

(1984) 04 AHC CK 0024
In the Allahabad High Court
Case No : Writ Petition No. 706 of 1978

Afzal Husain

APPELLANT

Vs

Ist Addl. District Judge and Others

RESPONDENT

Date of Decision : 23-04-1984

Acts Referred:

Uttar Pradesh Muslim Waqfs Act, 1960 — Section 29, 29(8), 30, 33(1), 33(2)

Citation : AIR 1985 All 79

Hon'ble Judges : S.C. Mathur, J

Bench : Single Bench

Advocate : R.K. Srivastava and Pradeep Kant, for the Appellant; Haider Abbas, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Mathur, J.—Afzal Husain, son of Altaf Husain has directed this petition against the proceedings taken by Shia Central Board of Waqfs U. P., opposite party No. 3, for his eviction from house No. 68/218 and the appurtenant land situate at Mohalla Bari Hat, district Bahraich.

2. On 7-10-1977 the Collector Bahraich issued an order to the petitioner stating therein that he had received a requisition from the Secretary Shia Central Board of Waqfs u/s 57A(i) of the U. P. Muslim Waqfs Act, 1960 regarding petitioner's unauthorised occupation of the property described in the order and requiring the petitioner to deliver possession of the said property to the Shia Central Board of Waqfs U. P. within a period of 30 days from the date of service of the order. In this order it was also stated that if the petitioner failed to deliver possession to the Waqf Board, ejectment proceedings shall be initiated against him as laid down in Rule 7 of the U. P. Muslim Waqfs (Recovery of Waqf Property) Rules, 1972. A copy of this order has been filed as Annexure No. 1 to the writ petition, on receipt of this order the petitioner preferred appeal u/s 49B(4) of the Act before the learned District Judge Bahraich which was transferred for hearing to the learned 1st Additional District Judge, Bahraich. A copy of the memorandum

of appeal is Annexure 2. The stand taken before the appellate Court by the petitioner was thus : --

(i) The property in dispute is neither Waqf property nor is it entered as property of Waqf in the register of Waqfs maintained in the office of the Shia Central Board of Waqfs UP.;

(ii) In view of the fact that the property was neither Waqf property nor it was entered in the register of Waqfs, the Board could not send requisition u/s 57A(i) to the Collector and therefore the Board's requisition and the Collector's order were invalid and without jurisdiction;

(iii) The enquiry, if any, made by the Board prior to the issue of the requisition to the Collector was a farce and was not conducted in accordance with the rules, therefore also the Board's requisition and the Collector's order are invalid and illegal;

(iv) The property belonged to the petitioner's uncle Sri Akhtar Husain who died leaving the petitioner his nearest heir, and as such heir, on the death of Sri Akhtar Husain the petitioner has become owner of the disputed property and this ownership continues;

(v) The petitioner resided in the house in the lifetime of Sri Akhtar Husain and continued to reside therein even after his death and in this manner he has been in occupation of the property for the last 30 years and he is not in unauthorised occupation of the property in question.

3. The appeal was dismissed by the learned 1st Additional District Judge, Bahraich by his judgment and order dated 13-2-1978, Annexure 3. The learned appellate Judge was of the opinion that the pleas raised by the petitioner could not be entertained in an appeal filed u/s 49B(4) of the Act because in the appeal the Court could only consider the validity of the Collector's order and not of the requisition sent by the Board. It was also observed that to challenge the validity of the requisition the petitioner may have the remedy of regular suit but the remedy of appeal was not available. Aggrieved by this order of the appellate Judge the petitioner has approached this Court under Article 226 of the Constitution.

4. In the present writ petition the petitioner has repeated the challenge made by him before the learned appellate Judge and has submitted additionally that the pleas raised by him raise the question of inherent jurisdiction of the Board and the Collector to act u/s 57A and if the facts alleged by him are found to be correct, the Board's requisition and the Collector's order will be non est in the eye of law and such a question can be gone into even by executing Court or authority and consequently by the Court hearing the appeal against the order of the executing authority. It has also been submitted that Section 57A is ultra vires of the Constitution. It may be stated that no arguments were advanced by the learned counsel for the petitioner on the constitutional validity of Section 57 A

and therefore this challenge does not require consideration.

