

(2005) 12 AHC CK 0049
In the Allahabad High Court
Case No : C.M. Application No. 269 of 2005

Rafi Khan

APPELLANT

Vs

U.P. Sunni Central Board of Waqf and Another

RESPONDENT

Date of Decision : 01-12-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Constitution of India, 1950 — Article 226, 227
Waqf Act, 1995 — Section 83, 83(9)

Citation : (2006) 1 AWC 517

Hon'ble Judges : Poonam Srivastava, J

Bench : Single Bench

Advocate : J.J. Munir, for the Appellant; None, for the Respondent

Judgement

Poonam Srivastava, J.—Heard learned counsel for the applicant.

2. This is an application under Article 227 of the Constitution of India invoking supervisory jurisdiction for modifying the order dated 22.11.2005, passed by the Waqf Tribunal and also to restrain the opposite party No. 2 from interfering with the possession of the applicant and other beneficiaries of the Waqf No. 122, Aligarh and from alienating property and assets in any manner during pendency of the application for temporary injunction.

3. Submission made by Sri J. J. Munir, counsel for the applicant is that one Mohd. Noor Khan created a waqf alul-aulad regarding his properties, which is in form of grove, shops and mosque besides some other properties located at Mohalla Atish Bazar, Aligarh. This Waqf was created for benefit of his family members and lineal descendants. The applicant claims himself to be lineal descendant of Wakhib, Mohd. Noor Khan. During his life time, he made scheme for settlement of the properties and he provided that he would remain mutawalli during his life time. After his death, his son Nooruddin was mutawalli of the Waqf. The applicant states that he is descended in the direct main line and took over as mutawalli of the Waqf and is managing affairs. Subsequently, some dispute arose relating to

the management of the Waqf property. This led to dispute, which was adjudicated by the District Judge, Aligarh in case No. 2 of 1939. Vide order dated 22.2.1941, it was provided that Trust Committee shall consist of members only from amongst male lineal descendant of Mohd. Noor Khan. In the course of time, affairs of the Waqf were taken over as mutawalli by Shri Ashfaq Ahmad alias Mohd. Ashfaq grandson of Wakhib, Mohd. Noor Khan. He has been continuing since 1959. The contesting opposite party is alleged to be harden criminal of district Aligarh. A complaint was instituted at his instance before the Waqf Board alleging misconduct and mismanagement by Shri Ashfaq Ahmad. The Waqf Board vide order dated 1.8.1995 directed removal of sitting mutawalli from the office. An application before the Waqf Tribunal/ Civil Judge (Senior Division) Aligarh u/s 83, Waqf Act, 1995 was filed, which was numbered as Misc. Case No. 31 of 1996. The Tribunal stayed operation of the order removing mutawalli dated 1.8.1995 but subsequently vide order dated 11.3.1998, dismissed the application/reference on 12.2.2001 on the ground that the Civil Judge (Senior Division) Aligarh, is not constituted as a Tribunal under the Waqf Act, 1995 in view of U.P. Government Notification No. 369/52-2-1998 dated 11.3.1998. A revision u/s 83(9) (Proviso) of the Waqf Act, 1995 was filed before this Court on the ground that the order was passed without giving an opportunity of hearing and non-consideration of material evidence. Notice was issued and operation of the order dated 1.8.1995, passed by the Waqf Board and also order dated 12.2.2001 were stayed. The said revision was dismissed in default and a restoration application to recall the order dated 19.9.2005 is pending. The contesting opposite party No. 2 got himself appointed as mutawalli of the Waqf which belongs to applicant's family, taking advantage of fact that revision stands dismissed in default. The contesting opposite party has started alienating the Waqf property. The instant application under Article 227 of the Constitution of India has been filed with a prayer that it is a case of urgency unless this Court ensures that contesting respondent may not misuse his authority only because revision, which has been dismissed in default and a restoration application is pending, the whole scheme of Waqf will stand frustrated and irreparable loss will be caused to the applicant, who is a direct lineal male descendant of the original creator of Waqf.

4. Counsel for the applicant has emphatically argued that no doubt, restoration application in the revision is still pending, unless this Court adopts preventive measures to safeguard interest of Waqf, irreparable loss will be caused. First question that has to be decided is that maintainability of the application under Article 227 of the Constitution of India.

