

(1998) 10 AHC CK 0007
In the Allahabad High Court
Case No : Writ Petition No. 4272 of 1983

Chhedi Lal Misra

APPELLANT

Vs

Civil Judge, Lucknow and others

RESPONDENT

Date of Decision : 13-10-1998

Acts Referred:

United Provinces Muslim Wakf Act, 1936 — Section 38, 38(8), 5
Uttar Pradesh Consolidation of Holdings Act, 1953 — Section 49
Uttar Pradesh Muslim Waqfs Act, 1960 — Section 28, 29, 29(8), 30, 49A

Citation : (1998) 4 AWC 459

Hon'ble Judges : S.H.A. Raza, J

Bench : Single Bench

Advocate : B.K. Singh, D.C. Mukherjee, Amit Mukherjee and Nirmal Tewari, for the Appellant; S. Wasi Haider, for the Respondent

Judgement

S. H. A. Raza, J.—The Deputy Commissioner, Lucknow Issued a notice u/s 49A read with Section 97A of the U. P. Muslim Waqf Act. 1960 (hereinafter called Act) against the unauthorised occupant, the petitioner, on a requisition sent by Shia Central Board of Waqf, U. P. The unauthorised occupant Chhedi Lal Misra filed an appeal before the District Judge, which was transferred to Civil Judge, Lucknow. The Civil Judge dismissed the appeal. Being aggrieved against the said order, the present writ petition has been filed.

2. The brief facts of the case are that one Mirza Mohammad Haider created a waqf of his entire property Including the property in question in the year 1926 and appointed his son Piyarey Misra as Mutwalli of the waqf property. The said waqf "waqf Alalkhair" (for waqf religious and charitable purposes) was registered u/s 38 of the U. P. Muslim Waqf Act, 1936. which is pari materia with Section 29 of the Act, 1960 and the same was notified in the Official Gazette in January. 1954.

3. No suit challenging the waqf in question was filed by any body within the specified period of limitation as provided under sub-section (8) of Section 38 of

the Act, 1936.

4. Although the waqf was created somewhere In the year 1926 but in the year 1958 the Waqif as well as his son, who was Mutwalli of the waqf colluded with each other. The Waqif/filed a regular suit against the Mulwalli for declaration that the property In question was not a waqf properly. The suit was decided on the basis of a compromise. Shia Central Board of Waqf did not file any appeal or raised any objection against the said compromise. In the meantime, consolidation proceedings commenced in the village in question. The waqif as well as Mutwalli transferred the said property to the petitioner and his name was recorded in the revenue papers.

5. The order issued by the Deputy Commissioner was assailed in the appeal and it was contended that the property in question was not a waqf property. It was alleged that the Shia Central Board of Waqf did not agitate the matter before the civil court and the decree of the civil court, which was passed on the basis of a compromise became final. It was also contended that the object of the trust was not to create a waqf Alalkhair (waqf for Religious and Charitable purposes) as the waqf for religious and charitable purposes was nominal.

6. During pendency of the appeal, a preliminary objection was raised by the respondents regarding limitation as the said appeal was barred by time. But that contention was not accepted by the first appellate court as the order was served upon the petitioner on 12.4.73 and the appeal was filed within a period of 30 days from the service of notice. An objection was also raised that the appellants did not sign the memo of appeal, but as the counsel had signed the memo of appeal, the defect was not considered to be fatal by the learned Civil Judge.

7. From the side of the appellant, It was contended that the appellant had preferred an application for summoning the record from the office of the Board, but that order was not complied with and the record was not produced. Hence an adverse Inference should be drawn against the respondents and the appeal be allowed.

8. The Board contended before the learned civil Judge that the file was not traceable. The contention of the appellant was not accepted, as nowhere in the memorandum of appeal the appellant had alleged that before sending the requisition to the Deputy Commissioner, the Board has not drawn any proceeding against the unauthorised occupant or the Board has not given a reasonable opportunity to the petitioner to show cause before the Board. Due to non-production of the record, it was contended before the learned civil Judge that the property in question was not a waqf property and in that regard, the compromise decree passed in Regular Suit No. 236 of 1958 between Mirza Mohammad Hatder and his son Piyare Mirza was relied upon.

9. The appellate court expressed a view that as Shia Central Board of Waqf was not a party to that compromise and that decree cannot be binding upon the Board. The Court of appeal was also of the view that it was not obligatory for the

Board to have applied for setting aside the decree or for its modification as provided u/s 66 of the Act, because in the year 1954 the property in question was notified in the Official Gazette as waqf property and the property was further mentioned in the register of waqf maintained by the Board u/s 38 of the Act, 1936. The entries into the waqf register maintained by the Board u/s 38 and the Gazette notification declaring the waqf for charitable purposes was never assailed either by Mirza Mohd. Haider the waqif or Piyarey Mirza, the Mutwalli. As the Board was not a party to the compromise decree, the right of the Board in respect of that property cannot be taken away.

10. In Gobinda Chandra Ghosh alias G. Ghosh and Another Vs. Abdul Majid Ostagar and Others, . it was held that as the appellant was transferee from MutwaUi, and so. he gets no protection, and is to be treated as a trespasser with respect to the waqf property. In Cheedella Kotaiah Vs. Wakf Board, Andhra Pradesh, Hyderabad and Others, . it was observed that after notification, if a property is purchased by a person from anyone, who is interested in the waqf, then the said transaction would be null and void. It was further held that transferee would be bound by the notification.

