
(2010) 09 CAL CK 0046
In the Calcutta High Court
Case No : C.O. No. 873 of 2009

Mussamat Naseem Ara Begum

APPELLANT

Vs

Rizwan Danish Hussain and Others

RESPONDENT

Date of Decision : 17-09-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 2 Rule 2, Order 7 Rule 11, 92
Constitution of India, 1950 — Article 227
Waqf Act, 1995 — Section 3, 32, 32(3), 33, 33(4)

Citation : (2010) 4 CALLT 556 : (2011) 1 CHN 295

Hon'ble Judges : Jyotirmay Bhattacharya, J

Bench : Single Bench

Advocate : S.P. Ray Chowdhury, S. Basu and S.P. Mukherjee, for the Appellant;
Haradhan Banerjee, A. Pain and P.P. Mukherjee, for the Respondent

Final Decision : Dismissed

Judgement

Jyotirmay Bhattacharya, J.—This application under Article 227 of the Constitution of India is directed against an order dated 6th January, 2007 passed by the Learned Civil Judge (Junior Division), Fifth Court at Alipore in Title Suit No. 282 of 2004 by which the application under Order 7 Rule 11 of the CPC filed by the defendant No. 1 was rejected by the learned Trial Judge on contest. The defendant No. 1 is aggrieved by the said order. Hence the said defendant has come before this Court with this application.

2. Heard Mr. Ray Chowdhury, learned Senior counsel, appearing for the petitioner and Mr. Banerjee, learned Counsel, appearing for the plaintiff/opposite party. Considered the materials on record including the order impugned.

3. Let me now consider as to how far the Learned Trial Judge was justified in passing the impugned order in the facts of the instant case.

4. It is settled law that while considering an application under Order 7 Rule 11 of

the Code of Civil Procedure, the Court cannot consider any other document save and except the plaint itself. And if, on consideration of the averments made by the plaintiff in the plaint, the Court is satisfied that any of the conditions as mentioned in Order 7 Rule 11 of the CPC is satisfied, then the plaint can be rejected under Order 7 Rule 11 of the Civil Procedure Code. Keeping in mind the aforesaid basic settled principle of law, this Court is required to consider as to whether any of the conditions as mentioned in Order 7 Rule 11 of the CPC is satisfied in the instant case or not and if on examination of the averment made in the plaint, the Court finds that any of the conditions as mentioned in Order 7 Rule 11 of the CPC is satisfied in the instant case then this Court will have no other alternative but to reject the plaint under Order 7 Rule 11 of the Civil Procedure Code.

5. Here is the case where the defendant No. 1 has prayed for rejection of the plaint on the ground that the suit is barred by law. Thus the said defendant claims that the plaint in the instant case is liable to be rejected on the ground as mentioned in Order 7 Rule 11(d) of the Code of Civil Procedure.

6. For ascertaining the substance of the defendant's said application in the present case, this Court has very carefully and anxiously considered the averments made by the plaintiff in the plaint as well as the deed of wakf which is a part of plaint. On consideration of the plaint itself, this Court finds that the plaintiffs being the members of the Shia community of Muslim filed the said suit in the representative capacity for protecting the rights of the members of the Shia community of Muslim in the Wakf Estate created by a deed of Wakf executed by Prince Kamar Kader Mirza Kohammad Adid Ali Bahadur, a Shia Mahamaddan on 14th June, 1987 with a view to settlement of his various properties for the maintenance of his children from generation to generation and for enforcement of his direction regarding use of his considerable immovable properties for various purpose including religious and charitable purpose. The said Wakf Estate comprised of various properties in different places including the suit property lying at premises No. 123, Karl Marx Sarani previously known as Circular Garden Reach Road, Kolkata-700023. The petitioner, in fact, claimed certain reliefs concerning the said premises 123, Karl Marx Sarani (previously known as Circular Garden Reach Road, Kolkata-700023).

7. On perusal of the plaint, this Court finds that the entire cause of action for the instant suit is based on the foundation that the said suit property is a part of the estate of the public Wakf which was created by the said Wakif for the purpose of performance of various religious activities by the members of the Shia Community of Muslim. A mosque is located in the ground floor of the said property. An Imambara is also located in the first floor of the said property. The plaintiff claimed that since the said mosque and the imambara were dedicated to the members of the Shia community of Muslim for performance of various religious activities therein, the Mutawalli has no authority to demolish the mosque and/or the imambara and/or to relocate the same in other place

depriving the members of the Shia community of Muslim from performing their religious activities therein.

