



W.P.(MD)No.19869 of 2024

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 30.10.2024

DATED : 28.01.2025

CORAM

THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.P.(MD)No.19869 of 2024

and

W.M.P.(MD)Nos.16842 & 16844 of 2024

1.Mohamed Yusuf,
Secretary/ Mutawalli,
The Administrative Committee of
The Mohaideen Aandavar Pallivasal,
Pattukottai, Thanjavur District.

2.A.K.Mohamed Rila

... Petitioners

Vs.

1.The Tamil Nadu Waqf Board,
Rep. By its Chief Executive Officer,
No.1, Jafer Syrang Street,
Vallalseethakathi Nagar,
Chennai.

2.The Superintendent of Waqf,
Tamil Nadu Waqf Board, Thanjavur Division,
Diwan Nagar, Court Road, Thanjavur.

... Respondents



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Prayer: Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorari, calling for the records relating to the impugned scheme framed and notified by the 1st Respondent qua Mohaideen Aandavar Periya Pallivasal Waqf, Pattukottai, Thanjavur District in LR.RC.No.7346/12/B7/TNJ dated 15.07.2024, published in the Tamil Nadu Government Gazette in No.IV-3a/40/2024 on 17.07.2024 and quash the same as illegal.

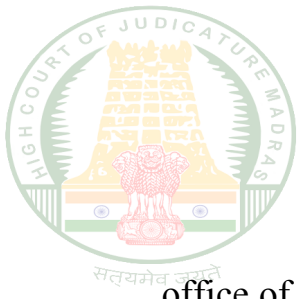
For Petitioners : Mr.M.Mahaboob Athiff

For Respondents : Mr.V.Ragavachari
Senior Advocate
for Mr.D.S.Haroon Rasheed

ORDER

The present writ petition has been filed assailing the impugned scheme framed and notified in the Tamil Nadu Government Gazette dated 17.07.2024 in respect of Mohaideen Aandavar Periya Pallivasal Waqf, Pattukottai, Thanjavur District.

2. The 1st petitioner is the Secretary of the Waqf in question, while the 2nd petitioner is the member of the said Waqf and a person interested in the Waqf in terms of Section 3(k) of the Waqf Act, 1995 (hereinafter referred to as “the Act”). As per the proforma governing the Waqf, the rule of succession to the



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office of mutawalli is by selection and not election. The relevant portions of the proforma is extracted hereunder:

PROFORMA REPORT

1. *Serial Number* : 370
2. *Name of Taluk* : Pattukottai
3. *Name of the Village* : Pattukottai
4. *Name of the Waqf and (Whether Sunni or Shia)* : Mohideen Andavar Mosque (Sunni)
5. *Original Waqf deeds, title deed and Patta Nos. and dates* : The Original Waqf deed is not available. Mosque is maintained.
6. *Nature of the Waqf (Whether pious, Religious, or Charitable or Waqf by user, Mashrutul Khidmat or Waqf alal Aulad)* : Pious and religious
7. *Object of the waqf and the conditions of grant* : The Mosque is maintained as per custom
8. *Name of the beneficiaries and and their address* : ----
9. *Name of the Muthavalli their address* : Mohamed Abdullah Rowther
Son of Mohaamed Matharsa
Rowther Analvuthankulathur



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10. *The Rule of succession to the office of the muthavalli and whether it is under the Waqf deed or by custom or by usage* : *Street, Pattukottai.*
Selection by the Jamath as per Custom.

3. Brief facts:

3.1 The subject Waqf is a notified Waqf under the Waqf Act, 1995 and registered with the 1st Board under GS No.416/TNJ. The 1st petitioner is the Secretary of the subject Waqf and the 2nd petitioner is the member of the petition mentioned Waqf and is a person interested in the Waqf in terms of section 3(k) of the Waqf Act, 1995. As per the statutory notification/Proforma governing the Waqf, the rule of succession in respect of the office of Mutawalli is by selection. It is reiterated that, as per the customs and usage governing the Waqf and the Proforma, the Mutawalli/Administrative Committee of the Waqf in question is chosen by selection by the Jamath and not by election.



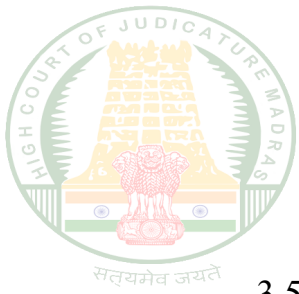
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3.2. It is stated that the previous Mutawalli Amanullah had misappropriated the funds of the subject Waqf and was removed from the office under section 64 of the Waqf Act on 09.01.2019.

3.3. After his removal, an administrative committee/adhoc committee had been appointed by the Board in terms of section 63 of the Act for the administration of the Waqf and for retrieval of the illegally alienated properties of the Waqf. While so, the respondent board had notified election to the Waqf. The notification calling for the election by the board was the subject matter of challenge in the earlier round of litigation in the case of Mohammed Yusuf vs. Tamil Nadu Waqf Board (W.P.(MD).No.13695 of 2020) wherein it was held that the board neither has power to conduct election nor it can alter the mode of selection of Mutawalli as found/indicated the Waqfnama or proforma or the customs and usage applicable to the concerned Waqf.

