



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 11.11.2019
PRONOUNCED ON: 30.06.2020
CORAM

THE HONOURABLE MRS. JUSTICE NISHA BANU

Second Appeal (MD) Nos.1021 of 2007 and 197 of 2008

and

M.P. (MD).Nos.1 and 2 of 2007 and 1 of 2013 and C.M.P. (MD).No.4770 of 2016 in S.A. (MD).No.1021 of 2007

and

Civil Revision Petition (MD).No.894 of 2007

and

M.P. (MD).No.1 of 2008

and

Contempt Petition (MD).No.23 of 2008

S.A. (MD).Nos.1021 of 2007 and 197 of 2008:

Jamaiyathu Ahlil Quaran Val Hadhees,
represented by its President S.Kamaludeen Madani,
S/o.Janab Shahul Hameeth,
105, Eadalakudi, Santhi Street,
Kottar, Nagercoil,
Kanyakumari District.

.. Appellant in both the appeals/
1st respondent / 1st defendant

Vs.

1.Almajithul Mubarak Pallivasal,
at Kadayanallur Main Bazaar,
represented by its Administrative
Committee President Shiek Uthuman,
97, Kalamathar Masthan Street,
Kadayanallur.

... 1st respondent /
Appellant / Plaintiff

2.Jamaiyathu Ahlil Quran Val Hadhees,
represented by its District Secretary,
Kovai Aayub,
105, Eadalakudi, Santhi Street,
Kottar, Nagercoil,
Kanyakumari District.

3.K.S.Rahamathulla Imthagi

4.K.S.Abdulla Umari

5.K.Mohamed Ismail Noor

6.E.K.M.S.Bhava



7.S.Allah Pichai

8.S.S.U.Sekana

9.K.M.Abdul Nazeer

... Respondents 2 to 9/
Respondents 2 to 9/Defendants 2 to 9

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COMMON PRAYER: Second Appeals filed under Section 100 of the Civil Procedure Code, against the judgment and decree, dated 31.10.2007, passed in A.S.No.46 of 2007 and Cross Objection No.46 of 2007 by the Principal Subordinate Judge, Tenkasi, reversing the judgment and decree, dated 03.07.2007, passed in O.S.No.167 of 2006 by the Principal District Munsif, Tenkasi.

For appellant in both
the appeals ... Mr.M.Ajmal Khan,
Senior Counsel for
for M/s.Ajmal Associates

For respondents 1, 6 to 9 in
S.A.(MD).No.1021 of 2007 &
1st respondent in S.A.(MD).No.
197 of 2008 ... Mr.G.Prabhu Rajadurai

For 3rd respondent in
S.A.(MD).No.1021 of 2007 ... Mr.S.E.Monica Vincent
For 3rd respondent in
S.A.(MD).No.197 of 2008 ... Mr.A.Nawazkhan

For 4th respondent in
S.A.(MD).No.1021/2007 Mr.T.Palanisamy

For respondent Nos.2 & 5
in S.A.(MD).No.1021/2007 ... No appearance

For respondent Nos.4 to 9 in
S.A.(MD).No.197 of 2008 ... No appearance

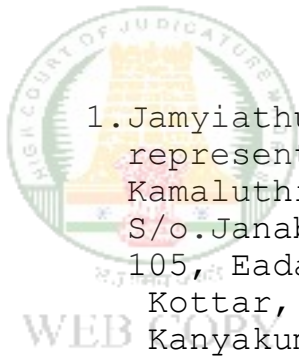
C.R.P. (MD) .No.894 of 2007:

1.V.K.Masood

2.M.S.Sheik Uthuman ... Petitioners/Plaintiffs

(Petitioners on their behalf and on behalf of Kadayanallur
Main Bazaar Almajithul Mubarak Pallivasal & Members of
Pallivasal)

Vs.



- 1.Jamyiathu Ahilil Quron Val Hathis
represented by its State President,
Kamaluthin Mathani,
S/o.Janab Shahul Hameeth,
105, Eadalakudi, Santhi Street,
Kottar, Nagaercoil,
Kanyakumari District.
- 2.Kadayanallur Almajithul Mubarak Pallivasal
represented by Administrative Committee,
President Sheik Uthuman,
S/o.Abdul Kathar,
97, Kalanthar Musthan Street,
Kadayanallur.
- 3.E.K.M.S.Pavaa
- 4.S.Allapitchai
- 5.S.S.U.Shegana

... Respondents /
Defendants

PRAYER: This Civil Revision Petition has been filed by the petitioner under Article 227 of the Constitution of India, against the judgment and decree dated 10.01.2007 passed in O.S.No.83 of 2006 by the Principal Subordinate Judge (Wakf Tribunal), Tirunelveli.

For petitioner Mr.M.Vishnu Varthanan

For 1st respondent ... Mr.M.Ajmal Khan,
Senior Counsel for
for M/s.Ajmal Associates

For 2nd respondent ... Mr.G.Prabhu Rajadurai

For respondents 3 to 5... No appearance

Contempt Petition (MD) No.23 of 2008

Jamaiyathu Ahilil Quaran Val Hadhees,
represented by its President S.Kamaludeen Madani,
S/o.Janab Shahul Hameeth,
105, Eadalakudi, Santhi Street,
Kottar, Nagercoil,
Kanyakumari District.

.. Petitioner /Petitioner

Vs.

- 1.Almajithul Mubarak Pallivasal,
at Kadayanallur Main Bazaar,
represented by its Administrative
Committee President Shiek Uthuman,
97, Kalamathar Masthan Street,
Kadayanallur.



2.E.K.M.S.Bhava

3.S.Allah Pichai

4.S.S.U.Sekana

5.K.M.Abdul Nazeer

... Respondents /
Contemnors

PRAYER: This contempt petition has been filed by the petitioner under Section 11 of the Contempt of Courts Act praying to punish the respondents for their wilful disobedience of the order dated 20.11.2007 passed in M.P.No.1 of 2007 in S.A.No.1021 of 2007 by this Court.

For petitioner Mr.M.Ajmal Khan,
Senior Counsel for
for M/s.Ajmal Associates

For 1st respondent ... Mr.G.Prabhu Rajadurai

For respondents 2 to 5 No appearance

COMMON JUDGMENT

Both the second appeals have been filed by the appellant/first defendant against the judgment and decree passed in A.S.No.46 of 2007 and Cross Objection No.46 of 2007, reversing the judgment and decree passed in O.S.No.167 of 2006.

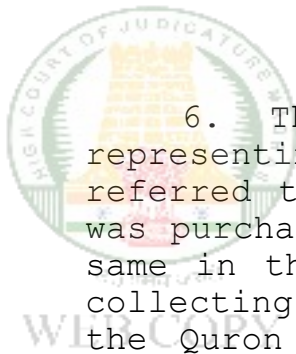
2. The contempt petition has been filed by the appellant/first defendant in S.A.(MD).No.1021 of 2007 against the plaintiff and the defendants 6 to 9 therein for disobeying the interim order of suspension granted by this Court.

3. The Civil Revision Petition has been filed by the petitioners/plaintiffs aggrieved by the judgment and decree passed by the trial Court in O.S.No.83 of 2006 in respect of the disallowed portion.

4. As the issues involved in all the cases are interrelated to each other, they heard together and are disposed of by way of this common judgment. Let us now first discuss the Civil Revision petition.