8. It is stated by the plaintiff that a provision for relocation of the mosque and the imambara was made in the wakf deed only in the event when this property is either acquired by the Government or the construction is totally demolished to the ground. It was also provided therein that if a situation for relocation of the mosque or the imambara arises in any of the situations as aforesaid, then the decision for such relocation is to be taken by a committee to be formed as per the instruction given in the said Wakf deed.

9. The plaintiff claims that none of the aforesaid situations has arisen in the instant case requiring relocation of the mosque and/or imambara for shifting the same from its existing location to elsewhere.

10. It is also claimed by the plaintiffs that the Mutawalli, instead of implementing the direction of the wakif given in the said deed of Wakf, is now trying to demolish the entire building including the mosque and the imambara for constructing a commercial complex in the said premises by treating the same as their private Wakf property and for implementation of his said desire he has illegally obtained a building plan sanctioned from the Municipal Authority. Under such situation the instant suit was filed by the plaintiff seeking the following reliefs:

- a) Leave under Order 1 Rule 8 of the Code of Civil Procedure;
- b) Leave under Order 2 Rule 2 of the Code of Civil Procedure;
- c) Leave u/s 92 of the Code of Civil Procedure;
- d) Decree for declaration that the defendant No. 1 is not entitled to demolish the Mosque and Imambara situated at 123, Karl Marx Sarani, Kolkata - 700023 as per the instruction of the Deed of Wakf of Late Prince Kamar Kader Mirza Mohammad Abid Ali Bahadur;
- e) Decree for permanent injunction restraining the defendant No. 1 to go ahead with any scheme/plan for demolition and development/transfer/alienation of the Masjid/Imambara of the Wakf Estate as Premises No. 123, Karl Marx Sarani, Kolkata-700023 or any part thereof, on the basis of any purported permission or sanction of scheme or building plan by the defendant Nos. 2 and 3;
- f) Temporary injunction with ad-interim orders of injunction in terms of prayer (d) above;
- g) Appointment of Special Officers/Advocate Commissioner;
- h) Receiver;
- i) Costs;
- j) Any other relief or reliefs as the Ld. Court may deem fit and proper.

11. The learned Trial Judge, while considering the defendant's said application under Order 7 Rule 11 of the Code of Civil Procedure, considered the pleadings of the plaintiff in the plaint as well as the said Wakf deed and ultimately came to the conclusion that the said Wakf which was created by the Wakif was in the nature of Wakf-al-al-aulad simplicitor. Thus the learned Trial Judge was of the view that since the said Wakf was created by the Wakif in the nature of Wakf-al-al-aulad without creating any immediate benefit for the members of the Shia community of Muslim for any religious or charitable purpose, such Wakf cannot be considered as Wakf within the meaning of Wakf as defined in Section 3(r)(iii) of the Wakf Act, 1995 and as such Section 85 of the said Act cannot be attracted in the instant case for ousting the jurisdiction of the Civil Court for trying the present suit.

12. The propriety of the said order of learned Trial Judge is under consideration before this Court. Let me now consider the propriety of said order from different angles. Firstly, if I accept the order of the learned Trial Judge as correct and legal then this Court has no other alternative but to hold that the plaint is liable to be rejected on the ground as mentioned in Order 7 Rule 11(a) of the CPC as the plaint does not disclose any cause for action for the present suit. Let me now explain as to why such conclusion is arrived at by this Court.

13. If the findings of learned Trial Judge regarding nature of the Wakf as wakfal-al-aulad simplicitor, is accepted then the plaintiffs as the members of the Shia Community cannot claim any right in the suit property. Thus the relief which is claimed by the plaintiff in the instant suit cannot be granted, as the wakf property is not a property belonging to public wakf estate.

14. The cause of action for the present suit will mature only if it is found that the suit property is a part of the public Wakf estate and the same was dedicated for use by the public at large or by a section of the public in connection with any religious or charitable purpose.

15. Thus this Court has no hesitation to hold that if this Court proceeds on the basis that the findings of the learned Trial Judge is good, valid, sound and legal then the plaint does not disclose any cause of action for the present suit. Accordingly the plaint is liable to be rejected under Order 7 Rule 11(a) of the Civil Procedure Code.