5. Apex Court in a number of recent decisions which has considerably expanded the scope of Article 227 of Constitution of India. In *Surya Dev Rai Vs. Ram Chander Rai and Others*, , the Apex Court held that the power under Articles 226 and 227 of the Constitution of India is always in addition to the revisional jurisdiction. However, while considering the rationale behind wide power under Article 227 of the Constitution of India, the Apex Court laid down, in practice, parameters for exercising jurisdiction though are almost similar but three

differences nevertheless exist. The power of superintendence under Article 227 is administrative as well as judicial and is capable of being invoked at the instance of any person aggrieved or may even be exercised suo motu. In a jurisdiction under Article 227, the High Court may not only quash or set aside the impugned proceedings, judgment or order but it may also make such directions as the facts and circumstances of the case may warrant. The High Court may also substitute its own decision under Article 227 of the Constitution. In another case decided by the Apex Court *Sadhana Lodh Vs. National Insurance Company Ltd. and Another*, , in paragraph 6 of the judgment an illustration was given which is quoted below :

As a matter of illustration, where a trial court in a civil suit refused to grant temporary injunction, and an appeal against refusal to grant injunction has been rejected, and a State enactment has barred the remedy of filing revision u/s 115, C.P.C., in such a situation a writ petition under Article 227 would lie and not under Article 226 of the Constitution. Thus, where the State Legislature has barred a remedy of filing a revision petition before the High Court u/s 115, C.P.C., no petition under Article 226 of the Constitution would lie for the reason that a mere wrong decision without anything more is not enough to attract jurisdiction of the High Court under Article 226 of the Constitution.

The Apex Court discussed the scope of Article 226 in another case *Achutananda Baidya Vs. Prafulla Kumar Gayen and others*, It was laid down that the power of superintendence of High Court is not confined to administrative superintendence alone but such power includes within its sweep the power of judicial review. In cases of erroneous assumption or acting beyond its jurisdiction, refusal to exercise Jurisdiction, error of law apparent on record as distinguished from a mere mistake of law, arbitrary or capricious exercise of authority or discretion, a patent error in procedure.

6. I am inclined to entertain this application in exercise of jurisdiction under Article 227 of the Constitution of India for the reason that only because recall application is pending, there are chances of entire Waqf property being wasted at the hands of a stranger. However, I cannot lose sight of the fact that this is an application for injuncting the contesting opposite party from interfering with the possession of Waqf No. 122, Aligarh and also to restrain him from alienating his property and assets. The interim relief will amount to grant of final relief. Sri J.J. Munir, learned Counsel appearing for the applicant has cited a decision of the Apex Court in the case of *Deoraj Vs. State of Maharashtra and Others*, . where it has been held that:

Situations emerge where the granting of an interim relief would tantamount to granting the final relief itself. And then there may be converse cases where withholding of an interim relief would tantamount to dismissal of main petition itself ; for, by the time the main matter comes up for hearing there would be nothing left to be allowed as relief to the petitioner though all the findings may be in his favour. In such cases the availability of a very strong prima facie case of

a standard much higher than just prima facie case, the considerations of balance of convenience and irreparable injury forcefully tilting the balance of case totally in favour of the applicant may persuade the Court to grant an interim relief though it amounts to granting the final relief itself. Of course, such would be rare and exceptional case. Held, that a foolproof case for the grant of interim relief was made out in favour of the appellant in the High Court on the basis of the material available before the Court.

7. In the instant case, counsel for the applicant has successfully been able to persuade this Court to come to a conclusion that in the event, property of Waqf is not safeguarded, it might be wasted at the hands of the contesting opposite party.

8. Looking to the facts and circumstances of the case, issue notice to the opposite party Nos. 1 and 2 returnable at an early date.

9. They may file counter-affidavit within six weeks from the date of receipt of notice. Rejoinder-affidavit, if any, may be filed within three weeks thereafter.

10. List immediately on expiry of the aforesaid period.

11. Till the next date of listing, the parties are directed to maintain status quo as of today and Waqf property No. 122, Aligarh, shall neither be alienated nor changed its nature.