

(2012) 11 AHC CK 0027
In the Allahabad High Court
Case No : Writ Petition No. 720 (MS) of 1990

Haji Sajjad Ali (died)

APPELLANT

Vs

Controller, U.P. Sunni Central Board of Waqfs.

RESPONDENT

Date of Decision : 23-11-2012

Acts Referred:

Uttar Pradesh Muslim Waqfs Act, 1960 — Section 3(5), 48

Citation : (2013) 4 ALJ 44

Hon'ble Judges : Narayan Shukla, J

Bench : Single Bench

Advocate : M.A. Siddiqui, for the Appellant; Z. Zilani, Learned Counsel, for the Respondent

Final Decision : Allowed

Judgement

Narayan Shukla, J.—Heard Mr. M.A. Siddiqui, learned counsel for the petitioner and Mr. Z. Zilani, learned counsel for the respondents. The petitioner has challenged the order dated 8th of August, 1988, passed by the Secretary, Sunni Central Board of Waqfs, Lucknow (in short "Board"). By means of order impugned the Board on the demise of Shri Rajab Ali, Mutawalli of Waqfs, Muslim Musafir Khana, No. 34-Gonda, appointed a Managing Committee.

2. The learned counsel for the petitioner submitted that a Muslim Musafir Khana was constructed by his father and uncle namely Haji Rajab Ali and Haji Abdul Rahman, sons of Ali Bux. They also applied for registration of the said Waqf on 25.12.1949. Though the scheme of administration provides for the administration and management of the Waqf by way of successionship of Mutawalliship being eligible therefor in terms of scheme of administration, but with ill intention to usurp the Waqf property some persons raised dispute about the administration of the Waqf. The Waqf authorities recorded the statement of surviving Mutawalli, namely, Haji Rajab Ali on 7.1.1978. He stated that he is the surviving Author and Mutawalli of Waqf and after his death his son would become the Mutawalli.

3. The Board on 19th of March, 1988 issued a notice to Rajab Ali. One of the charges was that he was not capable to discharge the functions of the office of Mutawalli and further he has assigned the same to his son Sajjad Ali (petitioner) illegally. Rajab Ali submitted reply of notice, thereafter he died. The petitioner claims that since during life time of his father he was actually managing the affairs of the Waqf as a helping hand, being son of Mutawalli in terms of the scheme of administration of Waqf, he became Mutawalli and thus he started functioning as Mutawalli. He was also acknowledged by the Board as Mutawalli as he was called upon by the Board to deposit the annual contribution concerning the said Waqf. The petitioner deposited a sum of Rs. 265/- in the Board on 26.9.1988. He also got audited the account of Waqf and paid the annual contribution as required by the Board.

4. The learned counsel for the petitioner submits that under the Muslim Law a Mutawalli is entitled to nominate his successor. It is further stated that the order impugned has been passed on the behest of some persons who are interested to grab the Waqf properly through the opposite parties as they filed objection before the Board submitting therein that the father and uncle of the petitioner were not authors of the Waqf, rather it was raised with the help of donation given by various persons. They further raised a plea that a small portion of Musafirkhana exist over agricultural land of Shri Garib Sakhi, who was made the President of the Committee of Management. However, the record of the Waqf Board itself reveals that the Musafirkhana in question was built by the said two persons. They only are the authors of the Waqf and it is being registered in the office of the Waqf Board in that capacity since 1949. There is no question to raise finger over the creation of Waqf after 40 years. Ultimately the Controller of Waqf Board rejected the petitioner's application vide order dated 11.1.1990 on two counts; firstly after the death of petitioner's father, namely, Rajab Ali, the application for appointment of Committee of Management was moved and secondly; there was no objection for appointing such Committee, it is further stated that the order impugned has been passed in violation of Section 19 as well as 48 of the U.P. Muslim Waqfs Act, 1960.

5. The learned counsel for the petitioner submitted that Section 48 empowers the Board to exercise the power for appointment of Committee of Management only when there is a vacancy and no one is competent to be appointed as Mutawalli under the terms of scheme of administration of the Waqf, whereas in the present case authors of Waqf through their statement dated 25th of December, 1949 stated that behind them their sons are to continue as Mutawalli and petitioner being son of Rajab Ali, one of the authors of the Waqf he had been working as Mutawalli, therefore, there was no vacancy at all to appoint the Committee of Management. Thus, it is stated that the Board failed to adhere to the provisions of the Act strictly.

