



W.A.(MD)No.437 of 2022 & W.P(MD)No.10969 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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RESERVED ON : 10.08.2022

DELIVERED ON : 29.08.2022

CORAM :

**THE HONOURABLE MR. JUSTICE P.N.PRAKASH
and
THE HONOURABLE MRS. JUSTICE R.HEMALATHA**

W.A.(MD)No.437 of 2022
and
C.M.P.(MD)Nos.4233 & 4237 of 2022
and
W.P.(MD)No.10969 of 2022
and
W.M.P.(MD)Nos.7906 & 7910 of 2022

W.A.(MD).No.437 of 2022

O.M.A.Udhuman Mydeen

Vs.

... Appellant

1. The Chief Executive Officer,
The Tamil Nadu Wakf Board,
No.1, Jaffer Syrang Street,
Vallal Sethakathi Nagar,
Chennai - 600 001.

2. The Inspector of Waqf,
54, High Road,
Tirunelveli District.
(Now as Tenkasi District)



W.A.(MD)No.437 of 2022 & W.P(MD)No.10969 of 2022

3.O.S.M.Hasan Magdhoom Alim

... Respondents

WEB CO **W.P.(MD).No.10969 of 2022:**

O.M.A.Udhuman Mydeen

... Petitioner

Vs.

1.The Chief Executive Officer,
The Tamil Nadu Wakf Board,
No.1, Jaffer Syrang Street,
Vallal Sethakathi Nagar,
Chennai - 600 001.

2. The Inspector of Waqf,
54, High Road,
Tirunelveli District.
(Now as Tenkasi District)

3.O.S.M.Hasan Magdhoom Alim

... Respondents

PRAYER in W.A.(MD)No.437 of 2022: Writ Appeal filed under Clause XV of Letters Patent Act, against the order in W.P.(MD).No.3791 of 2022 dated 01.04.2022 and 06.04.2022.

PRAYER in W.P.(MD)No.10969 of 2022: Writ Petition filed under Article 226 of Constitution of India, praying to issue a writ or order or direction in the nature of a Writ of Certiorarified Mandamus, calling for the entire records pertaining to the impugned order passed by the first respondent vide proceeding Ref No.௨௪/௬/ஆணை ௨11/12/ஆ1/தினேலி dated 13.05.2022 and quash the same and consequential direction to the first respondent to



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recognise the petitioner as Mutawalli of Naina Mohammed Periya Kuthuba Pallivasal, Kadayanallur, Tenkasi District and handover the charge forthwith.

In both cases:

For Appellant/Petitioner : Mr.Issac Mohanlal
Senior Counsel
assisted by Mr.Niranjan S.Kumar

For Respondents : Mr.K.K.Senthil
Standing Counsel
for R1 & R2

: Mr.M.Vallinayagam
Senior Counsel
assisted by Mr.VR.Shanmuganathan and
Mr.T.S.Mohamed

COMMON JUDGMENT

R.HEMALATHA, J.

This writ appeal has been filed against the order by a single Judge of this Court in W.P.(MD)No.3791 of 2022. There is also a writ petition in W.P.(MD)No.10969 of 2022 filed by the same appellant challenging the proceedings and consequent notification, dated 11.05.2022.



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2. Since the matter in issue in both the writ appeal and writ petition

pertains to the same facts, both are clubbed and a common order is passed.

3. The grandfather of the appellant Late.Janab M.S.Syed Masood Alim Sahib was the Mutawalli of three Wakfs namely, (1)Naina Mohammed Periya Kuthuba Pallivasal, (2)Syed Masood Nayagam Dharga and (3)Udhuman Labbai Sheik Thaika. He expired on 14.07.1984 leaving behind two sons namely, Late.O.M.S.Sheik Udhuman Alim Sahib (elder) and Late.O.M.S.Abdul Basith Alim Sahib (younger). Immediately, after the demise of the appellant's grandfather, his paternal uncle i.e., the elder son of his grandfather became the Mutawalli of all the three wakfs, which was objected to by the appellant's father, who claimed that, he also being the son of Late.M.S.Syed Masood Alim Sahib, was entitled by way of inheritance to become the Mutawalli vide his petition, dated 22.09.1984 to the Tamil Nadu Wakf Board. This petition was considered by the Board and vide their proceedings, dated 09.02.1985 decided that column 10 of the profoma reports for the three wakfs clearly stated that the rule of succession of the office of Mutawalli is hereditary according to customs. The Board further felt that a decision regarding the office of the Mutawalliship of Udhuman



