
(2011) 05 AHC CK 0034
In the Allahabad High Court
Case No : Writ - C No. 21140 of 2011

Mohd Achchey Khan and another	APPELLANT
Vs	
District Magistrate/Upper Survey Commissioner (Waqf) and others	RESPONDENT

Date of Decision : 31-05-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 3, 3(4), 3(4), 4(30)
General Clauses Act, 1897 — Section 3(32)
Negotiable Instruments Act, 1881 (NI) — Section 138
Waqf Act, 1995 — Section 2, 3, 36(8), 6(5), 61

Citation : (2011) 114 RD 724

Hon'ble Judges : Ran Vijai Singh, J; Ashok Bhushan, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Ashok Bhushan, J.—Heard Syed Mehmood Learned Counsel for the petitioner, Sri A.I. Naqvi, Learned Counsel for the respondent No. 3, Sri Punit Gupta, Learned Counsel appearing on behalf of respondent No. 4 as well as learned Standing Counsel representing the respondents No. 1 and 2. Counter-affidavit and rejoinder-affidavit have been exchanged between the parties and with consent of Learned Counsel for the parties, the writ petition is being finally decided.

2. By this writ petition, the petitioner has prayed for an order or direction in the nature of mandamus, commanding the respondents No. 1 and 2 to deliver charge and possession to petitioners society as per order of the Waqf Board of Waqf No. 116, Allahabad and check respondent No. 3 from interfering in the management of waqf.

3. Brief facts of the case which emerged from the pleadings of the parties are; Waqf No. 116, i.e. Waqf Daira Shah Hazrat Munawar Ali, Himmatganj, Tehsil Sadar, Allahabad is a duly registered waqf Alal Khair with the U.P. Sunni Central Waqf Board, Lucknow. The U.P. Sunni Central Waqf Board by order dated

14.9.2010 appointed the petitioners committee for managing the waqf on the ground that term of the committee has expired. The Chief Executive Officer of the U.P. Sunni Central Waqf Board by letter dated 24.9.2010 requested the District Magistrate to get the charge of the waqf handed over to the newly appointed committee. The respondent No. 3 after coming to know about the order dated 14.9.2010, moved an application before the Waqf Board on 27.9.2010 for recall of the said order. The respondent No. 3. also filed a writ petition being Civil Misc. writ petition No. 75813 of 2010 challenging the order dated 14.9.2010, which writ petition was disposed of by this Court on 17.1.2011, noticing the fact that application filed by the respondent No. 3 for recall of the order dated 14.9.2010 is already engaging the attention of the Board in which 17.1.2011 is the date fixed. The Waqf Board after hearing the respondent No. 3, rejected the recall application filed by the petitioner vide order dated 31.3.2011 with the observation that respondent No. 3 had already been removed by order dated 7.3.1990 from the office of the Mutwalli. It was further observed in the order that the respondent No. 3 had not been conducting himself properly and concealing the income of the wakf hence, allowing the application of the respondent No. 3 is not in the interest of the waqf. The petitioners committee had also made a request to the District Magistrate vide letter dated 18.10.2010, for taking appropriate steps so that newly appointed committee may take charge of the waqf. The petitioner on the aforesaid pleadings had come up in the writ petition praying for a mandamus. this Court issued an interim mandamus on 21.4.2011, directing the respondent No. 1 to take steps in pursuance of the letter dated 24.9.2010 within a period of two weeks from the date of production of a certified copy of the order or to show cause within the said period by filing counter-affidavit. A counter-affidavit has been filed on behalf of the respondents No. 1 and 3. Rejoinder affidavit has been filed by the petitioner to the counter-affidavit of the respondent No. 3. The respondent No. 3 after filing of the rejoinder affidavit by the petitioner has also filed counter-affidavit to the rejoinder affidavit, which was taken on record. The respondent No. 3 also filed three supplementary affidavits.

4. The case of the respondent No. 3 is that the respondent No. 3 was appointed as co-mutwalli alongwith mutwalli of the waqf late Azim Khan on 24.3.1988 by U.P. Sunni Central Waqf Board. The Mutwalli Azim Khan died on 4.5.1993 thereafter the respondent No. 3 claimed to be the sole mutwalli and discharging the duties of mutwalli. It is further stated that in the lifetime of late Azim Khan, certain persons tried to interfere in the functioning of the management of waqf hence, a civil suit No. 459 of 1984 was filed in which on the application for interim injunction, an order was passed restraining the defendants not to interfere in the peaceful discharge of the duties as mutwalli. It is further sated that against the order of the Waqf Board dated 7.3.1990, removing the respondent No. 3 from the mutwalliship, the respondent No. 3 had filed a civil suit No. 127 of 1990 along with Azim Khan. The respondent No. 3 is plaintiff No. 2 in the said suit. It is stated that in the said suit, the order 17.12.2005 has been

passed by the Civil Court directing for maintaining status quo on the spot. It is further submitted that committee which was appointed after removal of the respondent No. 3 by order dated 7.3.1990, never took charge and the respondent No. 3 was working and discharging the duties of mutwalli and has been in possession of the wqqf. In the rejoinder affidavit, filed by the petitioners, a copy of the order dated 7.3.1990, removing Mohammad Azim Khan from the mutwalliship and Mohammad Hanif Khan, from the co-mutwalliship, has been filed as Annexure-2. The order of the Board dated 14.2.1991 appointing a committee has been filed as Annexure-3. It is stated that appointment of respondent No. 3 as co-mutwalli by order dated 24.3.1988, was tilt the Board, directed otherwise. It is submitted that after removal of the respondent No. 3 by order dated 7.3.1990 and by appointment of a committee on 14.2.1991, the right of the respondent No. 3 to work as co-mutwalli came to an end. It is stated that the order appointing the committee was never challenged before any Court of law. With regard to suit No. 127 of 1990, it has been stated that after death of Mohd. Azim Khan in the year 1993, the suit stood abated and the order appointing the committee being not challenged in the suit, there was no occasion for the respondent No. 3 to claim any continuance. It is stated that suit No. 457 of 1984 was filed by late Mohd. Azim Khan and other persons as plaintiffs in which the respondent No. 3 was not a party. The said suit was filed against certain persons, who had encroached the wakf property and U.P. Sunni Central Waqf Board was not party to the said suit. It is stated that after death of Mohd. Azim Khan in the year 1993, the suit stood abated.