6. The opposite parties have contested the matter by filing the counter affidavit, through which they have submitted that the petitioner was never appointed as

Mutawalli of the instant Waqf, as such there was no occasion of his removal from Mutawalliship by means of order impugned and if he takes this order as removal from Mutawalliship, there is remedy to file a reference before the Muslim Waqf Tribunal u/s 55 of the U.P Muslim Waqfs Act, 1960. They have also denied the construction of the Musafirkhana in question by Haji Abdul Rahman and Haji Rajab Ali. They stated that the land of Musafirkhana was donated by one Garib Sakhi son of Shri Maula, who was the owner of the said land on which the Musafirkhana was constructed and as such any alleged claim of the Management and the Tauliat, said to have been given by Haji Abdul Rahman and Haji Rajab Ali is of no legal consequence and the same is not binding upon the Board. It is further stated that the land in dispute was recorded in the name of Maula son of Imam Bux, who was the father of Garib Sakhi. Though the statement of Haji Rajab Ali has not been denied, but it has been submitted that the said statement could not confer the title of Waqf upon the petitioner. It has been admitted that on the basis of the complaint made against Shri Rajab Ali for his gross mismanagement a notice was issued to him. They have also denied the petitioner's functioning as Mutawalli after the death of Rajab Ali, occurred in the month of Ramjan, 1988. It is further stated by the respondents that after service of charge-sheet dated 18.3.1988, upon Shri Haji Rajab Ali, he had been taking hardly interest in the affairs of the Musafirkhana, therefore, Mohd. Younus and the Members of his Committee started looking after the management of the Waqf and also realization of rent from two tenants, namely, Haji Zalil Ahmad Khan and Mohd. Khalid from May, 1988. While the other three tenants were the family members of the petitioner himself. Thus, it is the Committee of Management of Mohd. Younus, who had been managing the accounts of the said Waqf since December, 1987. It is further stated that after the death of Rajab Ali, there was vacancy in the office of Mutawalli, therefore, the Board appointed a Committee of Management impugned to administer the Waqf.

7. In addition to the above, the respondent No. 3 submitted that the appointment of Committee of Management by means of order impugned made on 8th of August, 1988 was subsequently ratified by the Controller of Board by means of order dated 11.1.1990 and after expiry of the term of the Committee of Management on 7.8.1993 it was again extended for a further period of five years w.e.f. 8.8.1993. It is further stated by him that the costs of construction of Musafirkhana was borne by the Muslims in general through donation and contributions for construction of building of Musafirkhana as well as Madarsa. He has also given the names of some of the persons through Annexure No. C-2, which contains 38 names. He has also brought on record the extract of Khatauni of 1347 fasali issued in the name of Maula, father of Garib Sakhi as also the extract of Khatauni of 1388 fasali to 1393 fasalis as Annexure No. C-4 issued in the name of Garib Sakhi with respect to the land in dispute. Thus, the respondents contended that the land on which the building of Waqf No. 34-Gonda is situated did not belong to the Estate of Balrampur or to the father or uncle of the petitioner, rather it is ancestral property of Garib Sakhi, who died on

10.9.1991.

