

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 25.11.2019

Pronounced on : 08.05.2020

CORAM:

THE HON'BLE MR. JUSTICE R.SURESH KUMAR

C.R.P.(PD).No.3723 of 2019

The President
Ameerunnisa Begum Sahiba Endowments
Triplicane, Chennai - 5. Petitioner

-vs-

D.Ganesan Respondent

Civil Revision Petition filed under Article 227 of the Constitution of India r/w Section 83(9) of the Waqf Act, 1995, against the order, dated 18.10.2029 made in O.A.Sr.No.159 of 2019 on the file of the Waqf Tribunal, Chennai.

For Petitioner : Mr.N.A.Nissar Ahmed

: Mr.V.Lakshminarayanan,
Standing Counsel for Tamil Nadu
Waqf Board as Amicus Curiae

ORDER

This Revision Petition has been filed against the order passed by the Tamil Nadu Waqf Tribunal in unnumbered O.A.Sr.No.159 of 2019, dated 18.10.2019, under which the application, i.e., O.A filed by the revision petitioner has been rejected as not maintainable.

2. The facts in nutshell are as follows :

(i) That the revision petitioner is the President of Ameerunnisa Begum Sahiba Endowments at Triplicane, Chennai-5 (herein after referred to as "the Petitioner"). The revision petitioner is having a property comprised in Shop No.13/76 at Bharathi Salai, Triplicane, Chennai-5 in R.S.No.847. The said property (herein after referred to as "petition property") was let out for lease to the respondent herein for a monthly rent of Rs.3,658/- with GST on rent at Rs.659/-.

(ii) According to the petitioner, the respondent / tenant was a chronic defaulter and he defaulted payment of rents from October 2018 to April 2019. The said amount of rental default comes to about Rs.26,699/-,

the same was not paid by the respondent despite repeated demand made in this regard by the petitioner.

(iii) Therefore the petitioner, being the custodian of the petition property, had issued a notice on 01.05.2019, whereby, it required the respondent to vacate and deliver vacant possession of the petition property and the lease, if any was still existing, the same was terminated. The petitioner also demanded the respondent to pay a sum of Rs.8,000/- per month as damages for the use and occupation till handing over possession of the petition property.

(iv) It is the further case of the petitioner that, despite the said notice dated 01.05.2019 having been received by the respondent, since he had not come forward to pay the rental arrears and also not in a position to vacate the petition property, these inactions on the part of the respondent triggered the petitioner to approach the Tamil Nadu Waqf Tribunal by filing the said O.A.Sr.No.159 of 2019 seeking for a prayer of direction to the respondent to vacate and deliver the vacant possession of the petition property.

(v) The said O.A.Sr, on presentation, seems to have been scrutinised by the Waqf Tribunal and the Waqf Tribunal on 21.08.2019 have returned the brief with the following note :

"(1) Under the Waqf properties lease rules 2014 under rule 23(iv) the lessor may terminate the lease by giving one month notice. Here 15 days notice is given.

(2) Under rule 24(2) of the Waqf Properties lease rules, if after expiration or termination of lease the lessee continues to occupy the leased premises it shall be treated as an encroachment and such encroachment shall be removed in accordance with the procedure specified in section 54 of the Act.

(3) Under section 54(3) of the Waqf Act the CEO of the Waqf Board has to make an application to the Tribunal for grant of order of eviction for removing encroachment.

(4) By Waqf (Amendment Act 2013) with effect from 1.11.2013 under section 83(1) eviction of tenant or determination of rights and obligations of the lessor and the lessee of the Waqf properties were brought within the jurisdiction of the

Tribunal. The CEO of the Waqf Board was granted power to order an encroachment to be removed prior to amendment. In pursuance of amendment to section 83 of the power of CEO to order eviction was taken away and jurisdiction is conferred on the Waqf Tribunal to decide the question of eviction of tenant. But the application for eviction is to be made by the CEO of the Waqf Board and not by the Mutawalli of Waqf. Here the application is made by the Mutawalli of Waqf."

(vi) Thereafter it was re-presented by the petitioner on 10.10.2019 giving compliance note or report stating that, the 15 days notice, dated 01.05.2019 was in order in view of the provisions of the T.P.Act and also the petitioner had taken a stand that, the provision, i.e., Section 54 of the Waqf Act by itself is not a bar in filing application for eviction under Section 83 (1) and (2) of the Waqf Act and therefore the O.A was maintainable and has to be numbered and to be tried.

(vii) However the Waqf Tribunal, having considered the said compliance note submitted by the petitioner and having not satisfied with

the said compliance report, has decided to reject the application on the ground of maintainability. That is how the impugned order, dated 18.10.2019 was passed by the Tribunal, which is under challenge in this revision.

3. Heard Mr.N.A.Nissar Ahmed, learned counsel appearing for the revision petitioner, who has made submissions that, under the scheme of the Waqf Act, 1995 (in short "the Act"), the role of the Mutawalli has been specified, who is incharge or custodian of the Waqf property for which he has been elected and appointed as Mutawalli. Accordingly, as per the functions and duties enumerated to be performed by a Mutawalli as contemplated under the Act, a Mutawalli or President of the Waqf can very well set the law in motion by filing appropriate application before the Waqf Tribunal under Section 83 (1) and (2) of the Act in view of the amendment made in the Act in the year 2013, where the scope of the jurisdiction of the Tribunal has been expanded to the extent that apart from deciding or determining any dispute, question or other matter related to a Waqf or Waqf property, determination of rights and obligations of the lessor and lessee of

such property, eviction of a tenant is also a subject which comes squarely under the jurisdiction of the Tribunal by virtue of the substitution by Act 27 of 2013 under Section 44, w.e.f., 01.11.2013, therefore the application filed by the revision petitioner can very well be maintained.

4. Further enlarging his submission, the learned counsel for the revision petitioner would also contend that, there is a specific provision as has been contemplated under Section 54 of the Act, for removal of encroachment from Waqf property, where, a procedure has been envisaged, under which the Chief Executive Officer of the Waqf Board if either on his own motion or complaint received in this regard feels that a property is a Waqf property which has been registered under the Act and there is an encroachment in that property, he can take action against such encroachment by calling upon the encroacher to give reasons as to why he should not be evicted and thereafter the Chief Executive Officer can approach the Waqf Tribunal by filing an application for grant of order of eviction for removing such encroachment and delivery of possession of the land or building. Though such a procedure has been contemplated under

Section 54 of the Act, it does not mean that the CEO of the Waqf Board alone is competent or entitled to set the law in motion for removal of encroachment, i.e., eviction of a tenant or encroacher in case of termination of lease on the lessee has become a defaulter.

