

(2002) 01 AP CK 0017

Andhra Pradesh High Court

Case No: Writ Petition No's. 12275/93, 25392/96 and 681/97

B. Gowra Reddy

APPELLANT

Vs

Government of Andhra Pradesh
and Others

RESPONDENT

Date of Decision: Jan. 4, 2002

Acts Referred:

- Constitution of India, 1950 - Article 226
- Jaipur Land Acquisition Act, 1943 - Section 11, 16, 17
- Urban Land (Ceiling and Regulation) Act, 1976 - Section 21
- Waqf Act, 1954 - Section 2(5), 25, 4, 5, 6

Citation: AIR 2002 AP 313 : (2002) 3 ALT 439

Hon'ble Judges: G. Bikshapathy, J

Bench: Single Bench

Advocate: M.V.S. Suresh Kumar, for the Appellant; Government Pleader and Standing Counsel for WAKF Board, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

G. Bikshapathy, J.

All the learned counsel agreed that these three Writ Petitions can be disposed of together; therefore, they are being disposed of by this common order.

2. Writ Petition Nos.12275 of 1993 and 681 of 1997 are filed by the individual-purchasers, while Writ Petition No.25392 of 1996 is filed by Sri Lakshmi Narasimha Swamy Colony Residents Association, the members of which are also the purchasers. The challenge is made to the notification issued by the Wakf Board, which was gazetted on 9-2-1989 insofar as it relates to the properties at serial No.2900 at page 225.

3. It is the case of the petitioners that one Mr. Abbas Ali Khan was the inamdar and Mr Rangiah was the cultivating tenant in respect of lands in S.Nos.141, 143, 144 and 145 situate at Meerpet village. After the Andhra Pradesh (Telangana Area) Inams Abolition Act, 1955 came into force, the cultivating tenants acquired occupancy rights. The petitioners in Writ Petition Nos.12275 of 1993 and 681 of 1997 had purchased total extent of Acs.22.19 gts. in the year 1972. The petitioners are only concerned with the land situate in S.No.141 (old) corresponding to new S.No.143 of Meerpet village from Mr Lakshmaiah s/o Rangaiah. After purchase, the lands were also exempted from the provisions of the Urban Land Ceiling Act and the Government issued exemption u/s 21 of the Act. The petitioners also obtained occupancy certificates from the Revenue Divisional Officer in 1980 after due enquiry. In the enquiry the legal representatives of original tenants were examined and they consented for grant of occupancy certificates in favour of the petitioner-purchasers. Thereafter, the land was converted into plots after obtaining permission of the Gram Panchayat and plots were sold to various persons. Some of the plots were purchased by the Members of Sri Laxminarasimha Swamy colony Residents Association (petitioner in Writ Petition No.25392 of 1996) under registered sale deeds by obtaining loans from the Central and State Governments and other financial agencies. They have constructed houses long back. While so, the Managing Committee of the Mosque filed the suit in O.S.No.1385 of 1992 on the file of the Munsif Magistrate, East and North, Ranga Reddy district for permanent injunction against the petitioner in Writ Petition No.12275 of 1993, stating that the property in question is a wakf property and that it was notified in the gazette on 9-2-1989. At that point of time, the petitioner in Writ Petition No.12275 of 1993 came to know that the property in question was notified and, therefore, he filed the Writ Petition challenging the notification made by the Wakf Board and published in the Gazette on 9-2-1989. Similarly the other two writ petitions have been filed challenging the same notification.

4. It is the case of the petitioners that even though the Managing Committee of the Mosque filed the suit, the same was dismissed for default. But, we are not concerned with the suit filed by the Managing Committee.

5. The petitioners submit that the notification as issued is in contravention of Sections 4 to 6 of the Wakf Act, 1954 (hereinafter referred to as "the Act") and therefore, it is illegal and not binding on them to the extent of the land possessed by them. Hence, they seek declaration to that extent. It is also their case that they have purchased the land from valid source, viz., by obtaining occupancy certificates, which were issued after conducting enquiry by the Revenue Divisional Officer, in which the original tenant, namely, the son of Rangaiah was also a party, who gave no objection before the authority. Therefore, they submit that they are the legal owners of the land in question and the Wakf Board has no authority or power to issue the impugned notification. Even otherwise, such a notification is invalid in law inasmuch as neither the original owner nor the petitioners were put on notice

before issuing the impugned Notification. Moreover, the enquiry as contemplated u/s 4 of the Act was not conducted by the Survey Commissioner and, therefore, they submit that the said notification is illegal and invalid.

6. Counter affidavits have been filed by the State Government and Wakf Board stating that when once the notification is issued and it has become final since nobody has challenged it, the petitioners are bound by the notification, which was issued as far back as in 1989 and they cannot resile from the notification now. It is also stated that before issuing the notification in 1989 survey was conducted in 1967 and Survey Commissioner has identified the land as wakf property and subsequently it was published in the gazette in 1989. The delay had taken place on account of financial constraints. In the wake of these facts and the notification having become final, the petitioners now in these Writ Petitions cannot challenge the same. Accordingly, the Writ Petitions have to be dismissed.

7. Mr. M.V.S. Suresh Kumar, the learned counsel appearing for the petitioners, submits that the notification, as such, is not sustainable in law as it is in gross violation of the provisions contained in Sections 4 to 6 of the Act. In support of his submission, he relies upon the decisions in MUSLIM WAKFS BOARD, RAJASTHAN V. RADHA KISHAN 1 and PUNJAB WAKF BOARD V. GRAM PANCHAYAT 2.