5. Sri Syed Mahmood, Learned Counsel for the petitioner submits that the petitioners committee which has been validly appointed by U.P. Sunni Central Waqf Board, is entitled to manage the affairs of the wakf and the District Magistrate is obliged to give possession to the petitioners committee u/s 68 of the Wakf Act, 1995. He further submits that application filed by the respondent No. 3 praying for recall of the order dated 14.9.2010 having been rejected by the Board, the respondent No. 3, cannot claim any right in the wakf. He submits that there is no order from any Court, staying the orders of the Board dated 14.9.2010 and 31.3.2011 hence, the petitioner is entitled to function as committee to manage the wqkf. It is submitted that the order dated 7.3.1990, removing the respondent No. 3 from the co-mutwalliship, has not been stayed by any Court. The order dated 14.2.1991 appointing the Committee consequent to the removal of the respondent No. 3, has neither been challenged before any Court nor its implementation having been stayed, there is no right in respondent No. 3 to continue as mutwalli. It is submitted that suit filed by Mohd. Azim Khan in 1984, was against certain encroachers of wakf property, which stood abated on the death of Mohd. Azim Khan. With regard to the suit filed in the year 1990, challenging the order of removal of Mohd. Azim Khan and respondent No. 3, it is submitted that after the death of Mohd. Azim Khan, the said suit has also abated. It is further submitted that in any view of the matter, the removal order and the order appointing committee in 1991 having not been stayed, the

respondent No. 3 cannot claim any right and his status is nothing but of a trespasser, who was in unauthorised occupation of the wakf property.

6. Sri A.I. Naqvi, Learned Counsel appearing for the respondent No. 3, refuting the submissions of Learned Counsel for the petitioner, submitted that application filed by the petitioner before the District Magistrate u/s 68(2) is not maintainable since the application was required to be made before "any Magistrate of the first class" which clearly means a Judicial Magistrate. He submits that the District Magistrate could not have taken any action for handing over possession of the wakf to the petitioner since the District Magistrate has no jurisdiction or power u/s 68(2). He submits that course open for the petitioner was only to make an application before the Judicial Magistrate of the first class having jurisdiction and it is only the judicial Magistrate, who is competent to pass any order or issue any direction. He has referred to and relied on the provisions of section 3(4) of the Criminal Procedure Code in support of his submissions. He further submits that respondent No. 3 is continuing co-mutwalli and after death of Mohd. Azim Khan, he became mutwalli of the wakf. He submits that against the order of removal of the respondent No. 3, suit No. 127 of 1990 is still pending. He submits that against the order dated 31.3.2011, the petitioner has also made a reference which is pending consideration. Sri A.I Naqvi further submits that the writ petition is barred by alternative remedy, which can be availed by the petitioner u/s 83 of the Wakf Act, 1995. In support of the submissions that the writ petition is barred by alternative remedy, reliance has been placed on the judgments of the Apex Court reported in Board of Wakf, West Bengal Vs. Anis Fatma Begum and Another, and Ramesh Gobindram (Deceased) Rep. By Lrs. v. Sugra Humayun Mirza Waqf 2010 (3) ARC 449 and the Division Bench judgment of this Court in Waqf Dargah Shah Mohammadi (Waqf No. 4 to 11), Allahabad and others v. U.P. Sunni Central Board of Waqf, Lucknow and others. 2003 (52) ALR 57 Sri Naqvi further submitted that the respondent No. 3 who was co-mutwalli shall be treated to become mutwalli after death of mutwalli. He has placed reliance on para 205-A of Mulla's Muhammadan Law. Sri Naqvi submits that the removal of the respondent No. 3 by Sunni Central Waqf Board vide order dated 7.3.1990, is under challenge in suit No. 127 of 1990, which suit is still pending. He further submits that the committee appointed in the year 1991 after removal of respondent No. 3, new mutwalli had never taken charge and it is the respondent No. 3, who has been continuing as mutwalli of the waqf and in reference No. 127 of 1990, the Wakf Board had given an oral undertaking that they will not take action.

7. We have considered the submissions of Learned Counsel for the parties and have perused the record.

8. The first submission which needs to be considered is as to whether the District Magistrate is entitled to entertain an application u/s 68(2) of the Wakf Act, 1995 directing for delivery of charge and possession to a newly appointed committee or the application can be entertained only by a judicial Magistrate. Section 68 of

the Wakf Act, 1995 is as follows:

68. Duty of mutawalli or committee to deliver possession of records etc.--(1) Where any mutawalli or committee of management has been removed by the Board in accordance with provisions of this Act, or of any scheme made by the Board, the mutawalli or the committee so removed from the office (hereinafter in this section referred to as the removed mutawalli or committee) shall handover charge and deliver possession of the records, accounts and all properties of the Wakf (including cash) to the successor mutawalli or the successor committee, within one month from the date specified in the order.

