

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD**

**WRIT PETITION NO.4258 OF 2007**

1. Shreyas Infrastructures,  
A Partnership firm,  
Through it's Partner,  
Shri Sapan Sushilkumar  
Zunzunwala, Age : 32 years,  
Occ. Agriculturist and Trade,  
r/o. Jai Nagar,  
Jalgaon
  2. Shri Sapan Sushilkumar  
Zunzunwala, Age : 32 years,  
Occ. Agriculturist and Trade,  
r/o. Jai Nagar,  
Jalgaon
- ..Petitioners

Vs.

1. The State of Maharashtra,  
Through it's Department,  
Relating to Waqf
  2. The Maharashtra State Board  
of Waqfs, Pan Chakki,  
Aurangabad,  
Through Chief Executive Officer
  3. The Chief Executive Officer,  
The Maharashtra State Board of  
Waqfs, Pan Chakki,  
Aurangabad
- ..Respondents

Mr.P.M.Shah, Senior Counsel i/b. Mr.S.P.Shah,  
Advocate for Petitioner

Mr.S.K.Tambe, for respondent no.1

Mr.Qureshi S.A.G., Advocate for respondent no.2

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**CORAM : SUNIL P. DESHMUKH AND  
SANGITRAO S. PATIL, JJ.**

**RESERVED ON : SEPTEMBER 11, 2017  
PRONOUNCED ON : OCTOBER 09, 2017**

**JUDGMENT (*PER SANGITRAO S. PATIL, J.*) :**

Heard the learned Senior Counsel for the petitioners, the learned A.G.P. for respondent no.1 and the learned Counsel for respondent nos.2 and 3.

2. Petitioner no.1 is a partnership firm, while petitioner no.2 is its partner. Respondent no.2 is the Maharashtra State Board of Waqfs ("the Board", for short) and respondent no.3 is the Chief Executive Officer of the said board.

3. The petitioners have challenged the legality of the notice dated Nil, served by respondent no.3 on

petitioner no.1 on 07.05.2007, whereby the transaction dated 28.06.2006 in respect of exchange of the lands between 'Dargah Hajrat Makka Shah Wali', situate at Asarjan, Gadipura, Nanded ("Dargah", for short) and petitioner no.1 has been called in question, on the ground that the said transaction of exchange was not sanctioned by two-thirds of the Members of the Board, as required under Section 32(2) (j) (as was existing prior to the amendment of 2013) of the Waqf Act, 1995 ("the Act", for short) and as such, it is illegal.

4. The learned Senior Counsel for the petitioners submits that the irrigated lands belonging to petitioner no.1 situate at villages Borgaon, Tq.Hadgaon; Pimparanwadi, Tq.Loha; and Kalambar, Tq.Loha, District Nanded, ad-measuring 26 H. 22 Are (65 acres) valued at Rs.59,67,000/- and in addition to that cash amount of Rs.25,00,000/-, were proposed to be given to the Dargah in exchange of the dry land of the Dargah, bearing block No.120, ad-

measuring 9 H. 6 R (22 acres) valued at Rs.55,66,000/- situate at Asarjan, Tq. and Dist. Nanded, which was the property of Waqf. The land of the Dargah was unproductive, while the lands of petitioner no.1 were irrigated. The Board considered the utility of the lands of petitioner no.1 and with a view to augment the income of the Dargah, resolved to exchange the land of the Dargah in lieu of the land of petitioner no.1. The said exchange transaction was most advantageous for the Dargah. Respondent no.3 published the proposal for exchange of the lands in the Gazette dated 6<sup>th</sup> October, 2015 of the Government of Maharashtra, calling upon objections from the public at large against the proposed exchange transaction within 15 days from the date of publication of the said proposal. No objection was raised by anybody. Respondent no.3 then passed an order dated 26.06.2006 stating therein as to how the proposed exchange transaction was beneficial for the Dargah. He further stated therein

that the requisite procedure for grant of sanction to the proposed exchange transaction was followed. Accordingly, he granted permission to execute the said exchange transaction on the terms and conditions mentioned in the order. Respondent no.3 referred to the resolutions dated 26.08.2005, 30.11.2005 and 19.06.2006 passed by the Board giving sanction to the proposed exchange transaction. It is specifically mentioned that he passed the order dated 26.06.2006 in pursuance of the order dated 21.06.2006 passed by respondent no.2. Respondent no.3 further issued a letter to the District Waqf Officer, District Nanded on 26.06.2006 informing him that the proposed exchange transaction was sanctioned by the Board in its meeting dated 19.06.2006 and directed him to execute the deed of exchange on behalf of the Dargah. He was further directed to exchange possession of the lands subject matter of the said transaction and report compliance. On the same day, respondent no.3 sent a letter to the Sub-Registrar, Nanded/Loha,