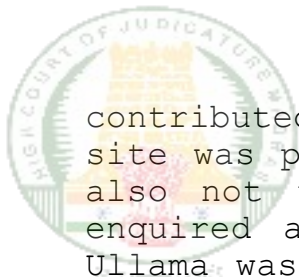
Civil Revision Petition :

5. For better appreciation and understanding, the parties are referred to as per their rank in the suit.



6. The case of the plaintiffs, who are stated to be representing the members Almajithul Mubarak Mosque (hereinafter referred to as " the Mosque") is that the suit schedule property was purchased in the year 1989 and a mosque was constructed in the same in the year 1994 for the welfare of Kadayanallur Muslims, by collecting subscriptions from the members who are having faith in the Quron and Hathis, and by inviting donations from the public through a monthly magazines. Thus, the said Mosque was dedicated as Public Wakf. The subscribing members of the Mosque have been electing the Administrative Committee from among themselves to manage the Mosque and at present Mr.Sheik Uthuman is elected as President of the Administrative Committee. The plaintiffs has been using the Mosque for offering prayer and participating in the activities of educating the Arabic language, keeping Islamic Library, etc. When a dispute arose with regard to the title over the suit schedule Mosque and administration between the first and second defendants, as per the bye-law of the first defendant, they approached Tamil Nadu Jamathul Ulama and on 12.02.1995, Tamil Nadu Jamathul Ulama had passed an order that the suit Mosque must be managed by the Kadayanalloor Muslims, who are following Quron and Hathis. Thereafter, the first defendant did not interfere in the administration of the second defendant. During the month of February, 2006, a serious dispute arose between the first and second defendants, due to which the Mosque was not opened for offering prayer. After several Peace Committee meetings, the Revenue Divisional Officer had passed an order on 23.03.2006 to the effect that till the right is decided by the District Munsif Court at Tenkasi, administration must be continued by the second defendant in the same position as before the dispute arose. Because of this dispute, the plaintiffs are not in a position to offer their prayer in the Mosque as usual and they are forced to offer their prayer in the open terrace of next building and the Arabic language was taught to the children in the verandah of neighbouring building. The Wakf property has not been properly maintained. When the plaintiffs demanded the defendants to permit them to maintain the Mosque and to carry on the Wakf activities, there is no response from them. No body can prevent the plaintiffs from offering prayer in the Mosque and to carry on the Wakf activities. The members are about 2000. Since they cannot join together to file the suit, the plaintiffs have filed the suit in the representative capacity for declaration that the plaintiffs are entitled to offer prayer in the suit schedule property and to participate in the Wakf activities carried on in the suit schedule property and for consequential injunction to restrain the defendants from interfering with the plaintiffs' right to offer prayer and their act in participating in the Wakf charitable activities carried on in the suit schedule property.

7. The case of the first defendant/Jamaiyathu Ahlil Quran Val Hadhees (JAQH), is that the first defendant is a registered society and it purchased the suit property and it belonged to the first defendant. The contention that "the Kadayanallur Muslims had



contributed and out of such contributions only, the suit schedule site was purchased and mosque was constructed" is not true. It is also not true to state that the Tamil Nadu Jamathul Ullama had enquired and had given a finding on 12.02.1995, as the Jamathul Ullama was not in existence during that period. The plaintiffs, at the instigation of the second defendant, had interfered with the peaceful prayer offered in the Mosque. There was no dedication of the suit property as Wakf. The Wakf Act, 1995 will apply only to a registered and notified Wakf. When the suit property is claimed as Wakf Property, the Wakfs Board is a necessary party. Donations have been obtained only from the members and not from the Public. On 11.02.2006, since the plaintiff and their men had removed an inscription on a stone mentioning the name of the first defendant, a dispute arose and it was complained to the Revenue Divisional Officer. In a Peace Committee Meeting, it was decided to maintain *status quo* prior to 12.02.2006. In the sale deed registered in respect of the suit property, Sheik Uthuman had attested and in such circumstances, he prayed to dismiss the suit.

8. The case of the second defendant / Mosque represented by Administrative Committee's President by name Sheik Uthuman is that the suit schedule site was purchased in the year 1989 and Mosque was constructed in the year 1994 by using the funds and donations collected from the public and persons who were having faith in Quron and Hathis. In the year 1989, it was decided by the plaintiffs to purchase the suit site in the name of the first defendant. The first defendant is not having any administrative control over the suit property. Even if they were having any right, it was extinguished on 14.02.2006 because of the decision of the Tamil Nadu Jamathul Ulama. On 23.03.2006 the Revenue Divisional Officer had passed an order to continue the administration of mosque as on the date. The second defendant had filed a suit in O.S.No.167 of 2006 before the Principal District Munsif Court, Tenkasi praying for injunction to restrain the first defendant from interfering with the administration of the 2nd defendant and it is pending. The second defendant was not responsible for not opening the Mosque. The first defendant is an unnecessary party in this case. The second defendant never prevented the prayer in the Mosque. The second defendant is ready to obey any direction that would be passed by the Court.

9. The defendants 3 to 5 have stated that the management of the Mosque is still with the second defendant and the first defendant is not at all having any right over the suit property. The defendants 3 to 5 are admitting the claim of the plaintiffs. They are ready to obey any direction that would be issued by the Court. Thus, they prayed to decree the suit.

10. On the side of the plaintiffs, the first plaintiff himself was examined as PW1 and Exs.A1 to A6 were marked and on the side of the defendants, one witness was examined as DW1 and Exs.B1 to B27

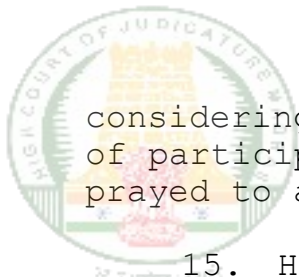


11. The Wakf Tribunal, after considering the oral and documentary evidence, has held that the prayer hall in the suit property is a Wakf property and thereby declared that the plaintiffs are entitled to offer prayer alone in the prayer hall situated in the suit schedule property as long as they accept the byelaw of the first defendant and granted the relief of consequential injunction. However, the trial Court negatived the reliefs of declaration that the plaintiffs are entitled to participate in the Wakf activities in the suit schedule property and consequential injunction in respect of that declaration, thereby decreed the suit in part. Aggrieved by the disallowed portion, the plaintiffs have filed the present Civil Revision Petition.

12. The learned counsel for the plaintiffs / revision petitioners submitted that overlooking the public contributions made by the residents of Kadayanallur Village and the activities relating to the Mosque, which has been administering by the 2nd respondent along with the members of the Mosque, the Tribunal has erroneously held that except the prayer hall, the other adjuncts in the suit property belonged to the first defendant. Having found that the schedule mentioned property has been purchased and constructed by the contributions of the public, the entire suit property ought to have been declared as a Wakf property by the Tribunal. As the plaintiffs are only members of the Mosque, the Tribunal ought to have granted the relief of declaration that the plaintiffs are entitled to participate in the Wakf activities also. But, the Tribunal has failed to do so. Thus, he prayed to allow the suit in toto.

13. The learned senior counsel appearing for the first defendant / JAQH submitted that the first defendant has no objection in permitting the plaintiffs to offer prayer in the Mosque. After considering the oral and documentary evidences and after having an elaborate discussions, the Tribunal has rightly held that the first defendant is having absolute title and administrative control over the suit property. The plaintiffs cannot claim to do charitable activities in the building belonging to the first defendant. Therefore, the Tribunal has rightly negatived the relief of declaration and the said finding need not be interfered with. Thus, he prayed to dismiss this revision petition.

14. The learned counsel appearing for the second defendant submitted that the Tribunal has no jurisdiction to decide the issue relating to the title of the suit property and therefore, the said finding of the Tribunal cannot be accepted and that the first defendant has no manner of right over the suit property. The entire suit property is a Wakf. The administrative control over the suit property only vests with the second defendant. As the plaintiffs are only members of the second defendant, they are entitled to



considering the above aspects, has erroneously rejected the relief of participation in the Wakf activities by the plaintiffs. Thus, he prayed to allow the revision petition.

