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REVISIONAL CIVIL

Mr. Justice P.B. Suresh Kumar, Mr. Justice P.V. Kunhikrishnan and

Mrs. Justice C.S. Sudha

C.R.P.(WAKF) Nos.38 of 2019 and 718 of 2014

2022 June 15

Ramani and others . . Revision Petitioners

v.

Kozhikode Puthiyapalliparipalana Committee and another . . Respondents

Issues for Consideration:

(1) Whether there is any conflict between the Division Bench judgments in ***Hamza Hajee, Jamal,*** **and** ***Mechery Vijayakumar*** concerning eviction proceedings and removal of encroachments after the 2013 amendment?.

(2) Whether following the 2013 amendments to Sections 54 and 83, a mutawalli/lessor is barred from directly instituting a suit for eviction and arrears of rent before the Wakf Tribunal without routing the complaint through the CEO under Section 54?.

Wakf Act, 1995 (Central Act 43 of 1995)—Section 54 (prior to Amendment Act 27 of 2013)—Scope of the term "encroacher"—Inclusion of tenants and lessees holding over—Competence of Chief Executive Officer—Under Section 54, before the amendment of

the Section in 2013, CEO had every right to order eviction of an encroacher -The term 'encroacher' takes within its ambit a tenant, lessee or mortgagee also—Precedent in *Ramesh Gobindram v. Sugra Humayun Mirza Wakf* confined to unamended Section 83(1) and does not curtail the independent statutory machinery under Section 54—The dictum in P.E. Sarjith v. Misbahul Huda Educational Trust lays down the correct law and is not rendered against the binding precedent laid down by the Supreme Court in Ramesh Gobindram v. Sugra Humayun Mirza Wakf and Faseela M. v. Munnerul Islam Madrassa Committee—Wakf Rules, 1996 (Kerala)—Rule 2(ha)

C.R.P. (Wakf) No.718 of 2014:

The 1st respondent, claiming to be the Mutawalli of a Wakf, owned a building which formed part of registered waqf property. The premises had been leased out to the revision petitioner on a monthly rent of ₹4,000/- for a stipulated term from 01.07.2008 to 31.05.2009. Following the expiration of the lease term, the tenant failed to vacate or hand over vacant possession, thereby continuing in occupation unauthorisedly. Consequently, the Mutawalli preferred an application under Section 54 of the Wakf Act, 1995 (prior to its amendment by Act 27 of 2013) before the Chief Executive Officer (CEO) of the Kerala State Wakf Board, praying for an order of eviction against the revision petitioner as an encroacher. The revision petitioner resisted the proceedings, asserting *inter alia* that he was a lawful lessee holding over and therefore could not be categorised as an "encroacher" under Section 54. It was further urged, on the strength of the Supreme Court judgment in **Ramesh Gobindram v. Sugra Humayun Mirza Wakf** [(2010) 8 SCC 726) and subsequent decisions, that proceedings for eviction of a tenant fell within the exclusive jurisdiction of the ordinary civil court and that neither the CEO nor the Wakf Tribunal possessed jurisdiction in the matter. Rejecting these objections, the CEO held the tenant to be an encroacher and directed his eviction. In appeal, the Wakf Tribunal, Kozhikode, affirmed the order of the CEO. Challenging these orders before the High Court, a Division Bench doubted the correctness of an earlier Division Bench ruling in *P.E. Sarjith v. Misbahul Huda Educational Trust* (C.R.P. (Wakf) No. 92 of 2015), which had upheld the CEO's jurisdiction under Section 54 to evict overstaying tenants, and referred the issue to the Full Bench.

In C.R.P. (Wakf) No. 38 of 2019:

The 1st respondent committee, managing the properties of the Puthiyapalli Waqf, instituted W.O.S. No. 12 of 2016 directly before the Wakf Tribunal, Kozhikode, against the predecessors-in-interest of the revision petitioners, praying for eviction, vacant surrender of the leased shop room, and recovery of arrears of rent along with future damages for use and occupation. The suit was resisted by the defendants contending that the Wakf Tribunal lacked inherent jurisdiction to entertain an eviction suit directly instituted by the landlord/Mutawalli. According to the defendants, following the substantial amendments brought into the Wakf Act by Central Act 27 of 2013, the sole and exclusive remedy available for recovering waqf properties from encroachers or overstaying tenants was the statutory machinery prescribed under Section 54, which mandated the filing of a complaint before the CEO, who alone could determine the encroachment and apply to the Tribunal for an order of eviction under Section 54(4). The Wakf Tribunal repelled this contention, decreed the suit, and ordered eviction together with recovery of rent arrears. In the revision preferred against the decree,

reliance was placed on earlier Division Bench decisions in *Hamza Hajee P.K. v. Kerala State Wakf Board* (2019 (2) KHC 527) and *Jamal v. Union of India* (2020 (2) KLT 619) to contend that only the CEO could institute or initiate proceedings for eviction of an encroacher, while the Mutawalli relied on *Mechery Vijayakumar v. Kinasseri Yateem Khana* (2020 (1) KLJ 978), which recognized the independent right of a mutawalli to file a direct eviction suit before the Tribunal under Section 83(1) of the Act. Finding an apparent conflict between these lines of Division Bench pronouncements on the post-2013 scheme of tenant evictions, the Division Bench referred the questions to the Full Bench for authoritative resolution. Anwserign the reference, the Full Bench;

Held:

As long as Rule 2(ha) continues to be in the statute book, this Court cannot ignore the same. As per the Rule, 'encroachment' means occupation of any wakf property without authority for such occupation and it includes the continued occupation of the property by any person even after the authority by way of grant or otherwise by which he was granted permission to occupy the property, has expired. Therefore, it is clear that the Rule takes in a lessee, tenant or licensee, who continues in occupation even after the expiry of the lease, tenancy or license. (*Paragraph 17*)

On the question whether CEO could have called upon the petitioner to surrender possession of the wakf property, it was held that in terms of Section 54 of the Act as it stood on the date the petition was filed before the CEO, he could after considering the objections if any filed before him, require the encroacher to remove the encroachment from the wakf property and deliver possession of the building to the Mutawalli concerned or the Board. The person aggrieved thereby had the right to institute a suit before the Tribunal to establish his right, title or interest in the land, building, space or other property. The right to institute such a suit was however not available to a person who has been let into possession of the land, building, space or other property as a lessee, licensee or mortgagee by the Mutawalli of the Wakf or by any person authorized by him in that behalf. The position has changed after Section 54 has been amended. Now under Section 54 of the Act as amended by Act 27 of 2013, the CEO cannot by himself order eviction. He can only issue notice to the encroacher and after considering the objections if any submitted by the encroacher, apply to the Wakf Tribunal for the grant of an order of eviction for removing such encroachment and delivery of possession of the land, building, space or other property encroached upon. (*Paragraph 34.1*)

Under these circumstances, we find that, the CEO under Section 54, before the amendment of Section 54 in the year 2013, had every right to order eviction of an encroacher, and that the term 'encroacher' takes within its ambit a tenant, lessee or mortgagee also. Points (i) to (iii) in the first reference order are answered accordingly. (*Paragraph 47*)

The dictum of the Division Bench in **P.E.Sarjith v. Misbahul Huda Educational Trust** [C.R.P. (Wakf) No.92/2015] lays down the correct law and is not rendered against the binding

precedent laid down by the Hon'ble Supreme Court in **Ramesh Gobindram v. Sugra Humayun Mirza Wakf** [A.I.R. 2010 SC 2897 and **Faseela M. v. Munnerul Islam Madrassa Committee** [2014 K.H.C. 4405]. (*Paragraph 55*)

Case Law Cited:

(1) Judgment of High Court of Kerala in C.R.P.(Wakf) No. 92 of 2015; (2) 2020 (1) K.L.J. 978—*Approved*

(3) (2010) 8 S.C.C. 726 = A.I.R. 2010 S.C. 2897; (4) I.L.R. 2014 (2) Ker. 893 = 2014 K.H.C. 4405; (5) 2020 (2) K.H.C. 523—*Referred to.*

Wakf Act, 1995 (Central Act 43 of 1995)—Sections 3(ee), 54(4) and 83(1) (post 2013 amendment)—Prior to amendment of Section 83, a suit for eviction of a tenant could not be filed before the Tribunal under Section 83 (1)—Only C.E.O. had the power to order removal of encroachment, before the amendment—After amendment, C.E.O. does not have the power, he can only move the Tribunal for removal of any encroachment from wakf property or for eviction of a tenant, lessee etc. if he is satisfied of the encroachment or of the unauthorized occupation of a wakf property—There is no conflict between the decisions in Hamza Hajee P.K. v. Kerala State Wakf Board, and Jamal v. Union of India, on the one hand and Mechery Vijayakumar v. Kinasseri Yateem Khana, on the other hand - Transfer of Property Act, 1882 (Central Act 4 of 1882).