Dist.Nanded informing that he had authorised the District Waqf Officer, Nanded to execute the exchange-deed in respect of the land of Dargah. Accordingly, the District Waqf Officer, Nanded appeared before the Joint Sub-Registrar, Class-II, Nanded-1 and executed the exchange-deed on behalf of the Dargah on 28.06.2006. Possession of the lands subject-matter of the Exchange deed also was exchanged.

5. The learned Senior Counsel submits that when respondent no.3, who was a responsible Officer, specifically mentioned in his correspondence that the proposed exchange transaction in respect of the lands of Dargah was duly sanctioned by the Board in its meetings, there was no reason for petitioner no.1 to have any suspicion about any irregularity in the resolution passed by the Board. The petitioners had no notice as to how the internal machinery of the Board was handled by its Officers. Petitioner no.1 is a *bona fide* transferee for value without notice of

any infirmity or irregularity about the in-door functions of the Board. Passing of the resolution by two-thirds majority of the members of the Board was a matter of internal administration of the Board. Petitioner no.1 placed reliance on the correspondence made and order passed by respondent no.3 while entering into the exchange transaction.

6. According to the learned Senior Counsel, there were in all nine members of the Board, out of which one Shabana Aazmi, was appointed as a Member of the Board because she was a Member of the Rajya-Sabha. Her appointment was co-terminus with her membership of Rajya-Sabha. She ceased to be a Member of the Board with effect from 26.08.2003 on her ceasing to be the Member of Rajya-sabha. In support of this contention, the learned Senior Counsel relied on the judgment in the case of **Mohd. Firdoz Ahmed s/o. Abdul Hai Vs. The Maharashtra State Board of Wakfs, Aurangabad (Writ Petition No.1694 of 2016)** decided by Nagpur Bench of this Court on 20.06.2016,

wherein it has been held that Explanation-II to the provisions of Section 14(1) of the Act was inserted only for the purpose of removal of doubts and it would be clear that a Member of Parliament or a Member of the State Legislative Assembly would be deemed to have vacated the office of the Member of Waqf Board from the date from which he ceases to be a Member of Parliament or a Member of State Legislative Assembly. The learned Senior Counsel further submits that one Ibrahim Q. Izzuddin had ceased to be a Member of the Board in pursuance of his resignation with effect from 18.05.2005. Therefore, according to him, there were only seven existing members of the Board when the resolutions dated 26.08.2005 and 30.11.2005 were passed. Both these resolutions were passed unanimously by five members including the Chairman of respondent no.2 i.e. two-thirds of majority of the members of the Board. He submits that the said resolutions were ultimately implemented by respondent no.3 by following the due procedure laid

down in the Act and therefore, it cannot be said that the exchange transaction was not duly sanctioned by the Board.

7. The learned Senior Counsel for the petitioners further submits that even if it is assumed that there is some technical defect in passing the resolutions by the Board while granting sanction to the exchange transaction, the petitioners acted in good faith and after taking reasonable care to ascertain that respondent no.3 had obtained express or implied sanction of the Board for the said transfer, exchanged their valuable lands and paid additional amount of Rs.25,00,000/- in consideration of the land of the Dargah, and therefore, the said exchange transaction would be saved under Section 41 of the Transfer of Property Act.

8. The learned Senior Counsel then submits that after completion of the exchange transaction, there has been material change in the circumstances. The names of the parties have been mutated in the record

of rights of the said lands. The said exchange-deed has been acted upon. Petitioner no.1 has sold out 2 acres of land out of block No.120 to the members of Kala family under a registered sale-deed. 41 Are of land out of the said land has been acquired for construction of Kavtha-Latur Road and since no compensation was paid, the petitioners secured directions from this Court by filing a Writ Petition, for initiation of the land acquisition proceedings. 40 Are of land from the said land has been acquired by Municipal Corporation, Nanded for construction of a road. The petitioners challenged the said acquisition proceedings upto the Hon'ble Supreme Court and got the said acquisition proceedings declared as lapsed. The acquisition proceedings have been initiated afresh. 2 H 1 Are land from the said land has been acquired by the Government for administrative building and the petitioners are pursuing the proceedings for enhancement of compensation awarded in respect of that acquisition.

