



C.R.P.Nos.3285 and 3622 of 2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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RESERVED ON : 22.08.2023

DELIVERED ON: 08.09.2023

CORAM :

The Hon'ble Mr.JUSTICE V.LAKSHMINARAYANAN

C.R.P.Nos.3285 and 3622 of 2014

and M.P.Nos.1 of 2014 (2 in Nos.)

CRP No.3285 of 2014

1. The Chairman,
The Tamil Nadu Waqf Board,
No.1, Jaffer Syrang Road,
Vallal Seethakathi Nagar,
Chennai-600 001.

2. The Chief Executive Officer,
The Tamil Nadu Waqf Board,
No.1, Jaffer Syrang Road,
Valla Seethakathi Nagar,
Chennai-600 001

..Petitioners

-VS-

1. M.S.Muhammad Yahya (died)



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2. The Superintendent,
The Tamil Nadu Waqf Board,
No.1, Jaffer Syrang Road,
Vallal Seethakathi Nagar,
Chennai-600 001.

3.Mrs.S.Kalaiselvi

4.S.Karthikeyan

5.S.Ramya

6.S.Vigneshwaran

7.Sulthana

8.Ajumunisa

9.Mohammed Ibrahim

10.Hakimunnisa

11.Aysha Fathima

12.M.Mohamed Mazhar

13.Kousiya @Humera Begum

14.Rehana Fathima

15.Zaibunnisa

16.Noorulain

17.Mohammed Hussain

18.Mohammed Abdullah Basha

(Respondents 7 to 18 were brought on record
as LR's of the deceased 1st respondent viz.,
M.S.Muhammad Yahya vide Court order dt.
12.01.2023 made in CMP Nos.9020 to 9022
and 9699, 9701 and 9758 of 2020 in CRP No.



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3285 of 2014)

.. Respondents

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CRP No.3622 of 2014

The Superintendent of Waqf,
Tamil Nadu Waqf Board,
No.1, Jaffer Syrang Street,
Vallal Seethakathi Nagar,
Chennai-600 001

.... Petitioner

VS

- 1.M.S.Mohammed Yahya (died)
2. The Chairman,
The Tamil Nadu Waqf Board,
No.1, Jaffer Syrang Road,
Vallal Seethakathi Nagar,
Chennai-600 001.
- 3.The Chief Executive Officer,
The Tamil Nadu Waqf Board,
No.1, Jaffer Syrang Road,
Valla Seethakathi Nagar,
Chennai-600 001.
- 4.S.Kalaiselvi
- 5.Karthikeyan
- 6.S.Ramya
- 7.S.Vigneshwaran
- 8.Sulthana
- 9.Ajumunisa
- 10.Mohammed Ibrahim



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11.Hakimunnisa

12.Aysha Fathima

13.M.M.Mohamed Mazhar

14.Kousiya @Humera Begum

15.Rehana Fathima

16.Noorulain

17.Mohammed Hussain

18.Mohammed Abdullah Basha

19.Zaibunnisa

(Respondents 8 to 19 were brought on record
as LR's of the deceased 1st respondent viz.,
M.S.Muhammad Yahya vide Court order dt.
12.01.2023 made in CMP Nos.9000, 9001
and 9002 of 2020 in CRP No.3622 of 2014)

... Respondents

CRP No.3285 of 2014:-

Civil Revision Petition filed under Section 115 of the Civil Procedure Code against the order dated 27.06.2014 passed by Hon'ble Waqf Tribunal (1st Assistant City Civil Court, Chennai) in O.A.No.19 of 2011.

CRP No.3622 of 2014:-

Civil Revision Petition filed under Article 227 of the Constitution of India against the judgment and decree dated 27.06.2014 made in OA No.19 of 2011 on the file of I Assistant Judge, City Civil Court (Waqf Tribunal),



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CRP No.3285 of 2014:

For Petitioners : Mr.Md.Fayaz Ali
For respondents : Mr.N.A.Nissar Ahmed
For Mr.J.Kowser Nissar
For R.2
Mr.P.Hari Babu
For R.3 to R.6
Mr.V. Manohar
For Mr.E.Sathiyaraj
For R.7 to R.18

CRP No.3622 of 2014

For Petitioner : Mr. N.A.Nissar Ahmed
Senior Counsel For
Mr. I. Kowser Nissar
For Respondents : Mr. Md. Fayaz Ali
For R2 and R.3
Mr.K. Then Rajan
For R.9
Mr.V. Manohar
For E. Sathiyaraj
For R.4 to R.8 &
R.10 to R.19

COMMON ORDER

Both these revisions are preferred against the order and decreetal order passed in O.A.No.19 of 2011 dated 27.04.2014 by the Waqf Tribunal



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cum I Assistant City Civil Court at Chennai.

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HISTORY OF THE CASE:

2. There existed one Muslim gentleman by name Janab K. Magdoom Muhammed Marakayar. He belonged to the Shafi school of Islam. However, during his life time, he embraced the Hanafi school and also declared that he belongs to the latter school. The Almighty has bestowed him with a lot of wealth. He did not think only about himself and expansion of more wealth but thought about giving it back to the society. He wrote three documents viz.,

(1) a document titled as Waqf-Alal-Aulad. This is a registered document registered on 27.08.1924. In this document, he declared that he belongs To the Hanafi School.

(2) After the said document, he wrote a Will dated 03.04.1939.

3) This was followed up by a Codicil dated 06.04.1943.

The Will and Codicil was put before this Court in its testamentary



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Jurisdiction. Probate was granted on 27.04.1944 in OP No.106 of 1944.

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3. Jb.K.Magdoom Muhammed Marakayar was managing his properties as long as he was alive. On his death, one Jb. M.S.A.Muhammad Jaffer came to be the administrator of the property. He filed O.S.No.4285 of 1976 on the file of III Assistant Judge, City Civil Court, Madras. In the said suit, he claimed a right of management of the properties. In the said suit, Jb. M.S.Muhammad Yahya (the applicant in O.A.No.19 of 2011) was appointed as Receiver. This suit was tried along with another suit filed by Jb. M.S.Muhammad Yahya in O.S.No.8296 of 1988.

4. Pending the suits, M.S.A.Muhammed Jaffer and M.S.Muhammad Yahya entered into a compromise and a decree was passed on 02.03.2001. On account of the said compromise, an order was obtained that the properties are the family properties of Jb. K.Magdoom Muhammad Marakayar and that they could be sold and alienated. I have to point out here that to these suits, the Tamil Nadu Waqf Board, which was created under the Wakf Act, 1954 and continued under Waqf Act, 1995, was not made a party. Pursuant to the decree, Mr.M.S.Muhammad Yahya continued as a Receiver



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of the property.

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5. On 01.06.2007, Tamil Nadu Waqf Board through its Chief Executive Officer, issued notice to Mr. M.S.Muhammad Yahya calling upon him to register the properties with the Tamil Nadu Waqf Board. Mr. M.S.Muhammad Yahya took a stand that these are the family private properties and are not Waqfs for the purpose of registration. This was followed up with another notice issued by the Waqf Board with a similar demand on 09.04.2008. Mr.M.S.Muhammad Yahya gave similar reply. By an Order dated 23.11.2010, which was preceded by an inquiry, the Waqf Board took over direct management of the Waqf and consequentially of its properties. This was followed up with Gazette Notification in the Tamil Nadu Gazette dated 17.11.2010 in Part-VI-Section-3. On the publication being made, Jb. M.S. Muhammad Yahya, who claimed to be the Receiver, challenged the proceedings before this Court and thereafter, filed O.A.No.19 of 2011. The relief sought for in the proceedings are as follows:-

*“...to set aside the order in
Na.Ka.No.4592/07/Chennai/Aa1 dated 22.11.2010*



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in Item No.21/09 Va.Vi.Ma.8/08/U5/Chennai dated 29.04.2010 passed by the First Respondent and the same was served to the Applicant only on 23.11.2010 thereby issuing a Gazette Publication in Tamil Nadu Government Gazette dated 17.11.2010 Part VI-Section 3 (a) consequently declaring that the properties are the Family Private Properties of K.Magdoom Muhammad Marakayar and pass such further or other orders as this Hon'ble Court may deem fit and proper and thus render justice.”

