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# MUSLIM LAW

*M. Afzal Wani**

## I INTRODUCTION

THE YEAR 2023 witnessed few but significant judicial deliveries from the high courts and the Supreme Court of India. These are mainly related to disputes on *waqf* land and rights of women regarding dissolution of marriage. While the former are quite vital to promote regulation of *waqf* endowments through strict adherence to legal principles, the latter is a phenomenal development regarding strengthening of women's rights in accordance with very judicious opinions and enlightening juristic deliveries of Prophet Muhammad saw, much in conformity with the constitutional equality under the Constitution of India.

## II WAQF LAWS

### Appointment of a joint *mutawalli*

An important dispute about the appointment of a joint mutawalli for a waqf came up for consideration before High Court of Calcutta in *Board of Waqf & Another,*[1] a case related to Amjad Ali Wakf Estate, wherein the applicants had approached the concerned waqf board for such appointment. The waqf board had refused to take action on the ground that the issue of adding a mutawalli has to be primarily determined by the waqf tribunal under section 83 of the Waqf Act of 1995. At the face of it, the waqf board has required the question of appointment of a joint *mutawalli* to be decided by the waqf tribunal, observing: "There was no good ground to bypass the statutory remedy of approaching the Waqf Tribunal" which are possessing power for "the determination of any dispute, question or other matter relating to a waqf or waqf property, eviction of a tenant or determination of rights and obligations of the lessor and the lessee of such property".[2] Ordinarily,

* Pro Vice Chancellor, IILM University, Greater Noida, UP.

1 *Board of Waqf* v. *Anis Fatima Begum*, AIR 2023 (NOC) 41 Cal.

2 Under section 83 of the Waqf Act, 1995, (1) Tribunals are… "for the determination of any dispute, question or other matter relating to a waqf or waqf property, eviction of a tenant or determination of rights and obligations of the lessor and the lessee of such property, under this Act and define the local limits and jurisdiction of such Tribunals. (2) Any mutawalli person interested in a waqf or any other person aggrieved by an order made under this Act, or rules made thereunder, may make an application within the time specified in this Act or where no such time has been specified, within such time as may be prescribed, to the Tribunal for the determination of any dispute, question or other matter relating to the waqf".

the appointment of *mutawallis* is dealt with under section 63 of the Waqf Act providing, "When there is a vacancy in the office of the mutawalli of a waqf and there is no one to be appointed under the terms of the deed of the waqf, or where the right of any person to act as mutawalli is disputed, the board may appoint any person to act as mutawalli for such period and on such conditions as it may think fit". The ratio of the decision is that in case of determining any dispute or question related to appointment of a mutawalli or joint-mutawalli, which is an issue related to the management of a waqf, the matter should be considered by the waqf tribunal, though the actual appointment shall be made by the concerned waqf board.

**Jurisdiction of *waqf* tribunals in eviction from *waqf* property**

In *Mumtaz Yarud Dowla Wakf,*[3] came up before the Supreme Court, a question mainly related to the power of a Waqf Tribunal to deal with the matters of eviction of 'wrongful' possessors of waqf properties in exclusion to civil courts. An earlier decision on the subject was *Ramesh Gobindram*,[4] providing that sections 6[5] and 7[6] of the 1995 Waqf Act do not confer the requisite jurisdiction on the Wakf Tribunal in deciding a subject *qua* an ejection of an individual from a property of any *waqf*. In the said judgment, it was asserted that there is nothing in section 83 of the Waqf Act to propose that it drives the exclusion of the jurisdiction of civil courts or extends any power beyond what is simply provided in sections 6, 7 and 85 of the Act. It only empowers the government to establish a tribunal or more tribunals as may be required to resolve any dispute, question of other matter relating to a wakf or wakf property which does not as such result into exclusion of the authority of the Civil Courts in waqf matters. It was recorded in support of this argument that the expression "for the determination of any dispute, question or other matter relating to a wakf or wakf property" existing in section 83 (1) is also appearing in section 85 of the Act, which is not excluding the civil courts' jurisdiction on any question or dispute, only because they relate to a waqf or a waqf property.

3 *MumtazYarud Dowla Wakf* v. *BadamBalakrishna Hotel Pvt. Ltd.,* AIR 2023 SC 5491: AIROnLine 2023 853: [2023 (6) MLJ 277 (SC).

4 *Ramesh Gobindram (Dead) through LRs*. v. *Sugra Humayun Mirza Wakf*, (2010) 8 SCC 726 decided before 2013 Waqf Amendment Act.

5 "S. 6. Disputes regarding *auqaf*.—(1) If any question arises whether a particular property specified as waqf property in the list of *auqaf* is waqf property or not or whether a waqf] specified in such list is a Shia waqf or Sunni [waqf], the Board or the mutawalli of the[waqf] or [any person aggrieved] may institute a suit in a Tribunal for the decision of the question and the decision of the Tribunal in respect of such matter shall be final."

6 "S. 7. Power of Tribunal to determine disputes regarding *auqaf*.—(1) If, after the commencement of this Act, any question or dispute] arises, whether a particular property specified as waqf property in a list of *auqaf* is waqf property or not, or whether a [waqf] specified in such list is a Shia waqf or a Sunni waqf, the Board or the mutawalli of the waqf, or any person aggrieved by the publication of the list of *auqaf* … , may apply to the Tribunal having jurisdiction in relation to such property, for the decision of the question and the decision of the Tribunal thereon shall be final:…."