One Gopinath Jadhav claimed title to block No.120 and filed R.C.S. No.49/2010 as well as Writ Petition No.3757 of 2009 which is being defended by the petitioners. The petitioners were required to file R.C.S. No.420/2009 against one Parashram and others, to protect their possession over the land block No.120. The petitioners spent about Rs.15,00,000/- for laying a wire-fencing, constructing two sheds for security guards, for digging a bore-well and for taking electricity connection in the said land. The petitioners spent about Rs.15,00,000/- towards salary of the security guards and bills of the security agency during last ten years. The petitioners paid Rs.24,00,000/- towards betterment charges etc.

9. The learned Senior Counsel states that the Dargah also started cultivating 63 acres of Bagayat land received from petitioner no.1 in exchange and is earning good income therefrom. He submits that in view of the above-mentioned developments, now the situation has become irreversible. If the exchange

transaction is undone, grave prejudice and irreparable loss would be caused to the petitioners. All these questions, including that of the interests created in favour of third parties, would be beyond the scope of Section 52 of the Act. He submits that whatever has been lawfully done by respondent nos.2 and 3 in approving and effecting the exchange transaction, cannot be unsettled by their successors. He submits that respondent nos.2 and 3 are estopped from challenging legality of the said exchange transaction.

10. The learned Senior Counsel submits that the impugned notice and its Annexure make it clear that the Board has already taken a decision that the above-referred exchange transaction is invalid. Therefore, the impugned notice cannot be said to be merely a show-cause notice. Relying on the judgments in the cases of **Siemens Ltd. Vs. State of Maharashtra and others, (2006)12 SCC 33** and **Assistant Commissioner (CT) LTU and anr. Vs. Amara Raja**

**Batteries Limited, (2009)8 SCC 209**, he submits that when a notice is issued after already forming an opinion by the Board that the exchange transaction is invalid, the Writ Petition would be maintainable against such notice communicating the decision itself, though apparently it is in the nature of a show-cause notice.

11. The learned Counsel for respondent nos.2 and 3, based on the contents of the reply dated 06.09.2007 and the additional reply dated 25.07.2016, submits that the Writ Petition being pre-mature is not maintainable. According to him, the impugned notice is just a show-cause notice. Instead of showing cause before respondent no.3, the petitioners preferred this Writ Petition. It was open for the petitioners to await until the orders are passed by respondent no.3. He states that as per the provisions of Section 32(2)(j) of the Act, the exchange transaction in respect of the lands of the Dargah should have been sanctioned by at least two-thirds of

the members of the Board. The exchange transaction subject matter of this Writ Petition has not got such sanction. Therefore, it is illegal. He further submits that the Government of Maharashtra had appointed Enquiry Commission headed by Mr.A.T.A.K. Shaikh to enquire into the illegalities committed by the then Chief Executive Officer and the Chairman of the Board in the matter of transfer of the lands of the Dargah and the said Enquiry Commission, in its report, held that the then Chief Executive Officer abused and misused its powers for extraneous considerations. The learned Counsel submits that no resolution has been passed by respondent no.2 either on 26.08.2005 or 30.11.2005 or 19.06.2006 giving sanction to the transaction of exchange of lands subject matter of this Writ Petition. The lands of the Dargah have not been properly valued. The amount of Rs.25,00,000/- was stated to be obtained from the petitioners by way of donation in addition to the lands proposed to be exchanged, however, the said

amount has not been deposited by the petitioners in the account of the Dargah. He submits that respondent no.3 was quite competent to issue impugned notice in order to take necessary action under Section 52 of the Act against the petitioners. He submits that no decision at all has been taken by respondent no.2 against the petitioners as yet. In case respondent no.2 takes any adverse decision against the petitioners, they would have an efficacious and effective alternate remedy to challenge it before the Waqf Tribunal. It is only after the decision of the Waqf Tribunal, if it goes against them, they can approach this Court by filing a Revision Application under the proviso to sub-section (9) of Section 83 of the Act. According to him, there are a number of disputed facts which cannot be considered by this Court. He contends that the petitioners cannot directly approach this Court by filing a Writ Petition under Article 226 of the Constitution of India, by-passing the statutory remedy. He,

therefore, prays that the Writ Petition may be dismissed.