Held:

As answered by us in the first reference order, before the amendment of Section 54, the CEO under sub-section (3) of Section 54 could order removal of encroachment after complying with the procedure contemplated under sub-sections (1), (2) and (3). Before the amendment of Section 83, in the light of the dictum of the Hon'ble Supreme Court in **Ramesh Gobindram** (*Supra*), a suit for eviction of a tenant could not be filed before the Tribunal under sub-section (1) of Section 83. The remedies available under Section 54 and Section 83 of the Act are completely different and before two different authorities, that is, the former is an application before the CEO and the latter a suit before the Tribunal. Pursuant to the amendment of the year 2013, the position has changed and now the CEO is no longer empowered to order removal of encroachment. On the other hand, he will have to move the Tribunal for removal of any encroachment from wakf property or for eviction of a tenant, lessee etc. if he is satisfied of the encroachment or of the unauthorized occupation of a wakf property. (*Paragraph 51*)

At the risk of repetition, we reiterate that in **Ramesh Gobindram and Punjab Wakf Board** (*Supra*), the
Apex Court
was considering the unamended Section 83 of the Act. In the said cases the Hon'ble Supreme

Court never had the occasion to consider Section 3(ee) or the amended provisions of Section 83(1) as per which the jurisdiction of the Tribunal has been expanded to include the jurisdiction to decide disputes relating to eviction of a tenant or determination of the rights and obligations of a lessor and lessee of wakf property. It was in the pre-amendment scenario that the *Apex Court* held that under Section 83(1), the Tribunal had no power to entertain a suit of eviction. The dictum in **Ramesh Gobindram** (*Supra*) cannot be applied to disputes which have arisen after the amendment to the Section has been brought in. That being the position we find that the Division Bench in **Mechery Vijayakumar** (*Supra*) has not gone wrong and that the dictum is not against the binding precedent of the Hon'ble Supreme Court in the aforesaid decisions. Points (i) to (iii) in the second reference order are answered accordingly (*Paragraph 53*)

There is no conflict between the three Division Bench decisions of this Court in **Hamza Hajee P.K. v. Kerala State Wakf Board** [2019 (2) K.H.C. 527 : I.L.R. 2019 (2) Kerala 378; **Jamal v. Union of India** [(2020 (2) K.L.T. 619] and **Mechery Vijayakumar v. Kinassery Yateem Khana** [2020 (1) K.L.J. 978]. They are also not in conflict with the binding precedent of the Hon'ble Supreme Court in **Ramesh Gobindram v. Sugra Humayun Mirza Wakf** [A.I.R. 2010 S.C. 2897] and **Punjab Wakf Board v. Sham Singh Harike** [(2019) 4 S.C.C. 698]. (*Reference Order in C.R.P. (WAKF) No.38 of 2019*)

Case Law Cited:

(6) I.L.R. 2019 (2) Kerala 378 = 2019 (2) K.H.C. 527; (7) I.L.R. 2020 (2) Ker. 222 = 2020 (2) K.L.T. 619—*Explained.*

(8) (2019) 4 S.C.C. 698; (9) 1969 K.H.C. 656; (10) 1991 K.H.C. 1066; (11) A.I.R. 2002 S.C. 3484; (12) 2006 K.H.C. 1664; (13) 2017 K.H.C. 6319; (14) 2016 K.H.C. 4512: A.I.R. 2016 Bombay 261; (15) A.I.R. 2003 Kerala 366; (16) I.L.R. 2010 (4) Ker. 804 = 2010 (4) K.H.C. 866; (17) 2019 (4) K.H.C. 123; (18) Judgment in C.R.P. (Wakf)No. 412 of 2012; (19) A.I.R. 1966 S.C. 1089; (20) 1991 Supp. (1) S.C.C. 518; (21) 2017 (4) K.H.C. 381; (22) 2020 (2) K.H.C. 512; (23) I.L.R. 2020 (4) Ker. 801 = 2020 K.H.C. 799; (24) I.L.R. 2020 (4) Ker. 1033 = 2020 (6) K.H.C. 697; (25) 2021 (1) K.H.C. 218; (26) 2022 (1) K.H.C. 423; (27) Judgment in Civil Appeal No.6336 of 2021; (28) 2021 S.C.C. Online S.C. 280; (29) Judgment on Madras High Court in C.R.P.(P.D.) No.3723 of 2019—*Referred to.*

List of Acts/Rules:

(1) Wakf Act, 1995.

(2) Wakf (Amendment) Act, 2013.

(3) Kerala Wakf Rules, 1996.

(4) Waqf Properties Lease Rules, 2014.

(5) Transfer of Property Act, 1882.

List of Keywords:

Wakf Tribunal, Encroacher, Tenant Holding Over, Eviction of Tenant, Chief Executive Officer (CEO), Section 54, Section 83(1), Act 27 of 2013, Lessor and Lessee, Full Bench Reference, Alternative Remedy, Dual Remedies.

Case Arising From:

References made by Division Benches of the High Court of Kerala in C.R.P. (Wakf) No.718 of 2014 and C.R.P. (Wakf) No.38 of 2019.

Appearance of Parties:

Sri. Shyam Padman (Sr. Adv.), *Sri. C.M. Andrews, Sri. P.T. Mohankumar, Sri. Boby M. Sekhar, Smt. Laya Mary Joseph. M/s. R.Bindu Sasthamangalam* and *Sri. Prasanth M.P.*
. . for revision petitioners

M/s. Pushparajan Kodoth, Sri. S.K. Jayesh Mohankumar, Vandana Menon, Smt. Vineetha James, Sri. Vimal Vijay, M/s.K.M.Firoz, Sri. S.Kannan, Smt. M.Shajna and *Sri. Jamsheed Hafiz*
. . for respondents

ORDER

The Order of the Court was pronounced by **C.S. Sudha, J.—**C.R.P.(WAKF) No.718/2014 is against the order dated 20/10/2014 of the Wakf Tribunal, Kozhikode in O.A.No.20 of 2013,

confirming the order passed by the Chief Executive Officer (CEO), Kerala State Wakf Board (the Board), Ernakulam under Section 54 of the Wakf Act, 1995 (the Act) in proceedings No. E4-2128/12-1 dated 27/08/2013. The revision petitioner herein is the Applicant before the Wakf Tribunal (Tribunal) and the respondent in the proceedings before the CEO. The 1st respondent herein, the Daruthaqva Islamic Cultural Centre, represented by its Secretary, is the Applicant before the CEO and the 1st respondent in the O.A. The 2nd and 3rd respondents herein are the CEO and the Board respectively. They are the 2nd and 3rd respondents in the O.A. also.

2. The 1st respondent herein, claiming to be the mutawalli, filed an application under Section 54 of the Wakf Act, 1995 (the Act) before the 2nd respondent CEO, alleging that the petitioner/tenant is unauthorizedly continuing in possession of their property, consisting of a building, even after the termination of the tenancy and that he has not vacated though notice intimating him of the termination of the tenancy and directing him to vacate the room has been served on him. The petitioner/tenant appeared before the CEO and filed objections *inter alia* contending that in the light of the decision of the Hon'ble Supreme Court in **Ramesh Gobindram v. Sugra Humayun Mirza Wakf,** A.I.R. 2010 S.C. 2897, the CEO has no power to order eviction of a tenant from a wakf property, however, the CEO ignoring the binding principle, has wrongly ordered eviction by order dated 27.08.2013. Aggrieved, the petitioner/tenant moved O.A.No.20/2013 before the Tribunal which in turn affirmed the decision of the CEO and hence the revision.

3. When the matter came up before a Division Bench of this Court, the Bench relying on the decisions of the Hon'ble Supreme Court in **Ramesh Gobindram** (*Supra*) and **Faseela M. v. Munnerul Islam Madrassa Committee,** 2014 K.H.C. 4405, held that, since the dispute involved is prior to the amendment of the Act in the year 2013, a suit for eviction of a tenant from wakf property has to be filed before the civil court and not before the Tribunal and so the impugned order is incorrect. The Division Bench disagreed with the decision of another Division Bench of this Court in a similar matter, that is, **P.E.Sarjith v. Misbahul Huda Educational Trust** [C.R.P. (Wakf) No.92/2015], which upheld the order of the Wakf Tribunal, confirming an order of eviction passed by the CEO in an application under Section 54. According to the Division Bench, in the light of the aforesaid binding precedents of the Hon'ble Supreme Court, the judgment in **P.E.Sarjith** *(Supra)* does not lay down the correct law. Hence as per Reference Order dated 19.10.2020, the matter was directed to be placed before the Hon'ble Chief Justice. Thus, the reference.

4. C.R.P. (WAKF) No.38 of 2019 is against the judgment dated 29.04.2019 of the Waqf Tribunal, Kozhikode, in O.S.No.220/2019, a suit for eviction filed by the first respondent Committee, against the predecessor-in-interest (1st defendant in the suit) of the revision petitioners herein. According to the plaintiff Committee, the plaint schedule room belongs to them and that the first defendant, the tenant of the room, was continuing in occupation of the premises owned by the former even after the termination of the lease. Hence the suit for eviction. During the pendency of the suit, the first defendant passed away and hence her legal representatives were impleaded as additional defendants 3 to 7, who are the revision petitioners herein. The Tribunal by the impugned judgment, decreed the suit and directed additional defendants 3 to 7/the revision petitioners, to surrender vacant possession of the plaint schedule room to the plaintiff, the first respondent herein, within a period of two months. Aggrieved, additional defendants 3 to 7 have filed the present C.R.P.