5. In this context, according to the learned counsel, apart from CEO of the Waqf Board, the proper person of any Waqf, namely the Mutawalli / President etc., can approach the Tribunal by filing an application in this regard under Section 83 (1) and (2) of the Act for eviction of such tenant or encroacher who has been in default or whose lease has been terminated or expired. Since there is no prohibition against a Mutawalli or President of a notified Waqf to approach the Tribunal for getting eviction order against a tenant or encroacher, such a prohibition cannot be put against Mutawalli or President of the notified Waqf and here in the case in hand, since such an embargo has been put in by the Tribunal by rejecting the application through the impugned order for want of maintainability, such a course of action, according to the learned counsel for the petitioner, is erroneous and therefore he seeks interference of this Court against the impugned order.

6. The learned counsel for the petitioner in support of the above submissions made in this regard, has relied upon a number of decisions, which are listed out hereunder :

1. Syed Khersha Sajanshah Mutavalli v. Bhuj Municipality (Gujarat), 1986 AIR (Gujarat) 1

2. Mohammed Ifetkhar Uddin v. Imdadgha Complex, Sarai Mosque Wakf, Rep. by its Secretary Mohammad Rafi, CDJ 2017 APHC 245

3. Faseela M v. Munnerul Islam Madrasa Committee and anothers, 2015 (3) SCC (Civil) 419

4. Muthulakshmi Ammal v. Seethimarakkarakath Alikoya Wakf, 2016 (3) Ker LJ 312

5. A.S.Abdul Khader Wakf v. Saber Miah, 2003 AIR (AP) 528

6. K.P.Alagar v. Kumbakonam Town Ekasha Thaikkal by its Muthavalli Makbul Sheriff, Kumbakonam, CDJ 2017 MHC 7395

7. K.G.Jilendran v. Mohideen Andavar Dharga, 2017 (5) LW 34

8. Riyas Nisha v. Mohamed Akbar, 2019 (2) LW 790

9. Markaz Constructions v. Sugra Humayun Mirza Wakf, 1996 AIHC 3325

10. Siraj-ul-Haq Khan and others v. The Sunni Central Board of Waqf, U.P and others, 1959 AIR (SC) 198

7. Since this revision has been filed against the impugned order in an unnumbered O.A., of the Waqf Tribunal, where the respondent rights has not been infringed, as the issue was whether the O.A., filed by the petitioner was maintainable before the Tribunal and also since a valuable legal question has been raised in this revision, in order to ascertain the legal position and to assist the Court, one of the standing counsel of the Tamil Nadu Waqf Board, Mr.V.Lakshminarayanan was requested to assist this Court as an Amicus. Accordingly he has appeared before this Court and has made his submissions stating that, under the old Waqf Act 1954, issue had come before the Supreme Court that, whether Waqf Tribunal or a Civil Court has got jurisdiction over tenancy or tenants of Waqf property, where the Hon'ble Supreme Court in **(2010) 8 SCC 726** in the matter of **Ramesh Gobindram through LRs v. Sugra Humayun Mirza Wakf** has held that, though the provisions of Waqf Act, especially Section 6 and 7 as well as Section 85 ousted the Civil Court jurisdiction, under

Section 6 and 7 of the Act, what has been specifically stated in those sections, only in respect of those matters, the jurisdiction of the Civil Court was ousted. Therefore the decision made by the Civil Court entertaining the suit filed can very well be accepted. While deciding the said case, according to the learned Amicus, Section 83 and 85 of the Waqf Act has been discussed widely.

8. The learned Amicus would further submit that, following the said decision of the Hon'ble Supreme Court, in the case of **Ramesh Gobindram** (*cited supra*), a Division Bench of this Court in **A.N.Kumar v. Arulmigu Arunachaleswarar Devasthanam, Thiruvannamalai & others**, reported in 2011-2-LW 1 has held as follows:

"41. The Supreme Court in a recent Judgment in **RAMESH GOBLNDRAM VS. SUGRA HUMAYUN MIRZA WAKF**, ((2010) 8 SCC 726), had occasion to deal with a similar question under the Wakf Act, 1995. While interpreting Section 85 of Wakf Act, 1995, and after detailing the Statement of Objects and Reasons and the legislative history of the Act, held that:

"The well settled rule in this regard is that the civil Courts have jurisdiction to try all suits of civil nature except those entertainment whereof is expressly or impliedly barred. The jurisdiction of civil Courts to try suits of civil nature is very expansive. Any statute shall be triable by a civil Court. Any such exception cannot be readily inferred by the Court. The Court would lean in favour of a construction that would uphold the retention of jurisdiction of Civil Courts and shift 'the onus of proof to the party that asserts that civil Court jurisdiction is ousted.'"

The Supreme Court after detailing the facts of the case extracted Section 85 of the Act which reads as under:

"85. Bar of Jurisdiction of Civil Courts: No suit or other legal proceeding shall lie in any civil Court in respect of any dispute, question or other matters relating to any wakf, wakf property, or other matters which is required by or under this Act to be determined by a Tribunal."

The Supreme Court stated that a plain reading of the above that civil Court jurisdiction is excluded only in cases where the matter in dispute is

required under the Act to be determined by the Tribunal. The Supreme Court finally answered the question holding that civil Court jurisdiction is not ousted and the ratio has been laid as under:

"The crucial question that shall have to be answered in every case where a plea regarding exclusion of the jurisdiction of the civil Court is raised, is whether the Tribunal is under the Act or the Rules required to deal with the matter sought to be brought to a civil Court. If it is not, the jurisdiction of Civil Court is not excluded."

9. The learned Amicus has also relied upon **M.K.Sulthan v. Hameed Shafi**, reported in **(2013) 3 MWN (Civil) 20**, where he relied upon the following paragraphs :

"8. On the side of the appellants/defendants 1 to 4 the following substantial questions of law have been raised for consideration:

(a) Whether the suit as framed is maintainable in view of Sec 32(2)(i) of Wakf Act, 1995?

(b) Whether the suit is not maintainable in view of Section 87 of the Wakf Act?

(c) Whether the notice issued under Section 106 of Transfer of Property Act is a valid one?

(d) Whether the suit is maintainable filed by the plaintiff either by individual capacity or as Muthavallis?

