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W.P.(MD).Nos.24409, 25763 and 25792 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on :	28.11.2022
Pronounced on :	27.01.2023

CORAM

THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.P.(MD).Nos.24409, 25763, 25792 of 2022

and

WMP.(MD).Nos. 19875, 19874, 19917, 19918, 18501, 18500 of 2022

W.P.(MD).No.24409 of 2022:

- 1.G.Syed Kutharathulla
- 2.S.Amir Ibrahim
- 3.A.Syed Kuthbai Alam Hussani
- 4.I.S.Ahamed Mustafa
- 5.Syed Abdul Rahiman Ibrahim

... Petitioners

Vs.

1.The Secretary,
Backward Classes, Most Backward Classes and
Minorities Welfare Department,
Secretariat, Chennai-600 009.

2.The Chairman,
Tamil Nadu Wakf Board,
No.1, Jaffer Syrang Street,
Vallal Seethakathi Nagar, Chennai-600 001.

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

4.A.H.Ibrahim (Died)



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5.A.Aynu Yakheen

... Respondents

(R5 is substituted in the place of R4, vide Court order dated 23.11.2022 in W.M.P(MD) No.20396 of 2022 in W.P.(MD)No.24409 of 2022 by MSQJ)

Prayer:Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus calling for the records pertaining to the impugned Scheme dated 12.07.2022 framed by the 2nd Respondent with regard to the administration of Kazimar Periya Pallivasal, Madurai and its properties situated at Madurai District and the consequential notification notified by the 1st Respondent in Tamil Nadu Government Gazette Published on 24.08.2022 and quash the same and consequently direct the 2nd Respondent to frame a new Scheme exclusively inculcating HAQDARS alone for causing the administration of the aforesaid Pallivasal and its properties to be made.

For petitioners : Mr.R.Anand

For Respondents : Mr.J.Ashok for R1
Additional Government Pleader

Mr.Haja Mohideen Gisthi,
Standing counsel assisted by
Mr.S.A.Ajmal Khan
Standing counsel for R2 & R3

Mr.G.Prabhu Rajadurai for R5

W.P(MD)No.25763 of 2022:

Shamsudeen Ibrahim

... Petitioner

Vs.

1.The Secretary,
Backward Classes, Most Backward Classes and



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Minorities Welfare Department,
Government of Tamil Nadu,
Secretariat,
Chennai 600 009.

2.The Tamil Nadu Wakf Board,
Represented by its Chief Executive Officer,
Door No.1,
Jaffer Syrang Street,
Vallal Seethakathi Nagar,
Chennai 600 001.

3.The Chairman,
Tamil Nadu Wakf Board,
Door No.1,
Jaffer Syrang Street,
Vallal Seethakathi Nagar,
Chennai 600 001.

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

5.A.H.Ibrahim

... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari calling for the records relating to the impugned Scheme dated 12.07.2022 framed by the 2nd Respondent with regard to the administration of Kazimar Periya Pallivasal Wakf, Madurai and its



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properties and the consequential notification published by the 1st Respondent in the Tamil Nadu Government Gazette dated 24.08.2022 and quash the same.

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For petitioner : Mr.J.Barathan

For Respondents : Mr.J.Ashok for R1

Additional Government Pleader

Mr.Haja Mohideen Gisthi,
Standing counsel assisted by
Mr.S.A.Ajmal Khan

Standing counsel for R2 to R4

W.P.(MD).No.25792 of 2022:

S.G.Azaam Ali

... Petitioner

Vs.

1.The Tamil Nadu Wakf Board,
Rep. by its Chief Executive Officer,
No.1 Jaffer Zairang Street,
Vallalseethakathi Nagar,
Chennai 1.

2.The Chairman,
Tamil Nadu Wakf Board,
No.1, Jaffer Zairang Street,
Vallalseethakathi Nagar,
Chennai 1.

... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari calling for the records relating to the impugned Scheme framed by the 1st Respondent vide resolution number 178/12



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(Na.Ka.No.13575/02/A8/Madurai dated 12.07.2022 and the consequential notification of the same in the Tamil Nadu Government Gazette in Lr.Rc.No. 13575/02/B8/MDU dated 18.08.2022 and quash the same.

For petitioner : Mr.M.Mahaboob Athiff

For Respondents : Mr.Haja Mohideen Gisthi,
Standing counsel assisted by
Mr.S.A.Ajmal Khan

Standing counsel for R2 to R4

COMMON ORDER

The challenge in the three writ petitions relate to the validity of the impugned Scheme dated 12.07.2022 framed by the Wakf Board (herein after referred to as the "Board") and the consequential notification published in the Tamil Nadu Government Gazette dated 24.08.2022, in respect of Kazimar Street Peria Pallivasal (hereinafter referred as the Subject Wakf). The three writ petitions are thus taken up and heard together.

2. The impugned Scheme is challenged as a nullity and non-est in law inasmuch as the same was made by the Board in gross disregard and contrary to the mandate contained in Section 69 of the Wakf Act, 1995 (herein after referred as the "Act").



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3. It may be relevant to set out briefly about the petitioners in the three writ petitions.

a) In W.P.(MD).No.24409 of 2022, the petitioner is stated to be a Haqdar and had filed the writ petitions on behalf of four others who are also stated to be Haqdars who had submitted Draft Scheme in respect of the Subject Wakf, and claiming to have right over the administration of the "Subject Wakf".

b) Insofar as W.P.(MD). No. 25792 of 2022, the challenge to the impugned Scheme is on the basis that the petitioner was the Mutawalli of the Wakf. The petitioner and his predecessors in office had been in administration of the Wakf, during the pendency of the previous litigation till handing over/taking over of the management of the Wakf pursuant to the orders of this Court in W.A. (MD). Nos. 702 and 703 of 2016 dated 25.09.2018.

c) In W.P.(MD).No.25763 of 2022, the writ petition is filed by Haqdars on the grounds similar to the petition in W.P.(MD). No. 25792 of 2022.

3.1. It may be relevant to note that the petitioners in all the three writ petitions are Haqdars who had admittedly submitted Draft Scheme under Section 69 of the Act and applicants in view thereof.



4. Before proceeding further it may be relevant to set out briefly the nature of the Wakf and also the history of the litigation leading upto the present writ petition to understand/appreciate the background to the present lis.

5. NATURE OF THE WAKF

The Kazimar Periya Pallivasal Wakf (herein after referred to as "Subject Wakf"), was established in the year 1284 AD and has been in existence for more than seven centuries. The Subject Wakf had been administered for the past 700 years by the beneficiaries/ service providers of the Wakf viz., Haqdars. The Haqdars are a small group of families in Madurai. The Proforma provided that the Mutawalliship is to be on the basis of hereditary succession and a Committee of 14 members are to be elected among the beneficiaries. As per the Proforma of the Subject Wakf dated 20.06.2022, the Wakf is a Mashruthul kidmat and thus a Wakf in terms of Section 3(r) (iii) of the Wakf Act, 1995. A Mashruthul kidmat is a Wakf created by grant in the nature of an Inam which is attached with conditions of service. The grants are normally granted in recognition of services to be rendered to the religious institutions. The Inam holders/ Mujawar i.e., the person who performs any service to the Wakf are considered as Mutawalli under Section 3(i) of the Wakf Act, 1995. The Wakf Act includes a Mujawar (person who performs any service) to be a Mutawalli.