Notably, a reading of section 85 reveals that the jurisdiction of the Civil Court stands excluded only in relation to matters which are expressly required to be dealt with by a Waqf Tribunal constituted under the Waqf Act of 1995. The Supreme Court in *Ramesh Gobindram*,[7] had raised a question, whether in every case in which a plea of exclusion of the jurisdiction is raised, the tribunal is under the provisions of the Waqf Act or the Rules made thereunder mandated to deal with the matter. If it is not so mandated, the civil court will have jurisdiction on those matters. In contrast to that if the tribunal is mandated to deal with an issue, the jurisdiction of civil courts will be excluded. The court, actually did not find the provisions of the Act expressly providing for determining the questions related to eviction and related matters by tribunals. It, therefore, held that any suit for eviction of the tenants from any wakf property could be filed only before the civil court and not the tribunal.

This position of law in the *Ramesh Gobindram*,[8] was not maintained by the court in *Mumtaz Yarud Dowla Wakf*.[9] It was with the following observations:

> Before 2013, when Ramesh Gobindram case was decided, persons permitted to approach the waqf tribunal under sections 6(1) and 7(1) included only the Waqf Board, the Mutawalli, or any person interested therein, i.e., to include any person who is interested in the property, though not in the *waqf* as such. But in 2013 the expression, "any person interested" was substituted by, "any person aggrieved" which is exhaustive to include any person's right to approach the tribunal if he is aggrieved and has interest in the waqf property.[10]

The court observed:

> On a proper analysis of the said decision, we have no hesitation in holding that the Wakf Tribunal has got sufficient jurisdiction to try every suit pertaining to either a Wakf or a Wakf property, notwithstanding the nature of relief concerned, except as mandated under the statute.

7 *Supra* note 4.

8 *Ibid.*

9 Supra note 3.

10 Other clarification include:

i) After 2013 amendment, even the eviction of a tenant and the determination of any rights or obligation of the lessors and lessees of such property, came within the purview of waqf tribunals.

ii) If an appeal arises from the proceedings which were instituted before 2013 amendment, the expression "any dispute, question or other matter relating to a waqf or waqf property" is sufficient to cover any dispute, question or other matter relating to a waqf property, including eviction.

iii) Though any suit is originally instituted before the civil court, but is later transferred to the Waqf Tribunal, after allowing the order of transfer to attain finality under the new law, it is not open to resurrect deal with the issue through earlier decision before the amendment.

The court, in *Mumtaz Yarud Dowla Wakf,*[11]also considered one more interpretatively significant issue by judicial carving of a distinction between 'institution' and 'adjudication' for dealing with pending cases in courts. Institution of a suit may take place before a forum for adjudication, insofar as the rights and liabilities are concerned, such institution will, however, have no relevancy where through an Act or amendment, jurisdiction to deal with such matters has been conferred on some other forum. This norm is subject to the condition that it may not apply when there is already a decree where a party has not raised the issue of jurisdiction at any point before.

The settlement of the position, as above, under the Waqf Act of 1995 is very significant for clarity and smooth dealing of the matters by waqf tribunals, not by civil courts. The *Rashid Wali Beg*[12] is, therefore, no more applicable. Even otherwise, as per the amendment of 2013, the jurisdiction now lies with the Wakf Tribunal. The court curiously observe: "Respondents have continuously put spokes on the wheels of justice as protracted proceedings have helped them to be in possession for over two decades, notwithstanding the expiry of the lease way back in the year 1999".[13]

High Court of Madhya Pradesh, in *Rakesh Kesharwani* v. *Imam Bada Shahesaan Karbala*[14] also delved on the same question: "Whether the civil court has jurisdiction to try the suit for eviction in the light of the amendment in sections 83 and 85 of the Waqf Act". The court explained:[15]

> "…We can break the first part of Section 83 into two limbs, the first concerning the determination of any dispute, question or other matter relating to a waqf and the second, concerning the determination of any dispute, question or other matter relating to a waqf property. After Amendment Act 27 of 2013, even the eviction of a tenant or determination of the rights and obligation of the lessor and lessee of such property, come within the purview of the Tribunal. Though the proceedings out of which the present appeal arises, were instituted before the Amendment Act, the words "any dispute, question or other matter relating to a waqf or waqf property" are

11 *Supra* note 3.

12 *Rashid Wali Beg* v. *Farid Pindari*, (2022) 4 SCC 414.

13 About the application of the amendment of 2013, the court observed that the 2013 amendment is undoubtedly a procedural amendment and shall apply retrospectively in the perspective of change of forum and jurisdiction. So the Rashid Wali Beg judgment was overruled.

14 *Rakesh Kesharwani* v. *Imam Bada Shahesaan Karbala,*AIR 2023 (NOC) 693 (MP): AIROnline 2023 MP 967

15 *Ibid.*

> sufficient to cover any dispute, question or other matter relating to a waqf property.[16]

The trial court was accordingly directed to return the plaint to the plaintiff for presentation to the jurisdictional Waqf Tribunal.