(2) Where any removed mutawalli or committee fails to deliver charge or deliver possession of the records, accounts and properties (including cash) to the successor mutawalli or committee within the time specified in sub-section (1), or prevents or obstructs such mutawalli or committee, from obtaining possession thereof after expiry of the period aforesaid, the successor mutawalli or any member of the successor committee may make an application, accompanied by a certified copy of the order appointing such successor mutawalli or committee, to any Magistrate of the first class within the local limits of whose jurisdiction any part of the Wakf property is situate and, thereupon such Magistrate may, after giving notice to the removed mutawalli or members of the removed committee, make an order directing the delivery of charge and possession of such records, accounts and properties (including cash) of the Wakf to the successor mutawalli or the committee, as the case may be, within such time as may be specified in the order.

(3) Where the removed mutawalli or any member of the removed committee, omits or fails to deliver charge and possession of the records, accounts and properties (including cash) within the time specified by the Magistrate under sub-section (2) the removed mutawalli or every member of the removed committee, as the case may be, shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to eight thousand rupees, or with both.

(4) Whenever any removed mutawalli or any member of the removed committee omits or fails to comply with the orders made by the Magistrate under sub-section (2), the Magistrate may authorise the successor mutawalli or committee to take charge and possession of such records, accounts, properties (including cash) and may authorise such person to take such police assistance as may be necessary for the purpose.

(5) No order of the appointment of the successor mutawalli or committee, shall be called in question in the proceedings before the Magistrate under this section.

(6) Nothing contained in this section shall bar the institution of any suit in a competent Civil Court by any person aggrieved by any order made under this section, to establish that he has right, title and interest in the properties specified in the order made by the Magistrate under sub-section (2).

9. Section 68(1) provides that where any mutawalli or committee of management has been removed by the Board the mutawalli or the Committee shall handover charge and deliver possession of the records, accounts and all properties of the Wakf to the successor mutawalli or the successor committee, within one month. Sub-section (2) of section 68 provides where any removed mutawalli or committee fails to deliver charge or deliver possession of the records, accounts and properties to the successor mutawalli or committee, the successor mutawalli or any member of the successor committee may make an application, to "any Magistrate of the first class within the local limits of whose jurisdiction any part of the Wakf property is situate" and, thereupon such Magistrate may, after giving notice to the removed mutawalli or members of the removed committee, make an order directing the delivery of charge. Sub-section (3) of section 68 provides that where the removed mutawalli or any member of the removed committee, omits or fails to deliver charge and possession of the records, accounts and properties the removed mutawalli or every member of the removed committee, shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to eight thousand rupees, or with both. Sub-section (6) of section 68 provides that nothing contained in this section shall bar the institution of any suit in a competent Civil Court by any person aggrieved by any order made under this section. The submission which has been pressed by Sri Naqvi, Learned Counsel for the respondent No. 3 is that since sub-section (3) of section 68 itself contemplates punishment of imprisonment and imposition of fine which cannot be awarded by District Magistrate i.e. an executive Magistrate, which can be awarded only by judicial Magistrate. Sub-sections (2) and (3) of section 68 have to be interpreted in a manner that Magistrate who is competent to entertain the application under subsection (2) of section 68 may also be competent to award punishment of imprisonment and fine. He submits that in view of the fact that District Magistrate cannot award punishment of imprisonment or fine, the interpretation has to be that the Magistrate first class referred to in Sub-section (2) of section 68 is the judicial Magistrate. For appreciating the above submission, it is necessary to look into the provisions of section 61 of the Wakf Act, 1995 which provides for penalties. Section 61 which is relevant is quoted below:

61. Penalties.--

(1) If a mutawalli fails to,--

- (a) apply for the registration of a Wakf;
- (b) furnish statements of particulars or accounts or returns as required under this Act;
- (c) supply information or particulars as required by the Board;
- (d) allow inspection of Wakf properties, accounts, records or deeds and documents relating thereto.

- (e) deliver possession of any Wakf property, if ordered by the Board or Tribunal;
- (f) carry out the directions of the Board;
- (g) discharge any public dues; or
- (h) do any other Act which he is lawfully required to do by or under this Act;

he shall, unless he satisfies the Court or the Tribunal that there was reasonable cause for his failure, be punishable with fine which may extend to eight thousand rupees.

(2) Notwithstanding anything contained in sub-section (1), if-

(a) a mutawalli omits or fails, with a view to concealing the existing of a Wakf, to apply for its registration under this Act;

(i) in the case of a Wakf created before the commencement of this Act, within the period specified therefor in sub-section (8) of section 36;

(ii) in the case of any Wakf created after such commencement, within three months from the date of the creation of the Wakf;

(b) a Mutawalli furnishes any statement, return, or information to the Board, which he knows or has reason to believe to be false, misleading, untrue or incorrect in any material particular he shall be punishable with imprisonment for a term which may extend to six months and also with fine which may extend to fifteen thousand rupees.

(3) No Court, shall take cognizance of an offence punishable under this Act save upon complaint made by the Board or an officer duly authorised by the board in this behalf.

(4) No Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

(5) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974). the fine imposed under sub-section (1), when realised, shall be credited to the Wakf Fund.

(6) In every case where offender is convicted after the commencement of this Act, of an offence punishable under sub-section (1) and sentenced to a fine, the Court shall also impose such term of imprisonment in default of payment of fine as is authorised by law for such default.

