

**(1983) 04 AHC CK 0056**

**In the Allahabad High Court**

**Case No : Civil Revision No. 592 of 1981**

Mohammad Musteh Hasan Jaffrey

APPELLANT

Vs

Azam Ali and Others

RESPONDENT

**Date of Decision : 08-04-1983**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11  
Limitation Act, 1963 — Section 10, 11, 12, 13, 14  
Uttar Pradesh Muslim Waqfs Act, 1960 — Section 2, 29, 29(1), 29(3), 29(4)

**Citation : (1983) 04 AHC CK 0056**

**Hon'ble Judges : P.N. Bakshi, J**

**Bench : Single Bench**

**Advocate : R.H. Zaidi, for the Appellant; G.N. Chandra and V.K. Jaiswal, for the Respondent**

**Final Decision : Allowed**

## Judgement

P.N. Bakshi, J.—The Plaintiff, Mohammad Musteh Hasan Jaffrey, filed a suit (strictly speaking a reference) before the Additional Civil Judge, Bijnor acting as a Mutwalli under the U.P. Muslim Waqfs Act, 1960, for a declaration that the Masjid in question is a Shia Masjid belonging to the Shia community and is duly registered as such by the Shia Waqf Board. Even though the Masjid belonged to the Shia community and was under its management. Sunnis were interfering with their possession and management and had also started making construction thereon. It was prayed that an injunction be issued restraining them from committing these illegal acts.

2. Defence to the suit, inter alia, was that the Masjid belonged to the Sunni community and it had never been under the management of Shias, that Ibne Hasan has been its Mutwalli for the last several years and has been managing the same. He had made constructions therein and even electric connection is in his name. The Defendants suit is liable to be dismissed.

3. The Tribunal has rejected the reference on the finding that the Shia

community has no connection with the Masjid in question vide its judgment dated 5th November, 1981. Hence this revision.

4. I have heard learned Counsel for the parties at considerable length and have also perused the impugned order.

5. One of the crucial questions which arises for determination in this case, is whether the Instant reference, which has been filed u/s 8/71 of the U.P. Muslim Waqfs Act before the Tribunal by the Plaintiff, is legally maintainable? Issue No. 5 has specifically been framed by the trial court in this connection. It appears from the record that the Masjid in question had been registered as a Shia Waqf by an order of the Board dated 5th September, 1979. A civil suit was at first filed in the court of the Munsif Bijnor inter parties, which was dismissed by him on 8-9th October, 1979, on the ground that the civil court had no jurisdiction to entertain this suit. The plaint was, therefore, returned to the Plaintiff for presentation to the proper court under Order 7 Rule 11 Code of Civil Procedure. The trial court was of the opinion that under the Muslim Waqfg Act, 1960, the Tribunal alone was authorised to hear a dispute of this nature and the decision of the civil court could not have the effect of resjudicata, as argued on behalf of the Defendant in the trial court. It, therefore, came to the conclusion that the instant reference was maintainable.

6. In this connection some provisions of the U.P. Muslim Waqfs Act, 1960 have to be considered. Chapter I of the said Act relates to Survey of Waqfs. u/s 4 of this Chapter, Commissioner of Waqfs and Additional or Assistant Commissioner of Waqfs are appointed. Additional and Assistant Commissioners of Waqfs have been empowered to exercise all the powers conferred on a Commissioner u/s 5 of this Act. Section 6 relates to Survey of Waqfs. The Commissioner has been directed to apportion the work of Survey of Waqfs between himself and the Additional and Assistant Commissioners. The general supervision of work and control remained with him. u/s 6(2) the Commissioner of Waqfs has been empowered to make inquiries, details In respect of which have been mentioned therein. A proviso has also been added to the effect that if there is any dispute as to whether a particular Waqf is a Shia Waqf or a Sunni Waqf, such dispute shall be decided on the basis of recitals in the need. In Sub-section (3) of Section 6 the Commissioner has been vested with the power of the civil court under the CPC while making such inquiries. Under Sub-section (4) of Section 6 of the Act when a report or inquiry is ready, it has to be submitted by the Commissioner etc. to the Shia and Sunni Boards of Waqfs and the State Government, who shall notify in the official gazettee, the Waqf relating to a particular sect, to which the provisions of the Act would apply. Section 7 relates to the recovery of costs of survey which has to be conducted Statewise, to be borne by all the Mutwallis in proportion to the income of the waqf property.

7. Now comes the most important Section for consideration viz. Section 8 of the Act, which runs as follows:

(1) If any dispute arises whether a particular property is waqf property or not or whether a Waqf is a Shia Waqf or Sunni Waqf, the Board concerned or the Mutwalli of the Waqf or any person interested therein, may, in accordance with the provisions of this Act, refer the dispute for adjudication to the Tribunal.