15. Heard the learned counsel appearing for both sides and perused the records carefully.

16. Admittedly, the first defendant / JAQH is a registered society, whereas the second defendant / Al Majithul Mubarak Mosque is an unregistered one. It is stated that the plaintiffs have filed the suit only after getting permission under Order 1 Rule 8 C.P.C. on their behalf and on behalf of the subscribing members of Mosque. According to the plaintiffs, the suit property was purchased and mosque was constructed through subscriptions as well as offerings from the public, especially Kadayanallur public. According to the first defendant, the suit property was purchased and mosque was constructed only through the offerings of the members of the society and hence, the suit property is absolutely belonged to the first defendant and it is not a dedicated one.

17. It is settled a position of law that whether a suit property is a Wakf property or not can be decided only by the Wakf Tribunal and not by the Civil Court. Based on the admission of DW1 that any Muslim can offer worship in the prayer hall of the suit property, if they accept the byelaws of the first defendant and relying on a decision of the Hon'ble Supreme Court, the Wakf Tribunal has held that the plaintiffs are entitled to offer prayer in the prayer hall in the suit schedule property as it is a Wakf by dedication. However, the Tribunal has negatived the relief of declaration to participate in the charitable activities holding that no material is produced to prove that the entire building, except the prayer hall, was dedicated expressly or impliedly.

18. The issues to be decided in this case are:

(a) Whether the finding of the Tribunal that the prayer hall alone can be held to be a Wakf property by implied dedication is correct or not?

(b) Whether the finding of the Tribunal that the plaintiffs are not entitled to the relief of declaration to participate in the charitable activities and consequential injunction is correct or not?

19. Before going into the issues involved in the Civil Revision Petition, this Court is of the view that it would be appropriate to refer the following decisions:

(a) The Hon'ble Supreme Court in the case of **Syed Mohd. Salie Labbai (dead) by Legal Heirs and another Vs. Mohd. Hanifa (dead) by Legal Heirs and others**, reported in **(1976) 4 Supreme Court Cases 780**, has held in paragraph Nos.39 to 46, 58 and 59 as follows:

"39. It would thus appear that in order to create



a valid dedication of a public nature, the following conditions must be satisfied :

(1) that the founder must declare his intention to dedicate a property for the purpose of a mosque. No particular form of declaration is necessary. The declaration can be presumed from the conduct of the founder either express or implied;

(2) that the founder must divest himself completely from the ownership of the property, the divestment can be inferred from the fact that he had delivered possession to the Mutawalli or an Imam of the mosque. Even if there is no actual delivery of possession the mere fact that members of the Mahomedan public are permitted to offer prayers with azan and ikamat, the wakf is complete and irrevocable; and

(3) that the founder must make some sort of a separate entrance to the mosque which may be used by the public to enter the mosque.

As regards the adjuncts the law is that where a mosque is built or dedicated for the public if any additions or alterations, either structural or otherwise, are made which are incidental to the offering of prayers or for other religious purposes, those constructions would be deemed to be accretions to the mosque and the entire thing will form one single unit so as to be a part of the mosque.

40. We would now refer to some authorities on the points discussed above.

41. In Jewun Doss Sahoo v. Shah Kubeer-ood-Deen(1) the Judicial Committee explained the significance of the word 'dedication' and observed thus:

"According to the two disciples, Wukf' signifies the appropriation of a particular article in such a manner as subjects it to the rules of divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God, by the advantage of it resulting to his creatures. The two disciples therefore hold appropriation to be absolute, though differing in this, that Aboo Yoosaf holds the appropriation to be absolute from the moment of its execution, whereas Mahomed holds it to be absolute only on the delivery of it to a Mutwaly, (or procurator), and, consequently, that it cannot be disposed of by gift or sale, and that inheritance also does not obtain with respect to it..... 'Bestow the actual land itself in charity in such a manner that it shall no longer be saleable or inheritable.' "

42. Similarly in Adam Sheik v. Isha Shaik.(1) a



Division Bench of the Calcutta High Court pointed out that a mosque becomes consecrated for public worship either by delivery or on the declaration of the wakif that he has constituted it into a Musjid, or on the performance of prayers therein even by one person. In this connection the Court observed as follows:

"According to all the authorities, a mosque becomes consecrated for public worship either by delivery to a Mutwalli (see Baillie's Digest, page 616) or on the declaration of the wakf that he has constituted it into a musjid or on the performance of prayers therein (Ruddul-Mukhtar Vol. III, p. 571). The prayers of one individual alone would be sufficient so long as it is accompanied by Azan. In the Fatwa Kazi Khan the principle is thus stated :- the delivery of possession as regards a musjid is complete when only one person has prayed in it with Azan and ikamat.

The view universally adopted is that prayers offered by one person in a mosque is sufficient to constitute it a public mosque devoted to the worship of God, for a mosque belongs to the Deity and there affixes to it a right of the Musulmans in general, and one person can be a proxy for the establishment of the right of the Creator and the public.

Therefore, if a person create a mosque and give permission to people to pray therein, it is an absolute wakf, and this opinion we adopt. (See also Fatwa Alamgiri, Vol. VI, and Baillie's Digest p. 616). The special purpose of a mosque is that persons should perform their devotions therein; and according to the accepted doctrine even where there is no evidence of an express dedication in words, if it appears that one single individual, (other than the wakif) has offered his prayers at the place after the usual summons or call to the public, the consecration is complete."

To the same effect is the decision of the Bombay High Court Saiyad Maher Husein v. Haji Alimahmed(2) where the following observations were made:

"There are special rules in the case of mosques- Wilson's Anglo-Mohamedan Law, Section 320; Ameer Ali's Muhammadan Law, Vo. I, p. 394 and Tyabji's Principles of Muhammadan Law, Section 514. When once a building has been set apart as a mosque it is enough to make it wakf if public prayers are once said there with the permission of the owner. ... Dedication may inferred from long user as wakf property.

In my opinion it must be presumed that the roza and the mosque have been duly dedicated and have



become wakf by user, and the presumption may fairly be extended to the other buildings and the land enclosed within the compound wall which may be regarded as appurtenant to the roza."

43. In Akbarali v. Mahomedally (AIR 1934 Bom 257), the Bombay High Court pointed out that even a vacant place may be dedicated as a mosque without having the appearance of a mosque. The High Court observed as follows:

"The general law of Islam in regard to devotions is so broad and liberal that the mosque in question will, even if not endowed with an Amil, be capable of furnishing for any devout Muslim (at least of the Dawoodi Hohra community) a place where he may-with or without the ministrations of an Amil or authorised leader of prayers-five times every day of his life offer prayers. ...

The books speak of an open space of building ground being consecrated as a masjid. Nor is it necessary for the purpose of consecrating a place or building as a masjid that there should be an Amil or any other religious officer appointed."

44. It is also well settled that where a mosque has been in existence for a long time and prayers have been offered therein, the Court will infer that it is not by leave and licence but that the dedication is complete and the property no longer belongs to the owner. In Miru v. Ramgo (AIR 1935 All 891), the High Court of Allahabad observed as follows:

"But where a building has stood on a piece of land for a long time and the worship has been performed in that building, then it would be a matter of inference for the Court which is the judge of facts, as to whether the right has been exercised in that building for such a sufficiently long time as to justify the presumption that the building itself had been allowed to be consecrated for the purposes of such rights being performed. Where there is a mosque or a temple, which has been in existence for a long time, and the terms of the original grant of the land cannot now be ascertained, there would be a fair presumption that the sites on which mosques or temples stand are dedicated property."

To the same effect is the decision of the Nagpur High Court in Abdul Rahim Khan v. Fakir Mohammad Shah (AIR 1946 Nag 401). The same principles are legally deducible from the decisions in Masjid Shahid Ganj Mosque v. Shrimani Gurdwara Parbandhak Committee,



Amritsar (AIR 1940 PC 116; Musaheb Khan v. Raj Kumar Bakshi (AIR 1938 Oudh 238) and Maula Baksh v. Amiruddin (AIR 1920 Lah 384).