12. As per Clause (j), sub-section (2) of Section 32 of the Act, as was prevailing prior to the amendment of 2013, it was the function of the Board to sanction any transfer of immovable property of a Waqf by way of sale, gift, mortgage, exchange or lease in accordance with the provisions of this Act, provided that no such sanction shall be given unless at least two-thirds of the members of the Board vote in favour of such transaction. Sub-section (1) of Section 51 of the Act states that notwithstanding anything contained in the waqf deed, any gift, sale, exchange or mortgage of any immovable property which is waqf property, shall be void unless such gift, sale, exchange or mortgage is effected with the prior sanction of the Board.

13. As per sub-section (2) of Section 51 of the Act, the Board may, after publishing in the Official Gazette, the particulars relating to the transaction

referred to in sub-section (1) and inviting any objections and suggestions with respect thereto and considering all objections and suggestions, if any, that may be received by it from the concerned Mutawalli or any person interested in the waqf, accord sanction to such transaction if it is of opinion that such transaction is -

- (i) necessary or beneficial to the waqf;
- (ii) consistent with the objects of the waqf;
- (iii) the consideration thereof is reasonable and adequate;

14. Here, it would be worthwhile to reproduce the provisions of Section 52 of the Act, which read as under :-

**"52. Recovery of wakf property transferred in contravention of section 51.— (1)** If the Board is satisfied, after making any inquiry in such manner as may be prescribed, that any immovable property of a wakf entered as

such in the register of wakf maintained under section 36, has been transferred without the previous sanction of the Board in contravention of the provisions of section 51, it may send a requisition to the Collector within whose jurisdiction the property is situate to obtain and deliver possession of the property to it.

(2) On receipt of a requisition under sub-section (1), the Collector shall pass an order directing the person in possession of the property to deliver the property to the Board within a period of thirty days from the date of the service of the order.

(3) Every order passed under sub-section (2) shall be served—

(a) by giving or tendering the order, or by sending it by post to the person for whom it is intended; or

(b) if such person cannot be found, by affixing the order on some

conspicuous part of his last known place of abode or business, or by giving or tendering the order to some adult male member or servant of his family or by causing it to be affixed on some conspicuous part of the property to which it relates:

Provided that where the person on whom the order is to be served is a minor, service upon his guardian or upon any adult male member or servant of his family shall be deemed to be the service upon the minor.

(4) Any person aggrieved by the order of the Collector under sub-section (2) may, within a period of thirty days from the date of the service of the order, prefer an appeal to the Tribunal within whose jurisdiction the property is situate and the decision of the Tribunal on such appeal shall be final.

(5) Where an order passed under sub-section (2) has not been complied with and the time for appealing against such

order has expired without an appeal having been preferred or the appeal, if any, preferred within that time has been dismissed, the Collector shall obtain possession of the property in respect of which the order has been made, using such force, if any, as may be necessary for the purpose and deliver it to the Board.

(6) In exercising his functions under this section the Collector shall be guided by such rules as may be provided by regulations."

The procedure under Section 52 of the Act for recovery of Waqf property which is found to have been transferred in contravention of Section 51 of the Act has been given in Rule 20 of the Maharashtra Waqf Rules, 2003. After obtaining certified copies of the documents of transfer from Sub-Registrar as provided in sub-rule (2) of Rule 20, the Chief Executive Officer of the Board has to verify the details of the property with reference to the record obtained from

the Sub-Registrar and proceed further to issue notices to the transferor and the transferee in Forms-AD and AD-1 respectively. The notice impugned in this Writ Petition is the same which has been issued by respondent no.3 to petitioner no.1 under Rule 20(3) in Form AD-1. The annexure to the impugned notice records some more details behind issuance of notice by respondent no.3. There is mention in the annexure that the transaction subject-matter of the Writ Petition has been effected without getting sanction of the Board supported by two-thirds of the Members voting in favour of the said transaction. Therefore, petitioner no.1 was called upon to explain as to why action should not be taken to recover the said property i.e. block no.120 under Section 52 of the Act. Here, it would be necessary to reproduce the prescribed "Form AD-1" in which the notice has to be given to the transferee :-

**Form AD-1**

[See rule 20(3)]

**NOTICE TO TRANSFEREE/PURCHASER**

Whereas the properties shown below in the Schedule are Wakf properties registered under section 36 and 37 of the Wakf Act, 1995.

