

(2000) 10 J&K CK 0003

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 97/79

Syed Lutfullah Shah

APPELLANT

Vs

A.W.Kripak and Others

RESPONDENT

Date of Decision : 02-10-2000

Acts Referred:

Wakf Act, 1978 — Section 4, 6

Citation : (2001) KashLJ 112

Hon'ble Judges : O.P.Sharma, J

Bench : Single Bench

Advocate : S.K.Anand, G.A.Lone, D.S.Chauhan, D.C.Raina, A.G.Sheikh, A.H.Naik, Advocates appearing for the Parties

Judgement

1. The only question involved in the case is whether the Ziarat Shah FaridudDin Sahib and Ziarat Shah IsrarudDin Sahib situated in Kishtwar are

Wakafs as defined in the Wakafs Act, 1978. In case these are Wakafs. their management will be under the Wakafs Act and the question whether

office of Sajjad Nisheen is heritable or not raised by the petitioner will be of academic interest only because management of such Wakafs has to be

under the Wakafs Act. In order to answer this, it is necessary to make a brief reference to the history of Kishtwar which once happened to be an

independent State before being annexed by Maharaja Gulab Singh in 1821 A.D. It is a matter of history that many of the rulers of this erstwhile

small hill principality had converted to Islam. Raja Kirat Singh is said to have embraced Islam some where in 1681 A.D.

2. It is said that Shah FaridudDin came to Kishtwar some where in 1664 and died in 1725 A.D. His son Shah AssararudDin it is said had died in

1685 A.D. Two Mausoleums were built at two different places where they were

buried. Both these Mausoleums are known as the Ziarats of Shah

FaridudDin and Shah AssararudDin and are visited by thousands of devotees from all over the State especially on their death anniversaries falling

on (7th Har and 25th Kartak) every year. While Urs of Shah FaridudDin Sahib is a public holiday for Tehsil Kishtwar, Urs of Shah AssararudDin

Sahib is a public holiday for the district of Doda. This speaks of the reverence the two saints are held by the people of the district.

3. It is admitted case of the parties that before the state intervened in exercise of the powers under the Wakafs Act by appointing Shri A.W.

Kripak as administrator, both the Shrines were being managed by two Sajjad Nisheen namely, Syed Lutfullah Shah and Peer NizamudDin, the

later having died during the pendency of these proceedings. Both of them challenged the appointment of the respondent¹ as administrator, Wakafs

Committee Kishtwar mainly on the ground that they alongwith their other members of the family are Sajjad Nisheen of the shrines and this right

under Mohammedan Lal is hereditary. However, while the petition was pending the government issued notification under S. 6 of the Wakafs Act,

1978 vide SRO 619 of 1979 whereby list of Wakafs of Kishtwar was published. This list included both the Ziarats. The petitioners challenged the

notification by filing appeal under section 5(2) of the Wakafs Act which was rejected by the appellate authority on 30.4.1982. The petitioners

amended the petition to challenge the report of the Special Officer dated 5.8.79, SRO 619 of 1979 dated 15.11.79 and the decision of the

appellate authority dated 30.4.82 dismissing the appeal filed under section 5(2) of Wakafs Act on the following grounds, 1) that the Special Officer

appointed under the Muslim Wakafs Act, 1959 had in his report dated 9.8.69 found that Ziarat Shah IsararudDin and Ziarat FaridudDin are out of

the preview of the Wakafs Act and (2) this report has become final u/s 61 of the Wakafs Act as no appeal was filed against it, (3) the report of the

Special Officer dated 5.8.79 is based on no evidence as he neither invited objections nor heard the petitioners. (4) SRO 619 of 1979 is invalid as

it is based on the report of Special Officer who did not follow the procedure prescribed under the Wakafs Act, (5) the declaration of shrines as

Wakafs is a mala fide act of the respondents against their political rivals who are managing the shrines, (6) the shrines are not Wakafs because the

land was granted by Hindu Raja of the time, (7) the appeal has been dismissed only because respondent³ is biased as the petitioners are his political rivals.