To this proceedings, he had impleaded the Chairman, the Chief Executive Officer and the Superintendent of Waqfs of Tamil Nadu Waqf Board as parties.

6. The Tamil Nadu Waqf Board filed a counter stating that a Waqf had been created on 27.08.1924 dedicating the properties for the benefit of the descendants and for religious, pious and charitable purposes. It also stated that under the document, Jb.K.Magdoom Mohammed Maraikayar appointed himself as the first Mutawalli. As per the Waqf Deed, he and his descendants



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have been divested of their title over the property and the Waqf had come into existence. It was further stated, specific amounts were allotted for religious, pious and charitable purposes. It was also stated that every month monies were allocated to be expended on

- i. Orphanages for buying rice,
- ii. Providing food every Friday or Monday nights to travellers (Musafirs),
- iii. For reciting Quran and
- iv. For performance of Moulud.

7. The idea behind this pleading seems to be that the Waqf created is a Waqf-Alal-Aulad composite and not one which is Waqf-Alal-Aulad Simpliciter. Since the Waqf created under the 1924 document is a Waqf-Alal-Aulad composite, the Waqf Board claimed supervisory jurisdiction over the same.

8. It was brought to the notice of this Court that one Sambandam, who is a tenant of the property, had filed an application before the Waqf Board stating that Mr.M.S.Muhammad Yahya was not appointed as Mutawalli but



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was alienating Waqf properties without the permission of the Waqf Board.

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9. The Waqf Board also brought to the notice of the Waqf Tribunal that on the basis of this application, an enquiry was initiated which was contested by Jb. M.S.Muhammad Yahya. The result of the enquiry was that the Waqf Board by an Order dated 29.04.2010 held that the Waqf is a composite one and it had supervision and control over the same. Consequently, the alienations of properties were contrary to Section 51 of the Waqf Act, 1995 and the same are void. Having come to that conclusion, the Board invoked Section 65 of the Waqf Act and took over direct management.

10. The Waqf Board also added that Mr.M.S.Muhammad Yahya did not submit accounts and expenditure to the Waqf Board and had not acted in accordance with Waqf Act. In addition to taking over direct management, the Waqf Board appointed an Executive Officer to the said Waqf.

11. On the basis of this proceedings, the Waqf Board, the Chief Executive Officer of the Waqf Board called upon the petitioner to hand over



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the records. The Waqf Board also took a stand that being an Order under Section 65 of the Act, proceedings were not maintainable before the Waqf Tribunal.

PREVIOUS PROCEEDINGS BEFORE THE HIGH COURT:

12. Challenging the order of the Waqf Board dated 29.04.2010, Mr.M.S.Muhammed Yahya had filed a writ petition in W.P.No.30029 of 2010. One of the purchasers viz., M/s Million Foundations also challenged the very same order in WP No.15652 of 2011. by a common order dated 12.08.2011, this Court held that a writ petition is not a remedy and the appropriate remedy is that of approaching the Waqf Tribunal, questioning the order dated 29.04.2010. This order of the learned Single Judge was put in challenge in W.A.No.1961 of 2011. The writ appellate Court concurred with the learned single judge and held that the remedy is only to move Waqf Tribunal and the writ petitions are not maintainable. It is on the basis of these orders that proceedings were initiated before the Waqf Tribunal.



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ANSWER ON JURIDICTION:

13. Under Section 65 of the Waqf Act, the Waqf Board is entitled to take direct management of the Waqfs. The Waqf Board is correct in its plea that an order under Section 65(1) of the Waqf Act can be challenged only before the Government under Section 65(2) of the Waqf Act. It has been held by this Court in the following judgments that a proceeding under Section 65(1) is not susceptible to challenge before Waqf Tribunal.

(i) Tamil Nadu Waqf Board represented by its Chairman vs Janab.K.S.M.A.Mohamed Mansoor (2010) 3 MLJ 621

(ii) Naina Mohammed Jamaath Pallivasal vs Tamil Nadu Waqf Board MANU/TN/1405/2005

14. However, in deference to the view taken by the Division Bench of this Court in W.A.No.1961 of 2011, whereby, the first respondent was directed to approach the Waqf Tribunal, I proceeded to hear the matter on merits of the case.

WAQF-ALAL-AULAD



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15. Waqf-Alal-Aulad is not defined by the Waqf Act. However, it is noticed in the definition of Waqf by the Act. Section 3(r)(iv) of the Waqf Act reads as follows:-

3.Definitions:

3(r) “*Waqf*” means the permanent dedication by a person professing Islam, of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes-

(i)....

(ii) ...

(iii)...

(iv) a Waqf-alal-aulad to the extent to which the property is dedicated for any purpose recognized by Muslim law as pious, religious or charitable

16. By this definition, the Waqf-alal-aulad to the extent of which the property is dedicated for a purpose recognised by the Muslim Law as pious, religious or charitable is covered by the Act. Mr. Justice Ameer Ali, the eminent Judge in his commentaries Muhammadan Law traces the origin of



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Waqfs. He would state that the Apostle of God said, *“Giving alms to the poor hath the reward of one alms, but that given to kindred hath two rewards-one, the reward of alms, the other, reward of helping relations”*. He would also extract a direction issued by the Holy Prophet in the following terms:

“ Zainad, wife of Ibin Masaud, came one day and asked the Prophet, “Who was the best entitled to receive her charity?

The Prophet of God declared, “Thy husband and thy children are the most entitled to receive the charity.”

17. Justice Ameer Ali would also quote a judgment of the Sudder Dewanny Adawlut. The said institution had held that a Waqf, according to the opinion of Abu Yusuf and Mohammed, implies

“ Relinquishment of proprietary right in any article of property such as lands, tenements and the rest, and consecrating it in such manner to the service of God that it may be of benefit to men, provided always that the thing appropriated be at the time of appropriation the property of the



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appropriator.”

(Mohammed Sadik v. Mahommed Ali and others Sel. Rep. I, page 17 as quoted in *Mahommedan Law compiled from authorities in the original Arabic containing the law relating to Gifts, Wakfs, wills, pre-emption and Bailment* by Syed Ameer Ali, 5th Edition, Volume I, page 194, Kitab Bhavan, New Delhi)

18. This is the pristine view of the Islamic Law. During the colonial Era, the concept of Waqf-alal-aulad came for interpretation before several Courts. The Privy Council in the case of ***Abdul Fata Mahomed Ishak and Others vs Russomoy Dhur Chowdry and Others (1894) I.L.R. 22 619 (P.C.)*** held that the principles of Muslim Law does not permit Waqf-alal-aulad. Lord Hobhouse held as follows:-

“ Some authorities go so far as to hold that for a valid Waqf the property should be solely dedicated to pious uses. On that point, however, this Board in Alusanulla Chowdhry's Case(1) adopted the opinion of Kemp, J., to the effect that provisions for the family out of the grantor's



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property may be consistent with the gift of it as Waqf. In favour of the view now urged for the Appellants there is the judicial opinion of Ameer Ali. J. in Bikani Mia's Case (2), dissenting from the rest of the Court; a dictum of Sir Raymoud West in the Bombay High Court in the case of Fatma Bibi vs Advocate General of Bombay (3), and a decision of Farran, J. in the same Court in the case of Amrullal Kalidas Shaik Husain (4) The weight of Ameer Ali, J's opinion on this subordinate point is somewhat lessened by his support of othe gift under consideration on the very broad grounds which their Lordships have considered to be untenable. The dictum of Sir R. West is mentioned in Alusanulla Chowdhry's Case (1) Furrar, J had before him a case very closely resembling the present one. He described the settlement as “ A perpetuity of the worst and most precious kind, and would be invalid on that ground unless it can be supported as a Waqf-nama” (5); and he thought that the authority of the Hedaya is againt it; but he adopted the principle stated by Sir R. West, which



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he treated as a decision, and he supported the gift on the strength of the ultimate trust for the poor.