45. Similarly regarding the portions which are adjuncts to the mosque the Bombay High Court has clearly observed that the said adjuncts will form part of the mosque and would not be the private property of the founder. The Nagpur High Court has also made similar observations. These observations have already been quoted above. This Court also in Mohammad Shah v. Fasihuddin Ansari (AIR 1956 SC 713) observed as follows:

"After a careful survey of the evidence we have reached the following conclusions:

(1) that the old mosque as it stood in 1880 is proved to be wakf property but that nothing beyond the building and the site on which it stood is shown to have been wakf at that date;

(2) that this property has been added to from time to time and the whole is now separately demarcated and that the additions and accretions form a composite and separate entity as shown in the plaintiffs' map. This is the area marked ABCD in that map;

(3) that this area is used by the public for religious purposes along with the old mosque and as the area has been made into a separately demarcated compact unit for a single purpose, namely, collective and individual worship in the mosque, it must be regarded as one unit and be treated as such. The whole is accordingly now wakf.

(4) that the accretions were made by Gulab Shah and the defendant both of whom claimed to be Mutwallis of the mosque;

(5) that this area also includes the shops and chabutra shown to the west of the mosque in the plaint map on a triangular piece of land;

(6) that the urinal, water pipe and bathroom were constructed for the use of the worshippers and so must be regarded as an adjunct of the wakf;"

46. Having discussed the law on the subject, we will not examine the question as to whether or not the mosque and the adjuncts thereof constitute a public wakf. We have already mentioned that the entire land in dispute consisting of the mosque, its adjuncts, the burial ground etc. was originally acquired by virtue of the documents Ext. B-1 dated May 12, 1730 and Ext. B-2 dated May 22, 1797 which have been referred to in



an earlier part of this judgment. The land in Ext. B-1 was acquired by the saint Syed Sultau Makhdoom Sahib who has been entombed in the land on which the Dargah has been built. A part of the site has been used continuously as a public burial ground and has become a public grave-yard as wakf as held by us. So far as the Dargah is concerned the Courts below have concurrently found as a fact that it was a private Dargah of the defendants Labbais and that there was no evidence to show that it was ever constituted as a public wakf. Learned counsel for the appellants in Civil Appeal No. 2026 of 1968 has not pressed his appeal relating to the Dargah. On a perusal of the evidence both oral and documentary we are satisfied that the Dargah has not been proved to be a public property, but is the private Dargah of the Labbais whose ancestor the original saint has been entombed therein. As Sayed Sultan Magdoom Sahib was a great saint and was held in great respect by all the villagers and as there was no mosque in the village at all it was only natural that the Muslims of the village would think of building a mosque in the village and they could find no better place to construct a mosque than the land in dispute, a part of which contained the Dargah of the great saint where he was entombed. The entire land was acquired by Ext. B-1 which was executed by Thirumalai Kolanda Pillai in favour of the saint as far back as May 12, 1730. The rest of the land was acquired by another sale deed Ext. B-2 dated May 22, 1797 executed by Malai Kolanda Pillai in favour of Kaidbar Sahib who was a direct descendant of the saint. This is the origin of the lands in dispute. So far as the mosque and its adjuncts are concerned, it would appear from the sketch map as also from the evidence produced by the parties that this part of the land consists of the following constructions:

(1) the main prayer hall which is commonly known as the mosque or Pallivasal;

(2) Mandapam or Vang Mandai as described by the witnesses which is a sort of a covered platform where according to the plaintiffs prayers are offered by the members of the Mahomedan public when the space in the main mosque is not sufficient to accommodate the big crowd.

(3) There is a small chamber in the nature of a store room adjacent to the mosque and a thatched shed. There is also a pond where water is pumped in through a pump-set which has been installed by the Mahomedans of the village, particularly the plaintiffs. There is



also a latrine to the south of the burial ground sons east of the mosque which is used for the persons who come to offer prayers in the mosque and the Mandapam.

..... 47.

58. Thus, even the witness for the defendants clearly admitted the nature and character of the various adjuncts to the mosque. The D. Ws., however, have tried to minimise the number of people who assembled during Friday prayers by saying that it would be between 40 to 50. But that is obviously wrong. It is well known that on special occasions like Fridays, Id, Ide-Milad and other auspicious occasions the entire Muslim community flock to the mosque for the purpose of offering prayers, because offering of prayers on such days is, according to the Islamic tenets, extremely auspicious and highly efficacious. It is also established from the evidence that the constructions referred to above had been made for the purpose of the mosque. Before a Mussalman offers his prayers he has first to wash his hands and feet in the prescribed manner and for this purpose arrangements are made in every mosque, and Pallivasal is no exception. Accordingly a tank or a Hauz, where water was pumped in was meant for the purpose of Wazoo i.e. for washing hands and feet which is a prerequisite for offering the prayers. Similarly as a large number of Muslims assembled on special occasions as mentioned above, the entire space including the mosque, the Mandapam, and the corridor was used for the purpose of offering prayers. Thus these constructions were used for religious purposes incidental to the offering of prayers and have become accretions to the mosque so as to constitute one single entity. Similarly the mats are meant for the Mahomedans to be used at the time of offering prayers. Lastly the loud speaker is used for reciting Azan and delivering Khutbas i.e. religious sermons. Thus all the adjuncts of the mosque are meant for purely religious purpose connected with the offering of prayers in the mosque.

59. The case of the defendants was that these constructions were their private property, but there is not an iota of evidence to prove the same. The law on the point is well settled that where any construction is made for the purpose of the mosque or for its benefit or by way of gift to the mosque, the same also becomes a public wakf. The statement of the law on the subject as mentioned by Baillie in his Digest of Mohummudan Law has already been extracted by us. In these circumstances, therefore, the conclusion is inescapable that the mosque as also all its



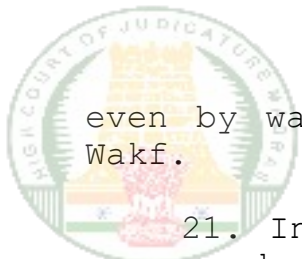
adjuncts referred to herein constitute one single unit and the entire thing a public wakf."

(b) In the case of **N.R.Abdul Azeez and others vs. E.Sundaresa Chettiar and another** reported in 1992 (1) MLJ 535, a learned Single Judge of this Court, after referring to various decisions, has held in paragraph Nos.17 and 18 as follows:

"17. So it is a fundamental principle of the Mohamedan Law of Wakf that when a mosque is built and consecrated by public worship, it ceases to be the property of the builder and vests in God. A mosque once so consecrated cannot in any case revert to the founder and every Mohammedan has the legal right to enter it, and perform devotions according to his own tenets so long as the form of worship is in accord with the recognised rules of Mohammedan Ecclesiastical Law. A mosque from its very nature is dedicated for worship and is open to all Muslims local and others. Once the mosque was constructed it stood dedicated to God and the owner is divested of his right, title and interest in the property. The very concept of a private mosque is unknown to Muslim Law. Once the founder dedicates a particular property for the purpose of a public mosque, no Muslim can be denied the right to offer prayers therein on the ground that the mosque fell into disuse long back and from the mere fact that Ex.A1 the village plan a mosque is shown to have existed in the year 1938, this disputed piece of land has become a wakf by user although there is no evidence of an express dedication and any attempt on the part of the respondents to prevent the appellants from coming over to the property and saying their prayers cannot be permitted.

18. In the result, the appeal is allowed and the judgments and decrees of the Courts below are set aside and the decree for injunction restraining the respondents from interfering with the appellants right of worship in the mosque described in the plaint schedule is granted as prayed for."