8. On the other hand, the leaned Government Pleader and the learned Counsel appearing for Wakf Board submitted that the Writ Petitions are not maintainable and the petitioners ought to have approached the appropriate forum seeking appropriate relief, within the time prescribed. Therefore, the Writ Petitions have to be dismissed. In support of their contentions, they rely upon the decisions reported in BEST INDIA TOBACCO CO. V. A.P.WAKF BOARD³, SAYYED ALI V. ANDHRA PRADESH WAKF BOARD, HYDERABAD⁴, M. BIKSHAPATHI V. GOVERNMENT OF ANDHRA PRADESH⁵ and SYED MUNEER V.CHIEF EXECUTIVE OFFICER, A.P.STATE WAQF BOARD, HYDERABAD⁶.

9. The issue that arises for consideration is whether the notification published in the Gazette on 9-2-1989 is valid and binding as far as the petitioners are concerned ?

10. The case of the petitioners is that the land in question belongs to them and they are the rightful owners, while it is the case of the State Government and Wakf Board that it is the property of the Wakf Board and that the notification as published in the Gazette on 9-2-1989, which has become final, is binding on the petitioners.

11. For proper appreciation of the above contentions, it is necessary to refer to Sections 4 to 6 of the Act.

" Preliminary survey of wakfs: (1) The State Government may, by notification in the Official Gazette, appoint for the State a Survey Commissioner of Wakfs and as many additional or assistant Survey Commissioners of wakfs as may be necessary for the purpose of making a survey of wakf properties existing in the State at the date of

the commencement of this Act.

(2) All Additional and Assistant Survey Commissioners of wakfs shall perform their functions under this Act under the general supervision and control of the Survey Commissioner of Wakfs.

(3) The Survey Commissioner shall, after making such inquiry as he may consider necessary, submit his report in respect of wakfs existing at the date of commencement of this Act in the State or any part thereof, to the State Government containing the following particulars, namely:-

(a) the number of wakfs in the State, or as the case may be, any part thereof, showing the Shia wakfs and Sunni wakfs separately;

(b) the nature and objects of each wakf;

(c) the gross income of the property comprised in each wakf;

(d) the amount of land revenue, cesses, rates and taxes payable in respect of such property;

(e) the expenses incurred in the realisation of the income and the pay or other remuneration of the mutawalli of each wakf; and

(f) such other particulars relating to each wakf as may be prescribed.

(4) The Survey Commissioner shall, while making any inquiry, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of the following matters, namely:-

(a) summoning and examining any witness;

(b) requiring the discovery and production of any document;

(c) requisitioning any public record from any court or office;

(d) issuing commissions for the examination of any witness or accounts;

(e) making any local inspection or local investigation;

(f) any other matter which may be "prescribed.

(5) If, during any such inquiry, any dispute arises as to whether a particular wakf is a Shia wakf or Sunni wakf and there are clear indications in the deed of wakf as to its nature, the dispute shall be decided on the basis of such deed.

(6) The State Government may, by notification in the Official Gazette, direct the Survey Commissioner to make a second or subsequent survey of wakf properties in the State and the provisions of sub-sections (2), (3), (4) and (5) shall apply to such survey as they apply to a survey directed under sub-section (1):

Provided that no such second or subsequent survey shall be made until the expiry of a period of twenty years from the date on which the report in relation to the immediately previous survey was submitted under sub-section (3). 5. Publication of list of wakfs: (1) On receipt of a report under sub-section (3) of section 4 the State Government shall forward a copy of the same to the Board. (2) The Board shall examine the report forwarded to it under sub-section (1) and publish, in the Official Gazette, a list of wakfs a in the State, or as the case may be, the part of the State, whether in existence at the commencement of this Act or coming into existence thereafter to which the report relates and containing such particulars as may be prescribed.

6 Disputes regarding wakfs:-

(1) If any question arises whether a particular property specified as a wakf property in a list of wakfs published under sub-section (2) of section 5-is a Wakf property or not or whether a wakf specified in such list is a Shia wakf or Sunni wakf, the Board or the mutawalli of the wakf or any person interested therein may institute a suit in a civil court of competent jurisdiction for the decision of the question and the decision of the civil court in respect of such matter shall be final:

Provided that no such suit shall be entertained by the civil court after the expiry of one year from the date of the publication of the list of wakfs under sub-section (2) of section 5-.

Provided further that in the case of the list of wakfs relating to any part of the State and published or purporting to have been published before the commencement of the Wakf (Amendment) Act, 1969, such suit may be entertained by the civil court within the period of one year from such commencement.

Explanation.- For the purposes of this section and section 6A, the expression "any person interested therein", occurring in sub-section (1) of this section and in sub-section (1) of section 6A, shall, in relation to any property specified as wakf property in a list of wakfs published, under sub-section (2)of section 5, after the commencement of the Wakf (Amendment) Act, 1984,shall include also every person who, though not interested in the wakf concerned, is interested in such property and to whom a reasonable opportunity had been afforded to represent his case by notice served on him in that behalf during the course of the relevant inquiry u/s 4.

(2) Notwithstanding anything contained in sub-section (1), no proceeding under this Act in respect of any wakf shall be stayed by reason only of the pendency of any such suit or of any appeal or other proceeding arising out of such suit.

(3) The Survey Commissioner shall not be made a party to any suit under sub-section (1) and no suit, prosecution or other legal proceeding shall lie against him in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules made thereunder.

(4) The list of wakfs published under sub-section (2) of section shall unless it is modified in pursuance of a decision of the civil court under sub-section (1), be final and conclusive.

