
(2008) 12 AHC CK 0019
In the Allahabad High Court

Maulvi Abdul Rahman Siyai	Vs	APPELLANT
Sardar Maqbool Hasan and Others		RESPONDENT

Date of Decision : 17-12-2008

Acts Referred:

Waqf Act, 1995 — Section 83(2)

Citation : AIR 2009 All 62 : (2009) 2 AWC 1115

Hon'ble Judges : Sabhajeet Yadav, J

Bench : Single Bench

Judgement

Sabhajeet Yadav, J.—The abovenoted civil revision has been preferred against the Judgment and order, dated 30-8-2008 passed by Civil Judge (Senior Division) Varanasi/Wakf Tribunal, whereby the application 241Ga and 242Ga filed by the revisionist in Wakf Referee No. 4 of 2007 Sardar Maqbool Hasan v. U.P. Sunni Central Wakf Board and others have been dismissed.

2. The brief (facts leading to the case are that there is a wakf known as Wakf Masjid Lat, and Roja Hajrat Maqdoom Tazuddin Ahmad Bukhari (Wakf No. 7) Varanasi District Varanasi registered with U.P. Sunni Central Wakf Board. The said wakf is not created by any wakf-deed rather it was created by user and registered as Public Wakf. On account of (death Of Late, Mohd. Bashir S/o Haji Abdul Ahmad vacancy of Mutawalli in the said wakf had occurred. The applicant/revisionist and respondent No. 1 have approach the respondent No. 2 namely U.P Sunni central Wakfs Board by moving their appointment as Mutawalli or the Committee of Management to manage the affairs of the said Wakf. The Wakf Board after hearing the parties has passed, an order dated 26-7-2007 in pursuance thereof Chief Executive Officer of the of U.P. Sunni Central Wakf Board issued office memorandum on 23-8-2007, whereby a Committee of Management of the applicant/revisionist was appointed for a period of one year and the application moved by the respondent No. 1 for his appointment as Mutawalli has been dismissed.

3. The respondent No. 1 being aggrieved by the said order of the Board and

office memorandum Issued by the Chief Executive Officer of the Board has filed application u/s 83(2) of the Wakf Act-1995 (herein after referred to as the Act), which was numbered as Reference No. 4 of 2007 before Wakf Tribunal/Civil Judge (Senior Division), Varanasi on 5-9-2007. The respondent No. 1 has also filed an application for grant of interim injunction in the said reference. Thereupon the Wakf Tribunal has passed an interim injunction in favour of respondent No. 1 on 3-10-2007. The applicant and other office bearers of the Committee of Management have challenged the said order by means of Civil Revision No. 396 of 2007 before this Court. After hearing both the parties this Court has disposed of the said revision with a direction to the Tribunal to decide the said Wakf Reference on merits within a period of three months from the date of production of certified copy of the order before the Tribunal vide judgment and order dated 21-2-2008.

4. It is stated that in spite of direction given by this Court the Wakf Tribunal could not decide the aforesaid Wakf reference within time, as directed by this Court, meantime one year term of the Committee of Management of the Wakf in question has expired on 25-7-2008 in view of order dated 26-7-2007 passed by the Wakf Board, therefore, the applicant-revisionist along with other office bearers of his committee of management has moved applications 241 Ga and 242 Ga before the Tribunal to dismiss the reference as having been rendered infructuous. Against the said applications the respondent No. 1 has filed his objection and after hearing the parties, aforesaid applications of applicant have been dismissed by the Wakf Tribunal vide impugned judgment and order dated 30-8-2008 holding that in given facts and circumstances of the case, the reference in question cannot be held to have become infructuous and the other reliefs claimed by the respondent concerned cannot be held to be consequential in nature. It was also held that admissibility of other reliefs claimed by the respondent No. 1 can be examined in the light of evidence adduced by the parties which has already been over.

5. Heard Sri V.M. Zaidi, learned Counsel for the applicant-revisionist and Sri Section M.A. Qazmi, learned Senior Counsel assisted by Sri S.A.M. Firdausi for the respondent No. 1.