Their Lordships cannot assent to these conclusions. They make words of more regard than things, and form more than substance. In their judgment the Calcutta High Court have in this case rightly decided that there is no substantial gift to the poor. A gift may be illusory whether from its small amount or from its uncertainty and remoteness. If a man were to settle a crore of rupees, and provide ten for the poor, that would be at once recognised as illusory. It is equally illusory to make a provision for the poor under which they re not entitled to receive a rupee till after the total extinction of a family; possibly not for hundreds of years; possibly not until the property had vanished away under the wasting agencies of litigation of malfeasance or misfortune; certainly not as long as there exists on the earth one of those objects whom the donors really cared to maintain in a



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high position. Their Lordships agree that the poor have been put into this settlement merely to give it a colour of piety and so to legalize arrangements meant to serve for the aggrandizement of a family.”

19. Coming to this conclusion, he did not agree with the view taken by eminent Mr.Justice Ameer Ali who had held as follows:

“ to hold that a Waqf, the benefaction of which is bestowed wholly or in part on the Waqif's family and his descendants, is invalid, would have the effect, in my opinion, of sweeping away an important branch of Muslim Law, with which are associated and intermixed the dearest religious interests of the people”.

20. On account of this decision of Privy Council, protests commenced in the subcontinent by persons belonging to Islamic faith. That forced the colonial legislature to take note of the prevailing practices amongst Muslims and to enact the Mussalman Waqf Validating Act, 1913. By this legislation, Waqf-alal-aulad was declared to be valid. This Act fell for interpretation by



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the Privy Council in ***Khajeh Solehman vs Nawab Sir Salimullah AIR 1922***

PC 107. The Privy Council held that the Act which was passed in 1913 was not retrospective in operation and therefore, it would not save Waqf-alal-aulad created prior to the Act. That brought in the Mussalman Waqf Validating Act, 1930. By virtue of the latter Act, all Waqf-Alal-Aulad created prior to the Mussalman Waqf Validating Act, 1913 was yet again declared to be valid.

21. The Acts now being in place, it commenced the second round of litigation. A Division Bench of the Madras High Court was called upon to decide the validity of Waqf which made provisions simultaneously for religious and charitable purposes as well as for the members of the family. In ***Syed Ahmad vs Julaiha Bivi AIR 1947 Madras 176***, a Division Bench of this Court held as follows:

“ The combined effect of these provisions is that a perpetual settlement of property for the maintenance and support of a Mahomedan settlor's family, children or descendants is perfectly valid, provided that



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the ultimate benefit of the disposition is expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose, although such reservation is to take effect after the extinction of the family children or descendants.

.....

That is to say, as we understand it, in Muhammadan law religious and pious purposes were always recognised as charitable. The point actually decided was that reading the Koran at the tomb of dead persons was not a charitable object under Muhammadan law, a view with the correctness of which we are not here concerned. No doubt, charity in the english sense was in some cases assumed to be an essential element in the constitution of a Waqf, a tendency deprecated by Ameer Ali, J. in the judgment referred to above. But the Act has made it perfectly clear that, in the



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context of Mussalman Waqfs, “religious, pious or charitable purposes” refer only to purposes “recognised” as such by the Muhammadan law. We cannot, therefore, accede to the suggestion that the test of a valid object of a Waqf is benefit to the public as in the English law of charitable trusts. Pious acts recognised among the Mussalmans as being for the good of the soul of the settlor or his ancestors have been upheld as valid objects of a Waqf.

.....

The Act recognises, by defining “Waqf” as a dedication for “a religious pious or charitable purpose” (S. 2) and including the maintenance and support of the Waqif's family, children and descendants among the purposes for which a Waqf can be created (S. 3), what Ameer Ali, J., endeavoured unsuccessfully to establish in his dissenting judgment, viz., that, in the eye of the Mahomedan law, provision for one's own family and



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descendants is a pious and charitable purpose. The Act did away with the doctrine of illusor Waqfas applied to such settlements of property. It also dispensed with the necessity of making express mention of a permanent object of benefaction as the ultimate destination of the dedicated property. The statute has thus fundamentally changed the entire situation and outlook and brought the law in regard to the matters dealt with by it into conformity with the principles enunciated by Abu Yusuf and accepted by later Mahomedan jurists. In applying a statute with such a history, the Court ought, in our opinion, to interpret its provisions, as far as the language would allow, in harmony with those principles without reading into it restriction “.

22. One would have expected this judgment to conclude the validity of a Waqf which is created simultaneously for the members of the family as well as charitable purposes. On account of the declaration of law by this



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Court, Waqf Board started issuing notices staking claim over Waqf-alal-aulad which were created specifically for the benefit of the descendants. In the case of ***Tamil Nadu Waqf Board vs M.Ebrahim Musuee AIR 1979 Madras 231***, Justice M.M.Ismail (as he then was) held that there are two kinds of Waqf- alal-aulad

- (i) Waqf-alal-aulad simpliciter and
- (ii) Waqf-alal-aulad composite.

23. The learned Judge had held that Waqf-alal-aulad simpliciter would arise when the entire income of the property is dedicated by the Waqif for the benefit of himself, his family and descendants with ultimate benefit to the poor or for any other purposes recognised by Mussalman Law as pious, religious or charitable, on the extinction of the family of the Waqif. Insofar as Waqf-alal-aulad composite, the learned Judge has held that this applies where a portion of the income is given for the benefit of the Waqif, his family, children and descendants and the remaining portion is reserved for the purpose of pious, religious or charitable purposes as recognized by



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Muslim Law. His Lordship went on to hold, where the property is Waqf-alal-aulad simpliciter, the Waqf Board does not have jurisdiction, but if it is a Waqf-alal-aulad composite, the Waqf Board will have the power to the extent the properties have been dedicated to pious, religious or charitable purposes. This view taken by Justice Ismail was preceded by two other authorities of this Court in ***Mohamed Mahin vs Madras State Waqf Board 1961 1 MLJ 65 (K.S.Venktaraman,J.) and G.M.A Bhaimia vs Madras State Waqf Board (1968) 1 MLJ 410 (T.Venkatadri,J.)***. This position of law is prevailing for more than 50 years.

24. The law enunciated *supra* has to be applied on the facts to this case. I have to analyse from the document if the author of the waqf deed created a Waqf-alal-aulad composite viz., the beneficiaries being himself/his family/descendants as well as for the benefit of any activity which is considered as pious, religious or charitable purposes or a Waqf-alal-aulad Simpliciter. If it is the former, the Waqf Board will have jurisdiction. If it is the latter, the Waqf Boad will not have jurisdiction.



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25. Before proceeding to do so, there remains two further aspects. The aforesaid judgments were rendered under the Waqf Act, 1954. It is necessary to compare the said provision with the Waqf Act of 1995. I have made a comparison and found that the Parliament had not touched the definition of Waqfs under the Act. The Tabular column shows as follows:-

<i>The Waqf Act, 1954</i>	<i>The Waqf Act, 1995</i>
<i>(l) “Waqf” means the permanent dedication by a person professing Islam (or any other person) of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes-</i>	<i>[(r) “waqf” means the permanent dedication by any person, of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes-</i>
<i>(i) a Waqf user (but such Waqf shall not cease to be a Waqf by reason only of the user having ceased irrespective of the period of such cesser);</i>	<i>(i) a waqf by user but such waqf shall not cease to be a waqf by reason only of the user having ceased irrespective of the period of such cesser;</i>
<i>(ii) grants (including mashrut-ul-khidmat (muafies, khairati, qazi services, madadmash) for any purpose, recognised by the Muslim law as pious, religious or charitable; and)</i>	<i>(ii) a Shamlat Patti, Shamlat Deh, Jumla Malkkan or by any other name entered in a revenue record;</i>
<i>(iii) a Waqf-alal-aulad;</i>	<i>(iii) “grants” including mashrat-ul-khidmat for any purpose recognised by the Muslim law as pious, religious or charitable; and</i>
<i>Provided that in the case of a dedication by a person not professing Islam, the Waqf</i>	<i>(iv) a waqf-alal-aulad to the extent to which the property is dedicated for any</i>



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<i>The Waqf Act, 1954</i>	<i>The Waqf Act, 1995</i>
<i>shall be void if, on the death of such person, any objection to such dedication is raised by one or more of his legal representatives.</i>	<i>purpose recognised by Muslim law as pious, religious or charitable, provided when the line of succession fails , the income of the waqf shall be spent for education, development, welfare and such other purposes as recognised by Muslim law,</i> <i>and “waqif” means any person making such dedication;]</i>

SHARIAT AND WAQF-ALAL- AULAD

26. There is an interesting position of law which I have to take note of. During the period when the East India Company's courts were dispensing justice and for a few decades when this country was directly under the control of the Crown, the Courts were applying custom and usage to parties. Muslims were no exception to this Rule. Instead of applying “ Shariat”, custom and usage had been applied. Therefore, on a demand made by Muslims, the Central Legislature brought about Shariat Act, 1937.