3.4. While so, the respondent Board has invoked its power under section 69 of the Act and framed a Scheme which inter alia include clauses providing for the conduct of election by the Board and the rule of succession was modified / changed from selection by Jamath to election by Jamath.



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3.5 A notification dated 16.07.2024 was issued by the 2nd respondent notifying election schedule to the petition mentioned Waqf on 29.09.2024. It was also stated that the said notification is issued by the 2nd respondent in his capacity as an Election Officer of the Waqf in question.

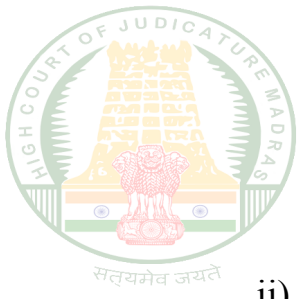
3.6 It may also be relevant to note that the scheme framed under section 69 was notified on 17.07.2024 in the Tamil Nadu Government Gazatte. Aggrieved by the same, the petitioner has filed the present writ petition challenging the scheme.

4. Against this background, question arises whether the impugned Scheme framed and notified by the 1st Respondent dated 15.07.2024 and published in the Gazette on 17.07.2024 is valid.

5. Case of the petitioners:

The case of the petitioner can be broadly divided into two segments viz.,

i) Absence of power with the Board to conduct elections for a Waqf even under Schemes framed in terms of Section 69 of the Act.



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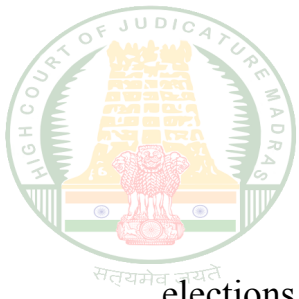
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ii) Secondly, the impugned Scheme is framed contrary to the mandatory requirements contemplated/ stipulated under Section 69 of the Act.

SEGMENT - I:

a) The scheme insofar as it *inter alia* provides for conduct of elections by the Board i.e., the 1st Respondent herein is without jurisdiction inasmuch as the power of the Board, even while framing a Scheme ought to be in conformity with the Customs and usages of the Waqf. The subject “Waqf” even in terms of the proforma, provides that the Mutawalli shall be selected by the Jamath as per custom. It has been the custom of the subject “Waqf”, to have its Mutawalli selected by Jamath. The Board, thus, cannot deviate from the above mode of appointment to the office of Mutawalli viz., selection by Jamath, instead provide that the Mutawalli would be elected by the Jamath and the Board would conduct the Elections.

b) This Court in 2022 (3) CWC 143 in the case of *Mohammed Yusuf vs. The Tamil Nadu Waqf Board*, had in an earlier round of litigation wherein while considering the question as to the power of the Board to conduct elections for Waqf, held that the Board does not have the power to conduct



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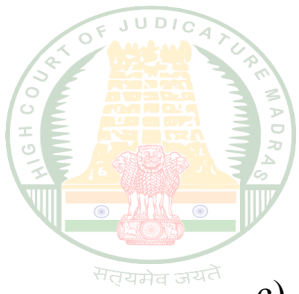
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elections. Importantly, the subject “Waqf” was part of the batch and had challenged the notification in Na.Ka.No.7346/12/Aa7/Thanjai calling for elections which was set aside. This Court was also pleased to observe as under:

“21...

a)The present administrative committee/ mutawalli shall take steps for appointment of the administrative committee/ mutawalli in accordance with the proforma / Waqf deed i.e., by selection within a period of 12 weeks from the date of receipt of a copy of this order.”

5.1. In the light of the above binding order of this Court which is yet to be stayed or set-aside, by any judicial order, the Scheme insofar as it *inter alia* provides for conduct of elections by the Board is a fraud on statutory power vested with the Board and is vitiated, being a colourable exercise of power and suffers from the vice of malice in law and thus a nullity. In other words, it is submitted that the scheme insofar as it provides for conduct of election by the Board circumvents and subverts judicial orders of this Court, through the quasi-judicial process of framing of schemes by the 1st Respondent Board in exercise of its powers under Section 69 of the Act.



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c) The impugned scheme insofar as it provides for conduct of elections by the Board also cannot be sustained inasmuch as it is contrary to the settled legal maxim - “*quando aliquid prohibetur; prohibetur et omne per quod devenitur ad illud*” meaning *what cannot be done directly – cannot be done indirectly*.

