
(2017) 03 UK CK 0055

In the Uttarakhand High Court

Case No : Writ Petition (M/S) No 2585 of 2016

Management of Committee

APPELLANT

Vs

State of Uttarakhand & others

RESPONDENT

Date of Decision : 30-03-2017

Acts Referred:

[Waqf Act, 1995](#), [Section 56\(1\)](#), [Section 83\(1\)](#), [Section 83\(4\)](#), [Section 32\(2\)\(j\)](#) -
Waqf Properties Lease Rules, 2014, — Rule 6, Rule 5, Rule 17

Citation : (2017) 03 UK CK 0055

Hon'ble Judges : Sudhanshu Dhulia

Bench : Single Bench

Advocate : T.A. Khan, Aditya Kumar Araya, Prabha Naithani, Dharmendra Barthwal, J.C. Belwal

Judgement

1. This writ petition has been filed by the Management of Committee of Waqf No. 664 "Waqf Haji Abdul Lateef", Khatima, District Udham Singh Nagar through its President, namely, Mohd. Raza Khan. The petitioner has challenged the validity and the propriety of the order dated 11.08.2016 by which the Chief Executive Officer of Uttarakhand Waqf Board has granted permission to respondent Nos. 5 and 6 for raising construction on the first floor above the shop which is already in their tenancy. The shop is admittedly the property of the petitioner, which is a Waqf. The order seems to have been passed on the application moved by respondent Nos. 5 and 6 before the Uttarakhand Waqf Board for permission to raise construction on the first floor of the shop. This permission was granted to respondent Nos. 5 and 6 by the Chief Executive Officer of the Uttarakhand Waqf Board vide its order dated 11.08.2016. The said order states that since respondent Nos. 5 and 6 are already in possession of ground floor, they are granted permission to raise construction on the first floor of the property. It further says that after raising construction, its rent would be determined by the petitioner - Management Committee of Waqf and the construction would be

completed within six months.

2. Learned Senior Counsel for the petitioner would first argue that what has effectively been done in the present case is not only that respondent Nos. 5 and 6 have been authorized to raise construction on the property of the Waqf, without there being any approval from the petitioner for the said construction. Moreover, effectively the constructed property is also leased out in favour of respondent Nos. 5 and 6, though for the sake of determination of its rent right has been given to the petitioner. This, according to the petitioner, is in violation of the law and the impugned orders are without jurisdiction.

3. The challenge of the petitioner to the said order is on various grounds. First and foremost, the learned Senior Counsel for the petitioner would argue that admittedly the property is under the Management of the Waqf - petitioner, and it is subjected to the provisions of the Waqf Act, 1995. Learned Senior Counsel for the petitioner relies upon Section 32(2)(j) of the Waqf Act, 1995 whereby one of the functions of the Board is to sanction lease of any immovable property of a Waqf, in accordance with the provisions of the Act and the rules made thereunder.

4. Section 32(2)(j) of the Waqf Act, 1995, which is relevant in the present case, reads as under:-

"32. Powers and function of the Board (1)

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

(a)

(b)

(c)

(d)

(e)

(f)

(g)

(h)

(i)

(j) to sanction lease of any immovable property of a waqf in accordance with the provisions of this Act and the rules made thereunder:

Provided that no such sanction shall be given unless a majority of the less than two-thirds of the members of the Board present cast their vote in favour of such transaction:

Provided further that where no such sanction is given by the Board, the reasons

for doing so shall be recorded in writing."

5. Learned Senior Counsel for the petitioner would then argue that there has been no sanction for the construction obtained by respondent Nos. 5 and 6. Proviso (j) to the SubSection (2) of Section 32 of the Waqf Board, 1995 clearly stipulates that before such a lease has to be given it must be sanctioned by majority of not less than two-third of the Board Members. This has not been done, as the Board at the relevant time was not functional. All the same it was under the control of District Magistrate, Dehradun, and therefore, at least an approval of District Magistrate ought to have been taken, which has admittedly not been done.