6. While assailing the impugned order passed by the Wakf Tribunal, learned Counsel for the revisionist Sri V. M. Zaidi has vehemently contended that the reference in question filed by the respondent No. 1 against the order of Wakf Board is not maintainable in view of Section 89 of the Act as neither two months prior notice showing intention to file such suit was given, to the Board nor the plaint/application contained any statement that such notice has been delivered or left at the office of Board. He urged that the provisions contained u/s 89 of the Act are mandatory in nature as such could not be waived by the respondent No. 1. In support of his submission, learned Counsel for the revisionist has placed reliance upon a decision of Madras High Court rendered in M.S. Abdul Hameed v. S.M. Sheikh Mohammad and Ors. AIR 2003 Madras 179.

7. Learned Counsel for the revisionist has further submitted that since the main relief claimed by respondent No. 1 was to set aside the order of Wakf Board dated 26-7-2007, wherein the term of the Committee of Management of Wakf in question appointed for one year was expired by 25-7-2008, has been rendered infructuous, therefore, other reliefs being incidental/consequential in nature can not be granted by the Wakf Tribunal for the reason that the main relief itself has become infructuous. Learned Counsel for the revisionist has further submitted that another relief seeking appointment of Mutawalli is within the sole domain of the Wakf Board, therefore, such relief can also not be granted by the tribunal. While substantiating his submission learned Counsel for the revisionist has placed reliance upon Section 32 of the Act which enumerates various powers and functions of the Board, and inter alia provides general powers of superintendence of Board over the Wakf and wakf property and further provisions of Section 63 of the Act empowered the Board to appoint Mutawalli of Wakf in certain situations and contended that since the power to appoint Mutawalli lies with the Board, therefore, no direction can be given by the Wakf Tribunal to appoint the respondent No. 1 as Mutawalli of the wakf in question, as such the relief claimed by the respondent No. 1 in this regard can also not be granted by the Wakf Tribunal. In this connection, he has also placed reliance upon a decision of Hon"ble Apex Court rendered in M.P. Wakf Board v. Subhan Shah 2007 (1) JCLR 815 SC : AIR 2006 SCW 5540.

8. Contrary to it, the contention of Sri S.M.A. Qazmi, learned Senior Counsel appearing for the respondent No. 1 in nutshell is that earlier to it the members of the committee constituted by the Wakf Board for administration of affairs of wakf in question has already preferred Revision No. 396 of 2007 before this Court against the interim injunction granted in favour of the respondent No. 1 in Reference No. 4 of 2007 Maqbool Hasan v. U.P. Sunni Central Board and Ors. The aforesaid revision was decided by this Court on 21-2-2008 : reported in 2008 (3) ALJ (NOC) 748 whereby a direction has been given to the Wakf Tribunal to decide the reference in question on merits within three months from the date of production of certified copy of the order passed by this Court before the Tribunal. In the aforesaid revision filed by the members of the Committee, the present revisionist was also party as one of revisionist. He did not raise any question of maintainability of reference on the ground that neither two months prior notice was given to the Board nor the plaint in question contains statement to the effect that such notice was either delivered or left at the office of the Board as required u/s 89 of the Wakf Act, therefore, now it is not open for the present revisionist to raise the question of maintainability of the aforesaid reference before Wakf Tribunal, as this Court has already directed the Wakf Tribunal to decide the reference in question on merits within a time frame schedule, accordingly, the question of maintainability of the aforesaid reference before the Wakf Tribunal cannot be gone into by this Court as the earlier decision rendered by this Court on 21-2-2008 shall operate as resjudicata between the parties. Besides this, learned Counsel for the respondent No. 1 has further urged that while filing

present revision, the revisionist did not file copy of the written statement filed before Wakf Tribunal so as to demonstrate before this Court as to whether aforesaid plea has been taken before the Wakf Tribunal or not and in absence of necessary material on record it is not open for the revisionist to raise such contention before this Court first time in this revision.

9. Learned Counsel for the respondent No. 1 has further urged that in the reference in question respondent No. 1 has sought three reliefs namely for setting aside the order of Board dated 26-7-2007 and the memorandum dated 23-8-2007 issued by Board, secondly the Wakf Board may be directed to appoint the respondent No. 1 Sardar Maqbool Hasan as Mutawalli of the Wakf in question and thirdly the respondents of the said reference i.e. the members of Committee constituted by the Board should be restrained from interfering in the working of respondent No. 1 as Mutawalli of the wakf. Therefore, in case on account of expiry of a period of one year term of Committee of Management even if the reliefs sought for by the respondent No. 1 before the Wakf Tribunal in respect of orders dated 26-7-2007 and 23-8-2007 passed by the Wakf Board has been rendered infructuous even then other reliefs claimed by the respondent No. 1 cannot be said to be either incidental or consequential in nature or otherwise cannot be granted by the Tribunal. Therefore, the submission of learned Counsel for the revisionist is without substance and the Tribunal has rightly rejected the application of the revisionist vide impugned order dated 30-8-2008 holding that the reference in question still survives to be proceeded with by the Tribunal. The submission of learned Counsel for the respondent No. 1 appears to have some substance and deserves to be accepted.

