



W.P.(MD).No.7014 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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RESERVED ON : 22.09.2023

PRONOUNCED ON : 17.11.2023

CORAM

THE HONOURABLE MRS.JUSTICE S.SRIMATHY

W.P.(MD).No.7014 of 2023

and

W.M.P.(MD)Nos.6634, 6635 and 19526 of 2023

1. Thaika Palli Jamaath (Pathans),
Rep.by its President,
Kottar, Nagercoil,
Kanyakumari District.
- 2.Malick Dhinar Baithulmal,
Rep.by its President,
No.23 C/15, Royal Nagar,
V-ways Colony, Vettaroorani,
Nagercoil,
Kanyakumari District.
- 3.Kottar Elankadai Muslim Samuthaya Trust,
Rep.by its Treasurer,
Kottar, Nagercoil,
Kanyakumari District.

.....Petitioners

.Vs.

- 1.Tamil Nadu Waqf Board,
Rep. By its Chairman,
No.1, Jaffer Syrang Street,
Vallal Seethakathi Nagar,
Chennai-600 001.



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

3.The Superintendent of Waqf,
Tirunelveli,
Tirunelveli District.

4.Janab Syed Ahamed Mustafa @ Ahamed

....Respondents

PRAYER:This Writ Petition is filed for Writ Of Certiorarified Mandamus, to call for the records relating to the impugned order issued by the 2nd respondent vide his proceedings in SE.MU order. 14604/07/A1 K.Kumari dated 03.03.2023 and quash the same as illegal and consequentially to direct the official respondents to conduct the election for the administration of Thaika Palli Trust, Nagarcoil, Kanyakumari District in accordance with the order made by this Court in W.P.(MD)No.22140 of 2022 dated 04.11.2022.

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

For R-1 to R-3 : Mr.K.K.Senthil
Standing Counsel

For R-4 : Mr.M.Saravanan for
Mr.R.Pon Karthikeyan



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ORDER

This Writ Petition is filed for Writ of Certiorarified Mandamus, to quash the impugned order issued by the 2nd respondent dated 03.03.2023 and consequentially to direct the official respondents to conduct the election for the administration of Thaika Palli Trust, Nagarcoil, Kanyakumari District in accordance with the order made by this Court in W.P.(MD)No.22140 of 2022 dated 04.11.2022.

2. The brief facts as stated in the affidavit are that the petitioners are Urdu speaking Muslims, properly known as “Pattans” and their forefathers established a trust known as Thaika Palli Trust which is a notified Waqf. The said Waqf owns extensive properties and the income is meant to be utilized for conducting ceremonies and daily prayers and for feeding fakirs, mendicants and poor wayfarers. The administration of the Wakf was with certain private persons and the last person who was in management is Syed Waliullah Shah Qadri Peer Zada (popularly known as S.P.Shah). The said person has mismanaged the affairs of Waqf and wantonly alienated the Waqf properties and misappropriated a huge amount and they disregarded most of the festival and failed to carry out to conduct any festival for which the Waqf was established. Hence the Waqf



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Board passed an order in W.A.No.9 of 1997 dated 15.06.1997 removing the above said S.P.Shah from the Muthawalliship and brought the Waqf under direct management. But some trespassers encroached the properties and misappropriated but the Waqf Board has not taken any action to recover the properties from the strangers. Hence the Waqf was not managed properly neither by the Muthavalli nor by the Waqf Board. Hence the petitioner's forefather had filed O.S.No.166 of 1979 on the file of the Sub Court, Nagarcoil for framing a scheme and the said suit was allowed, vide judgment and decree, dated 21.01.1983 and passed a preliminary decree for framing a scheme so as to elect 7 members for the administration of Waqf and its properties. In that 2 members are from Pattans of Kottar and 3 members from Maliq Thinar Paithulmal Trust of Arippu Street and 2 members of Elangadai Muslim Trust. Aggrieved over the said judgment, an appeal was preferred in A.S.No.197 of 1983 and the Waqf Board has also preferred an appeal A.S.No.449 of 1983. The High Court, vide judgment, dated 05.01.1993, had passed a common judgement and decree confirming the Sub Court with the modification in proportion of representation whereby 9 trustees by giving 3 to each Trust. Thereafter, final decree was passed by the Sub Court on 28.09.1993. Pursuant to the final decree, the Waqf has not taken any steps to conduct elections. Hence, I.A.No.431 of 2000 was filed for appointing an Advocate Commissioner and the same was allowed by the Principal Sub Court, vide order, dated 18.06.2010. Inspite of the



