
(2008) 12 SHI CK 0012
In the High Court Of Himachal Pradesh

Jeet Mohammed

APPELLANT

Vs

Jatinder Kaur and Another

RESPONDENT

Date of Decision : 16-12-2008

Acts Referred:

Waqf Act, 1995 — Section 86(9)

Citation : AIR 2009 HP 44

Hon'ble Judges : Deepak Gupta, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Deepak Gupta, J.—This revision u/s 83(9) of the Wakf Act, 1995 is directed against the order dated 4-8-2003 of the Wakf Tribunal, for Kangra, Hamirpur, Kullu, Una, Lahaul Spiti and Chamba Districts at Dharamsala.

2. Briefly stated the facts of the case are that the petitioner alleging himself to be the Pradhan of Jamait-E-Islam Committee, Raja-Ka-Talab, Tehsil Nurpur, District Kangra, H.P., filed a suit for permanent injunction for restraining the defendant from raising any construction on cutting or removing trees from or in any manner alienating the land comprised in Khasra No. 1093, khata No. 340, Khatauni No. 643 measuring 0-47-30 hectares, situate in Mohal and Mauza Bari, Tehsil Nurpur, District Kangra, H.P. This suit was later-on transferred to the Wakf Tribunal since the civil Court had no jurisdiction to entertain the same.

3. The grievance of the petitioner was that the suit land is recorded in the ownership of Punjab Wakf Board--defendant No. 2. According to him, the suit land is a graveyard and therefore, defendant No. 2 has no right to alienate or transfer the same. According to him, the defendant No. 2 is now threatening to alienate the suit land and transfer the same to defendant No. 1.

4. In the written statement, it was admitted that the suit property is recorded as Gair Mumkin Kabristan. It was further admitted that the vacant portion of the suit land measuring 450 sqr. mts. abutting the road has been leased out in

favour of defendant No. 1 vide allotment No. 24/LU w.e.f. 1-12-1999 on a monthly rent of Rs. 2150/-. Thereafter, by lease order dated 3-5-2000, permission to raise the construction on this land was also granted to respondent No. 1. It was alleged that it was within the authority of defendant No. 2 to lease out the property in favour of defendant No. 1. The Wakf Tribunal came to the conclusion that since the petitioner is not the President of the Jamait-E-Islam and the same is not a registered body, he has no locus standi to file the suit. The learned Tribunal also held that since the property belongs to defendant No. 2, it is entitled to deal with the property in any manner it feels like. This order of the learned Tribunal is under challenge in this petition.

5. I have heard Shri Anup Rattan, learned Counsel for the petitioner and Shri Ramakant Sharma, learned Counsel for respondent No. 1 and Shri B.S. Attri, learned Counsel for respondent No. 2.

6. It would be pertinent to mention that the Wakf Act, 1995 was enacted with the avowed purpose of providing better administration of Wakfs and formatters connected therewith or incidental thereto. The Wakf Act, 1954 was repealed and a new Wakf Act, 1995 was enacted by the Parliament which governs all Wakfs.

7. Section 3(r) defines Wakf and reads as follows:

(r) "Wakf means the permanent dedication by a person professing Islam, of any movable or immovable property for any purpose recognised by the Muslim Law as pious, religious or charitable and includes--

(i) A wakf by user but such wakf shall not cease to be a wakf by reason only of the user having ceased irrespective of the period of such cesser.

(ii) "Grants" including mashruf-ul-khidmat for any purpose recognised by the Muslim Law as pious, religious or charitable; and

(iii) A wakf-alal-aulad to the extent to which the property is dedicated for any purpose recognised by Muslim Law as pious, religious or charitable, and "wakf" means any person making such dedication.

8. A bare perusal of this definition shows that a wakf is created when a person professing Islam dedicates any movable or immovable property for any purpose recognized by Muslim law as pious, religious or charitable purpose. It is, therefore, obvious that a muslim creates a wakf for pious, religious and charitable purpose alone.

9. The Wakf Boards have been created u/s 13 of the Act and the constitution of the boards is given in Section 14 of the Act. It would be pertinent to note down the duties and powers of the Chief Executive Officer in Sections 25 & 26 of the Act, which read as follows:

25. Duties and powers of Chief Executive Officer.

(1) Subject to the provisions of this Act and of the rules made thereunder and

the directions of the Board, functions of the Chief Executive Officer shall include

(a) Investigating the nature and extent of wakfs and wakf properties and calling whenever necessary, an inventory of wakf properties and calling from time to time, for accounts, returns and information from mutawallis;

(b) Inspecting or causing inspection of wakf properties and account, records deeds or documents relating thereto,

(c) Doing generally of such acts as may be necessary for the control, maintenance and superintendence of wakfs.

(2) In exercising the powers of giving directions under Sub-section (1) in respect of any wakf, the Board shall act in conformity with the directions by the wakf in the deed of the wakf, the purpose of wakf and such usage and customs of the wakf as are sanctioned by the school of Muslim Law to which the wakf belongs.