9. It is an admitted fact that the suit property is the absolute property of the Wakf mentioned in the plaint. It is also equally an admitted fact that the suit property has been leased out to the first defendant and he sub-leased some portions of the suit property to the defendants 2 to 4. The present Suit has been instituted for the reliefs of recovery of possession and also for mesne profits.

10. The Courts below have concurrently rejected the defence put forth on the side of the defendants.

11. The learned counsel appearing for the appellants/defendants 1 to 4 has tried to impinge the concurrent Judgments and decrees passed by the Courts below on the following grounds:

The plaintiffs have no locus standi to institute the present suit and further the present suit is not at all maintainable in view of Section 32(2)(i) of the Wakf Act, 1995 as well as under Section 87 of the said Act and further the termination notice issued

under Section 106 of the Transfer of Property Act is not valid. Under the said circumstances, the concurrent Judgments and decrees passed by the Courts below are liable to be interfered with.

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22. The main argument put forth on the side of the appellants/defendants 1 to 4 is that the plaintiffs as Muthavallis cannot institute the present Suit.

23. In order to dispel the contention put forth on the side of the appellants/defendants 1 to 4, the learned counsel appearing for the respondents 1 to 11/plaintiffs has befittingly drawn the attention of the Court to the decision reported in AIR 1986 Gujarat 1 (Syed Khersha Sajanshah Mutvalli, Bhuj Kutch V. The Bhuj Municipality and another), wherein the decision reported in AIR 1978 Supreme Court 1362 (Bibi Siddique Fatima Vs. Saiyed Mohammad Mahmood Hasan) has been followed. In AIR 1978 Supreme Court 1362 (Bibi Siddique Fatima Vs. Saiyed Mohammad

Mahmood Hasan), the Hon'ble Apex Court has observed as follows:

"Under the Mahomedan Law, which is a personal law, the Mutawalli has right to file a suit in respect of the ex-wakf property. This right has not been taken away by Statute. In other words, the mere fact that S.36 of the Wakf Act does not speak about the management and administration of the wakf property as one of the duties of Mutawalli, does not imply that the Mutawalli has no right to file a suit in respect of wakf property. Nor do the provisions of S.55 of the Wakf Act disentitle a Mutawalli from instituting a suit in respect of wakf property. The definition of Mutawalli u/s.3(f) of the Act presupposes that the first and foremost duty of the Mutawalli would be to manage or administer the property. The Mutawalli has to perform two types of duties, religious duties and secular duties. The religious duties may be in the nature of offering prayers, dhup etc., while secular duties would include the collection of rent, managing the property, keeping the property in good condition, preparation thereof, administering the property and if somebody encroaches upon the

wakf property then to protect those rights. Thus, the fact that S.36 does not speak about the management and administration of the property as one of the duties of Mutawalli is immaterial. One has to take into consideration the very purpose for which the Act is enacted. It is clearly in the preamble that it is an Act to provide for the better administration and supervision of wakfs. Therefore, the Legislature intended that in addition to their duties under the Personal Law there must be further statutory duties and these duties are prescribed under S.36 of the said Act. Therefore, whatever the rights or duties the Mutawalli has under the personal law cannot be said to have been taken away merely because they are not so expressly provided as duties and powers of Mutawalli under the provisions of the Wakf Act."

24. A close reading of the dictum given by the Hon'ble Apex Court, it is made clear that a Muthavalli can very well institute a Suit so as to protect interest of Wakf or its properties.

25. In (2008) 8 MLJ 365 (Bibijan and 49 others Vs. Anwarsha Idgah & Mosque Avuila Durgah,

Panruti and 70 others), this Court has dealt with similar question and ultimately found that even worshippers can file a suit to protect wakf property or property of other religious institutions. They are entitled to maintain a suit for preserving trust property or restoring the property to the trust."

26. From the conjoint reading of the decision referred to supra, it is made clear that the plaintiffs are having locus standi to institute the present Suit for the reliefs sought for therein."

10. The learned Amicus has also relied upon **Union of India v. Brigadier P.S.Gill**, reported in (2012) 4 SCC 463, for the purpose of interpretation of statutes. By relying upon the said decision, the learned Amicus has contended that, for the purpose of determination of legislative intent or object of legislation, there must be an harmonious construction that, each word in enactment must be allowed to play its role, how so ever significant or insignificant the same may be in achieving legislative intent and promoting legislative object. By relying upon these decisions, the learned Amicus has contended that, even though under Section 54 of the

Waqf Act it has been specified that the CEO of the Waqf Board can set the law in motion on his satisfaction that, there has been an encroachment of Waqf property, by issuing notice to such alleged encroacher and thereafter on his satisfaction, move an application before the Waqf Tribunal for removal of such encroachment and delivery of possession of such land or building, the said arrangement made in Section 54 is only to enable the Waqf Board through CEO to have the over all supervision of all the Waqf properties under the control of the Board, therefore it does not mean that, the Mutawalli or President of a notified Waqf, who has been elected or appointed in this regard, does not have his own role to play under the provisions of the Waqf Act as a guardian of the Waqf property to protect the same and therefore in that capacity, he can also set the law in motion for eviction of encroacher / tenant, who is in default and in occupation of the Waqf property unlawfully and for recovery of possession of the land and building of the Waqf.

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11. It is not an exclusion or specific omission of the role of Mutawalli or President of the Waqf to approach the Tribunal under Section 83 (1) and

(2) of the Act for such a relief, as has been set out above, merely because of provisions of Section 54, where the role of the Chief Executive Officer has been stated. Therefore the learned Amicus would contend that, the legislative intent is not to exclude the role of Mutawalli in protecting or guarding the Waqf property by all means as has been contemplated under various provisions of the Waqf Act, therefore approaching the Tribunal under Section 83(1) and (2) of the Waqf Act for eviction of encroacher or tenant in default is one of the legal action expected to be taken by the lessor of the Waqf, who is none other than the Mutawalli or President of the Waqf. Therefore such a duty cast up on the Mutawalli or the power vest with the Mutawalli cannot be taken away or abrogated under Section 54 of the Act, as that was not the intention of the legislature in having Section 54 in the Act and therefore the learned Amicus would contend that, the Mutawalli or President of a notified Waqf can very well maintain a OA for seeking eviction of an encroacher or a tenant under default before the Waqf Tribunal.

12. I have considered the said submissions made by the learned counsel for the revision petitioner as well as learned Amicus Curie. The materials placed before this Court has been carefully perused.