5. The writ petition has been opposed by the Shia Central Board of Waqfs U. P., opposite party No. 3, hereinafter called the Waqfs Board. The Waqf Board has not disputed that Sri Akhtar Husain was originally the owner of the property in dispute but it has contended that the said Sri Akhtar Husain executed a registered deed of Waqf on 26-3-1968 dedicating the property in dispute for religious and charitable purposes. This waqf, according to the Waqfs Board, is known as " Waqf Akhtar Husain Khan Saheb". It is also claimed that the waqf was registered in the office of the Waqf Board u/s 29 of the U P. Muslim Waqfs Act, 1960, for short "Waqfs Act", and a registration certificate was issued on 22-7-1968. The Waqfs Board has also placed on record the Gazette Notification dated 4-11-1972 regarding registration of the waqf as a Shia Waqf by the name hereinbefore referred to. A copy of the notification is Annexure S. C. A2 to the supplementary affidavit To the said supplementary affidavit has been annexed as Annexure S.C.A1 an extract from the register of waqfs maintained u/s 39 of the U. P. Muslim Waqfs Act, 1936 and continued u/s 30 of the Waqfs Act, 1960. It is asserted on behalf of the Waqfs Board that the registration of a Waqf can only be challenged through a reference u/s 29(7) of the Waqfs Act and no reference having been claimed by the petitioner under the said provision, the registration of the waqf has become final and it is not open to challenge at the instance of the petitioner in the present proceedings. It is also claimed by the Waqfs Board that the requisition was sent to the Collector after due enquiry of which the petitioner was given sufficient notice.

6. At this stage it may be pointed out that no formal counter affidavit to the writ petition was filed on behalf of the Waqfs Board After the petitioner had obtained an interim order from this Court against his eviction, the Waqfs Board moved C.M. Application No. 2195(W) of 1978 for vacation of the said order. This application was accompanied with the affidavit of Sri Rahmat Husain who described himself as a Court clerk in the office of the Shia Central Board of Waqfs. Thereafter a supplementary affidavit dated 17-1-1984 was filed by Sri Masood Husain, who described himself as a Mukhtar and Court clerk of the Shia Central Board of Waqfs, opposite party No. 3. These two affidavits have been relied upon on behalf of the Waqfs Board for contesting the writ petition.

7. The first question that arises for consideration is whether the Waqf in question is registered as a Shia Waqf in the register of Waqfs maintained u/s 30 of the Waqfs Act As already stated hereinabove the Waqf Board has placed on record the notification issued under the authority of the Shia Central Board of Waqfs on 4-11-1972. A perusal of this notification, Annexure S. C. A. 2, shows that the waqf in question was registered as "Waqf Akhtar Husain Khan Saheb". In column No. 2 the name of the waqf is stated as Akhtar Husain Khan Saheb. The Waqf has been described to be wholly religious and charitable. Regarding the properties comprised in the waqf it is stated that the details of the said property are available in the office of the Shia Central Beard of Waqfs Uttar Pradesh, Nabi

Ullah Road, Lucknow. This document shows that a waqf by the name of Waqf Akhtar Husain Khan Saheb was registered u/s 29 of the U. P. Muslim Waqfs Act, 1960. So far as the properties owned by the waqf are concerned the Waqf Board has relied upon Annexure S.C.A1. A perusal of this document shows that the register was started u/s 39 of the U. P. Muslim Waqfs Act (Act 13 of 1936) and is being continued u/s 30 of the U. P. Muslim Waqfs Act, 1960. In this register the waqfs property is described as follows: --

"Ek Qita Makkan Qimti 5000/- Bamoojib Hudood Arba Tahrir Registered, Waqf Nama Registered Waqe Bari Hat, Bahraich."

At the bottom, the boundaries of this property have been given. The boundaries described in this document are as follows:--

" East -- Public Road. West-- House of (Illegible) Bhoj. North -- House of Rahim Bux Naddaf. South -- House of Abdul(illegible)."

If the above boundaries are compared with the boundaries mentioned in the Collector's order there is slight discrepancy. In Annexure S.C.A1 on the south is shown the house of Abdul while in the Collector's order the house of Abdul is shown on the north. Similarly in the extract the northern boundary is shown as the house of Rahim Bux while in the Collector's order on the north is shown the house of Abdul Thus, there appears to be inter change of the northern and the southern boundaries. The petitioner did not file any rejoinder affidavit to assert that Annexure S.C.A1 does not relate to the property in dispute. In the circumstance on the slight discrepancy hereinabove mentioned it cannot be said that the property in dispute is not entered as the property of Shia Waqf known as "Waqf Akhtar Husain Khan Saheb" in the register of Waqfs maintained u/s 30 of the Act in the office of the Waqf Board It is; also not the case of the petitioner that apart from the property mentioned in the extract Sri Akhtar Husain Khan Saheb owned any other property to which the registration of the waqf could be related From the documents mentioned herein it is established that the property in dispute is entered as the property of Shia Waqf in the register of the Waqfs maintained u/s 30 of the Waqfs Act, 1960.

