such disputes is extracted below:-

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.

(2) Any mutawalli or person interested in a wakf or any other person aggrieved

by an order made under this Act or Rules made thereunder, may make an application within the time specified in this Act or where no such time has been specified within such time as may be prescribed, to the Tribunal for the determination of any dispute, question or other matter relating to the Wakf.

(3) Where any application made under sub-section (1) relates to any Wakf property which falls within the territorial limits of the jurisdiction of two or more Tribunals, such application may be made to the Tribunal within the local limits of whose jurisdiction the mutawalli or any one of the mutawallis of the wakf actually and voluntarily resides, carries on business or personally works for gain, and, where any such application is made to the Tribunal aforesaid the other Tribunal or Tribunals having jurisdiction shall not entertain any application for the determination of such dispute, question or other matter:

Provided that the State Government may, if it is of opinion that it is expedient in the interest of the Wakf or any other person interested in the Wakf or the Wakf property to transfer such application to any other Tribunal having jurisdiction for the determination of the dispute, question or other matter relating to such Wakf or Wakf property, transfer such application to any other Tribunal having jurisdiction, and, on such transfer, the Tribunal to which the application is so transferred shall deal with the application from the stage, which was reached before the Tribunal from which the application has been so transferred, except where the Tribunal is of opinion that it is necessary in the interests of justice to deal with the application afresh.

(4) Every Tribunal shall consist of one person, who shall be member of the State Judicial Service holding a rank, not below that of a District Sessions or civil Judge, Class I and the appointment of every such person may be made either by name or by designation.

(5) 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 Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, or executing a decree or order.

(6) Notwithstanding anything contained in the CPC 1908 (5 of 1908) the Tribunal shall follow such procedure as may be prescribed.

(7) The decision of the Tribunal shall be final and binding upon the parties to the application and it shall have the force of a decree made by a civil Court.

(8) The execution of any decision of the Tribunal shall be made by the civil Court to which such decision is sent for execution in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

(9) No appeal shall lie against any decision or order whether interim or otherwise, given or made by the Tribunal:

Provided that a High Court may, on its own motion or on the application of the Board or any person aggrieved, call for and examine the records relating to any

dispute, question or other matter which has been determined by the Tribunal for the purpose of satisfying itself as to the correctness, legality or propriety of such determination and may confirm, reverse or modify such determination or pass such other order as it may think fit.

21. Further the provisions of section 85 of The Wakf Act 1994 and section 55C of The Wakf Act 1954 which prohibit the civil court from holding such matters being relevant are quoted below:-

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.

55-C. Bar of jurisdiction of civil courts in respect of matters determined by Tribunal.-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.

22. So, from reading Section 83, it is discernible that the State Government can appoint a Tribunal for the determination of any dispute, question or any matter relating to wakf or wakf property under the Wakf Act and define the local limits jurisdiction etc. There is no dispute that the Wakf Tribunal has been constituted with such vast powers as envisaged by Section 83. Thus, the jurisdiction of the Wakf Tribunal cannot be limited by reading Section 6 alone providing for the decision to determine the nature of the wakf property i.e., to the effect whether it is a wakf property or not; whether it is a Shia Wakf or Sunni Wakf and who is the interested person who can institute a suit. Section 6 further specifies that the person interested shall, in relation to the property, include every person who though not interested in the wakf concerned, is interested in such property. Therefore, this court is of the considered view that reading both the sections together and permitting them to operate in their totality, it is within the jurisdiction of the Tribunal to determine the dispute relating to wakf property. Consideration or non-consideration of the dispute relating to wakf property is within the purview of the Wakf Board and any irregularity or illegality in its consideration is within the jurisdiction of the Tribunal. After considering the relevant provisions of Mohmedan Law as mentioned above and the provisions as contemplated in the Codified law The Wakf Act 1954 (repealed) and The Wakf Act 1995, this court finds that the learned courts-below while rendering decisions in Civil Suit No. 294-A/1972 decided vide judgment and decree dated 9th August 1974 which stood confirmed in Civil appeal No. 5A/1976 decided by judgment and decree dated 6th December 1976, Civil Suit No. 13-A/1987 decided by judgment and decree dated 3rd January 1989 and the present Civil Suit No. 263-A/1994 decided by judgment and decree dated 23rd December 1999, did not at all think to consider the relevant provisions of Mohmedan law and the codified law. They further failed to consider the aspect regarding maintainability of the

suit u/s 9 of the CPC 1908 which is as follows:-

9. Courts to try all civil suits unless barred.-The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Explanation I-A.-suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

Explanation II.-For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.

23. Hence, to bring the dispute to an end, in the opinion of this court, ends of justice will be squarely met, in view of the facts and circumstances of the case and the questions raised, if the matter is remanded back to the trial court as it raises a pure question of law only. Resultantly, the judgment and decree dated 23rd December 1999 passed by the trial court is hereby set aside being not in consonance with the relevant provisions of law and the case is remanded back under Order 41 Rule 23 of C.P.C. for deciding legal issue formulated as under:-

Whether as per provisions contained in Section 85 of the Wakf (New) Act 1995 and Section 55C of the Wakf (Old) Act 1954, the suit was hit by Section 9 of C.P.C. and not tenable before the civil courts, if so its affect?

Accordingly, the learned trial court shall decide the case as per provisions of relevant law within a period of six months from the date of first appearance of the parties after affording due opportunity of hearing to the them. The parties shall appear before the trial court on 17th September 2013 and on further dates as may be fixed for hearing. No notice shall be necessary for their presence before the trial court. The counsel fee, if certified, shall be Rs. 5,000/-. The cost of this appeal shall be governed by final outcome. The memo of the costs be drawn up.