13. Before delve into the question raised in this revision, certain provisions of the Waqf Act have to be gone into.

14. Section 83 of the Act after amendment, w.e.f 01.11.2013 now stand as follows :

"83. Constitution of Tribunals, etc - The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a waqf or waqf property, eviction of a tenant or determination of rights and obligations of the lessor and the lessee of such property, under this Act and define the local limits and jurisdiction of such Tribunals.

(2) Any mutawalli, person interested in a waqf or any other person aggrieved by an order made under this Act, or rules made thereunder, may

make an application within the time specified in this Act or where no such time has been specified, within such time as may be prescribed, to the Tribunal for the determination of any dispute, question or other matter relating to the waqf."

15. Section 54 of the Act reads thus :

"54. Removal of encroachment from waqf property.—(1) Whenever the Chief Executive Officer considers whether on receiving any complaint or on his own motion that there has been an encroachment on any land, building, space or other property which is waqf property and, which has been registered as such under this Act, he shall cause to be served upon the encroacher a notice specifying the particulars of the encroachment and calling upon him to show cause before a date to be specified in such notice, as to why an order requiring him to remove the encroachment before the date so specified should not be made and shall also send a copy of such notice to the concerned mutawalli.

(2) The notice referred to in sub-section (1) shall be served in such manner as may be prescribed.

(3) If, after considering the objections, received during the period specified in the notice, and after conducting an inquiry in such manner as may be prescribed, the Chief Executive Officer is satisfied that the property in question is waqf property and that there has been an encroachment on any such waqf property, he may, make an application to the Tribunal for grant of order of eviction for removing such encroachment and deliver possession of the land, building, space or other property encroached upon to the mutawalli of the waqf.

(4) The Tribunal, upon receipt of such application from the Chief Executive Officer, for reasons to be recorded therein, make an order of eviction directing that the waqf property shall be vacated by all persons who may be in occupation thereof or any part thereof, and cause a copy of the order to be affixed on the outer door or some other conspicuous part of the waqf property :

Provided that the Tribunal may before making an order of eviction, give an opportunity of being

heard to the person against whom the application for eviction has been made by the Chief Executive Officer.

(5) If any person refused or fails to comply with the order of eviction within forty-five days from the date of affixture of the order under sub-section (2), the Chief Executive Officer or any other person duly authorised by him in this behalf may evict that person from, and take possession of, the waqf property."

16. Under Section 56 of the Waqf Act, 1995, Central Government has made a rule called Waqf Properties Lease Rules, 2014 (herein after referred to as "the Rules"). Certain provisions in the said rules are necessary to be gone into. Therefore those rules are hereby extracted :

"12. Payment and recovery of lease rent. - (1)

All amounts payable by the lessee to the lessor pursuant to the lease of waqf property shall be deemed to be lease rent and be recoverable as lease rent by the lessor who shall have all rights against the lessee for default in any payment thereof.

(2) Lease rent shall be paid to the lessor without deduction or set-off, at the address of the lessor or to such other person or at such other address, as the lessor may from time to time, designate in writing.

(3) If the lessee continues to occupy the premises after the expiration or earlier termination of the lease, the lessee shall, subject to final orders passed in any proceedings, continue to pay lease rent for the period of such unauthorised occupation.

23. Default. - (1) Each of the following events shall constitute an event of default, namely :-

- (i) all or any part of the lease rent is not paid by the lessee after it become due for such payment;
- (ii) the lessee fails to observe, perform or keep each and every of the covenants, agreements and conditions and fails to rectify or remedy the failure even after one month's notice by the lessor requiring the lessee to so remedy, correct, desist or comply;
- (iii) the lessee builds any structure on the land or building without prior sanction or approval of the Board; or

(iv) non-payment by the lessee of lease rentals or lease considerations for three consecutive months.

(2) Upon the occurrence of one or more of the events referred to in sub-rule (1), the lessor may, at its option,-

(i) be entitled to the full amount of the lease rent due and payable;

(ii) have no obligation to refund the security deposit which shall be deemed to be forfeited in favour of the Waqf.

(iii) seize and sell such goods and equipment of the lessee after obtaining an order from the Tribunal and may apply the proceeds thereof to all lease rent to which the lessor is then entitled under the lease:

Provided that any such sale may be effected by public auction or otherwise, and either in bulk or by individual item, as the lessor in its sole discretion may decide;

(iv) terminate the lease by giving one months notice and the lessee shall pay to the lessor lease rent for the unexpired portion of the term had it not been terminated.

24. Surrender of leased property on expiration or termination of lease.- (1) Upon expiration or

termination of the lease, the lessee shall immediately surrender possession of the leased premises and all leasehold improvements in substantially the condition in which the lessee is required to maintain the leased premises excepting only reasonable wear and tear, and upon surrender, all right, title, and interest of the lessee in the leased premises shall cease.

(2) If after the expiration or termination of the lease, the lessee continues to occupy the leased premises, it shall be treated as an encroachment and such encroachment shall be removed in accordance with the procedure specified in Section 54 of the Act.

(3) The lessor may remove and sell or otherwise dispose of any leasehold improvements, equipment or any other property of the lessee left on the leased premises by the lessee after the termination of the lease, in accordance with the procedure specified in Section 55-A of the Act."

17. Section 3 (ee) under definition clause reads thus :

"(ee) "encroacher" means any person or institution,

public or private, occupying waqf property, in whole or part, without the authority of law and includes a person whose tenancy, lease or licence has expired or has been terminated by mutawalli or the Board."

18. With these tools of various sections of the Act as well as the rules referred to above, the Tribunal has approached the present issue and has decided that under Rule 23 and 24, a tenant who has been in default and whose lease is terminated or expired automatically would become an encroacher and if he become an encroacher, certainly he has to be dealt with only under Rule 24(2), where it is specifically contemplated that such an encroachment shall be removed in accordance with the procedure specified in Section 54 of the Act. It has been specified that it should be dealt with as per the procedure under Section 54 of the Act, since Section 54 contemplates that CEO of the Board either on his own motion or any complaint that there has been an encroachment of any land or building of Waqf property, he has to issue a notice to the encroacher and seek his objections and after considering the objections if any filed by the encroacher

and if he is satisfied that the property in question is a Waqf property and there has been an encroachment of such property, he may make an application to the Tribunal for grant of order of eviction for removing such encroachment and delivery of possession of the land or building.