(3) Save as otherwise expressly provided, in this Act, the Chief Executive Officer shall exercise, such powers and perform any duties as may be assigned to him or delegated to him under this Act.

26. Powers of Chief Executive Officer in respect of orders or resolutions of Board.

Where the Chief Executive Officer considers that an order or resolution passed by the Board

(a) Has not been passed in accordance with the law; or

(b) Is in excess of or is an abuse of the powers conferred on the Board by or under this Act or by any other law; or

(c) If implemented, is likely to--

(i) Cause financial loss to the Board or the concerned wakf or to the wakfs generally; or

(ii) Lead to a riot or breach of peace; or

(iii) Cause danger to human life, health for safety; or

(d) Is not beneficial to the Board or to any wakf or to wakfs generally,

He may, before implementing such order or resolution place the matter before the Board for its reconsideration and, if such order or resolution is not confirmed by a majority of vote of the members present and voting after such reconsideration, refer the matter to the State Government along with his objections to the order or resolution, and the decision of the State Government thereon shall be final.

10. The powers and function of the Board mentioned in Section 32 and reads as follows:

32. Powers and function of the Board.

(1) Subject to any rules that may be made under this Act, the general superintendence of all wakfs in a State shall vest in the Board established or the State; and it shall be the duty of the Board so to exercise its powers under this Act as to ensure that the wakfs under its superintendence are properly, maintained, controlled and administered and the income thereof is duly applied to the objects and for the purposes for which such wakfs were created or intended:

Provided that in exercising its powers under this Act in respect of any wakf, the Board shall act in conformity with the directions of the wakf, the purposes of the wakf and any usage or custom of the wakf sanctioned by the school of Muslim law to which the wakf belongs.

Explanation.--For the removal of doubts, it is hereby declared that in this Sub-section, "wakf" includes a wakf in relation to which any scheme has been made by any Court of Law, whether before or after the commencement of this Act;

(2) Without prejudice to the generality of the foregoing power, the functions of the Board shall be-

(a) To maintain a record containing information relating to the origin, income, object and beneficiaries of every wakf;

(b) To ensure that the income and other property of wakfs are applied to the objects and for the purposes for which such wakfs were intended or created;

(c) To give directions for the administration of wakfs;

(d) To settle schemes of, management for a wakf;

Provided that no such settlement shall be made without giving the parties affected an opportunity of being heard;

(e) To direct--

(i) The utilisation of the surplus income of a wakf consistent with the objects of a wakf;

(ii) In what manner the income of a wakf the objects of which are not evident from any written instrument, shall be utilized;

(iii) In any case where any object of wakf has ceased to exist or has become incapable of achievement, that so much of the income of the wakf as was previously applied to that object shall be applied to any other object, which shall be similar, or nearly similar or to the original object or for the benefit of the poor or for the purpose of promotion of knowledge and learning in the Muslim community:

Provided that no direction shall be given under this clause without giving the parties affected an opportunity of being heard.

Explanation--For the purposes of this clause, the powers of the Board shall be exercised

(i) In the case of a Sunni wakf by the Sunni members of the Board only; and

(ii) In the case of Shia wakf, by the Shia members of the boards only:

Provided that Where having regard to the number of the Sunni or Shia members In the Board and other circumstances, It appears to the Board that the power should not be exercised by such members only, it may co-opt. such other Muslims being Sunnis or Shias, as the case may be as it thinks fit, to be temporary members of the Board for exercising its powers under this clause;

(f) To scrutinise and approve the budgets submitted by_ mutawallis and to arrange for the auditing of account of wakfs;

(g) To appoint and remove mutawallis in accordance with the provisions of this Act wakf,

(h) To take measures for the recovery of lost properties of any wakf;

(i) To institute and defend suits and proceedings relating to wakfs;

(J) To sanction any transfer of immovable property of a wakf by way of sale, gift, mortgage, exchange or lease, in accordance with the provisions of this Act:

Provided that no such sanction shall be given unless at least two-thirds of the members of the Board vote in favour of such transaction;

(k) To administer the Wakf Fund;

(l) To call for such returns, statistics, accounts and other, information from the mutawallis with respect to the wakf property as the Board may, from time to time, require;

(m) To inspect, or cause inspection of, wakf properties, accounts, records, or deeds and documents relating thereto;

(n) To investigate and determine the nature and extent of wakf and wakf property, and to cause, whenever necessary, a survey of such wakf property;

(o) Generally do all such acts as may be necessary for the control, maintenance and administration of wakfs.

(3) Where the Board has settled any scheme of management under Clause (d) or given any direction under Clause (e) of Sub-section (2), any person interested in the wakf or affected by such settlement or direction may institute a suit in a Tribunal for setting aside such settlement or directions and the decision of the Tribunal thereon shall be final.

(4) Where the Board is satisfied that any wakf land, which is a wakf property, offers a feasible potential for development as a shopping centre, market, housing

flats and the like, it may serve upon the mutawalli of the concerned wakf a notice requiring him within such time, but not less than sixty days, as may be specified in the notice, to convey its decision whether he is willing to execute the development works specified in the notice.