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same, the first respondent without conducting election has passed an order, dated 13.05.2022, appointing the 4th respondent as the Muthavalli for a period of three years till 10.05.2005, stating that his post is hereditary. Aggrieved over the same, W.P.(MD)No.22140 of 2022 was filed. During the course of hearing, the Learned Standing Counsel for the Waqf Board and the Learned Counsel for 4th respondent Muthawalli agreed that the scheme shall be implemented and they have undertaken to conduct election within a period of three months. Regarding the said submissions, the High Court has passed an order, dated 04.11.2022 by directing the waqf to conduct election within a period of three months but not later than 6 months. In compliance to the said order, the petitioners have elected three members in each trust and sent the details together with bio-data to the 2nd respondent through the 3rd respondent on 04.12.2022 and also issued a notice dated 18.01.2023 for passing suitable orders to formulate the scheme for the administration of the waqf and remove the 4th respondent from Muthavalliship. On receipt of the representation, the respondent issued notice dated 25.01.2023 for enquiry, the petitioner appeared before the respondent on 30.01.2023 and putforth their contentions. The Waqf Board has also agreed to conduct elections shortly.

3. While that being so, the first respondent Board has passed the impugned order, dated 03.03.2023, cancelling the scheme decree alleging that



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Muthavalliship to the said Waqf is hereditary according to the title deed and confirmed the appointment of the 4th respondent as Muthavalli, vide earlier resolution dated 11.05.2022. The first respondent has chosen to cancel the scheme decree which was in existence for more than 30 years. The first respondent Board was not empowered to cancel the scheme framed by a Civil Court and thus the impugned order is without jurisdiction. Moreover, the act of the respondent amounts to contempt against the order dated 04.11.2022 passed in W.P.(MD)No.22140 of 2022. The said 4th respondent has not at all come to the scene for more than 4 decades and they have not taken steps to manage the Waqf for past 4 decades and it is only the petitioners who have taken efforts and initiated legal battle and formulated to scheme to administer the Waqf. In the earlier writ petitions the 4th respondent has not even pleaded that he is a hereditary Muthawalli. On the other hand, he agreed for the implementation of the scheme in W.P.(MD)No.22140 of 2022 and hence the 4th respondent is estopped from making applications for cancellation of the scheme. Moreover, the 4th respondent's representation dated 02.01.2023 for cancelling the scheme is barred by the Doctrine of Constructive Res Judicata. The impugned order also suffers from violation of principle of natural justice. The petitioner had raised various grounds and prayed to quash the impugned order.



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4. The learned counsel appearing for the 4th respondent submitted that at the time of admission of the writ petition this Court has granted interim stay dated 30.03.2023 in W.M.P.(MD)No.6635 of 2023. The 4th respondent had filed vacate stay petition in W.M.P.(MD)No.19526 of 2023 along with counter.

5. In the counter it is stated that the 4th respondent is the lineal descendent of the creator of Wakf. Further it is stated that writ petition is filed raising the issue relating to right of administration of Wakf, but the writ petition is filed without impleading the said Wakf and hence the writ petition cannot be maintained for non-joinder of necessary parties. The Saint Hazarath Fazil Sha had chosen his lineal descendant as his spiritual descendant and made him as Khalief. Salim Khan disciple of Hazarath Fazil Sha had executed a “Parvana” in Persian language in 1215, Hijiri (equivalent to 1800 -1801 Calendar) appointing Hazarath Syed Mohammed Peer Sha as Mutawalli and beneficiary of the Wakf and vested several properties in his favour. As per the deed, the beneficiary-cum-Mutawalli has to conduct “Urs” ceremony of Saint Hazarath Fazil Sha and to pay the travel expenses for Fakirs and he can appropriate the remaining income from the properties for the maintenance and support of his family. The aforesaid Hazarath Syed Mohammed Peer Sha and his lineal descendants have been acting as Mutawalli of the Wakf hereditarily. The proforma of Wakf