The second respondent herein, the CEO, is the second defendant in the suit.

5. When the matter came up for hearing, the Division Bench found apparent conflict between judgments of three Division Benches of this Court, viz., **Hamza Hajee P.K. v. Kerala State Wakf Board** [2019 (2) K.H.C. 527 : I.L.R. 2019 (2) Kerala 378]; **Jamal v. Union of India** [2020 (2) K.L.T. 619] and **Mechery Vijayakumar v. Kinasseri Yatheem Khana** [2020 (1) K.L.J. 978]. In the light of the dictum of the Hon'ble Supreme Court in **Ramesh Gobindram** (*Supra*) and **Punjab Wakf Board v. Sham Singh Harike** [(2019) 4 S.C.C. 698], the Division Bench disagreed with the judgment of the Division Bench in **Mechery Vijayakumar** (*Supra*) and held that the same is not the correct law. Thus, the Registry as per Reference Order dated 07.12.2020 was directed to place the matter before the Hon'ble Chief Justice and hence the second reference.

6. Heard Sri.R. Bindu Sasthamangalam and Sri.Shyam Padman, the learned counsel for the revision petitioners; Sri.K.M.Firoz, the learned counsel for the first respondent in C.R.P.(Wakf)No.718/2014, Sri.Kodoth Pushparajan and Sri.K.Jayesh Mohankumar, the learned counsel for the first respondent in C.R.P.(Wakf) No.38/2019 and Sri.Jamsheed Hafiz, the learned Standing Counsel for the 2nd and 3rd respondents in C.R.P.(Wakf) No.718/2014 and the 2nd respondent in C.R.P.(Wakf) No.38/2019.

7. The points to be considered in the first Reference Order are–

(i) Is the dictum of the Division Bench in **P.E.Sarjith** *(Supra)* rendered against the binding precedent laid down by the Hon'ble Supreme Court in **Ramesh Gobindram** (*Supra*) and **Faseela** *(Supra)* ?

(ii) Whether the term 'encroacher' in Section 54 of the Act, takes within its ambit a lessee or tenant also?

(iii) The scope and powers of the CEO under Section 54 of the Act, that is, whether the CEO, prior to the amendment of Section 54 in the year 2013 by Act 27/2013, had the power to order eviction of a tenant from a wakf property?

There is no dispute to the position that after the amendment of Section 54 in the year 2013, the CEO has no such powers and that he will have to move the Tribunal for eviction of a tenant.

7.1. The points to be considered in the second Reference Order are -

(i) Is there any conflict between the three Division Bench decisions of this Court in **Hamza Hajee** (*Supra*); **Jamal** (*Supra*) and **Mechery Vijayakumar** (*Supra*)?

(ii) Is the dictum in **Mechery Vijayakumar** (*Supra*) in any way in conflict with the binding precedent of the Hon'ble Supreme Court in **Ramesh Gobindram** (*Supra*) and **Punjab Wakf Board** *(Supra)*?

(iii) Who is the person authorized or empowered to move for removal of encroachment of a person from wakf property and before which authority?

8. In the present proceedings, the revision petitioners will be referred to as the tenant ; the first respondent in the revision petitions as the mutawalli ; the second and third respondents in C.R.P.(Wakf) No.718/2014 and the second respondent in C.R.P.(Wakf) No.38/2019 as the Board.

9. We will first deal with points (i) to (iii) in the first reference order. According to the tenant, as per the dictum in **Ramesh Gobindram** (*Supra*) followed in **Faseela** *(Supra),* the Tribunal has no jurisdiction under the Act to deal with eviction of tenant and so the aggrieved landlord will have to move the civil court for necessary reliefs. *Per contra* the learned counsel for the mutawalli argued that the aforesaid decisions of the Hon'ble Supreme Court deal with the nature of suits that could be filed before the Tribunal taking into account Sections 6, 7, 83 and 85 of the Act. According to him, the aforesaid cases deal with suits for eviction filed under Section 83(1) before the Tribunal, which alone were held to be not maintainable and not an Application filed before the CEO of the Board under Section 54 of the Act for removal of encroachment from wakf property. In the said decisions, the Hon'ble Supreme Court had never an occasion to deal with the powers of the CEO under Section 54 before its amendment in the year 2013. According to the learned counsel, the Act provides for two remedies - one under Section 54 by moving the CEO by filing an application complaining of the encroachment; and the other to file a suit for eviction before the Tribunal under Section 83(1) of the Act. The learned counsel for the Board also endorses the arguments advanced on behalf of the mutawalli. The various decisions cited by the parties will be referred to as and when their respective arguments are considered.

10. It would be apposite to refer to the relevant statutory provisions in the Act, which are required to be looked into for a resolution of the issues involved herein. The Wakf Act, 1995 (the Act) repealed the earlier Wakf Act of 1954. The Act was amended by Act 27 of 2013 w.e.f 01.11.2013, by which certain insertions and substitutions were brought in. The dispute in C.R.P.(Wakf)No.718/2014 will have to be resolved based on the pre-amended provisions of the Act and in C.R.P.(Wakf)No.38/2019, with the post-amended provisions of the Act. Section 54 of the Act

before and after its amendment reads:

S. 54 BEFORE AMENDMENT	S.54 AFTER AMENDMENT w.ef. 01.11.2013

Removal of encroachment from Wakf property:-(1)Whenever the Chief Executive Officer considers whether on receiving any complaint or on his own motion that there has been an encroachment on any land, building, space or other property which is Wakf property and, which has been registered as such under this Act, he shall cause to be served upon the encroacher a notice specifying the particulars of the encroachment and calling upon him to show cause before a date to be specified in such notice as to why an order requiring him to remove the encroachment before the date so specified should not be made and shall also send a copy of such notice to the concerned mutawalli.	**Removal of encroachment from Waqf property**:-(1) Whenever the Chief Executive Officer considers whether on receiving any complaint or on his own motion that there has been an encroachment on any land, building, space or other property which is Waqf property and, which has been registered as such under this Act, he shall cause to be served upon the encroacher a notice specifying the particulars of the encroachment and calling upon him to show cause before a date to be specified in such notice, as to why an order requiring him to remove the encroachment before the date so specified should not be made and shall also send a copy of such notice to the concerned mutawalli.
(2) The notice referred to in sub-section (1) shall be served in such manner as may be prescribed.	(2) The notice referred to in sub-section (1) shall be served in such manner as may be prescribed.
(3) If, after considering the objections, received during the period specified in the notice, and after conducting an inquiry in such manner as may be prescribed, the Chief Executive Officer is satisfied that the property in question is Wakf property and that there has been an encroachment on any such Wakf property, he may, by an order, require the encroacher to remove such encroachment and deliver possession of the land, building, space or other property encroached upon to the mutawalli of the Wakf.	(3) If, after considering the objections, received during the period specified in the notice, and after conducting an inquiry in such manner as may be prescribed, the Chief Executive Officer is satisfied that the property in question is Waqf property and that there has been an encroachment on any such Waqf property, **he may, make an application to the Tribunal for grant of order of eviction for removing** such encroachment and deliver possession of the land, building, space or other property encroached upon to the mutawalli of the Waqf.
(4) Nothing contained in sub-section (3) shall prevent any person aggrieved by the order made by the Chief Executive Officer under that subsection from instituting a suit in a Tribunal to establish that he has right, title or	**(4) The Tribunal, upon receipt of such application from the Chief Executive Officer, for reasons to be recorded therein, make an order of eviction directing that the waqf property shall be vacated by all persons who may be in occupation**

11. The changes brought in by way of amendment to the Section is shown in bold font. In the first reference order, we are only concerned with the pre-amendment position of Section 54. Initially in the Act of 1995, a Central Act, the term 'encroachment' or 'encroacher' had not been defined. However, the State of Kerala brought in an amendment to the Kerala Wakf Rules, 1996 (the Rules), by inserting Rule 2(ha) w.e.f. 27/07/2005, defining the term 'encroachment' as:

> "(ha) 'encroachment' in relation to any wakf premises means occupation by any person of the Wakf premises without authority for such occupation and includes the continuance in occupation by any person of the wakf premises after the authority whether by way of grant or has been determined for any reason whatsoever, and includes any construction, alteration or addition carried out to the building without the authority;"

This amendment was brought in by the Government of Kerala in exercise of its powers under Section 109 of the Act, which deals with the power to make Rules. Section 109(1) says that the State Government, may, by notification in the Official Gazette, make Rules to carry out the purposes of the Act, other than those under Chapter III, which Chapter deals with the Central Wakf Council.