Provided that no such dispute shall be entertained by a Tribunal after the expiry of one year from the date of the publication of the list of Waqfs under Sub-section (4) of Section 6.

(2) The Commissioner, Additional Commissioner of Waqfs and Assistant Commissioner of Waqfs shall not be made a party to any proceeding under Sub-section (1).

8. Counsel for the applicant has submitted that the instant suit (Reference) has been made u/s 8 of the Act and has been filed before the Tribunal as required by Section 71 of the Act.

9. Counsel for the opposite parties submits that the matters which can be decided u/s 8 of the Act are only those which relate to Survey proceedings and the dispute of the Instant nature is not covered by this Section. Section 6 (2)(a) of the Act enjoins upon the Commissioner of Waqf to show the number of waqfs in the area, whether they are Sunni Waqfs or Shia Waqfs separately. Sub-section (b) of Section (2) of the Act gives the nature and object of each Waqf and under Sub-section (g) of the said Section, such other particulars of the Waqf, as may be prescribed, have to be mentioned. It would be taking a very narrow view of the Section If the dispute referred to In Section 6 is taken to mean a dispute only with regard to the area of the properties owned by the Waqfs or disputes concerning rights of taxes or surcharges payable to the Government, expenses and realization of income made by the Mutawalli. There does not appear to be any restriction placed upon the word "dispute" In Section 8 of the above Act, which would exclude the nature of the Waqf being considered or which would preclude a party from challenging that a particular property claimed by the Shia Waqf or the Sunni Waqf and vice versa does not relate to that waqf. In the Instant case the Plaintiff had come forward with the plea that they had got the Masjid in question registered as a Shia Masjid under Chapter III Section 29 of the Muslim Waqfs Act. They pleaded that since the opposite parties were causing obstruction in the management of the waqf by the Mutawalli and had trespassed upon the property, which belonged to the Shia Waqf and made constructions thereon, therefore, he sued for a declaration that the Masjid belonged to the Shia Waqf and the encroachment made by the Defendant was not justified for which an order of injunction was sought against him.

10. It may be mentioned at this stage that the Plaintiff had gone to the civil court for vindication of his rights, but the civil court came to the conclusion that it did not have jurisdiction to entertain the suit and, therefore, returned the plaint for presentation to the proper court. Every wrong has a remedy. In the instant case If the civil court had no jurisdiction to entertain the suit, certainly the Tribunal

would have the jurisdiction to give relief. The Plaintiff cannot be left to the winds remediless. Such could never be the intention of the law.

11. Counsel for the opposite parties has argued that if at all, the objection of the Plaintiff should have been filed u/s 57-A of Chapter VII of the U.P. Muslim Waqfs Act. That was the proper Section applicable and the remedy should have been claimed by him under that provision. In this connection it will be relevant to mention that Chapter VII deals with the special powers of the Board. u/s 56 a beneficiary or any person interested in the Waqf may make an application to the Board supported by an affidavit, to institute an inquiry relating to the administration of the Waqf or for examination and audit of its account.

12. u/s 57 if, after the enquiry, the Board is of opinion that the Mutawalli or the committee of management has acted otherwise than in accordance with the terms and conditions of the Waqf, it may take such action against them as may be deemed expedient. u/s 57-A of the Act if the Board is satisfied after making an inquiry that any person is in unauthorised occupation of any immovable property entered as property of a waqf in the register of waqfs maintained u/s 30 it may send a requisition to the Collector to obtain and deliver possession of the property as the Waqf. These three Sections have to be read together. Under these Sections an application has to be made by a beneficiary or interested person to the Board against the administration of the Waqf. It does not contemplate an application being made under these Sections by the Mutawalli himself. When the nature of the Waqf being a Shia or Sunni Waqf is challenged and when a person other than the Mutawalli of the said Waqf has committed acts of trespass etc. upon the property of the waqf, in that case, I am of the opinion, that the proper Section to apply for giving relief to the Mutawalli would be Section 8 and not Section 57-A of the Act. The Respondent's counsel has brought to my notice the U.P. Muslim Waqfs (Recovery of Waqf Property) Rules, 1972. These Rules indicate that they apply to the enquiries which are made as a result of any illegal transfer of Waqf property by the Mutawalli himself wherein the requisition is sent to the Collector to take speedy action for the recovery of possession of such property. For all these reasons, I am of the opinion that the suit (Reference) has been correctly made by the Plaintiff u/s 8/71 of the U.P. Muslim Waqfs Act.

13. The next question which arises for decision is regarding the effect of registration of the Masjid in question as a Shia Waqf under Chapter III Section 29 of the U.P. Muslim Waqfs Act. According to the case for the Plaintiff he had got the Masjid in question registered as a Shia Waqf on 5th September 1979. Section 29(1) runs as follows:

"(1) Every other waqf, whether subject to this Act or not and whether created before or after the commencement of this Act, shall be registered at the office of the Board of the sect to which the Waqf belongs

(2) Application for registration shall be made by the Mutawalli within three

months of his entering into possession of the Waqf property;

Provided that such applications may be made by the Waqf or his descendants or a beneficiary of the Waqf or any Muslim belonging to the sect to which the Waqf belongs".

