IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE T.R.RAVI

MONDAY, THE 07TH DAY OF DECEMBER 2020 / 16TH AGRAHAYANA, 1942

CRP(WAKF).No.51 OF 2019

AGAINST THE JUDGMENT AND DECREE IN OS 93/2019 DATED 06-07-2019 OF WAQF TRIBUNAL, KOZHIKODE

REVISION PETITIONERS/PLAINTIFFS:

1 DR.P.A.FAZAL GAFOOR,
AGED 62 YEARS
S/O.LATE DR.P.K.ABDUL GAFOOR, THE PRESIDENT,
MUSLIM EDUCATION SOCIETY (REGD.),
I.M.A.HALL ROAD, P.O.NADAKKAVU,
CALICUT, PIN - 673 011.

2 PRO.P.O.J.LABBA,
AGED 79 YEARS
S/O.P.M.OOMER LABBA, THE GENERAL SECRETARY,
MUSLIM EDUCATIONAL SOCIETY (REGD.),
I.M.A.HALL ROAD, P.O.NADAKKAVU,
CALICUT, PIN - 673 011.

3 THE PRINCIPAL, M.E.S.FATHIMA GAFOOR MEMMORIAL WOMENS COLLEGE,
P.O.NADAKKAVU, KOZHIKKODE - 11.

BY ADVS.
SRI.BABU KARUKAPADATH
SMT.M.A.VAHEEDA BABU
SHRI.P.U.VINOD KUMAR
SRI.AVINASH P RAVEENDRAN
SMT.ARYA RAGHUNATH
SMT.ANJALY N.S.
SMT.KADIJA JASMINE

RESPONDENTS/DEFENDANTS:

1 **THE KERALA STATE WAQF BOARD,**
REPRESENTED BY THE CHIEF EXECUTIVE OFFICER,
THE KERALA STATE WAQF BOARD DIVISIONAL OFFICE,
EROTH CENTRE BUILDING, BANK ROAD,
KOZHIKODE, PIN - 673 001.

2 **P.P.UMMAYYABI,**
THE PRESENT MUTHAWALLY,
PUTHIYA PONMANICHINTAKAM WAQF,
CONVENT ROAD, CALICUT - 673 032.

R1 BY ADV. SRI.T.P.SAJID
R1 BY ADV. SHRI.T.K.SAIDALIKUTTY, SC, WAQF BOARD
R2 BY ADV. SRI.K.A.JALEEL
R2 BY ADV. SRI.C.Y.VINOD KUMAR

THIS CRP (WAKF ACT) HAVING BEEN FINALLY HEARD ON 07-12-2020, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.VINOD CHANDRAN & T.R. RAVI,JJ.

CRP (WAKF)No.51 of 2019

Dated this the 7th day of December, 2020

ORDER

T.R.RAVI, J.

The revision petition has been filed by the plaintiffs before the Waqf Tribunal, Kozhikode. The suit was filed for setting aside an order passed by the Chief Executive Officer of the Waqf Board, whereby it was found that the petitioners are encroachers. There is also a prayer for declaring that the plaint schedule property is not waqf property.

2. The petitioners came into possession of the plaint schedule property on the basis of an oral licence followed by a registered lease deed No.340 of 1975. The lease was for a period of 50 years. The petitioners have put up buildings in the plaint schedule properties, where the MES Fathima Gafoor Memorial Women's College is functioning. Thereafter, by an agreement dated 25.11.1991, the parties had agreed to pay enhanced rent. On 03.03.2016, the Chief Executive Officer passed an order holding

that the plaint schedule property is waqf property owned by the 2nd respondent and that the petitioners are encroachers. The CEO directed the plaintiffs to remove the encroachments and in default the CEO has moved the Waqf Tribunal praying for an order of eviction against the petitioners. A decision was also taken to auction out the premises and find new tenants. The suit was filed against the above action.