8. The next question that arises for consideration is whether the above registration of the waqf and the entry of the property in the register maintained u/s 30 can be challenged in an appeal preferred u/s 49 B(4) of the Act For deciding this question some provisions of the Waqfs Act will require consideration.

9. Registration of Waqfs is dealt with in Chapter III of the Act. u/s 28 of the Act all waqfs which have already been registered under the provisions of the U. P. Muslim Waqfs Act 1936 shall be deemed to have been registered under the provisions of the Waqfs Act 1960. Section 29 provides the procedure for registration of waqf under the Act of 1960. The application made for registration of a waqf u/s 29 is to be signed and verified in the same manner as is provided in Civil PC, 1908 for signing and verification of pleadings. Registration is done under Sub-section,(7). Sub- section (8) of Section 29 provides that any person

aggrieved by an order of the Board under Sub-section (7) may, by application within 90 days from the date of that order, refer the dispute to the Tribunal which shall give its decision thereon. In view of this provision a person aggrieved by the order of the Board registering a waqf is entitled to have the dispute decided by a tribunal provided he makes an application in that behalf within 90 days from the date of the order. After a waqf has been registered u/s 29 it is required to be entered in the register of waqfs which is required to be maintained u/s 30 of the Act. If any question arises whether any property is waqf property the same is to be decided by the Board under Sub-section (1) of Section 33. Against the decision of the Board a reference to the Tribunal is maintainable at the instance of the aggrieved person under Sub-section (2) of the same section. The constitution and the powers of the Tribunal are contained in Chapter IX of the Act u/s 70 falling under this Chapter the Tribunal is to be constituted by the State Government. Under Sub-section (2) the Tribunal is to consist of one person only who shall be a judicial officer of the State Government not below the rank of a Civil Judge. u/s 72 the Tribunal while deciding the dispute is required to follow the same procedure as is prescribed by the Civil P. C., 1908 in regard to suits except where specific provision to the contrary has been made in the Act or the Rules framed thereunder. Under Sub-section (2) of Section 72 the provisions of the Evidence Act 1872 are applicable to the adjudication of a dispute by a Tribunal. The Tribunal gives its award u/s 73. u/s 74 the Tribunal is deemed to be a Civil Court and it enjoys the same powers as are vested in such a court under the provisions of the Civil PC when trying a suit or executing a decree or order. Section 75 provides that no person shall institute any suit or other proceedings in any Civil Court with respect to any dispute or question or other matter which is required or permitted under this Act to be referred to a Tribunal for adjudication. This section thus bars the jurisdiction of the Civil Court in respect of the matters triable by the Tribunal u/s 76 the award of the Tribunal is made final and conclusive. Such an award shall have the force of a decree and it cannot be questioned or appealed against in any Court of law. Under the proviso to this section discretion has been conferred upon this Court to call for and examine the record of any case for the purpose of satisfying itself as to the correctness, legality or propriety of any award made under this Act. This power may be exercised by this Court suo motu or on the application of the Board or of any person aggrieved. From these provisions it would appear that exclusive jurisdiction has been carved out in favour of the Board and the Tribunal in respect of matters which can be decided and dealt with by the Board and the Tribunal. The Court hearing appeal u/s 49B(4) of the Act is different from the Tribunal constituted u/s 70 of the Act. The matters which fall within the exclusive purview of the Board and the Tribunal cannot be agitated before the appellate authority hearing appeal under the said provision. I am, therefore, of the opinion that the petitioner was debarred from disputing the registration of the waqf before the appellate authority in the appeal preferred by him u/s 49 B(4) of the Act. The appellate authority was also debarred from considering the validity of the entry made in the register maintained u/s 30 of the Act. The entry in this

register, it may be pointed out, is consequential to the registration of the waqf u/s 29.

10. A provision very much akin to the above has been prescribed in Chapter I of the Act which deals with survey of Waqfs. u/s 4 falling in this Chapter the State Government appoints a Commissioner of Waqfs for the purpose of making a survey of all Waqf properties in the State or in specified area thereof. Under this provision the State Government is competent to appoint Additional Commissioners and Assistant Commissioners also. For the purpose of identifying the waqfs the Commissioner, Additional Commissioner or Assistant Commissioner appointed u/s 4 have been conferred with powers as are vested in a Civil Court under the Civil P.C., 1908 in respect of matters specified in Clauses (a) to (f) of Sub-section (3) of Section 6. After making the enquiry and identifying the waqfs, the Commissioner, Additional Commissioner or Assistant Commissioner is required to submit his report of enquiry to the Board. After this report has been submitted the State Government is required to notify in the gazette the waqfs relating to particular sects (Sunni or Shia) to which, according to such report, the provisions of this Act shall apply. Section 8 provides that if any dispute arises whether a particular property is waqf property or not or whether a waqf is a Shia waqf or Sunni waqf, the Board concerned or the mutawalli of the waqf or any person interested therein, may, in accordance with the provisions of the Act, refer the dispute for adjudication to the Tribunal. Similar provision regarding identification and registration of waqfs had been made in the U. P. Muslim Waqfs Act, 1936. The procedure prescribed for identification and registration of waqfs under the Act of 1936 was almost similar to the procedure prescribed in the Act of 1960.