**'Identification' of Waqf property under encroachers**

In *Salem Muslim Burial Ground Protection*,[17] the Supreme dealt with issues related to a land shown as waqf land in the government gazette, portions of which were occupied by some people having built houses on that land claiming to have lived there for long. The judgment is important in regard to *waqf* land occupied by encroachers widely from time to time and settlement of disputes regarding title and restoration of processes. The matter was settled by the writ court dismissing all the petitions on the ground that the character of the waqf land, once as a burial ground cannot change only because, for long, it had not been in use for the purposes of burial. The Division Bench also dismissed the appeals, but observed: " … in each of these cases, we would commend the claim of the concerned petitioner…of his right to continue in possession under section 19A of Tamil Nadu Estates (Abolition and Conversion Into Ryotwari) Act, 1948, subject, of course to all consideration that could be urged to the contrary effect by the Muslim Burial Ground Committee, or any person interested in claiming, even at present time the communal user or nature of the property in question.[18]

The court, however, subjected these remarks to the condition: "that the petitioners claiming under section 19A of Andhra Pradesh (Andhra Area) Estates (Abolition and Conversion into Ryotwari) Act, 1948 are *bonafidealienees* for value-who have taken such properties and put them to private uses, in the genuine belief that they were dealing with land in the private ownership of vendors from the

16 This is why *Ramesh Gobindram* v. *Sugra Humayun Mirza Wakf*, (2010) 8 SCC 726 was sought to be distinguished both in *W.B. Wakf Board* v. *Anis Fatma Begum*, (2010) 14 SCC 588 and *Punjab Wakf Board* v. *Pritpal Singh,* 2013 SCC Onine SC 1345 and such distinction was taken note of in *Akkode Jumayath Palli Paripalana Committee* v. *P.V. Ibrahim Haji*, (2014) 16 SCC 65. Additionally, this Court in *Kiran Devi* v. *Bihar State Sunni Wakf Board*, (2021) 15 SCC 15, refused to apply the ratio of *Ramesh Gobindram*, on the ground that the suit was originally instituted before the civil court, but was later transferred to the Waqf Tribunal and that after allowing the order of transfer to attain finality, it was not open to them to resurrect the issue through *Ramesh Gobindram*.

17 *Salem Muslim Burial Ground Protection* v. *State Of Tamil Nadu* on May 18, 2023: AIR 2023 SC 2769: AIROnLine 2023 SC 440

18 19. Rights of persons admitted into possession of Ryoti land for non-agricultural purpose.- Where any person has been admitted into possession of any Ryoti land by any landholder for a non-agricultural purpose, that person shall be entitled to remain in possession of the land subject however to the payment by him to the Government of the ryotwari or other assessment or the ground rent which may be imposed upon the land for each Fasli year commencing with the Fasli year in which the estate is notified:

Provided that such transaction was not void or illegal under any law in force at the time:

Provided further that a person who has been admitted into possession of any Ryoti land on or after the first day of July 1945 shall be entitled to no rights in respect of such land except where the Government otherwise direct.

Zamindar and not with communal land. The erection of buildings thereon by these persons may also be considered as evidence of *bonafides* and a fact entitling them, on equitable considerations to the benefit of action under section 19A of the Act."[19]

Though detrimental to its entitlements, the Muslim Burial Ground Committee did not confront these directions. Instead, they participated in the far-reaching proceedings carried out by the Director of Survey and Settlement…. It was found that the suitors had bought the "suit land" for considerable prices from persons in so called 'proprietorship' of the "suit land" for a substantial period of time, and not used for the purposes of burial. The Committee, to its disadvantage, also sought revision before the concerned Commissioner of Land Revenue, unsuccessfully.

In the Supreme Court, the appellant committee argued on the pretext:

i) "…once a wakf is always a wakf and, therefore, mere non burial of the dead bodies on the 'suit land' over the last 60 years or so would not alter its nature so as to confer any right upon the claimants respondents much less that of *ryotwaripatta* in exercise of power under Section 19A of the Abolition Act;

ii) the Division Bench of the High Court in exercise of its appellate power could have either dismissed or allowed the writ appeals but could not have directed for consideration of the claims under Section 19A of the Abolition Act that too while dismissing the writ appeals".

The court dismissed the first plea saying that there was no proof of dedication of the suit property as waqf by anyone and the suit land is also not a waqf by user.[20] Therefore, the suit land could not be proved to be a wakf property by long usage either. The creation of a waqf of the suit land, either by dedication or by usage, was considered by the Supreme Court as doubtful.

The argument that the suit land has been declared to be a wakf property vide notification dated April 29, 1959 was said to be acceptable only if the declaration was in consonance with the provisions of the Wakf Act, 1954 or the Waqf Act, 1995.[21] That not being so, the court ruled that it cannot be recognized as a wakf so as to allow it to be continued as a wakf property irrespective of its use or disuse as a burial ground.

19 "These observations and directions are the reason for the present appeals before the Supreme Court.

20 "There is even no concrete evidence on record to prove that the suit land prior to the year 1900 or 1867 was actually being used as a burial ground (qabristan)…the alleged use of the suit land as burial ground prior to 1900 or 1867 is not sufficient to establish a wakf by user in the absence of evidence to show that it was so used."

21 In the opinion of the court, "State Gazette is not binding upon the State Government. It means that the notification, if any, published in the official Gazette at the behest of the Wakf Act giving the lists of the wakfs is not a conclusive proof that a particular property is a wakf property especially, when no procedure as prescribed under Section 4 of the Wakf Act has been followed in issuing the same".