Whereas it is now learnt/informed that you are in possession of the Scheduled property of Wakf by way of transfer/Gift/Sale/Mortgage/Exchange vide document No..... dated ..... Registered in office of Sub-Registrar .....

| Schedule |                                       |                             |                      |            |
|----------|---------------------------------------|-----------------------------|----------------------|------------|
| Sr. No.  | Sy.No./<br>Property No./<br>Khata No. | Taluka/<br>Village/<br>Town | Extent/<br>Dimension | Boundaries |
| (1)      | (2)                                   | (3)                         | (4)                  | (5)        |
| -----    |                                       |                             |                      |            |

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Whereas, it is now learnt after due verification that the said transfer is in violation of the Section 51 of the Wakf Act, 1995. Therefore, you are called upon to explain as to why action should not be taken to recover the said property under section 52 of the Wakf Act, 1995 within seven days from the date of receipt of this Notice, failing which further action will be taken by the Maharashtra State Board of Wakfs.

Chief Executive Officer,  
The Maharashtra State Board of Wakfs

....

15. With the above background, it would be necessary to appreciate the contention of the learned Counsel for the parties about maintainability of the

Writ Petition. It will be clear from the contents of Form AD-1 of the notice, which was required to be served on petitioner no.1 as per Rule 20(3), it was necessary to be mentioned in the notice itself that after due verification it was noticed that transfer of the Waqf property is in violation of Section 51 of the Waqf Act, 1995 and to call upon petitioner no.1 to explain as to why action should not be taken to recover the said property under Section 52 of the Act within seven days from the date of receipt of the notice. The impugned notice has been issued by respondent no.3 in conformity with the contents of Form AD-1 of the notice. It cannot be said that respondent no.3 issued it with premeditation and after forming a firm opinion that the property i.e. block no.120 subject-matter of the exchange transaction would be recovered from petitioner no.1 without considering the contentions of petitioner no.1. In the circumstances, the contention of the learned Senior Counsel for the petitioners that

respondent no.3 conveyed his final decision to treat the exchange transaction as illegal and to recover possession of the land block no.120 under the garb of show-cause notice cannot be accepted.

16. When respondent no.3 was required to issue notice in Form AD-1, the reply filed on behalf of respondent no.3 referring the contents of that notice, would not indicate that the decision has already been taken to treat the exchange transaction illegal and to recover possession of the land block no.120 from the petitioners. If that be so, it was necessary for the petitioners to appear before respondent no.3 and show cause as to why the exchange transaction in respect of land block no.120 should not be treated as illegal and why possession of that land should not be taken back by respondent no.3. However, without exhausting that remedy, the petitioners directly approached this Court by filing Writ Petition under Article 226 of the Constitution of India.

17. The learned Senior Counsel for the petitioners cited the judgment in the case of **Siemens Ltd.** wherein a question under consideration was whether the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India would interfere with the demand directing payment of cess subject-matter of the *lis* before the Hon'ble the Supreme Court. The demand of cess was made terming the same as a show-cause notice and the appellant was directed to make payment of cess with interest immediately in respect of the purported supplies made to Navi Mumbai parties right from 01.06.1996. The Writ Petition filed by the appellant before the High Court questioning the said purported notice came to be dismissed with the following observations :-

“ Challenge is to a show-cause notice issued by the Corporation demanding certain payment of cess on the value of goods imported from Aurangabad and Daman. The petitioners may file their

reply to the show-cause notice and produce the relevant documents within two weeks. In case the order is adverse to the petitioner no recovery shall be made for a period of four weeks from the date of service of the order on the petitioner."