20. From the above decisions, it is clear that (a) Even a bare act of allowing the members of the Mohammedan public to offer prayer by a owner of the land amounts to a complete delivery of possession and dedication of the said land to the God. (b) The act of permitting the Mohammedans to build a mosque by owner of the land itself amounts to a complete dedication to the God or a declaration that the mosque is a public property and all the right, title and interest of the owner got completely extinguished. (c) Any construction made for the purpose of the Mosque or for its benefit,



even by way of gift to the Mosque, the same also become a Public Wakf.

21. In this case, it is not in dispute that the suit property was purchased and Mosque was constructed by the subscriptions and also offerings of the members of the first defendant. It is also equally not in dispute that some of the members of the first defendant are also the members of the Mosque/second defendant. However, according to the second defendant, the suit property has been purchased and mosque has been constructed not only by the subscriptions of the members but also the contributions of the public. The first defendant has not produced any document to show that by the subscriptions of the members of the first defendant alone, the suit property was purchased and mosque was constructed. Hence, it can be taken that the suit property was purchased and the Mosque was constructed in the suit property not only by the contributions of the members but also by the public. Though the suit property was purchased in the name of the first defendant, as the suit property was purchased through contributions of the public and Mosque and its adjuncts were constructed in the suit property for the religious purposes and the same have been permitted to be used by the Mohammedans for religious purposes, it can be categorically held that the entire suit property has already become a Public Wakf by implied dedication and the God Almighty is the owner the same. Hence, no one can claim ownership over the property. Therefore, the conclusion of the trial Court that the prayer hall alone is the Wakf property cannot be accepted. The entire suit property is a Public Wakf.

22. So far as the second issue is concerned, this Court is of the view that it would be appropriate to discuss and decide, after going into the merits of the cases in S.A.(MD)Nos.1021 of 2007 and 197 of 2008.

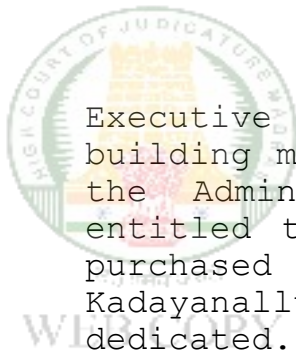
S.A. (MD)Nos.1021 of 2007 and 197 of 2008:

23. For better appreciation and understanding, the parties are referred to as per their in rank in the suit.

24. The case of the plaintiff / Mosque represented by the Administrative Committee's President by name Sheik Uthuman is that the plaint schedule Mosque at Kadayanallur was established for the benefit of the Muslims of Kadayanallur and the Muslims of Kadaynallur, who have faith in Quran and Hadees, have been maintaining and managing the said Mosque by constituting an Administrative Committee. The right of management of the Mosque vests with the Muslims of Kadayanallur, who have believe in Quran and Hadees and who have been paying subscriptions. The Muslims belonging to other places do not have any right except to offer prayer and they cannot act as members of the Executive Committee. The foundation of Mosque was laid down in the year 1994 and exemption was obtained from the payment of Property Tax assessment.

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While constructing upstairs portion, the then President of the

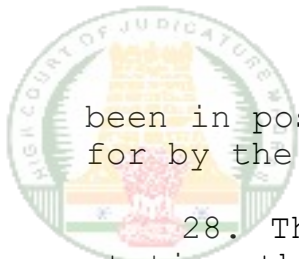


Executive Committee paid fees to the Municipality for collection of building materials. As per the custom and as per the resolution of the Administrative Committee, its President or Secretary are entitled to institute legal proceedings. The site of Mosque was purchased by the first defendant. As per the request of Muslim of Kadayanallur, Mosque was built by getting offerings and it was dedicated. After making a small contribution, the first defendant is attempting to manage the affairs of Mosque. The 1st defendant has no right over the management. Though the site was purchased in the name of the first defendant, as the Mosque was constructed and dedicated, the first defendant has lost his right over the site. On 14.02.2006 the defendants 1 to 9 attempted to capture the management. On 15.02.2006 a Peace Committee Meeting was conducted by RDO, Tenkasi and it was concluded that the persons who were in the management prior to 11.02.2006 should continue the management.

25. It is the further case of the plaintiff that when the first defendant attempted to interfere with the management of the Mosque, a dispute had arisen and the first defendant had approached Jamath Ulama. On 12.02.1995 the Jamath Ulama had rendered a decision to the effect that the Mosque should be managed by the Muslims residing at Kadayanallur. As the defendants acted against the abovesaid decision, the plaintiff has filed the suit for injunction restraining the defendants from interfering in the administration of the Mosque by the plaintiff through its Administrative Committee.

26. The case of the defendants 1 to 5 is that the plaint itself is not maintainable either in law or on facts. The first defendant / JAQH is a registered society. The Mosque at Kadayanallur was not build only for Kadayanallur Muslim People and only by their contributions. The Mosque absolutely belongs to the first defendant. In the year 1993, Shiek Udhuman was appointed as President by the first defendant in its Branch at Kadayanallur. Hence, Shiek Udhuman / Plaintiff was bound to act as per the direction of the first defendant. The first defendant had purchased the suit land through a sale deed in which Shiek Udhuman signed as second attestor. Formerly, the said Sheik Udhuman / Plaintiff was following the religious tents of JAQH, but, subsequently, he became a follower of a different organization of TNTJ and therefore, he has no authority to continue as the President of the Committee. When the plaintiff / Sheik Udhuman is an appointee of the first defendant, he is not having any right of suit against the first defendant. Jamath Ulama has not been functioning from the year 1993. Thus, the defendants 1 to 5 have made a counter claim of injunction against the plaintiff to the effect that Mosque / Administrative Committee or its agent should not disturb the possession of the defendants 1 to 5.

27. In the reply statement, the plaintiff had stated that it is not true that the Jamath Ullama has not been functioning from 02.06.1993. The plaintiff committee is not necessary to be a



been in possession by the plaintiff, the injunction relief sought for by the defendants 1 to 5 is not maintainable.

28. The defendants 6 and 7 have filed their written statement stating that they accept the case of the plaintiff and that they did not know as to why they have been impleaded in this case and that the suit is liable to be dismissed in respect of them as they are unnecessary parties to the suit.

29. On the side of the plaintiff, three witnesses were examined as PWs.1 to 3 and Exs.A1 to A13 were marked. On the side of the contesting defendants, one witness was examined as DW1 and Exs.B1 to B41 were marked.

30. The trial Court, after considering the oral and documentary evidence, has dismissed the suit holding that the plaintiff has not proved that he has been administering the Mosque and decreed the counter claim made by the defendants 1 to 5, except the portion of prayer hall, holding that they proved their title, possession and enjoyment by Ex.B1 - Sale Deed in respect of the suit property, Ex.B9 - Telephone receipt, Ex.B10 - Electricity Receipt and Exs.B28 and B29, the orders of the Tahildar.

31. Aggrieved by the judgment and decree passed by the trial Court, the plaintiff has filed an appeal suit and the first defendant filed cross objection. Before the first appellate Court, on the side of the plaintiff as well as the defendants, additional documents were filed and they were marked as Exs.A14 to A16 and Exs.B.42 and B43. The first appellate Court, after reappraising the oral and documentary evidence, has reversed the finding of the trial Court mainly relying on Ex.A5 - Gift Deed executed by third parties to the Mosque and Ex.A6 an order passed by Jamathul Ulama, holding that the suit property has already been dedicated and therefore, the question of ownership does not arise and that the plaintiff has proved his possession and management and thereby decreed the suit as prayed for and dismissed the counter claim made by the defendants 1 to 5. Aggrieved by the judgment and decree passed by the first appellate Court in the appeal as well as counter claim, the first defendant has filed these appeals.