16. Let me now consider the present problem from a different angle. I have already indicated above that the plaintiff never claimed in the plaint that the suit property is a wakf property belonging to the estate of wakf-al-al-aulad. The plaintiff never claimed that the wakf which was created by the wakif was in the nature of wakf-al-al-aulad. Rather the plaintiff all throughout maintained their stand that the wakf was created by the wakif by the said wakf deed for use of said property by the members of the Shia community of Muslim for performing religious charitable activities therein. The plaintiff also categorically denied the claim of the Mutawalli that the suit property is a property belonging to private

wakf estate. Accordingly they claimed relief in this suit for protecting their right as beneficiaries under the said deed of wakf as members of the Shia community of Muslim.

17. Since the cause of action for the instant suit is based on the aforesaid foundation, this Court, while considering an application under Order 7 Rule 11 of the Code of Civil Procedure, cannot introduce a third case even by examining the wakf deed. Thus this Court holds that while considering the defendant's application for rejection of plaint, the Court cannot proceed on the basis that the wakf was created by the wakif in nature of wakf-al-al-aulad and the suit property is not a part of the public wakf estate. On the contrary, the Court will have to proceed to consider the question regarding maintainability of the suit on the ground of bar of law by accepting each line of the plaintiffs' claim as true and correct and if the court finds that no decree can be passed by the Court due to any bar of law, even by assuming that every line of the plaintiff's claim is proved, then only plaint can be rejected.

18. Keeping in mind the basic principle regarding the scope of consideration of an application under Order 7 Rule 11 of the CPC as indicated hereinabove, this Court has examined as to whether the instant suit before the Civil Court is maintainable or not in view of the bar created u/s 85 of the said Act.

19. For proper appreciation of the bar of jurisdiction of the Civil Court as created u/s 85 of the said Act, the said provision is set out hereunder:

Section 85- Bar of jurisdiction of Civil Court.

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 the Tribunal.

20. On apparent look at the said provision at a glance, it appears that suit and/or other legal proceeding of any nature pertaining to any dispute, question or other matter relating to any wakf property or other matter which is required by or under this Act to be determined by the Tribunal cannot be tried by the Civil Court as the jurisdiction of the Civil Court to try such dispute, is ousted by Section 85 of the said Act.

21. Now a question crops up as to whether any dispute, question or other matter relating to any wakf, wakf property or other matter which is not required by or under this Act to be determined by the Tribunal, can be tried by the Civil Court or not. For finding out the answer to the said question, the Court is required to consider various other provisions of the said Act. Let me now discuss the various provision of the said Act which provides for determination of various types of disputes by the Tribunal set up u/s 83 of the said Act and/or by other forums:

1. Section 6 Sub-section (1) provides that Wakf Board/mutawalli/interested person can file suit before the Wakf Tribunal for decision as to whether a particular property in the list of wakfs is wakf property or not within the specified

period.

2. Section 6 Sub-section (1) also provides that the Wakf Board/mutawalli/interested person can file suit before the Wakf Tribunal for decision as to whether wakf specified in the list of wakfs is a Shia Wakf or Sunni Wakf within the specified period.

3. Section 32(3) of the said Act provides that the interested person/affected person can file suit before the Wakf Tribunal for setting aside any settlement for scheme, management or direction made or given by the Wakf Board.

4. Section 33(4) of the said Act provides that mutawalli/person aggrieved can prefer appeal before the Wakf Tribunal against the order of the Chief Executive Officer for making payment of the amount misappropriated or restoring other wakf property retained within 30 days from the date of receipt of such order.

5. Section 35(1) of the said Act provides that the chief Executive Officer may, with the prior approval of the Wakf Board, apply to the Wakf Tribunal for conditional attachment of the property of mutawalli or any other person against whom an order for payment is made, if such Muttawalli or person is about to dispose of the whole or any part office property or to remove the whole or any part of office property from the jurisdiction of such Chief Executive Officer.

6. Section 38(7) of the said Act provides that any Executive Officer or a member of his Staff may prefer appeal before the Wakf Tribunal against the order of his removal or dismissal made by the Wakf Board within 30 days from the date of communication of such order.

7. Section 39(3) of the said Act provides that Wakf Board may file an application before the Wakf Tribunal for recovery of possession of any building or place which was being used for any religious purpose or instruction or for charity, has ceased to be used for that purpose, whether before or after the commencement of this Act.