27. The title of the Act is “The Muslim Personal Law (Shariat)



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Application Act of 1937”. Section 2 of the said Act demands that notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land and Waqfs) regarding intestate succession etc., the law that will be applicable is Shariat. The Central Act, as it stands, excludes Shariat with respect to agricultural lands and Waqfs.

28. Taking note of this situation, the then State of Madras made an amendment to Section 2 of the Central Act. This was by way of Muslim Personal Law (Shariat) Amendment Act 18 of 1949. The words “*agricultural land*” and the words “*other than charities and charitable institutions and religious endowments*” were deleted in so far as State of Madras was concerned. As a result of this amendment, custom and usage cannot be applied to Waqfs in this State. Courts have to apply the principles of Shariat.

The provision as applicable in Tamil Nadu reads as follows :-

“ 2. *Application of Personal Law to Muslims:-*
Notwithstanding any custom or usage to the contrary, in all questions regarding intestate



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succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of person law, marriage, dissolution of marriage, including talaq, illa, zihar, lian, khula and mubaraat, maintenance, dower, guardianship gifts, trusts and trust properties and wakfs the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).-

T.N Act 18 of 1949, s.2(w.e.f.12.7.1949), as amended by T.N.Act 25 of 1957. This has been extended to the transferred territories (i.e.) the Kanyakumari District and the Shencottah Taluk of the Tirunelveli District in Tamil Nadu, by T.N.Act 23 of 1960. It has also been extended to the territories added to Tamil Nadu under the Central Act 56 of 1959 – See T.N.(Added Territories)Adaptation of Laws Order, 1961.”

29. As seen from the discussions in paragraph-13, as directed by the Apostle of God, giving property to one's family is the most important aspect



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of Islam with respect to law of charity. Therefore, I have to conclude that both Waqf-alal-aulad simpliciter as well as Waqf-alal-aulad composite answer the “Shariat”.

30. I take this view inspired by the judgments of this Court in the cases of *Puthiya Purayil Abdur Rahiman Karnavam and Manager of the Tavazhi Taraward and another vs Thayath Kancheentavida Abwomma and others (1956) 1 MLJ 119* and *Syed Ansaruddin vs Tamil Nadu Waqf Board (1992) 2 LW 685*.

DEDICATION OF PROPERTY TO A WAQF

31. To create a Waqf, should a Waqif do something more than writing a document?

It is here that I have to turn to Ameer Ali’s work again. He quotes the famous Islamic scholar Abu Yusuf. According to Abu Yusuf, Waqf is the detention of a thing in the implied ownership of Almighty, in such a manner that its profits may be applied for the benefit of human beings, and the dedication when once made, is absolute, so that the thing dedicated can



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neither be sold, nor given nor inherited. Mohammed, a fellow disciple of Abu Yusuf agrees with him on this point, but he thinks that the right of the Waqif does not cease in the property until he has appointed a Mutawalli or curator and delivered it into his hands.

(The Hanafi law relating to wakf or trusts – Syed Ameer Ali, Mahommedan law, volume I, page 195)

32. I quote Abu Yusuf because as per the declaration of Jb. Marakayar, he belonged to the Hanafi School. Therefore, the law that will be applicable to him is that School. Abu Yusuf was one of the foremost scholars of Islam. He was held in very high estimation by Abu Hanifa, whose courts, Qadi Abu Yusuf attended regularly.

33. It is narrated that Abu Hanifa himself acknowledged the mastery of Abu Yusuf over the Fiqh or Islamic law. So much so that, once when Abu Yusuf fell sick, Abu Hanifa visited him and returned to his house. Thereafter, Abu Hanifa told his companions, *“If, Allah forbid, this man (Abu Yusuf) dies, the world will lose one of its greatest scholars”*.



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Even if I were to apply the Shafi Law, the creation of the Waqf would still be valid. (See, *Pathu Kutti Umma vs Nedungadi Bank AIR 1937 Mad 731*).

DEED OF 1924

34. Having concluded on the position of law, I have to apply the same to the case on hand. Since the answer to the questions raised are dependent on the deed, I am extracting the deed in full together with its translation. It reads as follows : -

Document No.2671 of 1924

1)1924 ம் ஷ ஆகஸ்டு மீ 27 சென்னப்பட்டண முத்தியாலுப்பேட்டை
லிங்கசெட்டிதெரு ஷ 43 வது நெம்பர் வீட்டிலிருக்கும் மஹம்மதியர் ஹனபிமதம்
வர்த்தக ஜீவனம் காதர் சாயபு குமான் K. மக்தூம் மஹம்மது மரைக்காயராதிய
நான் எழுதிவைத்த Waqf Aulad என்னும் குடும்ப பரிபாலன Waqf நாமா
என்னவென்றால் என் தகப்பன் ஷாபி மதஹப் சேர்ந்தவர், ஆனபோதிலும்
நான் சில வருஷங்களாக ஹனபிமத ஹப்பைத்சேர்ந்து ஹனபியாக இருந்து
வருகிறேன், பின்னாலும் நான் ஹனபி மதஹப்பை சேர்ந்தவனே ஷாபிமத்



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ஹைக்கோர்ட் சேர்ந்தவனே என்று சந்தேகமும் சச்சரவும் நேரிடாதபடி நான் இன்றைய

தினம் நான் ஹைக்கோர்ட் என்று Declaration பத்திரமும் எழுதியிருக்கிறேன்.