SEGMENT-II:

a) Before framing a scheme, the Board must be satisfied either on its own motion or on application of not less than 5 persons interested in any Waqf to frame a scheme for the proper administration of the Waqf – However no such satisfaction is arrived at/ recorded by the Board.

b) Such satisfaction of the need to frame a scheme for administration of Waqf must be preceded by an enquiry – No material to show any enquiry made in compliance with the mandate under Section 69 of the Act.

c) After formation of opinion viz., the need to frame a scheme for the administration of the Waqf, the Board is required to provide a reasonable



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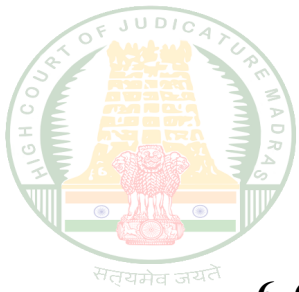
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opportunity of hearing to the muthavallis and others i.e., persons interested in the Waqf.

d) The Draft scheme should then be consulted with the muthawalli or others in the prescribed manner. However, there are no rules framed prescribing the manner in which the consultation must be made by the Board with the muthawalli or others. Importantly, there was no consultation by the Board as provided under Section 69 of the Act.

e) On consultation with the Muthawalli and persons interested, the Board may pass an order framing a scheme, which shall be notified in the Gazette.

5.2. The impugned scheme does not comply with any of the above requirements which are conditions precedent/ *sine qua non* for framing a Scheme under Section 69 of the Act.



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6. Case of the Respondents:

6.1. The respondent after making oral submissions filed written submission reiterating their submissions. The written submission of the respondent are extracted hereunder:

As per the Petitioner when the proforma states that the appointment to the office to the muthawalli is by selection and not election. Consequently, the attempt of the Waqf Board to conduct elections was challenged in W.P. (MD) No. 19015 of 2024.

It is alleged that the attempt of the Waqf Board to conduct elections is in contravention of the judgment of this Hon'ble Court in Mohamad Yusuf vs. Tamil Nadu Waqf Board, 2022 (3) CWC 143. It is also alleged that the scheme framed by the Board is unsustainable in view of the fact that it conflicts with the customs and usage of the Waqf and that the framing of a scheme that confers on the Board, a power to conduct an election, is a colorable exercise of power.

Arguendo, the Petitioner alleges that there was no consultation process before the scheme was notified and that on the date of notification i.e. 16-07-2024, the scheme was not in existence.

WRITTEN SUBMISSIONS OF THE RESPONDENTS

The Petitioner has predicated his challenge on three grounds, i.e., a) lack of jurisdiction of the Board, relying on proviso to Section 32 (1) of the Act; b) Fraud on statutory power and malice in law and c) Violation of Section 69 of the Act. As the interpretation of the same are intertwined, they are answered together.



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A. The Petitioner contends that the entire exercise of power under Section 69 of the Act to frame the impugned scheme is ultra vires to the proviso to Section 32 of the Act and is without jurisdiction. The contentions are absolutely frivolous. Section 32 of the Waqf Act, 1955 provides for the powers and functions of the board. The expressions 'superintendence and 'vest' together along with 'controlled/administered' which convey absolute control in the authority to ensure all the waqfs are administered. The Board is made the sole custodian and controller of the affairs of the waqf in the State.

B. These expressions under Section 32(1) are very wide in their connotation and amplitude. These include a variety of powers which are incidental or consequential, to achieve the declared objects. Pertinently Section 32(2)(d) provides for settling schemes for the administration of Waqf. The provision commences with absolute power being conferred upon the Board for the administration of the Waqfs within the State. The only requirement is that the Board considers the following:

- a. Directions of the Waqif*
- b. The purpose of the Waqf*
- c. Usage or custom of the Waqf sanctioned by the school of Muslim law to which the Waqf belongs.*

C. In the present case, the mutawalli of the Waqf had been removed by the Board under Section 64 of the act of owing to irregularities. Thereafter from the year 2019, the Waqf had been administered by the Ad-hoc committee and no new mutawalli was been appointed for the Waqf. The scheme framed by the Board is primarily for the welfare of the waqf and for the proper administration of the Waqf.

- a. Mohamed Mujeebur Rahman vs. The state of Tamil Nadu (2011 SCC Online Mad 685), the Hon'ble High Court had made clear that the settlement of scheme is within the purview of the Waqf Board.*



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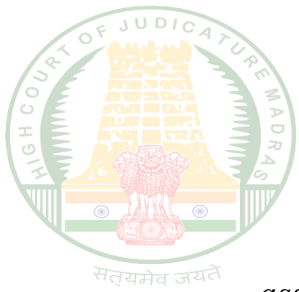
D. It is the contention of the Petitioner that the scheme framed is in variance to the customs and usage of the Waqf. Needless to state, the proviso to Section 32 (1), states that it is the custom of the Waqf, as recognized by the school of Muslim law. Consequently, the reliance upon the proforma alone would be insufficient. Similarly, no evidence has and can be led by the Petitioner to prove the existence of a custom. The issue of the existence of a custom has to be relegated to a court of competent jurisdiction.

E. The reliance placed on the Petitioner on the proforma to prove the existence of a custom is misplaced. The proforma is a record of the Board that states the origin, assets, income, object and beneficiaries of a Waqf. At the time of preparation of the proforma the existence of a custom is never proved. Consequently, the scheme cannot be assailed on the ground that it falls foul of the proviso to Section 32 (1) of the Act.