10. Having considered the rival submissions of learned Counsel for the parties and from perusal of record, the first question which arises for consideration is as to whether in given facts and circumstances of the case the reference in question pending before the Wakf Tribunal is not maintainable for want of two months prior notice to the Board and for want of statements in suit that such notice was left at the office of Board or delivered to it? In this connection, it is necessary to point out as contended by learned Counsel for the respondent No. 1 that in earlier revision filed by the members of the Committee which was numbered as Civil Revision No. 396 of 2007 Maulvi Muinuddin and Ors. v. Sardar Maqbool Hasan and Ors., the present revisionist was also party as one of the revisionist and said revision was decided by this Court on 21-2-2008 whereby this Court has directed the Wakf Tribunal, Varanasi to decide the reference No. 4 of 2007 Sardar Maqbool Hasan v. U.P. Sunni Central Wakf Board and others on merits within a period of three months. The aforesaid order dated 21-2-2008 passed by this Court has attained finality between the parties, therefore, is binding upon them on principle of res-judicata. Accordingly, this Court is not required to examine the question of maintainability of the said reference pending before the Wakf Tribunal. Besides this, it is also necessary to point out that revisionist did not file copy of written statement filed before the Tribunal in the reference in question to examine as to whether aforesaid plea has been raised by him before the Tribunal

or not. In absence of necessary material on record the revisionist cannot be permitted to raise aforesaid plea first time in this revision without any foundation of the same in the pleading before the Tribunal.

11. Now next question arises for consideration is as to whether on account of expiry of one year term of the Committee of Management appointed by the Wakf Board vide order dated 26-7-2007 and memorandum dated 23-8-2007 other reliefs claimed by respondent No. 1 in the reference in question have been rendered infructuous or not? In this connection, it is necessary to point out that it is no doubt true that the period of the Committee of Management appointed by the Wakf Board vide order dated 26-7-2007 has been expired on 25-7-2008 and period of office memorandum issued on 23-8-2007 has also expired on 22-8-2008, therefore, the relief for setting aside the aforesaid orders of the Wakf Board has been rendered infructuous by elapse of time. But so far as another relief claimed by the respondent No. 1 in the said reference seeking permanent injunction against the revisionist and other members of the Committee of Management is concerned, in my opinion, such relief is neither incidental nor consequential of the relief for setting aside the order of Board dated 26-7-2007 and office memorandum dated 23-8-2007, instead thereof in given facts and circumstances of the case, the relief of permanent injunction is independent and can still be examined by the Wakf Tribunal as to whether in given facts and circumstances of the case such relief can be granted to the respondent No. 1 or not. Therefore, the submissions of learned Counsel for the revisionist in this regard has to be rejected as having being without substance.

12. Now last question arises for consideration is that as to whether third relief claimed by the respondent No. 1 that Board may be directed to appoint respondent No. 1 as Mutawalli of the Wakf in question still survives and can be granted by the Tribunal or not? In this connection learned Counsel for the respondent No. 1 has placed reliance upon the various averments made in application moved by him u/s 83(2) of the Wakf Act before the Tribunal and stated that the Wakf in question was earlier registered by the Commissioner, Varanasi Division, Varanasi on 25-2-1938 under earlier existing law, wherein scheme of administration of Wakf including mode and manner of appointment of Mutawalli was provided and under the New Act 1995 also the said Wakf has been registered under which said scheme is continuing in force. Learned Counsel for the respondent No. 1 has urged that although u/s 32(1) of the Act, the Board has general power of control and superintendence over the administration of affairs of Wakf but said power is not absolute and is controlled by proviso of Section 32(1) of the Act which postulates in clearest terms that while exercising the aforesaid powers 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.