11. In the Board of Muslim Wakfs, Rajasthan Vs. Radha Kishan and Others, their Lordships of the Supreme Court were dealing with the effect of registration under the Waqfs Act of 1954 which had been extended to the State of Rajasthan. Under that Act also the procedure for identification and registration of waqfs was very much similar to the procedure prescribed under the U. P. Muslim Waqfs Acts of 1936 and 1960. In this case title was claimed by a Hindu to a property which had been identified and registered as waqf property. Their Lordships held that the said identification and registration was not binding on a non-muslim but so far as Muslims were concerned the said identification and registration was final and binding. In the present case the petitioner is also a Muslim and that too a Shia Muslim and he is therefore debarred from challenging the title of the waqf to the property in dispute in view of the registration u/s 29 and entry of the property in the register of waqfs maintained u/s 30 of the Act.

12. It was next submitted on behalf of the petitioner that the Board did not follow the procedure prescribed by the Act and the Rules framed thereunder before sending the requisition to the Collector and therefore the requisition is invalid and consequently the Collector's order is also invalid. Section 57 A provides as follows : --

"57A(1) If the Board is satisfied after making an inquiry in such manner as may be prescribed that any person is in unauthorised occupation of any immovable property entered as property of a waqf in the register of waqfs maintained u/s 30 it may send a requisition to the Collector within whose jurisdiction the property is situate to obtain and deliver possession of the property to it.

(2) The provisions of Sub-sections (2), (3), (4), (5), (6) and (7) of Section 49-B shall mutatis mutandis apply in relation to a requisition under Sub-section (1) as they apply in relation to a requisition under Sub-section (1) of that section."

Sub-sections (2), (3), (4), (5), (6) and (7) of Section 49B deal with the procedure to be followed by the Collector on receipt of requisition from the Board. In the present case it is not the case of the petitioner that the Collector did not follow the prescribed procedure and therefore it is not necessary to reproduce the said subsections. Section 57A itself does not prescribe any procedure to be followed before sending a requisition to the Collector. It lays down that inquiry shall be made in the manner as may be prescribed. The manner of inquiry has been prescribed under the U. P. Muslim Waqfs (Recovery of Waqf Property) Rules, 1972. Rule 8 provides that upon receiving a report from any person residing in the locality where the waqf property is situated or upon receiving information otherwise that a waqf property is in unauthorised occupation, the Board shall depute one of its officers to visit the locality and to ascertain the facts relating to genuineness or otherwise of the report or information, as the case may be. It further lays down that the officer deputed by the Board shall make a local enquiry and shall, as soon as may be, apprise the Board in writing as to the result of the local enquiry, including the details of the property affected, the duration of the unauthorised occupation, if any, the particulars of the person or persons in occupation, the evidence available in proof of unauthorised occupation and such other particulars as he considers relevant in the matter. This rule does not require any notice to be issued at the stage of the enquiry to the person alleged to be in unauthorised occupation of the waqf property. Clause (1) of Rule 9 provides that on receipt of the report mentioned in Rule 8 the Board shall cause a notice to be issued to the person in unauthorised occupation calling upon him to restore back the possession to the Board or to show cause against it within a period of 15 days from the receipt of the notice. Clause (ii) provides that if the person to whom notice is issued fails to comply with the notice or to show cause or if cause is shown, on giving an opportunity to the person concerned of being heard, the Board may if satisfied as to there being unauthorised occupation over waqf property pass orders for sending a requisition to the Collector within whose jurisdiction the property is situate to obtain and restore possession of the property to it Rule 10 prescribes the procedure to be followed by Collector on receipt of requisition. Because the petitioner does not challenge the procedure followed by the Collector it is not necessary to reproduce Rule 10.