5.1. A reading of the relevant portions of the Proforma of the Subject Wakf would reveal the same. The relevant clauses of the Proforma reads as under:-

6. Nature of the Wakf (Whether Pious, Religious or Charitable or Wakf by user, Mashruthul-Khidmat or wakf-alal-auiland)	Religious Mashruthul-Kidmat.
7. Object of the Wakf and conditions of grant.	This mosque had been in existence from the time of the Pandian Kings and properties have been dedicated for it support both by the Pandian Kings and Nawab.
10.The Rule of Succession to the office of Muthawalli and whether it is under the wakf-deed or by custom or by usage.	Hereditary as per the Title Deeds. The Managers are being now selected by the beneficiaries.
21.How the Wakf is administered at present, whether by a Scheme settled by court of law or by established customs or usage.	The Mosque is managed by a committee consisting of fourteen managers among whom there is a Managing Trustee.

6. HISTORY OF THE LITIGATION LEADING TO THE PRESENT WRIT PETITIONS

a. The "Subject Wakf" was under the management of the Haqdars. While so, there were allegations of commission of irregularities by the Muttawalli's of the Subject Wakf by a section of the Jamathars.



b. The Non-Haqdars who are also the Jamathars of the Subject Wakf submitted representation for framing a Scheme for the administration of the Subject Wakf under Section 69 of the Act. On the basis of the said representations the 2nd respondent Board by its proceedings dated 10.08.2004, decided to frame a Scheme for the administration of the "Subject Wakf".

c. The said decision of the Board dated 10.08.2004 was challenged before the Wakf Tribunal unsuccessfully. The order of the Tribunal came to be confirmed by this Court in CRP (MD) No. 491 of 2006 dated 22.02.2007. Thus the decision of the Board that a Scheme is to be framed, came to be affirmed.

d. Thereafter the Board issued a notice dated 09.10.2013 for holding an enquiry on 22.10.2013, for framing of the Scheme.

e. Thereafter by resolution dated 23.10.2013 the Board decided to take over Direct Management of the Wakf under Section 65 of the Act, for a period of 2 years. The same was challenged in W.P (MD) Nos.1977 and 5424 of 2014. The said writ petitions came to be disposed of, relegating the petitioner to prefer a revision/appeal before the State Government by an order dated 06.06.2014. As against the said order of the writ Court, the petitioners herein filed a writ appeal in W.A.(MD) No.919 of 2014 which came to be disposed of upholding the order in writ petition to avail the statutory remedy, while directing that the management of the Haqdars is not to be disturbed in the meanwhile.



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f. Pursuant thereto, a statutory appeal was preferred to the State Government, by then the term of 2 years of Direct Management by the Board had expired. However, the Board passed resolutions extending the period of Direct Management under Section 65 of the Act on 30.12.2015 and for the succeeding years. The periodical extensions resulted in the Direct Management by the Board exceeding the maximum period of 5 years stipulated in terms of Section 65 (1) of the Act. The resolutions extending the Direct Management beyond the period stipulated under the statute was challenged by way of an appeal before the Government, which stood rejected. Aggrieved by the said proceedings the same was challenged in W.P.(MD.) Nos. 2705 and 4566 of 2016. The Writ Court affirmed the said orders against which writ appeals in W.A(MD). Nos. 702 and 703 of 2016 came to be filed. The writ appeals came to be disposed of by order dated 25.09.2018 directing the petitioner herein/Mutawalli to handover the charges of the Wakf to the Board and with a direction to the Board to frame the Scheme as directed by this Court in W.P(MD)No.10422 of 2008. The said order of the Division Bench was appealed by the petitioner herein before the Hon'ble Supreme Court of India in SLP Civil Diary No. 41530 of 2018, which came to be dismissed by order dated 07.03.2019.



6.1.The result of the above litigations was that the Board was required to comply with the direction to frame a Scheme after affording an opportunity of hearing to all affected / interested parties.

7. The Board had pursuant to the directions/orders of this Court in CRP (MD) No.491 of 2006 dated 22.02.2007 and the Cont.P (MD) No.4 of 2009 in CRP (MD) No.491 of 2006 and W.P.(MD) Nos.10056 and 10422 of 2008 and also the orders of the Division Bench of this Court in W.A.(MD). Nos.702 and 703 of 2016, dated 25.09.2016, framed a Scheme on 12.07.2022 vide its resolution No.1786/212 in Na.Ka.No.13575/02/A8/Madurai) dated 12.07.2022 which was notified by the first respondent in the Tamil Nadu Government Gazzete published on 24.08.2022.

7.1. It is the legality/validity of the above Scheme framed under Section 69 of the Act which is under challenge before this Court, in these three writ petitions.

8. CASE OF THE PETITIONERS

The petitioners in all the three writ petitions have raised common grounds assailing the legality/validity of the Scheme framed by the Board.

(a). The learned counsel for the petitioner Mr.Anand in W.P.(MD).No. 24409 of 2022, challenged the impugned Scheme primarily on the ground that



the impugned Scheme has been made/framed without giving any opportunity to the petitioners and is thus in contravention of Section 32 (2) (d) read with Section 69 of the Wakf Act, 1995. It is submitted by placing reliance on Section 32 (2) (d) and Section 69 (1) of the Act that while Section 32 (2) (d) provides that no settlement of Schemes shall be made without giving the "parties affected" an opportunity of being heard. Section 69 of the Act provides that the Scheme would be framed after consultation with the "Muttawali or the applicant". It was thus submitted that the expression opportunity of being heard and "consultation" employed in Sections 32 and 69 of the Act, necessitates that the opportunity in terms of Section 32 of the Act must be meaningful in the case of parties affected, while Mutawali or the applicant ought to be consulted before framing the Scheme in terms of Section 69 of the Act. Failure to comply with the above mandate would prove fatal to the validity of the order.

b. The learned counsel for the petitioner in W.P.(MD)No.25792 of 2022 Mr.Mahaboob Athiff would challenge the impugned Scheme interalia on the following grounds:

i) The impugned Scheme suffers from abdication of the statutory power of the Board to frame the Scheme under Section 69 of the Act and is thus without jurisdiction.



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ii) The impugned Scheme has been framed without complying with the mandate of prior consultation under Section 69 of the Act and is therefore ultravires the powers of the Board inasmuch as the petitioners are admittedly Mutawalli and applicant as Draft Scheme has been submitted by Haqdars.

iii) The impugned Scheme has been framed without providing the petitioner a reasonable opportunity of hearing and is in violation of principles of natural justice.

iv) The impugned Scheme tested in light of the attendant haste and manner of exercise of power reflects fraud on statutory power and malice in law. The above argument was adopted by the learned counsel for the petitioner in W.P(MD).No.25763 of 2022.