The committee argued that when the high court decided to dismiss the writ, it had no authority of law to issue any direction to the government to consider claims under Section 19A of the Abolition Act of 1948. In this regard, the Supreme Court observed: [22]

> The argument, though in the first blush, appears to be attractive but upon deeper scrutiny is found to be bereft of merits for two reasons; first, the appellant Committee was never aggrieved by such a direction as it never questioned or challenged it in any higher forum; secondly, the appellant Committee appears to have accepted the said decision and the direction contained therein by participating in the subsequent proceedings before the Director of Survey and Settlement without any protest or taking any objection in this regard. In such an event and participation of the appellant Committee in the consequential proceedings debars it from turning around so as to agitate a point to which it had acquiesced and had virtually given up or accepted.

Again, the court asserted that once the Committee accepted the order of the Survey Director by participation in the proceedings, it is estopped in law from questioning the power of the court in issuing these directions.[23] The court clarified: "It is settled that law does not permit a person to both approbate and reprobate as no party can accept and reject the same instrument. A person cannot be permitted to say at one time that the transaction is valid and to obtain advantage under it and on the other hand to say that it is invalid or incorrect for the purposes of securing some other advantage."

**Application of limitation act to claims on *waqf* property**

In *Sabir Ali Khan*,[24]appeals were lodged in the Supreme Court of India against an order of the High Court of Allahabad related to application of Limitation Act to claims on waqf property.[25] A Shia Muslims, Akbar Ali khan purported to create a *waqf-alal-aulad* by a deed dated July 26, 1934 and appointed himself as the first Mutawalli. He and his heirs later showed their personal interest to transfer and possess the land in their ownership rather than maintaining it as waqf. They underwent multiple transactions of transfers and compromises to show their entitlement to the property. The matter, due to 'multiple interests'and sale of

22. *Supra* note 17.

23. 43. The Principle of Acquiescence has been explained in Black's Law Dictionary, 9th Edition, as a person's tacit or passive acceptance or implied consent to an act. It has been described as a principle of equity which must be made applicable in a case where the order has been passed and complied with without raising any objection. Acquiescence is followed by estoppel. A Constitution Bench of the Supreme Court in *Pannalal Binjraj* v. *Union of India*, six decades ago, had an occasion to explain the scope of estoppel. It says that once an order is passed against a person and he submits to the jurisdiction of the said order without raising any objection or complies with it, he cannot be permitted to challenge the said order, subsequently, when he could not succeed. The conduct of the person in complying with the order or submitting to the jurisdiction of the order of the court by participation, disentitles him to any relief before the court.

property came to the Waqf Tribunal about examining the registration of this property as a waqf. The board found that no proper enquiry had been made by the Waqf Board for entering it in the Waqf Register. Besides, the respondents were using the property as their own personal property who had become owners by way of adverse possession.

In the given circumstances, the court held that any above-mentioned transfers of the property executed were invalid for the reason that no permission of the Waqf Board was obtained. They as beneficiarieshad no right to sell waqf property. However, the court observed that a beneficiary could acquire title by adverse possession over waqf property. But, while a person in a fiduciary relationship or one, in whom the property was vested in trust, could not claim title by adverse possession over trust property. A Mutawalli, accordingly, on the said principle, could not claim title by adverse possession over waqf property.[26] The court observed:

> "In every case of Waqf, whether public or private, the property vests in God Almighty or in the Waqf itself as an institution or a foundation …, for the time being in force".[27]

The court, in this case, had to further consider the application of the law of limitation and for that referred to Article 96 of the Limitation Act, 1963.[28] Under this Article, a period of twelve years has been provided for a Suit by a Manager of a Muslim Religious or Charitable Endowment, *inter alia*, to recover possession transferred by a previous Manager for valuable consideration. It would not apply

24 *Sabir Ali Khan* v. *Syed Mohd. Ahmad Ali Khan and Others*, Civil Appeal Nos. 7086-7087 of 2009 Decided on April 13, 2023.

25 *Committee Of Management, Anjuman* v. *Rakhi Singh and Others,* decided on 31 May, 2023.

26 Relying upon *Mohammad Ismail Faruqui* v. *Union of India*, AIR 1995 SC 605; and the mosque known as *Masjid Shahid Ganj* v. *Shiromani Gurdwara Prabandhak Committee*, Amritsar, AIR 1940 PC 1162, it was found that title by adverse possession could be acquired over waqf property. But, a person in a fiduciary relationship or one, in whom the property was vested in trust, could not claim title by adverse possession over trust property. A Mutawalli, accordingly, on the said principle, could not claim title by adverse possession over waqf property [*Faqir Mohd. Shah* v. *Qazi Fasihuddin Ansari*, AIR 1956 SC 713; that a co-owner also cannot acquire title by adverse possession over trust property, is found to be well-recognised in law. And a beneficiary is not a co-owner and, therefore, the principle that a co-owner cannot acquire a right by adverse possession over the share of another co-owner, was not applicable to a beneficiary. A beneficiary did not hold the property in trust.

27 The high court drew support from the aforesaid view expressed by a Full Bench in the decision reported in *Moattar Raza* v. *Joint Director of Consolidation*, U.P. Camp at Bareilly, AIR 1970 All 509.

