(2023) 05 UK CK 0088

In the Uttarakhand High Court

Case No : Writ Petition (PIL) No. 82 Of 2023????

Tafazzul Hussain Ansari APPELLANT

Vs

State Of Uttarakhand And Others RESPONDENT

Date of Decision : 26-05-2023

Acts Referred:
Waqf Act, 1995 — Section 2, 3, 3(r), 3(r)(iv), 4,4(3), 5, 36

Citation : (2023) 05 UK CK 0088

Hon'ble Judges : Vipin Sanghi, CJ;Rakesh Thapliyal, J

Bench : Division Bench

Advocate : A.S. Rawat, Siddhartha Sah, C.S. Rawat, Gajendra Tripathi, T.A. Khan, Nishat Intezar

Final Decision : Dismissed

Judgement

Vipin Sanghi, CJ

1. The petitioner has preferred the present Writ Petition, in public interest, seeking the following reliefs:-

"(i) Issue a writ, rule, order or direction in the nature of mandamus directing the respondents not to resort to indiscriminate and arbitrary demolition of places of worship, shrines, mazars, etc. of Muslim Community dehors the provisions of Places of Worship (Special Provisions) Act, 1991 & Uttarakhand Policy for Removal, Relocation and Regularization of Unauthorized Religious Structures on Public Streets, Public Parks and Other Public Places, 2016.

(ii) Issue a writ, rule, order or direction in the nature of mandamus directing the respondent no. 9 to conduct of preliminary survey of auqaf (waqfs) and publish list of auqaf in accordance with Section 4 & 5 of Waqf Act, 1995.

(iii) Issue a writ, rule, order or direction in the nature of mandamus directing the respondents nos. 1-8 to restore the places of worship, shrines, mazars, etc. of Muslim Community in the State of Uttarakhand which have been demolished by the respondents nos. 1-8 illegally.”

2. The petitioner has made general statements, with regard to the alleged indiscriminate and arbitrary demolition of legal places of worship, shrines, mazars, etc. of Muslim Community. The said statements are completely vague and unsubstantiated.

3. Aforesaid being the position, the first and the third reliefs, in our view, cannot be granted in the present Writ Petition.

4. The second relief sought by the petitioner is for a direction to respondent no. 9 to conduct a preliminary survey of auqaf (waqfs), and to publish list of auqaf in accordance with Sections 4 and 5 of the Waqf Act, 1955.

5. At this stage, we may notice some relevant provisions of the Waqf Act, 1955. Section 3(r) of the aforesaid Act defines a “Waqf” to mean the permanent dedication by any person, of any movable or immovable property for any purpose, recognized by the Muslim law, as pious, religious or charitable. Therefore, it appears to us that, for creation of a Waqf, the essential ingredient is that, firstly, there should be a person, who owns movable or immovable property.

6. Secondly, that person should dedicate his own movable or immovable property for any purpose specified by Muslim Law as pious, religious or charitable.

7. The definition is inclusive. It includes a Waqf by user - such Waqf shall not cease to be a Waqf by reason only of the user having ceased, irrespective of the period of such cesser. It also includes a Shamlat Patti, Shamlat Deh, Jumla Malkkan or by any other name entered in a revenue record, and; “grants”, including mashrat-ul-khidmat for any purpose recognised by the Muslim law as pious, religious or charitable, and; a waqf-alal-aulad to the extent to which the property is dedicated for any purpose recognized by Muslim law as pious, religious or charitable, provided when the line of succession fails, the income of the Waqf shall be spent for education, development, welfare and such other purposes, as recognized by Muslim law.

8. The inclusions under Clauses (i), (ii), (iii) & (iv) in the definition of “Waqf”, to our understanding, cannot take away the primary meaning of the expression “Waqf”. A Waqf, by user, cannot be a mere user of a movable, or an immovable property for a pious, religious, or charitable use, recognized by the Muslim law simplicitor. It has to comply with the primary requirement of it being a dedication by a person of his movable or immovable property. Therefore, a Waqf cannot come into existence, when the property, which may be used for a pious, religious, or charitable purpose, as recognized by Muslim Law, is not the property of a person, but is public property, public land, or government land. The expression “a Waqf by user” only means that the owner of the property, movable or immovable, by his use, exhibits his intention to create a Waqf, i.e. dedication to his property for a purpose recognized by Muslim law as pious, religious or charitable.

9. So far as the inclusion in the definition of the expression "Waqf" of "Shamlat Patti, Shamlat Deh, Jumla Malkkan or by any other name entered in a revenue record", is concerned, there can be no difficulty, since that would be a matter of record.

10. "Grants", mentioned in Section 3(iii), would be grants made by the authority, i.e. the Government or the Sovereign, who is empowered to make the grant, and it would, therefore, exclude any government/ public property from Waqf, even if it is used for a purpose recognized by Muslim law as pious, religious, or charitable, which has not been granted by the empowered authority.