8. Section 40(2) of the said Act provides that person interested/person aggrieved can file an application before the Wakf Tribunal against the decision of the Wakf Board on the question as to whether a particular property is wakf property or not or whether a wakf is a Sunni Wakf or a Shia Wakf.

9. Section 40(4) of the said Act provides that the person interested/person aggrieved can file an application before the Wakf Tribunal against the order of the Wakf Board for calling upon any Trust or Society to register any property under the Act.

10. Section 48(2) of the said Act provides that mutawalli/aggrieved person may file an application before the Wakf Tribunal against the order or the Wakf Board for recovery of any amount from him on the basis of the Auditor's report within 30 days from the date of receipt of such order, provided that at first, he has to deposit the said amount in the Wakf Tribunal.

11. Under second proviso to Section 51(2) of the said Act provides that aggrieved mutawalli/other person may file an application before the Wakf Tribunal for permission to sell wakf property otherwise than by public auction.
12. Section 51(5) of the said Act provides that the aggrieved mutawalli/interested person may file appeal before the Wakf Tribunal against the decision of the Wakf Board for utilization or investment of the amount realised by sale, exchange, and mortgage of wakf property within 90 days from the date of communication of such decision or the publication of such decision.
13. Section 52(4) of the said Act provides that any aggrieved person may prefer an appeal before the Wakf Tribunal against the order of the Collector made u/s 52(2) of the Act within 30 days from the date of service of such order.
14. Section 52(4) of the said Act provides that any aggrieved person may institute a suit against the order of the Chief Executive Officer for removal of encroachment with a view to establishing his right, title and interest over the same.
15. Section 61(1) of the said Act provides that the Wakf Board may file a case in Court or Wakf Tribunal for pecuniary punishment of the mutawalli, if he fails to comply with any of the provisions of Sub-Section 1(a) to (h).
16. Section 61(2) of the said Act provides that Criminal proceeding can be started against the mutawalli.
17. Section 64(4) of the said Act provides that aggrieved mutawalli can prefer an appeal to the Wakf Tribunal against the order of the Wakf Board for his removal under any of the provisions of Section 64(1)(c) to (j) within one month from the date of the receipt of such order of removal.
18. Section 64(6) of the said Act provides that the Wakf Board may make an application to the Wakf Tribunal for the appointment of a receiver to manage the wakf pending the decision of the appeal filed by the mutawalli u/s 64(4) of the said Act.
19. Section 67(4) of the said Act provides that any aggrieved person can file an appeal before the Wakf Tribunal against the order of the Wakf Board for superseding the Managing Committee of a Wakf u/s 67(2) within 60 days from the date of such order.
20. Section 67(6) of the said Act provides that any aggrieved member of the Managing Committee of a wakf can prefer an appeal before the Wakf Tribunal against the order of the Wakf Board for the removal from the membership of the Managing Committee of such wakf within 30 days from the date of service of the order upon him.
21. The first proviso of Section 69(3) of the said Act provides that any aggrieved person may prefer an appeal before the Wakf Tribunal against the order of the Wakf Board framing a scheme for the administration of the wakf within 60 days

from the date of such order.

22. Section 72(7) of the said Act provides that any aggrieved mutawalli may prefer an appeal before the Wakf Board against the assessment or revision made by the Chief Executive Officer u/s 72(6) of the Act within 30 days from the date of the receipt of such assessment or revision.

23. Section 73(3) of the said Act provides that any bank or other person who is ordered by the Chief Executive Officer under Sub-section (1) for making any payment from the amount standing to the credit of any wakf, may prefer an appeal before the Wakf Tribunal within 30 days from the date of such order.

24. Section 83(2) of the said Act provides that any mutawalli/person interested in a wakf/person aggrieved may make an application before the Wakf Tribunal against any order made under this Act or rules made thereunder within the time specified in this Act or in absence of such specified time within such time as may be prescribed by rules made by the State Government.

25. Section 94(1) of the said Act provides that the Wakf Board may file an application before the Wakf Tribunal for direction upon the concerned mutawalli to pay to the Wakf Board or its authorized person the amount necessary for the performance of pious, religious or charitable acts recognised by Muslim law which he is under obligation to perform but fails to do so.