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Labbai Ali Sheik Dharga would be considered later due to certain pending

Civil Court proceedings and therefore, the office of Mutawalliship for the other two Wakfs namely, Naina Mohammed Periya Kuthuba Pallivasal and Syed Masood Nayagam Dharga only to be considered immediately. The Board decided to appoint Janab O.M.S.Abdul Basith Alim Sahib, the younger son as Mutawalli for Naina Mohammed Periya Kuthuba Pallivasal since he was holding a diploma from Madharsha of Lalpet and also a qualified Moulvi, who knew Quaran by heart. Further Janab O.M.S. Sheik Udhuman Labbai Alim Sahib was appointed as Mutawalli of Wakf known as Syed Masood Nayagam Dharga since he was already the correspondent of the High School under the name of Masood Thuluka High School, which came under the management of Syed Masood Nayagam Dharga. Both the brothers took charge as Mutawalli of the respective Wakfs. However, the elder brother Janab O.M.S.Sheik Udhuman Alim Sahib filed a writ petition in W.P.No.1575 of 1985 for setting aside the order of the Wakf Board dated 09.02.1985. The writ petition was allowed by an order, dated 31.07.1986 against which a writ appeal in W.A.No.848 of 1986 was filed by O.M.S.Sheik Abdul Bashith Alim Sahib (younger brother). In the said appeal, the First Bench of this Court vide an order, dated 27.07.1989 has



held as follows:

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“We have heard Mr.Habibulla Badsha, learned counsel for the appellant, Mr.R.Krishnamurthi for the contesting respondent-1 and Mr.Mustafa for the second respondent.

By consent, the following order is passed since the question to be decided in the case is whether the custom of hereditary succession by primogeniture would apply to the wakf in question. No doubt, under Sec.42 of the Wakf Act, the Wakf Board was of the view that on the death of the previous Muthawalli, there were as many vacancies which are three in this case, out of which we are presently concerned with only two. If really the Rule of Primogeniture is applied, one set of consequence would follow and if it is not established, the other consequences would follow. In these circumstances, we are of the view that though there are allegations to this effect in the affidavit filed in support of the writ petition, that has been denied by the second respondent (the present appellant) in paragraph No.1 of the counter affidavit. Therefore, the disputed duration of fact as to the custom of primogeniture had to be established in a Civil suit.

We direct the first respondent-writ petitioner to file a suit within one month from today. As and when such a



suit is filed, it shall be disposed of with utmost expedition, preferably within nine months from the date of filing of the suit. The Status Quo as on today shall prevail till the disposal of the suit. Till then, the Wakf Board shall stay off its hands concerning the appointment of Muthawalli.

We make it clear that we have not expressed any opinion on the merits of the case.

The Writ is ordered accordingly. No Costs."

4. Accordingly, a civil suit in O.S.No.138 of 1989 was filed by O.M.S.Udhuman Alim Sahib (elder brother) before the Sub Court, Tenkasi and the same was dismissed vide decree and judgment, dated 05.08.1993 on the ground that the plaintiff did not prove the rule of the "right of primogeniture". This decree and judgment was challenged in A.S.No.1024 of 1993 before this Court by the plaintiff (elder brother). The appellant's father (younger brother), who was holding the office of Mutawalliship of Naina Mohammed Periya Kuthuba Pallivasal died on 22.05.2012. Immediately, after his demise, his elder son O.M.A.Thanaulla submitted a petition to the Wakf Board on 28.05.2012 seeking his appointment as Mutawalli on the demise of his father. Janab O.M.A.Sheik Udhuman Alim



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Sahib (elder brother) objected to it citing the pendency of A.S.No.1024 of 1993 in the Court.