4. The stand of the respondent Chairman, Wakaf Committee, Kishtwar is that petitioner¹ was only a Manager of the Ziarat and his family members have no better right than he had in the Wakaf. It is also stated that the report of the Special Officer is in accord with the provisions of Wakaf Act, 1978 and cannot be called in question. Both the Ziarats, it is further stated, have all along been held to be Wakafs and the petitioner's have no right of inheritance.

5. The writ petition has been filed by Syed Luftullah Shah and Pir NizarnudDin (dead) ds Sajjad Nisheen of the shrines to trace their rights as Sajjad Nisheens of Ziarat Shah FaridudDin Sahib and Ziarat Shah IsrarudDin Sahib, Kishtwar respectively by inheritance. Therefore, the question involved is what is a Sajjad Nisheen and whether it is not heritable right under Muslim Law.

6. Mr. Naik, appearing for the petitioners raised a preliminary objection about the competence of Shri B.A. Kichloo to file counter since he was not a party to the writ petition. He next argued that the two shrines are not Wakafs as defined under the Act because the land has been conveyed by a Hindu Raja of the time. Since section 3 of the Wakafs Act does not include a Ziarat, therefore, he argued these Ziarats are not Wakafs. The decision of the Special Officer according to him is not in accord with Section 4 of the Act because the government did not challenge the report of the Special Officer dated 9.4.69 in the absence of which any fresh survey u/s 4 was illegal. Notification dated 5.8.79 (SRO 619 of 1979) it is further argued by him is without jurisdiction because the report of the Special Officer dated 9.8.69 appointed under the Wakaf Act, 1959 has attained finality under S. 61 of the Act. The report dated 5.8.79 according to the learned counsel is mechanical as he did not hold any detailed enquiry as required under law laid down by the apex court in the Board of Muslim Wakafs, Rajasthan vs. Radha Kishan and others (AIR 1979 SC 289). Not only this, even principles of natural justice have been violated because the Special Officer gave no opportunity to the petitioners to present their case. He also questioned the report and the notification on the

ground that there is no evidence that the Ziarats are Wakafs under the Wakaf Act. The contention of Mr. Lone is that the preliminary objection about the competence of Sh. Bashir Ahmed Kichloo to file counter is without any substance because the petitioners have challenged the appointment of Shri Kripak as administrator, Aquaf, Kishtwar, and Sh. B.A. Kichloo being his successor in office had a right to contest the petition even if he is not impleaded by name. According to him, counter was filed pursuant to the order of this court dated 7.10.87 to which the petitioners filed rejoinder on 18.11.87 without any objection about the competence of Shri Kichloo to file counter. Moreover, in para3 of the rejoinder, it has been admitted that Shri Kripak was sued as Chairman, Wakaf Committee Tehsil Kishtwar and this is sufficient to reject the preliminary objection. He next argued that petitioners being Sajjad Nisheens can not claim any personal right in the Ziarats undei law. The land adjoining to the Ziarat. it is further argued being owned by the shrine, claim of the petitioners to inheritance or ownership is also without any basis.

7. Let us examine these submissions with reference to the facts of the case and the law on the subject. The preliminary objection that counter filed by Shri B.A. Kichloo cannot be treated as part of the pleadings is without any substance because the petitioners have accepted his position as Chairman, Wakaf Committee, Kishtwar, the capacity in which he filed counter. This is evident from para3 of the rejoinder filed by the petitioner.

So this contention is rejected. The question whether the Ziarats are Wakafs as defined under the Wakafs Act, 1978 is to be decided on the basis of the admitted or undisputed facts Wakaf is defined u/s 3(d) of the Wakaf Act. It reads:

(d) ""Wakaf means the permanent dedication by a person professing Islam of any property moveable or immovable for any purpose recognised by

Muslim Law or usage as religious, pious or charitable and includes

(i) a Wakaf by user such as Masjid. Idgah, Dargah, Khankah, Maqbara Graveyard, Grave, Rauza, Mausoleum Takia. Sarai, Yatim Khana, Madrasa and Shafakhana....