11. Very recently, the Hon"ble Supreme Court in Sayyed Ali and Others Vs. Andhra Pradesh Wakf Board Hyderabad and Others, , held :

"A waqf Is a permanent dedication of property for purposes recognised by Muslim law as pious, religious or charitable and the property having been found as waqf would always retain its character as a waqf. In other words, once a waqf always a waqf and the grant of patta In favour of Mokhasadar under the Inams Act does not in any manner nullify the earlier dedication made of the property constituting the same as waqf. After a waqf has been created. It continues to be so for all time to come and further continues to be governed by the provisions of the Waqf Act and a grant of patta in favour of Mokhasadar does not affect the original character of the waqf property."

12. Under the 1936 Act as well as under the 1960 Act, there are two modes for the registration of waqfs, one on the basis of Survey made by the Commissioner of Waqf and the issuance of notification as provided in Section 5 of Act 1936 and Section 6 of the Act. 1960, the Board may register a waqf and secondly, the Board may Itself register a Waqf u/s 38 of the Act. 1936 and Section 29 of Act, 1960, on an application made by the Mutwalli, Waqif or his descendants or a beneficiary or any Muslim belonging to the sect to which the Waqf belongs.

13. In the present case, notification in the Uttar Pradesh Gazette January 23, 1954 was issued In pursuance of Section 5 (1) of the U. P. Muslim Waqfs Act XIII of 1936. according to the report of Commission of Waqfs U. P. and in pursuance of the said notification, the Waqf and its properties were registered by the Board, on the register maintained by it.

14. In the instant case, the compromise decree was passed after the registration of the waqf in question, which was notified in the Official Gazette. The entries in

the waqf register as well as the notification issued u/s 5 of the U. P. Muslim Waqf Act. 1936 declaring the property in question as waqf property, was not assailed either by the waqif or the Mutwalli or the purchaser u/s 28 of U. P. Muslim Waqf Act. 1960, a waqf registered before the commencement of this Act under the U. P. Muslim Waqf Act, 1936 shall be deemed to have been registered under the provisions of this Act. Hence the entries in waqf register maintained by the Board u/s 30 of U. P. Muslim Waqf Act, 1960 has become final in between the waqif as well as Mutwalli and being the Muslims they had no right to assail the same.

15. The petitioner, who is a non-Muslim, was not bound by the said entries into the waqf register maintained by the Board u/s 30 of the Act or the earlier notification issued u/s 5 of U. P. Muslim Waqf Act, 1936. He could have assailed the registration of the waqf in question before the Tribunal constituted under the U. P. Muslim Waqf Act ; but he did not file any reference under sub-section (8) of Section 29 of the Act within 90 days from the date of knowledge of the fact that the properties were registered by the Board in the register maintained by the Board u/s 30 of the Act. The notification indicated that the details of the waqf property are given in the register of waqf, hence it was incumbent upon him to have verified that fact and as soon as the proceedings u/s 49B of the Act were initiated against him, because after the Initiation of the proceedings he must, have known the fact that the property was registered as waqf in the register of waqf maintained by the Board u/s 30 of the Act.

16. In the Board of Muslim Wakfs, Rajasthan Vs. Radha Kishan and Others, . the Hon"ble Supreme Court while dealing with the effect of registration under the Waqf Act. 1954, which was extended to the State of Rajasthan. referred to the procedure for Identification and registration of waqf which was similar to the procedure prescribed under the U. P. Muslim Waqf Act of 1936 and 1960. In that case title was claimed by a Hindu to the property which was identified and registered as waqf property. Their Lordships held that the said registration and identification was not binding on a non-Muslim, but so far as Muslims were concerned the said Identification and registration was final and binding.

17. In the present case neither Mirza Mohd. Halder the creator of the waqf nor Piyarey Mirza had any authority to transfer the said property to the petitioner, as after the execution of the waqf deed, the property vested to Almighty in perpetuity, i.e., for all the times to come. The creator of the waqf as well as the mutwalli ceased to have any right over the property. The status of mutwalli is like a manager who possesses the power of supervision and superintendence over the waqf property but Mutwalli has no right to transfer any waqf properties, hence the deed of transfer by Mirza Mohd. Haider and Piyarey Mirza was patently a void transaction. The petitioner being a non-Muslim could have assailed the registration of waqf by filing a reference under sub-section (8) of Section 29 of the U. P. Muslim Waqf Act before the Tribunal, but having not done so. he cannot be permitted to assert that the property in question Is not the waqf property.

18. In Afzal Husain Vs. Ist Addl. District Judge and Others, , it was observed :

"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 eyes 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 57A 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."

19. In view of the aforesaid decision, it is evident that the Court of appeal could not go behind the order of the Board passed u/s 49B of the Act. The order of the Board cannot be faulted because the property is registered as waqf property into the register of waqfs maintained by the Board u/s 30 and the waqf was notified in the Official Gazette. The petitioner having failed to assail the notification issued u/s 5 of U. P. Muslim Waqf Act, 1936 and the entries made into the waqf register maintained u/s 30 of 1960 Act by filing a reference under subsection (8) of Section 29. cannot be permitted to raise that plea in appeal preferred u/s 49B (4) of the U. P. Muslim Waqfs Act.

20. It was next urged that as the Board had not filed any objection with regard to the property in question before the consolidation authorities, now it cannot be permitted to raise the" said question in view of the provisions of Section 49 of the U. P. Consolidation of Holdings Act. I am of the view that during consolidation operations, it was not necessary for the Board to have filed any objection before the consolidation authorities, because the Board could have recovered the property from the unauthorised occupant u/s 49B read with Section 57A of the

Act of 1960. I have very minutely scrutinised the judgment of the learned civil Judge, which is well-reasoned and does not suffer from any infirmity.

21. The writ petition is devoid of merit. It is accordingly dismissed.