9. CASE OF THE RESPONDENTS

To the contrary, the learned counsel for the respondent Mr.Haja Mohideen Gisthi submitted as under:-

PRELIMINARY ISSUE

9.1. It was submitted that the writ petition is not maintainable as the petitioner has an effective alternative remedy provided under Section 83 of the Wakf Act, 1995. The said Act is a self-contained code and prescribes the machinery for redressal of grievance including grievance, if any, in relation to the Scheme



framed under Section 69 of the Act, before the Wakf Tribunal. In this regard reliance was sought to be placed on the following judgments:-

- a) Board of Wakf, West Bengal and another Vs. Anis Fatma Begum and another (2010) 14 SCC 588
- b) Rashid Wali Beg Vs. Farid Pindari and others, (2022) 4 SCC 414
- c) I.Salam Khan Vs The Tamil Nadu Wakf Board, rep. by its Chairman and others 2005 (1) LW 676

9.2. The Board had framed the Scheme under Section 69 of the Act only after issuing notices and hearing the parties concerned extensively. The following Table set out in the written submission of the respondent which was relied upon in support of his contention that adequate opportunity was granted before framing the impugned Scheme is extracted below:-

Dates of Issue of Notice	Dates Fixed for Hearing
08/12/2021	14/12/2021
05/01/2022	11/01/2022
21/01/2022	27/01/2022
21/02/2022	01/03/2022
11/03/2022	16/03/2022
05/05/2022	10/05/2022



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9.3. It was submitted that all interested/ affected parties were heard extensively on 14.12.2021, 01.03.2022 and 10.05.2022. That notices were also effected by the Board in prominent places/including the precincts of the Masjid on 12.01.2022 calling upon the Jamathdars/residence of the Subject Wakf to submit their opinions/objections on or before 21.01.2022. The Board received more than 150 suggestions/opinions/objections which would clearly demonstrate that the notices were effective and the affected /interested parties had also availed the opportunity and submitted their objections. Reliance was also placed on a letter apparently written by one Mr.Fakrudeen, stated to be the Ex-Managing Trustee of the "Subject Wakf" and belonging to the Haqdars i.e., the petitioners group, who vide his letter dated 11.03.2022 addressed to the CEO of the Board who expressed satisfaction of the opportunity afforded. It was submitted that the entire Jamathdars were afforded an opportunity and also heard before the Scheme was framed. Thus the contention that the Scheme was made without affording a reasonable opportunity of being heard to the affected/interested parties was submitted to be clearly unjustified.

9.4. That the contention of the petitioner with regard to consultation by the Board with the Muttawalli or the applicant was in the view of the respondents misplaced for all interested parties were afforded an opportunity of hearing on



14.12.2021, 01.03.2022 and 10.05.2022. It was submitted by the learned counsel for the respondents that the opportunity of hearing is nothing but consulting the issue thread-bare. It was thus submitted that the contention of non-compliance with the requirement of consultation in terms of Section 69 of the Act, is misplaced. In other words it is submitted that "personal hearing" ought to be treated as "consultation".

9.5. In response to the case of the petitioner that by seeking legal opinion from retired judges, the Board had abdicated its authorities/duties it was submitted the above submission was misplaced since the opinion was one of the factors that were considered by the Board while framing the impugned Scheme.

10. CASE OF THE 5th RESPONDENT:

It is submitted by the learned counsel for the 5th respondent Mr.G.Prabhu Rajadurai viz., the Non-Haqdars that they would adopt the arguments of the Board and would submit that the present writ petitions as suggested by the learned counsel appearing for the Board, ought not to be entertained, in view of the existence of a statutory remedy by way of an appeal/revision. It was also submitted that the notices that is contemplated under the provisions of the Wakf Act, for the purpose of framing of the Scheme, is not a



private notice to each and every person interested in a Wakf but that a public notice is adequate. Relying upon the definition of expression person interested in a Wakf in terms of Section 3 (k) of the Act which provides that it would include any person who has right to worship perform religious rights or participate in any religious or any charitable institutions under the Wakf, it was submitted that the contention that private notice must be given to all the persons interested in a Wakf would render the provision itself unworkable and thus issuance of a public notice ought to be treated as sufficient compliance of the requirement under Section 32 (2) (d) of the Act.

10.1. On the strength of the above grounds/arguments it was submitted by both the Counsels for Respondents that that the writ petition is liable to be dismissed.

11. Heard both sides, perused the materials on record, including the written submissions/notes of both sides. It appears that the following issues may arise for consideration.

12. ISSUES FOR CONSIDERATION:-

I. Whether availability of a statutory remedy under the Wakf Act, would result in the power of Judicial Review under Article 226 of the Indian



Constitution being ousted or excluded?

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II. Whether the proviso to Section 32 (2) (d) of the Act, which provides that no Scheme shall be settled without giving an opportunity of being heard, would require a notice to each of the parties who may be affected (or) a public notice meant/intended to put all parties likely to be affected, on notice of the Scheme, which is intended to be settled would be adequate compliance thereof?

III. Whether the Board in framing the impugned Scheme for administration of Subject Wakf had abdicated its Authority / power by obtaining the opinion of an external entity (retired judge) resulting in the entire proceeding being vitiated?

IV. Whether the impugned Scheme was framed in compliance with the requirement of Consultation with the Mutawalli or the applicant as mandated under Section 69 (or) is it permissible to equate Consultation with "personal hearing" as suggested by the learned counsel for the respondent/Board?

V. Whether the respondent/Board had approved the impugned Scheme in undue haste and thus the entire exercise stands vitiated inasmuch as haste tends to arbitrariness thereby falling foul of Article 14 of the Constitution ?

13. I shall now proceed to answer the above questions/issues in seriatim:-



13.1. It was submitted by the learned counsel for the Board as well as by the Counsel for the 5th respondent that any proceedings which could be challenged before the Board/Tribunal arising under the Wakf Act, 1995 cannot be challenged by way of a Writ Petition under Article 226 and reliance was sought to be placed in support of above contentions on the judgments of the Supreme Court in the case of *Rashid Wali Beg Vs. Farid Pindari and others*, reported in (2022) 4 SCC 414, *Board of Wakf, West Bengal and another Vs. Anis Fathima Begum* reported in 2010 14 SCC 588 and this Court in *Salam Khan Vs. The Tamil Nadu Wakf Board* reported in 2005 One Law Weekly 676. Reference was also made to other judgments in support of the above contention, which I do not intend to refer to avoid multiplying case laws.

