

(1995) 09 AHC CK 0097

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 3491 of 1977

Ayodhya Prasad (dead, through LRs.) and others	APPELLANT
Vs	
Addl.Civil Judge, Moradabad and others	RESPONDENT

Date of Decision : 06-09-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, 9
Uttar Pradesh Muslim Waqfs Act, 1960 — Section 57A

Citation : (1995) 09 AHC CK 0097

Hon'ble Judges : Binod Kumar Roy, J

Final Decision : Allowed

Judgement

1. The prayer of the petitioners is to quash various orders passed by the authorities under the provisions of the U.P. Muslim Waqfs Act, 1960 (hereinafter referred to as the Act) and follow up orders as contained in Annexures 3 and 4 of writ petition No. 3491 of 1977 and AnnexureC8 to the counter affidavit of Respondent No. 3.

2. Even though the records of this writ petition are bulky, in my view the relevant facts are in a narrow compass.

According to the petitioners they are Hindus whose ancestors were, and after them they are in possession of 2.69 Acres of lands bearing Khasra No. 5943 situated in Mohalla Danish Bandan, Town Amroha, District Moradabad for last approximately 100 years, of which they had become its sirdar and later Bhumidhar; that children of one Syed Hussain Raja of the locality claimed the land to be a waqf property and Syed Hussain Raja as its Mutwalli and filed in that capacity a suit for eviction of fathers of petitioner Nos. 3 to 6 from the lands in question under the provisions of Section 202 of the U.P.Z. A. and L.R. Act; that the said suit was contested on the grounds, inter alia, that the lands aforementioned is not waqf property; that the suit was dismissed by judgment and order dated 1911967 (copy appended as Annexure1) holding to the effect that (i) the waqf deed dated 1151876 filed by the plaintiffs does not show that

neither it nor does the samad of the waqf property includes the disputed lands (ii) the plaintiff admits that he is the Zamindar of Khewat No. 1835, the total area of which is 4.22 acres out of which only 2.69 acres is in dispute and only 1.90 Acres is shown as grove (iii) the defendants on the other hand had shown their possession over the disputed plot for the last 45 years that is to say before coming into force of the abolition of Zamindari (iv) the name of the plaintiff had not come on record as Bhumidhari besides no entry was made in his favour, after the abolition of the Zamindari, (v) the plaintiff is not Mutawalli of the disputed plot and (vi) the defendants are not liable to be ejected; that the validity of the judgment aforementioned was challenged in appeal preferred by the Waqf Allahatala through Syed Husain Raja but later on an application was filed for withdrawing the suit on technical grounds, which despite opposition, was allowed by order dated 371969 on the ground that the defects in the plaint are such which require withdrawal and the suit was permitted to be withdrawn with liberty to file afresh and consequently the judgment and decree under appeal was set aside; that the descendants of Syed Husain Raja aforementioned approached Respondent No. 3. The Shia Central Board of Waqf, Lucknow for having possession of the lands after eviction of the petitioners which, without conducting any enquiry on or about February, 1974, sent a notice to the petitioners requesting them to vacate the lands in dispute as they were occupying them illegally; that the Respondent No. 3 was informed by the petitioners by a registered letter with acknowledgement due that they are rightful owners of the lands who had become Sirdar after the abolition of the Zamindari cannot be evicted; that the petitioners lodged a written protest before Respondent No. 3 on finding the close relationship of Syed Husain Raja with the president of the Board Respondent No. 3 and of being same group of persons yet they explained their position in detail; that they were assured by the President of the Board that he was convinced that they had become owners and Sirdar of the lands in question but instead of sending his order to them a requisition order under Section 57A of the Act (copy appended as Annexure3) was sent to the Collector, who later on issued an order directing the petitioners to vacate the lands; that the petitioners went up in appeal under Section 49B (4) of the Act, which was dismissed vide judgment dated 1281977 (as contained in Annexure4) that the orders are liable to be quashed on various grounds as the petitioners are Hindus the provisions of the Act do not apply to them.

Respondent No. 3 in its counter affidavit, sworn by Syed Mehsoob Hasan Khan, states, inter alia, that the disputed property is a waqf property by virtue of a registered waqf deed dated 1151876, which consists a Mango Grove and other trees, a Grave Yard of the family of the Waqi and some houses known as Mohammad Mohsin Khan, and was being managed by the successive Mutawalli; that the Waqf was registered under Section 38 of Act No. XIII of 1936; that about 1941 fathers of petitioner Nos. 2 to 8, who are Mali by caste, and who were faithful to the ancestors of the deponent, who were big Zamindars, were engaged as servants by the Mutawalli to look after the Grove and Grave Yard and