32. Second Appeal No.1021 of 2007 has been admitted on the following substantial questions of law:

1) Whether the lower appellate Court is correct in law in holding that the findings rendered by the Wakf Tribunal under Exs.B40 and B41 would not be binding on the Civil Court?

2) Whether the lower appellate Court has committed an error in law in holding that the appeal in A.S.No.46 of 2007 filed against the decree passed in the original suit is not barred by the principles of *res judicata* as no

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passed in the counter claim made by the appellant?

3) Whether the finding rendered by the Jamath under Ex.A6 was without jurisdiction? Whether the reliance made by the lower appellate Court on the said finding is perverse?

4) Whether the lower appellate Court has erroneously cast the burden on the defendant to prove the ownership of the superstructure and thus, decreed the suit even after observing that there was no evidence on the side of the plaintiff to prove the same?

33. Second Appeal No.197 of 2008 has been admitted on the following substantial questions of law:

i) Whether the findings of the first appellate Court with regard to Ex.A6 and Exs.B40 and B41 are perverse?

ii) Whether the first appellate Court erred in granting a decree of injunction without the respondent seeking a decree of declaration in the peculiar facts of the case?

34. Heard the learned counsel appearing for both sides and perused the records carefully.

35. Admittedly, the first defendant/appellant (JAQH) is a registered society, whereas the plaintiff is an unregistered society. Before the purchase of the suit property in the year 1993, the first defendant had a branch in Kadayanallur, in which the President of the Administrative Committee of the plaintiff, Shiek Udhuman was appointed as President by the first defendant. As rightly stated by the first defendant, Shiek Udhuman was bound to act as per the direction of the first defendant and he himself admitted that he had acted so. The first defendant had purchased the suit land through a registered sale deed, in which Shiek Udhuman signed as second attester.

36. According to the plaintiff, after purchase of the land by the first defendant for the purpose of constructing the Mosque, the Muslims of Kadayanallur themselves formed an Administrative Committee and collected money from various persons and constructed the Mosque in the year 1994 and the Committee had developed inside the Mosque Complex a school for imparting Islamic education, a Library, a Baithulmal for providing financial assistance for poor and that till today, the Mosque is in effective administration of the plaintiff. According to the first defendant, the plaintiff / Sheik Udhuman, who was the then President of the branch of the first defendant, had been provided with money by collecting money from the



property by forming a committee and merely because, he was administering the Committee for some time, he cannot claim right of management or possession.

37. Admittedly, the plaintiff is an unregistered body. The plaintiff has not stated as to how and when the Committee was constituted. The plaintiff has not produced any document regarding formation of the Committee. But, PW1 - Shiek Udhuman himself has admitted in his cross examination that at the time of construction of Mosque in the suit property, he was appointed as President of the Kadayanallur branch by the first defendant; he was directed to take care of the administration of the Mosque; he was the President of the Kadayanallur JAQH society till 2005; after 2005, he has not been acting as President of the Plaintiff due to his ill-health; while he was the President, he obtained planning permission for the construction of the Mosque; and he has also obtained Electricity Connection and Telephone Connection in the name of the Mosque. He has further admitted in his cross examination that there was no resolution passed to conduct the case in his name, but it was given only as oral instruction. The admissions of the plaintiff that he was appointed by the first defendant as President in its Branch at Kadayanallur and directed by the first defendant to manage the administration of the Mosque makes it clear that he had been administering the Mosque only as an agent of the first defendant and therefore, an agent can never become a principal. Having admitted in his evidence that he has acted as the President of the first defendant's /JAQH's Kadayanallur branch till 2005 and maintained the Mosque in dispute as an agent, now he cannot claim that he has been administering the Mosque at Kadayanallur Branch as a separate entity, and he has got possessory right or right over the administration of the Mosque.

38. In the case of **Maria Margarida Sequeria Ferandes and others Vs. Erasmo Jack De Sequeira Fernandes**, reported in (2012) 5 SCC 370, the Hon'ble Apex Court has held in paragraph Nos.93 to 97 as follows:

"93. The respondent's suit for injunction against the true owner - the appellant was not maintainable, particularly when it was established beyond doubt that the respondent was only a caretaker and he ought to have given possession of the premises to the true owner of the suit property on demand. Admittedly, the respondent does not claim any title over the suit property and he had not filed any proceedings disputing the title of the appellant.

94. This Court in *Puran Singh v. The State of Punjab* (1975) 4 SCC 518 held that an occupation of the property by a person as an agent or a servant at the instance of the owner will not amount to actual physical possession.

95. This Court in *Mahabir Prasad Jain (supra)* has



held that the possession of a servant or agent is that of his master or principal as the case may be for all purposes and the former cannot maintain a suit against the latter on the basis of such possession.

96. In *Sham Lal v. Rajinder Kumar* (1994 (30) DRJ 596), the High Court of Delhi held thus:

"12. On the basis of the material available on record, it will be a misnomer to say that the plaintiff has been in 'possession' of the suit property. The plaintiff is neither a tenant, nor a licensee, nor a person even in unlawful possession of the suit property. Possession of servant is possession of the real owner. A servant cannot be said to be having any interest in the suit property. It cannot be said that a servant or a chowkidar can exercise such a possession or right to possession over the property as to exclude the master and the real owner of the property from his possession or exercising right to possession over the property.

13. Possession is flexible term and is not necessarily restricted to mere actual possession of the property. The legal conception of possession may be in various forms. The two elements of possession are the corpus and the animus. A person though in physical possession may not be in possession in the eye of law, if the animus be lacking. On the contrary, to be in possession, it is not necessary that one must be in actual physical contact. To gain the complete idea of possession, one must consider:

(i) the person possessing, (ii) the things possessed and, (iii) the persons excluded from possession.

A man may hold an object without claiming any interest therein for himself. A servant though holding an object, holds it for his master. He has, therefore, merely custody of the thing and not the possession which would always be with the master though the master may not be in actual contact of the thing. It is in this light in which the concept of possession has to be understood in the context of a servant and & master."

The ratio of this judgment in *Sham Lal* (supra) is that merely because the plaintiff was employed as a servant or chowkidar to look after the property, it cannot be said that he had entered into such possession of the property as would entitle him to exclude even the master from enjoying or claiming possession of the property or as would entitle him to compel the master from staying away from his own property.



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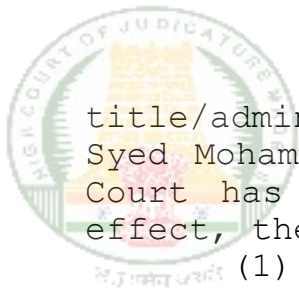


receipts, etc. in the name of the Mosque, which are not sufficient to hold that the suit property was purchased and mosque was constructed only by the Committee through the contribution of the members of the Mosque and it has been administering the Mosque. If it is true that the suit property was purchased by the efforts of the Committee under the President-ship of the Sheik Udhuman and Kadayanallur Mohammedans alone, definitely they would not have permitted to purchase the suit property in the name of the first defendant and they would have purchased the same in the name of their Committee itself.

41. Further, the Committee, which has been stated to be administering the Mosque as a separate entity, has not produced any piece of evidence with regard to the formation of the Committee and administration of the same. On the contrary, Ex.B34, dated 10.10.1996, would go to show that it is a letter written by then Secretary of the Committee seeking permission and assistance from the 1st defendant in connection with putting up the additional structure in the suit property. Ex.B11 would go to show that the then Secretary of the Mosque has filed a suit against the Government in O.S.No.383 of 2005, in which he has clearly stated that the suit property belongs to the first defendant. The evidence of PW1 - Sheik Udhuman and the entire documents produced on the side of the first defendant / JAQH, especially Exs.B1, B28, B29, B32, B33, B34 and B36 would go to show that the construction of the Mosque and administration of the Mosque has been made by the first defendant through the plaintiff / Committee.