8. So a grave as well as Rauza is a Wakaf by user. The petitioners have annexed a document written in Persian as annexureA with the original

petition at page 62/88. In this very document, the expression ""Khidmat Rauza

Sharief"" has been used with reference to these two Ziarats. Since the petitioners have placed reliance on this document, they are bound by it. Since Rauza is included in the definition so the shrines are Wakafs.

Another plea is that Hafiz Anayatullah, predecessor in interest of petitioner² was appointed Khalifa by Shah AkhyarudDin, son of Shah FaridudDin

and ever since his successors have been managing the Ziarats as Sajjad Nisheen. Their further case is that they are the recorded owners of the

land. But copies of the Jamabandi for the year 1976⁷⁷ and 1983⁸⁴ Bikrami show that the land comprised in Khewat Nos. 475 and 474 is owned

by the Asthan Hazrat Shah FaridudDin and Asthan AssararudDin respectively. The entries further reveal that the land is cultivated by the tenants

on behalf of the Asthans i.e. Ziarats. It means the property has been granted to the Ziarats of these two saints who were buried there.

9. Since the case of the petitioners is that they have been managing the property as Sajjad Nisheens, the question arises who is a Sajjad Nisheen

and whether the office of Sajjad Nisheen is heritable as claimed by them. Another question is whether Rauza is also known as Ziarat or Dargah. In

Committee of Muslim Aquaf vs. Anayatullah 1974 KLJ 331 decided by the then Chief Justice Late Murtaza Fazal Ali (later Judge of the Supreme

Court) on April 26, 1974, it has been held that Ziarat or Rauza was a Dargah within the meaning of section 5D of the Muslim Wakafs Act. 1959.

Since both Dargah as well as Rauza are included in the definition of Wakaf in the Wakafs Act, 1978, therefore, this holds good in the present case

as well. Dealing with the definition of Wakaf, their Lordships observed as under:

31. A perusal of this definition would clearly show that a Wakaf not only means permanent dedication of any property but also includes Wakaf by

user such as a Dargah or a Khankah It is not disputed that in the instant case the Ziarat or Rauza was a Dargah within the meaning of S. 5(d) of the

Act..."

10. As the petitioners claim right of management only as Sajjad Nisheen, what is then right is also no longer res integra in view of this judgment

(supra) where it has been Laid down that:

(21) In Vidya Varuti vs Baruswami. AIR 1992 P.C. 123, 126 their Lordships made the following observations:

Under the Hindu Law the image of a deity of the Hindu pantheon is, as has been

aptly called a 'juristic entity' vested with the capacity of receiving gifts and holding property, religious institutions known under different names are regarded possessing the same 'juristic' capacity and gifts are made to them co nomice....

The manager of the Wakf is the Mutwall, the governor, superintendent, or curator. In Jewan Das Sahbu's case the Judicial Committee call him

'procurator It related to a Khankha, a Mohammeden institution analogous in many respects to a Mutt where Hindu religious instruction is

dispensed. The head of these Khankhas. which exist in large numbers in India, is called a Sajjadanashin.

(22) But neither the Sajjadanashin nor the Mutwalli has any right in the property belonging to the Wakf: the property is not vested in him and he is

not a 'trustee' in the technical sense." The observations of their Lordships of the Privy Council therefore, make the position of the defendant

absolutely clear in law. The defendant being the Mutwall of the Dargah could not be held to be an owner of the property and his possession was

purely in a fiduciary capacity and was to ensure for the benefit of the Ziarat.

(23) To the same effect is another decision of thl1 Privy Council in Rustum vs. Maulvi Mushtaq AIR 1921 P.C. 105.107 wherein their Lordships

observed as follows:

A Receiver and Manager by virtue of his appointment has no estate in the property he is called upon to control: he possesses powers over it but

not an interest in it.

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They are trustees in the general sense that every man is a trustee to whom is entrusted the duty of managing and controlling property that belongs

to another.

11. Since the petitioners have no right in the property, therefore, question of inheritance does not arise. This judgment was upheld by the apex

court while dismissing Civil Appeal No 1484/74 on 7.2.91 relevant part of which is extracted below:

Before going into this point of law at some length it may be necessary to refer to certain proved facts in the case:

(1) It is not disputed that the present Ziarat existed since a long time and has

become a Wakf by long public user.