எனக்குச் சொந்தமானதும் இது வரைக்கும் என் சுவாதினத்திலும் என்

அனுபோகத்திலும் இருந்து வந்து பின் ஷெட்டியலில்/1,2,3 SON வது லக்கமிட்ட

வீடுமனைகள் கடைகளை நான் என் குடும்ப பரிபாலனத்துக்காக Waqf

செய்துவிட்டேன். இந்துவக்குப்புக்கு (Waqf) என்னையே முதல் முத்தவல்லி

என்னும் ட்ரஸ்டியாக நேமித்து ஷெட் முன்று சொத்துகளையும் என் சொந்த

சுவாதினத்திலிருந்து முத்தவல்லியான நிலைமையில் என் சுவாதினம் செய்து

கொண்டேன். இனிமேல் என் வாரிசுதாரர்களுக்கு ஷெட் சொத்துகளைப் பற்றி

எவ்விதமான அக்குபாத்தியமும் கிடையாது, கையெழுத்தும் K.Magdomohamed

.....2..... நான் ஆயுசுள்ள வரைக்கும் நான் முத்தவல்லியாகயிருந்து

இந்தவக்குப்புக்கு (Waqf) முத்தவல்லிகளாக சென்னை முத்தியாலுப்பேட்டை கல்தான்

தெருவு 26 வது நீ வீட்டிலிருக்கும் வர்த்தக ஜீவனம் ஷெக் அப்துல் காதர்

மனாக்காயர் குமாரன் சாய் அப்துர் ரஹிமான் சாயிபுவைம் சென்னை

முத்தியாலுப்பேட்டை ஆதம் தெருவு 10வது நீ வீட்டிலிருக்கும் உத்தியோக ஜீவனம்



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வேக் இஸ்மாயில் சாயபு குமார அஹம்மதுமொஹிதீன் சாயபுவையும் ஜாயின்ட் (joint) முத்தவல்லிகளாக நியமித்திருக்கிறேன். இவர்களுக்கு பின்னால் ஏற்படும் முத்தவல்லிகளும் இவர்களும் என் ஆயுசுக்குப்பின்னால் ஏற்படும் இந்த பத்திர மூலமாக தருமத்துக்கு விட்டிருக்கும் மூன்று ஸ்தாவா சொத்துக்களையும் வாடகைக்கு விட்டு வரப்பட்ட வாடகையிலிருந்து வரி மராமத்து இன்கம்டாக்ஸ் முதலிய சிவுகள் போக மிகுதி நிற்கும் தொகையிலிருந்து பின் ஷெடியூலில் கண்ட என் குடும்பஸ்தர்களுக்கும் அவர்கள் சந்ததிகளுக்கும் பரம்பரையாக என்னாலும் பின் கண்ட ஷரத்துகள் பிரகாரம் செலுத்தி வர வேண்டியது. பின்கண்டவர்கள் யாராவது இறந்து விட்டால் அந்த நபருக்கு ஏற்பட்டிருக்கும் தொகையை அந்த நபரின்னுடைய ஆண் பெண் சந்ததிகள் பேதமில்லாமல் சரிபாகமாக பிரித்து சந்ததிகள் ஒவ்வொருவருக்கும் ஒரு பாகமாக கொடுத்து வரவேண்டியது. இதே மாதிரியாக பரம்பரையாய் நடத்தி வரவேண்டியது. பின்கண்ட நபர்களுள் எவருக்காவது சந்ததியற்றுப் போனால் அந்த தொகையை ஏழை எளிவோர்களுக்கு அன்னதானம், சொர்ணதானம், வஸ்திரதானம் இவைகளுக்காக சிலவழித்து விடவேண்டியது. மஹம்மதிய லாப்பிரகாரம் நான் ஹனபியானதால் ஷெ



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சொத்துக்களில் 1 வது லக்கமிட்ட சென்னை முத்தியாலுப்பேட்டை லிங்க செட்டி வீதி, 43வது நெம்பர் வீடு மனையை நான் என ஆயுசு பரியந்தும் வாடகையில்லாமல் அனுபவித்துக் கொள்வேன். மற்ற 2, 3 லக்கமிட்ட சொத்துக்களை நான் வாடகைக்கு விட்டு வரும் தொகையிலிருந்து சிலவுகள் போக மிகுதியை என சவரக்ஷணக்காக சிலவழித்துக் கொள்வேன். மேல் கண்ட விதமாக என ஆயுசுக்குப் பின்னால்தான் முத்தவல்லிகள் இந்த ஷெடியூலில் கண்ட மூன்று சொத்துக்களையும் வாடகைக்கு விட்டு மேற்கண்ட விதமாக வரும்படியை பங்கிட்டுக் கொள்ள வேண்டியது. எனக்கு பின்னால் ஏற்படும் ஷெ முத்தவல்லிகள் இருவரும் அவர்கள் கால திசை வரையில் ஜாயின்டாக வேலைப்பார்த்து வந்து அவர்களுள் எவராவது ஒருவர் இறந்து விட்டால் ஜீவித்தியிருக்கிறவர் தனியாக அவர் கால திசை வரையில் வேலைப்பார்த்து வரவேண்டியது. ஷெ முத்தவல்லிகள் இருவரும் இறந்து விட்டப் பிறகு இதில் கண்ட தரும வேலையைப் பார்ப்பதற்காக ஷெ இரண்டு முத்தவல்லிகளுடைய ஆண் சந்ததிகளில் முத்த வயதுடையவர் யாரோ அவர்தான் முத்தவல்லிகளாக இருந்து இந்த வேலைகளை சரி வர பார்த்து வர வேண்டியது. இந்த விதமாக



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சதா காலமும் ஒவ்வொரு முத்தவல்லி இறந்து போகும் காலத்தில் அவருடைய

ஆண் சந்ததிகளில் முத்தவர் முத்தவல்லியாக ஏற்பட்டு வேலை பார்த்து

வரவேண்டியது. இந்த தரும காரியங்களை பார்ப்பதில் ஷை முத்தவல்லிகளுக்கு

அவசியமாக தோன்றினால் மாதம் ஒன்றுக்கு ரூபா 25/- இருபத்தைந்துக்கு

மேற்படாமல் சம்பளம் ஏற்பாடு செய்து ஒரு குமாஸ்தாவை வைத்துக் கொள்ள

வேண்டியது. இதில் கண்ட தரும காரியங்களை நடப்பிக்கவும் மவலுதுகள்

ஒதவும் என் சம்சாரம் குடியிருக்கவும் கமாமிஷ் ஆபிஸ் வைத்துக் கொள்ளவும்

மாதம் ஒன்றுக்கு ரூபா 30/- முப்பதுக்கு மேற்படாமல் ஒரு தனி வீடு

முத்தியாலுப்பேட்டையில் ஷை முத்தவல்லிகள் வாடகைக்கு எடுத்து கொள்ள

வேண்டியது. இதில் சொல்லியிருக்கும் தரும காரியங்களுக்கு சிலவானது போக

மிகுதியாய் நிற்கும் நிகர வரும்படியை ஷை முத்தவல்லிகள் விருத்தி செய்து

போதுமான பணம் சேருகிற காலத்தில் சென்னை முத்தியாலுப்பேட்டையில் ரூபாய்

5000/- ஐயாயிரத்திற்கு மேற்படாமல் ஒரு வீடு மனையை ஷை தரும

காரியங்களை நடத்தி வர விலைக்கிரையத்திற்கு வாங்கிக் கொள்ள வேண்டியது.

அந்த காலத்தில் ஷை வாடகை வீட்டை விட்டு விட வேண்டியது. இதன்



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வெள்ளியலில் கண்ட சொத்துக்களிலிருந்து வரும் வரும்படியிலிருந்து ஷை

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முத்தவல்லிகள் செய்ய வேண்டிய விவரம் இதனடியில் விவரித்து இருக்கிறேன்.

அதாவது என் பெண்சாதி அஸனம்மாலுக்கு மாதம் ஒன்றுக்கு ரூபா 30 (முப்பது)

என் தமக்கை ஆம்னம்மாளுக்கு மாதம் ஒன்றுக்கு ரூபாய் 25 எனது தங்கை

ஜெயிதுன் பீவிக்க மாதம் ஒன்றுக்கு ரூபாய் 25 எனது தங்கை கதீஜா பீவிக்க

மாதம் ஒன்றுக்கு ரூபாய் 25...0...0...ஷை என் அக்காள் மகள் ரஹிமா

பீபிக்கு மாதம் ஒன்றுக்கு ரூபாய் 25...0....0 திருவல்லிக்கேணியிலிருக்கிற

எதீம் கானாவுக்கு அல்லது இதர எதீம் கானாவுக்கு பிள்ளைகள் சாப்பாட்டுக்காக

அரிசி வாங்கி கொடுத்து வர மாதம் ஒன்றுக்கு ரூபாய் 25....0.....0 பிரதி

வெள்ளிக்கிழமை திங்கள் கிழமை இரவுகளில் பத்து முஸாபீர்களுக்கு

சாப்பாடு செய்து வைப்பதற்காக மாதம் ஒன்றுக்கு ரூபாய் 30....0....0 மாதத்தில்

ஐந்து கத்தம் குருஆன் ஒதுவதற்காக மாதம் ஒன்றுக்கு ரூபாய் 10....0....0

(பார்வி)இ நபி நாயகம் அவர்கள் பேரால் பன்னிரண்டு மொவலுது ஒதி வைத்து

ஏழைகளுக்கு சாப்பாடு செய்து வைப்பதற்காக வருஷம் ஒன்றுக்கு ரூபாய்

200...0....0 கியலாவி, கவுது நாயகம் அவர்கள் பேரால் பதினொரு மொவலுது ஒதி



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வைத்து ஏழை எளிதானவர்களுக்கு சாப்பாடு செய்து வைக்க வருஷம் ஒன்றுக்கு ரூபாய் 100....0....0 இவைகள் போக மிகுதியாக நிற்கும் வரும்படிகளை பண்டு சேர்த்து ஏழைகளின் கலியாண தர்ம விஷயங்களுக்கு கொடுத்து வர வேண்டியது இந்தபடிக்கு நான் சம்மதித்து எழுதி வைத்த Waqf Aulad என்னும் குடும்ப பரிபாலன Waqf நாமா.