28 *Description of suit Limitation Period Time from which period begins to run* 96. By the manager of Hindu, Muslim or Buddhist religious or charitable endowment to recover possession of movable or immovable properly comprised in the endowment which has been transferred by a previous manager for a valuable considerationTwelve years.
The date of death, resignation or removal of the transferor or the date of appointment of the plaintiff as manager of the endowment, whichever is later.

in the case of a void transfer. In the case of a transfer being void on account of breach of a statutory requirement, adverse possession of the transferee would commence from the date of the transfer. If the Suit for Recovery of Possession was not instituted within the period of twelve years under Article 65, the rights of the Manager to recover the endowed property would stand extinguished under Section 27 of the Limitation Act.[29] The correct interpretation to be placed on Article 96 is to confine its ambit to suits to recover possession where the right to recover possession was not lost under Section 27 of the Limitation Act. In other words, it is found that Article 96 would be of avail only in regard to voidable transfers and not void transactions.

In appeal the Supreme Court did not find any merit in the contentions raised against the findings of the high court and dismissed the appeals.[30]

**Judgment of unduly constituted tribunal**

The High Court of Gujarat at Ahmedabad in *Pir Mohammed Shah Dargah Trush*[31]considered the acceptability of the decision of a waqf tribunal not constituted in accordance with the relevant provisions of the Waqf Act. According to Section 83(4) of the Waqf Act: "Every Tribunal shall consist of- (i) one person, who shall be member of the State Judicial Service holding a rank, not below that of a District, Sessions or Civil Judge, Class I, who shall be the Chairman. (ii) one person, who shall be an officer from the State Civil Services equivalent in the rank to that of the Additional District Magistrate, Member. (iii) one person having knowledge of Muslim law and jurisprudence, Member and the appointment of every such person shall be made either by name or by designation." In the light of that provision the court found that the impugned judgment and order was not passed by a duly constituted tribunal under the Act. Thus, the impugned judgment and order were quashed and set aside, and the matter was remanded back to the Gujarat State Waqf Tribunal for a decision afresh by a duly constituted Tribunal.

**Power to remove *kalifa* of a *dargah***

In a High Court of Madras case, *K.M. Kalifa Masthan Sahib Kadiri*,[32] the issue was of the jurisdiction and determination of some issues in reference to Nagore Dargah, which is a surveyed, notified and registered *waqf.* The *waqf* is administered by a scheme-decree passed by the court. One member of the Board of Trustees, namely, Dr. K.M. KalifaMasthan Sahib Kadiri, was functioning as the Kalifa (leading priest) of the Dargah. He was removed from that position on the ground of: (i) illegally using the name of Dargah for his personal gain against its

29 S. 27: Extinguishment of right to property: At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

30 *Sabir Ali Khan* v. *Syed Mohd. Ahmad Ali Khan* , Civil Appeal Nos. 7086-7087 of 2009 Decided on April 13, 2023.

31 *Pir Mohammed Shah Dargah Trush* v. *Mohammed Nadim Ghulam Rasul Malek*,AIR 2023 GUJ 77: AIROnline 2023 Guj 61.

32 *K.M. Kalifa Masthan Sahib Kadiri* v. *Tamil Nadu Waqf Board*, AIR 2023 MAD 166: AIROnLine 2023MAD 194.

decorum and sanctity; (ii) insulting all the other Board of Trustees in a filthy language and tarnishing their images; (iii) creating discredits and chaos in the administration of Dargah; (iv) posting the Dargah rituals in social media like Facebook, Youtube etc., for his personal benefit and collected donations in his personal bank account; and (v) usurping the powers of the Board of Trustees to fortify his position. The Chief Executive Officer, Tamil Nadu Waqf Board refused to interfere with the Trustee's action considering it as internal issue resolvable within the ambit of the Board of Trustees who are the authority to appoint Kalifa as per the scheme.

On challenging this the Single Judge was pleased to uphold removing the petitioner as Kalifa, as decided by the Board of Trustees, and the remedy for him lying in the Waqf Tribunal under Section 83 of the Waqf Act,1995. On this an *intra*- court appeal was preferred by the appellant/writ petitioner against the same.[33] During the proceedings before the court it was found that in an earlier decision relating to same *dagah,* the court had categorically declared that after the enactment of the Waqf Act of 1995, the Waqf Board had replaced the Scheme Court and, therefore, it was only the Waqf Board which had the jurisdiction to consider the allegations as against the appellant.

Per contra, it was submitted that the Office of the Kalifa cannot be equated to that of *Mutawalli*. The office is to be equated to that of Sajjidanashin and as such *Kalifa* is only an employee of the Waqf. The appellant is not removed from the office of hereditary trustee but the order of the Chief Executive Officer is only relating to his work as Kalifa; therefore, that would squarely fall within the powers of the Chief Executive Officer under Section 25(c) of the Act. As a matter of fact, the impugned order further relegates the matter to the Trust Board to take disciplinary action and the order is passed only with the limited purpose of keeping the petitioner away from the Office of the *Kalifa*, given the nature of the allegations against the petitioner. Therefore, he would submit that the order of the learned Single Judge does not need any interference.