(5) On and from the commencement of the Wakf (Amendment) Act, 1984 in a State, no suit or other legal proceeding shall be instituted or commenced in a civil court in that State in relation to any question referred to in sub-section (1)."

12. u/s 4 of the Act, the State Government is required to issue notification appointing the Survey Commissioner for the purpose of making a survey of wakf properties existing in the State at the date of commencement of the Act and for that purpose he is empowered with certain powers as are vested in a civil Court under the Civil Procedure Code. The Survey Commissioner is also required to issue notice to the concerned parties and decide the issue. u/s 5(1) of the Act, on receipt of the report from the Survey Commissioner under sub-section (3) of Section 4 of the Act, the State Government shall forward a copy of the same to the Board. Under sub-Section (2) of Section 5, the Board shall then examine the report forwarded to it under sub-section (1) of Section 5 of the Act and publish in the official gazette, a list of wakf.

13. Therefore, after a report is filed by the Survey Commissioner u/s 4(3) of the Act, the State Government is required to forward a copy of the same to the Wakf Board and then the Board after examination of the said report, publish a list of wakf in the Official Gazette.

14. u/s 6 of the Act, if any question arises, whether a particular property specified as wakf property in the list of wakfs published in the Gazette, is wakf property or not, the interested parties are required to institute a suit in a civil Court within one year from the date of the notification u/s 5(2) of the Act. It is not in dispute that the notification was published on 9-2-1989 as required u/s 5(2) of the Act. But, the question is whether the said notification is valid and binding as far as the petitioners are concerned.

15. In *MUSLIM WAKFS BOARD, RAJASTHAN V. RADHA KISHAN* (1 supra) a similar matter came up for consideration before the Supreme Court. The effect of Sections 4 and 5 was considered by the Supreme Court in paragraph 25 of its Judgment, which reads : "The very heading of Ch. II and the caption to S. 4 no doubt suggest that the Commissioner makes only a preliminary survey regarding existing wakfs and the list of wakfs prepared by him is published by the Board and neither the Commissioner nor the Board is required to make any enquiry regarding the character of the property. That is to say, the making of survey is only an administrative act and not a quasi-judicial Act. But, on a closer examination, it is clear that while making a survey of the existing wakfs in a State, under Ss. (1) of S. 4, the Commissioner is required by Ss. (3) to submit a report to the State Government in regard to the several matters referred to in clauses (a) to (f) thereof. There may be

a dispute as between the Board, the mutawalli or a person interested in the wakf, as regards (a) the existence of a wakf, i.e. whether a particular property is wakf property, (b) whether it is a Shia wakf or a Sunni wakf, (c) the extent of the property attached to the wakf, (d) the nature and object of the wakf, etc. While making such an enquiry, the Commissioner is invested by Ss. (4) with the powers vested in a civil court under the Code of Civil Procedure, 1908, in respect of the summoning and examining of any witness, requiring the discovery and production of any document, requisitioning any public record from any court or office, issuing commissions for the examination of any witness or accounts, making any local inspection or local investigation, etc. In view of these comprehensive provisions, it is not disputed before us that the enquiry that the Commissioner makes for the purpose of submission of his report under Ss. (3), while making a survey of existing wakfs in the State under Ss. (1), is not purely of an administrative nature but partakes of a quasi-judicial character, in respect of the persons falling within the scope of Ss. (1) of S. 6."

16. With regard to the expression "any person interested therein" was also considered in the above decision and it was held that a notification issued u/s 6 of the Act binds the persons interested in the wakf and not third party, which is evident from paragraphs 33 and 34, which are extracted below: "33, The answer to these questions must turn on the true meaning and construction of the word "therein" in the expression "any person interested therein" appearing in Ss. (1) of S. 6. In order to understand the meaning of the word "therein" in our view, it is necessary to refer to the proceeding words "the Board or the mutawalli of the wakf". The word "therein" must necessarily refer to the "wakf" which immediately precedes it. It cannot refer to the "wakf property". Ss. (1) of S. 6 enumerates the persons who can file suits and also the questions in respect of which such suite can be filed. In enumerating the persons who are empowered to file suits under this provision, only file Board, the mutawalli of the wakf, and "any person interested therein, thereby necessarily meaning any person interested in the wakf, are listed It "should be bone in mind that the Act deals with wakfs, its institutions and its properties. It would, therefore, be logical and reasonably to infer that its provisions empower only those who are interested in the wakfs, to institute suits. (34) In dealing with the question, the High court observes:

In our opinion, the words "any person interested therein" appearing in Ss. (1) of S. 6 mean no more than a person interested in a wakf as defined in clause (h) of S. 3 of the Act

It is urged by learned Counsel for die petitioners that the legislature has not used in S. 6(1) the words "any person interested in a wakf" and, therefore, tins meaning should not be given to the words "any person interested therein". This argument is not tenable because the words "any person interested appear soon after "the matawalli of the wakf" and therefore the word "therein" has been used to avoid

repetition of the words "in the wakf" and not to extend the scope of the S. to persons who fall outside the scope of the words "person interested in the wakf". The purpose of S. 6 is to confine the dispute between the Wakf Board, the mutawalli and a person interested in the wakf.

That, in our opinion, is the right construction."

17. In paragraph 39 the Supreme Court has clearly laid down that where a stranger who is a non-Muslim and is in possession of a certain property, his right, title and interest cannot be put in jeopardy merely because the property is included in the list and such a person is not required to file a suit for declaration of title within a period of one year. The Supreme Court held:

"The special rule of limitation laid down in proviso to sub.s (1) of Sec. 6 is not applicable to him. In other words, the list published by the Board of Wakfs under sub.s.2 of S.5 can be challenged by him by filing a suit for declaration of title even after the expiry of the period of one year, if the necessity of filing such arises."