Typed by

1. C. Usha, Typist
2. K.C.Nirmala, Typist
3. K. Lydia Nancy, Typist

A reading of the document would force a reader to appreciate the author. As early as 1924 when women were not given any rights, the Waqif gave equal rights to women and also gave substantial share to the women folk in his family.

35. I requested the Translation Section attached to this Court to give me official translation of the 1924 document which created the Waqf. The said translation reads as follows:

ENGLISH TRANSLATION OF THE WAQF @ FAMILY



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ARRANGEMENT IN TAMIL, DATED 27TH DAY OF AUGUST, 1924

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Doc. No.2671/1924

“ This the 27th day of August 1924, I, Mukdhoom Mohamad, S/o. Kadher Sahib, Mohammed Hanafi Muslim, Merchant, residing at No.43, Linga Chetty Street, Muthialpet, Chennapattinam, execute this Waqf Aulade @ family arrangement, execute this Waqf Deed as follows;

My father belongs to Shafi Muslim. Inspite of it, I have been following Hanafi Muslim for the past several years. In order to avoid any confusion/dispute as to whether I belong to Shafi Muslim or Hanabi Muslim, today I execute a Declaration Deed that I am a Hanafi Muslim. I execute this Waqf Deed in respect of the houses and shops mentioned in schedules 1,2,3 which belong to me and are under my own possession and enjoyment. I execute this Waqf for the management of my family . I appoint myself as the first “Muthavali” @ trustee of this Waqf and acquired these three properties as the “Muthavali”. Hereafter, my heirs do not have any right or possession over the aforesaid properties. I will act as “Muthavali” throughout my



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lifetime, to this Waqf. As “Muthavali”, I appoint, Sahib Abdul Raheem Sahib S/o. Abdul Kader, trader, residing at No.26, Sulthan Street, Muthiyalpet, Chennai, and Ahammad Moideen, S/o. Shaib Ismail, employee, residing at No.10, Abdul Street, Muthialpet, Chennai as the joint “Muthavalis”. They and the “Muthavalis” appointed after them, shall let out these three immovable properties, of the rent received, the amount remaining after paying the taxes, maintenance, Income tax, etc., shall be paid to my family members and their heirs and successors from generation to generation as per the clauses mentioned in the schedule hereunder.

If any of the persons mentioned hereunder dies, the amount allotted for that person shall be equally given to the heir of that person irrespective of their gender. It is to be continued from generation to generation in a similar manner. In case, any of the following persons are issueless, that amount shall be spent for “Annadhanam”, “Swarnadanam” and “Vasthradanam” for the poor and the needy. Since I am a Hanafi Muslim, I will enjoy the property mentioned in the 1st schedule, situated at No.43, Linga Chetty Street, Muthiyalapet, Chennai throughout my lifetime without paying any rent. I



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will let out the properties mentioned as 2 and 3 for rent and shall use the remaining amount of the rent, after all expenses, for taking care of myself.

Only after my lifetime, the 'Muthavalis' shall let out the three properties on rent and share the rental income in the aforesaid manner. Both the “Muthavalis” who would succeed me shall after my lifetime jointly work together and when one among them dies, the other person who survives shall continue to work until his lifetime. After the lifetimes of both the “Muthavalis”, the eldest male heir of the “Muthavalis” shall continue to do the charity work in a proper manner as a “Muthavali”. Likewise, for generations, as and when each of the Muthavalis die, their eldest male heir shall become “Muthavali” and continue to do the work. If the Muthavalis feel necessary, they may appoint a clerk for a sum not exceeding Rs.25/- (Rupees twenty five per month). The aforesaid Muthavalli shall rent an independent house at Muthialpet not exceeding a rent of Rs.30/-(Rupees thirty) in order to do the aforesaid charity work, recite Mouloodh, for my wife to reside and to run a “kamamish” office (business). The surplus amount that remains after caring out all the aforesaid charity work, shall be invested by the “Muthavalis” and when enough money is saved, they shall purchase a



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housing plot at Muthialpet for a sale consideration not exceeding RS. 5000/ (Rupees five thousand) to run the aforesaid charities. At that point of time, the rented house shall be vacated. I have described hereunder the details of the charities to be done by the “Muthavalis” out of the income derived from the properties mentioned in the schedule.

That is..

- Rs.30/- (Rupees thirty) per month to be given to my wife, Aslammal.

● ■ Rs..25/- per month to be given to my elder sister, Ameena Ammal.

● ■ Rs.25/- per month to be given to my younger sister, Zaitoon Beevi.

● ■ Rs. 25/- per month to my younger sister, Khatheeja Beevi.

● ■ Rs. 25/- per month to my aforesaid elder sister's daughter, Rahima Beevi.

● ■ Rs.25/- per month to be given “Yatheem Khana” (orphanage) at Triplicane or other “Yatheem Khana”.

● ■ Rs.25/- to be given for the purchase of rice to provide food for children.

● ■ Rs.30/- per month to be allotted to provide food for travellers every evening Friday-Monday.

● ■ Rs.10/- per month for people who recite the Quaran completely five times a month. (Bharvee).

● ■ Rs. 200/- every year to feed the poor people by reciting 12 Mauloodhs in the name of the Prophet Mohammed and



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● ■ Rs. 100/- every year to feed the poor people by reciting 11 Mauloodhs in the name of Ghouse Nayagam.

● ■ The remaining amount shall be collected as a fund to be given for the marriage expenses of the poor.

Accordingly, I consent and execute this Waqf Aulad @ Waqf Nama (Family Arrangement).

FINDINGS OF THE WAQF TRIBUNAL

36. The Waqf Tribunal cum I Assistant City Civil Court held that as the Waqif of 1924 Waqf Deed had executed a Will in 1939 and codicil in 1944, the Waqf deed did not come into force. In addition, it held that as the probate proceedings were not challenged or revoked by the Waqf Board and since the probate proceedings are proceedings *in rem*, it binds the Waqf Board. Consequently, it held that the order of the Waqf Board is bad in law and set aside the same.

SUBMISSION OF THE COUNSELS

37. It was submitted by Mr.N.A.Nissar Ahmed learned Senior Counsel appearing for Mr.J.Kowser Nissar and Mr.Md.Fayaz Ali, learned counsel for the revision petitioner in CRP No.3285 of 2014 that



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i) the Waqf in which we are concerned with is Waqf-alal-aulad composite and therefore, the Waqf Board will have jurisdiction.

ii) the take over of the direct management by the impugned order is justified as the Manager/Mutawalli/Receiver had not complied with the terms of Waqf Act, 1995.

iii) there is no necessity for a challenge to the proceedings in OP No.106 of 1944, since the Will and the Codicil dealt with some other properties.

38. Mr.N.A.Nissar Ahmed, learned Senior Counsel relied upon the following judgments:-

(i) Chhedi Lal Misra (dead) through LRS vs Civil Judge, Lucknow and others (2007) 5 MLJ 431 (SC);

(ii) Anjuman Islamia through Zahur Uddin vs Latafat Ali and Others AIR (37) 1950 Allahabad 109;

(iii) Syed Zainuddin Hossain and others vs Muhammed Abdur Rahim and Others AIR



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1933 Calcutta 102.

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39. Rejecting this argument, Mr.V.Manohar would argue that

(i) the Waqf is a contingent Waqf. The Mutawalli would have to give the the amount by way of maintenance first to the family and it is only on the death of the family member, the share of the deceased beneficiary will go for charitable purposes.

(ii) the usage of the word “இதில் கண்ட” shows that it is a family charity.

(iii) the creation of Waqf has nothing to do with the property or its administration.

(iv) since a Will was executed by Jb.K.Magdoom Muhammed Marakayar, the Waqf deed did not come into force and

(iv) the property was not coupled with performance of charity and therefore, the requirements of Waqf



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was not made out.

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40. In response, Mr.N.A.Nissar Ahmed submits that Jb.K.Magdoom Muhammed Marakayar, the Waqif appointed himself as Mutawalli. The reading of the deed shows that human ownership of the property ceased and the Waqif did not make any reservation in the deed for cancellation. He would finally urge that the Waqf deed was not rescinded by the Will.