One more submission in the matter was that pursuant to the order of the Chief Executive Officer, the final order was also passed by the Board of Trustees removing the aggrieved person from the Office of *Kalifa*. Therefore, the only remedy available to the petitioner is to approach the Waqf Tribunal. It was submitted that the impugned order squarely falls within the power of the Chief Executive Officer under Section 25 of the Act, and that he is empowered to generally perform such acts as may be necessary for the control and maintenance and the Superintendence of the Waqf and it enjoins him to act in conformity with the deed of the Waqf and the customs. The Chief Executive Officer of the Waqf Board

33. The challenge was based on the ground that there was absolutely no jurisdiction whatsoever for the Chief Executive Officer under s. 25 of the Waqf Act, 1995 to pass the order impugned in the Writ Petition; and there was no specific provision regarding the manner of removal of Kalifa in the scheme decree. On the other hand, the scheme decree contains specific provisions that the parties have to approach this Scheme Court in respect of any matter which is not expressly provided in the scheme decree.

certainly has powers to take action against the employees of the Waqf and, therefore, the impugned order passed is very much within the jurisdiction. He also had conducted an enquiry in the matter for which it cannot be contended that the order was passed in violation of the principles of natural justice. Therefore, the impugned order does not call for any interference and the post of Kalifa is amenable to the action by the trustees.[34]

It was also clarified that when the Tribunal has got all the powers of the civil court, any action of the respondent for invoking Article 226 of the Constitution of India, cannot be permitted.

**Residual power of superintendence**

Under Waqf Act of 1995, the residual power of superintendence over the working of a waqf, under a scheme for the waqf, if any, framed by the concerned court, shall lie in the Waqf Board. But the Nagore Durgah seems to believe that any compromise effected by interested parties operates as an estoppel against such a role to be played by the Waqf Board. The position has been clarified earlier by a Division Bench of this court In *H.H. The Prince of Arcot*:[35]

> The compromise cannot read to mean that any particular authority or institution would become above law and no action would be taken in accordance with law notwithstanding any transgression or violation of law. No immunity above law would have been contemplated to be given by way of compromise.

It has been observed that the litigants in *waqf* matters do most of the times create complexities and confusions about the nature of waqf properties or their dedication or entitlements about management. The also present compromises effected by them with multiple claimants to meet their claims through making courts to respect their compromises. But the court in *K.M. Kalifa Masthan Sahib Kadiri*,[36] made following observations in this regard:

i) Any statutory authority has no power to barter away its statutory responsibility, duty or authority merely to facilitate a compromise.

ii) The residual power of supervision onwaqfs lasting with the Court, as the conscience keeper of the public trusts,based on the principle of *parenspatriae,* would not shift from a Scheme-Court to the Waqf Board.

iii) The power to lay down general principles or policies in regard to the administration of the institution and conduct of the worship and the celebrations shall lie with the Board of Trustees.

iv) The office of *Kalifa* is hereditary in nature. When some of the trustees make allegations against another trustee, the matter cannot be left to be

34 Under s. 64 of the Act removal of mutawalli is different from the present exercise which is only removal from the office of *Kalifa*. He would submit that the Board of Trustees is entitled to consider the misdeeds and misgivings of the appellant.

35 (2006) 3 MLJ 856.

36 *Supra* note 32.

decided by the same Trust Board and it is the Waqf Board, which has the power of superintendence, should decide the issue.

v) The powers under Section 25 of the Waqf Act, are the powers of administration and superintendence of day-to-day administration and are in the nature of the powers and duties in implementing and carrying out the scheme and not meddling with or modifying the scheme as such.

vi) The impugned order passed by the Chief Executive Officer amounts to clarifying/modifying/framing additional Clauses to the scheme decree itself and as such, those powers would vest only with the Waqf Board itself and not the Chief Executive Officer under Section 25(c) of the Waqf Act.[37]

**Gyanvapi mosque**

In *Committee of Management, Anjuman*,[38] the High Court of Judicature at Allahabad was to consider the claims of Hindus against the Committee of Management of Anjuman Intezamia Masajid, Gyanvapi Mosque. On anapplication under Order VII Rule 11 CPC, the Committee demanded that the such a plaint ought to be rejected without a trial of the suit, because the suit is barred by The Places of Worship (Special Provisions) Act, 1991as there is in existence the Gyanvapi Mosque for the past 600 years and is still in existence, where Muslims from the city of Varanasi and its neighbourhood offer *namaz* five times a day as also on the two Eids and Fridays *etc.*, without any hindrance. The plaintiffs, however, sought relief of doing pooja, Archana in the said Mosque. This would, however, violate the Act of 1991.

Besides, the plaintiffs claim a right in property though that is a waqf and the civil court's jurisdiction to try the suit is barred under Section 85 of the Act of 1995.

Against this it was pleaded that there is no mosque situated in the area and the forcible offering of *namaz* at a particular point of time or a particular place, would not alter its character into a mosque. It was emphasized that Deities are continuously in existence within the property in question since before 15th of August, 1947 and the worshippers have a right to *darshan* and *pooja* of the Deities. They have every right to file a suit to protect and preserve the right to practice their religion flowing from Article 25 of the Constitution. The parties to the suit should prove by evidence as to what was the religious character of the property prevalent on the August 15, 1947.

The court declared section 4 of the Places of Worship (Special Provisions) Act, 1991 and section 85 of the Waqf Act, 1995 as not applicable to the matter.

The matter is now for further consideration by the Supreme Court.

37 In view thereof, the Writ Appeal was allowed and the parties aggrieved by the order of the Waqf Board were held entitled to "to move before the Tribunal in the manner known to law".