F. The Petitioner also assails the scheme on the ground that it amounts to 'Statutory Fraud' as it is in contravention of the judgment of this Hon'ble Court in Mohamad Yusuf vs. Tamil Nadu Waqf Board. At this juncture, this Respondent would humbly submit that this Hon'ble Court was not apprised of certain precedents that would be squarely applicable for the issue sought to be answered.

a. In All India Imam Organization and Ors vs. Union of India and Ors. (1993) 3 SCC 584, the Supreme Court confirmed that the Waqf Board has control over the Waqf.

G. Further, the judgment proceeds to isolate provisions of the Act for the purpose of interpreting whether the Board has jurisdiction to conduct an election. The statutory rules of interpretation dictate that any Act ought to be read as a whole. A reading of the Waqf Act, 1995, as a whole would clearly indicate that the intention of the Legislature was to ensure absolute superintendence of the Waqfs, in a State, by the Board constituted under the Act. The Board is vested with the power to



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assume direct management of a Waqf, recover the properties of a Waqf, determine whether a property is Waqf property or not, remove encroachments, remove & appoint muthawallis and hold any inquiry relating to the administration of a Waqf. The relegation of a Board to that of an administrative functionary would therefore run contra to the very legislation and such interpretation is unsustainable.

H. Consequently, it is humbly submitted that the decision of this Hon'ble Court in Mohamad Yusuf vs. Tamil Nadu Waqf Board ought to be revisited in light of the aforementioned precedents. It is also stated that the decision is a subject matter of challenge in a writ appeal and is scheduled for final disposal.

I. Further, Section 69 of the Act states that the Waqf board may frame such scheme for the administration of the waqf either on its own motion or on application made on the concerned waqf. Any person aggrieved by the such settlement of scheme of management of waqf may institute a suit in tribunal for setting aside such settlement. Consequently, the remedy of the Petitioner is only before the Tribunal and not before this Hon'ble Court. This is on account of the fact that the factual issues surrounding the scheme and any objections that arise therefrom can only be decided by the Tribunal, after appreciation of evidence.

a. S. SaitBasha Vs The Chief Executive Officer and Anr (2013 SCC Online Mad 1926).

J. Reliance is also placed on the judgment of the Hon'ble Bombay High Court in Shaikh Saleemuddin v. Baba Quereshi, 2015 (11) RCR (civil) 1 (bom). The Hon'ble High Court held that,

“Reading section 32 with section 69 makes it clear that the what section 69 is providing for is the “power” to frame scheme for administration of waqf. Sub-section (1) of section 69 makes it clear that the board may frame a scheme “for administration of the Waqf”. The very fact that



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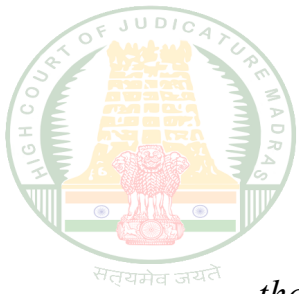
section 69 provides the scheme under this section which can even provide for removal of mutawalli, making clear that the scheme which is being contemplated under section 69 is broader scheme for complete administration of the waqf. This is different from what is provided in Section 32 which deals with settling schemes for managing the affairs of the waqf. Section 69, 70 and 71 of the act read together makes it clear that the board can frame scheme for the complete administration of the waqf which can even provide for removal of mutawalli”.

K. Therefore, it is pertinent to note that section 69 of the Act which empowers the board to frame a scheme for mere administration of the waqf, and can extend to even removal of mutawalli. Consequently, it would be absurd to suggest that the mode of selecting a muthawalli, would be outside the scope of the Board while framing a scheme under Section 69 of the Act.

6.2. The learned counsel for the Respondents would finally submit the following:

1. *“That the issue of the existence of a custom can only be ascertained after evidence is led by the Petitioner and the exercise can only be carried out by the competent Court i.e. the Waqf Tribunal*

2. *That the judgment of this Hon’ble Court in Mohamad Yusuf vs. Tamil Nadu Waqf Board needs to be revisited with specific reference to the legislative intent of the Act, the powers of*



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the Board and the precedents on the issue of the powers of the Board”.

7. Heard both sides and perused the materials on record.

8. Before proceeding to deal with the merits, it may be necessary to deal with the preliminary objection as to the maintainability of the writ by Mohamed Yusuf on the premise that the said Mohamed Yusuf, i.e., the 1st petitioner in W.P(MD)No.19869 of 2024 had submitted a Draft scheme which contained clauses for conduct of elections by the Board, it was thus submitted that the writ petition in W.P(MD)No.19869 of 2024 by Mohamed Yusuf cannot be maintained on the ground of estoppel. Though the above issue was raised orally the respondent Board in its written submissions had not raised the above aspect. Nevertheless, it appears to me that the above contention may not have any bearing on the outcome of the writ petition for the following reasons viz.,

a) The above Draft scheme was submitted by the petitioner Mohamed Yusuf prior to the order of this court in Mohamed Yusuf's case dated 19.04.2023, wherein it was held that the Board does not have the power to conduct elections. In view thereof the above Draft scheme submitted prior to



