
(1993) 10 AHC CK 0035
In the Allahabad High Court
Case No : Writ Petition No. 6159 of 1981

S.Ravindra singh and another	Vs	APPELLANT
3rd ADDL.DISTRICT JUDGE, FAIZABAD and others		RESPONDENT

Date of Decision : 05-10-1993

Acts Referred:

Constitution of India, 1950 — Article 226
Uttar Pradesh Muslim Waqfs (Recovery of Waqf Property) Rules, 1972 — Rule 8
Uttar Pradesh Muslim Waqfs Act, 1960 — Section 49B, 57A, 78

Citation : (1993) 10 AHC CK 0035

Hon'ble Judges : H.N.Tilhari, J

Final Decision : Dismissed

Judgement

Hari Nath Tilhari, J.—By this writ petition, the petitioner has sought the issuance of a writ of certiorari for quashing the order dated 19121981 passed by opposite party No. 1 i. e. IIIrd Additional District Judge, Faizabad, in exercise of his appellate jurisdiction under Section 49B of U.P. Muslim Waqfs Act read with section 57(A)(2) thereof and annexed as Annexure No. 1 to the writ petition, whereby the Addl. District Judge has affirmed the order dated September 30, 1990 passed by the Collector, Faizabad, respondent No. 2 in the writ petition under Section 57(A) of Muslim Waqfs Act in respect of a shop situate at Moti Masjid, Faizabad.

2. Brief facts of the case are that one Srimati Karbalai Begum moved an application on November 30, 1978 with the allegations to the effect that the petitioners have illegally and forcibly occupied shop no. 730 situate in Mohalla Rekabganj, Faizabad and action under Section 50(A) of U. P. Muslim Waqf Act, 1960 be taken against them and they may be removed from illegal possession.

3. According to the facts of the case, the matter was got enquired by the Board and after the receipt of the inquiry report to the effect that the property in dispute is a Waqf property belonging to opposite party No. 3 i. e. Shia Central Board of Waqf and that the petitioners were occupying the same unauthorisedly,

the notices were issued to the present petitioners who filed objections supported by their affidavits on 27/3/1980. In their objection, the petitioners denied the allegations to the effect that they were trespassers. The petitioners in their objection have alleged that they were not the trespassers but they were the tenants of the shop. The Controller, Central Board of Waqf by order dated 23rd April, 1980 opined and held that Sardar Ravindra Singh and Sardar Dilip Singh, the present petitioners were trespassers or persons in unauthorised occupation and were liable to be evicted and, therefore, the Board resolved to evict the present petitioners from the shop in dispute and resolved that requisition under Section 57(A) of U. P. Muslim Waqfs Act, 1960 be sent to the Collector, Faizabad for taking over the possession of the said property.

4. On the basis of the order of the Controller, the Collector on 30th September, 1980 issued an order to the petitioners directing them to deliver the possession of the property in dispute to the Shia Central Board of Waqfs within a period of 30 days from the date of service of the order. It was also mentioned in the notice that in case of failure to comply with the same, ejectment proceeding would be initiated against the alleged unauthorised occupant i. e. present petitioners in accordance with Rule 7 of Uttar Pradesh Muslim Waqfs (Recovery of Waqf Property) Rules, 1972.

5. Thereupon the present petitioner filed an appeal challenging the orders dated 30/9/80 of the Collector, Faizabad as well as the order of the Board i. e. Misc. Civil Appeal No. 85 of 1980. This appeal was filed under Section 49B(4) read with Section 57A(2) of the Act.

6. The Additional District Judge, after considering the matter in detail, affirmed the order and the findings recorded by the Controller of the Board, on the basis of which order dated 30/9/80 had been issued. The Additional District Judge held that the Board had rightly held that the two i. e. Ravindra Singh and Dilip Singh i. e. the two objectors were unauthorised occupants and that they failed to prove that the property in dispute was let out to them by the Board or by Mutawalli of the Waqf. He took the view that no evidence has been led, neither any receipt has been filed nor any evidence of term of tenancy contract was adduced. He further took the view that the objectors, the alleged unauthorised occupants did not file and could not file any documentary evidence to prove that Mutawalli or landlord admitted or accepted them as tenant nor is there any proof of any contract of tenancy between the Mutawalli and the trespasser and so with this finding, the Additional District Judge dismissed the petitioner's appeal.