42. Now, let us discuss about the questions of law involved in the second appeals. The first appellate Court has held that the judgment and decree passed by the trial Court in O.S.No.83 of 2006, which have been marked as Exs.B40 and B41, are not applicable to the Civil Court. The suit before the Wakf Tribunal was filed by the members of the Wakf and the relief sought for in the said suit was to permit the members of the Society to offer prayer and to permit them to participate in the Wakf activities. It was held by the Tribunal that the prayer hall alone is the Wakf and that the building adjuncts to the same is belonged to the first defendant. It is seen that the first appellate Court has held that the findings of the Wakf Tribunal, with regard to the ownership of the suit property, cannot bind on the Civil Court, as the said finding was given exceeding the jurisdiction of the Tribunal.

43. Admittedly, the suit before the Wakf Tribunal and the suit before the Civil Court were filed in one and the same year ie., in the year 2006. The suit before the Wakf Tribunal was filed by the members of the Mosque at Kadayanallur seeking declaration that the members are entitled to offer prayer in the suit schedule property and to participate in the wakf activities carried on in the suit schedule property and for consequential injunctions. Whereas, the



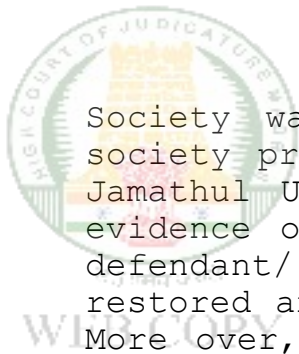
title/administration over the suit property. In the decision in Syed Mohammed Salie Labbiai case, cited supra, the Hon'ble Supreme Court has held that before a plea of *res judicata* can be given effect, the following conditions must be satisfied:

- (1) that the litigating parties must be the same;
- (2) that the subject matter of the suit also must be identical;
- (3) that the matter must be finally decided between the parties; and
- (4) that the suit must be decided by a Court of competent jurisdiction.

In the present case, for deciding the issues raised before the Tribunal, the question of title has been incidentally gone into by the Tribunal, but, such decision cannot be taken as final decision for the reason that the question of title was not the main issue to be decided for the reliefs claimed by the plaintiffs before the Tribunal; the issue of title has already been pending before the Civil Court and the question of title can be decided only before the Civil Court. Thus, the question of title incidentally gone into by the Tribunal for the reliefs claimed therein shall not operate as *res judicata* to decide the suit filed for question of title before the competent jurisdiction. Hence, the finding of the first appellate Court with regard to Exs.B40 and B41 is not perverse.

44. It is a settled law that the issue as to whether a property is a Wakf Property or not, can be decided only by the Wakf Tribunal. Though the Wakf Tribunal has held that the prayer hall alone is the Wakf, this Court has now hereinabove in the Civil Revision Petition filed against the judgment of the Wakf Tribunal has held that the prayer hall as well as the adjuncts property which have been constructed for the religious purpose ie., the entire suit property is Wakf property and that it became the property of God Almighty and no one can claim ownership over the suit property.

45. Let us now discuss the finding of the first appellate Court with regard to the decision of Tamil Nadu Jamathul Ulama dated 12.02.1995. Ex.A6. According to the plaintiff, the Tamil Nadu Jamathul Ulama by order dated 12.02.1995 has held that the administration of the Mosque has to be made by the Kadayanallur Mohammedan people, who are following Quran and Hadees. According to the first defendant, the said Jamathul Ulama defunct on 03.06.1993 itself and therefore, the order dated 12.02.1995 is invalid. In Ex.B14 - the Register of the Tamil Nadu Jamathul Ulama dated 24.06.1993 itself, it is recorded that the Jamathul Ulama society itself was dissolved and such final notification has also been published in Gazette notification of the Government under Section 44 (2) of the Societies Registration Act. PW2 - the then President of the Jamathul Ulama, who passed the order dated 12.02.1995, has stated in his evidence that he was the President of the Jamathul Ulama during the period 1993 to 1995 and due to non production of



Society was dissolved and that subsequently, the Jamathul Ulama society produced the audit accounts, but he did not know when the Jamathul Ulama Society has been restored to function. From the evidence of PW2, it is clear that as rightly stated by the first defendant/ JAQH till 1995, the Jamathul Ulama Society has not been restored and therefore, the order dated 12.02.1995 has no validity. Moreover, the Jamathul Ulama is not an authority to decide about the right of management of Mosque. Therefore, the finding of the first appellate Court with regard to Ex.A6 is nothing but perverse.

46. As stated earlier, the trial Court has dismissed the relief of junction sought for by the plaintiff and granted the relief of junction in favour of the first defendant to the effect that the plaintiff Committee should not interfere with the administration of the JAQH in the suit property, except the prayer hall, which is declared as Wakf by the Tribunal. Aggrieved by the said judgment and decree, it is seen that the plaintiff has filed an appeal and the first defendant has filed cross objection. The plaintiff has not filed an appeal against the decree passed in favour of the first defendant / JAQH in the counter claim. According to the first defendant / JAQH, non filing of appeal by the plaintiff against the decree passed in favour of the first defendant in the counter claim stood as *res judicata* to the appeal suit filed by him.

47. In the decision reported in **1993 Suppl. (2) SCC 146 [Premier Tyres Limited v. Kerala State Road Transport Corporation]**, the Hon'ble Supreme Court has held as follows:

"4. Although none of these decisions were concerned with a situation where no appeal was filed against the decision in connected suit but it appears that where an appeal arising out of connected suits is dismissed on merits the other cannot be heard, and has to be dismissed. The question is what happens where no appeal is filed, as in this case from the decree in connected suit. Effect of non filing of appeal against a judgment or decree is that it become final. This finality can be taken away only in accordance with law. Same consequences follows when a judgment or decree in a connected suit is not appealed from.

... ..

6. Thus the finality of finding recorded in the connected suit, due to non filing appeal, precluded the Court from proceeding with appeal in other suit. In any view of the matter the order of the High Court is not liable to interference.

48. In another decision reported in **2015 SCC online Kerala 3799 [Giriya & others v. Rajan & another]**, the Hon'ble Supreme Court



has held as follows:

"12. Upshot of the discussion is that the counter claim raised in a suit shall be treated as a cross suit as per statutory mandate. It has all the trappings of a regular suit, like paying the requisite court fee, filing a written statement, raising the relevant issues and deciding the issues on evidence. It is also clear that the suit and the counter claim shall be disposed of by a judgment, but a decree shall be drawn up in the counter claim too, although it may be a composite one with the decree in the suit. Well settled is the proposition of law that the rule of estoppel in the form of res judicata will be attracted at a subsequent stage in the same suit, if findings on some of the issues are allowed to attain finality. The ratio in the decisions in A.Z.Mohammed Farooq's and Philip's cases (supra) only indicate the forum where an appeal has to be filed considering the suit claim and counter claim as a unified proceedings. The said decisions do not lay down a proposition that no separate appeal need be filed, if a party is prejudicially affected by the adjudication in the suit as well as in the counter claim. The question of res judicata was not at all adverted to in those decisions. The ratio in the binding precedents in Janardhanan Pillai and Premier Tyres Ltd. and other cases clearly lay down that there should be separate appeals in cross suits; otherwise the appeal filed against one decree allowing the other decree, the one passed simultaneously with the challenged decree, to become final, then the appeal will be barred by res judicata. I am of the definite view that the same principle is applicable in the case of a decree passed in a counter claim also.

