
(1984) 10 AHC CK 0025
In the Allahabad High Court
Case No : Writ Petition No. 1794 of 1984

Allah Bux

APPELLANT

Vs

3rd Addl.DJ, Lko. and others

RESPONDENT

Date of Decision : 18-10-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 35, Order 21 Rule 43, Order 21 Rule 66

Uttar Pradesh Muslim Waqfs Act, 1960 — Section 57A, 66

Citation : (1984) 10 AHC CK 0025

Hon'ble Judges : S.Saghir Ahmad, J

Final Decision : Dismissed

Judgement

S. Saghir Ahmad, J.—This is a writ petition under Article 226 of the Constitution.

2. The facts giving rise to this petition are these :

3. A suit (Reg. Suit No. 365 of 1968) was instituted in the court of Munsif South, Lucknow against the petitioner by Smt. Husna, Smt. Naziran, Smt. Siddiqan and Smt. Afsar Jehan for a decree for possession over a part of plot no. 400 situated in Mohalla Ramganj, Ward Daulatganj, Lucknow which was said to be the family graveyard of the plaintiffs, and for permanent injunction for restraining the defendant (petitioner) from making constructions over any portion of the aforesaid plot no. 400. The suit was contested by the defendant on a number of grounds raised in the written statement which was filed by him on 721969. The trial court on a consideration of the pleadings of the parties framed necessary issues in the suit. Issues nos. 1 and 5 which are relevant may be reproduced below :

?1. Whether plaintiffs are Mutwaiiii of the family graveyard as is alleged in para 3, 4 and 5 of the plaint ?

2. Whether Waqf Board is a necessary party ?

4. The trial court held that the plaintiffs were the Mutwallis of the family

graveyard, that is, a portion of plot no. 400, and that the Waqf Board was not a necessary party. It may be stated that the trial court, in accordance of the provisions of Section 66 of the Uttar Pradesh Muslim Waqf Act, 1960, had issued a notice of the suit to the Waqf Board but it did not put in appearance and did not contest the suit. The suit was ultimately decreed on 2551971. The petitioner thereafter filed Regular Civil Appeal No. 266 of 1971 which was dismissed by Civil Judge, Mohanlalganj, Lucknow on the petitioner's own application that the appeal was not pressed. In the meantime, plaintiff no. 4, Smt. Afsar Jehan, died on 29775 followed by plaintiff no. 1, Smt. Husna, who died on 221980. On 1151981 an application was moved in the trial court for execution of the decree under order XXI Rule 35 read with order XXI Rules 43 and 66 of the Code of Civil Procedure. There was also a prayer made in the execution application that the heirs of the deceased plaintiff, Smt. Afsar Jehan and Smt. Husna, may be substituted. A separate application for substitution of the heirs of the deceased plaintiffs Smt. Afsar Jehan and Smt. Husna was also filed. The petitioner filed objections against the substitution application on 7111981. In the meantime, Smt Siddiqan, plaintiff no. 3, also died on 16121982 and consequently her heirs moved an application for being substituted in her place. This application was filed on 1421983. The petitioner did not file any objection to the application of the heirs of Smt. Siddiqan for being substituted and consequently this application was allowed by the trial court on 1831983. The objections of the petitioner which he had filed against the application for substitution of the heirs of Smt. Afsar Jehan and Smt. Husna were rejected by the trial court on 28111983 vide judgment contained in annexure 5 to the writ petition. A revision was thereafter filed by the petitioner in the court of the District Judge on 21121983 which was ultimately dismissed by the III Addl. District Judge, Lucknow on 331984. It is in these circumstances that the petitioner has filed this writ petition in which he has challenged the correctness of the orders passed by the trial court as also the revisional court.

5. The main contentions of the learned counsel for the petitioner are these, (1) The plaintiffs were held to be Mutwallis of the disputed land which was a portion of plot no. 400. This land had been held by the trial court to be the waqf property and since Smt. Husna, Smt. Afsar Jehan or for that matter Smt. Siddiqan were held to be Mutwallis of the property in question, there could not have been a substitution of the heirs of these ladies in the execution application as the office of Mutwalli was not heritable. (2) Once a vacancy had occurred in the office of the Mutwalli by the death of Smt. Husna, Smt. Afsar Jehan and Smt. Siddiqan, the Waqf Board, under the provisions of the U.P. Muslim Waqf Act, had a right to fill up that vacancy and, therefore, in the absence of an order of the Board, the heirs of the above ladies could not have been legally substituted in the execution proceedings. (3) Notice of the execution proceedings should have been issued to the Sunni Central Board of Waqf, U.P. and since this has not been done, the entire proceedings are bad and are liable to be quashed on account of the violation of the mandatory provision of Section 66 of the U.P. Muslim Waqfs Act.

(4) Under Section 57A of the U.P. Muslim Waqfs Act, there was a remedy available to the Mutwallis to obtain possession over the Waqf property and consequently the present execution proceedings which could not have been legally initiated are liable to be quashed.