5. In the meanwhile, there were applications from one A.Syed Masood and also from the present appellant and from the son of O.M.S.Sheik Udhuman Alim Sahib (elder brother), the third respondent in the present appeal. On 16.11.2012, the Wakf Board issued enquiry notice to all applicants and after the enquiry, unanimously resolved vide order, dated 25.06.2014 to appoint O.M.S.Hasan Magdhoom Alim (third respondent) son of O.M.S.Sheik Udhuman Alim Sahib. According to the notification dated 27.06.2014 issued by the Chief Executive Officer of the Board, this appointment of Mutawalli of Pallivasal was for three years or the date of final order by this Court in A.S.No.1024 of 1993, whichever is earlier. Janab Sheik Udhuman Alim Sahib (elder brother) died on 29.06.2014 exactly two days after the appointment of his son as Mutawalli of Pallivasal. The present appellant challenged the order of the Wakf Board in W.P. (MD)No.12143 of 2014 which was allowed by this Court on 29.04.2016. Challenging this order, two writ appeals were filed namely W.A.(MD).No. 865 of 2016 by the Wakf Board and W.A.(MD).No.866 of 2016 by O.M.S



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Hasan Magdhoom Alim (third respondent herein). These writ appeals were dismissed vide orders dated 22.03.2018, in which one of us was presiding (R.Hemalatha,J.), by observing as follows:

"17. It is to be noted at this juncture that the Tamil Nadu Wakf Board is not a party either in O.S.No.138 of 1989 or in CRP. (MD).No.324 of 2005 and it is also not in dispute that the appellant in W.A.(MD).No.866 of 2016 is continuing as a Mutawalli by way of succession in respect of 'Syed Masood Nayagam Dharga', Therku Ayyapuram, Kadayanallur.

18.The impugned resolution of the Tamil Nadu Wakf Board, dated 21.08.2013, also did not indicate that there was a mismanagement or other misdeeds of the part of the first respondent/writ petitioner.

19. Be that as it may, now the office of Mutawalliship in respect of 'Naina Mohammed Peria Kuthba Pallivasal', Periya Street, Kadayanallur, falls vacant on account of the expiry of the tenure of the appellant in W.A.(MD).No.866 of 2016.

20. This Court taking into consideration of the fact that the appellant in W.A.(MD).No.866 of 2016 is acting as Mutawalli in respect of 'Syed Masood Nayagam Dharga', Therku Ayyapuram, Kadayanallur, is of the considered view that till



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the proceedings takes place, as to the appointment of permanent Mutawalli, in respect of 'Naina Mohammed Periya Kuthba Pallivasal', Periya Street, Kadayanallur, the first respondent in both the writ appeals/writ petitioner, is to be continued as temporary Mutawalli in respect of 'Naina Mohammed Periya Kuthba Pallivasal', Periya Street, Kadayanallur and it is also made clear that it is also subject to the result of A.S.No.1024 of 1993.

21. This Court would also make it clear that de horse this order, it is always open to the appellant in W.A.(MD).No.865 of 2016, namely, Tamil Nadu Wakf Board, to exercise its powers in terms of the Wakf Act, 1995 and the rules framed there under, as to the office of Mutawalliship in respect of 'Naina Mohammed Periya Kuthba Pallivasal', Periya Street, Kadayanallur as well as 'Syed Masood Nayagam Dharga', Therku Ayyapuram, Kadayanallur.

22. Both the writ appeals are dismissed, subject to above observations."

Consequent upon the directions given in the above appeals, the Tamil Nadu Wakf Board once again issued an enquiry notice dated 12.06.2018 to the appellant and the third respondent, conducted enquiry on 19.06.2018 and



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resolved to appoint the third respondent as the interim Mutawalli of the Naina Mohammed Periya Kuthuba Pallivasal till the disposal of A.S.No. 1024 of 1993 vide proceedings, dated 27.06.2018. The notification was issued to this effect by its Chief Executive Officer on 05.07.2018. This was again challenged by the appellant on 19.07.2018 in W.P.(MD).No.16615 of 2018 and which was allowed on 30.08.2018 quashing the appointment of the third respondent as Mutawalli and directing the Board to appoint the appellant as Mutawalli of Pallivasal till the disposal of A.S.No.1024 of 1993. This order was challenged vide W.A.(MD).No.1468 of 2018 by Wakf Board and W.A.(MD).No.1707 of 2018 by the third respondent. These writ appeals were dismissed by this Court on 23.10.2019. The third respondent filed SLP No.5767 of 2020 before the Hon'ble Supreme Court, which vide its orders dated 20.05.2020 dismissed the SLP granting liberty to the third respondent to take steps for disposal of the appeal in A.S.No.1024 of 1993.