Sub-section (4) of section 61 provides that no Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act. The punishment with imprisonment and fine as contemplated under Sub-section (3) of section 68 has to be read along with section 61. Subsection (3) of section 61 provides that no Court, shall take cognizance of an offence punishable under this Act save upon complaint made by

the Board or an officer duly authorised by the board in this behalf. Thus for imprisonment and fine as contemplated under sub-section (3) of section 68, the procedure as contemplated under sub-section (3) of section 61 has to be resorted and the competent Court for trying any offence punishable under the Wakf Act, 1995 has to be Metropolitan Magistrate or Judicial Magistrate. Thus, the intention of the Legislature is clear that so far as trial of offence under the Act is concerned, it is to be done by the Metropolitan Magistrate and Judicial Magistrate.

10. Now the question to be considered is as to whether the Magistrate as contemplated under sub-section (2) of section 68 has to be the judicial Magistrate, who can pass order for delivery of charge and possession or that can be done by the Executive Magistrate of the first class. It is relevant to notice that sub-section (2) of section 68 uses the words "Magistrate of the first class" and sub-section (4) of section 61 uses the words "Metropolitan Magistrate or a Judicial Magistrate of the first class" The Legislature when uses two expressions in same statute, both the expressions have to be given different meaning since the Legislature is well aware of the both the expressions and it is well settled principles of statutory interpretation that different words used in the same statute has to be given its meaning and purpose. Legislature is not supposed to use any expression or word without any purpose and object. Had the Legislature intended that application u/s 68(2) for directing delivery of possession has to be done by the judicial Magistrate, there was no reason for not using the same expression in section 68(2). It is further relevant to note that subsection (3) of section 68 where the Legislature provides that where the removed mutawalli or any member of the removed committee, omits or fails to deliver charge and possession of the records, accounts and properties (including cash) within the time specified by the Magistrate under subsection (2) the removed mutawalli or every member of the removed committee, as the case may be, shall be punishable with imprisonment for a term which may extend to six months or with fine. The Legislature in first part of sub-section (3) has used the expression "the Magistrate" whereas in the latter part of the section imprisonment and fine has been contemplated. The same Magistrate is neither referred nor can be inferred. The Apex Court had occasion to consider the use of word "the bank" and "a bank" while construing the provisions under the Negotiable Instruments Act, 1881, in the case of Shri Ishar Alloy Steels Ltd. Vs. Jayaswals NECO Ltd., The Apex Court held that when the Legislature uses two different expressions i.e. "a bank" and "the bank", the intention is clear that both the expressions have been used not for the same meaning. Following was laid down in paragraph 9:

9. The use of the words "a bank" and "the bank" in the section is indicator of the intention of the Legislature. The former is indirect article and the latter is pre-fixed by direct article. If the Legislature intended to have the same meanings for "a bank" and "the bank", there was no cause or occasion for mentioning it distinctly and differently by using two different articles. It is worth noticing that the word "banker" in section 3 of the Act is pre-fixed by the indefinite article "a"

and the word "bank" where the cheque is intended to be presented u/s 138 is prefixed by the definite article "the". The same section permits a person to issue a cheque on an account maintained by him with "a bank" and makes him liable for criminal prosecution if it is returned by "the bank" unpaid. The payment of the cheque is contemplated by "the bank" meaning thereby where the person issuing the cheque has an account. "The" is the word used before nouns, with a specifying of particularising effect opposed to the indefinite or generalising force of "a" or "an". It determines what particular thing is meant; that is, what particular thing we are to assume to be meant. "The" is always mentioned to denote particular thing or a person. "The" would, therefore, refer implicitly to a specified bank and not any bank. "The bank" referred to in clause (a) to the proviso to section 138 of the Act would mean the drawee-bank on which the cheque is drawn and not all banks where the cheque is presented for collection including the bank of the payee, in whose favour the cheque is issued.

11. In Commissioner of Income Tax, New Delhi (Now Rajasthan) Vs. East West Import and Export (P) Ltd., (Now Known as Asian Distributors Ltd.), Jaipur, the Apex Court had interpreted two expressions in the same statute "at the end of the previous year" and "in the course of such previous year". The Apex Court held that both the expressions have been used in different meanings. Following was laid down in paragraph 7:

7. The Explanation has reference to the point of time at two places: the first one has been stated as "at the end of the previous year" and the second, which is in issue, is "in the course of such previous year". Counsel for the Revenue has emphasised upon the feature that in the same Explanation reference to time has been expressed differently and if the legislative intention was not to distinguish and while stating "in the course of such previous year" it was intended to convey the idea of the last day of the previous year, there would have been no necessity of expressing the position differently. There is abundant authority to support the stand of the Counsel for the Revenue that when the situation has been differently expressed the Legislature must be taken to have intended to express a different intention.

12. The provision of Code of Criminal Procedure which has been referred to and relied by Learned Counsel for the respondents also clinches the issue. Section 3 of the Code of Criminal Procedure, 1973 deals with Construction of references. Section 3 which is relevant is as follows:

3 Construction of references.--(1) In this Code,--

(a) any reference, without any qualifying words, to a Magistrate, shall be construed, unless the context otherwise requires,--

(i) in relation to an area outside a metropolitan area, as a reference to a Judicial Magistrate;

(ii) in relation to a metropolitan area, as a reference to a Metropolitan Magistrate;

(b) any reference to a Magistrate of the second class shall, in relation to an area outside a metropolitan area, be construed as a reference to a Judicial Magistrate of the second class, and, in relation to a metropolitan area, as a reference to a Metropolitan Magistrate;

(c) any reference to a Magistrate of the first class shall,--

(i) in relation to a metropolitan area, be construed as a reference to a Metropolitan Magistrate exercising jurisdiction in that area,

(ii) in relation to any other area, be construed as a reference to a Judicial Magistrate of the first class exercising jurisdiction in that area;

(d) any reference to the Chief Judicial Magistrate shall, in relation to a metropolitan area, be construed as a reference to the Chief Metropolitan Magistrate exercising jurisdiction in that area.