49. When the similar issue arises for consideration in the case of **S.Rajeswari Vs.Perumal and another(S.A.No.848 of 2016)**, a learned Single Judge of this Court, by order dated 13.07.2018, after referring to the above decisions, has held as follows:

"15(b) The appellant and respondents let in oral and documentary evidence. The learned Trial Judge, considering the pleadings, oral and documentary evidence, decreed the suit and dismissed the counter claim. Two separate decrees were drafted for decreeing the suit and dismissing the counter claim. The respondents filed only one first appeal A.S.No.75 of 2014 challenging the decree passed in

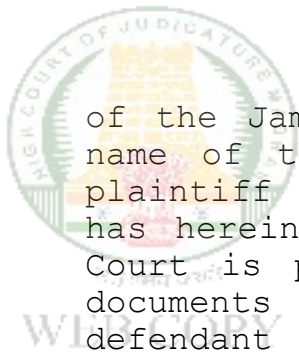


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No appeal was filed challenging the dismissal of the counter claim. It is well settled that the counter claim itself is in the nature of suit. It is well settled that counter claim has to be considered as separate suit and courts have to pass a judgment and decree in respect of counter claim. Even if the suit itself is dismissed for any reason whatsoever, the counter claim can be allowed on merits and a separate decree is to be drafted. When common judgment is delivered in respect of two or more suits, appeals are to be filed in respect of all the suits which are decided against him. If a party fails to file appeal in respect of one of the suits, the said judgment will be *res judicata* in respect of the judgment appealed. In the present case, the suit filed by the appellant was decreed and counter claim filed by the respondents was dismissed. The learned Trial Judge, considering the averments in the counter claim, the evidence let in and arguments of the respondents, dismissed the counter claim of the respondents by giving cogent and valid reasons. The respondents did not file any appeal challenging the dismissal of the counter claim. The First Appellate Judge, failed to consider the failure on the part of the respondents to challenge the dismissal of the counter claim, erroneously set aside the dismissal of the counter claim and allowed the counter claim. The First Appellate Judge failed to take note that the dismissal of counter claim and the same not being challenged, the appeal filed by the respondent is hit by principles of *res judicata*. The dismissal of the counter claim has become final and the reasons given by the First Appellate Judge for allowing the counter claim is not valid and legal.

50. The above decisions makes it clear that as the counter claim is also a suit, the decree passed in the counter claim has to be challenged by filing a separate appeal. In the absence of an appeal to the counter claim, the appeal preferred in respect of the suit is barred by principle of *res judicata*. The first appellate Court, without considering the above aspect, has erroneously dealt with the appeal suit holding that the unified appeal is sufficient. Hence, the said finding of the first appellate Court is liable to be set aside. Consequently, the judgment and decree passed by the first appellate Court is liable to be set aside on this ground alone.

51. As stated earlier, the first appellate Court has reversed the finding of the trial Court about the formation and maintenance of the Mosque, only based on Ex.A6 ie., the decision



of the Jamathul Ulama and some of the documents standings in the name of the Mosque and it has come to the conclusion that the plaintiff Committee has been administering the Mosque. This Court has hereinabove held that the said finding of the first appellate Court is perverse and that as per the admission of PW1 and the documents produced on the side of the first defendant, the first defendant had been administering the Mosque. The first appellate Court, without properly looking into the documents produced on either side and only contradicting the documents produced on the side of the first defendant, has held that it appears, the plaintiff has been administering the Mosque. Therefore, the said finding cannot be accepted.

52. According to the first defendant, the plaintiff ought to have sought for the relief of declaration that the President is entitled to manage the Pallivasal and its property in the peculiar facts of the case. In this case, admittedly, both the plaintiff as well as the first defendant have sought for only the relief of injunction. The plaintiff has admitted that the suit property has been constructed by the contributions of the public. It has already been decided that the suit property is the property of the God Almighty and it has been administering by the first defendant. For deciding the issue of administration of the suit property, the relief of declaration to that effect need not be sought for. Therefore, this question is decided in favour of the plaintiff.

53. In short, the suit property is nothing but Public Wakf and the ownership is with God Almighty. The administration of the Mosque is with the first defendant and therefore, the plaintiff should not disturb the administration of the Mosque by the first defendant.

Civil Revision Petition :

54. Before the trial Court, the plaintiffs sought for the relief of declaration that the plaintiffs are entitled to offer prayer in the suit schedule property and to participate in the Wakf Activities carried on in the suit schedule property and consequential injunctions restraining the defendants from interfering with the plaintiffs right to offer prayer and their act in participating in the Wakf charitable activities carried on in the suit schedule property. The trial Court has granted the relief of declaration with regard to offering prayer, so long they accept the byelaw of the first defendant, that too in a limited extent of prayer Hall holding that except prayer hall, other adjuncts are owned by the first defendant. Now, it has been held that the entire suit property has already become a Public Wakf by implied dedication. In the above second appeals, it has been decided that the administration of the Mosque is with the first defendant. The



first defendant has already stated that any Mohammedan can offer prayer in the Mosque. Hence, this Court is inclined to declare that the plaintiffs are entitled to offer prayer in the suit property as long as they accept the byelaws of the first defendant.

55. So far as the relief of participation in the Wakf activities by the plaintiffs is concerned, this Court is of the view that such declaration cannot be granted to the plaintiffs, as it would affect the smooth functioning and administration of the Wakf by the first defendant. However, it is always open to the plaintiffs to participate in the Wakf activities carried on in the suit property as per the instructions and directions of the administrator of the first defendant by following the byelaw of the first defendant. Though the conclusion arrived at by the Tribunal for negating the relief of declaration in respect of participation is not correct, the result is the same.

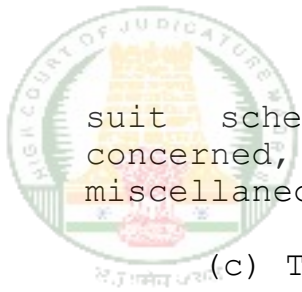
Contempt Petition :

56. It is seen that after admitting the Second Appeal (MD) No.1021 of 2007 filed by the first defendant/ JAQH, this Court has granted an interim order of suspension of the judgment and decree of the first appellate Court. While so, the plaintiff along with the defendants 6 to 9 and his henchmen broke open the lock of the suit property and conducted prayer as against the order of this Court and created law and order problem in the locality by attacking other worshippers. Hence, the first defendant / JAQH has come up with this contempt petition. In view of the above discussions and conclusions and length of time, this Court is inclined to close this contempt petition.

57. In the result,

(a) Both the Second Appeals are allowed and the judgment and decree passed by the Courts below are set aside. The suit is dismissed. The counter claim of permanent injunction sought for by the defendants 1 to 5 is hereby granted. No costs. Consequently, connected miscellaneous petitions are closed.

(b) The Civil Revision Petition is allowed in part and the judgment and decree of the trial Court is set aside. The suit is partly decreed declaring that the plaintiffs are entitled to offer prayer in the suit property as long as they accept the byelaws of the first defendant and permanent injunction is granted restraining the defendants from preventing the plaintiffs to offer prayer in the suit property. So far as the prayer for declaration that the plaintiffs are entitled to participate in the Wakf activities in the



suit schedule property and for consequential injunction is concerned, the suit is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

(c) The Contempt Petition is closed. No costs.

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Assistant Registrar (CS II)

// True Copy //

/ /2020

Sub Assistant Registrar (CS)

gcg

To

1.The Principal Subordinate Judge,
Tenkasi.

2.The Principal District Munsif,
Tenkasi.

3.The Principal Subordinate Judge / Wakf Tribunal,
Tirunelveli.

Copy to:

The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.(2C)

S.A. (MD) Nos.1021/2007 & 197/2008
and C.R.P. (MD).No.894 of 2007 and
Contempt Petition (MD).No.23 of 2008
30.06.2020

KK(13.07.2020) 30P 6C