6. Learned Senior Counsel for the petitioner would also argue that under the powers vested under Section 56 (1) of the Waqf Act, 1995, the Central Government has framed the rules for this purpose which is known as "The Waqf Properties Lease Rules, 2014" wherein rule 5 lays down the procedure for lease of the property which is not for a short duration. Rule 5 of the Waqf Properties Lease Rules, 2014 reads as under:-

"5. Procedure for lease other than short duration lease. - Save as provided in Rule 4 above relating to short duration lease, the mutawalli or Board, as the case may be, shall in all cases where lease of waqf property is required to be given for a period of more than one year but not exceeding thirty years, publish the invitation of bids in at least one leading notional (Hindi, Urdu or English) newspaper and one regional or local newspaper containing the following details, namely -

- (i) exact area or description and location of the waqf property;
- (ii) the purpose or object for which the property is required to be leased;
- (iii) the period for which the property is required to be leased;
- (iv) the minimum reserve price per square feet;

Provided that no such advertisement in newspaper shall be required for lease of waqf property whose lease rental income is less than Rs 1000 (Rupees one thousand) per month and the mutawalli or Board shall invite applications from persons desiring to take the property on lease and execute the lease by following the procedure specified in sub-rules(2) and (3) of Rule 4:

Provided further that the mutawalli, Board or any member of the managing committee of a waqf, including their spouse, parents, children, brothers, sisters, spouses of brothers and sisters or children of brothers and sisters, shall not be eligible to apply for lease under this rule."

7. Another relevant provision of the rules would be rule 6 of the Waqf Properties Lease Rules, which reads as under:-

"6. Invitation of bid for lease:- Competitive bids shall be invited in all cases in

which the rental income from the leased property is more than Rs. 1000 (Rupees One thousand) per month and the waqf property shall be leased out to the highest bidder:

Provided that the bid shall in no case be less than the reserve price referred to in Rule 7."

8. Rule 17 of the Waqf Properties Lease Rules, 2014 is also relevant in the present case, which reads as under:-

"17. Grant of long term lease of up to thirty years in certain cases- (1) A lease of any immovable waqf property exceeding one year period and extending up to thirty years may be granted for the purposes of carrying out any commercial activity, education or health purposes, with the approval of the State Government. If the State Government fails to grant permission within 3 months, the permission may be deemed to be granted.

(2) The sanction for grant of lease under sub-rule (1) shall be given by the Board in accordance with the procedure contained in clause (j) of sub-section (2) of Section 32 of the Act."

9. Learned Senior Counsel for the petitioner would submit that the provision of rule 5 of the Waqf Properties Rules provides that before inviting bids for the lease of a waqf property, it has to be published in at least one leading National newspaper either in Hindi, Urdu or English and one regional or local newspaper giving below the details of the properties, as prescribed under rule 5 of the Waqf Properties Lease Rules, 2014, which has again not been followed in the present case. Moreover, there is also a clear violation of rule 6 as well as rule 17 of the Waqf Properties Lease Rules, 2014 as well, inasmuch as the prescribed procedure was not followed, before granting the lease and moreover, there has been no approval of the State Government.

10. On the other hand, learned counsel for the Waqf Board/respondent Nos. 2 and 3 has firstly argued that the petitioner has an alternative remedy under sub-section (1) and sub-section (4) of Section 83 of the Waqf Act, 1995 inasmuch as Waqf Tribunal has already been constituted in the State of Uttarakhand, which is operating in Haldwani (District Nainital) and there is a statutory provision for an adjudication of such dispute by the Tribunal.

11. Second argument of the learned counsel for the Waqf Board is that what has been given by the Chief Executive Officer in its order dated 11.08.2016 is not technically a lease. All that has been granted by the impugned order dated 11.08.2016 was a permission to respondent Nos. 5 and 6 to raise construction on the first floor of the property, which was in their possession. Therefore, the provision relating to lease of the property, as relied upon by the learned counsel for the petitioner, would not be applied in this case.

12. Apart from the above arguments, the first argument of Mr. J.C. Belwal, learned counsel for the private respondent Nos. 5 and 6 is that the writ petition

has become infructuous, considering the relief sought by the petitioner was restraining the construction inasmuch as in compliance of the order dated 11.08.2016 construction has already been done.

13. Learned counsel for the private respondents would argue that the possession of the property is already given to them and after obtaining valid permission for raising construction, the construction has been done and the newly constructed portion of the property is under their possession. Second argument of the private respondents is that the petitioner is seeking writ of mandamus against the private respondents, which cannot be granted under the law.

14. Learned counsel for the respondent nos. 5 and 6 would also submit that the petitioner in its reply before the Chief Executive Officer has mentioned that they have already given right for construction on the first floor to one Nasir Siddiqui and Arif Siddiqui and therefore the petitioner has not come with clean hands before this Court, as they have seriously violated provision of law.