8. In reply of submissions of the respondents, the petitioner has further submitted that it is incorrect to say that the Musafirkhana in question is situated at Plot No. 689, whereas it is situated partly over plot No. 690 and partly over plot No. 691. In support of his submission he has brought on record the certified copy of Khasara of 1403 fasali, 1390 fasali and 1393 fasali. On 31st July, 1993, the petitioner moved an application before the Tehsildar, Tulsipur, Gonda to know the location of Musafirkhana. The Tehsildar authorities reported that the said Musafirkhana is situated over Gata No. 690 measuring 0.02 and at Gata No. 691 measuring 0.08. This report is dated 15th of August, 1993. It is stated by him that the Musafirkhana was built prior to the abolition of Zamindari and Garib Sakhi and his father Maula never had any concern with the plot No. 690. So far as plot No. 689 is concerned, the sons of Garib Sakhi, namely, Kallu and Idu are selling the same to different persons after demarcating it in small plots to raise construction over there. So far as the land of donation is concerned it is stated that the persons who are named in the said list. themselves have given the affidavits denying any such donation given by them for construction of Musafirkhana in question. Their affidavits have also been brought on record as Annexure No. R-9 to R-15 to the rejoinder affidavit. It has further been stated that Waqf was registered by them after their complete satisfaction with the contents of scheme of administration of Waqf in 1950 and Rajab Ali and Abdul Rahman were recognized as Waqf from 1949 to 1995. Their status as such could not be challenged for 40 years. The statement of authors dated 25.12.1949 and the report of Inspector of the Waqf Board dated 7.2.1950 constitute the part of order of registration dated 7.2.1950. The registration certificate is based on the statement of authors Rajab Ali and Abdul Rahman. In the application for registration, these two persons have been described as authors of the Waqf. Accordingly Rajab Ali petitioner's father continued as Mutawalli with his brother Abdul Rahman jointly till his life time as Mutawalli and after the death of Abdul Rahman, Rajab Ali acted as sole Mutawalli till his death and thereafter the petitioner in terms of the scheme of administration of Waqf is continuing as Mutawalli of the Waqf. In the notice dated 19th of March, 1988 issued by the Waqf Board, Rajab Ali had been accorded as Mutawalli, whereby certain charges were levelled against him. Mr. Rajab Ali replied the notice. Thereafter probably in the month of May or June, 1988 Rajab Ali died.

9. Meanwhile in 1977-78 one Khan Bahadur moved an application to the Government to make certain inquiries which was forwarded to the Waqf Board for necessary inquiries. During the course of inquiry Haji Rajab Ali made a statement on 7.1.1978. The statement of Rajab Ali is on record as R-18. Through his statement Mr. Rajab Ali stated that he constructed the building of Musafirkhana after getting permission from Balrampur Estate in 1937-38, in which he also expressed his wish to remain as Mutawalli during his life time and after him to continue the Mutwalliship on the basis of succession to his heir. The Secretary of Waqf Board also intimated to the State Government that the necessary

instructions have been issued to the Mutawalli to look after the maintenance of Musafirkhana and being necessary repairs done. Thus, it is stated that all these facts wholly reveal that in terms of scheme of administration of Waqf, Mutawalli has got a right to nominate his successor of his family or any person to nominate any member of the family, who is eligible and entitled to be a Mutawalli, shall be Mutawalli to administer the Waqf.

10. In support of his submission the petitioner has placed reliance upon the following judgments, in which this court has hold that the dispute of Mutawalliship should be raised before the Controller of U.P. Sunni Board of Waqfs, Lucknow, who is competent to decide the same:--

(1) Shri Rukunuddin Khan Vs. Controller, U.P. Sunni Central Board of Waqfs, Lucknow and others, .

(2) AIR 1943 278 (Oudh) . In this case this court recognized the Mutawalli nominated by the deceased Mutawalli when he was on his death bed and declared that this was valid appointment.

(3) Syed Hashim Husain and others v. Sheikh Ahmad Raza and others, reported in 1973 ALJ 837. In this case the Division Bench of this court upheld the power of nomination of his successor under the Mohammedan Law by a Mutawalli during good health. The relevant portion of paragraphs 14, 24, 25 and 45 are reproduced hereunder:--

14. It is thus clear that a mutawalli is not a trustee or manager but a superintendent of property. A mutawalli is further not the owner of the property, but merely a servant of God, managing the property for the good of his creatures. The founder of the waqf has the power to appoint the first mutwalli and to lay down a scheme for the administration of the trust and for succession to the office of mutwalli. He may nominate, successors by name or indicate any class, together with their qualifications, from whom the mutwalli may be appointed and may invest the mutwalli with power to nominate a successor after his death or relinquishment of office.

24.....Mohammedan Law thus permits the appointment of a successor by a mutwalli to be effective after his death. So the appointment of a successor by a mutwalli in good health which would be effective after the death of the mutwalli does fall within the permissible limits of the Mohammedan Law. Taking the view contrary to this, and holding that a mutwalli can appoint a successor only when he is in death bed would be irrational.....