38 *Committee of Management, Anjuman* v. *Rakhi Singh,* 2023 AIR 2023 (NOC) 697 (ALL): AIROnLine 2023 ALL 943

## III WOMEN RIGHTS

***Women's absolute right to khula***

In the High Court of Kerala at Ernakulam was considered the most significant right of Muslim women to resort to the extra-judicial divorce of by *khula*, unilaterally.[39] The court exhaustively delved into the crucial question and declared that the right to terminate the marriage at the instance of a Muslim wife is an absolute right, conferred on her by the holy Quran and is not subject to the acceptance or the will of her husband. The court declared that the *khula* would be valid if the following conditions were satisfied:

a) A declaration of repudiation or termination of marriage was made by the wife.

b) An offer to return dower or any other material gain received by her during marital tie.

c) An effective attempt for reconciliation was preceded before the declaration of *khula*.

Opposite to woman's absolute right to *khula* herself by herself,[40] it was contended before the court that if a Muslim wife wishes to terminate her marriage with her husband, she has to demand *talaq* from her husband and on his refusal, she has to approach the *qazi* or court. The submissions made before the court included:

i. As a consequence of the declaration of such right by the district judge, a large section of Muslim women is resorting to khula in derogation of the Sunnah.

ii. A court cannot decide on religious beliefs and practices and ought to follow the opinion of Islamic Scholars.

iii. Almost all across the globe, on the demand of the wife to terminate the marriage, the husband has to pronounce talaq, obliging her demand.

iv. In countries where qazis are recognised, on refusal of the husband, the qazis would terminate the marriage.

v. Nowhere in the world, a Muslim wife is allowed to unilaterally terminate the marriage.

39. *Xxxxx* v. *Xxxxx,* AIR 2023 Ker 33: *Review Petitioner/s* v. *XXXXX* … Respondent/s. R.P. No. 936 of 2021. High Court of Kerala: In a review petition arising from an appeal filed by the husband challenging a divorce decree granted to a Muslim wife under the Dissolution of Muslim Marriages Act, 1939, the division bench of A. MuhamedMustaque* and C.S. Dias, JJ. has dismissed the review petition and has upheld that in the absence of any mechanism in the country to recognize the termination of marriage at the instance of the Muslim wife, when the husband refuses to give consent, then khula can be invoked without the conjunction of the husband.

40. The term 'khula herself by herself by the wife' is used in contrast to the general term 'declaration of *talaq* to her by the husband". Husband has a right to *talaq her*. Can she not *khula herself?*

vi. In the absence of qazis, the competent civil court in India has to terminate the marriage.

In favour of the women's right, the verse of the Holy Quran was quoted:

> The divorce is twice, after that, either you retain her on reasonable terms or release her with kindness. And it is not lawful for you (men) to take back (from your wives) any of your Mahr (bridal money given by the husband to his wife at the time of marriage) which you have given them, except when both parties fear that they would be unable to keep the limits ordained by Allah (e.g. to deal with each other on a fair basis). Then if you fear that they would not be able to keep the limits ordained by Allah, then there is no sin on either of them if she gives back (the Mahr or a part of it) for her Al-Khul' (divorce). These are the limits ordained by Allah, so do not transgress them. And whoever transgresses the limits ordained by Allah, then such are the Zalimun (wrong-doers, etc.).[41]

The moral injunction so stipulated in the above verse has to be read in the context of the Prophet's warning to the believers that divorce is "the most hated of the permissible things to Allah".[42]

Explaining the matter further, the court exhorted:

> The legal conundrum in this case is not an isolated one. It has evolved over the years as the scholars of Islamic studies, who have no training in legal sciences started to elucidate on the point of law in Islam, on a mixture of belief and practice. Islam has a code of law, apart from laying down rules relating to beliefs and practices. Legal norms are the cornerstones of creating a social and cultural order within the Muslim community. The dilemma that persisted, in this case, is, perhaps, more related to the practice that has been followed for years, overlooking the mandate of the legal norm conferring on Muslim women the right to terminate the marriage without the conjunction of the husband. The Court in such circumstances is expected to look at the legal norm, if the same relies upon Quranic legislations and the sayings and practices of the Prophet (Sunnah). The underlying distinction between Fiqh and Shariah needs to be stressed here. Fiqh has been loosely translated to English as Islamic law and literally means 'the understanding of what is intended'. Shariah means 'a straight path'. Fiqh refers to the science of deducing Islamic laws from the evidence found in the sources of Islamic law.[43]

The court also supported its view by the well-known ruling of the Prophet Muhammad saw:

41 Ch. II, verse 229.

42 See *Sunan Ibn Majah*, Book on Hadith, 2018 Vol.3 Ch.1, Book 10 (English Translation).

43 *Supra* note 39.

> One Thabit had two wives. One of them was Jamilah. Jamilah did not like the looks of Thabit. She approached the Holy Prophet. She said, "Messenger of Allah! Nothing can keep the two of us together. I do not dislike him for any blemish in his faith or his morals. It is his appearance that I dislike. I want to separate from him." The Prophet replied, "Will you give him back the garden he gave you"? She replied, "I am prepared to give him the garden he gave and even prepared to give more". The Prophet said, "You only need to give him the garden". Then the Prophet summoned Thabit and told him to accept the garden and divorce Jamilah.[44]

The court clarified that "though khula is an extra-judicial form of divorce, when the husband refuses to give consent, it takes the form of *faskh* (a judicial divorce); judge having no discretion in the matter, but to give effect to the *khula*, if the wife insists."[45]

Many more jurisprudential questions were raised before the court for not considering the right of women to *khula* as absolute. The court, however, could not agree with these contentions. The court thus declared: "…in the absence of any mechanism in the country to recognize the termination of marriage at the instance of the wife when the husband refuses to give consent, the court can simply hold that khula can be invoked without the conjunction of the husband."