13.2. The thrust of the argument of the respondents is that all matters pertaining to Wakfs should be challenged in the first instance before the Wakf Tribunal under Section 83 of the Wakf Act and should not be entertained either by the Civil Court or by the High Court under Article 226 of the Constitution of India. While there can be no two views about the position that existence / availability of an alternative statutory remedy is a factor which ought to be taken into consideration while exercising discretion under Article 226 of the Constitution of India. However, the above judgments cannot be understood as submitted by the learned counsel for the respondents as imposing an embargo or



treating the power under Article 226 of the Constitution as being ousted in respect of matters relating to Wakf in view of existence of an alternate statutory remedy nor can it be understood as conferring an immunity to proceedings/orders relating to Wakf from judicial review under Article 226. Any attempt to understand the above judgments in the manner suggested by the counsel for the respondents needs to be rejected as being puerile. I say so for the reason that Article 226 is part of the Basic Structure of the Constitution and thus cannot be touched / whittled down / tampered with nor can any embargo be imposed on the said power. In this regard it may be relevant to note the reiteration of the above legal position viz., the power of judicial review being part of Basic Structure by a Constitution Bench of Seven Judges of the Hon'ble Supreme Court in the case of *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261, wherein even while dealing with Tribunals constituted under the Constitution it was held that the power under Article 226 can never be ousted and the orders of the Constitutional Tribunals is amenable to judicial review. It may also be relevant to refer to the following judgments in this regard:-

i) *In the case of Madras Bar Assn. v. Union of India*, (2021) 7 SCC 369, para 5

"The judgment in *S.P. Sampath Kumar v. Union of India*, (1987) 1 SCC 124] was referred to a larger Bench for reconsideration in view of later rulings, notably this Court held that the power of judicial review vested in the High Courts and this Court under Articles 226 and 227, and 32 is a part of the basic structure of the Constitution. Therefore, the Court held that the tribunals cannot act as substitutes



of the High Courts and this Court, and that their functioning is only supplementary and that all decisions of Administrative Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. Addressing the issue of the dependence of tribunals on the Executive for administrative requirements, a recommendation was made for creation of a single umbrella organisation which will be an independent supervisory body to oversee the working of the tribunals. This Court was also of the opinion that the Ministry of Law and Justice, Government of India should be the nodal Ministry".

ii) In case of T.K. Rangarajan v. Govt. of T.N., (2003) 6 SCC 581 wherein, after referring to the constitutional Bench Judgment in L.Chandra Kumar it was reiterated as under:

"... Negating said contention, this Court made it clear that jurisdiction conferred upon the High Court under Article 226 of the Constitution is a part of the inviolable basic structure of the Constitution and it cannot be said that such Tribunals are an effective substitute of the High Courts in discharging powers of judicial review..

iii) While on the significance of the Article 226 under the Constitutional Scheme, it may be relevant to refer that even in cases where there was a "finality clause" under the statute, the same was held would not result in ouster of power of judicial review under Article 226 of the Constitution. In this regard, it may be relevant to refer to the judgment in the case of Srikrishna Rice Mills Ltd v. Joint Director, Government of India, (1974) 1 SCR 418.

"It may also be relevant to note that even in cases where Courts dealt with provisions containing "finality clause", for eg., Sec 3 (3A) (iv) of the Essential Commodities Act, 1955 which stipulated that the average market rate determined shall be final was explained as



not in any manner affecting the jurisdiction of the High Court under Article 226 get ousted."

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iv) While referring to the judgment of Hon'ble Supreme Court in L Chandra Kumar stated supra it was held In I.R. Coelho v. State of T.N., (2007) 2 SCC 1,

149. Article 31-B gives validation based on fictional immunity. In judging the validity of constitutional amendment we have to be guided by the impact test. The basic structure doctrine requires the State to justify the degree of invasion of fundamental rights. Parliament is presumed to legislate compatibly with the fundamental rights and this is where judicial review comes in. Greater the invasion into essential freedoms, greater is the need for justification and determination by Court whether invasion was necessary and if so, to what extent. The degree of invasion is for the Court to decide. Compatibility is one of the species of judicial review which is premised on compatibility with rights regarded as fundamental. The power to grant immunity, at will, on fictional basis, without full judicial review, will nullify the entire basic structure doctrine. The golden triangle referred to above is the basic feature of the Constitution as it stands for equality and rule of law.

A reading of the above judgments would dispel the notion that Wakf matters are outside/beyond the realm of Judicial review is unsustainable.

13.3. The above judgments relied upon by the respondents ought to be understood as reiterating the well-settled principles which Courts must bear in mind while exercising the power of judicial review under Article 226 viz., that Courts would normally exercise restraint when there is an effective alternative remedy. The above rule is a self-imposed restriction for there can never be an absolute embargo insofar as the power of Judicial Review of the High Court



under Article 226. The power to entertain a Writ Petition under Article 226 is discretionary. It is trite law that existence of alternate remedy though a factor which the Courts ought to bear in mind while exercising its discretion under Article 226, it cannot be understood as an absolute embargo/bar. Any attempt to do so would fall foul of the Basic Structure which is inviolable and ought to remain untouched.

13.4.It is also necessary to bear in mind that Supreme Court had consistently held that existence of alternate remedy cannot be a bar and has also carved out exceptions when the Courts would exercise their discretion and entertain writ petitions despite existence of alternate remedy. Some of the exception which have been carved out by the Supreme Court to the Rule of Alternative Remedy are:-

- (i). Where the proceeding are in violation of the fundamental rights,
- (ii).Where the proceeding are in violation of the principles of natural justice,
- (iii). Where the proceedings are bad for want of jurisdiction, and
- (iv). Where the proceedings suffers from error apparent on the face of record.

The orders/Scheme's under Wakf Act are no exception to the above Rule.



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13.5. The above list of circumstances which are carved out as exceptions to the rule of alternate remedy is not exhaustive for power of Judicial Review is a discretionary remedy and there cannot be any fetters. Now if we keep the above judicial principles in mind, it appears to me, the submission of the respondent that there is an absolute embargo to maintain writ petition against orders passed under the Wakf Act appears to be unacceptable. In this regard, it may also be relevant to note that the cases referred to by the petitioner relating to Wakf matters the issue related primarily to civil disputes and as a matter of fact, the recent judgment in the case of Rashid Wali Beg, relied upon by the respondent the issue therein was with reference to maintainability of the suit and not writ petition under Article 226. In any view, as indicated above judicial review under Article 226 of the Constitution being discretionary, and importantly part of basic structure of the Constitution, if the issue/grievance raised or the complaints made by the petitioner touches upon fundamental rights or lack of jurisdiction or violation of principles of natural justice with reference to exercise of power by a statutory authority, the mere existence of an alternate statutory remedy may not be a bar for exercise of power of judicial review under Article 226.

13.6. In the case of the same parties in Cont.P. (MD) No. 4 of 2009, CRP (MD) No. 491 of 2006, W.P. (MD) Nos. 10056 and 10422 of 2008 Hon'ble



Mr. Justice V. Ramasubramaim (as he then was) has held in para 49 that

"Therefore, when the whole proceedings have been turned into an empty formality and there is no application of mind, I cannot drive the petitioners to file a civil suit in the Tribunal under Section 32 (3) or an appeal before the Tribunal under the proviso to Section 69 (3)".

13.7. Keeping the above aspects in mind the challenge to the validity of order dated 12.07.2022, falls within the exceptions carved out to the rule of alternate remedy viz., the proceedings are bad for want of jurisdiction and that the impugned proceedings suffers from the vice of arbitrariness thereby falling foul of Article 14 of the Constitution of India and thus this Court is inclined to entertain the writ petitions and examine the issues raised. Having rejected the issue of maintainability raised by the respondents, I shall now proceed to answer the issues/questions framed.

II. Whether the proviso to Section 32 (2) (d) of the Act, which provides that no Schemes shall be settled without giving an opportunity of being heard, would require a notice to each of the parties who may be affected / interested (or) a public notice meant/intended to put all parties likely to be affected, on notice of the Scheme, which is intended to be settled would be adequate compliance thereof?



