IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

TUESDAY, THE 17TH DAY OF MARCH 2015/26TH PHALGUNA, 1936

WP(C).No. 24006 of 2009 (U)

PETITIONER:

ISLAHUL MUSLIMEEN JAMA-ATH,
REG.NO.104/59, KOZHIKODE, SVM PO,
KARUNAGAPPALLY, KOLLAM
REP.BY ITS SECRETARY MOHAMMEDKUNJU.

BY ADVS.SRI.SIBY MATHEW
SRI.PHILIP J.VETTICKATTU
SRI.B.PREMNATH (E)

RESPONDENTS:

1. KARUNAGAPPALLY GRAMA PANCHAYAT
KARUNAGAPPALLY, REP.BY ITS SECRETARY.

2. THE DISTRICT COLLECTOR, KOLLAM.

3. A.BASHEER, KATTOOR VEEDU, SVM PO,
KOZHIKODE, KARUNAGAPPALLY, KOLLAM.

4. IBRAHIMKUTTY, MAZHAMPLETHPUTHANVEEDU,
SVM PO, KOZHIKODE, KARUNAGAPPALLY, KOLLAM.

5. A.P.ABDULKHADAR MOULAVI, GENERAL
SECRETARY, KERALA NADUVATHUL MUJAHIDIN,
MUJAHID CENTRE, ANEE HALL ROAD, KOZHIKODE.

ADDL. R6 IMPLEADED

KARUNAGAPALLY MUNICIPALITY
KARUNAGAPALLY, KOLLAM - 690 518.

IMPLEADED AS PER ORDER DATED 18.02.2015 IN IA 2051/15.

R1 BY ADV. SRI.M.R.SASITH
R3 & 4 BY ADVS. SRI.V.V.ASOKAN
SRI.P.P.RAMACHANDRAN
R2 BY GOVERNMENT PLEADER SRI.JUSTIN JACOB

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 17-03-2015 ALONG WITH WPC. 30282/2011, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN WPC 24006/2009

PETITIONER'S EXHIBITS:

EXT. P1 TRUE COPY OF COMPLAINT DATED 3.8.2006 FILED BY THE PETITIONER BEFORE THE SECOND RESPONDENT

EXT. P2 TRUE COPY OF REPRESENTATION DATED 16.7.2008 SUBMITTED BY THE PETITIONER BEFORE THE SUPERINTENDENT OF POLICE, KOLLAM

EXT. P3 TRUE COPY OF LETTER DATED 8.8.2008 ISSUED BY THE SAMASTHA KERALA JAMIYYATHIL ULAMA DISTRICT COMMITTEE

EXT. P4 TRUE COPY OF COMPLAINT DATED 3.9.2008 FILED BY THE PETITIONER BEFORE THE FIRST RESPONDENT

EXT. P5 TRUE COPY OF LETTER DATED 4.12.2008 ISSUED BY THE FIRST RESPONDENT TO THE PETITIONER

EXT. P6 TRUE COPY OF LETTER DATED 9.1.2009 BY THE FIRST RESPONDENT UNDER THE RIGHT TO INFORMATION ACT

EXT. P7 TRUE COPY OF REPRESENTATION DATED 24.7.2009 SUBMITTED BY THE PETITIONER BEFORE THE FIRST RESPONDENT

EXT. P8 TRUE COPY OF REPRESENTATION DATED 18.8.2009 FILED BY THE PETITIONER BEFORE THE FIRST RESPONDENT

EXT. P9 TRUE COPY OF JUDGMENT DATED 5.9.2008 IN WPC 27059/2008 OF THIS HON'BLE COURT

EXT. P10 TRUE COPY OF PLAN SUBMITTED BY THE PETITIONER BEFORE THE PANCHAYATH

EXT. P11 TRUE COPY OF ORDER NO.K3/1521/08 DATED 20.8.2009 REJECTING THE REPRESENTATION FILED BY THE PETITIONER

EXT. P12 PHOTOGRAPHS SHOWING THE INSIDE PORTION OF THE BUILDING IN QUESTION

EXT. P13 TRUE COPY OF THE PETITION DATED 10.2.2015 SUBMITTED BY THE PETITIONER BEFORE THE SECOND RESPONDENT

EXT. P14 TRUE COPY OF REPORT DATED 23.2.2015 PREPARED BY THE KARUNAGAPPALLY MUNICIPALITY

EXT. P14(a) TRUE COPY OF ENGLISH TRANSLATION OF EXT.P14

RESPONDENT'S EXHIBITS:

EXT. R1(a) TRUE COPY OF THE PERMIT NO.K6-330/06-07 DATED 4.11.2006

EXT.R1(b) TRUE COPY OF THE JUDGMENT DATED 5.9.2008 IN WPC 27059/2008

EXT.R1(c) TRUE COPY OF THE PROCEEDINGS DATED 11.12.2008

EXT.R1(d) TRUE COPY OF THE ORDER OF THE FIRST RESPONDENT

EXT.R3(a) TRUE COPY OF THE BUILDING PERMIT ISSUED BY KARUNAGAPPALLY GRAMA PANCHAYAT

EXT. R3(b) PHOTOGRAPH SHOWING THE NATURE OF THE BUILDING INCLUDING ITS INTERIOR VIEW

EXT.R3(c)PHOTOGRAPHS SHOWING THE NATURE OF THE BUILDING INCLUDING ITS INTERIOR VIEW

EXT.R3(d) TRUE COPY OF THE PROCEEDINGS OF THE KARUNAGAPPALLY GRAMA PANCHAYAT

EXT. R3(e) TRUE COPY OF THE ENGLISH TRANSLATION OF THE PROCEEDINGS OF THE SECRETARY, KARUNAGAPPALLY GRAMA PANCHAYAT

EXT. R3(f) TRUE COPY OF THE COUNTER AFFIDAVIT FILED BY THE THIRD RESPONDENT IN WPC 30282/2011

EXT. R3(g) TRUE COPY OF THE ADDITIONAL COUNTER AFFIDAVIT FILED BY THE THIRD RESPONDENT IN WPC 30282/2011

EXT. R3(h) TRUE COPY OF THE PROCEEDINGS OF THE SECRETARY, KARUNAGAPPALLY GRAMA PANCHAYAT

EXT. R3(ha) TRUE COPY OF THE TRANSLATION OF EXT.R3(h)

EXT. R3(i) TRUE COPY OF THE PROCEEDINGS OF THE KERALA STATE WAKF BOARD

EXT. R3(ia) TRUE COPY OF THE TRANSLATION OF EXT.R3(i)

EXT. R6(a) TRUE COPY OF REPORT OF ADDITIONAL SIXTH RESPONDENT

EXT. R6(b) TRUE COPY OF THE ENGLISH TRANSLATION OF EXT.R6(a)

/TRUE COPY/

P.S. TO JUDGE

Dama Seshadri Naidu, J.

W.P.(C)No.24006 of 2009 U

& W.P.(C)No.30282 of 2011 I

Dated this the 17th day of March, 2015

COMMON JUDGMENT

Though the writ petitions are filed by two different persons—one by the congregation of a particular religion, another by a neighbour having different interest—since they have raised similar issues against the same set of respondents, this Court intends to dispose of both the writ petitions through a common judgment. For ease of reference and expression, the facts as have been pleaded in W.P.(C)No.24006/2009 are taken for narrative purpose, as well as for the purpose of referring to the parties in the discussion.

2. Briefly stated, respondents 3 and 4 are said to be the members of the petitioner Jama-ath, whereas the fifth respondent was an 'outsider' hailing from Kozhikode. In

fact, the learned Senior Counsel representing the said respondents informed the Court that the fifth respondent is no more.

3. Tracing the genesis of the issue, it can be seen that in 2006 respondents 3 and 4 filed an application before the first respondent, the erstwhile Grama Panchayat, now a Municipality, for building permit to construct an office room. As could be seen from Exhibit R3(a) dated 04.11.2006, permission was granted. From the information gathered by the petitioner through Exhibit P6, which is the reply by the respondent Municipality to an application made by the petitioner under the provisions of the Right to Information Act, it is evident that permission was granted only to construct a building for secular purpose—to be used as a reading room. Having constructed the building in terms of the building permit, it was named by the respondent as Salafi Centre.