(5) On consideration of the reply, if any, received to the notice issued under Sub-section (4), the Board, if it is satisfied that the mutawalli is not willing or is not capable of executing the works required to be executed in terms of the notice, it may, with the prior approval of the Government, take over the property, clear it of any building or structure thereon, which, in the opinion of the Board is necessary for execution of the works and execute such works from wakf funds or from the finances which may be raised on the security of the properties of the wakf concerned, and control and manage the properties till such time as all expenses incurred by the Board under this section, together with Interest thereon, the expenditure on maintenance of such works and other legitimate charges incurred on the property are recovered from the income derived from the property:

Provided that the Board shall compensate annually the mutawalli of the concerned wakf to the extent of the average annual net income derived from the property during the three years immediately preceding the taking over of the property by the Board.

(6) After all the expenses as enumerated in Sub-section (5) have been recouped from the income of the developed properties, the developed properties shall be handed over to mutawalli of the concerned wakf.

11. A bare reading of Section 32 clearly shows that the Board is vested with the powers of general superintendence of all wakfs in the State. It is the duty of the Board to ensure that the wakfs under its superintendence are properly maintained, controlled and administered and the income thereof is duly applied to meet the objects and the purposes for which such wakfs were created or intended. It is obvious that the wakf board is a trustee of the property which is under its control. The property vests in the wakf board not as an absolute owner having a right to deal with the property in any manner it feels like but to deal with the property in a proper manner in accordance with the, objects and the purpose for which the wakf is created. The Board obviously is expected to ensure that the properties are managed in such a fashion as to get the highest income for the board. The Board or its officials cannot on their own whim and fancy dispose of the property of the board in any manner they feel like.

12. A reading of the entire Act clearly shows that the wakf board is basically created to manage the property of the wakf. It does have the power to deal with the property, but such power must be exercised in a manner in accordance with the objects for which the wakf was created and also to ensure that the property earns best income, for the board.

13. Section 3(k) of the Wakf Act, 1995, reads as under:

(k) Person interested in a wakf means any person who is entitled to receive any pecuniary or other benefits from the wakf and includes

(i) Any person who has a right to worship or to perform any religious rite in a mosque, idgah, imambara, dargah, khangah, maqbara, graveyard or any other religious institution connected with the wakf or to participate in any religious or charitable institution under the wakf

(ii) The wakf and any descendant of the wakf and the mutawalli,

14. A bare reading of this provision shows that any person who receives any benefit from the wakf whether pecuniary or otherwise is a person interested in the wakf. The definition is inclusive in nature and includes any person who has a right to worship in a mosque, idgah, imambara, dargah, khangah, maqbara, graveyard etc. The petitioner who professes muslim religion definitely has the right to worship in a mosque and other institutions mentioned in this section. Therefore, he is a person interested in a wakf.

15. When these aspects are kept in mind, it is obvious that any person who professes Islam is a person interested in the management of the wakf board. He can raise dispute(s) before the Wakf Tribunal that such property is being frittered away or are being sold against the intention of the creator of the wakf. The tribunal created under the Act has to deal with the matters keeping in view the provisions of the Act. Unfortunately, in this case, the tribunal acted more like a civil Court and less like a tribunal. The State in its wisdom has barred the jurisdiction of the civil Courts and vested the same in a tribunal. The intention behind this is that the property of the wakf is not wasted and caught up in delays caused by legal niceties but the same are dealt with expeditiously by a Tribunal. In the present case the approach of the tribunal was totally against the spirit of the Act.

16. Keeping in view the aforesaid discussion, I am of the considered opinion that it cannot be said that the petitioner had no locus standi to challenge the alienation of the wakf property by respondent No. 2 in favour of respondent No. 1. In fact, it was the duty of the tribunal to ensure that the property of the wakf which is in the nature of trust property is not squandered away and fetches the best price. It was also the duty of the Tribunal to ascertain whether the land which was transferred by defendant No. 2 to defendant No. 1 is a part of Kabristan or not. If it was part of the grave-yard, whether this alienation was legal or was it against the purpose for which the wakf was created. If a person dedicates his property and creates a wakf for the purpose of grave-yard, the wakf board cannot alienate the said property for some other commercial use except for certain compelling reasons.

17. All these questions are questions which the tribunal has to deal with and which it has failed to deal with. Therefore, I have no option but to set aside the order of the learned Tribunal. The case is remanded to the Tribunal. The Tribunal may give fresh opportunity to the parties to lead evidence and therefore, shall

decide the matter in light of the observations made hereinabove.

18. The Registry is directed to ensure that the record of the case is sent back to the learned Tribunal as early as possible. The Tribunal is also directed to issue notices to the parties through their counsel as reflected in the power of attorney before it. Service of such notice(s) on the counsel shall be deemed to be effective service of the parties. The Tribunal shall dispose of the matter as early as possible and in any event not later than 31st December, 2009.

19. The petition is disposed of in the aforesaid terms. No order as to costs.