(2) That the first defendant was the Sajjadanashin or caretaker of the Ziarat.

(3) That the land belonged to the Govt. originally.

(4) That the Govt. granted the land in dispute to the Ziarat and not to the defendants.

(5) That the defendants was admittedly in possession of the Ziarat and also the properties appurtenant thereto.

In these circumstances, it is clear that even if the defendants were in possession of the lands, their possession would have to be referable to a lawful

title and cannot be treated to be adverse to the Ziarat. In other words the possession of the defendant would be for the benefit of the Ziarat.

These observations were approved by their Lordships by observing as under

We agree with the above quoted findings of the High Court and approve the same.

12. In the definition of Wakaf given in the Muslim Wakaf Act, 1959, Dargah, Maqbara. Grave, Rauza and Khankah were also included. These

are also included in the present Act. It is an admitted case of the parties that graves of these two Saints are the places of wothership for those who

had faith in them. The facts of the case in Civil Appeal No. 1484/74 (supra) decided by their Lordships were identical. Para1 of the judgment

reads as under:

Hazrat Baba Ibrahim, a Saint, lived in the area called Rakhbahu in the City of Jammu. After his demise in the year 1872 his grave became a place

of wothership for those who had faith in him. The place was called Ziarat Hazrat Baba Ibrahim (hereinafter called "the Ziaraf). The Ziarat was

managed by Sain Ladha. a nephew of Baba Hazrat Ibrahim After Sain Ladha's death his son Mian Lal Din succeeded him. At present the Ziarat is

being managed by the sons of Mian Lal Din who died in the year 1963.

13. The State Govt. had granted some land to the Ziarat of Hazrat Ibrahim. This Court as well as apex court held that the grant was in favour of

the Ziarat. In the same way the then ruler of Kishtwar made grant of land in favour of the Ziarats as the revenue entries reveal. Petitioner, therefore,

have no personal interest in the property which is a Wakaf as defined under the Muslim Wakaf Act, 1959 and also under the Wakaf Act. 1978.

So it is not open to the petitioners to dispute the fact that both the Ziarats are Wakafs as defined under the Act.

14. The next question is whether the report of the Special Officer appointed under the Muslim Act, 1959 is final and therefore, the report of the

Special Officer under the Wakaf Act, 1978 dated 5.8.79 and SRO 619 of 1979 is a nullity. Under the Muslim Wakaf Act, Special Officer was

appointed u/s 4. Section 5 prescribes the mode of publications of the list of Wakafs on the basis of the report of the Special Officer. Subsection

(4) of section 5 of the Old Act provided that the list of Wakafs published under subsection (2) of section 5 shall be final and conclusive. The report

of the Special Officer appointed under the Muslim Wakafs Act holding the Ziarats are not Wakafs having not been challenged by the Govt.

according to Mr. Naik had become final and therefore, the report impugned is invalid and nonest. However, report dated 9.8.69 of the Special

Officer is not inconsistent with the plea that Ziarats are Wakafs. He only found that no Wakaf Committee had been established for Kishtwar by the

Govt. in terms of section 7 of the J and K Muslim Wakaf Act. and as such Ziarats were managed by the petitioners. Paras 2 and 3 of the report

are illustrative of the fact that both the Ziarats were treated by the Special Officer as also the Sajjad Nisheen as Wakafs. These parts of the report

are extracted below:

The Committee of Wakafs for this area has not so far been established by the Govt. as provided u/s 7 of J and K Muslim Wakaf Act. 1959

which requires to be done as early as possible, so that proper management to these Wakafs is ensured and accounts thereof are maintained and

got audited properly as required under sections 30 and 31 of the said Act. Both the shrines i.e. Hazrat Shah AsrarudDin and Hazrat Shah

FaridudDin (Hazrat Shah AsrarudDin S/o Hazrat Shah FaridudDin) are being managed by Sajjad Nisheen and Mutwali Syed Hussain Shah Sahib.