had allowed them to live at the said grove; that the ancestor of the deponent used to give theka of the fruits of the trees to them, that from, the very beginning in the Revenue Records the waqf property, consisting of Grove and Grave Yard stand continuously recorded; that the provision of Section 38 of Act No. XIII of 1936 was reiterated under Section 30 of the U.P. Act No. XVI of 1960 and the property in question is entered in the Register maintained by the Waqf Board; that the petitioners had not acquired any right in the properties, who had never denied before 1965 its character as a waqf property; that the suit was filed under a wrong legal advice treating the defendants as Asami, which was withdrawn and the judgment rendered therein has no relevance now; that an enquiry was made by the Inspector of the Board, who also submitted his report; that Syed Alia Raja Khan, as managing Mutawalli of the waqf, filed an application under section 57A of the Act against the petitioners for taking appropriate action against them, on which notices were issued, objections filed and the petitioners as well as the Mutawalli of the Waqf were asked to produce their evidence in accordance with the provisions of Section 58 of the Act and some of the petitioners and Mutawalli filed their documents, some of them also made statements which were recorded, and a final judgment was pronounced, which in the absence of any challenge under Section 33 (2) of the Act, has become final and binding on the petitioners who however, on 22/7/1975 filed a suit for grant of injunction, which was ultimately dismissed.

The Submissions:

3. Sri G.N. Verma, the learned counsel appearing on behalf of the petitioners, submitted as follows (i) After withdrawal of the earlier suit from the Appellate Court with liberty to institute a fresh suit on account of alleged technicalities, instead of filing of a fresh suit for declaration of title in regard to the lands in question and for recovery of possession, illegally the provisions of the Act was invoked (ii) The impugned orders were illegally passed even though, as repeatedly laid down by the Supreme Court in Board of Muslims Waqfs v. Radha Kishan AIR 1979 SC 289 and Board of Muslims Waqfs v. Hadi Begum and others 1993 Supp (1) Supreme Court Cases 192 that the jurisdiction under the Waqfs Act cannot be invoked when the other side is a non-Muslim to whom the Act do not apply and accordingly the impugned orders including the proceedings initiated under the said Act, all are liable to be quashed.

4. Mr. Haider Hussain followed up by Mr. Banarsi Das, the learned counsel appearing on behalf of the Respondents, on the other hand, contended as follows:

(i) The submissions of Mr. Verma have got no force. It was open for the respondents either to institute a fresh suit under the provisions of U.P.Z.A. & L.R. Act or to take recourse to the provisions of the Waqfs Act and thus in taking recourse to the later mode no illegality and/or impropriety was committed by the Respondents.

(ii) The claim of the petitioners was also negated in the suit filed by them

against which also they did not prefer any appeal and the finding recorded therein is binding on them.

(iii) The decisions relied upon are in relation to the Waqfs Act as applicable to the State of Rajasthan, and not to this State. Under Section 49B of the U.P. Act, a provision has been made for the protection of waqf properties and on the finding of fact recorded by the authorities the land in question was a waqf property and, thus, the defence of the petitioners that it was their Sirdari etc. was correctly not accepted by the authorities under the Act and also for the reasons of their own the petitioners did not assail the findings recorded against them by filing an appeal under Section 49B (4) of the Act.

5. Learned counsel for the petitioner, in reply, contended that the submissions made on behalf of the Respondents are untenable. Infact, this Court in *Afzal Husain v. I Additional District Judge* AIR 1985 Allahabad 79 (Vide Paragraph 11) has considered the judgment of the Apex Court in *Board of Muslim Waqfs, Rajasthan* and has held that the provisions of the Act extended to the State of Rajasthan are very much similar to that prescribed under the U.P. Acts of 1936 and 1960 but not applied the ratio of the said judgment on the ground that since the writ petitioner is a shia muslim and therefore, cannot challenge the title of the waqf property. With reference to the observations made by the Supreme Court in *Smt. Sarla Mudgal v. Union of India* 1995 (4) Judgment Today SC 331, the learned counsel further contended that the Waqs Act is a personal law applicable to the muslims only, which by no stretch of imagination can be held applicable to the non muslims. With reference to yet another judgment of the Supreme Court in *Sarguja Transport Service v. State Transport Appellate Tribunal, Gwalior and others* AIR 1987 SC 88, the learned counsel contended that withdrawal of the earlier suit by the Appellate Court under Order XXIII Rule 1 of the Code of Civil Procedure was founded on public policy and in the said view of the matter recourse to institution of a suit for eviction of the petitioners after removal of the technical defects as urged by them should have been taken and taking recourse to the provisions of the Waqfs Act was wholly illegal and improper. The findings recorded in the suit of the petitioners filed for grant of permanent injunction do not operate as *Res judicata* and stand in their way to challenge the impugned order in this writ petition.

My findings:

6. I find merit in the submissions made on behalf of the petitioners.

7. The Rajasthan High Court, after considering different provisions of the Waqfs Act, 1954, the judgment of which was under challenge in appeal before the Supreme Court in the *Board of Muslims Waqfs* (Supra) relied upon by Mr. Verma, had observed as follows:

?The very object of the Waqfs Act is to provide for better administration and supervision of Waqfs and the Board has been given powers of superintendence over all waqfs which vest in the Board. This provisions seems to have been made

in order to avoid prolongation of triangular disputes between the Waqfs Board, the Mutawalli and a person interested in the waqf who would be a person of the same community. It could never have been the intention of the legislature to cast a cloud on the right, title or interest, of persons who are not Muslims. That is, if a person who is non-Muslim whether he be a Christian, a Hindu, a Sikh, a Parsi or of any other religious denomination and if he is in possession of a certain property his right, title and interest cannot be out in jeopardy simply because that property is included in the list published under subsection (2) of Section 5. (Emphasis supplied).