18. While reiterating the same view in PUNJAB WAKF BOARD case (2 supra), the Supreme Court held that even though the Explanation to Section 6 of the Act was not given operative date, but the purport of bringing such an explanation was to bind the third parties also who were interested in the wakf property and who are put on notice and were heard. Paragraphs 20 and 21, which are relevant, read as follows:

"(20) We are unable to see how the above decision in Sayyed Ali (supra) could be of any help to the appellant in the present case. The dispute here is not between the Wakf Board on one hand and the Mutawalli or those who are claiming under him, on the other hand. Here the dispute is between the Wakf Board and a third party, namely, Panchayat representing the Village community. In our view, in this context, the decision of the three Judge bench of this court in the case of [Board of Muslim Wakfs, Rajasthan Vs. Radha Kishan and Others](#), is more directly in point. In that case, it was pointed out that the words mentioned in Ss. (1) of Section 6 of the Wakf Act, namely "the Board or the mutawalli of the wakf or any person interested therein", would show that the requirement to file a civil suit within one year of the Notification under the Wakf Act as mentioned in sub-section (2) of Section 6 of the Wakf Act was in connection with any dispute between the Wakf Board in the one hand and the mutawalli of the Wakf on the other or any person interested therein. The word "therein" was interpreted as meaning "interested" in the wakf as distinct from interested in the property, i.e. a third party. This is clear from the following passage in the above said judgment (para 33).

"33. "The answer to these questions must turn on the true meaning and construction of the word "therein" in the expression "any person interested therein" appearing in Ss. (1) of Section 6. In order to understand the meaning of the word "therein" in our view, it is necessary to refer to the preceding words "the Board or

the mutawali of the wakf. The word "therein" must necessarily refer to the wakf which immediately precedes it. It cannot refer to the "wakf property". Ss. (1) of Section 6 enumerates the persons who can file suits and also the questions in respect of which such suits can be filed. In enumerating the persons who are empowered to file suits under this provision, only the Board, the mutawalli of the wakf, and "any person interested therein", thereby necessary meaning any person interested in the wakf, are listed. It should be borne in mind that the Act deals with wakfs, its institutions and its properties. It would, therefore, be logical and reasonable to infer that its provisions empower only those who are interested in the wakfs, to institute suits".

19. (21) While coming to the above said conclusion, this court relied on an earlier decision in [Sirajul Haq Khan and Others Vs. The Sunni Central Board of Waqf, U.P. and Others](#),

20. In this connection, we have to point out that the Government of India has not issued any date for commencement of the explanation in Section 6 of the Wakf Act quoted above. Even if it is assumed that the Explanation can be invoked, there is no material before us to show that any notice was issued to the Gram Panchayat before the issuance of the Notification, as required by the Explanation. If no notice was issued as required by the Notification, the Notification would not come in the way of a Civil Court to decide the question if raised between the Wakf and a third party, even if such a suit was filed beyond one year from the date of the Notification. Thus, once the Assistant Collector and the Collector had jurisdiction to decide, their decision became final and Section 13 of the Panchayat Act Punjab Village Common Land (Regulation) Act, 1961 barred the civil suit filed by the Wakf Board.

21. The decisions cited by the learned counsel for Wakf Board need to be taken note of while deciding the issue in question. In BEST INDIA TOBACCO CO case (3 supra), a Division Bench of this Court held that there can be no challenge to the list of wakfs after the expiry of one year period from the date of publication of the Notification. It was observed that the beneficiaries of the wakf are the Muslim public as mentioned in column 9 of Ex.A2. Column 22 contains the declaration of the Mutawalli that the particulars mentioned are correct to the best of his knowledge and belief and it also contains his signature. In view of that it was held that it was not open to the appellant-1st defendant therein for the first time to raise the contention that the suit property is not wakf property. Referring to the Inam Fair Register, the Division Bench held that a combined reading of the relevant entries in the Inam Fair Register shows that the inam was neither a personal grant nor a grant burdened with service, but it is a grant in favour of an institution. In BOARD OF MUSLIM WAKFS V. SMT. HADI BEGUM 7 the Supreme Court held that the order u/s 4 and publication of list of properties u/s 5(2) can be challenged under Article 226 of the Constitution of India only on the ground of want of jurisdiction since the civil Suit is maintainable to challenge the list published u/s 5(2) of the Act. In this regard, the Supreme Court

observed in paragraphs 15 to 17, as follows:

"(15) At this stage, it may be mentioned that the challenge to the Order of the Wakfs Commissioner passed u/s 4 of the Act and the lists of wakf properties u/s 5(2) of the Act was made in proceedings under Article 226 of the Constitution. In view of the fact that a civil suit is maintainable to challenge the list published u/s 5(2), the scope of challenge to the said list in proceedings under Article 226 of the Constitution would be confined to cases where the order of the Wakfs Commissioner passed u/s 4 of the Act suffers from want of jurisdiction and since the list issued u/s 5(2) is based on the order of the Wakfs Commissioner, the lack of jurisdiction in the Wakfs Commissioner to make the order would invalidate the list. The learned Single Judge proceeding on that basis set aside the order of the Wakfs Commissioner dated 9/07/1962 and the list of Wakf properties dated 2/12/1965, as amended on 29/06/1967 on the ground that while holding an enquiry u/s 4 of the Act, the Wakfs Commissioner had no jurisdiction to determine whether particular property was wakf property. The said basis for interference was not available to the division bench of the High court in view of the decision of this court in Board of Muslim Wakfs v. Radha Krishna. The division bench of the High court has found that there was total lack of jurisdiction in the Wakfs Commissioner insofar as he proceeded to declare as wakf property the remaining land in Bagh Nawab Kallan Khan after excluding 2 bigha and 17 biswas of land covered by the mosque and the makbara, on the ground that the said land stood acquired by the State government in the land acquisition proceedings initiated under the Jaipur Land Acquisition Act the State Government had taken possession of the said land as early as in the year 1945. In arriving at the said Finding, the learned Judges have placed reliance on the earlier decision of the High court dated 11/03/1957 in D.B. Civil Writ Petition No. 115 of 1955. We are unable to read the judgment of the High court dated 11/03/1957 in the manner as read by the learned Judges of the High court. In the earlier judgment dated 11/03/1957, the High court noticed that there was dispute between the parties on the question as to whether possession of the land had been taken in 1945 because while the case of the petitioner in that writ petition (Sahibzada Zafar Jang Khan) was that he was still in possession of the land, the stand of the State Government was that possession had been taken in 1945. Without going into the said disputed question of fact, the High court proceeded to deal with the matter on the assumption that the State government had taken possession of the disputed land in 1945 as alleged by it. Examining the matter on that basis, the High court observed that under the provisions of the Jaipur Land Acquisition Act, the land could vest in the State Government either u/s 16 or u/s 17 and that it was not the case of the State that any action u/s 17 was taken in the case and the only provision which could, therefore, be invoked was Section 16. The High court, examined whether an award u/s 11 had been made and whether the report of the Land Acquisition Officer dated 11/10/1944 could be treated as an award u/s 11, after observing that an award must contain the compensation which in the opinion of the Land Acquisition

Officer should be allowed, and that in the report dated 11/10/1944, no compensation had been mentioned in respect of the land in question and all that the report says is "that when the Matmi case of Sahibzada Zafar Jang Khan was decided the land will be given to him in exchange. The High court found that the so called award postpones the payment of compensation till the Matmi order was passed and no compensation was fixed in October, 1944 either in the shape of cash or in the shape of land to be given in exchange. In the view of the High court there was no award so far as this land was concerned u/s II and all that the Land Acquisition Officer did in 1944 was to postpone the making of the award and it was concluded: "Therefore, in spite of the proceedings under the Jaipur Land Acquisition Act in 1944, the land cannot be said to have been vested in State". While dealing with the relief which could be granted to the petitioner in that case, the High court observed that the proceedings could not be quashed and the State should not be prohibited from depriving him of the possession of the land and that all that the applicant could ask was that the postponed compensation should now be worked out and paid to him. The High court, therefore, while allowing the writ petition, directed the Collector of Jaipur to work out the compensation in that case under the law and award it subject to whatever be the result of Matmi proceedings. It is thus evident that in the said judgment dated 11/03/1957, the High court found that in spite of the proceedings under the Jaipur Land Acquisition Act in 1944, the land could not be said to have been vested in the State u/s 16. This position continued till the award was made by the Land Acquisition Officer on 30/07/1962. It was, therefore, not correct for the division bench of the High court in the judgment under appeal to say that at the time when the Wakfs Commissioner conducted the enquiry and passed the order 9/07/1962, the land in dispute had already vested in the State government under the land acquisition proceedings under the then Jaipur Land Acquisition Act in 1944. The order dated 9/07/1962 passed by the Wakfs Commissioner cannot, therefore, be held to be an order passed without jurisdiction on that account.

(16) The learned Judges of the division bench of the High court have also held that the order of the Wakfs Commissioner dated 9/07/1962 was passed in contravention of the principles of natural justice inasmuch as the State government was not made a party to the proceedings and no opportunity was given to the State government. In taking this view, the learned Judges have again proceeded on the basis that the land in question had already vested in the State government under the land acquisition proceedings and the State government had an interest in the said property. Since we are of the view that at the time when the Wakfs Commissioner was conducting the enquiry the property had not vested in the State government under the land acquisition proceedings, it was not incumbent upon the Wakfs Commissioner to issue any notice to the State government in those proceedings and the said proceedings could not be held to have been vitiated on that account. (17) The other infirmity that has been pointed out by the learned Judges of the division

bench of the High court in the order of the Wakfs Commissioner dated 9/07/1962 is that there was total lack of material to show that the land was ever given expressly or impliedly, or held or used for pious, religious or charitable purposes and that the wakf was confined only to the land measuring I bigha and 17 biswas of land on which the mosque and the makbara are situated. This finding of the High court is based on the construction of the orders of the former Government of Jaipur dated December 2, 1895, October 30, 1898 and 6/01/1930 as well as the statements of the witnesses. In our opinion, the question whether the wakf property covered the entire 33 bighas of land of Bagh Nawab Kallan Khan or was confined to I bigha and 17 biswas of land on which the mosque and the makbara are situated had to be determined on the basis of appraisal and appreciation of evidence documentary as well as oral, that was produced before the "Wakfs Commissioner during the course of enquiry. The Wakfs Commissioner was vested with the jurisdiction to arrive at a decision on this question on a consideration of the said evidence and such a determination by the Wakfs Commissioner could not be held to be vitiated on the ground of lack of jurisdiction for the reason that the Wakfs Commissioner had committed an error in construing the documentary evidence produced before him. The order dated 9/07/1962 passed by the Wakfs Commissioner and the list of wakf properties dated 2/12/1965 as amended by notification dated 29/06/1967, published under subsection (2) of Section 5 of the Act were not open to challenge before the High court under Article 226 of the Constitution on the ground that the Finding recorded by the Wakfs Commissioner was not supported by the evidence on record."