12. When the attention of the Division Bench was drawn to Rule 2(ha), it was held that a definition contained in the Rules cannot override the effect of the statutory provisions contained in the Wakf Act prior to the 2013 amendment. Section 109(2)(xiii) of the Act empowers the State Government to make Rules regarding the manner of service of notice issued under sub-section (1) of Section 54 and the manner in which any inquiry is to be made under sub-section (3) of that Section. According to the Division Bench, there is nothing in the Rule making power which empowers the State to introduce definitions which are not contained in the principal enactment and thus confer jurisdiction on the Tribunal, which was not intended in the principal Act. It was also held that all the relevant provisions of the Act had been considered by the Hon'ble Supreme Court in the aforesaid decisions and that it has been categorically held that a suit for eviction would not come under any of the specific provisions contained in the Act which requires consideration by the Tribunal and hence the suit is maintainable only before the civil court.

13. The learned counsel for the tenant canvassed for the same position as held by the Division Bench and argued that Rule 2(ha) is invalid as the State has no power to bring in a new definition, not contained in the Central Act of 1995. The learned counsel for the mutawalli, on the other hand, argued that in the present C.R.P., the tenant has not challenged the vires of the aforesaid Rule, which he cannot also do. Moreover, the State is a necessary party if the vires of any statute or Rule is challenged. Reference is made to the decisions in **Dhulabhai v. State of M.P.** [1969 KHC 656]; **Alpha Chem v. State of U.P.** [1991 K.H.C. 1066]; **S.Shanmugavel Nadar v. State of T.N**.[A.I.R. 2002 S.C. 3484] and **Union of India v. S.K.Saigal** [2006 K.H.C. 1664] in support of this argument.

14. The learned counsels for the tenant have no quarrel with the argument advanced that challenge to the provisions of a Statute or Rules cannot be made in a proceeding of the nature before us or that the constitutional validity of any State legislation can be raised without the State being a party in the proceedings. They also do not challenge the proposition that the mandate of any Rule(s) could be ignored in the absence of a challenge and without striking them down. Therefore, Rule 2(ha) cannot be brushed aside or ignored as long as it remains in the statute book. The fact that the definition of the term 'encroachment' in Rule 2(ha) takes within its ambit a tenant or lessee, is not disputed. Now even in the absence of the said Rule, it was pointed out on behalf of the mutawalli and the Board that the term 'encroacher' in Section 54, does include a tenant or lessee, which according to them, is clear from a reading of sub-section (4) and its proviso. There is certainly force in this argument.

15. Sub-section (3) to Section 54 says that if, after considering the objections, received during the period specified in the notice issued under sub-section (1), and after conducting an inquiry in such manner as may be prescribed, if the CEO is satisfied that the property in question is wakf property and that there has been an encroachment on any such Wakf property, he may, by an order, require the encroacher to remove such encroachment and deliver possession of the land, building, space or other property encroached upon to the mutawalli of the Wakf. Sub-section (4) says that nothing contained in sub-section (3) shall prevent any person aggrieved by the order made by the CEO under that sub-section from instituting a suit in a Tribunal to establish that he has right, title or interest in the land, building space or other property. The proviso to the said subsection, however, says that that no such suit shall be instituted by a person who has been let into possession of the land, building, space or other property as a lessee, licensee or mortgagee by the mutawalli of the Wakf or by any other person authorized by him in that behalf. Therefore, any person aggrieved, which person could be a lessee, licensee or mortgagee, by an order of the CEO under Section 54(3), can institute a suit before a Tribunal to establish his right, title or interest in land, building etc., as contemplated under Section 54(4). But the proviso bars an aggrieved, if he is a person who has been let into possession of the land, building, space or other property as a lessee, licensee or mortgagee by the mutawalli of the Wakf or by any other person authorized by him in that behalf, from filing such a suit.

16. A question may then arise as to the necessity of bringing in Section 3(ee) in the definition clause of the Act by way of amendment in the year 2013, if the term 'encroacher' in Section 54 (1) already took within its ambit a tenant, lessee, licensee or a mortgagee also. The statement of objects and reasons to Act 27 of 2013, under clause (ii) to the heading "*The major issues which required to*

be addressed urgently are as mentioned below" reads -

> "(ii) Encroachment on wakf properties: Many wakf properties are on prime urban lands. With the fast phase of urban growth, such wakf properties are consistently getting encroached, depriving the benefits to the community and thus contrary to the object of such auqaf. In some cases, such alienation takes place owing to acts of commission or omission by mutuawallis and concerned State Wakf Boards. The procedure prescribed for removal of encroachments is long drawn and generally ineffective. Therefore, the provisions of the Act are required to be strengthened to deal effectively the issues of encroachments and alienation of wakf properties." (Emphasis supplied)

Section 3 (ee) reads -

> "'encroacher' means any person or institution, public or private, occupying waqf property, in whole or part, without the authority of law and includes a person whose tenancy, lease or licence has expired or has been terminated by muthavalli or the Board."

17. Therefore, as argued on behalf of the mutawalli and the Board, it seems that the amendment was brought in only to strengthen the provisions of the Act to effectively deal with the issue of encroachment of wakf properties. By the amendment, nothing new has been introduced into the Act as the unamended provisions of Section 54 did include within its ambit a tenant or lessee also which is apparent from a reading of subsection (4) and its proviso. Even otherwise, as long as Rule 2(ha) continues to be in the statute book, this Court cannot ignore the same. As per the Rule, 'encroachment' means occupation of any wakf property without authority for such occupation and it includes the continued occupation of the property by any person even after the authority by way of grant or otherwise by which he was granted permission to occupy the property, has expired. Therefore, it is clear that the Rule takes in a lessee, tenant or licensee, who continues in occupation even after the expiry of the lease, tenancy or license.

18. Now to Section 83 of the Act, which before and after amendment reads –

S. 83 BEFORE AMENDMENT	**S.83 AFTER AMENDMENT w.ef. 01/11/2013**

83. Constitution of Tribunals, etc.— (1) The State Government shall, by notification in the Official Gazette, constitute as many as Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a Wakf or Wakf property under this Act and define the local limits and jurisdiction under this Act of each of such Tribunals.	**83. Constitution of Tribunals, etc.-** (1) The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, 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 Wakf 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 Wakf.	(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.
(3),(4),(5), (6),(7),(8),(9) - these subsections not relevant here and so not quoted.	(3), (4), **(4-A),** (5), (6), (7), (8), (9)- these sub-sections not relevant here and so not quoted.

19. By the amendment, the original jurisdiction of the Tribunal referred to in sub-section (1) has been expanded by including the jurisdiction to adjudicate on eviction of tenant or determination of rights and obligations of a lessor or lessee of a wakf property. The other major change brought in by way of the aforesaid amendment is to sub-section (4) of Section 83, by which the constitution of the Tribunal has been changed. We are not concerned with the same in the present proceedings. Suffice it to refer to sub-sections (1) and (2) of Section 83, dealing with the power of a wakf Tribunal constituted under Section 83(1) of the Act.

20. The learned counsel appearing for the mutawalli submitted that sub-section (1) of Section 83 deals with the original jurisdiction whereas sub-section (2) deals with the appellate jurisdiction of the Tribunal. According to the learned counsel, provisions in a statute providing for or containing different remedies or empowering or conferring two different jurisdictions on an Authority or Tribunal suffers from no infirmity and to substantiate this argument, referred to the dictum of the Hon'ble Supreme Court in **Power Machines India Ltd v. State of Madhya Pradesh** [2017 K.H.C. 6319]. In the said case, it has been held that it is open to the Legislature to legislate different remedies which may sometimes be even inconsistent. It is a question of electing a remedy and that election of a remedy would depend upon the choice of the aggrieved.

21. Reference was also made to the decision of the High Court of Bombay in **Central India AYUSH Drugs Manufactures Association, Nagpur v. State of Maharashtra** [2016 K.H.C. 4512 : A.I.R. 2016 Bombay 261]. In this case the court noticed that original and appellate powers have been conferred on the National Green Tribunal (N.G.T.). It was also noticed that the scheme of the N.G.T. Act does not permit the NGT to decide upon the vires of any of the enactments which confer appellate or other jurisdiction upon it and does not empower it to examine the validity of any Rules or Regulations made under the enactment.

22. A reading of the various provisions of the Act will show that a Tribunal constituted under Section 83(1) has been given both original as well as appellate jurisdictions. As per sub-section (1), the State Government can constitute as many Tribunals as it thinks fit for the purpose of determination of any dispute, question or other matter relating to Wakf or Wakf property. After the amendment in the year 2013, the Tribunal has also the power to decide on the eviction of a tenant or determination of rights and obligations of a lessor or lessee of wakf property. Therefore, the Tribunal can be moved by any aggrieved person for the adjudication of the disputes referred to in sub-section (1). Sub-sections (3) and (4) of Section 39 and Section 94 are some of the other provisions which indicate the original jurisdiction of the Tribunal that can be invoked by the aggrieved person concerned. S.39 deals with the power of the Board in relation to wakf which has ceased to exist. Sub-section (3) says that if the Board has reason to believe that any building or other place which was being used for religious purpose or charity has ceased to be used for that purpose, make an application to the Tribunal for an order directing the recovery of such building or other place. Sub-section (4) deals with the orders that can be passed by the Tribunal in the event it is moved under sub-section (3). S.94 deals with the power of the Board to make an application to the Tribunal in case of failure of a mutawalli to discharge his duties. Sub-section (2) says that if the Board moves such an application, it can pass such orders as it thinks fit. Therefore, in addition to the disputes referred to in Section 83(1), the Tribunal has the original jurisdiction to decide or adjudicate on the

disputes or matters referred to hereinabove.