26. Section 94(2) of the said provides that the Wakf Board/any person interested in the wakf may make an application to the Wakf Tribunal for direction upon the concerned mutawalli to discharge any duty imposed upon him under the wakf when he willfully fails to discharge the same.

22. These are the provisions which are provided in the said Act for determination of various types dispute relating to wakf property by the Tribunal set up u/s 83 of the said Act and/or by other forums.

23. Mr. Banerjee, learned Advocate, appearing for the opposite party submitted that there may be various other dispute relating to wakf property which are not triable by the Tribunal. According to Mr. Banerjee, if any dispute is raised relating to wakf property which is not triable by the Tribunal, such dispute can be adjudicated upon by other Courts such as Civil Courts and/or Criminal Courts. By referring to Section 61(2) of the said Act, Mr. Banerjee contended that a Criminal proceeding can be started against the mutawalli for punishment on the complaint made by the Wakf Board or an officer duly authorised by the Wakf Board, if the mutawalli fails to comply with any of the provisions contained in Sub-Section 2(a) to (b) of Section 61 of the said Act. He further contended that Section 65(2) of the said Act also provides that any person interested in the wakf may file an application before the State Government challenging the correctness, legality and propriety of the notification issued by the Wakf Board u/s 65(1) of the said Act, for assuming direct management of wakf. By referring to Section 68(6) of the said Act, he further contended that the said provision provides that an aggrieved

person may institute a suit in a competent Civil Court against any order made by the Magistrate under Sub-section (2) for establishing the right, title and interest over the property specified in such order. By referring to Section 55A (West Bengal Amendment) of the Act he contended that the said provision provides that the Criminal proceeding may be started against the encroacher of the Registered wakf property on the complaint of the Wakf Board. Referring to the aforesaid provision of the said Act Mr. Banerjee contended that Section 85 of the said Act does not impose any restriction on the jurisdiction of the Civil Court in entertaining any suit of any nature pertaining to any dispute relating to wakf or wakf property which are not triable by the Tribunal. Mr. Banerjee thus contended that only those disputes which are triable by the Tribunals as per various provisions of the said Act, as mentioned above, cannot be tried by the Civil Court, as the Civil Court's jurisdiction is ousted u/s 85 of the said Act.

24. Mr. Banerjee thus contended that since the dispute which is raised in the instant suit is not capable of resolution by the Tribunal under any of the aforesaid provisions of the said Act and furthermore since the reliefs which were claimed by the petitioner by way of injunction in the said suit, cannot be granted by the Tribunal, the Civil Court is the proper forum where such a dispute can be tried and the grievances of the plaintiffs can be redressed appropriately. To support the aforesaid contention Mr. Banerjee relied upon the following decisions of this Hon'ble Court:

- i) In the case of Anis Fatma Begum Vs. Board of Wakf,
- ii) In the case of Abul Kalam Mallick and Ors. v. Abdul Aziz Mallick and Ors. reported in (2005) 1 WBLR (Cal) 665;
- iii) In the case of Nurjahan Begum v. Amin Ahmed Khan and Ors. reported in (2006)2 CLJ (Cal) 66.
- iv) In the case of Abdul Rahiman Musaliar Vs. Muhammed Sahib,

25. Relying upon the aforesaid decisions Mr. Banerjee submitted that since the dispute which is raised in this suit is incapable of adjudication by the Tribunal, the disputed issue raised in the instant suit can be tried by the Civil Court. As such he claimed that the defendant's application under Order 7 Rule 11 of the CPC is liable to be rejected. He thus supported the impugned order.

26. Mr. Ray Chowdhury, learned Senior Counsel, appearing for the petitioner, submitted that the decision which was cited by Mr. Banerjee in the case of Anis Fatma Begum v. Board of Wakf, West Bengal (supra) has no application in the facts of the instant case as that was a case where the Division Bench of this Hon'ble Court dealt with a dispute relating to a wakf which was created in the nature of wakf-al-al-aulad while the plaintiff in the present suit is claiming that wakf here is a public wakf and they are the beneficiaries therein. He further contended that the said decision is now under consideration before the Hon'ble Supreme Court and the operation of the said order, having been stayed by the

Hon''ble Supreme Court, the present problem cannot be resolved with reference to the said decision.