22. The Supreme Court, however, held that the order passed by the Wakf Commissioner and the list of wakf properties as amended by notification dated June 29, 1967 published u/s 5(2) of the Act were not open to challenge before the High Court under Art. 226 of the Constitution of India on the ground that the finding recorded by the Wakf Commissioner was not supported by the evidence on record. Obviously an enquiry was conducted and the parties interested were given opportunity in the proceedings.

23. In M.BIKSHAPATHI's case (5 supra), a Division Bench of this Court held :

"Going by the principles of interpretation of a statute, a section should be read in a manner that both the sections should be operative so as to give effect to the intention of the Legislature. It is discernible from reading Section 83 that the State Government can appoint a Tribunal for the determination of any dispute, question or any matter relating to wakf or wakf property under the Wakf Act and define the local limits jurisdiction etc. There is no dispute that the Wakf Tribunal has been constituted with such vast powers as envisaged by Section 83. Thus, the jurisdiction of the Wakf Tribunal cannot be limited by reading Section 6 alone providing for the decision to determine the nature of wakf property i.e. to the effect whether it is a wakf property or not; whether it is a Shia Wakf or Sunni Wakf and who is the

interested person who can institute a suit. Section 6 further specifies that the person interested shall, in relation to the property, include every person who though not interested in the wakf concerned, is interested in such property. We are of the considered view that reading both sections together and permitting them to operate in their locality, it is within the jurisdiction of the Tribunal to determine whether the wakf property has been rightly leased or wrongly leased or any questions relating to wakf property. Consideration or non-consideration of the application of the appellant for leasing out the wakf property is within the purview of the Wakf Board and any irregularity or illegality in its consideration is within the jurisdiction of the Tribunal."

24. Reliance was also placed on the decision of a learned single Judge of this Court in JAI BHARAT CO-OPERATIVE HOUSING SOCIETY LTD. A.P.STATE WAKF BOARD 8 wherein it was held that any dispute with regard to certain property as to whether it is wakf property or not, should be decided by the Wakf Tribunal constituted u/s 83 of the Act and the High Court has no jurisdiction to entertain such a claim under Art. 226 of the Constitution of India. In SYED ALI 's case (4 supra) it was held that any wakf covered by the provisions of the Wakf Act being a permanent dedication, grant of patta under Inams Act does not nullify it. Once it is recorded as wakf it cannot be nullified under the provisions of Inams Abolition Act. The Supreme Court in that regard observed in paragraph 8 as follows:

"The second argument of learned counsel for the appellant is that the findings recorded by the High court as regards the character of the property in its judgment dated 22/4/1970 rendered in Writ Petition No. 1726 of 1968, arising out of the order passed by the Revenue Divisional Officer, Visakhapatnam, constituted resjudicata. Parliament has enacted the Wakf Act to provide for better administration and supervision of wakfs. Under Ss. (2) of Section 5 of the Act the Board is required to publish in the c Official Gazette the list of wakf properties whether in existence at the commencement of the Act or coming into existence thereafter. Section 6 of the Wakf Act further provides that if any question arises whether a particular property specified as wakf property in the list of wakfs published under the Act, is a wakf property or not, the Board or Mutawallis of the wakfor any person interested therein, may institute a suit in a Civil court of Competent jurisdiction for decision of the question and the decision of the Civil court in respect of such matter shall be final. It is also provided therein that no such suit shall be entertained by the Civil court after the expiry of one year from the date of the publication of the list of wakfs under Ss. (2) of Section 5 of the Act. Ss. (4) of Section 6 further provides that the list of wakfs published under Ss. (2) of Section 5 shall, unless it is modified in pursuance of a decision of the civil court under Ss. (1), be final and conclusive. Therefore, any dispute relating to the character of wakf property is to be decided in the manner provided under the Wakf Act. Subject to the result of a civil suit, if filed, the list of wakfs published in the Official Gazette is final and conclusive. In the present case, the disputed property was shown as wakf property in the A.P. Official Gazette on

30-11-1961 and no suit having been filed challenging the wakf property, the entries in the Official Gazette describing the property as wakf became final and conclusive. u/s 3 of the Inams Act, a Tahsildar may suo motu make an enquiry for the purpose of grant of patta on three points, one of them being, whether inam land is held by any institution. While making an enquiry in the present case as to find out whether the inam land was held by the Dargah, the Tahsildar was not required to enquire into and adjudicate upon the character of the wakf property mentioned in the list of wakfs published in the Official Gazette under Ss. (2) of Section 5 of the Wakf Act, as the dispute in that regard as to its character could only be decided in the manner provided in Section 6 of the Wakf Act. Assuming that the wakf property was not found to be held by the Dargah u/s 3 of the Inam Act, it was not open to the Tahsildar to adjudicate upon the character of the wakf property as the same was a grant by way of service inam for purposes recognized by the Muslim law as pious, religious or charitable which constituted the property as wakf. Thus, we find that the finding of the Tahsildar that the property was not wakf, was wholly erroneous and beyond his jurisdiction. Consequently, the finding of the Tahsildar that the property is not a wakf property would not constitute res judicata in the subsequent suit filed by the Wakf Board. It is well settled that if a decision of a court or a tribunal is without jurisdiction, such a decision or finding cannot operate as res judicata in any subsequent proceedings. The plea of res judicata presupposes that there is in existence a decree or judgment which is legal but when the judgment is non est in law, no plea of res judicata can be founded on such a judgment. It would be appropriate here to quote the following passage from Res judicata - Spencer Bower and Turner, 2nd Edn., p. 92:-

"Competent jurisdiction is an essential condition of every valid res judicata, which means that, in order that a judicial decision relied upon, whether as a bar, or as the foundation of an action, may conclusively bind the parties, or (in the case of in rem decisions) the world, it must appear that the judicial tribunal pronouncing the decision had jurisdiction over the cause or matter, and over the parties, sufficient to warrant it in so doing."