6. Subsequently, the Tamil Nadu Wakf Board appointed the appellant as Mutawalli for a period of three years as directed by this Court in W.P. (MD).No.16615 of 2018. However, this appointment was subject to the outcome of A.S.No.1024 of 1993, vide orders, dated 16.07.2020.



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Accordingly, the Chief Executive Officer vide his proceedings No. 6211/12/B1/TVN dated 16.07.2020 passed the following order:

“Hence in pursuance of the orders of the Hon'ble High Court in W.P(MD)No.16615/2018 dated 30.08.2018 and orders of the Hon'ble Supreme Court of India in S.L.P(Civil)No. 5767/2020 dated 20.05.2020, Janab O.M.S.Udhuman Mydheen is appointed as Muthawalli of Naina Mohamed Kuthba Peria Pallivasal, Kadayanallur, Tirunelveli District for the period of three years from the date of order and shall be subject to the outcome of A.S.No.1024/1999.”

This appointment order for a period of three years only, according to the appellant, was an act of wilful disobedience of the orders passed in W.P. (MD).No.16615 of 2018, W.A.Nos.1468 of 2018 and 1707 of 2018 by which the Board had committed contempt of Court and contempt petitions in Cont.P.(MD).Nos.238 & 239 of 2020 were filed by the appellant stating that his appointment as Mutawalli ought to have been till the disposal of A.S.No.1024 of 1993 and not for three years as stipulated in the Board's order, dated 16.07.2020. Consequent upon this, a revised order was passed by the Board on 07.10.2020. The appellant was appointed as Mutawalli of Pallivasal till the disposal of A.S.No.1024 of 1993. The related contempt



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petitions were therefore closed on 15.10.2020 recording the compliance of the order of this Court. A.S.No.1024 of 1993 was dismissed on 21.12.2020 as abated citing the reason that both the parties were deceased and nothing survived for adjudication.

7. The Wakf Board, immediately, on 06.01.2021, issued notice to the appellant as well as third respondent for appearing in person for appointment as Mutawalli as the tenure of the appellant came to an end with the disposal of A.S.No.1024 of 1993. Subsequently, a C.M.P.(MD).No.886 of 2021 was filed in A.S.No.1024 of 1993 praying for restoration of the first appeal, which was dismissed as abated. A Single Judge vide orders dated 26.02.2021 observed as follows and allowed the same.

"4. Admittedly, the suit is instituted as per the direction of the Division Bench. However, the suit got dismissed. As against which, the appeal suit has been filed and since the appellant died and no steps have been taken, the appeal suit was also dismissed as abated. As the challenge in the main suit is as against the order of the Wakf Board of the year 1985 and the same got dismissed, it goes without saying that the Wakf Board order stands revived.



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5. Accordingly, the order dated 22.02.2021 passed by this Court in C.M.P.(MD).No.886 of 2021 is recalled. Consequently, the order passed by this Court in A.S.(MD).No.1024 of 1993 dated 21.12.2020, dismissing the appeal suit, stands revived."

In the meanwhile, Wakf Board issued another enquiry notice, dated 24.02.2022, which was challenged by this appellant in W.P.(MD).No.3791 of 2022 and an interim order of stay in W.M.P.(MD).No.3299 of 2022 was granted. Subsequently, on 07.03.2022, a fresh enquiry notice was issued by the Wakf Board pursuant upon the directions given by this Court in W.M.P.(MD).No.3299 of 2022 in W.P.(MD).No.3791 of 2022. Even before the final disposal of W.P.(MD).No.3791 of 2022 on 01.04.2022, an enquiry notice, dated 24.03.2022 scheduling the enquiry on 30.03.2022 and a resolution, dated 30.03.2022 appointing the third respondent as Mutawalli of Pallivasal was issued. The order of Chief Executive Officer of the Board to that effect dated 31.03.2022 was also issued. The final order in W.P.(MD).No.3791 of 2022 was passed on 01.04.2022 dismissing the writ petition by directing the Wakf Board to complete the enquiry and appoint a competent person as Mutawalli. When it was brought to the notice of this Court regarding the appointment of Mutawalli even before the final order



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was pronounced in W.P.(MD).No.3791 of 2022, this Court cancelled the order of the Wakf Board dated 31.03.2022 and directed *status quo ante*. It further directed the Board to comply with its order in W.P.(MD).No.3791 of 2022. The Wakf Board, accordingly, issued a fresh enquiry notice on 02.05.2022 and thereafter, again appointed the third respondent as Mutawalli vide proceedings, dated 11.05.2022.