23. Sub-section (2) of Section 83 on the other hand, deals with the appellate jurisdiction of the Tribunal, which says that any mutawalli or a person interested in a wakf or any other person aggrieved by an order made under this Act can make an application to the Tribunal for the determination of any dispute, question or other matter relating to the waqf. This is apparently the appellate jurisdiction of the Tribunal. Section 64 of the Act deals with the power of the Board to remove a mutawalli on any of the grounds mentioned in clauses (a) to (k) of Section 64(1). Section 64(4) says that a mutawalli, aggrieved by an order passed by the Board under clauses (c) to (i) of sub-section (1), may appeal against the said order to the Tribunal. Section 67 deals with supervision and supersession of Committee of management. Section 67(2) says that if the Board is satisfied that a Committee referred to in sub-section (1) is not functioning properly and satisfactorily or that the wakf is being mismanaged and that in the interest of its proper management, it is necessary so to do, can pass an order superseding such Committee. The proviso to Section 67(4) says that any person aggrieved by an order made by the Board under sub-section (2) may prefer an appeal to the Tribunal. Section 69(1) deals with the power of the Board to frame scheme for administration of wakf. The proviso to sub- section (3) to Section 69 says that any person aggrieved by an order made under the Section may prefer an appeal to the Tribunal. Section 73 deals with the power of the CEO to direct banks or other person to make payments. Sub-section (3) says that any bank or person who has been ordered to make a payment may prefer an appeal against such order to the Tribunal. These are the instances where the appellate jurisdiction of the Tribunal can be invoked.

24. In the light of the aforesaid provisions, the argument that sub-section (1) of Section 83 does not deal with the original jurisdiction of the Tribunal and that it merely refers to the power of the State Government to constitute as many Tribunals as it thinks fit, does not appear to be correct. It is certainly true that the power of the Government to constitute Tribunals is contained in the said sub-section. The said constitution of the necessary number of Tribunals is for the purpose of determining the disputes referred to in sub-section (1) and also the matters under subsection (4) of Section 39 and Section 94. This can only be the original jurisdiction of the Tribunal. Sub-section (2) of Section 83 on the other hand, deals with the appellate jurisdiction of the Tribunal, which is clear from a reading of the same as well as the various sub-sections of Sections 64, 67, 69 and 73 referred to hereinabove. Legislature has rightly or wrongly conferred such jurisdiction on the Tribunal, which is neither inconsistent nor infirm, and even if it be so, the same cannot be challenged in a proceeding of this nature.

25. Further, as held by the Hon’ble Supreme Court in **Power Machines India Ltd** (*Supra*) it is open to the Legislature or it is at liberty to legislate different remedies which may even be inconsistent and it is the option of the person concerned who wants to invoke the remedy to choose between the different or various remedies. In the case on hand, there is apparently no conflict or inconsistency between the remedy available under Section 54 and Section 83. During the pre-amendment stage, the CEO on his own motion or on receipt of a complaint that there has been an encroachment on any wakf property, after serving notice on the encroacher and after making an inquiry as prescribed, if satisfied of the encroachment, had the right to order the encroacher to remove the encroachment and deliver vacant possession of the property to the mutawalli concerned.

If the encroacher refused to comply with the order, the CEO by virtue of Section 55 could move the Sub Divisional Magistrate concerned to get the order executed, if necessary, with police assistance also. However, after the amendment the position has changed. Now the CEO cannot order eviction, but once he is convinced after following the procedure contemplated under sub-sections (1), (2) and (3) that the encroachment is on wakf property, he can move the Tribunal under Section 83(1) to get the encroachment removed or the encroacher evicted. Therefore, before the amendment of Section 54 in the year 2013, the CEO did have the power to order eviction under the Section, which power is certainly different from the one contained under Section 83(1) and (2), which apparently deals with the power of the Tribunal to deal with disputes referred to therein.

26. Now coming to the various decisions submitted on behalf of the tenant in support of the argument that only the

Civil Court

is empowered to order eviction. In **Ramesh Gobindram** (*Supra*) the question considered was whether the Wakf Tribunal constituted under S.83 of the Act was competent to entertain and adjudicate disputes regarding eviction of the appellants who were occupying Wakf properties. The Hon'ble Supreme Court held that, from a conjoint reading of the provisions of S.6 and S.7 of the Act, it is clear that the jurisdiction to determine whether or not a property is a wakf property or whether a wakf is a Shia wakf or a Sunni wakf rests entirely with the Tribunal and no suit or other proceeding can be instituted or commenced in a Civil Court in relation to any such question after the commencement of the Act. Under S.6 read with S.7 the institution in a

Civil Court

is barred only in regard to questions that are specifically enumerated therein. The bar is not complete so as to extend to other questions that may arise in relation to the wakf property. It held that a plain reading of Section 85 would show that the

Civil Court

's jurisdiction is excluded only in cases where the matter in dispute is required under the Act to be determined by the Tribunal. The words "which is required by or under this Act to be determined by Tribunal" holds the key to the question whether or not all disputes concerning the wakf or wakf property stand excluded from the jurisdiction of the Civil Court. Whenever a question arises whether "any dispute, question or other matter" relating to "any wakf or wakf property or other matter" falls within the jurisdiction of a

Civil Court

, the answer would depend upon whether any such dispute, question or other matter is required under the Act to be determined by the Tribunal constituted under the Act. If the answer is in the affirmative, the jurisdiction of the

Civil Court

would be excluded *qua* such a question, for in that case the Tribunal alone can entertain and determine any such question. The bar of jurisdiction contained in S.85 is in that sense much wider than that contained in S.6(5) read with S.7 of the Wakf Act. While the latter bars the jurisdiction of the Civil Court only in relation to questions specified in S.6(1) and S.7(1), the bar of jurisdiction contained in S.85 would exclude the jurisdiction of the Civil Courts not only in relation to matters that specifically fall in S.6 and S.7 but also other matters required to be determined by a Tribunal under the Act.

26.1. Referring to Section 83, the Apex court held that there is nothing in the Section to suggest that it pushes the exclusion of the jurisdiction of the Civil Courts to beyond what has been provided for in S.6(5), S.7 and S.85 of the Act. It simply empowers the Government to constitute a Tribunal or Tribunals for determination of any dispute, question or other matter relating to a wakf or wakf property which does not *ipso facto* mean that the jurisdiction of the Civil Courts stands completely excluded by reason of such establishment. The expression "for the determination of any dispute, question or other matter relating to a wakf or wakf property" appearing in S.83(1) also appears in S.85 of the Act. S.85 does not, however, exclude the jurisdiction of the Civil Courts in respect of any or every question or disputes only because the same relates to a wakf or a wakf property. S.85 in terms provides that the jurisdiction of the

Civil Court

shall stand excluded in relation to only such matters as are required by or under this Act to be determined by the Tribunal. The crucial question that shall have to be answered in every case where a plea regarding exclusion of the jurisdiction of the

Civil Court

is raised is whether the Tribunal is under the Act or the Rules required to deal with the matter sought to be brought before a

Civil Court

. If not, the jurisdiction of the

Civil Court

is not excluded. But if the Tribunal is required to decide the matter, the jurisdiction of the

Civil Court

would stand excluded.

26.2. In the aforesaid decision, the Apex court also held that the contrary view taken by this Court in **Aliyathammada Beethathabiyappura Pookkoya Haji v. Pattakkal CheriyaKoya: AIR 2003 Kerala 366**, is not good law.

27. In **Board of Wakf, West Bengal v. Anis Fatma Begum, 2010 (4) KHC 866,** it has been held that all matters pertaining to wakfs or wakf property are to be entertained by the Tribunal and not by the Civil Court or High Court. The dictum in **Gobindram** (*Supra*) was referred to and differentiated by holding that the said case dealt with an eviction dispute, whereas the dispute involved in the case under consideration was from a judgment questioning the demarcation of wakf property.

28. In **Faseela** *(Supra)*, the dispute was whether a suit for eviction by the landlord of a tenant of wakf property, is triable by a civil court or a Tribunal. It was held that the decision in **Gobindram** is squarely applicable and concluded that the suit for eviction of a tenant from the wakf property can only be filed before a civil court.