19. The Tribunal having taken note of these provisions, especially in the context of Rule 24(2) and Section 54 of the Act, has come to a conclusion that, in the present case in hand, the respondent being a defaulted tenant and whose lease since claimed to have been terminated by the petitioner, as per the said clause of the rule, the respondent become an encroacher and once he becomes an encroacher, he has to be dealt with, for his eviction, only as contemplated under Section 54 of the Act and under Section 54 only the CEO has been empowered to set the law in motion by approaching the Tribunal for eviction, hence the present attempt made by the President of the Waqf, i.e., the petitioner in his capacity as such by filing the present O.A., before the Tribunal is not maintainable and accordingly, the Tribunal has rejected the said O.A., through the impugned order at the admission stage without even numbering for want of maintainability.

20. In this context, if we look at the scheme of the Act, under Section 6 and 7, what are all the disputes regarding Waqfs and the power of the Tribunal constituted in this regard to determine such disputes regarding Waqfs has been contemplated.

21. The Tribunal is constituted under Section 83 of the Act which has already been extracted. Section 83 (1) of the Act before amendment, i.e., before 01.11.2013, stood as, "the State Government shall, by notification in the official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter related to a Waqf or Waqf property under this Act and define the local limits and jurisdiction under this Act of each of such Tribunals". The said Section stood amended w.e.f. 01.11.2013. After the amendment, the amended provision of Section 83(1) as has been extracted above reads with the words "relating to a Waqf or Waqf property, eviction of a tenant or determination of rights and obligations of the lessor and lessee of such property".

22. Therefore the words "eviction of a tenant" and the words "determination of rights and obligations of the lessor and lessee of such property" had been the new insertions in the amended provisions of Section 83(1), thereby the legislature has expanded the jurisdiction of the Waqf Tribunal to decide not only the dispute or question or matter relating to the Waqf or Waqf property but also specifically the dispute with regard to the eviction of tenant and also the determination of rights and obligations of the lessor and lessee.

23. Therefore definitely the scope of Waqf Tribunal has been expanded by the said amendment. In this context, since the rules have been very much relied upon by the Tribunal while rejecting the O.A., through the impugned order, the relevant rules as has been extracted herein above are to be dealt with.

24. Under Rule 12, the lessor is entitled to recover the rent payable by the tenant and the words used in Rule 12 also speaks about "the default in any payment thereof". Therefore not only recovering the rent from the

lessee but also in case of default of payment of rent, that shall also be dealt with only by the lessor.

25. In this context, if we look at Rule 23 under the heading "Default" it speaks about what are all the events which constitute the default. There are four such events and if any one such event taken place or happened, the lessor has got his options which includes to terminate the lease by giving one month notice and the lessee shall pay to the lessor lease rent for the unexpired portion of the term had it not been terminated. Once the lease is terminated under Rule 23, then what shall be the aftermath has been stated in Rule 24, where Rule 24(2) states that, after the expiration or termination of the lease and still the lessee continues to occupy the leased out premises, then it shall be treated as an encroachment. Once it is treated as an encroachment within the meaning of Rule 24(2) such encroachment shall be removed in accordance with the procedure specified in Section 54 of the Act.

26. Only in these circumstances or context, the Tribunal seems to have been in the opinion that, in view of the stand taken by the revision petitioner that the lease has already been terminated or expired and therefore the respondent was directed to vacate and hand over the vacant possession and still since the respondent is continuing in occupation of the petition property, then the respondent, within the meaning of Rule 24(2) as referred to above, shall be treated only as encroacher and in that case, such encroacher shall be removed only in accordance with the procedure specified in Section 54 of the Act, accordingly, the CEO of the Waqf Board alone can set the law in motion by his own action of determining whether there has been an encroachment in the Waqf property and in case he satisfies, he can approach the Tribunal and not by Mutawalli or President of the Waqf.

27. Therefore the exact controversy in the present revision is as to whether the CEO of the Waqf Board alone is entitled to set the law in motion by approaching the Tribunal under Section 54 of the Act for eviction of the tenant in default / encroacher, or a Mutawalli or President in the

capacity of a lessor of a notified Waqf, whose property is in occupation or encroachment, can also set the law in motion or approach the Tribunal by filing appropriate application for eviction of the tenant in default / encroacher.

28. In this context it is to be noted that, when the Mutawalli is appointed or elected to maintain a Waqf property, he is entrusted with certain duties as contemplated under Section 50 of the Act. Section 50 of the Act reads thus :

"50. Duties of Mutawalli - It shall be the duty of every mutawalli, -

- (a) to carry out the directions of the Board in accordance with the provisions of this Act or of any rule or order made thereunder;
- (b) to furnish such returns and supply such information or particulars as may from time to time be required by the Board in accordance with the provisions of this Act or of any rule or order made thereunder;
- (c) to allow inspection of waqf properties, accounts or records or deeds and documents relating thereto;

- (d) to discharge all public dues; and
- (e) to do any other act which he is lawfully required to do by or under this Act."

29. One of the duty cast upon the Mutawalli in the aforesaid section is to do any other act which is lawfully required to do by or under this Act. Since the Mutawalli has been placed as the guardian or custodian of the Waqf property concerned during the period of Mutawalliship and periodically he has to make returns and supply of information to the Waqf Board and also he has to carry out the directions of the Board in accordance with the provisions of the Act, the role of Mutawalli, in so far as the protection and development of Waqf property concerned, is not denuded or limited only as a puppet or titular head of the Waqf concerned.

30. In every state there shall be a Waqf Board to be constituted or incorporated under Section 13 of the Act. Therefore what are all the Waqf properties as notified and registered under the Act are all come under the jurisdiction and overall supervision of the Waqf Board concerned. Therefore certainly there would be a many number of notified and registered

Waqfs and under these Waqfs, lot of property such as land and building would be available. In so far as the immovable properties are concerned, how those properties shall be dealt with has been specifically made under Section 56 of the Act under the heading "Restriction on power to grant lease of waqf property". Under Section 56, Central Government has been empowered to make rules, accordingly, the rules as stated above has been made by the Central Government, where exhaustive procedure has been contemplated as to how Waqf properties have to be dealt with by way of lease. Once the lessee become defaulter how such defaulters shall be dealt with by the lessor has been contemplated under Rule 23, which has already been discussed.

31. If a lease is terminated by the lessor because of the default under Rule 23, the lessee shall surrender the leased out property on such termination, if further default, i.e., not surrendering the leased out property, then such a lessee shall only be treated as an encroacher and he shall be removed in accordance with the procedure specified in Section 54 of the Act.