4. When certain alleged attempts were made by the respondents 3 and 4 (referred to as 'the respondents') to use the building as a mosque, the petitioner filed W.P.(C) No.24006/2009. Similarly, the petitioner in W.P.(C)No. 30282/2011 has also ventilated the grievance that the respondents have been trying to carry on religious activities, such as juma prayers in a secular building.

5. In course of time, the respondents filed a counter affidavit on 06.09.2009 placing on record that the building was strictly used for the purpose it was constructed, i.e., for non-religious purposes. Later, in response to the reply affidavit filed by the petitioner along with certain photographs in Exhibit P12 on 18.09.2009, the respondents once again filed an additional counter affidavit on 27.09.2009 reiterating their stand that the building has been meant, and accordingly used, only for non-religious purposes. It can be seen that in W.P.(C)No.30282/2011,

Government also filed a counter affidavit on 17.02.2014. At any rate, the erstwhile Grama Panchayat in its counter affidavit dated 21.08.2009 averred that the respondents had been using the building in violation of the building permit.

6. In the above factual background, the learned counsel for the petitioner has strenuously contended that the respondents initially obtained the building permit only to construct a building for secular purpose and that, subsequently, they have surreptitiously put the building to a different purpose, which is prohibited without prior permission. Expatiating on his submissions, the learned counsel would contend that, since 1993 there have been guidelines in force governing the communal harmony and that later, through G.O.(P)No.217/05/Home dated 25.07.2005, the guidelines were given statutory force by the State Government. He has also contended that Rule 5(6B) of the Kerala Municipality Building Rules,1999, incorporated

through an amendment in 2010, once again reiterated the need, making it mandatory, to obtain necessary permission before constructing any building for religious purposes. In sum and substance, the contention is that all along, ever since the building was constructed, the respondents have been using it for conducting juma prayers, i.e., religious purpose, which is impermissible.

7. The learned counsel for the respondent Municipality has also supported the contentions of the learned counsel for the petitioners in both the writ petitions. He has further submitted that even recently, based on an interim order of this Court dated 18.02.2015, the respondent Grama Panchayat has filed a report before this Court testifying that the respondents have been conducting juma prayers without a valid permit.

8. The learned counsel for the respondent Municipality has further contended that, if at all there are

any proceedings issued by the Municipality exempting the building from tax, they do not automatically enure to the benefit of the respondents, so that they could use it for religious purposes, which, in fact, requires permission under other provisions of law.

9. Per contra, the learned Senior Counsel for respondents 3 and 4 has strenuously opposed the claims and contentions of the petitioners, as well as the respondent Municipality. According to him, there is no dispute concerning the submission of the petitioners that respondents 3 and 4 initially obtained the building permit and constructed a building only for secular purpose. It is the singular contention of the learned Senior Counsel that later the respondents applied to the Wakf Board and obtained Exhibit R3(i) dated 25.04.2012, through which the building has been recognised as a Masjid.

10. The learned Senior Counsel has also contended that based on Exhibit R3(i), the respondent Municipality issued Exhibit R3(h) proceedings dated 09.12.2013 granting tax exemption. So long as Exhibits R3(i) and R3(h) proceedings issued by the Wakf Board and respondent Municipality respectively stand, the petitioners, according to the learned Senior Counsel, cannot be heard contending that the respondents are estopped from putting the building to a religious use.

11. The learned Senior Counsel, taking me through the items of relief sought by the petitioner in W.P.(C)No. 24006/2009, has submitted that almost all the prayers stood answered, by efflux of time. In elaboration of his submissions, the learned Senior Counsel has submitted that relief (v) seeks a declaration that in terms of bye-laws and Exhibit P3 Fathwa, no new Jama-Ath can be started in an area where there is an existing Jama-Athi. Placing reliance

on **Vishwa Lochan Madan v. Union of India** (2014 (3) KLT 206 (SC)), the learned Senior Counsel has contended that Ext.P3, the so called Fathwa, has no legal significance. He has also further submitted that the bye-laws, if any, of a society or another entity do not bind outsiders.

12. The learned Senior Counsel has further contended that when the very petitioner in W.P.(C)No.24006/2009 earlier filed W.P.(C)No.27059/2008 contending that the respondents constructed the building without any valid building permit, this Court disposed of the writ petition through Exhibit P9 judgment. According to him, in the subsequent developments it has become apparent that the building was constructed in strict statutory compliance. Thus, even the relief (1) stands answered. Further referring to the reliefs (3) and (4), the learned Senior Counsel has contended that the building cannot be treated as unauthorised; since it has been recognised as a Masjid by

the Wakf Board, there cannot be any impediment to put the building for religious use.