8. Now the appellant has filed this appeal challenging the order passed in W.P.(MD).No.3791 of 2022 and also W.P.(MD).No.10969 of 2022 against the order of Wakf Board, dated 11.05.2022.

9. Heard, Mr.Issac Mohanlal, Senior Counsel assisted by Mr.Niranjan S.Kumar for the appellant/petitioner and Mr.K.K.Senthil, Standing Counsel for R1 & R2 and Mr.M.Vallinayagam, Senior Counsel, assisted by VR.Shanmuganathan and Mr.T.S.Mohamed Mohideen for R3.

10. As can be understood from the sequence of the on going legal tussle to become Mutawalli of the Pallivasal, the Wakf Board in its proceedings, dated 09.02.1985 took a dispassionate view consequent upon



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the demise of Janab O.M.S.Syed Masood Alim Sahib on 14.08.1984. Out of the three Wakf's, which are managed by him, the Board had decided to ensure the succession of the office of the Mutawalli as per the prevailing customs as hereditary based on the column 10 of the profoma reports. Again while considering the stakes of both the claimants, the Wakf Board did not go by the right of primogeniture and both the brothers had accepted and taken charge of the respective Wakfs, the Mosque and the Dharga. The reasons assigned in that order was to a large extent based on reasoning in the sense that the elder brother, who was already the Correspondent of a High School under the management of Dharga was given the control of Dharga, while the younger brother, who was a qualified Moulvi, Hafiz and Fazil was considered more appropriate to run the Mosque and manage the affairs in an effective way. Therefore, it can be understood that the choice for becoming a Mutawalli was made with two criteria i.e., a person's being the immediate legal heir of the original Mutawalli and to some extent the suitability of the individuals to the nature of duties expected from them. The elder brother, who felt that between the hereditary claimants, the right of primogeniture ought to have been given and denial of his right was in itself injustice to him approached this Court in W.P.No.1575 of 1985. The entire



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trouble started at this point and the litigation initiated by him to establish

his right as the elder brother took a pretty long time and yet continuing. The

Wakf Board also played a role in getting the legal tangle tougher by taking hasty decisions, which were time and again struck down by the Courts.

Nevertheless, the younger brother continued as Mutawalli till his death on 22.05.2012. Technically speaking the Wakf Board ought to have intervened at this stage to finalise as to the successor of the deceased younger brother.

Despite the reverses faced by the elder brother, who was the Mutawalli of Syed Masood Nayagam Dharga in the legal battle till 2012, the Wakf Board, after the death of younger brother on 22.05.2012, took a strange decision of appointing the third respondent, the son of the elder brother, as the Mutawalli to succeed the younger brother. It is pertinent to observe here that the third respondent was not the son of the younger brother and there were two sons for the younger brother. The appellant was the younger son of the younger brother and his own sibling had no objection in the appellant becoming the Mutawalli of the Pallivasal. This appointment of the third respondent on 25.06.2014 defied logic. Interestingly, there were more than one contender for this appointment and the resolution and orders, dated 27.06.2014 issued by the Chief Executive Officer, Wakf Board, did not



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assign any specific reason for selecting the third respondent except for stating that the appointment was temporary and was subject to the outcome of the legal proceedings in the High Court in A.S.No.1024 of 1993. This order was criticized by this Court in the related writ petition in W.P.(MD).No.12143 of 2014 as well as the writ appeals in W.A.(MD).Nos.865 & 866 of 2016 in which the Wakf Board also was the appellant.

11. The elder brother also expired on 29.06.2014. There is no word of mention as to who succeeded him as Mutawalli of the Dharga.