29. The next decision referred to on behalf of the tenant is **Punjab Wakf Board** *(Supra)*. Two appeals were considered in the said case. In the case wherein the defendant pleaded that suit

property was not Wakf property, the Apex court held that the same required to be decided by the Wakf Tribunal and the decision to the contrary by the High Court was set aside. In the second suit filed by the Wakf Board for possession of suit property and injunction before the Tribunal, it was held that dispute was fully covered by the ratio laid down in **Ramesh Gobindram** (*supra*). Therefore, the decision of the High court allowing the revision petition relying on the dictum in **Ramesh Gobindram** was upheld.

30. Relying on the aforesaid decisions, the learned counsel for the petitioner/tenant argued that the CEO even before the amendment of the Act in the year 2013, had no power to order eviction of a tenant and that a suit for eviction of a tenant from a wakf property could only be entertained by a civil court and not by a Wakf Tribunal also.

31. Reference has been made to the following decisions on behalf of the mutawalli. In **Manoj Kumar v. Chief Executive Officer,** 2019 (4) K.H.C. 123 a Division Bench of this Court held that the Board can obtain an order from the Tribunal, directing a tenant who occupies the building, after expiry of the term of lease, to vacate the tenanted premises, without resorting to the provisions under the Kerala Buildings (Lease and Rent Control) Act, 1965. The Bench referred to the dictum in **Faseela** *(Supra)* and held that the facts in the said case were entirely different because the said case dealt with an application filed in the year 2010 before the amendment seeking eviction of a tenant, whereas, the case on hand dealt with an application filed by the Board before the Tribunal, for enforcing an order passed by the Board, in view of the amendment to S.3(ee) of the Act. The dictum in **Faseela** was held to be not applicable as the facts and circumstances involved in both cases were held to be entirely different. It was also noticed that, in **Faseela** *(Supra)***,** the Hon'ble Supreme Court did not have the occasion to consider the legal effect and impact of S.3(ee) inserted by Act 27 of 2013.

32. The aforesaid case apparently deals with the position after the amendment of S.54 of the Act and hence not applicable to the facts of the case on hand.

33. **Hindustan Petroleum Corporation Ltd v. Kerala State Wakf Board,** C.R.P(Wakf)No. 412/2012 is a case in which identical issues have been considered and decided by a Division Bench of this Court. The decision rendered on 13.08.2021 is obviously and apparently after the present reference order. The present reference order is not seen brought to the notice of the court by either side. This court held that as per sub-section (2) of Section 54, prior to its amendment in 2013, if, after considering the objections, received during the period specified in the notice, and after conducting an inquiry in such manner as may be prescribed, the CEO is satisfied that the property in question is wakf property and that there has been an encroachment on such waqf property, he may, by an order, require the encroacher to remove such encroachment and deliver possession of the land, building, space or other property encroached upon to the mutawalli of the wakf. By the amendment to sub-section (3) of Section 54 of the principal Act, the words "he may, by an order, require the encroacher to remove", have been substituted by the words "he may, make an application to the Tribunal for grant of order of eviction for removing". It was held that till the amendment of sub-

section (2) of Section 54 of the Act, by Section 32(a) of the Wakf (Amendment) Act, 2013, the CEO was well within his powers to pass an order requiring the encroacher of a wakf property to remove such encroachment and deliver possession to the mutawalli of the wakf. Regarding the challenge to Rule 2(ha) it was held that in view of the law laid down by the Apex Court in **M/s.K.S.Venkitaraman and Co. (P) Ltd. v. State of Madras** [A.I.R. 1966 S.C. 1089]**; Alpha Chem. v. State of UP** [1991 Supp. (1) S.C.C. 518] and also the judgment of the Division Bench of the Bombay High Court in **Central India AYUSH Drugs Manufacturers Association** (*Supra)*, the challenge against the vires of the Rule could not be raised before the Tribunal in a petition filed under subsection (2) of Section 83 of the Act or before this Court in a civil revision petition filed under the proviso to sub-section (9) of Section 83 of the Act. Finding so, the revision was dismissed.

34. The Division Bench in the first Reference Order refers to the Division Bench decision in **P.E Sarjith v. Misbahul Huda Educational Trust** [C.R.P.(Wakf) No.92/2015] and has disagreed with the same. That is a case in which an application was moved under Section 54 before the CEO by the first respondent therein, a Trust, the owner of the building, in which a shop was occupied by the revision petitioner tenant. The CEO found that the tenant had been continuing in occupation of the room even after the expiry of the licence and so held that he was liable to be evicted. Accordingly, the CEO issued order dated 29.5.2014 directing the petitioner tenant to remove the encroachment from the wakf property on or before 30.6.2014, failing which he was cautioned that necessary application would be made to the Tribunal for execution of the order. Aggrieved, the petitioner tenant filed appeal under Section 83(2) of the Act before the Tribunal. The Tribunal considered the rival contentions and held that as the petitioner tenant had been in possession of the premises before the Act had been amended by Act 27 of 2013, the law applicable is the unamended provisions of S.54. Applying Rule 2(ha) of Kerala Wakf Rules, 1996, the Tribunal held that a person, who is in occupation of wakf property after the authority for such occupation has been determined, is an encroacher liable to be evicted under the Act. The appeal was accordingly dismissed.

34.1 When the matter came up before a Division Bench of this court, it held that the continued occupation of the premises by the petitioner after the termination of the tenancy amounts to encroachment as defined in Rule 2(ha) of the Kerala Wakf Rules. In such circumstances, the Bench rejected the contention of the petitioner tenant that, as the Act did not contain a definition of the term ‘encroacher’ before it was amended by Act 27 of 2013, the ordinary dictionary meaning of the term ‘encroacher’ alone ought to have been looked into. Consequently, no infirmity was found in the finding of the CEO or the Tribunal to the effect that the occupation of the petitioner tenant after the authority for such occupation, viz, the licence arrangement had been terminated, amounted to encroachment in respect of wakf property. On the question whether CEO could have called upon the petitioner to surrender possession of the wakf property, it was held that in terms of Section 54 of the Act as it stood on the date the petition was filed before the CEO, he could after considering the objections if any filed before him, require the encroacher to remove the encroachment from the wakf property and deliver possession of the building to the Mutawalli concerned or the Board. The person aggrieved thereby had the right to institute a suit before the Tribunal to establish his right, title or interest in the land, building, space or other property. The right to institute such a suit was however not available to a person who has been let into possession of the land, building, space or other property as a lessee, licensee or mortgagee by the Mutawalli of the Wakf or by any person

authorized by him in that behalf. The position has changed after Section 54 has been amended. Now under Section 54 of the Act as amended by Act 27 of 2013, the CEO cannot by himself order eviction. He can only issue notice to the encroacher and after considering the objections if any submitted by the encroacher, apply to the Wakf Tribunal for the grant of an order of eviction for removing such encroachment and delivery of possession of the land, building, space or other property encroached upon.

34.2. The Bench did notice that the CEO had issued orders on 29.5.2014, apparently after the Act had been amended. By that order, he directed the petitioner tenant to remove the encroachment from the wakf property on or before 30.6.2014, failing which he was cautioned that necessary application would be made before the Tribunal. The Bench held that on the terms of Section 54 of the Act as it stood after the amendment, the CEO could not have issued an order directing the encroacher to vacate the premises. But the effect of the order passed by CEO was only that if the petitioner tenant did not vacate the premises, it would be open to the former to move the Tribunal for an order directing the petitioner to vacate the wakf property. Hence the contention of the petitioner tenant that the CEO could have only moved a suit before the civil court seeking the petitioner's eviction was found to be without any merit and so was rejected.

35. In **Mercy Baby v. Kerala State Waqf Board,** 2017(4) K.H.C. 381 a Division Bench of this court held that a person aggrieved by an order passed by the CEO may approach the Tribunal under Section 83 and that, his remedy is not to file a writ of certiorari to quash the order of the CEO.

36. In **Hamza Hajee** (*Supra*), a decision rendered after the amendment of Section 54, a Division Bench of this court held that the power for removal of an encroachment is vested only on the CEO and the Wakf Tribunal and that the CEO has no power to delegate such power to any other Officer of the Board.

37. In **Aboobacker C.A. v. Kerala State Waqf Board** [2020 (2) K.H.C. 512], a Division Bench of this court after referring to Section 54 and Rule 82 of the Rules, 2019, held that the satisfaction contemplated under sub-section (3) of S.54, which needs to be arrived at by the CEO, should be on the basis of an adjudication to be conducted, which is basically in the nature of a quasi - judicial proceedings. The satisfaction to be arrived at should be based on proper reasonings after conducting a proper adjudication.

38. In **Darul Huda Masjid Mahallu Committee v. Kokkur Juma Masjid Committee President** [2020 K.H.C. 799], a Division Bench of this Court held that a relief in the nature of removing encroachment, specifically falls under the purview of S.54, particularly since by the amendment made in 2013, the word "encroacher" has been defined in S.3(ee) to mean any person or institution, public or private, occupying wakf property, in whole or part, without the authority of law and includes a person whose tenancy, lease or licence has expired or has been terminated by mutawalli or the Board. It is for the aggrieved to decide whether he wants to move the civil court

with a suit for eviction or the CEO under S.54, for removal of encroachment.