13. The combined effect of the above provisions is that the first enquiry which

the Board has to make is whether the immovable property in respect of which action is to be taken is entered as property of waqf in the register of waqfs maintained u/s 30. The next enquiry that he is required to make is whether the said property is in unauthorised occupation of any one. Action u/s 57 A can be taken only when the first condition is satisfied, namely that the property is entered as waqf property in the register of waqfs maintained u/s 30. This is a jurisdictional fact and action u/s 57 A would be permissible only when the property is so entered. Under this provision it is not enough that the property is waqf property. The said property has also to be entered as waqf property in the register of waqfs maintained u/s 30. It is on the satisfaction of this jurisdictional fact that action can be taken by the Board u/s 57 A. I have already held hereinabove that the property in dispute is entered in the register of waqfs maintained u/s 30 and therefore the first requirement of this section is fulfilled in the present case. The section of course prescribes that this jurisdictional fact shall be determined in such manner as may be prescribed. The manner in which the enquiry has been held in the present case has been described in the two affidavits filed on behalf of the Board. In the first affidavit dated 10-4-1978 it has been stated that a notice to show cause was issued to the petitioner on 6-4-1977 but the petitioner failed to show cause against the said notice. It is then stated that ultimately on 4-8-1977 the Board through its Controller sent the requisition to the Collector for dispossessing the petitioner from the property in question. In para 17 of the said affidavit it has been stated that the petitioner's allegation that he was not served with any notice is absolutely false. In the supplementary counter affidavit dated 1-7-1-1984 it has been stated that on 25-10-1975 Sri Hamid Husain the Mutawalli of the waqf complained to the Board that the petitioner had been unauthorisedly occupying the property of the waqf in question. On receipt of this application an enquiry was initiated by the Board through its inspector. From the report of the inspector as well as from the documents available in the office of the Board it was proved that the petitioner had been unauthorisedly occupying the waqf property and therefore the Controller of the Board directed to serve the petitioner with a notice u/s 57 A read with Section 49B of the Act but he refused to accept the same on the false pretext that his parentage had not been mentioned correctly. It is then stated in para 8 that several notices were thereafter sent to the petitioner and they were served upon him but he failed to file any objection against the same. In para 9 it is stated that it was only when the petitioner failed to avail of the opportunity to explain his position that a requisition was sent by the Board to the Collector on 4-8-1977. On behalf of the petitioner no affidavit was filed to controvert the averments made on behalf of the Board. It has, therefore, to be accepted that before sending the requisition dated 4-8-1977 notice was issued to the petitioner on 6-4-1977 to show cause against the proposed action but he failed to show any cause. In the proceedings taken u/s 57A the petitioner was not entitled to challenge the entry already made in the register of waqfs maintained u/s 30 and therefore a very limited objection could be filed by him. Through the limited objection he could only show the right available to him to remain in occupation of

the property but not the right based on ownership. In the present case the petitioner has not claimed any right to remain in occupation of the property in dispute except the right based on ownership. This right is not available to the petitioner. On the facts and circumstances of the case, I am of the opinion that there was substantial compliance of the procedure prescribed by the Act and the Rules framed thereunder.

14. The last question that survives for determination is as to whether the pleas raised by the petitioner before the learned District Judge were available to him in the appeal preferred u/s 49B(4) of the Act. Learned District Judge has taken the view that the Collector was exercising the powers of an executing Court and just as an executing Court cannot go behind the decree or order the Collector too could not go behind the requisition and since the appeal lay to him not against the order of the Board but against the order of the Collector and the Collector's order was not alleged to suffer from any infirmity, the pleas raised by the petitioner could not be entertained in the said appeal. It is true that an executing Court cannot go behind the order which it is required to execute but there are certain exceptions to this rule and one of the exceptions is that if the order is a nullity or non est in the eye of law it can be ignored even by the executing Court. In the present case the petitioner tried to assert before the appellate authority that the order was non est inasmuch as the property in dispute had not been entered as the property of waqfs in the register maintained u/s 30 of the Act. Jurisdiction u/s 57 A can be invoked only in respect of a property which is so entered. Where, therefore, the person to whom notice has been issued asserts that the property in respect of which the proceedings have been initiated is not so entered in the register, this dispute the executing Court cannot decline to decide. It appears that, before the learned District Judge no material had been placed by the Board to substantiate its plea that the property was so entered in the register of waqfs. As such the learned District Judge committed manifest error when he did not enter into the controversy relating to the entry in the waqf register. However this infirmity does not call for interference with his order inasmuch as before this Court evidence has been placed on behalf of the Board which has not been controverted by the petitioner. The consequence is that despite the infirmity in the order of the learned District Judge the writ petition will have to be dismissed.

15. In view of (sic) the petition fails and is hereby dismissed. In the circumstances of the case the costs of the petition shall be easy. The interim order, if any, shall stand discharged.