(2) In this Code, unless the context otherwise requires, any reference to the Court of a Judicial Magistrate shall, in relation to a metropolitan area, be construed as a reference to the Court of the Metropolitan Magistrate for that area.

(3) Unless the context otherwise requires, any reference in any enactment passed before the commencement of this Code,--

(a) to a Magistrate of the first class, shall be construed as a reference to a Judicial Magistrate of the first class;

(b) to a Magistrate of the second class or of the third class, shall be construed as a reference to a Judicial Magistrate of the second class;

(c) to a Presidency Magistrate or Chief Presidency Magistrate, shall be construed as a reference, respectively, to a Metropolitan Magistrate or the Chief Metropolitan Magistrate;

(d) to any area which is included in a metropolitan area, as a reference to such metropolitan area, and any reference to a Magistrate of the first class or of the second class in relation to such area, shall be construed as reference to the Metropolitan Magistrate exercising jurisdiction in such area.

(4) Where, under any law, other than this Code, the function exercisable by a Magistrate relate to matters-

(a) which involve the appreciation or sifting of evidence or the formulation of any decision which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any Court, they shall, subject to the provisions of this Code, be exercisable by a Judicial Magistrate; or

(b) which are administrative or executive in nature, such as, the granting of a licence, the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable

by an Executive Magistrate.

13. Section 3(4) which provides that where, under any law, other than Code of Criminal Procedure, the function exercisable by a Magistrate relate to matters as enumerated in sub clauses (a) and (b) the Magistrate shall be deemed to be either a Judicial Magistrate or an Administrative Magistrate. Under Sub-section (2) of section 68 of the Wakf Act, 1995, the District Magistrate has to act on an application by the newly appointed mutwalli or committee along with a certified copy of the order of the Board and direct for delivery of charge. The Magistrate contemplated u/s 68(2) has not to go behind the order of the Board appointing mutwalli or Committee nor it can question the said orders which is clear by the specific provisions of section 68(5) of the Wakf Act. Thus, the Magistrate function is not the appreciation or shifting of evidence or the formulation of any decision hence, section 3(4)(a) of Code of Criminal Procedure is not attracted and the nature of the function of the Magistrate is only administrative or executive in nature, hence the Magistrate used in said statute has to be construed as Executive Magistrate. The functioning of the Magistrate as contemplated by section 68(3) being administrative or executive in nature, the conclusion is inescapable that provisions of section 68(2) of the Wakf Act read with section 3(4)(b) of the Code of Criminal Procedure, clearly refers to the executive Magistrate. The view which we have taken above, also finds support from various authorities of different High Courts. Before the Madras High Court, the provisions of section 68 of the Wakf Act, 1995 came for consideration in Jabar Maideen and another v. Vallam Jumma Pallivasal (Cri. R.C. (MD). No. 526 of 2006 decided on 19.10.2006. The revision was directed against the order of the Judicial Magistrate. The revisionists were erstwhile Board of Trustees of a committee. New members of the Board were elected. The previous mutwalli or committee as per section 68 were required to hand over the charge within a month. However, they refused to hand over possession of the records. An application was filed before the learned Judicial Magistrate for necessary directions, which directions were issued by the leaned Magistrate. One of the submissions which was raised before the High Court was that application u/s 68(2) was not maintainable before the Judicial Magistrate and the same was maintainable before the Executive Magistrate. The said submission was considered by Madras High Court and the Madras High Court took the view that application u/s 68(2) was maintainable before the Executive Magistrate hence, the Judicial Magistrate had no authority to pass orders on the application. Paragraphs 4, 5, 10, 12, 13, 14 and 15 are relevant which are quoted below:

4. The Learned Counsel for the petitioners would submit that the authority contemplated u/s 68 of the Wakf Act, 1995 is only the Executive Magistrate for the purpose of making an order directing the delivery of charge and possession of the records, accounts and the properties (including cash) of the Wakf to the successor Mutawalli or Committee as the case may be. Referring to section 61 of the Wakf Act, 1995, the Learned Counsel for the petitioners would further submit that the offence punishable alone will have to be taken cognizance of by the

Court, not inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class concerned. Therefore, the Executive Magistrate should have been approached first by the respondent herein seeking relief u/s 68 of the Wakf Act, 1995.

5. The Learned Counsel for the respondent would vehemently contend that as section 68 of the Wakf Act, 1995 contemplates formulation of some decision by the Magistrate, it will have to be construed that what has been meant u/s 68 of the Wakf Act, 1995 is only the powers of the Judicial Magistrate and not the Executive Magistrate. The punishment for non-compliance of the direction issued by the Judicial Magistrate has also been contemplated u/s 68 of the Wakf Act, 1995. Referring to section 3(32) of the General Clauses Act, 1897, the Learned Counsel for the respondent would submit that the term "Magistrate" shall include every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure. The learned Judicial Magistrate No. 2, Thanjavur has rightly entertained the application and the relief prayed for has also been granted, he would further contend.