7. Feeling aggrieved from the order contained in Annexure Nos. 8, 9 and 10 to the writ petition, passed by the present opposite parties 1, 2. and 3 the present petitioners have filed this petition under Article 226 of the Constitution of India.

8. Parties have exchanged the Counteraffidavit and the rejoinder affidavit.

9. I have heard Shri Hari Shanker Sahai, learned Counsel for the petitioners at

great length. On behalf of opposite parties, the case has been argued by Pt. Durga Charan Mukharjee and Shri J. N. Mathur. It has been contended before me on behalf of the petitioners by Shri Hari Shanker Sahai that the order impugned is bad in law and it is suffering from substantial error of law and jurisdiction apparent on the face of record.

10. Shri Sahai submitted that it suffers from jurisdictional and substantial error of law and error of law apparent on the face of record, as no opportunity of producing any evidence was given nor was any opportunity of hearing provided to the petitioners by the opposite parties 2 and 3, before passing orders contained in Annexure Nos. 8 and 9. Shri Sahai further submitted that the authority concerned were wrong in saying that no evidence of tenancy or contract of tenancy was produced and he invited my attention to certain documents, namely, the electricity bills, Sales Tax Assessment papers and some Municipal Assessment papers and on the basis thereof Shri Sahai had contended that those documents were sufficient enough to prove the status of the petitioners to be that of tenants or not of a trespasser as alleged. Shri Sahai invited my attention to the provisions of Rules 8 & 9 of U.P. Muslim Waqfs (Recovery of Waqf Property) Rules, 1972 as well as to the provisions of section 57A and 58 of the Muslim Waqfs Act in support of his contention No. 1 that it was legal and obligatory on the opposite party to give him opportunity of hearing and producing evidence.

11. Learned Counsel for the opposite parties invited my attention to the ordersheet of the case which has been filed as Annexure No. A. 1 to the Counteraffidavit as well as to the allegations made in paragraph 14 of the Counter affidavit to contend that the contention of the learned Counsel for the petitioners to the effect that they were not given any opportunity, in fact, is without substance. Learned Counsel for the opposite parties further contended that the finding, as regards the question of the position of the petitioners in relation to the nature of possession over the property in dispute as unauthorised occupant was a finding of fact and the same has been arrived at after considering the evidence on record and this Court should be reluctant enough to interfere with that finding. It has been submitted that a finding of fact arrived at after considering the evidence should not be interfered with, in view of the settled principle of law under Article 226 of the Constitution of India.

12. Learned Counsel for the opposite parties further submitted that the evidence which has been referred to by the learned Counsel for the petitioner, namely, the documentary evidence has been considered by the Appellate Court, it is not a case of nonconsideration nor it is a case of non examining of that piece of evidence which has been referred to and so he submitted that this is not a fit case for interference under Article 226 of the Constitution of India.

13. It will be pertinent to mention that in the end, on behalf of the petitioner in rejoinder affidavit, it has been stated that in case this Court does not accept the contention of the petitioners' counsel it may grant some time to the petitioners

to handover vacant possession and the petitioners will undertake to handover the vacant possession.

14. I have applied my mind and considered the contentions of the learned Counsel for the parties. Before I proceed to examine the matter on its merit, in my opinion it will be just and proper to make a reference to relevant provisions of the Act.

15. Section 57A of U. P. Muslim Waqfs Act, 1960 reads as under :

Section 57A Recovery of possession of Waqf Property from unauthorised occupants.

(1) If the Board is satisfied after making an inquiry in such manner as may be prescribed that any person is in unauthorised occupation of any immovable property entered as property of a waqf in the register of waqf maintained under Section 30 it may send a requisition to the Collector within whose jurisdiction the property is situate to obtain and deliver possession of the property to it."

16. In view of the provision of Section 57A(1) it is also necessary to make a reference to the provisions of Section 49B of the Act which reads as under:

Requisition to Collector (Section 49B (I))

"The requisition to the Collector shall then be drawn up by the Secretary in form I and sent to the Collector of the District in which the property is situate by registered post acknowledgement due."