In *Afzal Husain* (Supra) relied upon by the petitioners this Court noticed the aforementioned judgment of the Supreme Court and observed as follows:

?In the *Board of Muslim Waqfs, Rajasthan v. Radha Kishan*, (AIR 1979 SC 289) 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 Act 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 under Section 29 and entry of the property in the register of waqfs maintained under Section 30 of the Act.? (Emphasis Supplied)

8. The case of the Respondents that the petitioners' fathers were merely servants and licensees having been given only a right to collect fruits on certain terms and conditions, could not be adjudicated by the authority under the provisions of the Waqfs Act rather only by a competent Civil or Revenue Court.

9. In *Sarguja Transport Service* the Supreme Court has observed as follows:

?The principle underlying Rule 1 of Order XXIII of the Code is that when a plaintiff once institutes a suit in a Court and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same subjectmatter again after abandoning the earlier suit or by withdrawing it without the permission of the Court to file fresh suit. *Invito beneficium non datur*. The law confers upon a man no rights or benefits which he does not desire. Whoever waives, abandons or disclaims a right will lose it. In order to prevent a litigant from abusing the process of the Court by instituting suits again and again on the same cause of action without any good reason the Code insists that he should obtain the permission of the Court to file a fresh suit after establishing either of the two grounds mentioned in subrule (3) of Rule 1 of Order XXIII. The principle underlying the above rule is founded on public policy, but it is not the

same as the rule of res judicata contained in Section 11 of the Code which provides that no court shall try any suit or issue in which the matter directly or substantially in issue has been directly or substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. The rule of res judicata applies to a case where the suit or an issue has already been heard and finally decided by a Court. In the case of abandonment or withdrawal of a suit without the permission of the Court to file a fresh suit, there is no prior adjudication of a suit or an issue is involved, yet the Code provides, as stated earlier, that a second suit will not lie in subrule (4) of Rule 1 of Order XXIII of the Code when the first suit is withdrawn without the permission referred to in subrule (3) in order to prevent the abuse of the process of the Court.?

It is also important to notice the conduct of the Respondents, who withdrew their suit in appeal in which finding was recorded that the disputed property was not a waqf property and on account of certain technical defects the said suit was allowed by the Appellate Court to be withdrawn with liberty to sue afresh. The Respondents, therefore, knew the defence of the petitioners taken in the suit and were thus, not justified in invoking the provisions of the Waqfs Act, which as laid down by the Hon'ble Supreme Court, could not be invoked against a person, who is non muslim. The withdrawal of the suit was permitted on account of a public policy enshrined in Order XXIII Rule 1 of the Code of Civil Procedure as interpreted by the Supreme Court, as rightly pointed out by the learned counsel for the petitioner and for this reason it was not open for them to take recourse of the provisions of the Waqfs Act.

In Board of Muslim Waqfs (Supra) the Supreme Court has reiterated what was said earlier in Board of Muslim Waqfs (Supra).

A bare perusal of various provisions of the Act as applicable to Rajasthan and our State leaves no manner of doubt that the Act as applicable to Rajasthan is in pari materia with the Act as applicable to our State and thus the ratio laid down by the Apex Court is binding on me. The submissions of the learned counsel for the Respondents that the decisions relied upon by the learned counsel for the petitioners are distinguishable is devoid of any substance.

In Board of Muslim Waqfs (Supra) the Supreme Court has reiterated what was said earlier in Board of Muslims Waqfs (Supra).

10. Thus, I hold that the provisions of the Waqfs Act was not applicable to the petitioners, who are admittedly Hindus, who were claiming right, title and interest in the suit properties and accordingly Section 57 A of the Act was illegally invoked, proceedings were illegally commenced and the order passed therein are without jurisdiction and void and not binding on the petitioners.

11. Non preference of any appeal by the petitioners against the order of the

authority under the Act or dismissing their suit filed for grant of permanent injunction, as submitted by the learned counsel for the Respondents, in the peculiar facts and circumstances does not stand as a bar against them, in moving this Court.

12. I am also of the view that the petitioners will be seriously prejudiced, if the impugned orders are allowed to stand.

13. For the reasons aforementioned this writ petition is allowed, the impugned orders passed by the authorities and the proceedings instituted under the provisions of the Act, all are quashed.

14. In the peculiar facts and circumstances, I make no order as to costs.

15. It is, however, clarified that this judgment only examines the jurisdictional question and does not decide the merit of the claim of one or other party, and it will be open for the Respondents to take such action against the petitioners which is permissible in law.

16. Let a writ of certiorari issue accordingly.