10. The moment a certified copy of the order appointing the successor Mutawalli or Committee is produced seeking necessary direction to the jurisdiction Magistrate of the first class, the latter is bound to make an order directing the delivery of charge and possession of the records to the successor Mutawalli or the Committee. No appreciation or shifting of evidence is contemplated in the aforesaid proceedings of the jurisdiction Magistrate of the first class contemplated u/s 68 of the Wakf Act, 1995. Further, the formulation of decision does not expose the erstwhile Mutawalli or Committee to any punishment or penalty. It is only the non-compliance of the direction issued by the jurisdiction Magistrate of the first class which invites punishment with imprisonment for a term, which may extend to six months or with fine or with both. If the functions exercisable by a Magistrate relates to administrative or executive in nature, then the same will have to be exercised only by an Executive Magistrate, as per the above provision of law.

12. It has been very specifically stated that a Metropolitan Magistrate or a Judicial Magistrate of the first class concerned has the power to try the offences punishable under the Wakf Act, 1995. The Legislature has intended to distinguish the Magistrate of the first class referred to u/s 68 of the Wakf Act, 1995 and a Metropolitan Magistrate or a Judicial Magistrate of the first class contemplated u/s 61 of the Wakf Act, 1995. When the subject of punishment for the offences committed under the Act is dealt with under the provisions of section 61 of the Wakf Act, 1995, it has been intended that a Metropolitan Magistrate or a Judicial Magistrate of the first class has the authority to deal with such offences. When the subject of passing an order on production of a certified copy of the order of appointment of successor Mutawalli or Committee is dealt with u/s 68 of the Wakf Act, 1995, it has been intended that any jurisdiction Magistrate of the first class has the authority to issue necessary directions. It is not as if the Legislature

was not alive to the basic difference between Judicial Magistrate and Magistrate of First Class. The maintenance of the distinction is reflected in section 61(4) and section 68(2) of the Act. If the Legislature has intended to entrust the function contemplated u/s 68(2) of the Wakf Act, 1995 to the Judicial Magistrate of the first class, it would have definitely described so unambiguously conspicuous and the difference found incorporated in section 61(4) and section 68(2) of the Wakf Act, 1995 will not be there in the statute.

13. If the orders of the Executive Magistrate of the first class passed u/s 68(2) of the Wakf Act, 1995 is not obeyed in letter and spirit, then it becomes an offence punishable u/s 68(3) of the said Act. When such a disobedience on the part of the erstwhile Mutawalli or the committee becomes punishable u/s 61(3) and 61(4) of the said Act, the Board or the officer duly authorised by the Board has the authority to approach a Metropolitan Magistrate or a Judicial Magistrate of the first class concerned to try the offence and punish the violator of the order.

14. The definition given u/s 3(32) of the General Clauses Act for the term "Magistrate" will apply only in a case, where there is nothing repugnant in the subject or context in the relevant Act. As already pointed out the conjoint reading of section 68 and section 61 of the Wakf Act, 1995 would indicate that the Executive Magistrate of the first class has the power to pass an administrative order, directing the delivery of charge and possession of records to the successor Mutawalli or the Committee. Any violation of such order, which is punishable u/s 68(3) of the said Act shall be tried by a Metropolitan Magistrate or a Judicial Magistrate of the first class on a complaint made by the Board or an officer duly authorised by the Board.

15. The learned Judicial Magistrate No. 2, Thanjavur has no authority to pass any order u/s 68(2) of the Wakf Act, 1995. The respondent has to approach only the Jurisdiction Executive Magistrate to pass necessary orders u/s 68(2) of the said Act."

16. It may also be noticed that above judgment of the Madras High Court was dissented by another Single Judge in Crl. O.P. (MD) No. 2321 of 2009 A.K. Kalifulla v. M. Abdul Khader by order dated 2.9.2009 whereby the matter was referred to be placed before a Division Bench. The view was expressed by learned Single Judge in A.K. Kalifulla (supra) that section 68(2) refers to Judicial Magistrate. Referring to earlier judgment of learned Single Judge in Jabar Maideen (supra) case in subsequent case learned Single Judge took the view that different article "the" referred to in sub-section (3) means the Magistrate of first class. He further held that the Magistrate while passing the order u/s 68(2) has to inquire shift, appreciate evidence and formulate the decision. Following was observed in paragraphs 21 to 24:

"21. Here the learned Judge has held that when a certified copy of the order appointing a successor Mutawalli or Committee is produced "seeking necessary direction to the jurisdiction Magistrate of the first class, the latter is bound to

make an order directing the delivery of charge and possession of the records to the successor Mutawalli or the Committee. According to the learned Judge, it requires no appreciation or sifting of evidence. Further held that it will not lead to any formation of decision which exposes the removed Mutawalli or Committee to any punishment or penalty. Therefore the duty exercisable is only by an Executive Magistrate.

22. Here I humbly disagree with the learned Single Judge. In my considered opinion, Clause (2) of section 68 contemplates that the Magistrate "may" after giving notice to the removed Mutawalli, make an order. It contemplates an enquiry, appreciation or sifting of evidence and formulation of decision which exposes the person to some punishment as the failure of such order is punishable with imprisonment.

23. The learned Single Judge has held that the moment a certified copy of the order is produced before the jurisdiction Magistrate, the latter is bound to make an order, which in my opinion is not correct as the words used is "may". Clause 3 of section 68 reads as follows:

where the removed Mutawalli or any member of the removed Committee omits or fails to deliver charge and possession of the records, accounts and properties (including cash) within the time specified by "the Magistrate" under sub-section (2), the removed Mutawalli or every member of the removed committee as the case may be, shall be punishable with imprisonment for a term which may extend to 6 months or with fine which may extend to 78,000/- or with both.

24. Here the definite article "the" refers to the Magistrate mentioned earlier. Therefore, the Magistrate of the First Class mentioned in Clause (3) is "the" Magistrate which refers the Magistrate mentioned in Clause (2).