14. The learned counsel for the petitioner Mr.Anand in W.P.(MD).No.24409 of 2022 would submit that Section 32 (2) (d) of the Act requires every person interested in the Wakf to be afforded an opportunity of hearing and be issued with individual notices. Section 32 (2) (d) provides that settlement of any Scheme shall not be made without giving the "affected parties an opportunity of being heard". It is well settled that natural justice its extent, manner and nature ought to be understood keeping in mind the context and the statutory Scheme. There is no strait jacket formula with regard to Natural Justice which would depend on the facts of each case. Section 2(k) contains a definition for person interested in a Wakf , Section 32 (2) (d) does not employ the expression 'person interested' but parties affected . There is no definition under the Act for the expression parties affected . The expression parties affected appears to be narrower than parties interested . In the facts of the present case public notice has been effective which is evident from the fact that more than 150 suggestions / objections had been received and thus the petitioners submission of lack of notice / opportunity in the facts of the present case is unacceptable.

III. Whether the Board in framing the impugned Scheme for administration of Subject Wakf had abdicated its Authority / power by obtaining the opinion of an external entity (retired judge) resulting in the entire proceeding being vitiated?



15. The power to frame Schemes for the administration of the Wakf is vested with the Board under Section 69 of the Act. Section 69 of the Act reads as under:

"69. Power of Board to frame Scheme for administration of wakf:

(1) Whenever the Board is satisfied, whether on its own motion or on the application of not less than five persons interested in any wakf, that it is necessary or desirable to frame a Scheme for the proper administration of the wakf, it may by an order frame such Scheme for the administration of the wakf, after consultation with the mutawalli or the applicant, in the prescribed manner.

(2) A Scheme framed under sub-section (1) may provide for the removal of the mutawalli of the wakf holding office as such immediately before the date on which the Scheme comes into force:

Provided that where any such Scheme provides for the removal of any hereditary mutawalli, the Scheme shall also provide for the appointment of the person next in hereditary succession of the mutawalli so removed, as one of the members of the committee appointed for the proper administration of the wakf.

(3) Every order made under sub-section (2) shall be published in the prescribed manner, and, on such publication shall be final and binding on the mutawalli, and all persons interested in the wakf:

Provided that any person aggrieved by an order made under this section may, within sixty days from the date of the order, prefer an appeal to the Tribunal and after hearing such appeal, the Tribunal may confirm, reverse or modify the order:

Provided further that the Tribunal shall have no power to stay the operation of the order made under this section.

(4) The Board may, at any time by an order, whether made before or after the Scheme has come into force, cancel or modify the Scheme.



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(5) Pending the framing of the Scheme for the proper administration of the wakf, the Board may appoint a suitable person to perform all or any of the functions of the mutawalli thereof and to exercise the powers, and perform the duties, of such mutawalli."

15.1. From a reading of the above provision the following positions appears to emerge,

i) The power to frame a Scheme for administration of Wakf is vested with the Board.

ii) The Board shall frame a Scheme on being satisfied either on its own motion or on an application of not less than "5 persons interested in the Wakf" that it is necessary or desirable to frame a Scheme for the proper Administration of the Wakf.

iii) The Board shall frame the Scheme "after consultation" with the Mutawalli or the applicant in the prescribed manner.

16.Importantly, the power to frame a Scheme under Section 69 of the Wakf Act ought to be exercised only by the Board and "after consultation" with the Mutawalli or the applicants. It thus appears that Parliament had while conferring power on the Board to frame a Scheme has also identified the entities with whom the Board would consult while exercising such power viz., Mutawalli or applicant. Thus Section 69 of the Act covers the field of identifying the



entities who are required to be consulted viz., Mutawalli or applicants. It has thereby excluded any other external agency / third party from consultation by the Board. The said provision does not empower delegation of the said power to any other person/entity. It is clear that the intent of the legislature is that the power to settle the Schemes for the administration of the Wakf is to be exercised only by the Board after consultation with the Mutavallis or applicant and not with any other external agency.

17. It is submitted by Mr.Mahaboob Athiff that the impugned Scheme is neither the Scheme framed by the Board by itself nor a Scheme framed by the Board in consultation with the Mutawalli or applicants but is for all purposes a Scheme framed by a external entity who was required by the Wakf to draft a Scheme for the Subject Wakf . In this regard, reliance was placed on resolution dated 20.06.2022 whereby the Board after observing that there were difference of opinion among the members, in other words absence/ lack of unanimity of opinion, it was resolved to forward all the relevant documents to retired Judges. Importantly it was also resolved that the opinion of the retired Judge shall be treated as a final decision. The relevant portion of the said resolution is extracted here under:



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“மதுரை காஜிமர் தெரு பெரிய பள்ளிவாசல் வக்வுக்கு நிர்வாகத்திட்டம் (Scheme Decree) தயாரித்து மாண்புமிகு சென்னை உயர்நீதிமன்றம் மதுரை கிளை (CONTEMPT) No.390/2021 நாள் 02.12.2021 ன் படி உயர்நீதிமன்றத்தில் சமர்ப்பிக்க தமிழ்நாடு வக்வு வாரியத்தின் சிறப்புக் கூட்டம் இன்று 20.06.2022 திங்கட் கிழமை கூட்டப்பட்டு அதுபற்றிய கலந்தாய்வு நடைபெற்றது.

நீண்ட கருத்துப்பரிமாற்றங்கள் மற்றும் கோப்புகளின் ஆய்வுக்குப்பிறகு வக்பின் நிர்வாகத்திட்டம் தயாரிப்பதில் மாண்புமிகு வாரிய உறுப்பினர்களுக்கிடையில் ஒத்த கருத்து ஏற்படவில்லை.

ஆகவே, இந்த வக்வு சம்பந்தப்பட்ட அனைத்து கோப்புகளின் நகல்களையும்

1. மாண்புமிகு நீதியரசர், அவர்கள்

2. மாண்புமிகு நீதியரசர், அவர்கள்

ஆகியோரிடம் வழங்கி, நீண்ட காலமாக நிர்வாகத்தில் இருந்து வந்த மர்ஹூம் காஜீ தாஜீதூன் அவர்களின் வழிதோன்றல்களின் (குடும்பத்தினரின்) நிர்வாகம் தொடர்வதா? அல்லது இக்குடும்பத்தினர் உள்ளிட்ட இந்த வக்பின் முஹல்லா ஜமாஅத்தின் அனைவரும் பங்குபெறும் நிர்வாகத் தேர்தல் முறையில் வக்வு நிர்வாகம் பங்குபெறும் நிர்வாகத் தேர்தல் முறையில் வக்வு நிர்வாகம் அமைக்கப்படுவதா? என்ற கேள்விகளுக்கு நீதியரசர்களின் கருத்துக்களை அறிக்கையாகப் பெற்று, அதனையே இறுதி தீர்வாக முடிவு செய்து, அதன்படியே நிர்வாகத்திட்டம் தயாரிக்கலாம் என ஏகமனதாகத் தீர்மானம் நிறைவேற்றப்பட்டது.”