In paragraph 9 of the judgment, it was ruled by the Hon'ble the Supreme Court that when a notice is issued with premeditation, a writ petition would be maintainable. In such an event, even if the Court directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose. It is evident in the instant case that the respondent has clearly made up its mind. It explicitly said so both in the counter-affidavit as also in its purported show-cause notice. With these observations, the Hon'ble Supreme Court held in paragraph 11 of the judgment as under :-

11. A bare perusal of the order impugned before the High Court as also

the statements made before us in the counter-affidavit filed by the respondents, we are satisfied that the statutory authority has already applied its mind and has formed an opinion as regards the liability or otherwise of the appellant. If in passing the order the respondent has already determined the liability of the appellant and the only question which remains for its consideration is quantification thereof, the same does not remain in the realm of a show-cause notice. The writ petition, in our opinion, was maintainable. "

18. In the present case, as stated above, respondent no.2 cannot be said to have taken any decision in respect of the nature of transaction as well as recovery of possession of the land block no.120 since respondent no.3 reproduced the contents of Form AD-1 which, as per the provisions of Rule 20(3), were required to be mentioned in the show-cause notice. It was not possible for him to deviate from the

contents of Form AD-1. Consequently, respondent no.3 cannot be said to have predetermined the issue and the impugned notice cannot be said to have been issued with premeditation.

19. In view of these distinguishing facts, the judgment in the case of **Siemens Ltd.** (supra) would be of no help to the petitioners to show that the Writ Petition is maintainable against the impugned show-cause notice.

20. The learned Senior Counsel then pressed into service the judgment in the case of **Assistant Commissioner (CT) LTU and anr. Vs. Amara Raja Batteries Limited, (2009)8 SCC 209** to substantiate his contention that even if there is alternate remedy, the Writ Petition would be maintainable. In that case, the Government of Andhra Pradesh, in order to encourage industrialisation in the entire State had been evolving various schemes in terms whereof, incentives were to be provided to entrepreneurs not

only for the establishment of new units but also expansion thereof. Such incentives were being granted in various forms such as subsidy, deferment/tax holiday, rebate in electricity charges, interest subsidy, etc. For the said purpose, Government Orders were being issued from time to time since 1989. In terms of the Government Order dated 20.05.1996, the respondents applied for and were granted eligibility certificate on their project for expansion of their factory, as a result whereof the benefit of deferment on sales tax to the extent of 13.5% of the capital investment made by them was conferred. The respondents claimed benefit of deferment on sales tax payable by them on their production in their expanded units which were either rejected or restricted to a lesser amount while passing the orders of assessment by the Assessing Officers under the Andhra Pradesh General Sales Tax Act, 1957. Some of the matters were taken to Sales Tax Appellate Tribunal. Some of the writ applications were filed questioning the order of

assessment, without availing the remedies available to the assessee under the Andhra Pradesh General Sales Tax Act. The High Court opined that the definition "base turnover" referred only to the quantum of production and not the turnover thereof and hence, the Tribunal's judgment to that effect was held to be erroneous. Special Leave Petitions were filed before the Hon'ble Supreme Court against the judgment of the High Court. The learned Senior Counsel appearing on behalf of the State of Andhra Pradesh contended that the High Court should not have entertained the petitions directly against the order of assessment as the question as to whether the entrepreneurs had fulfilled the conditions laid down in the said GOMs or not were required to be considered by the respective assessing authorities. The Hon'ble Supreme Court repelled the contentions of the learned Senior Counsel appearing for the State holding that as the Tribunal had already expressed its views in the matter, appeal to the appellate

authority as also the Tribunal would have been an idle formality and the contention of the learned Senior Counsel appearing for the State that High Court should not have entertained the writ applications directly from the orders of assessment was held to be not correct.

21. From the facts of the above cited case, it is clear that in view of the opinion already expressed by the Tribunal in the same set of circumstances, the Hon'ble the Supreme Court held that approaching the appellate authority or the Tribunal would have been an idle formality and therefore, the Writ Petitions filed directly before the High Court were held to be maintainable.

22. In the present case, respondent no.3 has simply issued a show-cause notice in the prescribed proforma AD-1 as required under Rule 20(3). It is still open for the petitioner to show cause justifying the exchange transaction in respect of the land block no.120. In case the petitioners satisfy

respondent no.2 that the exchange transaction was legal, they would certainly be entitled to retain possession of the land block no.120. Thus, approaching respondent no.2 for showing cause justifying the exchange transaction in respect of the land block no.120 would not be an empty formality. Respondent no.2 would certainly be under an obligation to consider the reasons placed forth by the petitioners before taking any decision. In the circumstances, the above-cited judgment would not be helpful to the petitioners to justify filing of this Writ Petition directly. Moreover, the decision of respondent no.2 would not be final one. As per subsection (4) of Section 52 of the Act, in case respondent no.2 sends any requisition to the Collector to obtain possession of the land block no.120 and deliver it to respondent no.2 and if the Collector passes an order directing the petitioners to deliver the said lands to respondent no.2, the petitioners may, within a period of 30 days from the

date of service of that order, prefer an appeal to the Tribunal constituted under Section 83 of the Act.