15. After having heard the rival submissions of the parties, the determination of this Court is as follows.

16. The first argument at the hands of the learned counsel for the Waqf Board is to be rejected at the very threshold for the simple reason that the alternative remedy cannot always be an equal efficacious remedy. Here the challenge is as to the procedure itself. Moreover, there is another reason why at this stage writ petition cannot be dismissed on the ground of alternative remedy. Earlier in the present matter, when the writ petition was filed challenging the validity of the impugned order, the petitioner had pressed for interim relief, which was not granted to him by this Court. This Court vide order dated 20.09.2016 passed following order:-

"Mr. T.A. Khan, Senior Advocate assisted by Mr. Vinay Bhatt, Advocate for the petitioner.

Mr. P.C. Bisht, Standing Counsel for the State/respondent nos. 2 and 3.

Mr. Dharmendra Barthwal, Advocate for respondent nos. 2 and 3.

Issue notices to respondent nos. 5 and 6. Steps to be taken within a week.

Respondents shall file their counter affidavit within a period of three weeks.

List this matter after four weeks in the daily cause list."

17. Subsequently, the petitioner had preferred a special appeal, being SPA No. 277 of 2016, before the Division Bench against the above order, which was disposed of vide order dated 07.10.2016. The operative portion of the same reads as under:-

"7. Today, when the matter was taken up, learned Senior Counsel appearing for the appellant would in fact submit that the respondent nos. 5 and 6 have completed the construction of the walls and the construction of the lintel is going

on. According to the learned counsel for the appellant it is pointed out that this shows that the prayer has not become infructuous. It is submitted that only after the construction will be over, the possession will be given.

6. We notice that in the first place, there is an impugned order, which is not a judgment as such, but there is a refusal to grant stay. We notice further that the learned Single Judge directed that the case be listed after four weeks from the date of the order, which means the case will be listed some time around 20.10.2016, which is just four days after reopening.

7. We leave it open to the appellant, if so advised, to either seek expeditious disposal of the writ petition.

8. In such circumstances without prejudice to the right of the appellant to move the Court for early disposal of the case, the appeal is closed."

18. For this reason, considering the above decision passed in special appeal, it would not be proper to dismiss the writ petition on the ground of alternative remedy.

19. The second argument of the Waqf Board is that what has effectively been given to respondent Nos. 5 and 6 is a lease deed though ostensibly, it is merely a permission to raise construction, as by the same order the Chief Executive Officer has also permitted the respondents to continue in possession on the new construction. Therefore, the order dated 11.08.2016 is in fact a lease in favour of respondent Nos. 5 and 6. The procedure, as to how the property of a Waqf Board can be leased out, is given under Section 32(2)(j) of the Waqf Board read with rules (which have already been referred above) of which there has been a clear violation.

20. As far as the writ petition has becoming infructuous, it cannot be accepted for the reasons that due to the changed

circumstances, a relief can always be molded in a writ court. Moreover, apart from the main prayer of the petitioner, he has also prayed "any relief which this Court deem fit". The writ petition is primarily for quashing the order dated 11.08.2016, which has been passed by the Statutory authority, which is in violation of the law and is totally without jurisdiction. Moreover, it is an appropriate case where mandamus can always be issued against the private persons as well.

21. In view of the above discussion, the writ petition succeeds with the following directions.

22. The respondent Nos. 5 and 6 shall handover the peaceful possession of the first floor of the building to the petitioner within a period of four weeks from the date the certified copy is obtained by the petitioner.

23. Since learned counsel for respondent Nos. 5 and 6 has an apprehension that they have raised the construction on permission being granted by the Chief

Executive Officer, they cannot be put to loss which has been spent by them on raising the said construction, which is approximately Rs.5.00 lakh (Rupees Five Lakh Only). On this, learned Senior Counsel for the petitioner has given an offer that they are prepare to give an amount of Rs.5.00 Lakh (Rupees Five Lakh Only) to respondent Nos. 5 and 6 in order to compensate the private respondents, which is accepted to the counsel for respondent Nos. 5 and 6. Let this be done.

24. This Court has been informed that as of now Board has been constituted and presently functional. The Waqf Board is being represented by Mr. Dharmendra Barthwal - Advocate, who is further directed that the Waqf Board shall adopt due process, as provided in the Act as well as in the Rules and lease out the property in accordance with law.

25. It is further made clear since respondent Nos. 5 and 6 are ready to handover the peaceful possession of the property in dispute to the petitioner, they are also at liberty to participate in the bid process, which will be initiated by the Waqf Board.