Chairman Notified Area Committee Syed NizamudDin, Hakim Syed Shah and other who have got this hereditary right by virtue of one of their

ancestors having been nominated as successor (Khalifa) by Hazrat FaridudDin in accordance with a deed. These Sajjad Nisheens hold the

charge of both the Ziarats independently since about 600 years back. Whatever the income whether donated through offerings or NazuruNayaz

that is being spent by these Sajjad Nisheens on the maintenance and repairs etc. of the Ziarats The Ziarats have thus attained a separate and independent position and should continue as such. The Committee to be established afresh will have no jurisdiction in the maintenance and other affairs of the holy shrines. The Sajjad Nisheens. however, are able to establish a Wakaf Committee for the Tehsil Wakafs and give their active support to establish a Wakaf Committee to be recognised by the govt. under Muslim Wakaf Act. The names of these Sajjad Nisheens as representatives of these two shrines have therefore, been included in the panel of members submitted separately for the Tehsil Wakaf Committee.

15 Under section 5, this report was to be submitted to the govt. who had to forward its copy of the respective committee. It is admitted by the Special Officer that no committee was appointed for Kishtwar and, therefore, section 5(1) could not be complied. Under subsec. (2) of section 5, the committee had to examine the report and also get it published in the govt. gazette. It was only after complying subsection (1) and (2) of section 5 that the list of Wakafs could attain finality, under subsec (4). Since there was no Wakaf Committee in Kishtwar. the report of Special Officer remained unnoticed as it could not be acted upon. It was next argued by Mr. Naik that this aspect has attained the finality u/s 61 of the Wakafs

Act (new). This section reads as under:

61. Repeal and saving The J and K Muslim Wakafs Act, 1959 is hereby repealed; Provided that such repeal shall not affect the previous operation the said law and subject thereto, anything done or any action taken in the exercise of any power conferred by or under the law so repealed, shall be deemed to have been done or taken under the Act as if this Act were in force on the day on which such thing was done or action was taken.

16 The provision will be attracted only if any action had to be initiated on the report of the Special Officer. Since "anything done or action taken means followup action under sec. 5 of the Muslim Wakaf Act But as no action under sec. 5 was taken, it would not be an action taken in exercise of powers conferred under the Act. In view of the above section 61 has no application. This argument therefore, has no merit and is rejected.

17. This brings us to the challenge to the report of Special Officer dated 5.8.79 ant! SRO 619 of 1979. The main contention of Mr. Naik is that

petitioners were not heard before passing the impugned order, thereby he has violated the principles of natural justice. However the finding of the

Special Officer may first be noticed. Paras 3 and 4 of the report read as under:

On receipt of certain applications from the people of locality and others as also from Mohtamim of the two Mausoleums and enquiry was

conducted by me at Kishtwar during the course of my survey of Wakaf property. Statements of a number of witnesses were recorded who

corroborated the revenue record showing the immovable property as Wakaf property. Only two persons who styled themselves as Sajjad

Nisheens of the Dargah have claimed that they were owners of all Wakaf property of the Ziarat. They also claimed that they are the proprietors

of two Mausoleums. I have examined all the evidence produced including the documents comprising all revenue record and have come to the

conclusion that all immovable property dedicated to the two Ziarats is Wakaf property within the meaning of section 3(d) of the J and K Wakafs

Act, 1978. Under the aforesaid proposition of law Mausoleums Khankah and Graveyard constitute Wakaf property by user.

18. The fact that it is a Dargah where the graves of two saints exist is not disputed. The fact that grant of land by the then ruler was to the Asthan

i.e. Ziarats is recorded in the revenue record. Nothing more was required by him. Moreover, assuming that the petitioners were not given effective

hearing, the question involved is what they wanted to prove or establish In this behalf para 6 of the grounds of appeal filed by them under the

Wakaf Act is relevant. It reads as under

6. That the properties attached to these Ziarats have been gifted to the ancestors of the appellants and as such are their personal properties.

The appellants and their ancestors have been managing the same. The appellants are in possession of all the documents describing them as being

gifted to their ancestors by different rulers and authorities of the time.