13. Though the learned Senior Counsel has also referred to Exhibit P12 photographs and also the photographs produced along with the additional counter affidavit to hammer home the point that the petitioner has tried to mislead the court by displaying the photographs which do not pertain to the building in question at all, I do not propose to go into that aspect, since the writ petitions could be disposed of based on admitted facts.

14. Heard the learned counsel for the petitioners, the learned counsel for the respondent Municipality and the learned Senior Counsel for respondents 3 and 4, apart from perusing the record.

15. The singular issue that is required to be determined in the present writ petition is whether the respondents are using the building in question as a place of

religious worship without proper conversion of the user of the building by a competent authority.

16. As has already been observed, it is not in dispute that the building has initially been constructed for a secular purpose, to serve a reading room. Way back in 2009 itself, a congregation of the same religion and also a neighbour came up before this Court complaining that the respondents had disregarded the statutory regulations and started using the building for religious purposes. At any rate, at this length of time, it cannot be determined whether the building in question all along has been put to a different use from the one it has been intended to serve in the very beginning. The question, however, is whether the respondents are entitled to use the building in presenti for religious purposes based on Exhibit R3(i) proceedings of the Wakf Board and also Exhibit R3(h) proceedings of the respondent Municipality.

17. To a specific query from this Court, the learned Senior Counsel has submitted that Exhibit R3(i) dated 25.04.2012 was issued by the Wakf Board, which is a statutory authority. At any rate, the learned Senior Counsel could not bring to my notice any provision under the Wakf Act, which actually empowers the Wakf Board to recognise a building of a secular nature as a religious one. I am, therefore, constrained to conclude that Exhibit R3(i) is, at best, an extra-legal order issued by the Wakf Board, having no statutory sanctity. Ipso facto, the respondents cannot place any reliance on it.

18. A perusal of Exhibit R3(h) proceedings amply demonstrates that simply based on Exhibit R3(i) order, which, in my considered view, has no legal force, the respondent Municipality exempted the building from tax treating it as a religious structure. It is a classic case of begging the question; in Fowler's words, the fallacy of

founding a conclusion on a basis that as much needs to be proved as the conclusion itself. Exhibit R3(h) gets its legitimacy from Exhibit R3(i), which in itself lacs legitimacy in statutory terms. The ineluctable conclusion is that neither Exhibit R3(i) nor Exhibit R3(h) validly authorises the change of user of the building in the manner known to law.

19. Variably expressed, the respondents tried to sustain their plea that they could use the building for religious purposes based on Exhibit R3(h) proceedings issued by the respondent Municipality. Exhibit R3(h) can be sustained only in terms of Sections 233 and 235 of the Kerala Municipality Act, but not on the basis of Exhibit R3 (i) proceedings issued by the Wakf Board. Once Exhibit R3 (i) proceedings of the Wakf Board are held to be without substance, the substratum of Exhibit R3(h) proceedings falls to the ground. As such, mere exemption of a building from tax purview does not ipso facto change the nature of the

building, especially in the light of the statutory provisions in that regard.

20. It is profitable to examine Section 235 of the Act, which, to the extent relevant, is as follows:

> **235. Exemption.**— (1) The following buildings and lands shall be exempt from the property tax:
> (a) places set apart for public worship, and either actually so used or used for no other purpose;
> (b) buildings used extensively for public worship;
> xxxxxx

21. From the above extract of the provision it is very evident that use of the building determines the tax, rather than the tax determining the use of the building; the property having been validly put to public worship is a condition precedent, rather than a condition subsequent.

22. There is sufficient force in the contentiion of the learned counsel for the petitioners that prior to the Government Order dated 25.07.2005, the Ministry of Home

Affairs issued guidelines on communal harmony. Guideline 3.16 is to the following effect:

> "Any construction of religious places shall be made only after the proposals/plans are duly approved by the appropriate authority/ statutory body and at the earmarked places. Cases of construction of unauthorised religious places should be dealt with severely under the existing laws. Negligence on the part of the District administration in implementing this direction should be seriously viewed and guilty dealt with."