13. Sri S.M.A. Qazmi has further urged that u/s 37 of the Act, the Board is

required to maintain a register of the wakf, which shall contain in respect of each wakf copies of wakf-deed, when available and certain other information's and particulars including the name of Mutawalli and the rules of succession to the office of Mutawalli under the wakf-deed or by custom or usages. At the strength of the aforesaid provisions of the Act Sri Qazmi has submitted that since the wakf in question was not created by any wakf deed instead thereof it was created by user, therefore, the mode or manner of succession to the office of Mutawalli shall be governed by the custom or usage as contained in the register of wakf maintained by the Board and the Board would not be entitled or empowered to appoint and remove the Mutawalli at its sweet will or in arbitrary manner. In this view of the matter it would be within competence of the Wakf Tribunal to examine the issue and pass appropriate order in this regard.

14. To appreciate the aforesaid contention, it would be useful to extract the provisions of Sections 32, 37 and 63 of the Act as under:

32. Powers and functions of the Board.--

(1) Subject to any rule 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 the 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) x x x x xx

(b) x x xx xx

(c) x xxx xx

(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) x xxxxx

(f) x xxx xx

(g) to appoint and remove mutawallis in accordance with the provisions of this Act;

(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.

37. Register of wakfs--The Board shall maintain a register of wakfs which shall contain in respect of each wakf copies of the "wakf deeds, when available and the following particulars, namely:

(a) the class of the wakf;

(b) the name of the mutawalli;

(c) the rule of succession to the office of mutawalli under the wakf deed or by custom or by usage;

(d) particulars of all wakf properties and all title deeds and documents relating thereto;

(e) particulars of the scheme of administration and the scheme of expenditure at the time of registration;

(f) such other particulars as may be provided by regulations.

63. Power to appoint mutawallis in certain cases.--When there is a vacancy in the office of the mutawalli of a wakf and there is no one to be appointed under the terms of the deed of the wakf, or, where the right of any person to act as mutawalli is disputed, the Board may appoint any person to act as mutawalli for such period and on such conditions as it may think fit.

15. From a plain reading of the provisions of Section 32(1) of the Act, it is clear that subject to any rule made under the Act, the general superintendence of all the wakfs in State is vested in the Board established or the State and it shall be the duty of the Board to ensure that 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. The proviso added to this Section 32(1) is of controlling in nature, which postulates in clearest terms that while exercising its power under the 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.

16. Further u/s 32(2)(g) of the Act the Board is empowered to appoint and remove the Mutawalli in accordance with the provisions of the Act, but this power of appointment and removal of the Mutawalli is without any prejudice to the

general power of superintendence of the Board over a wakf. Besides, Section 37(c) of the Act also indicates that the rule of succession to the office of Mutawalli is governed by the wakf deed and if the wakf is not created by the wakf deed, the same is governed by the custom or usage. However the power to appoint Mutawalli u/s 63 of the Act can be exercised by the" Board only When there is no one to be appointed under the terms of wakf-deed or where the right of any person to act as Mutawalli is disputed, in that situations alone the Board may appoint any person to act as Mutawalli for such period and on such conditions as it may think fit and not in other situations.

17. It implies that while exercising the power of superintendence including the appointment of Mutawalli the Board has no absolute power, instead thereof the Board is under duty to follow directions of the wakf as contained in the wakf-deed and if the wakf is not created by any wakf-deed, it shall be governed by the customs and usage of the wakf, which have sanction of School of Muslim law to which it belongs. Therefore, in my opinion, the power of superintendence and control of the Board over the wakf including to the appointment of Mutawalli to a wakf is not absolute, as such while exercising such power of superintendence in respect of a wakf, the Board cannot act according to its sweet will, rather it has to act in conformity with the directions of the concerned wakf but where the wakf is not created by any wakf-deed or where the wakf is created by user and there exist no such wakf-deed like in present case, in such situation, in view of Section 37(c) of the Act, the rule of succession to the office of Mutawalli shall be governed by the customs or usage and/or scheme of the administration of said wakf by virtue of the provision of Section 37(e) of the Act. Therefore, the submission of learned Counsel for the revisionist in this regard, cannot be accepted.

18. Now coming to the scope of inquiry by the wakf tribunal, it would be useful to extract the relevant provisions of Sections 83 and 85 of the Act as herein after:

83. Constitution of Tribunals, etc.--(1) The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a wakf or wakf property under this Act and define the local limits and jurisdiction under this Act of each of such Tribunals.

(2) Any mutawalli person interested in a waki or any other person aggrieved by an order made under this Act, or rules made there under, may make an application within the time specified in this Act or where no such time has been specified, within such time as may be prescribed, to the Tribunal for the determination of any dispute, question or other matter relating to the wakf.