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the above judgment may not constitute a bar to the petitioner Mohamed Yusuf challenging the power of the Board to conduct election. This is in view that it is trite law that there is no estoppel against law. In this regard, it is useful to refer to the following judgments:

1. M.I. Builders (P) Ltd. v. Radhey Shyam Sahu, (1999) 6 SCC 464 :

*“No doubt the Mahapalika is a continuing body and it will be estopped from changing its stand in the given case. But when the Mahapalika finds that its action was contrary to the provisions of law by which it was constituted there could certainly be no impediment in its way to change its stand. There cannot be any estoppel operating against the Mahapalika. The principles laid down in *Union of India v. Anglo Afghan Agencies Ltd.* [AIR 1968 SC 718 : (1968) 2 SCR 366] and of the Calcutta High Court in *Ganges Mfg. Co. v. Sourujmull* [ILR (1880) 5 Cal 669, 678 : 5 CLR 533] cannot apply to the facts of the present case.”*

2. State of Rajasthan v. Surendra Mohnot, (2014) 14 SCC 77 :

*“18. In *Union of India v. Hira Lal* [(1996) 10 SCC 574] , it has been held that the concession made by the Government Advocate on the question of law could not be said to be binding upon the Government.”*

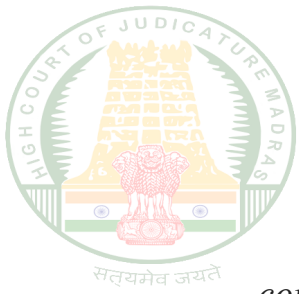
b) It is equally settled that, a concession, consent or representation made by any person cannot deprive such person from challenging an order if the order is illegal or unconstitutional, for there can be no estoppel against law and



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the right to judicial redress is a Constitutional Right. Further, consent cannot confer jurisdiction on any authority which inherently lacks jurisdiction and therefore the Board cannot cite the Draft scheme submitted by the petitioner as a justification for assuming jurisdiction. In this regard, useful reliance can be placed on the decision of the Constitution Bench of the Apex Court in *Vyapuri Kuppusamy vs. State of Maharashtra*, reported in (1985) 3 SCC 545, wherein it was held as follows:

“28. It is not possible to accept the contention that the petitioners are estopped from setting up their fundamental rights as a defence to the demolition of the huts put up by them on pavements or parts of public roads. There can be no estoppel against the Constitution. The Constitution is not only the paramount law of the land but, it is the source and sustenance of all laws. Its provisions are conceived in public interest and are intended to serve a public purpose. This principle can have no application to representations made regarding the assertion or enforcement of fundamental rights. No individual can barter away the freedoms conferred upon him by the Constitution. A concession made by him in a proceeding, whether under a mistake of law or otherwise, that he does not possess or will not enforce any particular fundamental right, cannot create an estoppel against him in that or any subsequent proceeding. Such a



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concession, if enforced, would defeat the purpose of the Constitution.”

8.1 It is thus beyond the pale of any doubt that there is no estoppel against law, thus mere submission of the Draft scheme prior to the decision of this Court in the petitioner's case, reported in Mohammed Yusuf vs Tamil Nadu Waqf Board (W.P.(MD).No.13695 of 2020), holding that the Board does not have power to conduct election to a Waqf would not by itself non-suit the petitioner.

8.2 It is further submitted that the first petitioner had not disclosed the said fact, while instituting the present writ petition, however an unconditional apology tendered by the petitioner was placed on record with a prayer to pardon the omission and assures that the same is neither deliberate nor wanton. This court is inclined to accept the same. This is in view of the fact that I had already found that submission of the Draft scheme would not estop the petitioner, and non-suit the first petitioner from maintaining the present challenge. Further, there are two petitioners and the 2nd petitioner could still pursue the challenge independent of the 1st petitioner, on the same grounds, thus the objection may



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not materially alter the scope of examination of the issue nor the outcome of the writ petition.

9. I shall proceed to deal with the second segment of the submissions / challenge made by the petitioners. To appreciate the above contention of the petitioner, which revolves around the mandate of Section 69 of the Act, it may be relevant rather necessary to extract Section 69 of the Act, which reads as under:

“69. Power of Board to frame scheme for administration of 1 [waqf].--2 [(1) Where the Board is satisfied after an enquiry, whether on its own motion or on the application of not less than five persons interested in any waqf, to frame a scheme for the proper administration of the waqf, it may, by an order, frame such scheme for the administration of the waqf, after giving reasonable opportunity and after consultation with the mutawalli or others in the prescribed manner.]

(2) A scheme framed under sub-section (1) may provide for the removal of the mutawalli of the 1 [waqf] 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



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provide for the appointment of the person next in hereditary succession to the mutawalli so removed, as one of the members of the committee appointed for the proper administration of the 1 [waqf].