23. Even if it is assumed that the decision of the Tribunal goes against the petitioners, under the proviso to sub-section (9) of Section 83 of the Act, the petitioners would have an opportunity to challenge the correctness, legality and propriety of the judgment and order passed by the Tribunal by filing a Revision Application before this court. Thus, the petitioners have an effective and efficacious remedy available to them to challenge the orders passed against them before this Court. Under the revisional powers, under the proviso to sub-section (9) of Section 83 of the Act, the High Court may reverse or modify the orders passed by the Tribunal. It is well settled that when statute provides appeal or effective alternative remedy like Revision, the Writ Petition is ordinarily not maintainable.

24. The learned Senior Counsel for the petitioners submits that the present Writ Petition has been admitted by this Court and Rule has been issued in the year 2008 without reserving any right in favour of the respondents to raise plea of non-maintainability of the Writ Petition on account of any alternative remedy, therefore, at the stage of final hearing, the petitioners cannot be non-suited merely on technical plea of availability of alternative remedy. In support of this contention, he relied on the decision in the case of **Proctor and Gamble India Ltd. Vs. Municipal Corporation of Greater Bombay, 2004(1)Mh.L.J. 406**. The point that was under consideration in the said case was whether the products like cough drops, cough tabs, cough tablets, cough syrup and cough lozenge manufactured by the petitioners can be subjected to levy of octroi duty under the provisions of the Mumbai Municipal Corporation Act, 1888. The demand of octroi was challenged by the petitioners on the ground that the

point regarding non-liability of the petitioners to pay octroi duty on such products has been decided by this Court in the case of **Proctor and Gamble India Limited and anr. Vs. The Municipal Corporation of Greater Bombay and ors., 1994(3) Bom.C.R. 403**, which judgment was subsequently confirmed by the Division Bench of this Court in **Appeal No.916 of 1993 in Writ Petition No.3589 of 1983** decided on **09.08.1994** and accordingly, the respondents were not entitled to claim payment of octroi duty on the said products. It was the contention of the petitioners that the authorities arbitrarily sought to levy the octroi duty on the said products though the said products had already been classified as medicines by the licensing authorities as well as the Central Excise Authorities and considering the law laid down by this Court, it was not permissible for the Corporation while deciding the issue regarding the liability of octroi duty to change such classification. It was sought to be contended on behalf of the Corporation

that the orders of the authorities can be subjected to appeal under Section 217 of the Act of 1988 and therefore, there being alternative efficacious remedy, the petitioners should not approach the High Court in writ jurisdiction.

25. Since the dispute about classification of the products subject matter of the Writ Petition was already decided by this Court, it was held that the contention of the Corporation regarding classification of the products of the petitioner as confectionery items cannot be sustained. In view of the fact that the petitioners had a good case on merits, the objection challenging tenability of Writ Petition on account of alternative remedy was rejected.

26. In the present case, considering the above factual controversy between the parties, a number of disputed questions would arise for determination. It would be necessary to record evidence of the

parties in respect of those disputed facts in detail. It is not that the present case is based on some law point which is already decided or on the facts which are not in dispute. The following are some of the disputed facts which would be required to be considered on the basis of the evidence produced by the parties :-

- (i) Whether the lands subject-matter of the exchange transaction were duly valued ?
- (ii) Whether the amount of Rs.25,00,000/- has been paid by the petitioners to the Waqf/Dargah ?
- (iii) Whether the exchange transaction was effected to safeguard the interests and objectives of the waqf ?
- (iv) Whether the exchange transaction is unconscionable ?