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contains all the above particulars and it has been clearly stated the rule of succession of Mutawalli is hereditary. Further the hereditary Mutawalli had been shown as beneficiary in Column No.7 of the proforma. The 4th respondent family are the descendants of the said Hazarath Syed Mohammed Peer Sha and they are administering the Wakf right from its inception. The Wakf owned several immovable properties and the same was leased to several third parties. The 4th respondent's great grandfather Syed Peer Sha Mohaideen Khadri, grandfather Syed Abdul Latif Mohaideen Shah Khadri and father Syed Peer Shah Mohaideen Khadri @ S.P.Shah had administered the Wakf successively. The hereditary Mutawallis have been conducting "Urs festival" every year. The 4th respondent's family is residing in Pottalpudur, Tenkasi which is situated outside Kanyakumari District. One Abubaker and two other local residents of Kottar filed O.S.No.55 of 1974 against the Mutawalli and Wakf Board contending that they are Pathans residing at Arippu Street, Kottar and their ancestors created the Wakf by dedicating several properties. And further contended that the 4th respondent ancestors residing in Pottalpudur was appointed as hereditary mutawallis as there were no eminent person in Kottar area. They said Abubakar and others further contended that Pathans of Kottar alone is entitled to be appointed as Mutawalli. However, the said suit was dismissed by holding that the Pathans of Kottar did not dedicate any property in favour of the Wakf. Further, the court has held the 4th respondent ancestors



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alone have been administering the Wakf as hereditary mutawalli i.e. descendants of Hazarath Syed Mohammed Peer Sha. The above degree has reached finality. The above proceeding is an attempt by the tenants and other occupants of the Wakf property to destabilise the administration of the Wakf.

6. The fourth respondent further contended that the untimely demise of his grandfather at the age of 37, the 4th respondent father who was a minor at the time took charge as Mutawalli. At this juncture, Wakf Board had suddenly removed the 4th respondent's father from Mutawalliship on the ground that his paternal uncle had leased out properties to various third parties and did not take action against the occupiers who put up construction in the properties. Under the Wakf Act, even a removed Mutawalli is eligible for reappointment after five years. But in the instant case, the Wakf Board neither restore the 4th respondent father as Mutawalli nor appointed the person next in line as Mutawalli. Hence the 4th respondent sent several representations to the Wakf Board and also submitted petitions personally. Ultimately through resolution dated 11.05.2022 Wakf Board has appointed the 4th respondent as Mutawalli in the above resolution. In the above resolution the Wakf Board has recorded the fact that the succession of Mutawalli is hereditary and the scheme decree obtained without impleading the hereditary Mutawalli is not binding on them and when there is a person next in line there is no need for framing any scheme. Based on the above



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resolution, the Chief Executive Officer of Wakf Board has issued an order dated 13.05.2023 and immediately the 4th respondent took charge and discharging the function of Mutawalli. At this juncture one Syed Ismail and Azeem filed W.P. (MD)No.22140 of 2022, challenging the consequential order dated 13.05.2022, appointing the 4th respondent as Mutawalli and contended that the Patans of Kottar had dedicated properties for Thaikka Palli Trust and they alone are entitled to appoint trustees as per the scheme decree framed in O.S.No.166 of 1979, as modified in A.S.No.197 of 1983 and A.S.No.440 of 1983. The above proceeding is a collusive proceeding between the Pathans of Kottar and Wakf Board. On instigation of tenants and persons in occupation of Wakf property, the Pathans of Kottar had filed the above suit claiming right of administration over the Hazarath Fazil Sha Oulia Thaika Wakf suppressing the fact the line of succession of the Wakf is Hereditary and properties vests with the Mutawalli and he can appropriate the income from the property after spending for the religious charities, namely, conducting Urs festival and paying travel expenses to Fakirs. When the line of succession of Mutawalli is hereditary, the suit filed without impleading the hereditary Mutawalli is not maintainable and the same is not binding on the hereditary Mutawalli. Both the orders were obtained behind the back of the 4th respondent and his family.