25. In SYED MUNEER's case (6 supra) a Division Bench of this Court held that the Writ Petition questioning the order of the Wakf Board directing taking possession of the land on the ground that it is a wakf property is not maintainable and the said question can be decided only by a Tribunal u/s 83 of the Act. In view of that alternative remedy, the Writ Petition was held to be not maintainable.

26. A survey of various referred referred to above would lead to two issues, which have to be considered by this Court, viz., whether there was a contravention of the provisions of Sections 4 to 6 of the Act and whether the Writ Petitions are maintainable under Article 226 of Constitution of India.

27. It is not in dispute that the petitioners have challenged the validity of the Gazette notification dated 9-2-1989. It is their case that there is a violation of provisions

contained u/s 4 of the Act inasmuch no enquiry was conducted by the Survey Commissioner as required u/s 4 of the Act. In such an event, it is the case of the petitioners that no suit need be filed as the validity of the notification itself is in challenge. The Supreme Court has not ruled out the filing of Writ Petition in all the cases where the notifications were issued. In BOARD OF MULSIM MAKFS case (7 supra), as already noted above, the Supreme Court held when an enquiry was conducted and in consequence of such an enquiry, a notification was issued and in such an event, the challenge cannot be made under Article 226 of the Constitution of India except on the question of jurisdiction. But, with regard to the procedure, which ought to have been followed, the Supreme Court did not stipulate any yardstick for challenging such a notification. It is no doubt true that when a competent authority has decided the issue under the provisions of the Act, it is only to be challenged under the provisions of the Act and resort cannot be taken to Article 226 of the Constitution of India. But, however, in case when the order passed is wholly without jurisdiction or the authority lacks the competence or there is infraction of statutory provisions, it cannot be said that the Writ Petition is not available to the aggrieved party. In the instant cases, it has to be seen whether the notification issued u/s 5 of the Act was preceded by the statutory compliance as stipulated u/s 4 of the Act.

28. The respondents have placed before this Court, the letter of the Deputy Tahsildar dated 21-7-1967 and submitted that this report has been approved by the Survey Commissioner to the effect that the property in question was a wakf property and, therefore, it must be deemed that an enquiry was conducted by the Wakf Commissioner and such a presumption is permissible in law and that on the basis of this report of the Deputy Tahsildar, the notification was issued in 1989. Now, the question is whether the Survey Commissioner even assuming that he was appointed under the provisions of the Act, had conducted the enquiry as required u/s 4 of the Act. The pre-requisite for publishing the wakf is an enquiry to be conducted u/s 4 of the Act and such an enquiry report has to be forwarded to the State Government, who in turn has to forward the same to the Wakf Board and the Wakf Board is required to examine the report and thereafter publish the list of wakfs in the Official Gazette. If these requirements were fulfilled, then the contention of the learned counsel for the Wakf Board and the learned Government Pleader would be sustainable. When the pre-requisite for publishing the wakf is not fulfilled, then the question would remain whether that can be challenged under Article 226 of the Constitution of India or in a suit as is sought to be contended by the learned counsel for the respondents.

29. As held by the Supreme Court in MUSLIM WAF BOARD case (1 supra), the proceedings u/s 4 of the Act are not administrative proceedings and they are quasi-judicial proceedings and there is no record to show that a notice was issued to either Mr. Rangaiah or his son Mr. Lakshmaiah at any point of time and no information is forthcoming as to what type of enquiry was conducted by the Survey

Commissioner, which is required to be conducted u/s 4 of the Act. Admittedly, the Survey Commissioner was vested with the powers of a civil Court while conducting the enquiry u/s 4 of the Act and he has the powers to summon even the persons who are sought to be interested in the litigation. That is the reason why more importance was given to the report of the Survey Commissioner rather than the publication u/s 5 of the Act as it is a consequential action pursuant to the report of the Survey Commissioner and its examination by the Wakf Board. It is not in dispute that the notification was issued in 1989, but the pre-requisite for issuing the notification is the enquiry, which is contemplated u/s 4(3) of the Act. The letter of the Deputy Tahsildar dated 24-7-1967 reads thus:

"With reference to the subject, it is to state that it has been proved beyond doubt that the property mentioned in the schedule at the margin in a wakf property pertaining to Abbas Ali Khan mosque, Meerpet, Jillalaguda, One Laxhmiah R/o Meerpet has illegally occupied over the said wakf property and enjoying the same. The said property is estimated to be more than Rs.6,000/- per acre as per the local rates. The said land may be taken under the custody of the Government and one year assignment may be arranged and legal action must be taken against the illegal occupant, which shall be beneficial."

30. Except the above letter, there is no other material forthcoming as to what type of enquiry was conducted. Learned Government Pleader would, however, tried to stress his argument to the extent that the survey report was prepared by the Survey Commissioner and in column 11(A)(viii) it was mentioned that during the enquiry it came to be known that at the time of Mr. Mir Abbas Ali Khan, the land was given on lease to Mr. Laxhmiah and since then he is in occupation and the lease amount was not being paid to any one. In the said column, it was also mentioned that in the Munthakab it was mentioned for the purpose of Ood-e-Gul only and there is no other document. The Survey Commissioner has recorded his findings as follows:

"As per the order dt.23-6-66 in file No.841/CWV/67 S.Nos.38-131-153 M, 28 Acs. And 32 Gts. for the Mosque of Abbas Ali Khan entered in this form is wakf."