17. Under U. P. Muslim Waqfs Act exercising the power under Section 78, the Government has been pleased to frame the rules known as U. P. Muslim Waqfs (Recovery of Waqfs Property) Rules, 1972

Rule 8 provides as under :

Inquiry regarding unauthorised occupation (Section 57A(1))

"Upon receiving a report from any person residing in the locality where the Waqf property is situate or upon receiving information otherwise that a Waqf property is in unauthorised occupation, the Board shall depute one of its officers to visit the locality and to ascertain the facts relating to genuineness or otherwise of the report or information as the case may be. The officer deputed by the Board shall make a local enquiry and shall, as soon as may be, apprise the Board in writing as to the result of the local inquiry, including the details of the property affected, the duration of the unauthorised occupation, if any, the particulars of the person or persons in occupation, the evidence available in proof of unauthorised occupation and such other particulars as he considers relevant in the matter."

Rule 9 provides as under :

Inquiry by Board (Section 57A (1))

(i) On receipt of the report mentioned in Rule 8 the Board shall cause a notice to be issued to the person in unauthorised occupation calling upon him to restore back the possession to the Board or to show cause against it within a period of 15 days from the receipt of the notice.

(ii) If the person to whom notice is issued fails to comply with the notice or to show cause or if cause is shown on giving an opportunity to the person concerned of being heard, the Board may if satisfied as to there being unauthorised occupation over Waqf property pass orders for sending a requisition to the Collector within whose jurisdiction the property is situate to obtain and restore possession of the property to it."

18. A reading of Section 57A indicates that in the cases where Board is satisfied after making inquiry that any person is in unauthorised occupation of the property which is entered as Waqf property in the register of Wafs maintained by the Board concerned, it may send a requisition to the Collector within whose jurisdiction the property is situate, to obtain and deliver possession of the property to it and in this matter of inquiry, it has been provided that provision of Section 49B shall be applicable and available including the provision regarding the appeal from the order passed under Section 57A. According to rules 8 of the rule when a report is received by the Board from any person of the locality in which the property is situate that the Waqf property is in unauthorised occupation of some one, it may depute someone of its officers to ascertain the facts relating to the genuineness of the information or report and to submit the report of its local inquiry and on the basis of that report if it appears that some one is in unauthorised occupation it is provided that Board shall cause a notice to be issued to those who are in unauthorised occupation calling upon them to restore back the possession or to show cause against that notice within a period of 15 days from the date of service of notice on them.

19. Clause (2) of rule 9 further provides that in case no objection is filed or no cause is shown even then the Board when it is satisfied that there is sometime in unauthorised occupation of Waqf property it may pass an order for sending requisition to Collector. If the person to whom notice is issued fails to comply with the notice or to show cause or if cause is shown, on giving an opportunity to the person concerned of being heard, the Board may, if satisfied as to there being unauthorised occupation over waqf property, pass orders for sending a requisition to the Collector within whose jurisdiction the property is situate to obtain and restore possession of the property to it.

20. A reading of Clause (2) of rule 9 per se shows that once a written objection has been received by the Board, the Board shall have to give an opportunity of hearing after objections are filed, namely, it shall have to fix the date for filing of the evidence and hearing, before passing any final orders in the matter. When this specific mode has been provided, it means that no order and acquisition can be passed in cases where the written objection has been filed and cause has been shown, without further fixing the date for further hearing i. e. for filing

evidence and early hearing. It is trite principle of law when there is power to do certain thing in a prescribed mode or manner then that power has to be exercised in that particular mode or manner alone and not otherwise, other modes are closed. See *Nazir Ahmad v. King Emperor*, and *A. K. Roy v. State of Punjab* reported in (AIR 1936 Privy Council page 253) and 1986 (4) SCC 326 i. e. (AIR 1986 SC 2160) respectively.

21. Keeping these principles in view when I examine the facts of this case and look to the allegations of paragraph 14 of the Counteraffidavit alongwith Annexure A1 to the Counteraffidavit and, in particular, taking in view the very material fact that the allegations made in paragraph 14 of the Counter affidavit has not been controverted in the rejoinder affidavit, it appears to me that the contention made by the petitioners' Counsel that there has been no compliance of rule 9 and no opportunity of hearing was given after the objection was filed, is without substance.