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7. The fourth respondent further submitted that all the contentions raised in O.S.No.166 of 1979 were raised in O.S.No.55 of 1974 and the same was rejected by the competent court. The categorical finding of the court in O.S.No. 55 of 1974 is that the Pathans of Kottar have no right over the administration of Hazarath Fazil Sha Oulia and they did not prove their contention that the Pathans dedicated properties in favour of the Wakf. The court has also found that the line of succession is hereditary and the 4th respondent and family are administering the Wakf. But in O.S.No.166 of 1979 the Wakf Board had simply filed a written statement, conceding the averment in plaint. Based on the same, the suit was decreed, permitting the Malik Thinar Paithumal Trust, Kottar Ilangadai Muslim Trust and Pathans of Kottar to elect members to administer the Wakf. Though the degree was passed 40 years back till date, the same is not implemented. None of three groups were willing to send their representatives. Further apart from the properties of Hazarath Fazil Oulia Thaika the properties of several other Wakfs, namely, Ilangadai Muslim Trust were also included in the schedule of property. Consequently, the decree has become unenforceable. Further the decree obtained behind the 4th respondent bank is not binding on the 4th respondent and family. At this juncture, vide order dated 04.11.2022, the Hon'ble High Court was pleased to dispose of W.P.(MD)No. 22140 of 2022 and directed the Wakf Board to explore the possibility of conducting election as per the scheme decree and if the Wakf Board comes to the conclusion that the



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implementation of the scheme decree is not feasible, the parties were given liberty to redress their grievance in a manner known to law. After due deliberations, the Wakf Board had passed a resolution dated 30.01.2023 stating that since this subject Wakf is hereditary, the scheme appointing outsiders as trustees is against the very object of the formation of Wakf and hence the scheme appointing outsiders as trustees was rejected and the 4th respondent appointment as hereditary Mutawalli was confirmed. Challenging the same the petitioner has preferred the present writ petition.

8. In W.P.(MD)No.22140 of 2022 the petitioner thereunder had deliberately challenged the consequential proceedings without challenging the resolution which contains the reason for taking such decision. As the resolution was not placed before the Hon'ble Court, a wrong impression was created that the 4th respondent's appointment was made under section 63 and hence the Hon'ble Court had passed an order in W.P.(MD)No.22140 of 2022 recording that the 4th respondent was appointed under section 63. In the resolution dated 11.05.2022 the Wakf Board has recorded the fact that the succession of Mutawalli of Wakf is hereditary and the scheme decree obtained without impleading the hereditary Mutawalli is not binding on them and when there is a person next in line, there is no need to frame any scheme. But suppressing the



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above resolution one Syed Ismail and Asim had obtained orders and now sets up another three persons and filed the present writ petition. Further the 4th respondent submitted that he had never instructed his counsel to give any consent for implementing the scheme decree. In fact based on the 4th respondent application the Wakf Board had passed a resolution dated 11.05.2022, appointing the 4th respondent as hereditary Mutawalli by accepting the hereditary rights of the 4th respondent. When the 4th respondent is fighting for his rights in various forms the order dated 4.11.2023 passed in W.P.(MD)No. 22140 of 2022 as if the 4th respondent accepted the scheme decree is ex-facie erroneous and unsustainable. Moreover an Advocate is not competent to give up the rights of his client or to withdraw the client's claim without obtaining written instruction from the client. Hence the order passed on the basis of Counsels oral instruction as if the 4th respondent have withdrawn the claim of hereditary mutawalli is not sustainable in law. Further the 4th respondent has filed a review application to review the order dated 04.11.2023 passed in W.P. (MD)No.22140 of 2022. Further the 4th respondent has stoutly denied the allegation of misappropriation of Wakf money and mismanagement of the affairs of the Wakf. As the scheme decree was obtained without impleading the hereditary Mutawalli, the same is not binding on the Mutawalli. As far as the Wake is concerned, the petitioner and others are total outsiders and they can never be appointed as Mutawalli. Even if a Mutawalli is removed, the person



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next in line has to be appointed as Mutawalli. The petitioner is having alternative remedy of appeal and hence the writ petition is not maintainable. Moreover the 4th respondent has conducted the Urs festival last year and is making arrangements to conduct the same this year also which is scheduled to be conducted on 24.09.2023. Now citing the interim order the writ petitioner is taking hectic steps to stall the festival. Hence the 4th respondent prayed to vacate the interim order and dismiss the writ petition.