18. It is submitted that opinion was given by one of the retired Judges

on 11.07.2022 addressed to the Chief Executive Officer of the Tamil Nadu Wakf



Board and the same was adopted by the Board on 12.07.2022 i.e., in less than 24 hours. The following Table would show that the Scheme proposed by the retired Judge has been adopted wholly by the respondent/Board.

Subject	Draft Scheme of Retired Judge	Pg.No.	Impugned Scheme
Exclusive Claim of Haqdars to Administration	Rejected (The proposal/Draft Scheme of the Haqdars was negated)	104-109	Rejected
Scheme to Include Haqdars and Non-Haqdars	Accepted	109-111	Accepted
Total Number of Management Committee	13	111	13
Representation for Haqdars	Provided for 3 options including: 5 to be nominated from amongst the Haqdars and cannot contest in the election amongst the general Jamathdars but entitled to cast votes	111	5 to be nominated from amongst the Haqdars and they would have no right to contest in the election from the general Jamathdars, however would have the right to vote. (Clause 3(iii) and (vi)).
Representation for Non-Haqdars	5 members to be elected by the general members by election once in three years	111	5 members to be elected for a period of 3 years
Eligibility to be a member of the general member	Should be 18 years of age ordinarily residing in the Mohalla of the Wakf in the streets in the annexure.	111	Should be 18 years of age residing in the streets found in the annexure.
Voters list	To be prepared every 3 years	111	To be prepared every 3 years
Nominated Members	The management committee is to comprise of 3 eminent Muslims in Madurai city.	111	Board to nominate 3 members who are eminent Muslims of Madurai (Clause 3(5))

The Draft Scheme /opinion of the learned Judge was attached to the Scheme as Annexure C and forms part and parcel of the Scheme.



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19. From a perusal of the Resolution requesting the retired Judge for his opinion while also stating that the same shall be treated as final, it would be clear leaving no room for any doubt that there was abject surrender of the statutory power/authority by the Board to an external non-statutory entity. The abdication of authority by the Board becomes manifest in other words the abdication by the Board which was covert became overt /evident ex-facie, as would be evident from the approval by the Board to the Scheme framed by the external entity in less than a day without complying with the requirement under Section 69 of Consultation with the Mutawalli or applicant.

20. Having found that the impugned Scheme suffers from the vice of abdication of power, I shall now proceed to examine the consequences that follows abdication of authority. The position relating to abdication and its consequences can possibly be summarized as under:

i) That the authority which has been conferred with the competence under the statute alone can pass the order. No other person, even a superior authority, cannot interfere with the functioning of the statutory authority.

ii) It is not open to an authority to mortgage their discretion, volition and decision-making authority and be prepared to give way to carry out



commands having no sanctity in law.

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iii) If any decision is taken by a statutory authority at the behest or on suggestion of a person who has no statutory role to play, the same would be patently illegal.

iv) The authority empowered to act under the statute alone should exercise its discretion following the procedure prescribed therein and interference/ influence by any authority upon whom the statute does not confer any jurisdiction, would violate the statutory Scheme and may fall foul of the constitutional safe guards in particular arbitrariness thereby violative of Article 14 of the Indian Constitution.

21. It may be relevant to refer to the following judgments in support of the above position:

i) Bahadursinh Lakhubhai Gohil v. Jagdishbhai M. Kamalia, (2004) 2 SCC 65 has held as follows:

"It is also well settled that if any decision is taken by a statutory authority at the behest or on the suggestion of a person who has no statutory role to play, the same would be ultra vires .

ii) The Joint Action Committee of Airline Pilots Association vs. DGCA 2011 (5) SCC 435, wherein the Hon'ble Apex Court held as follows:



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26. *The contention was raised before the High Court that the Circular dated 29-5-2008 has been issued by the authority having no competence, thus cannot be enforced. It is a settled legal proposition that the authority which has been conferred with the competence under the statute alone can pass the order. No other person, even a superior authority, can interfere with the functioning of the statutory authority. In a democratic set-up like ours, persons occupying key positions are not supposed to mortgage their discretion, volition and decision-making authority and be prepared to give way to carry out commands having no sanctity in law. Thus, if any decision is taken by a statutory authority at the behest or on suggestion of a person who has no statutory role to play, the same would be patently illegal.*

27. *Similar view has been reiterated by this Court in ... Pancham Chand v. State of H.P. [(2008) 7 SCC 117] observing that an authority vested with the power to act under the statute alone should exercise its discretion following the procedure prescribed therein and interference on the part of any authority upon whom the statute does not confer any jurisdiction, is wholly unwarranted in law. It violates the constitutional Scheme.*

28. *In view of the above, the legal position emerges that the authority who has been vested with the power to exercise its discretion alone can pass the order. Even a senior official cannot provide for any guideline or direction to the authority under the statute to act in a particular manner. "*

iii) Similarly, the Hon'ble Apex Court in "Prem Chandra vs. CTO, AIR 1958 SC 667" had deprecated the practice of statutory authorities basing their decisions on the basis of borrowed opinions from other authorities who have no statutory role to play, the relevant portion has follows,



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"18....."The file of the assessee, however, shows that even though the 1st respondent was satisfied on the materials placed by the appellants and their representative before him that the appellants were not liable to pay sales tax in regard to these transactions, he referred the matter first for instructions and then for obtaining the "valued opinion" of his superior, the Assistant Commissioner (C.S.) and the latter expressed his opinion that the appellants were liable in respect of these transactions. All this was done behind the back of the appellants and the appellants had no opportunity of meeting the point of view which had been adopted by the Assistant Commissioner (C.S.) and the first respondent quietly followed these instructions and advice of the Assistant Commissioner.

19. We are really surprised at the manner in which the first respondent dealt with the matter of this assessment. It is clear that he did not exercise his own judgment in the and faithfully followed the instructions conveyed to him by the Assistant Commissioner (C.S.) without giving the appellants an opportunity to meet the points urged against them. The whole procedure was contrary to the principles of natural justice. The procedure adopted was, to say the least, unfair and was calculated to undermine the confidence of the public in the impartial and fair administration of the Sales Tax Department concerned."

22. It may also be relevant to refer to the following passages from the Book titled Administrative Law book of H.W.E. Wadhe & C.F. Forsyth (11th Edition page No. 269)

"Closely akin to delegation, and scarcely distinguishable from it in some cases, is any arrangement by which a power conferred



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upon one authority is in substance exercised by another. The proper authority may share its power with someone else, or may allow someone else to dictate to it by declining to act without their consent or by submitting to their wishes or instructions. The effect then is that the discretion conferred by Parliament is exercised, at least in part, by the wrong authority, and the resulting decision is ultra vires and void. So strict are the courts in applying this principle that they condemn some administrative arrangements which must seem quite natural and proper to those who make them... This doctrine has even been applied to voting by local councilors.

... A decision of the Home Secretary that a prisoner should serve a term of at least twenty years was quashed because he acted 'as a rubber stamp on the advice of the judge or of the parole board without making his own decisions'.