12. The learned counsel for the first respondent (Wakf Board) would contend that as per the settled law any dispute in matters pertaining to the Wakfs, the Wakf Tribunal should be approached first before seeking remedy from any Civil Court or High Court. He relied on the decision in "**Board of Wakf West Bengal Vs. Anis Fatima Begum and another**" reported in "**(2010) 14 SCC 588**" in which it was held thus:

"7..... In our opinion, all matters pertaining to Wakfs should be filed in the first instance before the Wakf Tribunal constituted under [Section 83](#) of the Wakf Act, 1995



and should not be entertained by the Civil Court or by the High Court straightaway under [Article 226](#) of the Constitution of India. It may be mentioned that the [Wakf Act, 1995](#) is a recent parliamentary statute which has constituted a special Tribunal for deciding disputes relating to Wakfs. The obvious purpose of constituting such a Tribunal was that a lot of cases relating to Wakfs were being filed in the courts in India and they were occupying a lot of time of all the Courts in the country, which resulted in increase in pendency of cases in the Courts. Hence, a special Tribunal has been constituted for deciding such matters.

.....

10.Thus, the Wakf Tribunal can decide all disputes, questions or other matters relating to a Wakf or Wakf property. The words "any dispute, question or other matters relating to a Wakf or Wakf property" are, in our opinion, words of very wide connotation. Any dispute, question or other matters whatsoever and in whatever manner which arises relating to a Wakf or Wakf property can be decided by the Wakf Tribunal. The word 'Wakf' has been defined in [Section 3 \(r\)](#) of the [Wakf Act, 1995](#) and hence once the property is found to be a Wakf property as defined in [Section 3 \(r\)](#), then any dispute, question or other matter relating to it



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should be agitated before the Wakf Tribunal.

11. Under [Section 83](#) (5) of the [Wakf Act](#), 1995 the Tribunal has all powers of the Civil Court under the Code of Civil Procedure, and hence it has also powers under Order 39 Rules 1, 2 and 2A of the Code of Civil Procedure to grant temporary injunctions and enforce such injunctions. Hence, a full-fledged remedy is available to any party if there is any dispute, question or other matter relating to a Wakf or Wakf property.

12. We may further clarify that the party can approach the Wakf Tribunal, even if no order has been passed under the Act, against which he/she is aggrieved. It may be mentioned that [Sections 83](#) (1) and 84 of the Act do not confine the jurisdiction of the Wakf Tribunal to the determination of the correctness or otherwise of an order passed under the Act. No doubt [Section 83](#) (2) refers to the orders passed under the Act, but, in our opinion, [Sections 83](#) (1) and 84 of the Act are independent provisions, and they do not require an order to be passed under the Act before invoking the jurisdiction of the Wakf Tribunal. Hence, it cannot be said that a party can approach the Wakf Tribunal only against an order passed under the Act. In our opinion, even if no order has been passed under the Act, the party can approach the



Wakf Tribunal for the determination of any dispute, question or other matters relating to a Wakf or Wakf property, as the plain language of [Sections 83 \(1\)](#) and 84 indicates.

13. We may clarify that under the proviso to [Section 83 \(9\)](#) of the [Wakf Act, 1995](#) a party aggrieved by the decision of the Tribunal can approach the High Court which can call for the records for satisfying itself as to the correctness, legality or propriety of the decision of the Tribunal. This provision make it clear that the intention of Parliament is that the party who wishes to raise any dispute or matter relating to a Wakf or Wakf property should first approach the Tribunal before approaching the High Court.

14. It is well-settled that when there is a special law providing for a special forum, then recourse cannot be taken to the general law vide Justice G.P. Singh's Principles of Statutory Interpretation (9th Edn. 2004, pp 133-134).

15. In [Chief Engineer, Hydel Project & Ors vs. Ravinder Nath & Ors.](#) (2008) 2 SCC 350, this Court held that when the matter fell in the area covered by the [Industrial Disputes Act](#), the Civil Court would have no jurisdiction. In the above



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decision the Court has referred to several earlier decisions on this point.

16. In view of the above, we are of the opinion that since the matter fell under the purview of the [Wakf Act](#), only the Wakf Tribunal has jurisdiction in the matter, and not the Civil Court."

Therefore, according to him, the appellant had a statutory alternative remedy of appeal before the Wakf Tribunal under Section 83 of Wakf Act, 1995 and approaching the High Court without exhausting the available remedy renders the case not maintainable. He further contended that by virtue of Section 63 of the Wakf Act, 1995, the power to appoint Mutawalli is vested with the Wakf Board and cannot be decided otherwise. Furthermore, his contention is that hereditary succession or primogeniture succession cannot be the criteria and the knowledge of Islam has to be tested and the discretion of the Board is vital and final.