22. The allegation of paragraph 14 of the Counteraffidavit reads as under :

"Para 12 of the writ petition is incorrect. After the objection had been filed by the petitioners and the documents were submitted, the Enquiring Officer gave full opportunity to the petitioners, for being heard. It is absolutely incorrect to state that no opportunity was given to the petitioners to produce the evidence or to place their point of view. The ordersheet maintained by the Controller of the Waqf Board shows that the petitioners were represented by Sri Wasi Haider Advocate. On 5th April, 1980, the petitioners had filed their objections and they were permitted to give such evidence as they intended to produce on the next date of hearing which was given as 30th April, 1980. On the next date the petitioner's Counsel requested for production of some documents which was permitted to be done by 20th May, 1980. The petitioners did not make any request to produce any other evidence than the documents which they have filed. The case was adjourned several times, and there was ample opportunity to the petitioners to have requested for the production of any other evidence which they required. In the end the case was put up for final arguments on 18/9/1980. On that date the petitioner's Counsel Sri Wasi Haider, Advocate, made detailed arguments and thereafter the case was adjourned to 22/9/1980 for delivery of judgment. A true photostat of the certified copy of the running ordersheet is Annexure AI. From Annexure AI it would be apparent that the proceedings were continued in a fair and impartial manner and full opportunity was made available to the petitioners to produce the evidence or to raise all contentions on the merit that they liked. In this manner there has been no violation of the principles of natural justice. That the Controller took into consideration all the material facts and has passed a speaking order dated 23/9/1980, a copy of which is Annexure 8 to the writ petition. It would appear from a perusal of Annexure 8 that all the contentions raised by the petitioners were given due consideration, and in a judicial manner the final orders were passed. Even in the writ petition, the petitioners have not stated that any material fact or evidence which they had produced or placed

before the Controller had been ignored. It is submitted that Annexure 8 is a validly passed order."

23. A perusal of the ordersheet further shows that the case initially fixed for April 5, 1980 and the notice in that regard were sent by registered post as well as were published in the News papers and on April 5, 1980, the alleged unauthorised occupants i.e. the petitioners filed their objections before the Board through Counsel Sri Wasi Haider, Advocate and after objections had been filed on 5th April, 80 or earlier as per ordersheet dated 30th April, 1980, was fixed for production of the evidence and a notice had also been issued. The ordersheet further indicates that later on an application was moved on behalf of unauthorised occupant's Counsel that the documentary evidence be brought on record which had been allowed and the next date in the case was fixed, namely, May 20, 1980. It further appears on the ordersheet that the learned Counsel for the parties appeared in the office of the Board. Their attendance was noted and case was fixed in the month of June 4, 1980. It does not appear that either the petitioners or any of the parties did produce any further evidence either on May 20, 1980 or on 4th June, 1980. It appears that on that date, the Controller was not present and the case was adjourned to July 8, 1980 and case was again adjourned to September 12, 1980 and on September 12, 1980 the case was adjourned to 18th September, 1980. On 18th September, 1980 it appears that the Counsel for the parties appeared and the case was argued by the Counsel for unauthorised occupant, namely, Sri Wasi Haider, Advocate and 22nd September, 1980 had been fixed for orders. From the ordersheet, it appears that no application was ever made on behalf of the petitioners that they want to produce oral evidence or they want to cross-examine the person who is alleged to have made the report i. e. Smt. Karbalai Begum.

24. A perusal of ordersheet per se shows that after the filing of the objections by the petitioners, the date of evidence was fixed and the parties had filed documentary evidence, no oral evidence was sought to be produced and nor the parties did seek to produce and to adduce any oral evidence. As I have mentioned earlier, the allegations made in paragraph 14 of the Counter Affidavit have not been controverted or denied by the petitioners in their rejoinder affidavit. The allegations have to be taken as having been admitted or in any case, the allegations go uncontroverted. This is well settled principle of law that allegations of fact made on affidavit by a party when require to be controverted by affidavit have not been denied and continued have got to be taken to be have been admitted to be correct. In the case of Juggi Lal Kamla Pat v. Ram Janki Gupta & another reported in (AIR 1962 Allahabad 407) it has been laid down by this High Court as under :

"A statement on oath, whether true or false, has to be met by a counter affidavit in reply, or by challenging the statement by cross-examining the deponent. If that is not done, it would be presumed that the allegations, if untrue would have been, rebutted by the other side,"

25. It will also be relevant herewith to make a reference to the following observations of the Lordships of the Supreme Court in the Case of Messrs Mehta Parikh Co, v. The Commissioner of Income Tax, Bombay, which observations have been quoted by the Div. Bench of this Court as well. The observations are as under :

"It was not open to the Revenue to challenge the correctness of the cashbook entries or the statements made by those deponents in their affidavits.