23. Applying the above legal principle to the facts on hand the impugned Scheme cannot be stated to be a Scheme framed by the Board for it has merely completed the formality of affixing its seal of approval to the Scheme drafted by an entity which has no role under the Act in the framing of the Scheme. In other words, the impugned Scheme is in gross disregard and cannot be stated to be one made under Section 69 of the Act.

IV. Whether the impugned Scheme was framed in compliance with the requirement of Consultation with the Mutawalli or the applicant as mandated under Section 69 (or) is it permissible to equate Consultation with "personal hearing" as suggested by the learned counsel for the respondent/Board?



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24. To answer the above question it may be relevant to contrast Section 69 and 32 which deals with framing of Schemes while Section 32 (2) (d) of the Act provides that settlement of Scheme shall not be made without giving the "parties affected an opportunity of being heard", in contrast Section 69 requires the Scheme to be framed "after consultation with the Mutawalli or the applicant in the prescribed manner". There seems to be a conscious use of different expressions in Sections 32 (2) (d) and 69 of the Act, while dealing with different classes of persons / entities involved with the Wakf. While Section 32 deals with parties affected and provides that they shall be granted an opportunity of heard, Section 69 deals with Mutawalli and Applicant and provides that the Scheme shall be framed after consultation.

25. In the present case the highest that has been set out by the counsel for the respondent in response to the submission of lack/absence of consultation, is that personal hearing was granted and the same would constitute and satisfy the requirement of consultation mandated under Section 69 of the Act. The above submission has no legal basis and it would be evident from the fact that Parliament has chosen to employ different expressions while dealing with the



nature of the right / opportunity to be extended to entities involved in different capacities in the framing of the Schemes. While with reference to "parties affected" it provides for opportunity of being heard , whereas while dealing with Mutawalli and the applicant it mandates consultation. When Parliament has expressed itself differently with reference to different set of entities, it ought to be understood that the intent was to convey different meaning.

26. Importantly, consultation requires meetings of minds with definite facts constituting the foundation and source for final decision being made available to the persons/entities to be consulted to make the above exercise meaningful and ensure that the intended purpose/object of the above exercise is served. Section 69(1) of the Act mandates that any Scheme shall be framed after consultation with the Mutawalli or applicant. Any failure to comply with the mandate of "consultation" renders the entire action ultra vires under Section 69 of the Act.

27. Applying the above principles to the instant case, wherein admittedly the Draft Scheme was not even circulated to the petitioners herein/parties affected / interested parties and thus there was not even an attempt to comply with the process of consultation in compliance with Section 69 of the



Act. The Scheme was finalized in less than 24 hours on receipt of the Draft Scheme from the external entity clearly showing pre-determination and disregard to the requirement of consultation as mandated under Section 69 of the Act. To understand / appreciate the significance of consultation when the statute requires the same, it may be relevant to refer to the following judgments,

a) Decision of the Hon'ble Apex Court in State of Gujarat vs. Justice R.A Mehta, 2013 (3) SCC 1, wherein considering the concept of consultation and when a consultation is said to be undertaken the Court held as follows:

"25. The object of consultation is to render its process meaningful so that it may serve its intended purpose. Consultation requires the meeting of minds between the parties that are involved in the consultative process on the basis of material facts and points in order to arrive at a correct or at least a satisfactory solution. If a certain power can be exercised only after consultation such consultation must be conscious, effective, meaningful and purposeful. To ensure this, each party must disclose to the other all relevant facts for due deliberation. The consultee must express his opinion only after complete consideration of the matter on the basis of all the relevant facts and quintessence. Consultation may have different meanings in different situations depending upon the nature and purpose of the statute... "

b) In Chandramouleshwar Prasad v. Patna High Court (1969) 3 SCC 56 (para 7), Hon'ble Apex Court held as under:

"consultation or deliberation can neither be complete nor effective before the parties thereto make their respective points of view



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known to the other or others and discuss and examine the relative merits of their views. If one party makes a proposal to the other, who has a counter-proposal in mind which is not communicated to the proposer, a direction issued to give effect to the counter-proposal without any further discussion with respect to such counter-proposal with the proposer cannot be said to have been issued after consultation. If a certain power can be exercised only after consultation, such consultation cannot be said to have been undertaken if one party makes a proposal to the other/ authority, who has a different proposal in mind, which is not communicated to the proposer and a direction by the authority to give effect to such different proposal is made .

c) When the authority is required to act in consultation with entities/authorities expressly indicated it cannot done through any other external entity. For instance if A is empowered to appoint B in consultation with C, he will not be exercising the power in the manner prescribed if he appoints B in consultation with C and D. In this regard, it may be relevant to refer to the judgment in Chandra Mohan v. State of Uttar Pradesh, (1967) 1 SCR 77:

.. These provisions indicate that the duty to consult is so integrated with the exercise of the power that the power can be exercised only in consultation with the person or persons designated therein. To state it differently, if A is empowered to appoint B in consultation with C, he will not be exercising the power in the manner prescribed if he appoints B in consultation with C and D

These provision indicate that the duty to consult is so integrated with the exercise of the power that the power can be exercised only in consultation with the person or persons designated there. In another case, it was said in the same context consultation is not complete or effective before parties thereto make the respective points of view known to the



other or others and discuss and examine the relative merits of their views.

If one party makes a proposal the other party has a counter proposal in his mind which is not communicated to the proposer, an order issued to give effect to the counter cannot be said to have been made after consultation. But if a meeting all the persons required to be consulted is called in which all of them have opportunity to be present and deliberate, a decision taken in the meeting cannot be challenged on the ground that some of the persons required be consulted were absent in the meeting .

Applying the above judgement to the case on hand, the Act having identified the entities to be consulted viz., Mutawalli or applicant, it excludes consultation with any other body / entity and exercise of power in consultation with an entity not identified by the statute would vitiate the proceeding.

28. It may also be relevant to refer to the following passages in Book Titled “Penumbra of Natural Justice” by Tapash Gan Choudhury, wherein, while dealing with the usual Requirements of consultation, the learned Author has explained as under:

(a) The consultation must be at a time when proposals are still at a formative stage. The proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response.¹

(b) Those consulted must be provided with sufficient information to enable them to express their views. It bears mentioning, however, that it is not

1- R v. Richord upon Thames London Borough Council, 2001 ER (D) 422 (Dec).



necessary to provide ample information, but at least enough information is to be furnished to enable the purpose of the consultation to be fulfilled.¹

(c) The potential consultees must be allowed sufficient time for consideration and response. The scale, complexity and importance of the subject matter are factors in assessing how much time is required. Though the court is at liberty to make allowances where decisions are required to be taken urgently, and will assess the time allowed by reference to the facts as they appeared to the authority at the time, no degree of urgency can absolve the authority from the obligation to consult at all. If the original time-limit is very short, the authority unreasonable if it refuses a request for an expansion. It has time-limit is complied with noted, however, that if a statutory is not for the court to say that too little time has been allowed.²

d) The decision-maker must consult with an open mind and listen, in the words of Ackner, LJ as expressed *R. v Secretary of State for the Environment, ex Brent London Borough Council* with mind 'Ajar'. A failure to pay any heed to the views expressed in consultation might be impugned on the ground of failure to take account of relevant considerations.

e) The result of consultation must be consciously taken into account in finalizing any statutory proposals. It has to be borne in mind that the decision-

¹ R v. Secretary of state for Social Services, ex p. Association of Metropolitan Authorities [1986] 1 All 164

² Port Louis Corpn v. A-G of Mauritius (1965) AC 1111.



maker is not bound by the views expressed to him by the consultee.
This would be an unlawful fettering of discretion.