6. The contentions are without merits.

7. So far as the question of issuance of notice to the Board is concerned, it may be noted that the trial court had issued a notice to the Board under Section 66 of the U. P. Muslim Waqf Act during the pendency of the suit but the Board, inspite of the service of the notice upon it, had not put in appearance and had not sought to be impleaded as a party in the suit. Since notice of the suit had already been issued to the Board, it was no longer required of the trial court to issue a fresh notice of the execution proceedings to the Board.

8. Let me now consider the question of substitution. It may be stated that the properties involved in the suit are of two kinds; (a) Waqf property and (b) secular property. The waqf property is the family graveyard over a portion of which the petitioner had entered into possession and had raised unauthorised constructions. The other property in respect of which relief for injunction was claimed is the remaining part of plot no. 400 over which the petitioner, as the plaintiff allegations show, had threatened to raise constructions

9. Under the Mohammedan Law, the property, on the creation of the Waqf, vests in the Almighty. The Mutwalli is a mere manager or superintendent of the waqf property.

10. The office of a 'Mutwalli' is a temporal office, but in a given case e.g. SajjadaNashin it can be a combination of secular and ecclesiastical offices. The office of 'Mutwalli' does not devolve upon the heir of the deceased Mutwalli by inheritance. In Ahmad C.H. Arif Vs. The Commissioner of Wealth Tax, Calcutta. AIR 1971 SC 1961 it has been held as under :

'Now 'property' is a term of the widest import and subject to any limitation which the context may require, it signifies every possible interest which a person can clearly hold or enjoy. The meaning of the word 'property' has come up for examination before this court in a number of cases. Reference may be made to one of them in which the question arose whether Mahantship or Shebaitship which combines elements of office and property would fall within the ambit of the word 'property' as used in Article 19 (1) (f) of the Constitution. It was observed in the Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, 1954 SCR 1005 at p. 1019 (AIR 1954 SC 282 at p. 288) that there was no reason why that word should not be given a liberal and wide connotation and should not be extended to those wellrecognised types of interests which had the insignia or characteristic of proprietary right. Although Mahantship was not heritable like the ordinary property, it was still held that the Mahant was entitled to claim protection of Article 19 (1) (f) of the Constitution? (Emphasis supplied).

11 Succession to the office of Mutwalli is regulated either by the terms of the deed by which the waqf was created or by the customary practices or traditions pertaining to the waqf. The vacancy can also be supplied by an appointment of the successor Mutwalli by a statutory body (Waqf Board) created under an Act of Parliament or State Legislature (see, for example, U. P. Muslim Waqf Act, 1960).

12. A Mutwalli, being Manager of waqf properties, can institute a suit for and on behalf of the waqf for appropriate relief. He can also file a suit for declaration of his status as a Mutwalli and can seek a decree for injunction for restraining the defendants from interfering with his functioning as Mutwalli. But a suit of this nature will be based on a personal cause of action which will come to an end on the death of the plaintiff so that there cannot be a substitution made in his place. This, however, will not be the position in the suit of the former nature, where a successor Mutwalli can be substituted in place of the deceased Mutwalli. The position in the instant case, however, is a little different. The present suit was filed by four plaintiffs in respect of a portion of a family graveyard (held to be Waqf property) and the other land which was secular property. On the death of the plaintiffs, the rights in the secular property devolved upon their heirs who have already been substituted, and in my opinion, rightly in the execution case. So far as waqf property is concerned, it will be noticed that three of the plaintiffs, namely, Smt. Husna, Smt. Siddiqan and Smt. Afsar Jehan have died but Smt. Nazeeran is still alive. She was also held to be one of the Mutwallis of the property in question. She, in her capacity as the surviving Mutwalli of the waqf property, can execute the decree for the benefit of the waqf. For this reason also, the plea that there could not be a substitution in the instant case is not of any material consequence.

13. Learned counsel for the petitioner lastly contended that since there was a specific provision made for recovery of possession over the waqf property which was in occupation of unauthorised persons, the decree cannot be executed. Learned counsel for the petitioner has invited my attention to the provisions of Section 57A of the U. P Muslim Waqf Act. It provides as under :

57A. Recovery of possession of waqf property from unauthorised occupants. (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 under Section 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 subsections (2), (3), (4), (5), (6) and (7) of Section 49B shall mutatis mutandis apply in relation to a requisition under subsection (1) as they apply in relation to a requisition under subsection (1) of that section.

14. The provisions contained in Section 57A were introduced in the U.P., Muslim Waqf Act, by U. P. Act No. 28 of 1971. The suit in the instant case had already been filed in the year 1968. It was decreed on 25.5.1971 while U.P. Act No. 28 of 1971 was enforced with effect from 5.11.1971. Moreover, under Section 57A of the

Act it is the Board which has been given the power to recover possession over waqf property from unauthorised persons through the agency of the Collector. It does not fetter the right of a Mutwalli to obtain possession over the waqf property in execution of a decree passed in favour of the Waqf prior to the introduction of Section 57A in the U. P. Muslim Waqf Act.

15. No other point was pressed.

16. For the reasons given above, I do not find any merit in the petition which is dismissed with costs.

(Petition dismissed)