That being the position, the state of affairs, as it obtained on 12/11/1946, had got to be appreciated, having regard to those entries in the cash books and the affidavits filed before the Appellate Assistant Commissioner, taking them at their face value."

26. These observations were made by the Hon^{ble} Supreme Court in the context of the facts that the assessee had filed their affidavit in support of their case but neither Appellate Assistant Commissioner nor Income Tax Officer considered it necessary to deny or challenge them either by filing the Counteraffidavit or by seeking presence of deponents and assessee in order to cross-examine him with reference to the statement made by them in their affidavit.

27. In the present case, the allegations made in the Counteraffidavit by the opposite parties which, in particular, contained in paragraph 14,

"have not been controverted in any manner so, prima facie, they have to be taken on their face value.

28. Thus, a perusal of this allegation in paragraph 14 and a perusal of the affidavit per se shows that after the filing of the written objections by the petitioners against show cause notice, the opposite party No. 3. had granted the petitioners opportunity of producing evidence of "hearing before passing the order contained in Annexure No. 8 to the writ petition and by issuing the requisition in question.

29. As such the first contention of the learned Counsel for the petitioners that there has been breach of Rule (2) is of no substance.

30. The finding on the question whether the petitioners have been tenants or trespassers, the opposite party No. 3 as well as learned Additional District Judge has considered the entire evidence that had been adduced by the parties including the Municipal assessment register entries as well as the electricity bills and they have come to the conclusion that those documents prove the petitioner's possession over and occupation of the property in dispute but those documents do not prove, as well as, that evidence is not sufficient to prove, the petitioner's status as a tenant in occupation. Thus petitioners had failed to prove their case and to show or establish their right of possession as tenant as pleaded by them, and so their possession was nothing but that of unauthorised occupants. This is a finding of fact.

31. A finding of fact may be erroneous. There might have been a misappreciation or wrong appreciation of evidence but that does not entitle this Court to interfere with a finding of fact under Article 226 of the Constitution of India nor does this Court interfere with the finding of fact simply on the ground that the finding has been erroneous and had been arrived by or on account of misappreciation of evidence. A finding of fact can be interfered with only if it has been arrived at on wrong application of principle of law relevant thereto or it has been arrived at after having ignored certain material admissible evidence on record or that it has been arrived at after having taken into consideration certain piece of evidence or certain materials not admissible and not relevant to the matter. If the finding of fact does not suffer from any error of this nature or of the nature like the above this Court does not interfere with a finding of fact so the finding is final and I do not think it proper to interfere with the same. No other submission has been made.

32. Learned Counsel for the opposite parties have very fairly conceded to the request of the petitioners, taking into consideration, human view of the suggestion that on the petitioners furnishing an undertaking in the form of an affidavit in this Court within a period of one month from today, to hand over the vacant possession of the property in dispute to the opposite party No. 3 on the expiry of a period of four months from the date of this order as well as to deposit damages for use and occupation for a period of three years earlier from today as well as for further period of months granted to the petitioner to handover vacant possession calculated at the rate of Rs. 5/ per day within a period of four months from today, the petitioner may be granted that time of four months to vacate.

33. In view of the above, while dismissing this petition as being without merits, the petitioners are granted in total four months time from today to vacate the premises in dispute and to handover its vacant possession to the opposite party No. 3 without any objection provided

(a) The petitioners within a period of one month from today furnish a written undertaking in this Court in the form of an affidavit that each of them will, on expiry of aforesaid period of four months, handover the vacant possession of the premises in dispute to the opposite party No. 3 and to none else without any objection.

(b) That they shall deposit or deposits the damages for use and occupation for the period of three years earlier to the date of this order as well as the further period of four months subsequent to the date of this decision, @ Rs. 5/ per day within a period of three months from today.

(c) That the orders contained in Annexure Nos. 8, 9 and 10 shall not be implemented but in case of breach of any of the above conditions, the petitioners will not be entitled to this period and in case of breach of any of the conditions of this order by the petitioners, it will be open to the opposite parties to proceed with the execution and implementation of orders, contained in Annexures 8, 9

and 10 i. e. order dated 23480, 30980 and 191281.

34. Subject to the above, the writ petition is hereby dismissed. Costs are made easy.

(Petition dismissed.)