3. In exercise of the power available to the Chief Executive Officer under Section 54(3) of the Waqf Act, the officer has already filed O.A.No.64 of 2017 before the Waqf Tribunal, Kozhikode which was re-numbered as O.A.No.28 of 2019 after reconstitution of the Waqf Tribunal. It can thus be seen that there were two proceedings before the Waqf Tribunal, one initiated at the instance of the CEO for eviction of the petitioners as O.A.No.28 of 2019 and the other initiated at the instance of the petitioners seeking a declaration that the proceedings of the CEO are bad in law and for a declaration that the property itself is not a waqf property, as O.S.No.93 of 2019. The respondents contended that the suit is not maintainable and the remedy of the petitioners is to challenge the action of the CEO in O.A.No.28 of 2019 as provided under Section 54(4) of the Act.

4. By order dated 06.07.2019, the Waqf Tribunal has found that there is an alternative remedy available to the petitioners under Section 83(2) of the Act and that the same questions are being considered in O.A.No.28 of 2019. On the above said reasoning, the suit has been dismissed.

5. Heard Sri Babu Karukappadath on behalf of the petitioners and Sri T.K.Saidalikutty on behalf of the the 1st respondent and Sri C.Y.Vinod Kumar for the 2nd respondent.

6. The counsel for the petitioner submits that the Tribunal should not have dismissed the suit on the ground of maintainability, particularly since a specific contention has been taken in the suit that the property is not a waqf property. According to the counsel, even though a waqf by name Puthiya Ponmanichinthakam Waqf was registered in 1996, much after the lease in favour of the petitioners, the properties scheduled to the plaint were not included in the register of Waqf. It is further submitted that the plaint schedule property was included in the waqf register only in 2002, by the Chief Executive Officer, without following the procedure laid down for the purpose and without any notice to the petitioners, who have been in possession of the property from 1975. The issue involved

in O.A.No.28 of 2019 is only regarding the prima facie finding entered into by the CEO under Section 54(1) that there has been an encroachment in a waqf property, which has been registered under the Act. Even though under the proviso to Section 54(4), the Tribunal is obliged to hear the person against whom the application for eviction has been made by the Chief Executive Officer, that would not be akin to a hearing contemplated in a suit instituted, contending that the plaint schedule property itself is not a waqf property; is the contention. We find considerable force in the submissions of the counsel for the petitioner. The question whether a property which has been specified as waqf property in the list of waqfs, is a waqf property or not, is a matter which can be challenged by any person aggrieved, by instituting a suit before the Tribunal, under Sections 6 and 7 of the Waqf Act. Sections 4 and 5 of the Act provides for the preliminary survey of waqfs in the State, which is the basis for the preparation of list of waqfs. A specific procedure is prescribed for preparation of such list of waqfs and for making additions to the list. The period of limitation of one year for preferring such a challenge under Section 7 from the date of publication of the list of document, will not apply to persons who

have not been put on notice about such inclusion. It can be seen that the list is prepared by the State Government and not by the Board or the Chief Executive Officer. Section 36 of the Act provides for registration of waqfs created before or after commencement of the Act. The power is vested with the Board to register a waqf under Section 36. Under Section 40, the Board is also vested with the power to decide whether a property is a waqf property. A reading of Sections 4, 5, 6, 7, 8, 36, 37 and 40 would show that the Statute contemplates a list of waqf prepared at the instance of the State Government and also a register of waqfs prepared by the Waqf Board. The question whether a property included in the list of waqfs is a waqf or not, can be challenged by an aggrieved person before the Tribunal. So also, the question whether the property registered in the register of waqfs before the Board is waqf or not can be challenged by the aggrieved person before the Tribunal. As such, it is not correct to say that such a challenge is not maintainable and that the petitioners should be relegated to the remedy of defending an action initiated by the CEO for evicting them, wherein they can raise a collateral challenge that the property is not a waqf property.

7. We hence set aside the order of the Waqf Tribunal and remand the matter to the Tribunal. The Tribunal shall decide the issues after a proper trial. It is also directed that the suit initiated by the petitioners should be jointly heard along with O.A.No.28 of 2019 filed by the CEO. The Tribunal shall dispose of the cases at the earliest, at any rate, within six months from the date of receipt of a copy of this judgment. We make it clear that we are not making any observation regarding the merits of the contentions of the parties. The parties will bear their respective costs.

Sd/-
K. VINOD CHANDRAN
JUDGE

Sd/-
T.R. RAVI
JUDGE

dsn