32. If we look at Section 54, a procedure has been contemplated, under which, CEO of the Waqf Board has to act upon and ultimately under Section 54(3), if the CEO is satisfied that the property in question is a Waqf property and there has been an encroachment on any such Waqf property, he may make an application to the Tribunal for grant of order of eviction for removing such encroachment and deliver possession of the land and building.

33. The CEO has been empowered to make an application to the Tribunal for eviction of such encroachment. Therefore it does not contemplate that, in each and every such encroachment or overstaying of the lessee, whose lease has been expired or terminated, that the CEO shall make an application for eviction of encroachment. Therefore the legislative intent here is to empower the CEO to have the over all control of the Waqf properties from being exploited by way of encroachment. Therefore a separate procedure is contemplated under Section 54, under which in the first phase, CEO himself has to act upon by issuing notice to the encroacher seeking his objections and thereafter on his satisfaction, he can file an application to the Tribunal.

34. The aforesaid procedure under Section 54 cannot denude the power and duty cast upon the Mutawalli or President of the notified Waqf to protect the Waqf property by taking all effective steps which includes filing an application before the Tribunal under Section 83(1) of the Act for eviction of tenant at default / encroacher.

35. This legislative intent is obvious because, prior to the amendment, the word "eviction of tenant or determination of rights and obligations of the lessor and the lessee of such property" had not been there in Section 83(1) of the Act, where as, only after amendment w.e.f 01.11.2013, these words had been specifically included in that section, thereby the scope and jurisdiction of the Tribunal has been enlarged.

36. Sub-section 2 of Section 83 makes it clear that, any Mutawalli, person interested in a Waqf or any other person aggrieved by an order made under this Act or rules made thereunder may make an application to the Tribunal within the specified period, for the determination of any dispute, question or other matter relating to the Waqf.

37. Therefore a general power has been given or rights have been conferred either on Mutawalli or a person interested in a Waqf or any other person aggrieved by any order made under the Act or the rules to make an application to the Tribunal under Section 83(2) of the Act.

38. When that being the position, we cannot construe a dichotomy of the person who set the law in motion under Section 83(1) and 83(2) of the Act by stating that under Section 83(2) any one can set the law in motion including a Mutawalli or person interested or person aggrieved to, however under Section 83(1) for eviction of a tenant, only the CEO of the Board alone can set the law in motion as per the procedure contemplated under Section 54 of the Act.

39. If such a construction is made, that would defeat the legislative object and intention in this regard, particularly in the context of the amendment made from 01.11.2013 by Act 27 of 2013 in Section 83(1) of the Act.

40. Moreover the Judgments cited by the learned counsel appearing for the revision petitioner as well as the Amicus, by and large have given the legal principle, that even under the old Waqf Act as well as the 1995 Act, though the Civil Courts jurisdiction has been ousted for the purpose of eviction, once the suit is filed before the Civil Court and the same is entertained, nothing wrong in rendering decision by the Civil Court in such matters related to a Waqf property unmindful of the ousting of the Civil Courts jurisdiction under Section 85 of the Act.

41. In **1986 AIR Gujarat 1**, in the matter of **Syed Khersha Sajanshah Mutavalli v. Bhuj Municipality**, the question framed by the learned Judge of the Gujarat High Court is as follows :

"1. The present Second Appeal is filed by the original plaintiff. In this appeal the following two substantial questions of law are formulated.

(1) Whether on the facts and in the circumstances of the case and having regard to the true legal position, the lower Appellate Court was right in law in holding that the appellant being merely a mutawalli had no right to file the present suit?"

2...

The answer is at paras 17 and 18, which reads thus :

"17. In the case of Hashim Husain v. Ahmad Raza reported in AIR 1974 All 305, the Division Bench of the Allahabad High Court after referring to various authorities like Tyabji's Muslim Law on the point in para 24 has observed as under: -

"Although it is true that a mutawalli is not a trustee within the meaning of the Act, or as understood either generally or under the Indian Trusts Act, but the nature of the duties which he is required to perform are more or less the same. A mutawalli stands in fiduciary relationship and it, is against the interest of society in general that such relationship should be allowed to be terminated unilaterally."

Thus it is clear from the above judgments and particularly (1878-79) ILR 3 Born 84 that Mutawalli can file a suit in respect of the wakf property. In that view of the matter, it is not necessary to examine the other authorities cited at the Bar.

18. It is, therefore, clear that under the Mahomendan Law, which is a personal law, the

Mutwalli has right to file a suit in respect of the wakf property. Now Mr. Y. S. Mankad submits that Section 36 of the Wakf Act, 1954 prescribes the duties of Mutawalli and, therefore, it does not fall under Section 36 or other relevant provisions of the Act, Mutawalli cannot file a suit and one cannot rely on the Mahomadan personal law when there is a statute enacted on the subject. It is true that Section 36 speaks about the duties of Mutawallis. They are as under: -

- (a) to carry out the directions of the Board;
- (b) to furnish such returns and supply such information or particulars as may from time to time be required by the Board;
- (c) to allow inspection of wakf properties, accounts or records or deeds and documents relating thereto;
- (d) to discharge all public dues; and
- (e) to do any other act which he is lawfully required to do by or under this Act.

At this juncture when the word "Mutawalli" is used in Section 36 it would be necessary to read the definition of the word "Mutawalli" as given in

the said Act. It is Section 3(f), which runs as under: -

"3(f). "mutawalli" means any person appointed either verbally or under any deed or instrument by which a wakf has been created or by a competent authority to be the mutawalli of a wakf and includes any naib-mutawalli khadim, mujawar, sajjadanasin, amin or other person appointed by a mutawalli to perform the duties of a mutawalli and, save as otherwise provided in this Act, any person or Committee for the time being managing or administering any wakf property as such."

From reading the said definition it is clear that it not only means any person appointed under instrument of wakf or verbally but it would also include khadim, mujawar, sajjadanasin and except or otherwise provided in the Act any person or committee for the time being managing or administering any wakf property as such. Therefore, on the date on which this Act came into force when any person was de facto managing or administering the property, was also included as Mutawalli. Therefore, the definition presupposes that the first and foremost duty of the Mutawalli would be to manage or administer the

property. The Mutawalli has to perform two types of duties: religious duties and secular duties. The religious duties may be in the nature of offering prayers, dhup, etc. while secular duties would include the collection of rent, managing the property, keeping the property in good condition, preparation thereof, administering the property and if somebody encroaches upon the wakf property then to protect those rights. It is pertinent to note that Section 36 does not speak about the management and administration of the property as one of the duties of Mutawalli. We have to take into consideration the very purpose for which the Act is enacted. It is clearly in the preamble that it is an Act to, provide for the better administration and supervision of wakfs. Therefore, the Legislature intended that in addition to their duties under the Personal Law there must be further statutory duties and those duties are prescribed under S.36 of the said Act. Therefore, whatever the rights or duties the Mutawalli has under the personal law cannot be said to have been taken away merely because they are not so expressly provided as duties and powers of Mutawalli under the provisions of the Wakf Act."