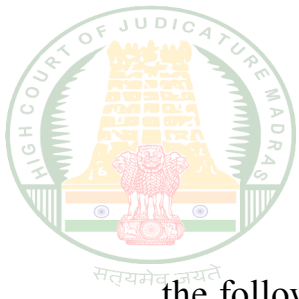
(3) Every order made under sub-section (2) shall be published in the prescribed manner, and, on such publication shall be final and binding on the mutawalli, and all persons interested in the 1 [waqf]:

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.

(5) Pending the framing of the scheme for the proper administration of the 3 [waqf], 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.”

10. From a reading of Section 69 of the Act, in particular, sub-section (1) to Section 69 of the Act, it appears that before a scheme is framed thereunder



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the following requirements must be complied with. I shall proceed to deal with the same:

a) Satisfaction of the Board:

10.1. The Board must be “*satisfied*” of the need to frame a Scheme for the proper administration of the Waqf, it may then proceed to frame a Scheme in the manner provided under Section 69 of the Act. The above satisfaction must be arrived at by the Board “*after an enquiry*” on its own motion or on an application of not less than 5 persons interested in any Waqf to frame a Scheme.

10.2. The expression “*satisfied*” would mean making up its mind (or) the authority coming to a conclusion on the evidence available. The expression “*satisfied*” must mean reasonably satisfied and excludes arbitrariness or rationality. Satisfaction must be honest, careful, rational and based on material and not on conjunctures and surmises. To understand the scope of the expression “*satisfied*” employed in Section 69 of the Act, it may be relevant to refer to the following judgments:



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i) T.P. Senkumar v. Union of India, reported in (2017) 6 SCC 801:

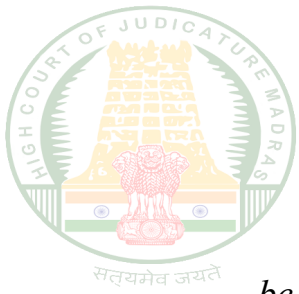
“93. The learned counsel for the State Government is right in submitting that it is only a prima facie satisfaction that is to be arrived at by the State Government that the general public is dissatisfied with the efficiency of the police so as to enable a shifting out of the State Police Chief. However, that prima facie satisfaction must be based on some cogent and rational material. Nothing has been placed before us in this regard except the view that there was dissatisfaction among the general public on the efficiency of the police. Mere repetition of the provisions of Section 97(2)(e) of the Act is not sufficient — there must be some material on record (other than a newspaper report) but unfortunately nothing has been pointed out to us during the course of submissions. It is not enough to merely contend that the State Government was subjectively satisfied that the appellant ought to be transferred out as the State Police Chief.

ii) Ratan Roy v. State of Bihar, 1950 SCC OnLine Pat 20 Pg 443:

“But it must also be remembered at the same time that where ever a legislation uses the word “satisfied”, it must mean reasonably satisfied. I again quote for my authority the decision of the House of Lords in Liversidge v. Anderson. In that case Lord Wright pointed out; “satisfied” must mean “reasonably satisfied”, it cannot import an arbitrary or irrational state of being satisfied”.

iii) Chandreshwari Prasad NarainDeo v. State of Bihar, reported in 1955 SCC OnLine Pat 62 :

“31. The contention of learned Government Pleader was that the satisfaction of the Collector under S. 4(h) was in the nature of a subjective satisfaction and, therefore, could not be questioned by a Superior Court. I am unable to agree. I think the word “satisfied” in S. 4(h) must be construed to mean “reasonably satisfied”, and, therefore, the finding of the Collector under S. 4(h) cannot be a subjective or arbitrary finding but must



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be based upon adequate material. I also think that the satisfaction of the Collector under S. 4(h) is not a capricious satisfaction but must be capable of being tested in an objective manner.”

(emphasis supplied)

10.3. Therefore, even before initiating any proceedings for framing of Scheme, the Board is mandated, to record satisfaction “after an enquiry”, that it is necessary for the proper administration of the Waqf that a scheme should be framed. Recording of satisfaction is a condition precedent or *sine qua non* before the Board proceeds to frame a Scheme or exercise the power to frame a Scheme for the Waqf. In the present case, admittedly the Board has neither held any enquiry nor recorded satisfaction of the need to frame a scheme for the proper administration of the Waqf.

10.4. Importantly, despite a specific challenge having been made by the petitioner that there was no satisfaction recorded by the Board before proceeding to frame the impugned scheme. The Respondent has not let in any material/ evidence to show that there was a formation of opinion or in other words, the Board was satisfied of the need to frame a Scheme for the proper administration of the Waqf. The above satisfaction is a condition precedent / *sine qua non* for exercise of power, absence of which would render the entire



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proceedings ultra vires Section 69 of the Act. Thus, failure to record the satisfaction of the Board to frame scheme in terms of section 69 of the Act, would vitiate the entire proceedings.

b. Absence of enquiry:

The satisfaction by the Board of the need to frame a scheme must be arrived at “after making an enquiry”, however no such enquiry was made. The written submissions nor the counter of the Respondent even speak about conduct of an enquiry, on the basis of which the Board was satisfied of the need to frame a Scheme for the administration of the Waqf. It appears that enquiry leading to satisfaction of the need to frame a Scheme by the Board is a condition precedent/ jurisdictional fact, for the Board to proceed to exercise its power under Section 69 of the Act. It is relevant to note that the above requirement of an enquiry preceding such formation of satisfaction has been specifically incorporated by the Waqf Amendment Act of 2013 (Act 27 of 2013), prior to which, the requirement was merely to be satisfied that is necessary and expedient to frame a Scheme. Therefore, the holding of an enquiry before formation of opinion, that a scheme is to be framed for the proper administration of the Wakf is mandatory and the non-compliance of the same would render the entire exercise void. I say so, for any attempt at



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dispensing with enquiry (or) treating it as directory, would result in rendering the legislative exercise of mandating the Board to arrive at a satisfaction of the need to frame a scheme for proper administration of the Wakf after an enquiry a wasteful legislative exercise. It is trite that any legislative exercise has a purpose and one ought not to impute superfluity (or) render the legislative exercise otiose. It may be relevant to refer to the following judgments to appreciate the relevance and importance of existence of jurisdictional facts and application of mind as to its existence by the authority concerned before assuming jurisdiction. It is relevant to extract the judgment of the Hon'ble Supreme Court in the case of *Arun Kumar v. Union of India* reported in (2007)

I SCC 732, which reads as under:

“74. A “jurisdictional fact” is a fact which must exist before a court, tribunal or an authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency-s power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not possess.

75. In Halsbury's Laws of England, it has been stated: “Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be



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described as preliminary to, or collateral to the merits of, the issue. If, at the inception of an inquiry by an inferior tribunal, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether to act or not and can give a ruling on the preliminary or collateral issue; but that ruling is not conclusive”.

76. The existence of jurisdictional fact is thus sine qua non or condition precedent for the exercise of power by a court of limited jurisdiction.”

(emphasis supplied)

10.5. Keeping in view the law laid down as to the relevance of “*jurisdictional fact*”, in mind, and the absence of enquiry leading to the satisfaction of the Board to frame a Scheme for the proper administration of the Waqf, which this Court finds is a Jurisdictional fact, absent in the present case, the impugned Scheme is without Jurisdiction.

c. Lack of consultation:

The learned counsel for the petitioner would submit that the impugned scheme was framed without consultation with the muthawalli or others as mandated under Section 69 of the Act. The scope of consultation in terms of Section 69 of the Act has been considered by this Court in the case of *G.Syed Kudrathulla reported in (2023) 3 CTC 440*, the relevant portion of the order reads as under:



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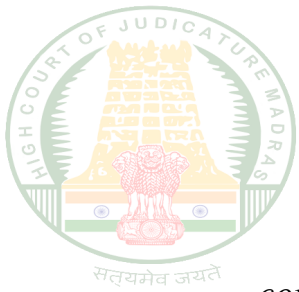
“ 24. To answer the above question it may be relevant to contrast Section 69 and 32 which deals with framing of Schemes while Section 32 (2) (d) of the Act provides that settlement of Scheme shall not be made without giving the “parties affected an opportunity of being heard“, in contrast Section 69 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 Waqf. 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. 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. 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



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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 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) In Chandra Mohan v. State of Uttar Pradesh, (1967) 1 SCR 77:



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“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”.

11. The above portion of the judgments would demonstrate the significance of consultation whenever mandated by a statute. Failure to comply with the mandate of “consultation” renders the entire action ultra vires, Section 69 of the Act.

12. Applying the above decision of this Court, I find that the impugned scheme stands vitiated inasmuch as the scheme was not framed on consultation as mandated under Section 69 of the Act. The act of consultation contemplated / provided under Section 69 of the Act is mandatory and failure to comply with the above mandatory requirement would vitiate the scheme.

d. Departure from Draft Scheme:



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It is also submitted by the learned counsel for the petitioners that there are several clauses in the impugned scheme which are different from the Draft scheme furnished and thus the impugned proceedings stands vitiated. In support of the above contention, the learned counsel for the petitioner had in the written submission set out a Table wherein the variations are tabulated. The Table below is relevant and thus extracted:

S.No.	Subject	Draft Scheme	Impugned Scheme
1.	Territorial operation	All 33 wards of Pattukottai	Confined to Ward No.27, 28, 29, 24, 23, 30 to 33. Interestingly the area/ ward in which the Mosque is located is not included in the territorial limits.
2.	Subscription fee	Rs.500/- per annum	Rs.250/- per annum
3.	Eligibility for membership and election	Should have completed 18 years of age and should have paid subscription	Should be a member of a family residing in the territorial area and should be a subscriber.
4.	Mode of selecting the mutawalli	Administrative committee is to be elected by the Jamath once in three years	Election by secret ballot method for 3 years.
5.	Election of president and office bearers	Elected directly by the Jamathdars by the general body whereas other office bearers such as treasurer, secretary are to be elected indirectly from amongst the committee members.	The president and all other office bearers are to be elected from amongst the elected members of the committee indirectly.
6.	Disqualification to contest for elections	The contestant or his wife or children should be a tenant or lessee in the properties of the Masjid or Dargah.	The contestant alone requires to be not a tenant. The tnenacy by the wife or children is not a bar.