27. This Court does not find much substance in such submission of Mr. Ray Chowdhury as, so long as the said decision is not set aside by the Hon''ble Supreme Court, the principle laid down therein will govern the field, notwithstanding stay order passed by the Hon''ble Supreme Court which is binding upon the parties to the said proceeding only.

28. Let me now consider the effect of the said Division Bench decision of this Hon''ble Court, hereunder. It was held therein that the Wakf Act, 1995 will have application to wakf-al-al-aulad or wakfs created for private and secular purposes to the extent of the provision made therein for religious and charitable purposes, but the wakf character of the remaining portion of the wakf property will not be affected or altered merely because of the fact that they would no longer be governed by the provisions of the aforesaid Act. It was held therein that such wakfs would continue to retain their wakf character and would be governed by the Mahamaddan law and enactment enacted in respect thereof such as Mussalman Wakf Validating Act of 1913 and 1930, the Religious Endowments Act, 1963 and the Shariat Law Application Law 1937. It was further held therein that the definition of wakf u/s 3(r) of the Wakf Act, 1995 indicates that the legislature with deliberate intention kept private wakfs beyond the ambit of the said Act and the administrative control of the authorities appointed or constituted under the said Act, except to the extent of the provision which was made therein for religious and charitable purposes. It was further held therein that the definition of wakf in the 1995 Act excludes private wakfs to be controlled under this Act, but Section 96 brings within the ambit of the 1995 Act the wakfs which are created for secular activities which would include social, economic, educational and such welfare activities. It was further held therein that for giving a harmonious construction between the definition of wakf as defined in Section 3(r) of the said Act and the provisions of Section 96 thereof, one will have to construe the social activities for which wakfs are created. If the activities are of charitable nature and are extended to the persons who are not the members of the wakif's family, Wakf Act of 1995 will apply to that extent which is dedicated for secular purposes as these wakfs have been included within the scope and ambit of Section 95. It was thus held therein that in view of the definition of wakf in Section 3(r) of the said Act, it cannot be accepted that on account of Section 43 of the said Act, even private wakfs which stand excluded by the aforesaid definition would continue to be governed under the provision of 1995 Act, simply because of the deemed registration u/s 43 of the said Act.

29. On perusal of the said decision, this Court holds that the present problem which is raised in the instant suit cannot be resolved by referring to the aforesaid Division Bench decision of this Hon''ble Court only, as it is not a case where the plaintiff claims that the suit property is a private wakf property i.e. a property belonging to wakf-al-al-aulad and as such the dispute raised in the said suit

cannot be decided by the Tribunal. On the contrary, the plaintiffs claim that the suit property is a wakf property which was dedicated by the wakif for its use by the members of the Shia Community of Muslim for performing their religious and charitable activities therein and as such the plaintiffs themselves claimed that the Wakf Act of 1995 is applicable to the suit property. Thus this Court holds that the present problem cannot be resolved with reference to the aforesaid Division Bench Decision of this Court, wherein the incidence of a private wakf or wakf-al-al-aulad was primarily considered, without addressing on the issue regarding maintainability of such suit before the Civil Court. In fact, no such issue was raised in the said case before Their Lordships.

30. Of course it is correctly pointed out by Mr. Banerjee from the said decision that when a private wakf property which is dedicated for any religious or charitable or any pious purpose recognised under the Mohammedan law, for any person other than wakif's family, then Wakf Act, 1995 will apply to such wakf to the extent of the provision made therein for religious and charitable purpose for any person other wakif's family in view of Section 3(iii) of the said Act. Thus the contention of Mr. Banerjee that the said decision will help the court to decide the present problem to some extent, cannot be ignored altogether as in the present case the wakf deed provides for use of part of its income for charitable purpose, under certain circumstances, on occurrence of certain eventualities. However it is not the case of the plaintiff that the wakf estate is wakf-al-al-aulad or the wakf deed provides for immediate utilization of the income of the wakf estate for charitable purpose. The wakf deed provides that in the event the wakif has no descendant in his family, then part of the surplus income of the wakf estate which was directed to be given to his descendant, is to be spent for charitable purpose. It is not the plaintiff's case that the said situation has matured. If the situation has not matured then the income of the wakf estate will remain a part of wakf-al-al-aulad. Even assuming that such situation has matured, still then the wakf estate will still remain as wakf-al-al-aulad and the part of the income of the said wakf estate which was directed to be spent for charitable purpose may form part of public wakf, attracting the provision of Section 3(iii) to that part only, as per the said Division Bench decision of this Court. However since this pleading is absent in the instant case, this discussion, in my view, is irrelevant herein.