13. Section 63 of Wakf Act reads as follows :

"63.Power to appoint mutawallis in certain cases.—When there is a vacancy in the office of the mutawalli of a wakf and there is no one to be appointed under the terms of the



deed of the wakf, or where the right of any person to act as mutawalli is disputed the Board may appoint any person to act as mutawalli for such period and on such conditions as it may think fit".

14. It was another contention that no Muslim can claim a hereditary right in a Mosque especially when the Mosque belongs to 'Shafi School of Islam'. The Principle laid down in "**Syed Mohd. Salie Labbai (Dead) Vs Mohd. Hanifa (Dead)** by LRs. reported in "**AIR 1976 SC 1569**" is as follows:

"..... (f). Further, under the Muslim law once the dedication was complete, the property passed from the owner to God and it never returns to the owner and therefore, the question of the mosque being private can never arise. The very concept of a private mosque is wholly foreign to the dedication of a mosque for a public purpose under Muslim Law. Under that system of 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 in the mosque to whatever section



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or creed he may belong, and that is why the law is so strict that the moment even a single person is allowed to offer his prayers in a mosque it becomes dedicated to the public, Also, any adjuncts to a mosque, which are also used for religious purposes, become as much a part of the mosque as the mosque itself.

According to him, when such is the case, the petitioner cannot claim as if he is entitled to the said office as a matter of right.

15. On the other hand, counsel for the appellant contended that the Board exhibited favouritism while replacing the appellant and appointed the third respondent in his place as Mutawalli of Pallivasal. According to him, grave injustice was done to him by the Board which kept on denying him the right to inherit the legacy of his father. His further contention is that the appellant also was in constant touch with the happenings in the Mosque helping his father and having been brought up in such an atmosphere he has been a devout Muslim. Merely because his father was the younger son of his grandfather, and thereafter, the appellant succeeding him for the office of



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Mutawali, cannot be denied on flimsy grounds. He also contended that it was not his father, who initiated the legal proceedings and that it was only the paternal uncle (elder brother of his father), who filed a writ petition challenging the appointment of the appellant's father as the Mutawalli of Pallivasal. In such a scenario, the contention of the respondent regarding jurisdiction of a Civil Court appears strange. It is also his contention that there was no occasion for the Board to invoke the provisions of Section 63 of the Act, as there was no vacancy for the office of Mutawalli at any point of time.

16. The series of decisions and the reversal of those decisions taken by the Wakf Board in the instant case raises a few questions out of which the main is as to whether there is any clear cut guidelines for appointment of Mutawalli. The proceedings dated 09.02.1985 prominently mentions about the hereditary system in vogue. It is true that the grandfather of the appellant was the sole Mutawalli for the three Wakfs as mentioned above. On his demise, the Board thought it fit to give the Pallivasal to the younger son and Dharga to the elder one. It is to be noted that both of them were siblings and initially the elder one had taken control of all the three Wakfs and this was



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set right by the Board. It is also true that as per Mohammedan Law when a Muslim dedicates his property for the objects of charity or to God, he completely parts with the corpus which vests in God and never returns to the founder. However, what has been the custom in this case is the hereditary succession of the Mutawalliship. This is decided by the PROFOMA - the Wakf Deed. The only apparent problem which shows up its head is the lack of clarity as to the criteria of selection for appointment as Mutawalli. The same Wakf Board which earlier said that the hereditary succession is the customary basis for such appointments now talks about the merit as assessed by the Board. This makes the entire system opaque and arbitrary.

17. We are not here to give lengthy sermon nor do we intend to get into any advisory mode, but the time and energy spent in the litigation involving just one Mosque could be just a tip of the iceberg. Wakf Board definitely is a supervisory Board with illustrious persons holding office as members of the Board. The need to have a proper system to select and nominate Mutawallis would reduce the avoidable friction between various eligible members of the community.



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WEB COPY 18. In the instant case, the appellant had the hereditary right to become the Mutawalli of Pallivasal following his father's footsteps but unnecessarily he was made to run from pillar to post not only because of his cousin brother, the third respondent, but also because of the indecisiveness and bias exhibited by the Board which ought to have acted in a professional manner. Such unprofessionalism would not help the Board in managing the affairs of the various Wakfs under their supervisory control. A careful reading of the Board's order dated 09.02.1985 clearly stated as follows :

"Though the rule of succession is hereditary according to custom it is not the case that the eldest son O.M.S.Sheik Udhuman Alim Sahib is entitled to the appointed as Mutawalli of all three Wakfs is not sustainable".