S.No.	Subject	Draft Scheme	Impugned Scheme
7.	Financial transactions of the waqf	The bank accounts are to be operated by the president and treasurer or president and secretary.	The bank accounts can be operated by the secretary and the treasurer or mutawalli and treasurer.
8.	General Body Quoram	5 members are sufficient to request for a general body meeting. No specific quoram is required for a general body meeting and can be conducted with nominal number of members if the president authorizes it to be necessary.	Atleast 2/3 rd of the total membership should present a membership to call for a general body meeting. A minimum of 2/3 rd of members are necessary as quoram to hold the meeting even if the president even if the president finds if necessary.
9.	Amendment of bye laws	To amend the bylaws, 50% of the total members should be present and the motion should be passed at least 50% of such members.	At least 2/3 rd members should be present and 2/3 rd members should support the motion.

12.1. It thus appears that the impugned scheme is different from the Draft Scheme, thereby vitiating the entire exercise, moreso, when the modified/amended clauses relates to essence/core of the Scheme inasmuch as it *inter alia* alters the territorial operation, eligibility for membership in election and mode of selecting the mutawalli.

13. It is trite law that whenever the Act contemplates granting of a reasonable opportunity before performing an Act, the opportunity that is granted must be real and not illusory. If the scheme which is finalised contains

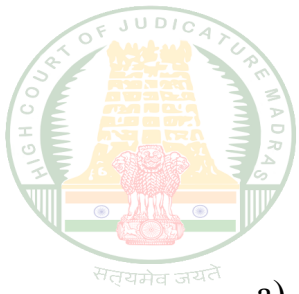


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clauses which are different from that contained in the Draft scheme there is never an opportunity for muthawalli or others to put forth their views to the actual / final scheme that is framed. In this regard, it may be relevant to refer to the judgment of the Supreme Court in *Chandra Mohan v. State of Uttar Pradesh*, (1967) 1 SCR 77:

“ 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?.. ”

14. In the light of the above discussion, there is no doubt in my mind that the impugned scheme has been framed without complying with the mandate contained in Section 69 of the Act viz.,



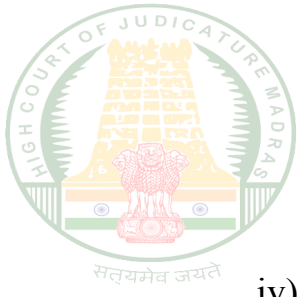
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- a) There was no enquiry by the Board leading to its satisfaction of the need to frame a scheme for the proper administration of the Waqf.
- b) There is no satisfaction recorded nor material disclosed which could form the basis for the Board to be satisfied of the need to frame a scheme.
- c) There is no consultation with muthawalli or others.
- d) The Draft scheme and the final scheme contained clauses which are materially different thereby denying the entities who ought to be consulted, of a reasonable opportunity to put forth its views regarding the scheme.

15. Importantly, the submissions of the Respondents does not address any of the above issues instead proceeds to focus on the power of the Board to conduct elections and requires this Court to revisit its earlier orders holding that the Board does not have power to conduct elections in a series of cases some of them being:

- i) *Shajahan Vs. The Tamil Nadu Waqf Board and others* – W.P.(MD).No. 20031 of 2023 dated 31.08.2023,
- ii) *A.Mohammad Mubarak Vs. The Tamil Nadu Waqf Board and another* – W.P.No.22010 of 2023 dated 08.09.2023,
- iii) *S.A.K.Ibrahim Vs. The Chief Executive Officer, Tamil Nadu Waqf Board and others* – W.P.Nos.16712 of 2020 and 29451 of 2023 dated 15.11.2023,



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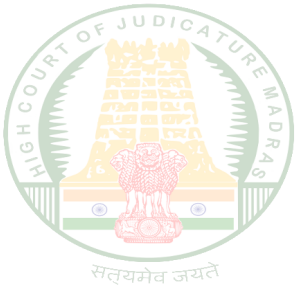
iv) *N.Mohammed Ali Jinna Vs. The Tamil Nadu Waqf Board and others*
– W.P.(MD).No.25585 of 2022 dated 07.06.2024.

16. I find that the impugned scheme is liable to be set aside on the basis that it is not in compliance with the mandate in Section 69 of the Act, hence I don't propose to examine the power of the Board to conduct elections for the purpose of disposing this writ petition.

17. In view thereof, the writ petition stands disposed of. There shall be no order as to costs. Consequently, connected Miscellaneous Petitions stand closed.

28.01.2025

NCC : Yes / No
Index : Yes / No
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MOHAMMED SHAFFIQ, J.

mka

To:

1.The Chief Executive Officer
Tamil Nadu Waqf Board,
No.1, Jafer Syrang Street,
Vallalseethakathi Nagar,
Chennai.

2.The Superintendent of Waqf,
Tamil Nadu Waqf Board, Thanjavur Division,
Diwan Nagar, Court Road, Thanjavur.

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28.01.2025