31. If this is construed as the report of the Survey Commissioner, then the purpose of incorporation of Section 4 of the Act is frustrated. It is only a form prescribed for registering a wakf. But what is required to be done by the Survey Commissioner is not to enter the wakf as such and he is bound to enquire whether the property is a wakf property or not. He is also empowered to conduct the enquiry as was observed by the Supreme Court in the decisions referred to above. Mere filling of columns would not amount to report of the Survey Commissioner so as to bind the petitioners. Moreover, it is not in dispute that no notice was ever given to the occupants, who were recorded as such in the revenue register. Admittedly, the report was of 1967 by which time the petitioners were not the purchasers. They came into picture at a later point of time. But, even then the enquiry ought to project as to the notice having been given to the persons. Even according to the

reports submitted by the Deputy Tahsildar and also the remarks made by the Survey Commissioner one Lakshmaiah was in actual cultivation, but according to the Deputy Commissioner Laxmaiah was in illegal occupation. Be that as it may, a notice was necessary to be given to the person who is in occupation. But, there is no such record forthcoming as to what type of notice was issued to the parties and what type of enquiry was conducted. The report of the Deputy Tahsildar cannot be construed as an enquiry report or the proforma for the survey of wakf properties can be treated as a report of the Survey Commissioner. The report as such has to conform to the requirements of Section 4 of the Act as has been held by the Supreme Court in the catena of decisions referred to above. It is also noticed from the counter that the subject matter of the property was endowed by the owner of the land one Abbas Ali Khan into the Wakf Board in the year 1968 and the same was included in the list of wakf properties and the same was published in the gazettee dated 9.2.1989 along with other properties endowed by the same person. If this is to be accepted, it has to be held that the Wakf was registered for the first time in 1968 and there could not have been any report of the Wakf Commissioner in 1967. Further the requirements u/s 25 of the Wakf Act 1954 have to be complied with. There is not even an iota of proof of dedication by Abbas Ali Khan nor is there any Wakf deed. It is very much doubtful whether Abbas Ali Khan was alive in 1968 as can be seen from the Judgment of II Additional, City Civil Court in O.S.No. 368/69 dated 31.3.1982 filed by one Abdul Qavi against Laxmaiah and others. When such statutory requirements are not followed, the further question that falls for consideration is whether still the petitioners are required to approach the appropriate Tribunal or they can agitate under Article 226 of the Constitution of India.

32. It is true that u/s 83 of the Act any dispute arising out of wakf properties can be agitated only before the Tribunal constituted under the Act. But, in the instant cases, the very principal requirement of notice and conducting enquiry as envisaged under the Act are lacking. Therefore, the question of driving the petitioners to the Tribunal would not arise. Admittedly, the petitioners have made out their occupation rights from Mr. Rangaiah's possession and thereafter Mr. Lakshmaiah and they have purchased the land under registered sale deeds and that too after obtaining appropriate permission from the competent authority and it is also one of the contentions of the petitioners that they have acquired title by adverse possession. But, I am not inclined to adjudicate the same inasmuch as I am only concerned with the validity of the notification published in the Gazette on 9-2-1989. The decision referred to by the learned counsel for Wakf Board that the petitioners have to approach the Tribunal or the civil Court, as the case may be, even after the expiry of one year period after the publication of gazette notification is not applicable to the present cases, as that situation would not arise inasmuch as when the notice itself is lacking and no purpose will be served by approaching the Tribunal or civil Court. It is also to be noted that the report of the Survey Commissioner sent by the

Government to the Wakf Board has no automatic acceptance. It is required to examine such report before publishing the list. This statutory obligation is also totally lacking in this case. When the violation of statutory provisions is made out, it is always open to the parties to approach this Court under Article 226 of the Constitution of India. Admittedly, as can be seen from various documents filed by both the parties in these matters, nothing has been established to sustain the contention that the enquiry was conducted as required u/s 4(3) of the Act. In such a situation, it cannot be said that the impugned Notification is binding on the petitioners and accordingly, the petitioners are entitled to challenge the same as it is illegal and not enforceable as far as the petitioners are concerned. Accordingly, I have to reject the contention raised on behalf of the Wakf Board and also the Government in this regard.

33. It is also to be noted in this regard that though the Wakf Board has been contending that the property in question is a wakf property, which was notified in the Official Gazette as early as in 1989, but it is surprising to note that till today no action has been initiated either for evicting the petitioners or for recovery of possession of the wakf property and no proceedings were initiated before the Tribunal constituted under the Act. None of the revenue records even whisper about the property as belonging to Wakf Board. It appears that the Wakf Board has filed an appeal only against the order of granting occupancy rights to the petitioners, and that too after one and half decades which is pending before the appellate authority on which I am not inclined to make any comments. Under these circumstances, I have to necessarily hold that the notification published by the Wakf Board in the Gazette on 9-2-1989 is not valid and the same is not binding on the petitioners. Accordingly, it is set aside as far as the petitioners are concerned. So far as the relief for quashing the proceedings pending before the appellate authority under the Inams Abolition Act is concerned, I am not inclined to do so. It is open for the parties to agitate their respective rights before the appropriate authority.

34. Accordingly, the Writ Petitions are allowed to the extent indicated above. No order as to costs.