39. In **Sajitha Haris v. Kannavam Charitable Trust, Kannur** [2020 (6) K.H.C. 697], the issue involved was relating to the day-today management of an institution under the wakf. It was held by a Division Bench of this court that the suit was not maintainable before the Tribunal and that the same had to be decided by the civil court.

40. In **Moosakutti Y.C. @ Moosa Moulavi v. Liwa-Ul Huda Islamic Trust** [2021 (1) K.H.C. 218], a Division Bench of this court held that the Tribunal does not have the power to adjudicate a dispute as to whether a property is a waqf property or not unless it is included in the list as spoken of in Chapter II or entered or sought to be entered in the Register maintained under S.37 by the Board. The Board also could *suo motu* or on application of the defendants, proceed under S.37, in which event, the jurisdiction would be with the Tribunal.

41. In **Vasudevan V.K. v. Kerala State Wakf Board** [2022 (1) K.H.C. 423], a Division Bench of this court held that a tenant continuing in possession after the expiry of the lease agreement is an 'encroacher' and so the order of eviction of the CEO under S.54 of the Act after following the procedure under S.54(3) is valid and that it suffers from no infirmity.

42. The learned counsel for the mutawalli also relied on the latest decision of the Hon'ble Supreme Court in **Rashid Wali Beg v**. **Farid Pindari** [Civil Appeal No.6336/2021]. The Hon'ble Supreme Court after referring to its various decisions and also of the different High Courts, held that Section 83(1) provides for the determination of any dispute, question or any other matter, (i) relating to a waqf and (ii) relating to a waqf property. This prescription cannot be taken to have been curtailed or circumscribed by Sections 6(1) and 7(1), to come to the conclusion that the Tribunal will assume jurisdiction only when property is disputed to be a waqf property. To arrive at such a conclusion, the Apex Court relied on the dictum of a three judge Bench in **Kiran Devi v. Bihar State Sunni Wakf Board** [2021 S.C.C. Online S.C. 280].

43. According to the learned counsel for the mutawalli, all the decisions relied on by the petitioner/tenant relate to suits filed before the Tribunal under S.83(1) and not relating to Application(s) filed before the CEO under Section 54 of the Act. Therefore, relying on the aforesaid decisions the argument advanced is that before the amendment of S.54 in the year 2013, it was well within the power of the CEO to pass an order of eviction under the Section.

44. The learned counsel for the Board referred to a Single Bench decision of the Madras High Court, that is, **President, Ameerunnisa Begum Sahiba Endowments v. D. Ganesan** [C.R.P.(PD) No.3723/2019], in which the court agreed with the dictum in **Mechery Vijayakumar** (*Supra*). As stated earlier, the Board endorses the arguments advanced on behalf of the mutawalli.

45. A plain reading of Section 54 before its amendment in the year 2013, makes it clear that the CEO did have the power to pass an order of eviction or removal of an encroacher of wakf property. However, after the amendment of S.54, the CEO no longer has the power to order eviction. On the other hand, he will have to move an application before the Tribunal as contemplated under Section 54(3) of the Act, if he is convinced or satisfied after serving a notice under sub-section (1) on the encroacher and after conducting an inquiry under sub-section (3) that there has been an encroachment on any wakf property. Further, in the light of Rule 2(ha) (before Section 3(ee) came into the statute book), there cannot be a dispute that the term 'encroacher' includes a tenant or lessee also.

46. It is true that the dictum of the Hon'ble Supreme Court in **Ramesh Gobindram** (*Supra*) has not been referred to by the Bench in **P.E.Sarjith** (*Supra*). However, **Ramesh Gobindram** is not applicable to the facts of the said case as the Bench in the said case was dealing with the powers of the CEO under Section 54 and not the powers of the Tribunal under Section 83. In **Ramesh Gobindram** (*Supra*) the Hon'ble Supreme Court dealt with the powers of a Tribunal constituted under Section 83 and the extent to which the jurisdiction of the Civil Court stands barred in the light of Sections 6, 7 and Section 85 of the Act.

47. We agree with the Division Bench decisions in **HPCL** *(Supra)* and **P.E.Sarjith** *(Supra)* as the said cases also dealt with applications under Section 54, which is the case here also. These decisions can be distinguished from the decision of the Hon'ble Supreme Court in **Ramesh Gobindram** *(Supra)* as the Hon'ble Supreme Court in the said case was dealing with a completely different fact situation, that is, suits that could be filed before the Tribunal under Section 83(1) and was not dealing with applications filed before the CEO under Section 54. Under these circumstances, we find that, the CEO under Section 54, before the amendment of Section 54 in the year 2013, had every right to order eviction of an encroacher, and that the term 'encroacher' takes within its ambit a tenant, lessee or mortgagee also. Points (i) to (iii) in the first reference order are answered accordingly.

48. Now coming to points (i) to (iii) in the second reference order, **Hamza Hajee P.K. v. Kerala State Wakf Board** [2019 (2) K.H.C. 527 : I.L.R. 2019(2) Kerala 378], is a decision rendered by a Division Bench of this Court on 03/04/2019**.** This is a case in which the CEO authorized the Divisional Officer of the Board to initiate and take steps for eviction of a tenant from a wakf property after the expiry of the tenancy. The main challenge in the writ petition was against the competence of the Divisional Officer to initiate proceedings under Section 54 of the Act. The Division Bench held that by virtue of Section 54, the power for removing encroachment is vested only on the CEO and on the Tribunal. The CEO himself has to initiate the proceedings under Section

54. He is bound to conduct an inquiry based on the objection if any received from the alleged 'encroacher'. On being satisfied about the encroachment, the CEO is bound to approach the Wakf Tribunal for getting an order of removal of the encroachment. There is no provision in the Act or under the Wakf Properties Lease Rules, 2014 authorizing the CEO to delegate such powers to any other officer of the Board. Therefore, the Bench held that the steps initiated by the Divisional Officer for removing the petitioner from the occupation of the shop room, on the basis that he is an 'encroacher', are without jurisdiction or competence. Hence the proceedings initiated by the Divisional Officer was quashed.

49. **Jamal v. Union of India** [2020 (2) K.L.T. 619] was rendered by another Division Bench of this Court on 03.02.2020. The legal question that arose in the case was– Does the Junior Superintendent of the Board have the power to issue a notice under S.54(1) of the Act? The Division Bench held that the comprehensive procedure contemplated under sub-sections (1) to (3) of S.54 read with Rule 82 of the Kerala State Waqf Rules, 2019, would clearly indicate that, the powers vested and the exercise necessitated upon by the CEO, even though administrative in nature, is a power to be exercised based on materials made available before him, after hearing the parties and after conducting an inquiry. Therefore, it assumes all the characteristics of a quasi - judicial function, which the law requires to be exercised in some respects as if it were judicial. In the impugned notices, the Junior Superintendent had merely informed the petitioners that a complaint had been received with respect to the alleged encroachment of the shop rooms in the waqf property and therefore the petitioners were requested to appear before the CEO at the time and place mentioned therein and to submit their written version on or before the mentioned date and time, failing which, the matter would be heard and decided in the absence of the petitioners. Referring to S.54(1) the Bench held that, proceedings need to be initiated by the CEO either on receiving any complaint or on his own motion, when he considers that there has been an encroachment on any building which is a waqf property and which is registered under the Waqf Act. Therefore, the quasi - judicial function vested on the CEO starts with an initial consideration regarding the alleged encroachment, either on the basis of a complaint received or on his own motion. The exercise of such consideration and the issuance of the show cause notice, has to be done by the CEO himself. The notice seen issued by the Junior Superintendent in the case did not indicate anything about the consideration of the complaint by the CEO. A preliminary subjective satisfaction by the CEO that there has been an encroachment, was seen to be totally lacking in the notices. In a proceeding under S.54 of the Act, the Officer specially authorized is the CEO and therefore the notice can be issued only by him and it can be caused to be served through any Officer authorized on that behalf. As the impugned notices did not indicate that they were issued by the CEO or under orders of the CEO, it held that the impugned notices could not be sustained legally as one issued by the CEO or as a notice issued on behalf of the CEO. Hence, the writ petition was allowed and the notices as well as the proceedings initiated on the basis of such notices, were quashed. The Division Bench referred to and agreed with the dictum in **Hamza Hajee** *(Supra).*

50. **Mechery Vijayakumar v. Kinassery Yateem Khana** [2020 (1) K.L.J. 978] was rendered by a Division Bench of this Court on 07.02.2020. In this case, a suit was filed before the Tribunal seeking eviction of the revision petitioner tenant from a wakf property on termination of the lease. The suit had been initially instituted on 11.06.2014 before the

Munsiff Court

, Kozhikode, that is, after the amending Act No.27/2013 had come into force. Following the finding

of the Munsiff court that the civil court has no jurisdiction to entertain the suit, it was returned and presented before the Tribunal. The suit was decreed by the Tribunal. Aggrieved by the decree dated 25.05.2019, the tenant filed the revision petition. The question that *inter alia* arose in the revision was whether the Waqf Tribunal has jurisdiction to entertain a proceedings for eviction and recovery of arrears of rent. The Division Bench rejected the challenge raised by the petitioner tenant against the finding of the Tribunal rejecting the contention that the Tribunal has no power to entertain the suit since S.85 of the Act does not admit a suit for eviction and arrears of rent within the scope, scheme and ambit of the Act. Relying on S.85, it was canvassed by the petitioner therein that, as the Act does not provide for reliefs to the lessor of a property for eviction of a tenant and recovery of arrears of rent, the Tribunal has no jurisdiction over the subject matter of the suit and the appropriate forum for seeking the said reliefs is an ordinary civil court as held by Hon'ble Supreme Court in **Ramesh Gobindram** (*Supra*) followed by **Punjab Wakf Board** (*Supra*).