23. Further, in G.O.(P)No.217/05/Home dated 25.07.2005, the Government imposed clauses 23 and 23(a) (i) and (ii) strictly mandating that no place of worship shall be established without clearance of the district administration. It is profitable to extract the statutory mandate in that regard, which is as follows:

> "23. Any construction of religious place should be made only with prior approval of the District Authorities and at the earmarked place. Cases of construction of unauthorised religious places should be dealt with severely under existing laws. Negligence on the part of the District Administration in implementing this direction should be

seriously viewed and guilty dealt with.

23(a)(i) Renovation of existing places of worship can be undertaken after informing the matter to the District Administration. However, any addition or expansion to the existing structure should be done only with the previous permission and concurrence of the District Administration. This addition of expansion should not in any way cause any inconvenience to the public, should not obstruct traffic, should not be an impediment to the future expansion of roads and other public amenities. Any addition or expansion can be undertaken only with observing the building rules and with the prior permission of Town Planning Department of Local Self Government, as the case may be;

(ii) Any new construction of a place of worship shall be done only with the clearance of the District Administration. Any religious activities centered around a newly established places of worship should not precipitate communal tension or law and order situation. Before sanctioning requests for construction of new paces of religious worship, the District Administration should ensure this. In such cases the District Administration may take recourse to shift the places of worship after arriving at a consensus with the parties concerned."

(emphasis added)

24. In the same vein we may examine Rule 5(6B) of the Kerala Municipality Building Rules, 1999, which reads

thus:

> "Rule 5 (6B) In any case of an application for development or redevelopment of any land within the Security Zone, the Secretary shall consult the District Collector concerned before permission is granted. The District Collector, after getting specific recommendation from the Director General of Police, shall furnish his reply. The objection if any raised and/or restriction and/or regulation if any suggested by the District Collector shall be complied by the Secretary while issuing the permit.
>
> Provided that in the case of development or redevelopment for religious purpose or worship, prior approval or clearance or permission and concurrence as the case may be, of the District Collector concerned shall be obtained and also the conditions stipulated in the Manual of Guidelines to Prevent and Control Communal Disturbances and to Promote Communal Harmony which is in force have to be complied with. Applications for renovation without involving additional built-up area or structural alterations of existing buildings for religious purpose or places of worship can be considered by the Secretary after informing the District Collector in form in Appendix - N duly filled by the applicant and verified by the Secretary. The permit shall be issued only after the receipt of the concurrence by the District Collector."
>
> (emphasis added)

25. The proviso to Rule 5(6B) extracted above makes it manifestly clear that in case of development or redevelopment of any property for religious purpose or worship, prior approval or clearance or permission and concurrence as the case may be of the District Collector concerned shall be obtained. It also further mandates that the conditions stipulated in the Manual of Guidelines to Prevent and Control Communal Disturbances and to Promote Communal Harmony, which is in force, have to be complied with. When Rule 5(6B) of the Rules is read in conjunction with the Manual of Guidelines to Prevent and Control Communal Disturbances and to Promote Communal Harmony, the conclusion is inescapable that the respondents cannot carry on any religious activity in a structure exclusively authorised for secular purpose.

26. In the totality of circumstances, it is very evident that conversion of the building for tax purpose would not

ipso facto result in change of user. In the light of the statutory stipulation, which has already been extracted and adverted to, it is beyond the shadow of doubt that the respondent ought not to have used the building for religious purposes until it has been properly converted for the said purpose through a process known to law.

27. I make it clear that there is no impediment for respondents 3 and 4 to make a proper application to the authorities concerned for the change of user of the building and obtain necessary orders in strict statutory compliance before they could put the building to religious purposes. Until the same is done, it is imperative that the respondents 3 and 4 cannot use the building for any religious purposes, other than the authorised purpose, i.e., to be used as a reading room, purely for secular purpose. It is further made clear that if any application is made by the respondents 3 and 4 for the change of user of the building, it shall be

considered by the authority concerned independently, uninfluenced by any of the observations made in this judgment.

In the facts and circumstances, to the extent indicated above, both the writ petitions are allowed. No order as to costs.

Dama Seshadri Naidu, Judge

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