19. So what the petitioners wanted to establish before the inquiry officer was that the land was gifted to their ancestors But their stand in the

petition is that they are Sajjad Nashin of the Ziarats and the right is heritable. The plea that the land was gifted to their ancestors is also against

the revenue record produced by them as noticed above because the land is owned by the Asthan i.e. Ziarat.

20. Regarding the plea that right of hearing was denied. Para15 of the appeal nails the lie. It reads as under:

That it was disputed before the Special Officer that the properties are not Wakaf properties and the Special Officer has no jurisdiction to make

any investigation/inquiry or report in view of the fact that the matter is also subjudice before the Hon'ble Court. The officer did not also adopt the

procedure as required u/s 4 of the J and K Wakaf Act. 1978 and did not even care to peruse the deed1title deeds other relevant documents 01

revenue record etc. etc. which is in possession of the appellants to establish that the said two Ziarats and the properties attached to these are the

exclusive properties of the appellants which had fallen to them from the hands or their ancestothers who were the Sajjaci Nisheens of the said

Ziarats as then ancestothers had been.

21. This averment in the grounds of appeal proves that the petitioners were heard, but their claim that they are the owners of the Ziarats and

properties attached thereto was negatived by the Special Officer. So it is admitted that petitioners were heard, whether their plea was accepted or

not is immaterial Moreover, the order of Special Officer is in accord with the revenue record indicating that the grant of land was in favour of

Asthan i.e Ziarats and since the petitioners were only Sajjad Nisheens they cannot claim ownership. It is thus a Wakaf by user. They have

abandoned this plea in the writ petition by claiming the right of Sajjad Nisheens of the Ziarats by inheritance. Next question is whether office of

Sajjad Nisheens is inheritable under the Muslim Law. This question fell for consideration of a Division Bench of High Court of Calcutta in Mst.

Zohra Khatoon vs Mohd. Jane Alam AIR 1978 Calcutta 133. the Bench while negating the plea that the rights of Mutwali are inheritable held as

under

In general. Mutwali is not allowed to sell, mortgage or lease the Wakf property unless he obtains the permission of the court which has the general

powers of controlling the actions of Mutwan Save and except as recognised by any custom, the law does not favour the right to act as Mutwali

becoming heritable. When the Mutwali dies subject to any specific provision to the contrary in the deed of endowment, the Wakaf if still alive

possesses the right to appoint another and in his absence his executor and in the

absence of both, it is the court that appoints the successor

Mutwali. The Mutwali under the Mohammedan Law has no ownership right or estate in the Wakaf property.

The Bench further held that:

as observed by Amir Ali", a Wakaf is a permanent benefaction for the good of God's creatures; the Wakaf may bestow the usufruct but not the

property upon whosoever he chooses and in whatever manner he likes, only it must endure for ever." Such being the position, the beneficiary

acquires no interest in the strict sense in the property itself though an interest in the usufruct arising out of such property is vested in the beneficiary.

22. So the claim of the petitioners that the right of Sajjad Nisheen is heritable has no basis and is rejected accordingly.

23. A halfhearted argument was advanced to show that the land having been granted to the Asthan by Raja Kirat Singh of Kishtwar, a Hindu, the

Ziarats are not Wakafs. However, it has already been found that Raja Kirat Singh embraced Islam shortly after he ascended the throne in 1664

A.D. This happened at the time of visit of Mughal Emperor Aurangzeb to Kashmir. This fact is recorded by D.C. Sharma in his book "History and

Culture of Kishtwar'. 1995. The grant is said to have been made much thereafter as he ruled upto 1728 A.D. So even this argument must fail and

is rejected accordingly.

24. The petitioners have thus failed to make out any case for interference by this Court in exercise of the powers of judicial review under Article

226 of the Constitution. They have also failed to show any infirmity in the order of dismissal of their appeal by the appellate authority under the

Wakafs Act. All the grounds urged on behalf of the petitioners having failed, this petition has been found to be without any merit because all the

issues raised are concluded by the judgment of this court in the case of Committee of Muslim Wakaf vs. Anayatullah and others 1974 KLJ 331

which has been upheld by the apex court (supra). The petition is, therefore, dismissed with Rs. 5000/ as costs.