31. Mr. Ray Chowdhury referred to a Division Bench decision of the Madhya Pradesh High Court in the case of Wakf Imambara Imlipura Vs. Smt. Khursheeda Bi and Others, which, according to him, will help this Court to decide the present problem raised before this Court.

32. On perusal of the said decision, this Court finds that Madhya Pradesh High Court after considering various provisions of the said Act and by taking note of various other judicial pronouncement of different courts, held that Section 85 of the said Act consists of two parts. First part provides that 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. Second part provides that other matter which is required by or under this Act to be determined by the Tribunal cannot be tried by the Civil Court. It was held therein that the words "other matter" has been used in the first part as well as in the second part but in the first part user of the words "any dispute, question or other matter" is wide enough to cover within its ken the suit for ejectment filed by the wakf against a tenant. It was further held therein that second part deals with other matter which is required by or under the said Act to be determined by the Tribunal as provided in Sections 6, 7, 32, 33, 35, 40, 51, 52, 54, 64, 67 and 69. The Madhya Pradesh High Court thus held that the legislative intention is clear from reading of Sections 83 and 85, that the Tribunal is deemed to be a Civil Court and can exercise similar powers as may be exercised by the Civil Court under the CPC while trying the suit, executing a decree or order. It was also held therein that the bar created by Section 85 cannot be confined to dispute as to title of the wakf property or with respect to possession based on title of wakf property but the said bar outs the jurisdiction of the Civil Court to try the ejectment suit also, which according to the said High Court, is triable by the Tribunal.

33. On careful consideration of the aforesaid decision of the Madhya Pradesh High Court this Court holds that the interpretation given to Section 85 of the said Act by Madhya Pradesh High Court in the aforesaid decision is accepted to some extent but not as a whole for the following reason:

34. If Section 85 of the said Act is considered as a composite provision as contended by Mr. Banerjee, then user of the expression "or other matter" twice in the said provision cannot be reconciled properly. If on the contrary the user of the said expression in two places of the said provision has to be given any proper meaning then this Court agrees with the decision of the Madhya Pradesh High Court that the said provision consists of two parts, first part deals with general exclusion of Civil Court's jurisdiction to try any dispute of any nature relating to wakf or wakf property and the second part deals with exclusion of the Civil Court's jurisdiction to try any dispute which are required to be determined by the Tribunal under various provision of the said Act.

35. Then again a question crops up as to why the second part was included in the said provision by the legislature, if the first part is sufficient enough to cover the second part also. On the contrary, if this problem is considered from a different angle then another question emerges; as to why the first part was included in the said provision if the legislature really intended to exclude the jurisdiction of the Civil Court only in respect of the dispute which is triable by the tribunal under the said Act?

36. For resolving the said issue, certain other provisions of the said Act, are required to be considered which did not find any place for consideration in the decision of Madhya Pradesh High Court. Section 68(6), Section 90, Section 93 of the said Act may be referred to in this connection. Those provisions are set out hereunder:

68. Duty of mutawalli or committee to deliver possession of records, etc.-(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).

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

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

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

(4) In the absence of a notice under sub0section (2), the sale shall be declared void, if the Board, within one month of its coming to know of the sale, applies in this behalf to the court or other authority under whose order the sale was held.

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

37. These provisions made it abundantly clear that disputes contemplated under these provisions touching the wakf or wakf property are triable by the civil Court to the exclusion of the jurisdiction of the Tribunal.

38. As such it cannot be held that first part of Section 85 of the said Act ousts the jurisdiction of the Civil Court to try any dispute touching the wakf or wakf property of any nature whatsoever completely.

39. Thus this Court holds that the Civil Court's jurisdiction is not ousted completely by the first part of Section 85 of the said Act.

40. Since the legislature never uses any unnecessary and/or surplus word and/or expression in any Act, the Court is required to construe the said provision contained in Section 85 of the said Act by reading it harmoniously with the other provisions of the said Act, so that a meaningful meaning can be given to the said provision, rather to make the said provision useless and/or unworkable.