14. With due regard to the learned Single judge, we do not subscribe to the view taken by learned Single Judge in the case of A.K. Kalifulla (supra). Learned Single Judge lost sight to the fact that u/s 68(3), the punishment of imprisonment and fine is not contemplated by the Magistrate referred to in section 68(2), rather for trial of offence u/s 61, an application by the Board is necessary for trying any person for offence under the Wakf Act. The word "the Magistrate" referred in section 68(2) of the Wakf Act has no role to play with regard to trial of offence.

15. The Patna High Court had occasion to consider the expression Magistrate first class" as used in Bihar Municipal Elections and Election Petitions Rules in Krishna Kumar Singh and Another Vs. State of Bihar and Others, . Following was laid down in paragraph 5:

5. Magistrate of the first class, who could be appointed as a Returning Officer was so appointed under the Cr. P.C. 1898 (Act 5 of 1898). The said Code was repealed by the Cri. P.C. 1973 (Act 2 of 1974). Section 3 of the 1974 Act provides in its subsection (4) that where, under any law, other than this Code,

the functions exercisable by a Magistrate relate to matters --.....(b) which are administrative or executive in nature, such as, the granting of a licence the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable by an Executive Magistrate, Although no corresponding amendment has been made in Rule 8 aforesaid, reference therein to a Magistrate of first class has now to be read as a reference to an Executive Magistrate. It has not been disputed before us that Respondents 3 and 4 are Executive Magistrates. They in our view were eligible for appointment as Returning Officers."

16. The expression used in section 3(4)(b) of Criminal Procedure Code " which are administrative or executive in nature, such as, the granting of a licence, the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution" is not an exhaustive definition rather is illustrative hence, the nature of the power exercised by the Magistrate First Class u/s 68(2) of the Wakf Act has to be treated as executive. In view of the aforesaid submissions, we are of the view that District Magistrate/Magistrate i.e. executive Magistrate have full jurisdiction to direct for delivery of the charge u/s 68(2) and the application need not be filed before the Judicial Magistrate as contended by Learned Counsel for the respondent No. 3. The submissions of Learned Counsel for the respondent No. 3 thus, cannot be accepted.

17. The second submission which has been pressed by Learned Counsel for the respondent No. 3 is that the writ petition is barred by alternative remedy as provided u/s 83 of the Wakf Act. Section 83 of the Wakf Act is as follows:

83. Constitution of Tribunals, etc.--(1) The State Government shall, by notification in the official Gazette, constitute as many as 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 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, 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 interest 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.

18. In the present case, the Wakf Board has appointed a committee on 14.9.2010 appointing the petitioner. The order of the Wakf Board is in favour of the petitioner. For taking charge in pursuance of the order of the Board, specific procedure is provided u/s 68 of the Act which has been taken recourse of by the petitioner. Section 83 is not attracted in the present case nor the petitioner could be relegated to section 83 since the petitioners are not aggrieved by order of the Board rather the order of Board is in their favour and specific procedure having been provided u/s 68 to get the charge of Wakf, section 83 is not attracted. Section 83 can be pressed into service by the respondent No. 3, who is aggrieved by the said order and claims that he is mutwalli of the Wakf and entitled to

continue. It is relevant to notice that section 68(6) clearly entitles any person who is aggrieved by an order passed u/s 68 to institute a suit in competent Court to establish his right title and interest.

19. Learned Counsel for the petitioner has relied on the two judgments of the Apex Court in Board of Waqf, West Bengal and another v. Anis Fatma Begum and another (supra) and Ramesh Gobindram (Deceased) Rep. By Lrs. v. Sugra Humayun Mirza Waqf (supra) as well as Division Bench judgment of this Court in the case of Waqf Dargah Shah Mohammadi (Waqf Nos. 4 to 11), Allahabad and others v. U.P. Sunni Central Board of Waqf, Lucknow and others (supra), which have laid down that Special Tribunal has been constituted for deciding the dispute relating to wakf. In Board of Waqf, West Bengal and another v. Anis Fatma Begum and another (supra), original suit No. 488 of 1999 was filed in the High Court with regard to demarcation of the wakf property in two distinctive parts. Learned Single Judge decided the matter against which appeal was also dismissed. The Apex Court held that the dispute was covered by section 83 hence, only the Wakf Tribunal has jurisdiction in the matter. The said case is clearly distinguishable. In Ramesh Gobindram (Deceased) Rep. By Lrs. v. Sugra Humayun Mirza Waqf (supra), High Court rejected the revision petition against the order of Wakf Tribunal by which order Tribunal has directed eviction. The question before the Apex Court was as to whether the Wakf Tribunal can adjudicate a dispute regarding eviction of a tenant holding a Wakf property under the Scheme of the Wakf Act, 1995. The Apex Court after considering the provisions held that there is nothing in section 83 to suggest that it pushes the exclusion of the jurisdiction of the Civil Courts extends beyond what has been provided for in section 6(5), section 7 and section 85 of the Act. The Apex Court held that the suit seeking eviction of the tenants from the wakf property could, therefore, be filed only before the Civil Court and not before the Tribunal. Following was laid down in paragraph 23:

23. In the cases at hand the Act does not provide for any proceedings before the Tribunal for determination of a dispute concerning the eviction of a tenant in occupation of a wakf property or the rights and obligations of the lessor and the lessees of such property. A suit seeking eviction of the tenants from what is admittedly wakf property could, therefore, be filed only before the Civil Court and not before the Tribunal. The contrary view expressed by the Tribunal and the High Court of Andhra Pradesh is not, therefore, legally sound. So also the view taken by the High Courts of Rajasthan, Madhya Pradesh, Kerala and Punjab and Haryana in the decisions referred to earlier do not declare the law correctly and shall to the extent they run counter to what we have said hereinabove stand overruled. The view taken by the High Courts of Allahabad, Karnataka, Madras and Bombay is, however, affirmed.