DISCUSSION

41. Since lot of arguments were made on the Will, I will now refer to the said document. The Will was executed on 03.04.1939. At that relevant time, Jb.K.Magdoom Muhammed Marakayar was residing in No.43, Linghi Chetty Street, Chennai. Under the said Will, he refers to a previous Will written by him on 09.03.1935 with respect to the properties situated in Door No.1/4 and 2/4, Aiyappa Chetty Street, Muthialpet, Chennai. In the said Will of the year 1939, he has dealt with the following properties:-

“ Two houses and their ground sites, situate



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within the jurisdiction of the Madras Registrar's Office, Madras Registration Sub District, Madras Chingelput Registration District, in the Western Row of Ayyappa Chetty Street, Muthialpet, Madras lying within these four boundaries viz., bounded on the North by Vaidya Chetty's house, south by Ponnuswami Chetty's house, East by Ayyappa Chetty Steet, West by Loganatha Chetty's house bearing Municipal Doro No.1/4 and 2/4, Old Survey No.561, re-survey No.5210 and Collector's Certificate No.536 and measuring 1500 sq.ft.”

42. This shows that the testator has never dealt with the properties which are the subject matter of the Wakf Deed of 1924.. Apart from that, the Codicil dated 06.04.1943 clarifies this issue. In the said Codicil, clauses 4 and 5 are one of importance, which are extracted hereunder:-

“ (4) By this Will, I have appointed the aforesaid executor H.S.A.Hamid Avergal alone as the joint Muthavalli, after my life



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time, in respect of the Wakf deed brought about by me on 27.08.1924. Further I have removed from the office of joint Muthavalli Ahmed Muideen Sahib appointed by me, under the aforesaid Wakf deed, to assume the said office after my life time. The aforesaid executor H.S.A.Hamid himself shall in the place of the aforesaid person hold the office of joint Muthavalli.

(5) H.S.A.Hamid, my executor aforesaid, shall, after my life time, himself take possession not only of the properties set out in the aforesaid will and in the Wakf deed dated 27.08.1924 but also of all other immovable and moveable properties that I now possess and that I may hereafter acquire, collect all the outstandings due to me, discharge the debts, if any, due from my estate, manage all the affairs pertaining to the estate and divide and give all the net immoveable and moveable properties remaining in my estate as etailed in para 6 hereunder.”



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43. The reading of these two clauses would show that the testator not only affirmed the Waqf Deed that he had written on 27.08.1924 but has exercised the power of removal of Mutawalli, who had to succeed him. The words in paragraph No.5 of the Codicil reaffirms the position that Jb. Marakaiyar was the Mutawalli till his death and that the executor appointed under the Will not only takes possession of the properties covered by the Will but also those properties which are covered by Waqf Deed dated 27.08.1924, in the capacity of a Mutawalli. Therefore, the argument that by the execution of Will the testator has revoked the Waqf Deed, necessarily has to fall to the ground.

44. In addition, the Waqif of the year 1924 Waqf Deed and the testator of the years 1939 and 1943 Will are also one and the same person. He consciously decided that the Waqf deed had come into force and had directed the executor of the Will to manage his private properties as well as the properties covered under the Waqf. Therefore, the finding of the learned tribunal that since probate has been granted by High Court and since it has



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not been set aside, the Waqf deed does not come into force, is an erroneous finding of fact.

45. I am also not able to sustain the finding that the Waqf Deed created in the year 1924 did not vest the properties immediately with the Waqf. I reach this conclusion on the basis of the deed of 1924 and from a reading of the WILL executed by Jb. Marakayar. In addition, the extract of the Waqf deed would show that after the execution of the document, the heirs of Mutawalli do not have any right or possession over the properties. This is in tune with the view taken by Abu Yusuf as seen from the extract in Justice Ameer Ali's classic work.

46. Assuming that the WILL dealt with the properties which are the subject matter of the Waqf-Alal-Aulad, a probate of the WILL will not affect the vesting of title. This is because the tribunal did not appreciate the fact that the probate Court never goes into a question of title. ***Krishna Kumar Birla vs Rajendra Singh Lodha 2008 4 SCC 300 (Paragraph Nos.57, 66,67 and 84).***

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47. The Waqf deed also state that the Waqif will act as a Mutawalli throughout his life time with respect to the properties covered under the Waqf. It is in exercise of that power, by Codicil of the year 1943, he removed the joint Mutawalli Mr.Ahmed Mohideen Sahib. If he had not operated the Waqf deed from 1924 till 1939 and thereafter, till 1943, he would not have referred specifically to the Waqf deed in the Will.

48. Apart from that, as already seen from above, a reading of clause-5 of the Will shows, the executor was to act for the properties covered under the Will as well as for the properties covered under the Waqf deed. Consequently, the portion of the order of the Waqf Tribunal holding that the “Will” supercedes the Waqf Deed is erroneous.

49. The argument of Mr.Manohar is that the words “ இதில் கண்ட ” should mean only the family charities. In my view, this is a truncated reading of the Waqf deed. The extract of the Waqf Deed shows that the first five charities mentioned in them are for the members of the family and the



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remaining six directions to Mutawalli are all pious, religious and charitable.

They are

- (i) Providing monies to orphanages
- (ii) For purchase of rice to provide food for children
- (iii) Providing Food for travellers (Mussafir)
- (iv) For people who recite Holy Quran completely five times a month
- (v) To perform 12 Mauloodhs in the name of Prophet Mohammed
- (vi) Finally, feeding people by reciting 11 Mauloodhs in the name of Ghouse Nayagam.

50. All these cannot but be considered as pious, religious and charitable as per Islam. Reading of the holy Quran in public and in private places has been held to be a valid Waqf by this Court in the case of ***Abdul Sattar Ismail vs Abdul Humid Sait AIR 1944 Mad 504*** . Maintenance of poor relations and dependence is also held to be valid Waqf (See, ***Mukarram Ali Khan vs Anjuman-Un-Nissa Bibi AIR 1924 All 223***). Further, one of the objects of the Waqf is to take care of the poor and



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travellers. This also constitutes a Waqf as held in the case of *Abdul Karim Adenwalla vs Rahimabai and Others AIR 1946 Bombay 342*. Therefore, the term “இதில் கண்ட” encompasses not only the charities set forth to the family, but also the aforesaid aspects. This is clear from the document. I have described herein the details of the charity:-

இதில் கண்ட தரும காரியங்களை நடப்பிக்கவும் மவலுதுகள் ஒதவும் என சம்சாரம் குடியிருக்கவும் கமாமிஷ் ஆபிஸ் வைத்துக் கொள்ளவும் மாதம் ஒன்றுக்கு ரூபா 30/- முப்பதுக்கு மேற்படாமல் ஒரு தனி வீடு முத்தியாலுப்பேட்டையில் வைத்து முத்தவல்லிகள் வாடகைக்கு எடுத்து கொள்ள வேண்டியது. இதில் சொல்லியிருக்கும் தரும காரியங்களுக்கு சிலவானது போக மிகுதியாய் நிற்கும் நிகர வரும்படியை வைத்து முத்தவல்லிகள் விருத்தி செய்து போதுமான பணம் சேருகிற காலத்தில் சென்னை முத்தியாலுப்பேட்டையில் ரூபாய் 5000/- ஐயாயிரத்திற்கு மேற்படாமல் ஒரு வீடு மனையை வைத்து தரும காரியங்களை நடத்தி வர விலைக்கிரையத்திற்கு வாங்கிக் கொள்ள வேண்டியது. அந்த காலத்தில் வைத்து வாடகை



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வீட்டை விட்டு விட வேண்டியது. இதன்
வெஷியூலில் கண்ட சொத்துக்களிலிருந்து வரும்
வரும்படியிலிருந்து ஷை முத்தவல்லிகள் செய்ய
வேண்டிய விவரம் இதனடியில் விவரித்து
இருக்கிறேன்.

51. The extract of these lines would show that “தர்ம காரியம்” found in the document means maintenance of the family as well as performance of the aforesaid charities set forth in the schedule.

52. Now turning to the point, what would happen in case one of the families died without issues, the Mutawalli has contemplated that situation also stating as follows:

"பின்கண்ட நபர்களுள் எவருக்காவது சந்ததியற்றுப்
போனால் அந்த தொகையை ஏழை
எளிவோர்களுக்கு அன்னதானம், சொர்ணதானம்,
வஸ்திரதானம் இவைகளுக்காக சிலவழித்து
விடவேண்டியது. .