41. If the expression "or other matter" which is used in the second part of the said provision is read conjointly with the preceding part of the said provision then the said expression in the second part will be construed as surplusage. On the contrary, if the expression "or" preceded by the expression "other matter" in the

second part is read disjunctively then a meaningful meaning can be given to the said expression. Thus this Court is of the view that the decision of the Madhya Pradesh High Court can be accepted with some modification.

42. Thus if the said provision of Section 85 of the said Act is read harmoniously with the other provision of the said Act as mentioned above then, this Court has no hesitation to hold that Section 85 of the said Act consists of two parts; first part deals with general exclusion, subject to various provisions of the said Act which authorises the Civil Court, to try certain types of dispute, and the second part deals with the exclusion of Civil Court's jurisdiction over those matters which are determinable by the Tribunal under the said Act.

43. The principle laid down by the learned Single Judge of this Hon'ble Court in the case of *Abul Kalam Mallick and Ors. v. Abdul Aziz Mallick and Ors.* (Supra) will make it clear that a disputed claim of title over a wakf property between two rival claimants, can be decided by the Civil Court. Learned Single Judge of this Court held in the said decision that such a dispute regarding title to the wakf property can be tried by the Civil Court. In my view, Section 90 of the said Act was correctly interpreted in the said decision.

44. In the present case, the plaintiffs claim that they are beneficiaries in wakf property. The instant suit was filed to establish their right of performance of religious functions in the suit property and for injunction for restraining the defendants from carrying on any act in contravention of the provision of the wakf deed. By applying the provision of Section 90 of the said Act, this Court holds that since the right of the plaintiff as beneficiary under the wakf deed was sought to be enforced in the said suit, such suit can be maintained before the Civil Court, inasmuch as such type of suit are not excluded from the jurisdiction of the civil court's either under the first part or under the second part of Section 85 of the said Act.

45. However the decision of the other Single Judge of this Hon'ble Court in the case of *Nurjahan Begum v. Amin Ahmed Khan and Ors.* (supra) has no application in the instant case as a dispute which was decided in the said case related to wakf property covered under the wakf-al-al-aulad which was in the nature of private wakf without creating any provision which is recognised by the Muslim law as pious, religious or charitable or any other allied provision as mentioned in Section 3(r) of the said Act and as such it was rightly held therein that such a dispute cannot be decided by the Tribunal.

46. The unreported Division Bench decision of this Hon'ble Court in the case of *Khur Shid Aswar Khan v. Board of Wakf and Ors.* passed on 7th March, 2008 in SAT No. 4113 of 2004 also does not fit in the present case. However the said decision can be considered for assessing the submission of Mr. Banerjee, to the effect that the Tribunal has no jurisdiction to pass any order of injunction in any proceeding before it. Such submission of Mr. Banerjee does not find any support from the aforesaid Division Bench decision of this Hon'ble Court wherein it was

held that a suit for permanent injunction for restraining the defendant from proceeding further with the illegal and invalid order passed by the defendant viz. Board of wakfs, can be tried by the Tribunal constituted u/s 83 of the said Act. It was further held therein that the suit which was filed before the Civil Court challenging the order of the said defendant is barred. Thus it cannot be held that Tribunal has no jurisdiction to pass any injunction order in any proceeding before it. When Section 83(5) of the said Act says that Tribunal shall be deemed to be a Civil Court, it cannot be held that Tribunal cannot pass any injunction order, as the said provision says that while considering a suit or proceeding, the Tribunal can exercise all the power of the Civil Court available under the Civil Procedure Code. The decision of Kerala High Court in the case of Abdul Rahaman Musalin v. T.M. Muhammed Sahib (supra) which is contrary to the unreported division bench decision of Calcutta High Court, cannot be accepted as good law.

47. Be that, as it may, the said decision cannot help this Court to solve the present problem, as that was a case where the decision of the wakf Board was challenged; as such it was held therein that civil Court has no jurisdiction to try the said suit. Here in the present case, decision of the wakf Board has not been challenged though legality of the sanction of the building plan issued by the Municipal Authority is under challenge in the present suit.

48. Thus on overall consideration of the entire scheme of the said Act, this Court cannot hold that the plaint is liable to be rejected due to bar in maintaining this suit before the civil court u/s 85 of the said Act as contended by the defendant.

49. The revisional application thus stands rejected.

50. Urgent xerox certified copy of this order, if applied for, be given to the parties as expeditiously as possible.