20. The next judgment relied by Learned Counsel for the respondent No. 3 is in the case of Waqf Dargah Shah Mohammadi (Waqf Nos. 4 to 11), Allahabad and others v. U.P. Sunni Central Board of Waqf, Lucknow and others (supra). In the

said case, writ petitioner Committee of Management was removed by order of Waqf Board dated 30.5.1979. A suit was filed against the order dated 30.5.1979, which was quashed by the Civil Judge. A new committee was appointed by the Board on 15.7.1985. Thereafter the tenure of the committee was extended. The Division Bench of this Court dismissed the writ petition on the ground of alternative remedy u/s 83 of the Wakf Act which was filed by the petitioner who were claiming to continue with the Wakf. Following was laid down in paragraph 8:

Since highly disputed questions of fact are involved in this case we are of the opinion that it will be expedient that the petitioner be relegated to his alternative remedy before the Waqf Tribunal constituted u/s 83 of the Waqf Act 1995. In *Nazma Khatoon v. U.P. Sunni Central Board of Waqf*, writ petition No. 3400 (MB) of 2000 decided on 18.11.2002 a Division Bench of this Court held that all the matters relating to waqf as defined in section 2(r) of the Waqf Act are cognizable by the Waqf Tribunal. The Court held that the Waqf Tribunal has jurisdiction even if no order has been passed under the Waqf Act 1995, since the scope of section 83 is very wide. The Court also held that the Wqaf Tribunal has power to grant interim order.

21. The said judgment laid down the ratio that it was open for the respondent No. 3 who was aggrieved by appointment of new committee on 14.9.2010 to file claim before the Wakf Tribunal. It has been stated by Learned Counsel for the respondent No. 3 that reference has already been made by the respondent No. 3 before the Wakf Tribunal against the order dated 14.9.2010, which is pending consideration. The said judgment is clearly distinguishable and does not help the respondent No. 3 in the present case. Thus, the second submissions of Learned Counsel for the respondent No. 3 that writ petition is barred by alternative remedy u/s 83 is misconceived and cannot be accepted.

22. The submission which has been pressed by Sri Naqvi is that since the committee which was appointed in 1991 never took charge and respondent No. 3 is still continuing as mutwalli, therefore, the Board has no jurisdiction to appoint new committee on 14.9.2010. It is on the record that the respondent No. 3 himself has filed an application before the Board to recall the order dated 14.9.2010, which has been rejected by detailed order dated 31.3.2011. The petitioner's application to recall the order dated 14.9.2010 having been rejected by the Board and there being no order staying the effect of the orders dated 14.9.2010 and 31.3.2011, the respondent No. 3 cannot be heard in saying that he is still entitled to continue as mutwalli of the wakf.

23. In so far as the suit which was filed in the year 1984 by Mohd. Azim Khan is concerned, the said suit was filed against certain encroachers of the wakf in the year 1984 and the mutwalli and co- mutwalli who were plaintiffs in the suit both having dead, the order of interim injunction passed in the suit is no longer relevant for the issues which are raised in the present writ petition:

24. Much emphasis has been laid down by Learned Counsel for the respondent

No. 3 on the order of status quo passed in suit No. 127 of 1990 by the Civil Court on 17.12.2005, copy of which order has been filed as Annexure C.A-3 to the counter affidavit filed on behalf of respondent No. 3. It is relevant to note that in suit No. 127 of 1990, the order removing the respondent No. 3 as co mutwalli was challenged and the order removing the respondent No. 3 passed in the year 1990 was never stayed. It has also been noticed that the order appointing the new committee in the year 1991 was never challenged before any competent Court. The order of Civil Judge dated 17.12.2005 indicates that the direction was passed for maintaining the status quo on the spot. That direction was to the parties. The writ petitioner admittedly was not party to the aforesaid proceedings nor subsequent events which took place after filing of the suit in the year 1990 by plaintiffs have been brought on the record of suit No. 127 of 1990. The said order could have no application on the rights of the writ petitioner who has been validly appointed as committee by the Board on 14.9.2010 and application filed by the respondent No. 3 to recall the said order has already been rejected. Although it has been stated that against the order dated 14.9.2010, the respondent No. 3 has already made a reference before the Wakf Tribunal but no order has been passed by the Wakf Tribunal staying the effect of the order dated 14.9.2010. In view of the above, we are of the view that the order dated 17.12.2005 could have no application with regard to the claim of the petitioners which came into existence by order of the Board dated 14.9.2010. No order staying the effect of the order dated 14.9.2010 has been claimed by the respondent No. 3 nor brought to our notice.

25. In view of the foregoing discussions, we are of the view that the District Magistrate is fully empowered and entitled to issue direction u/s 68(2) of the Wakf Act to deliver possession. In the counter-affidavit filed by the State, it has been stated that on an application submitted by the petitioners, the proceedings u/s 68(2) were going on before the Magistrate after notice to the respondent No. 3 but in view of the fact that 13.5.2010 was fixed by this Court, no orders were passed by the Magistrate. In view of the aforesaid, we are of the view that the Magistrate u/s 68(2) may take appropriate steps for handing over charge of the Wakf property within two weeks from the date a copy of this order is produced before him.

26. The writ petition is allowed accordingly.