25. We, are, therefore, not prepared to hold that the power under the Mohammedan Law was given only to make it ineffective, and would thus hold that the nomination of a successor by a mutwalli can be made even in good health, to take effect on death.

45.....Accordingly, applying the principles of equity, justice and good conscience we would like to hold that Syed Ghulam Abbas was entitled, and was

not debarred from nominating his successor by the document while he was in good health.

(4) Noor Mohammed v. U.P. Sunni Central Waqf Board, (2003) 11 SCC 782 . In this case Hon''ble Supreme Court took up one of the questions to decide as to whether the Mulawalli was entitled to appoint his successor Mutawalli for the Wakf? The question was answered in the affirmative manner by the Division Bench of the High Court, in the case of Hashim Husain v. Ahmad Raza, reported in 1973 ALJ 837. The Hon''ble Supreme Court recorded its agreement with the judgment of the High Court.

11. Some provisions the U.P. Muslim Waqfs Act, 1960 are also necessary to be mentioned for decision of the case. Section 3(5) of the U.P. Muslim Waqfs Act, 1960 defines the term "mutawalli" as follows:--

(5) "mutawalli" means any person appointed either verbally or under any deed or instrument by which a waqf has been created or by a competent authority to be the mutawalli of a waqf and includes any naib-mutawalli, khadim, mujawar, sajjadanashim, amin or other person appointed by a mutawalli, to perform the duties of a mutawalli and, save as otherwise provided in this Act, any person or Committee for the time being managing or administering any waqf property as such.

Legislative changes.- Clause (5) was substituted by Act 28 of 1971.

11A. The relevant period to determine the validity of Waqf as well as Mulawalliship is the period when the Waqf was created. Admittedly the Waqf in question was created in the month of February, 1950, therefore, the controversy involved for decision shall be governed under the provisions of U.P. Muslim Waqfs Act, 1936. The term of mutawalli is defined under the United Provinces Muslim Waqfs Act, 1936, which is reproduced hereunder:--

"mutawalli" means a manager of a waqf or endowment and includes an amin, a sajjadanashin, a khadim, naib-mutawalli and a committee of management, and, save as otherwise provided in this Act, any person who is for the time being in charge of, or administering, any endowment as such.

U.P. Muslim Waqfs Act, 1960.

Section 19 defines the functions of the Board.

(1)

(2) Without prejudice to the generality of the provisions of sub-section (1) the powers and duties of the Board shall be-

(o) to remove a mutawalli, or appoint a mutawalli and to put the mutawalli so appointed in possession of the waqf property under the provisions of this Act:

Provided that in the appointment of mutawallis or in making any other management of waqf property, the Board shall be guided, as far as possible, by

the directions of the waqf, if any;

Section 48 Emergency powers of Board when office of Mutawalli of waqf vacant. Without prejudice to the generality of the powers conferred by clause (o) of sub-section (2) of Section 19, the Board may, where there is a vacancy in the office of the mutawalli of a waqf-

(a) appoint any person to act as mutawalli for such period and on such conditions as it thinks fit; or

(b) by notification in the Official Gazette assume direct management of the waqf for such period not exceeding five years as may be specified in the notification:

Provided that in the case of a waqf created by a "deed", the Board may act under this section only if there is no one competent to be appointed as mutawalli under the terms of such "deed".

12. The "deed" which is a scheme of administration of the Waqf as well as the statement of Haji Rajab Ali and Abdul Rahman, the original authors of "deed" recorded before the Inspector of Waqf Board on 25th of December, 1949, have also been brought on record. The authors, to administer the Waqf property after their term of life have nominated the members of family in the order of preference, out of whom nobody can be permitted to act as Mutawalli, thus the terms of Waqf establish that the nature of Waqf is of private Waqf, which is called as "Waqf-alal-aulad".

13. The word "Waqf is defined u/s 3(11) of the Act, 1960, which is reproduced hereunder:--

(11) Waqf means the permanent dedication or grant of any property for any purpose recognized by the Muslim Law or usage as religious, pious or charitable, and includes waqf-alal-aulad to the extent to which the property is dedicated or granted for any such purpose as aforesaid and waqfs by user; and "waqf means the person who makes such dedication or grant;"

14. As is evident from the aforesaid definition the "waqf-alal-aulad" is included under the term of "Waqf and is governed under the provisions of the U.P. Muslim Waqfs Act.