This portion reflected the fair and reasonable approach of the Board way back in 1985. Equity appears to have been the watch word when the Board took such a decision. The proceedings of the Board then had made clear logical reasoning therefore, making the decision transparent. Over the past three decades, it is found that all the subsequent orders were neither transparent nor logical. They were merely intimating the appointment of



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Mutawalli of the Pallivasal without assigning any reason. Subsequent orders of the Board have either been in compliance with the Court orders or have exhibited arbitrariness. As already discussed the appointment of the third respondent in the place of Janab O.M.S.Sheik Abdul Basheed Alim Sahib (younger brother) after his demise on 22.05.2012 is one such decision. It is also not clear about the fate of the appointment of Mutawalli for the one remaining Wakf namely Udhuman Labbai Sheik Ali Dharga for which no decision was taken in 1985 owing to certain civil litigations and it was mentioned that it would be dealt with separately at a later stage. This again exposes the partisan attitude of the Board. It is also evident that the right of primogeniture did not find favour with either the Board in 1985 or the Court in O.S.No.138 of 1989 (in Sub Court, Tenkasi).

19. The contention of the learned counsel for the appellant that profoma of any of the Wakfs has a final say as to the rule of succession of the office of Mutawalli. This is the basic constitution which describes not only the rule of succession but also the objects of the Wakfs and the income and expenditure details along with the list of movable and immovable assets. Such is the significance of profoma that the Board itself relies on the



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contents of the profoma for effective management and supervision of the respective Wakfs. Therefore, in this background, the Board ought to have acted with discretion and taken more conscious decisions with proper reasoning which could have avoided such litigations.

20. As regards the maintainability of the Writ in this Court or any litigation in any other Civil Court, it is clear that lack of a fair and level playing field with clear guidelines could have avoided the affected party from approaching the Court.

21. A three-Judge bench of the Supreme Court has ruled in **M/s.Magadh Sugar & Energy Ltd. v. the State of Bihar & Others [2021 SCC online SC 801]**, delivered on September 24, 2021, that the existence of an alternate remedy does not by itself bar the High Court from exercising its jurisdiction in certain contingencies. In the decision of **Radha Krishen Industries v. State of Himachal Pradesh & Others [2021 SCC OnLine SC 334]**, a two-judge bench of the Supreme Court has summarized the principles governing the exercise of writ jurisdiction by the High Court in the presence of an alternate remedy. The Supreme Court has observed:



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“28. The principles of law, which emerge are that:

(i) The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights but for any other purpose as well;

(ii) The HC has discretion not to entertain a writ petition. One of the restrictions placed on the power of the HC is where an effective alternative remedy is available to the aggrieved person;

(iii) Exceptions to the rule of alternate remedy arise where (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of principles of natural justice; (c) the order or proceedings are whole without jurisdiction, or (d) the vires of legislation is challenged;

(iv) An alternate remedy by itself does not divest the HC of its powers in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law;

(v) when a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that



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particular statutory remedy before invoking the statutory remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience, and discretion; and

(vi) In cases, where there are disputed questions of fact, the HC may decide to decline jurisdiction in a writ petition. However, if the HC is objective of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with.”

22. In the facts and circumstances, the entire series of happenings warranted intervention of this Court to render justice. In view of these findings, the order passed by the Wakf Board, dated 11.05.2022 is liable to be set aside. Therefore, the said order, dated 11.05.2022 stands quashed and the Wakf Board is directed to appoint the appellant as the Mutawali of the Naina Mohammed Periya Kuthuba Pallivasal, Kadayanallur, Tenkasi District with immediate effect for lifetime. This order has to be complied with within two weeks.



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23. In the result, the Writ Appeal and Writ Petition are allowed. No

costs. Consequently, connected miscellaneous petitions are closed.

[P.N.P., J.] [R.H., J.]
29.08.2022

Index : yes/no
Internet : Yes/No
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P.N.PRAKASH, J.
and
R.HEMALATHA, J.

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Judgment in
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29.08.2022