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53. My reading of this document leads me to the conclusion that Mutawalli has to pay the members of the family set forth in the schedule and also perform charitable work mentioned therein. In case of death of any of the beneficiaries mentioned in the document without any issue, apart from the performance of the charities mentioned in the document, the Mutawalli would have to perform “ அன்னதானம், சொர்ணதானம், வஸ்திரதானம்” to the poor people. Looking at other angle, the purpose of charity set forth in the schedule was not dependent upon the death of the family members of the Waqif. It was the performance of the remaining three charities mentioned in the body of the deed, which were dependent on the death. In fine, as per the document, the Mutawalli had to maintain the family, perform the charities set forth in the schedule and in case of death of any of the specified persons, then the performance of the other three arose.

54. To the submission of Mr.Manohar that the properties had nothing to do with the performance of the charity, here also, I am not with him for the following reasons. The document gives a direction as to how to generate the income for the Waqf and how to expend it. It reads:-

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"இவர்களுக்கு பின்னால் ஏற்படும் முத்தவல்லிகளும் இவர்களும் என் ஆயுசுக்குப்பின்னால் ஏற்படும் இந்த பத்திர மூலமாக தருமத்துக்கு விட்டிருக்கும் மூன்று ஸ்தாவா சொத்துக்களையும் வாடகைக்கு விட்டு வரப்பட்ட வாடகையிலிருந்து வரி மராமத்து இன்கம்டாக்ஸ் முதலிய சிவுகள் போக மிகுதி நிற்கும் தொகையிலிருந்து பின் ஷெடியூலில் கண்ட என் குடும்பஸ்தர்களுக்கும் அவர்கள் சந்ததிகளுக்கும் பரம்பரையாக என்னாலும் பின் கண்ட ஷரத்துகள் பிரகாரம் செலுத்தி வர வேண்டியது."

Thus the Mutawalli has to administer the work including payment of money to the family members by letting out the property to tenants and perform the charity from and out of the income that it generated. Therefore, the submission that the property had nothing to do with the administration should necessarily be rejected. Unless and until the property is properly maintained and let out, it would not have generated income. Only on generation of income, the charity would have been performed. Therefore, the administration of the property and performing of the charity are inextricably



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linked to each other.

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55. Further reading of the Waqf deed of the year 1924 leads me to the fact that the Waqif/Mutawalli has divested himself of human ownership. It is clear from the document whereunder he had executed Waqf deed with respect to the properties set forth in the schedule 1 to 3 belonging to him and had appointed himself as first Mutawalli of the Waqf. This shows that from being the owner of the property, he became a Mutawalli/Manager of the same. He had also declared his legal heirs would not have any right over the properties. This fact is sufficient to come to the conclusion that human ownership stood terminated.

56. It is here I have to agree with Mr.Mr.N.A.Nissar Ahmed that the wishes of a Waqif though supreme, when it comes to the terms and conditions of the document/Waqf Nama, he had consciously not reserved his right to revoke the document. This is not the case of Waqf-Bil-Wasiyat or a Waqf created by a Will. It is the document which has been executed atleast two decades before the death of the Waqif. There is no evidence on record by



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the applicant before the Tribunal that the Waqif ever revoked the Waqf. On the contrary, the Codicil on which the 1st respondent relies upon shows that the Waqf was not only acted upon but was affirmed in the Codicil written in the year 1943. This position of law has been settled by the verdict of the Supreme Court in the case of ***Chhedi Lal Misra (Dead) through LRs vs Civil Judge, Lucknow and Ors (2007) 5 MLJ 431 SC***. The relevant portion reads as follows:-

“ 7. In our view, the law relating to the creation and continuation of wakfs has been correctly explained by the learned Judge in keeping with the well-established principles that once a wakfis created, the wakif stands divested of his title to the properties which after the creation of the wakf vests in the Almighty. It is no doubt true that in a given case the creation of a wakf may be questioned if it is shown that the wakif had no intention to create a wakf but had done so to avoid a liability...

Sadly for the respondents, there is no evidence to that effect in this case.



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57. As to how the Waqf deed has to be interpreted is settled by judgment of a Division Bench of Calcutta High Court in the case of ***Zainuddin Hossain and Others vs Muhammad Abdur Rahim and others*** ***AIR 1933 Calcutta 102***. It is akin to reading of other documents. The intention of the settlor/Waqif should be gathered from the terms of the document. It does not prevent the Court from looking into the attendant circumstances when the intention of the Waqif are not apparent from the deed. The Court is also permitted to look into the subsequent circumstances, if such circumstances throw some light on the execution of the document. I respectfully follow the view taken by the Bench. It is pertinent to point out here that the Division Bench had accorded high respect to the view of Abu Yusuf.

58. To the argument that the Waqif did not divest the property from himself, I have to state that in the present case, there is a document evidencing creation of Waqf-alal-aulad. The founder/Waqif has declared himself as the first Mutawalli. Under such circumstances, no transfer of



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physical possession is necessary nor is it necessary that the property should be transferred from the name of donor into his name as Mutawalli. An apparent transaction must be presumed to be real and the onus of proving the contract is on the person alleging that the Waqf was not intended to be acted upon. It is the declaration of law as per the Supreme Court in the case of ***Garib Das and others vs Munshi Abdul Hamid and Others AIR 1970 SC 1035***. In this case, there is absolutely no evidence on the part of the applicants before the Waqf Tribunal that the Waqif did not intend the Waqf to come into force. Therefore, I am entitled to look into the subsequent conduct as held by the Kerala High Court in the case of ***Official Receiver, Ernakulam vs Kassim Moosa Sait and Others AIR 1967 Kerala 73***. The subsequent conduct of Mutawalli in executing a Will specifically referring to the Waqf deed of the year 1924 confirm his intention not only to declare but also to continue with the same after his life time.

59. This position had been clearly laid down by a Division Bench of the Allahabad High Court in the case ***Anjumann Islamia through Zahur Uddin vs Latafat Ali and Others AIR 1950 Allahabad 109***. The relevant



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portion reads as follows:-

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“ Where the waqf deed contains the declaration of endowment and the statement that the waqif would be the first mutawalli and remain so far his lifetime, this statement amounts to a statement that he had divested himself of the possession as mutawalli. Further the fact that he, as mutawalli, got rent notes executed by six tenants in respect of the waqf property immediately after the execution of the waqf shows that he had delivered possession to himself as mutawalli.

60. A valid Waqf having been created, the title to the property passes to Almighty Allah. It can neither be revoked nor Allah be divested of the property. Once it is found that Waqf has been created, even assuming that terms thereof were not carried out, it is irrelevant to the court. The Waqf deed came into force in the year 1924. The charities being simultaneous, to the family as well as public charities, I have to hold that it is a Waqf-Alal-Aulad composite and consequently, the Waqf Board has jurisdiction.



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61. In fine, the reasoning of the tribunal is unsustainable and necessarily has to be interfered with. Accordingly, I hold as follows : -

- i. the Waqf Deed of 1924 came into force;
- ii. the Waqf-alal aulad created by the 1924 deed is a composite one;
- iii. the Waqf Board has jurisdiction over the same to the extent that the charities are pious, religious and charitable;
- iv. the WILL and CODICIL do not put an end to the Waqf deed as they not only deal with other properties of the Waqif but also affirm the Waqf Deed of 1924;
- v. the act of alienations without the consent of the Waqf Board is void; and
- vi. the Waqf Board rightly took over direct management of the Waqf as it was in contravention of the Wakf Act, 1954, the Waqf



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Act, 1995 and to the specific directions of the Waqf Board to the administrator (who is a Mutawalli as per the definition in the Waqf Act).

62. Consequently, the judgment and decree dated 27.06.2014 in O.A.No.19 of 2011 passed by the Waqf Tribunal (1st Assistant City Civil Court, Chennai) is set aside. Both the Civil Revision Petitions are allowed. Costs throughout. Consequently, connected miscellaneous petitions are closed.

08.09.2023

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To

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V.LAKSHMINARAYANAN,J.,

SR

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