- (v) What was the exact number of the Members of the Board at the relevant time ?
- (vi) Whether there was a resolution passed by two-thirds of the Members of the Board giving sanction to the exchange transaction of the land block no.120 ?
- (vii) Whether petitioner no.1 being a transferee of the land block no.120, acted in good faith and took reasonable care to ascertain that the then Chief Executive Officer had obtained express or implied sanction of the Board for effecting the exchange transaction ?
- (viii) Whether the petitioners are entitled to claim benefit of Section 41 of the Transfer of Property Act ?
- (ix) Whether the then Chairman and the Chief Executive Officer misused the powers vested

in them in effecting the exchange transaction ?

(x) Whether the present Chairman and the Chief Executive Officer of the Board would be justified in challenging the exchange transaction effected by their predecessors ?

(xi) Whether there has been material change in the circumstances after effecting the exchange transaction which has made the situation irreversible? If yes, what equitable reliefs could be granted in favour of the parties concerned ?

27. The above-mentioned list of the disputed facts is illustrative and not exhaustive. A number of factual disputes may be required to be considered by the authorities concerned while resolving the controversy subject matter of this Writ Petition. Such was not the position in the case of **Proctor and Gamble** (Supra) cited on behalf of the petitioners.

The above-referred disputed facts cannot be decided by the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India and more particularly, when there is efficacious remedy available to the petitioners under the provisions of the Waqf Act. In the circumstances, even if the Writ Petition was admitted and Rule was issued for final hearing, we are of the view that the petitioners will have to be relegated to exhaust the remedies available to agitate their contentions justifying the exchange transaction as per the provisions of the Waqf Act.

28. The learned Senior Counsel for the petitioners contends that the scope of Section 52 of the Act is limited and it would be beyond the jurisdiction of the Waqf Board or the Tribunal to consider the questions in respect of creation of third party interests in the land block no.120; the subsequent change in the situation in the land block no.120 as well as the lands given to Dargah in

exchange and the other co-related factual aspects and therefore, this Court should entertain this Writ Petition. We are not inclined to accept this contention. As per sub-section (1) of Section 83 of the Act, the State Government has constituted the Tribunal for determination of any dispute, question or other matter related to Waqf or Waqf property under this Act. As per sub-section (5) of Section 83 of the Act, the Tribunal shall be deemed to be a Civil Court and shall have the same powers as may be exercised by a Civil Court under the Code of Civil Procedure, 1908, while trying a suit, or executing a decree or order. If that be so, it will be open for the petitioners to approach the Tribunal independently by filing a suit in respect of the claims which, according to them, could not be considered under Section 52 of the Act. Moreover, if the Tribunal also cannot consider any dispute in view of its limited jurisdiction to determine the issues, the jurisdiction of the Civil Court could be invoked

by the petitioners as per Section 9 of the Code of Civil Procedure.

29. The Hon'ble the Supreme Court has consistently held that alternate remedy would not operate as a bar in the following contingencies :-

- (i) Where the Writ Petition has been filed for enforcement of any fundamental rights;
- (ii) Where there has been violation of the principles of natural justice;
- (iii) Where the proceedings are wholly without jurisdiction;
- (iv) Where vires of the Act is challenged.

30. The facts of the present Writ Petition do not attract any of the above-mentioned contingencies. If that be so, in view of the effective and efficacious remedy available to the petitioners, we are not inclined to entertain this Writ Petition in

exercise of the powers under Article 226 of the Constitution of India, though the Writ Petition has reached the stage of final hearing.

31. For the reasons stated above, the Writ Petition is liable to be dismissed being not maintainable. The petitioners would be at liberty to appear before respondent no.2 and show cause in response to the impugned notice. The petitioners further would be at liberty to approach the appropriate forum for necessary reliefs as permissible under the law. We make it clear that we have not expressed any opinion on merits of the matter. All the points are kept open for being agitated before the appropriate forum.

32. In the result, we pass the following order :-

The Writ Petition is dismissed.

[SANGITRAO S. PATIL, J.] [SUNIL P. DESHMUKH, J.]

33. After pronouncement of the judgment, the learned Counsel appearing for the petitioners prays that the interim relief may be continued for a period of eight weeks so as to enable the petitioners to challenge the judgment and order passed today. The learned Counsel for respondent nos.1 and 2 opposes this prayer.

34. Interim relief was granted by this Court and that was continued as per the order dated 22.02.2008. In this view of the matter, we think fit to continue the interim relief for a period of six weeks from today.

**[SANGITRAO S. PATIL, J.]      [SUNIL P. DESHMUKH, J.]**