The matter will now have to be settled by the Supreme Court which issued notice in a Special Leave Petition moved by Kerala Muslim Jamaat against Kerala High Court's Judgments.[46]

## IV PROPERTY LAW

### *Hiba*

In *Star Paper Mills Ltd*.,[47] the Supreme Court of India considered the question: If "a memorandum of oral gift (*hiba*), which does not by itself bring about a transfer of immovable property or create, extinguish or enlarge rights, but merely records an antecedent oral transaction, accompanied by acceptance and delivery

44 *Ibid*.

45 The counsel for the petitioners cited numerous judgments to fortify his submissions on the nature of khula. We are not referring to any of the judgments for the reason that none of the judgments have decided upon the question involved in this review. All the decisions of foreign courts and domestic courts refer to the practice and form of khula exercised. In the judgment cited of the apex court in *Juveria Abdul Majid Patni* v. *Atif Iqbal Mansoori* [(2014) 10 SCC 736], the court had adverted to the form of khula followed, to decide upon a question arising under the Protection of Women from Domestic Violence Act, 2005.

46. *Available at:* https://www.verdictum.in/court-updates/supreme-court/supreme-court-issues-notice-in-slp-against-kerala-high-courts-judgment-upholding-muslim-womens-right-to-seek-extra-judicial-divorce-khula1528535#:~:text=The%20Supreme%20Court%20today%20 issued%20notice%20in%20a,unilateral%20extrajudicial%20modes%20of%20dissolving %20marriage.%20i.e.%20%22Khula%22.

47. *Star Paper Mills Ltd*. v. *Anisa Begum,*AIR 2023 All 110: AIROnline 2023 All 64

of possession, requires compulsorily registration and is taxable to stamp duty". The trial judge, in the instant case, held that it requires neither.

In revision, the Allahabad High Court assumed only the relevance of taxability of the *hiba*document for stamp duty as an issue to be considered. Earlier, the Supreme Court in *Mohammad Shamim Akhtar*,[48] had held that Section 2(14) of the Indian Stamp Act, 1899 "includes every document or record which purports to create, transfer, limit, extend, extinguish or record the right or liability of a party in respect of any property". In *Hafeeza Bibi*,[49] the Supreme Court had ruled: "that a deed of gift by a Mohammedan is not an instrument effecting, creating or making a gift, but a mere piece of evidence and that such a writing is not a document of title, but mere evidence of it, is trite exposition of the law, so far as the position goes under the Central Statute".[50] The court added that under the Central Statute also, if a deed of gift were made in writing conveying thereby the donor's interest to the donee in an immovable property, it would be taxable to stamp duty, like any other instrument of gift. It is only in cases where oral gift under the Mohammedan law is made and concluded by acceptance with delivery of possession, and a record of it, is subsequently drawn up, often called a memorandum of oral gift, or a record made of the antecedent and concluded transaction of *hiba* that it is not chargeable to stamp duty. Under Uttar Pradesh State amendment (14-A) has been inserted reading: 'Instrument of Gift'-'Instrument of Gift' includes an instrument whether by way of declaration or otherwise, for making or accepting an oral gift…."[51] The court ultimately held:

> "…there is not the slightest doubt that after enforcement of the State Amendment, a memorandum of oral gift recording an antecedent transaction of *hiba*, howsoever described and in whatever kind of words couched, is taxable to stamp duty as an instrument of gift. The order impugned holding to the contrary passed by the learned Additional District Judge cannot be countenanced".

48. *Mohammad Shamim Akhtar* v. *State of U.P,*2012(11) ADJ 698.

49. *Hafeeza Bibi* v. *Shaikh Farid*, 2011 (2) ARC 218.

50. The Apex Court in the aforesaid decision distinguishing the decision of the Full Bench of High Court of Andhra Pradesh in the case of *Inspector General of Registration and Stamps, Govt. of Hyderabad* v. *Tayyaba Begum,* AIR 1962 AP 199, approved the view of the Calcutta High Court in the case of *Nasib Ali* v. *Wajed Ali*, AIR 1927 Cal 197, holding that a deed of gift by Mohammedan is not an instrument effecting, creating or making the gift but a mere piece of evidence. Such writing is not a document of title but a piece of evidence only.

51. The definition of an instrument of gift in sub-S. (14-A) of S. 2 is an inclusive definition and expressly says that it includes an instrument of gift whether by way of declaration or otherwise, for making or accepting an oral gift. The express words employed by the Amendment extend the sweep of the Act to cover not only those instruments of gift that by themselves convey the property donated, but also include declarations of gifts made or accepted orally. A conveyance by oral gift of immovable property is not known to the corpus juris in India except under the Mohammedan Law, for which the provision is included in the Transfer of Property Act.

In *Salma Begum* v. *Mehrunnisha*,[52] the donee claimed title to the suit property on the basis of oral *hiba*. The parties had not taken any steps to change their title under the revenue records. The claimant heir of the donor had given an unregistered consent letter for the *hiba*, which was produced by the donee as a proof of *hiba*. The court held that the essentials of valid gift in the case were not fulfilled.

52. AIR 2023(NOC) 136 CHH.