9. Heard, Mr.M.Ajmal Khan, learned Senior Counsel for M/s.Ajmal Associates appearing for the petitioners, Mr.K.K.Senthil, learned Standing Counsel appearing for the respondents 1 to 3, Mr.M.Saravanan for Mr.R.Pon Karthikeyan, learned Counsel for the 4th respondent and perused the materials available on record.

10. After hearing rival submissions, this Court given its anxious consideration to the issues raised in the Writ petitions. The first contention of the petitioner is that the Wakf Board has no jurisdiction to cancel the scheme decree framed by the competence Civil Court and confirmed by High Court is Appeal Suit. But it is seen that the said scheme decree is framed in the suit without impleading the hereditary Mutawalli or their family members. It is



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atrocious to file a suit without impleading the existing hereditary Mutawalli.

Even more shocking is that the Wakf was created by stating that the Wakf ought to be managed by “Hereditary according to the title deed”. This is recorded in the proforma G.S.5KK-page No.12 also. The said title deed or the proforma was not marked as a document in the suit. Therefore this Court is of the considered opinion that the scheme decree is obtained by fraud and hence the same is non-est in the eyes of law.

11. The next contention of the petitioner is that the 2nd respondent, Chief Executive Officer has agreed before the Hon’ble High Court in W.P.(MD)No. 22140 of 2022 that they would ensure that the scheme would be implemented within a period of 3 months but not later than 6 months and as such the Board is estopped from cancelling the scheme. This contention of the petitioner cannot be accepted since Wakf Board has no right or power to concede against the Wakf Deed. If conceded then the Wakf Board is encroaching into the rights of the Wakf creator, which is impermissible. Infact the Wakf Board ought to have brought to the knowledge of the Courts in Suit, in Appeal Suit, in W.P.(MD)No. 22140 of 2022 and in other proceedings that the creator of the Wakf has stated that the Mutawalli as hereditary and hence the Wakf Board had terrible failed in its duty to protect the Wakf. As stated supra the Wakf Board has no right to concede and no business to change the character of Wakf. Hence the plea of the petitioner that the Wakf Board had conceded fails.



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12. The next contention of the petitioner is that the 4th respondent is barred from making representation to cancel the scheme decree as he had agreed before the Hon'ble Court in W.P.(MD)No. 22140 of 2022 and his representation dated 02.01.2023 is barred by Doctrine of Constructive Res Judicata. This contention of the petitioner cannot be accepted since the Advocate's concession cannot bind the parties. It is settled proposition that the Advocates can represent the client case, but they do not have right or power to concede unless a written instructions is given for conceding the case. In the present case there is no such written instruction. Moreover, in the counter filed by the 4th respondent, he has specifically stated that he is fighting for his rights before various forums and the advocate is not competent to give up the client rights and he has not instructed to concede. Infact this Court goes a step further to ascertain whether the 4th respondent has right to concede against the wish of the creator of Wakf or the Wakf Deed, then the answer would be "No". Therefore, this Court is of the considered opinion that the 4th respondent also has no right to concede at all and if he concedes then he is acting against the wish of the "Creator of Wakf". In such circumstances the rights of the Creator of Wakf ought to be protected and consequently the rights of the 4th respondent and the family ought to be protected.



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13. The next contention of the petitioner is that in W.P.(MD)No. 22140 of 2022 the Hon'ble Court had directed to seek redressal of grievance to remove the difficulty to implement the scheme and not to cancel the scheme itself. This Court has already held that the scheme is obtained by fraud and hence this plea also cannot be entertained.