42. In **2013 (3) MWN Civil 20** in M.K.Sulthan's case (cited supra), the issue was whether the Mutawalli can institute the suit. The learned Judge of this Court in the said Judgment, after having taken into account the 1986 AIR (Gujarat) 1 referred to above as well as AIR (1978) SC 1362, has held that, Mutawalli can maintain the suit and the relevant portion of the said Judgment has already been extracted herein above.

43. Like that in 2011 (2) LW 1, a Division Bench of this Court, following the Ramesh Gobindram case (2010) 8 SCC 726, has taken the similar view.

44. That apart, in yet another Judgment from the Andhra Pradesh High Court, where a Division Bench in the matter of **A.S.Abdul Khader Wakf v. Saber Miah**, reported in **(2003) AIR AP 528**, has framed the following substantial question of law in a second appeal.

"20. The substantial questions of law which arise for consideration in these Second Appeals are :

1. Whether the view taken by the appellate Court

that the suit is not maintainable, is sustainable in law ?

2. Whether a Mutawalli can maintain the suit for eviction and for recovery of mesne profits or damages for use and occupation ?

3. Whether a managing Mutawalli or a joint Mutawalli can maintain a suit ? If so, under what circumstances ?

and it has been held as follows :

21... It is pertinent to note that the appellate Court had reversed the judgments and decrees of the Court of first instance on the ground of the maintainability of the suits since those were not instituted by the Wakf Board, but they were instituted by the managing Mutawalli. Suffice for us to state that the Mutawalli who is the person in-charge of the affairs of the Wakf in relation to supervision and management and who is normally interested in the Maintenance and management of the Wakf and the Wakf properties, in the interest of the Institution, can definitely maintain a suit for eviction, recovery of mesne profits or damages for use and occupation.

"25. In the present case, the managing Mutawalli

who is interested in safeguarding the interests of the Wakf and its properties had instituted the suits praying for appropriate reliefs. It is also pertinent to note that the managing Mutawalli is permitted to institute these suits by the Wakf Board as evidenced by Ex. A-4. A Mutawalli is a person who will manage and supervise, the Wakf properties. In view of the R.C. Rev. 377/2011 11 | P a g e same, it cannot be said that a Mutawalli cannot maintain a suit in relation to Wakf property at all and the Wakf Board alone should institute the suit. Hence, we are of the considered opinion that a Mutawalli can definitely institute a suit for recovery of possession of the Wakf property from tenants and also for appropriate reliefs.

26. ...

27. The position of a Mutawalli is just akin to a Trustee. It is no doubt true that a Mutawalli cannot act adverse to the interests of the Wakf. A Mutawalli is expected to administer and manage the properties of the Wakf keeping in view the wishes of the founder and a Mutawalli is expected to protect the interest of the beneficiaries as well. When there are more than one Mutawallis, we are

also of the opinion that one of the Mutawallis can definitely maintain a suit representing the other Mutawallis as well unless there is conflict of interest otherwise. A co-owner can definitely maintain, a suit for the relief of eviction and even in the case of Mutawallis, when there are more than one Mutawalli, one such joint Mutawalli can definitely maintain a suit. The principle applicable in the case of a co-owner in this regard can be extended even in the case of Mutawallis...."

45. Apart from these Judgments, though number of decisions have been referred by the learned counsel appearing for the revision petitioner, most of the said Judgments are related to the issue, whether a Civil Court has got jurisdiction to entertain the suit, despite the bar in the provisions of the Waqf Act and other related issues. Because those issue is not substantially in issue in the present case, as here, it is the only issue as to whether the Mutawalli or President of the Waqf like the President / petitioner instead of CEO of the Waqf Board as contemplated under Section 54 of the Act can approach the Tribunal seeking for an order of eviction of a

tenant in default / encroacher or not ?

46. The aforesaid Judgments which have been specifically referred to and have been discussed herein above, almost taken a view that, the role of a Mutawalli in so far as the notified and registered Waqf is concerned is paramount and important and the importance of the role of Mutawalli or President of the notified Waqf cannot be taken away abruptly or completely merely because of the procedure contemplated under Section 54 of the Act, in so far as it relates to seeking eviction of the tenant in default / encroacher.

47. When that being the position, I am of the considered view that, the decision taken by the Tribunal through the impugned order to state that, the OA filed by the revision petitioner is not maintainable because it was filed by the President / Mutawalli of the Waqf and not by the CEO as contemplated under Section 54 of the Waqf Act, is an erroneous view or decision, therefore it requires interference.

48. It is pertinent to be noted herein that, during the period where this

Judgment has been reserved by this Court, a Division Bench of the Kerala High Court by a decision, dated 07.02.2020 in the matter of **Mechery Vijayakumar v. Kinnasseri Yatheem Khana** reported in **CDJ 2020 Kerala HC 158**, has exactly answered to the issue. In that case, almost of similar facts, the petitioner therein in a similar revision petition, had raised a question as to whether the property therein was a Waqf property or not. The Division Bench after having considered various aspects of the case, has ultimately decided that the property was a Waqf property and also incidentally decided the question as to whether the petitioner therein who was considered to be an encroacher can be evicted by setting the law in motion by a Mutawalli of the Waqf and in this regard, as contemplated under Section 54 of the Act, whether the CEO alone was empowered to do the same also has been considered and decided. The relevant portion of the order of the Division Bench of the Kerala High Court cited supra are usefully referred to herein :

"26. On going through the impugned judgment of the Waqf Tribunal, we could notice that, while arriving at a finding that the Waqf Tribunal has jurisdiction, it relied on Rules 23 and 24 of the

Waqf Properties Lease Rules, 2014, to hold that the suit for eviction and arrears of rent are matters provided by the scheme of the Act and Rules. Rule 23 provides for determination of the liability of the tenant who defaults payment of the agreed rent, while Rule 24 provides for adjudication of liability of a tenant for surrender of the tenanted premises on termination of lease. Rule 24(2) provides as hereunder:

Looking at Section 54(4) of the Act, it could be seen that the exercise of power of the Tribunal to order eviction of Waqf property in the occupation of the tenant could arise only on the motion of the Chief Executive Officer of the Board, who is to, first of all, satisfy himself that the person liable for eviction from the tenanted premises is an encroacher. Under Section 3(ee) of the Waqf Act, a tenant who continues to occupy the tenanted premises after termination of tenancy is also an 'encroacher'. Therefore, it may prima facie appear

that jurisdiction of Waqf Tribunal to entertain a suit for eviction could accrue only on the application of the Chief Executive Officer of the Waqf Board. If this is accepted as the correct position of law, the present suit for eviction brought at the instance of the Mutawalli of Kinasseri Yatheem Khana cannot be said to be instituted in accordance with the provisions under Section 85 of the Act.