Sub-section (3) of Section 29 of the Act then lays down the various details and particulars which are required to be filled in the application for registration. Sub-section (4) requires that every application shall be accompanied by a copy of the Waqf deed. Sub-section (5) applies the CPC to the pleadings for the verification of such pleadings. Sub-section (6) authorises the board to ask for further particulars to be supplied to it by the applicant Section 29(7) runs thus:

On receipt of an application for registration the Board may, before the registration of the Waqf make such enquiries as it thinks fit in respect of the genuineness and validity of the application and the correctness of any particular there, and, when the application is made by any person other than the person administering the Waqf property, the Board shall, before registering the waqf, give notice of the application to the person administering the waqf property and shall, after according him a reasonable opportunity of being heard, pass such orders as it may deem fit.

Sub-section (8) of Section 29 is quoted as under:

Any person aggrieved by an order of the Board under Sub-section (7) may, by application within 90 days from the date of that order, refer the dispute to the Tribunal which shall give its decision thereon.

14. Counsel for the opposite parties has submitted that the registration by the Shia Waqf Board is not in accordance with the procedure prescribed by the law and, therefore, it has no legal sanctity. He urged that the application was a collusive one. No enquiries were made. No notice was sent to the opposite parties and, therefore, the registration is illegal. So far as the question of making an enquiry is concerned, that was a matter solely within the discretion of the Board and no hard and fast rule can be laid down as to the extent of this enquiry. So far as the notice of the application is concerned that would only arise in a case where the Mutawalli himself is not in possession of the property. In the instant case the application was filed by the Mutawalli himself for registration of the Masjid, as a Shia Waqf and in such a case notice would not be necessary. However, it is not necessary for me to finally decide these factual questions. The opposite party had a right to get the wrong if any corrected by approaching the Board under Sub-section (8) quoted above, within 90 days of the order of the Board, if he was aggrieved by such an order and request the Board to refer the dispute to the Tribunal for giving a final decision. That was not done. The opposite parties" counsel argues that he had no knowledge of the registration proceedings. The Civil Suit was decided on 9th October 1979 and in those proceedings the opposite parties did get the knowledge with regard to the registration of the Masjid as a Shia Waqf. Yet no attempt was made for a

reference under Sub-section (8) of Section 29. Again when the present application was filed u/s 8/71 of the Act on 24th September, 1979 the opposite parties again obtained knowledge of the registration, but yet no steps were taken for getting the matter referred u/s 29(8) of the Act. It is noticeable that even though the instant proceedings have gone for over 3 1/2 years, yet no application has been made before the Board for getting the registration of the Masjid as a Shia Waqf set aside through a reference made u/s 29(8) of the Act. Even though u/s 29(8) a period of 90 days has been fixed as a period within which the dispute can be referred to the Tribunal, yet there is no provision in the U.P. Muslim Waqf Act, 1960 which excludes the application of the Indian Limitation Act to these proceedings. Section 29 of the Limitation Act applies Sections 4 - 24 of the said Act, to all special or local laws unless expressly excluded. In these circumstances, it was open to the opposite parties to approach the Board u/s 29(8) of the Act, even beyond a period of 90 days for the purpose of getting the registration of the Masjid as a Shia Waqf set aside by reference to the Tribunal.

15. It is thus clear that the registration of the Masjid in question, as a Shia Masjid, u/s 29(8) of the U.P. Muslim Waqfs Act has now become final since it has not been challenged so far by any person aggrieved by the order of the Board. According to the allegations in this suit the Defendants had been duly registered as a Shia Masjid. The trial court has found the Defendants possession. The Defendants in the instant case have not availed of the proper remedy provided to them by law. In my opinion, the only matter which could be legitimately considered in this reference was whether there had been an act of trespass by the Defendants or not. So far as the nature of the property was concerned viz., it being the property belonging to the Shia community, validly registered under the aforesaid Act, that question could not be seen or reconsidered in these proceedings before the Tribunal. Of course, it was open to the Tribunal to consider whether the property in question was covered by the Waqf deed. It could also be considered whether the Defendants had committed an act of trespass on the said property rendering him liable to ejectment. But it could not go into the question whether the registration itself of the mosque as Shia Waqf was in accordance with the procedure prescribed by law. In my opinion, therefore, this is a fit case in which Plaintiff should have been granted the relief prayed for by him.

16. This revision application is accordingly allowed. The impugned order passed by the court below on 5th November 1981 is set aside and the Plaintiff's suit for injunction (reference) restraining the Defendants from interfering with the Plaintiff's possession of the Masjid in question is decreed with costs throughout.