50.1. The Bench held that the said decisions have neither any relevance to the facts of the case nor do they bar institution of suits for eviction and arrears of rent before the Tribunal, after Act No.27 of 2013, amending the Act which came into force with effect from 01.11.2013. S.83 of the Act as it stood previously before the aforesaid amendment did not provide for determination of disputes between lessor and lessee and for eviction of a tenant or recovery of arrears of rent. After the amendment, it specifically provides that the Tribunal has jurisdiction to entertain legal proceedings for eviction of a tenant or determination of rights and obligations of lessor and lessee of Waqf property. It further held that, looking at S.54(4) of the Act, it could be seen that the exercise of power of the Tribunal to order eviction of Waqf property in the occupation of the tenant could arise only on the motion of the CEO of the Board, who is to, first of all, satisfy himself that the person liable for eviction from the tenanted premises is an encroacher. Under S.3(ee) of the Act, a tenant who continues to occupy the tenanted premises after termination of tenancy is also an 'encroacher'. Neither the Act nor the Waqf Properties Lease Rules, 2014, prohibit a Mutawalli from suing for eviction and arrears of rent, since none of the provisions aforesaid either expressly or impliedly debar the mutawalli of a Waqf from approaching the Tribunal with a civil suit seeking the aforesaid reliefs. S.54(4) read with R.23 and R.24 of Waqf Properties Lease Rules, 2014, only provide for one of the legal modes of eviction of tenant from the premises and recovery of arrears of rent through the CEO. Existence of such an alternative mode of legal proceeding prescribed by the Act and the Rules is no legal bar to a mutawalli of a waqf bringing a suit for eviction and arrears of rent by himself before the Tribunal. Right of a lessor under the Transfer of Property Act, 1882 to sue for eviction of tenant with arrears of rent is neither impaired nor abrogated by the scheme of the Act. Mutawalli being a person who creates lease and entitled to receive the rent, is in the position of a lessor, having regard to the provisions of Transfer of Property Act. The right of a lessor to sue for eviction and arrears of rent under the general law is indefeasible and is honoured and preserved by S.83 and S.85 of the Act. Therefore, the Bench held that the Tribunal had rightly entertained the suit for eviction and arrears of rent filed by the Mutawalli. The decree passed by the Tribunal for eviction and arrears of rent was held to be perfectly in order, not suffering from any illegality or impropriety and hence the impugned decree was confirmed and the revision dismissed.

51. There is no apparent conflict or conflict for that matter between the aforesaid three judgments. The first two decisions, namely, **Hamza Hajee** (*Supra*) and **Jamal** (*Supra*) only dealt with the question as to who could initiate proceedings under sub-section (1) of S.54 for removal of

encroachment on wakf property. In both the cases it has been held that it is only the CEO and none other who can initiate proceedings for removal of encroachment under sub-section (1) of Section 54 and that the CEO has no power to delegate the said power to any other person or other officer of the Board. As answered by us in the first reference order, before the amendment of Section 54, the CEO under sub-section (3) of Section 54 could order removal of encroachment after complying with the procedure contemplated under sub-sections (1), (2) and (3). Before the amendment of Section 83, in the light of the dictum of the Hon'ble Supreme Court in **Ramesh Gobindram** (*Supra*), a suit for eviction of a tenant could not be filed before the Tribunal under sub-section (1) of Section 83. The remedies available under Section 54 and Section 83 of the Act are completely different and before two different authorities, that is, the former is an application before the CEO and the latter a suit before the Tribunal. Pursuant to the amendment of the year 2013, the position has changed and now the CEO is no longer empowered to order removal of encroachment. On the other hand, he will have to move the Tribunal for removal of any encroachment from wakf property or for eviction of a tenant, lessee etc. if he is satisfied of the encroachment or of the unauthorized occupation of a wakf property.

52. In **Mechery Vijayakumar** (*Supra*), a completely different issue has been considered. In the said case, the authority or competence of a mutawalli to file a suit for eviction before the Tribunal under Section 83(1) was challenged. It needs to be noticed that all the three judgments have been rendered after the amendment of the Act in the year 2013. The Hon'ble Supreme Court in **Ramesh Gobindram** (*Supra*) and in the subsequent decision considered the pre-amendment scenario and held that only matters which require to be decided by the Tribunal as per the Act could be adjudicated by the Tribunal and that the jurisdiction of the

Civil Court

under Section 85 is not barred in other cases or disputes. A suit for eviction of a tenant or lessee, as per the said dictum, is not a matter that required to be adjudicated under the Act by the Tribunal and hence the Supreme Court held that such a suit could be filed only before the

Civil Court

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Apex Court

in **Ramesh Gobindram** (*Supra*) never had the occasion to consider the amended Section 83. The Division Bench has only held that two remedies are available under the Act, that is, one under Section 54(4) and the other under Section 83(1). The one under Section 54 can be initiated by the CEO by issuing a notice to the encroacher and if the former is satisfied after considering the objections if any filed by the latter, that there has been an encroachment into the wakf property, then he can move the Tribunal for necessary orders. The second remedy under Section 83(1) can be resorted to by the mutawalli, in case he is the lessor of the wakf property by moving the Tribunal directly by filing a suit for eviction. The dictum in no way is in conflict with the dictum in **Hamza Hajee** or **Jamal** (*Supra*).

53. The dictum in **Mechery Vijayakumar** (*Supra*) is also not against the binding precedents of the Hon'ble Supreme Court in **Ramesh Gobindram** (*Supra*) and **Punjab Wakf Board** (*Supra*). At the risk of repetition, we reiterate that in **Ramesh Gobindram** and **Punjab Wakf Board** (*Supra*), the

Apex Court

was considering the unamended Section 83 of the Act. In the said cases the Hon'ble Supreme Court

never had the occasion to consider Section 3(ee) or the amended provisions of Section 83(1) as per which the jurisdiction of the Tribunal has been expanded to include the jurisdiction to decide disputes relating to eviction of a tenant or determination of the rights and obligations of a lessor and lessee of wakf property. It was in the pre-amendment scenario that the

Apex Court

held that under Section 83(1), the Tribunal had no power to entertain a suit of eviction. The dictum in **Ramesh Gobindram** (*Supra*) cannot be applied to disputes which have arisen after the amendment to the Section has been brought in. That being the position we find that the Division Bench in **Mechery Vijayakumar** (*Supra*) has not gone wrong and that the dictum is not against the binding precedent of the Hon'ble Supreme Court in the aforesaid decisions. Points (i) to (iii) in the second reference order are answered accordingly.

The references are answered as follows: -

Reference Order in C.R.P.(WAKF) No. 718 of 2014 -

The dictum of the Division Bench in **P.E.Sarjith v. Misbahul Huda Educational Trust** [C.R.P. (Wakf) No.92/2015] lays down the correct law and is not rendered against the binding precedent laid down by the Hon'ble Supreme Court in **Ramesh Gobindram v. Sugra Humayun Mirza Wakf** [A.I.R. 2010 S.C. 2897] and **Faseela M. v. Munnerul Islam Madrassa Committee** [2014 K.H.C. 4405].

Reference Order in C.R.P.(WAKF) No. 38 of 2019 -

There is no conflict between the three Division Bench decisions of this Court in **Hamza Hajee P.K. v. Kerala State Wakf Board** [2019 (2) K.H.C. 527 : I.L.R. 2019 (2) Kerala 378]; **Jamal v. Union of India** [2020 (2) K.L.T. 619] and **Mechery Vijayakumar v. Kinassery Yateem Khana** [2020 (1) K.L.J. 978]. They are also not in conflict with the binding precedent of the Hon'ble Supreme Court in **Ramesh Gobindram v. Sugra Humayun Mirza Wakf** [A.I.R. 2010 S.C. 2897] and **Punjab Wakf Board v. Sham Singh Harike** [(2019) 4 S.C.C. 698].

The references are answered accordingly. The civil revision petitions shall be placed before the Bench concerned as per roster.

Result of the Case:

References answered.

Headnote prepared by M.S.