(5) The Tribunal shall be deemed to be a civil court and shall have the same powers as may be exercised by a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, or executing a decree or order.

85. Bar of jurisdiction of Civil Courts. - No suit or other legal proceeding shall lie

in any Civil, Court in respect of any dispute, question or other matter relating to any wakf, wakf property or other matter which is required by or under this Act to be determined by a Tribunal.

19. From a joint reading of the provisions of Sub-section (1) and (5) of Section 83 and Section 85 of the Act, it is clear that the Wakf Tribunals constituted by State Government are empowered to determine any dispute, question or other matters relating to a Wakf or Wakf property under this Act within their local limits as defined under the notifications constituting such Tribunal and they shall be deemed to be civil court and shall have the same powers as may be exercised by a civil court under the CPC while trying a, suit or executing a decree or order and further by virtue of the provisions of Section 85 of the Act, the jurisdiction of civil court is barred for entertaining or trying any suit or other legal proceedings in respect of any dispute, question or other matter relating to any Wakf, Wakf property or other matter, which is required by or under this Act to be determined by a Tribunal. It implies that civil court shall have no jurisdiction to entertain and try any suit or other legal proceeding in respect of which Wakf Tribunal has such jurisdiction.

20. From a plain reading of the provisions of Sub-section (2) of Section 83 of the Act it is clear that any mutawalli or person interested in a Wakf or any other person aggrieved by an order under this Act, or Rules made thereunder, may make an application within time specified in this Act or where no such time has been specified, within such time as may be prescribed, to the Tribunal for the determination of any dispute, question or other matters relating to the Wakf. It implies that any mutawalli or person interested in a Wakf may make an application to the Tribunal within time specified in this Act or where no such time has been specified, within such time as may be prescribed for determination of any dispute, question or other matter relating to the Wakf. Such an application can also be made by any other person aggrieved by an order made under this Act or Rules made there under but in my opinion, such other person cannot make any such application to the Tribunal unless and until he is aggrieved by an order made under this Act or Rules framed thereunder but this condition is not precedent or prior condition for any Mutwalli or any person interested in a wakf to approach the Tribunal.

21. The expression "other matter relating to a wakf or wakf property" is very comprehensive and is of wide import or amplitude which may embrace in its sweep any matter relating to the management of wakf and wakf property, therefore, the appointment of the Mutawalli or the Committee for management of the wakf in my considered opinion, would fall within the ambit of expression "other matter relating to a wakf or wakf property" and can be decided by the Wakf Tribunals.

22. The aforesaid view also finds support from the decisions of this Court rendered in *Najma Khatoon v. U.P. Sunni Central Board of Wakf and Ors.* 2003 (21) LCD 266, wherein it has been held that the Tribunal can adjudicate any

dispute, question or other matter relating to the Wakf or Wakf property under the Act and another Division Bench of this Court in Wakf Dargah Shah Mohd. and Ors. v. U.P. Sunni Central Board of Wakf Lucknow and Ors. 2003 (52) ALR 57 has held that the Wakf Tribunal has jurisdiction to entertain the case, even if no order is passed under the Wakf Act, 1995, as the scope of Section 83 is very wide, the Court has held that the Wakf Tribunal has power to grant interim order also. Similar view has also been taken by the Uttaranchal High Court in Amanullah Khan v. State of Uttaranchal and Ors. AIR 2005 Utt 178. I am in full agreement with the view taken in the aforesaid cases. The decision of the Hon'ble Apex Court cited by learned Counsel for the revisionist, in my opinion, can be of no assistance to the case of revisionist as the same is distinguishable on facts.

23. Thus in view of aforesaid discussion, there can be no scope for doubt to hold that the wakf tribunal is well within its authority to decide the entitlement of the respondent No. 1 to be appointed" as Mutawalli of the wakf in question on the basis of evidence adduced by the parties in the light of the observation made herein before. In given facts and circumstances of the case, I am in full agreement with the view taken by the wakf tribunal that other relief sought for by the respondent No. 1 in pending reference before wakf tribunal has to be examined in the light of evidence adduced by the parties and entire reference can not be held to have become infructuous. In my opinion, instant revision is without merit and liable to be dismissed.

24. The tribunal is directed to decide the reference in question within two months on merit as earlier directed by this Court from the date of production of certified copy of this order before the tribunal.

25. Accordingly, the revision is hereby dismissed and the Interim order stands vacated.