15. Since there was no "deed" in writing for creation of a Waqf, the respondents created doubt over the constitution of Waqf with the submission that there is no provision to constitute the Waqf orally, the learned counsel for the petitioner drew the attention of this court towards the definition of "deed" as provided in the "Random House Webster's College Dictionary", which is quoted hereunder:--

"deed" 1. something that is done, performed, or accomplished; an act: Do a good deed every day. 2. an exploit or achievement: Brave men's deeds live after them. 3. action or performance, esp. as illustrative of intentions, promises, or the like: is deeds speak for themselves. 4. Law. A writing or document executed under seal and delivered to effect a conveyance, esp. of real estate. 5. to convey

or transfer by deed.

16. By inviting the attention of this court towards the definition of "deed", as above, the learned counsel for the petitioner submitted that the conduct of the authors itself establishes that they were in intention to create a Waqf to manage the Musafirkhana constructed by them and they created so which is supported by their statement also, therefore, it cannot be said that the authors of Waqf had no intention to create a Waqf.

17. I seriously considered the rival submissions of the learned counsels for the parties as well as perused the records. The notice issued by the Waqf Board to Haji Rajab Ali establishes that he was recognized as Mutawalli. His statement was recorded before the Board, in which he accepted the construction of Muslim Musafirkhana as well as creation of Waqf by him along with his brother Haji Abdul Rahman. The registration of Waqf is also established in his life time. The establishment of Muslim Musafirkhana on Gata No. 689 is not established, rather the revenue authorities have reported its establishment partly on Gata No. 690 and partly on Gata No. 691. No doubt Haji Abdul Rahman as well as Haji Rajab Ali both have failed to establish their title over the said Gatas, but there is no occasion to disbelieve their claim that they got it from the then Zamindar before abolition of Zamindari and after abolition of Zamindari it vested to them, over which they constructed the Muslim Musafirkhana. Though they have not produced any revenue record to establish their names recorded as tenure holders, but the fact remains that Muslim Musafirkhana has been established over there for the charitable purposes, therefore, at this stage I am of the view that the question of title is absolutely irrelevant for consideration as to who was the owner of the land. Mr. Z. Zilani, learned counsel for the respondents submitted that unless the creator of Waqf establishes his right and title over the land in dispute, he cannot be considered to be capable to grant it to another, therefore, the waqf in question cannot be treated as the Waqf created by Haji Rajab Ali as he failed to establish his title over the land in dispute.

18. Since Mr. Haji Rajab Ali has been recognized as Mutawalli, I am of the view that at this stage the question of title is irrelevant for consideration. Therefore, at this stage the relevant question for consideration is whether he was entitled to nominate his successor as Mutawalli or not? In the "deed" which is followed with the application for registration, his wish/willingness to nominate Mutawalli to his family members is recorded. The nomination is well permitted under the Law as has been held by the several judgments referred to herein-above. The petitioner being son of Haji Rajab Ali claims himself as Mutawalli by virtue of his nomination and submits that he has deposited the contribution of the concerned Waqf to the Board also, which has been recognized. The affidavits of some persons managed by the objectors against the functions of the petitioner as Mutawalli have been turned down by the administrators of the affidavits, rather they have recognized the petitioner as Mutawalli of the Waqf in question. The construction of Muslim Musafirkhana as claimed by the people in large by

Muslim community have not been proved.

19. In light of the aforesaid facts and circumstances of the case, I am of the view that the petitioner is Mutawalli of Waqf Muslim Musafirkhana No. 34-Gonda and hence there was no occasion to appoint the Committee of Management to administer the Waqf, unless the petitioner's conduct comes under the purview of Waqf Board to examine and appoint the Committee of Management to administer the Waqf after providing opportunity of hearing to the petitioner. Therefore, the order impugned dated 8th of August, 1988 appointing the Committee of Management to administer the Waqf in question is hereby quashed. The petitioner is permitted to function as Mutawalli of the said Waqf subject to control of the Waqf Board under the provisions of the Waqf Act. The writ petition stands allowed.