27. But we are of the opinion that neither the Wakf Act nor the Rules 2014, prohibit a Mutawalli from suing for eviction and arrears of rent, since none of the provisions aforesaid either expressly or impliedly debars the Mutawalli of a Waqf from approaching the Waqf Tribunal with a civil suit seeking the aforesaid reliefs. Section 54(4) read with Rules 23 and 24 of Waqf Properties Lease Rules, 2014, only provides for one of the legal modes of eviction of tenant from the premises and recovery of arrears of rent through the Chief Executive Officer. Existence of such an alternative mode of legal proceeding prescribed by the Act and the Rules is no legal bar to a Mutawalli of a Waqf bringing a suit for

eviction and arrears of rent by himself before the Tribunal. Right of a lessor under Transfer of Property Act, 1882 to sue for eviction of tenant with arrears of rent is neither impaired nor abrogated by the scheme of the Waqf Act. Mutawalli being a person who creates lease and entitled to receive the rent, is in the position of a lessor, having regard to the provisions of Transfer of Property Act. The right of a lessor to sue for eviction and arrears of rent under the general law is indefeasible and is honoured and preserved by Sections 83 and 85 of the Act. Therefore, we hold that the Waqf Tribunal has rightly entertained the present suit for eviction and arrears of rent filed by the Mutawalli representing the plaintiff."

49. I am in respectful agreement with the said view taken by the Kerala High Court. Unless such view is taken it will lead to an anarchy where the legislative intent, especially in the context of amendment made in Section 83(1) of the Act would get defeated. Moreover the word "may" used in Section 54(3) of the Act also to be taken note of and it should be considered that, the CEO of the Waqf Board also under the route or

procedure contemplated under Section 54 can take effective steps to evict the tenant in default or the encroacher of any Waqf property either on complaint or on his own motion, apart from the protective action to be taken by the concerned Mutawalli or President of the Waqf concerned by directly approaching the Tribunal under Section 83(1) and (2) of the Act, seeking for eviction of such tenant in default / encroacher. The locus, therefore, of the Mutawalli or President of the notified Waqf in approaching the Tribunal for seeking eviction of the tenant in default / encroacher has not been taken away or denuded merely because of different procedure as has been contemplated under Section 54 of the Act, where the CEO has been empowered to do the eviction procedure as provided therein.

50. Therefore I am of the considered view that, the reasoning given by the learned Tribunal in the impugned order by rejecting the application filed by the revision petitioner as not maintainable, cannot be sustained under the legal scrutiny, therefore the said order is liable to be set aside and accordingly is set aside.

51. Resultantly this Civil Revision Petition is allowed and the Tribunal is directed to entertain the O.A.Sr.No.175 of 2019 filed by the revision petitioner and decide the same on merits and in accordance with law. However, there shall be no order as to costs.

08.05.2020

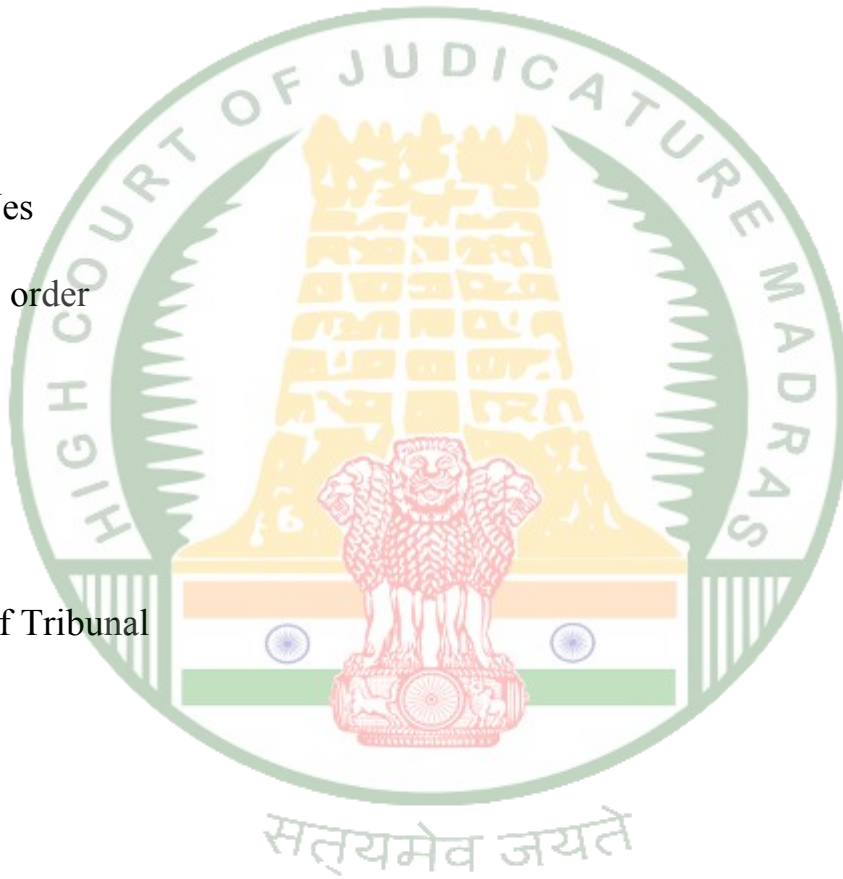
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Speaking order

tsvn

To

The Waqf Tribunal
Chennai.



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C.R.P.No.3723 of 2019

R.SURESH KUMAR, J.

tsvn



**Order in
C.R.P.(PD).No.3723 of 2019**

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08.05.2020