29. The above judgments would clearly demonstrate the significance of consultation whenever mandated by a statute. The attempt to equate consultation with personal hearing is unfounded. The process of a consultation is legally different from providing a hearing. Consultation would mean concurrence it would also mean to ask or seek advice or the view of the persons on a particular subject, on the other hand a hearing is normally an exercise undertaken by an authority who occupies a position or vested with the authority to take a decision which would have an impact on the right of a person who is extended an opportunity of hearing. Keeping in mind the above legal principles with regard to the significance of consultation whenever the legislature mandates the same and the nature of the conduct expected of the authority/party who is required to consult, it leaves no doubt in my mind that before finalizing the Scheme the Board ought to have consulted the petitioners inasmuch as they are admittedly Mutawalli or applicants. Failure to comply with the mandate of "consultation" renders the entire action ultra vires under Section 69 of the Act. In view of the above the impugned order stands vitiated for want of compliance with the requirement of consultation in terms of Section 69 of the Act.



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V. Whether the respondent/Board had approved the impugned Scheme in violation of principles of natural justice in undue haste and thus the entire exercise stands vitiated as falling foul of Article 14 of the Constitution ?

30.The impugned proceeding also suffers from violation of principles of natural justice inasmuch as it has been framed without even furnishing copies of the Draft Scheme obtained from the non-statutory authority/entity, useful reference in this regard may be made to the judgments of Hon'ble Supreme Court in Supreme Court Advocates on Record Association v. Union of India, AIR 1994 SC 268, 382 and GVK Industries Limited v. Income Tax Officer, (2015) 11 SCC 734, further judgments of this Court in VSO Bala Krishnan Vs Dist. Collector reported in 2009 (2) MLJ 557 and Selvaraj Vs RDO reported in 2010 (6) CTC 73.

30.1.Secondly, the impugned Scheme has been framed with undue haste as would be evident from the fact that on receipt of the Draft Scheme on 11.07.2022 from the Retired Judge who was requested by the Respondent to offer his opinion and to Draft a Scheme, the Board has the very next day i.e.



12.07.2022 without putting the parties affected or parties who are to be consulted in terms of the Act on notice or furnishing copies thereof has proceeded to adopt the same. The undue haste with which the Scheme was framed by adopting the Scheme Drafted by an external agency/party by itself would vitiate the impugned Scheme, for haste tends to arbitrariness and would thereby fall foul of Article 14 of the Constitution. In this regard it may be relevant to refer to the judgment of Hon'ble Supreme Court in Zenit Mataplast (P) Ltd. v. State of Maharashtra, (2009) 10 SCC 388, pg 399

"39. Anything done in undue haste can also be termed as arbitrary and cannot be condoned in law (vide M.P. Hasta Shilpa Vikas Nigam Ltd. v. Devendra Kumar Jain [(1995) 1 SCC 638 : 1995 SCC (L&S) 364 : (1995) 29 ATC 159] and Bahadursinh Lakhubhai Gohil v. Jagdishbhai M. Kamalia [(2004) 2 SCC 65 : AIR 2004 SC 1159])."

31. Finally the impugned Scheme also smacks of lack of good faith in the exercise of power by the Board as would evident from the following facts, when taken into account cumulatively:

(i) The abject surrender of power to an external agency/party of the power to frame a Scheme which was vested exclusively with the Board.

(ii) The failure to consult the petitioner/Mutawaali/applicant in terms of Section 69 of the Act.



(iii) The failure to even disclose the Draft Scheme to the parties affected and parties who are to be consulted before framing the Scheme.

(iv) The adoption of the Draft Scheme framed by a non-statutory party/entity in less than 24 hours of receipt in undue haste.

(v) The action of placing the issue of passing final orders on the Scheme on 12.07.2022 (a day after Bakrid), conscious of the fact that members would have difficulty in participating in the said meeting moreso when the said meeting was an administrative meeting of the Wakf.

32. The above sequence of events when looked at collectively points to the fact that the power under Section 69 of the Act has been exercised in gross disregard to the mandate and for purposes that are alien/foreign to the object/purpose of Section 69 of the Act and thus suffers from legal malice, which is yet another reason as to why the impugned Scheme cannot be sustained. In this regard it may be relevant to refer to the following judgments:

a) Yashwant Bhoir V. Collector (2012) 4 SCC 407,

47. & Legal malice or malice in law means something done without lawful excuse. It is a deliberate act in disregard to the rights of others. It is an act which is taken with an oblique or indirect object. It is an act done



wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite.

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48. *Mala fide exercise of power does not imply any moral turpitude. It means exercise of statutory power for purposes foreign to those for which it is in law intended. It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, where intent is manifested by its injurious acts. Passing an order for unauthorised purpose constitutes malice in law.*

(emphasis supplied)

b) In, Express Newspapers Pvt. Ltd. Vs. Union of India, 1986 (1) SCC 133

"Mala Fides on the part of the Government in power or its functionaries would be sufficient to invalidate the impugned notices. Fraud on power vitiates the impugned orders if they were not exercised bona fide for the purpose for which the power was conferred .

33. For all the above reasons, I am inclined to set aside the impugned Scheme. It was submitted by the Counsel for the Respondent Board that liberty may be given to frame a fresh/new Scheme and time line may be stipulated by this Court. Recording the above, the respondents are directed to frame the Scheme in compliance with directions of this Court in C.R.P.No.491 of 2006, Cont.P.(MD) No.4 of 2009 and W.P.(MD) No.2705 of 2016 and provision of



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Section 32 (2) (d) and 69 of the Act within a period of 12 weeks from the date of receipt of a copy of this order.

34. Accordingly, the impugned Scheme framed by the Respondent Board dated 12.07.2022 is set-aside and these Writ Petitions are disposed of with the above directions. Consequently, connected Miscellaneous Petitions are closed. No costs.

27.01.2023

(1/3)

Index:Yes/No

Speaking/Non speaking order

nst/shk



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To

- 1.The Secretary,
Backward Classes, Most Backward Classes and
Minorities Welfare Department,
Secretariat, Chennai-600 009.
- 2.The Chairman,
Tamil Nadu Wakf Board,
No.1, Jaffer Syrang Street,
Vallal Seethakathi Nagar, Chennai-600 001.
- 3.The Chief Executive Officer,
Tamil Nadu Wakf Board,
No.1, Jaffer Syrang Street,
Vallal Seethakathi Nagar, Chennai-600 001.
- 4.The Tamil Nadu Wakf Board,
Represented by its Chief Executive Officer,
Door No.1,
Jaffer Syrang Street,
Vallal Seethakathi Nagar,
Chennai 600 001.



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MOHAMMED SHAFFIQ,J.

nst/shk

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and

WMP.(MD).Nos.19875, 19874, 19917, 19918, 18501, 18500 of 2022

(1/3)

27.01.2023