14. The next contention of the petitioner is that the claim of the 4th respondent is barred by Law of Limitation by virtue of Article 107 of the Limitation Act, 1963 which clearly provides a period of 12 years for possession of hereditary office and the 4th respondent having not claimed the office of Mutawalli for the past 40 years is not entitled to make the claim now. It is seen from the facts that the scheme is framed in O.S.No.166 of 1979 dated 21.03.1983 and then confirmed in A.S.No.197 and 440 of 1983 dated 05.01.1993 and Fair Decree dated 18.06.2010 was made in I.A.No.431 of 2000 and it is only by filing W.P.(MD)No. 22140 of 2022 the petitioners are trying to implement the scheme. Infact the petitioners claim is hit by limitation since the petitioners are trying to implement the order after a lapse of 12 years that too by filing writ petition and not by filing Execution Petition. In the order dated 04.11.2022 in W.P.(MD)No. 22140 of 2022 also it has been expressed that the scheme is not implementable. From these facts it is evident that the scheme was



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never ever implemented and it is unimplementable. And also, the petitioners were not in the administration of the Wakf all these years. On the other hand, the 4th respondent great grandfather, grandfather and father was in the administration of the Wakf, subsequently the Wakf was in direct administration of the Wakf Board. Therefore, the plea of limitation against the 4th respondent cannot be sustained, but the limitation is against the petitioners. It is pertinent to state herein that this Court has already held that the scheme decree is obtained by fraud and on this ground also the plea of limitation cannot be entertained, since fraud vitiates everything.

15. The next contention of the petitioner is that the 4th respondent cannot claim after a lapse of so many years and the 4th respondent's ancestors had not claimed any right all these years. This Court is of the considered opinion even though the 4th respondent ancestors had not taken any steps to rectify the mistake, the 4th respondent being the descendent of the original creator of the Waqf, wants to rectify the mistake and he wanted to carry out his ancestors wish. Especially the 4th respondent wanted to carry out the wish of the creator of Wakf. Atleast the 4th respondent had come forward now to fulfill the wish of the creator of wakf and the same cannot be doubted.



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16. As rightly pointed out by the Learned Counsel appearing for the 4th respondent in the earlier suit in O.S.No.55 of 1974 it has been held that the petitioners or their ancestors have not dedicated any property to the Wakf of Hazarath Fazil Oulia Thaika. The petitioners by taking advantage that the 4th respondent and his family are residing in Pottalpudur, Tenkasi and the petitioners being the residents of Kottar claiming themselves as Pathans of Kottar is trying to usurp the administration of the Wakf. The local residents have no any right to eliminate the hereditary Muthavalli and take over the management under their control. In order to usurp the management, the petitioners are throwing allegations of misappropriation and mismanagement. But the fact remains that the 4th respondent grandfather died at the age of 37, that too when the petitioner's father was minor. In the meanwhile, the paternal uncle of the 4th respondent had not managed the properties of the Wakf, hence the Wakf Board had taken the Wakf under direct management. The 4th respondent is claiming the hereditary rights and has putforth his case before the Wakf Board and after considering the case of the 4th respondent, the Wakf Board had restored the hereditary nature of the Hazarath Fazil Oulia Thaika Wakf. Finally, the Wakf Board had rectified its mistake, which it has committed in the Suit, Appeal Suit and W.P.(MD)No.22140 of 2022. Therefore, this Court is of the considered opinion that the petitioners have not raised any legally sustainable ground and hence the writ petition is liable to be dismissed.



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17. The 4th respondent had stated that some other Wakf properties are added in the Wakf of Hazarath Fazil Oulia Thaika. The official respondents shall take necessary steps to delete the properties belonging to other Wakfs. The official respondents and the 4th respondent are directed to take steps to restore the property belonging to the Wakf of Hazarath Fazil Oulia Thaika and if there are any encroachments the same shall be removed.

18. For the reasons stated above, the impugned orders are sustained. The writ petition is dismissed. No Costs. Consequently, connected miscellaneous petitions are closed.

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NCC : Yes/No

Index : Yes / No

Internet : Yes/ No

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