11. "Waqf-alal-aulad", mentioned in Clause (iv) of Section 3(r), also relates to property owned by an individual, and would exclude any property, which is a public property or property of the State.

12. We may now notice the settled principles in this regard. Under the Muslim Law, a waqf can be created in several ways but primarily by permanent dedication of any movable and immovable property by a person professing Islam for any purpose recognized by Muslim Law as pious, religious or charitable purpose and in the absence of such dedication it can be presumed to have come into existence by long use. Dedication of his property by a Muslim is, however, essential.

13. Ordinarily, a waqf is brought into existence by any express dedication of movable or immovable property for religious or charitable purpose as recognized by Muslim Law. Once such dedication is made, the property sought to be dedicated gets divested from the wakif, i.e. the person creating or dedicating it. The waqf so created acquires a permanent nature and cannot be revoked or rescinded subsequently. The property of the waqf is unalienable and cannot be sold or transferred for private purpose.

14. The dedication resulting in the creation of a waqf may, at times, in the absence of an express dedication, may also be reasonably inferred from the facts and circumstances of the case such as long usage of the property as a waqf property, provided it has been put to use for religious or public charitable purposes.

15. The dedication must not be transient, but it must be permanent. The dedication must be for purposes which are regarded as pious, charitable or religious as per Muslim Law.

16. The privy council, in one of its earlier decisions, Jewen Doss Sahoo v. Shah Kubeer-ood-deen, [(1840) 2 MIA 390] explained the significance of the word "dedication" and observed thus :

"According to the two disciples, waqf signifies the appropriation of a particular article in such a manner as subjects it to the rule of divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God, by the advantage of it resulting to his creatures."

17. Justice S.I Jafri in his book “Waqf Laws in India” published in 2015 has explained that a waqf is an unconditional and permanent dedication of property with implied detention in the ownership of God in such a manner that the property of the owner may be extinguished and its profit may revert to or be applied for the benefit of mankind, except for purposes prohibited by Islam.

18. We may now turn to Sections 4 & 5 of the Waqf Act, 1955, on which the petitioner places reliance. The said Sections reads as follows :-

“4. Preliminary survey of auqaf.--(1) The State Government may, by notification in the Official Gazette, appoint for the State a Survey Commissioner of Auqaf and as many Additional or Assistant Survey Commissioners of Auqaf as may be necessary for the purpose of making a survey of auqaf in the State.

(1A) Every State Government shall maintain a list of auqaf referred to in sub-section (1) and the survey of auqaf shall be completed within a period of one year from the date of commencement of the Wakf (Amendment) Act, 2013 (27 of 2013), in case such survey was not done before the commencement of the Wakf (Amendment) Act, 2013:

Provided that where no Survey Commissioner of Waqf has been appointed, a Survey Commissioner for auqaf shall be appointed within three months from the date of such commencement.

(2) All Additional and Assistant Survey Commissioner of Auqaf shall perform their functions under this Act under the general supervision and control of the Survey Commissioner of Auqaf.

(3) The Survey Commissioner shall, after making such inquiry as he may consider necessary, submit his report, in respect of auqaf existing at the date of the commencement of this Act in the State or any part thereof, to the State Government containing the following particulars, namely:--

(a) the number of auqaf in the State showing the Shia auqaf and Sunni auqaf separately;

(b) the nature and objects of each waqf;

(c) the gross income of the property comprised in each waqf;

(d) the amount of land revenue, cesses, rates and taxes payable in respect of each waqf;

(e) the expenses incurred in the realisation of the income and the pay or other remuneration of the mutawalli of each waqf; and

(f) such other particulars relating to each waqf as may be prescribed.

(4) The Survey Commissioner shall, while making any inquiry, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) in respect of the following matters, namely:--

(a) summoning and examining any witness;

(b) requiring the discovery and production of any document;

(c) requisitioning any public record from any court or office;

(d) issuing commissions for the examination of any witness or accounts;

(e) making any local inspection or local investigation;

(f) such other matters as may be prescribed.

(5) If, during any such inquiry, any dispute arises as to whether a particular waqf is a Shia waqf or Sunni waqf and there are clear indications in the deed of waqf as to its nature, the dispute shall be decided on the basis of such deed.

(6) The State Government may, by notification in the Official Gazette, direct the Survey Commissioner to make a second or subsequent survey of waqf properties in the State and the provisions of sub-sections (2), (3), (4) and (5) shall apply to such survey as they apply to a survey directed under sub-section (1):

Provided that no such second or subsequent survey shall be made until the expiry of a period of ten years from the date on which the report in relation to the immediately previous survey was submitted under sub-section (3):

Provided further that the waqf properties already notified shall not be reviewed again in subsequent survey except where the status of such property has been changed in accordance with the provisions of any law."

(emphasis supplied)

5. Publication of list of auqaf.--(1) On receipt of a report under sub-section (3) of section 4, the State Government shall forward a copy of the same to the Board.

(2) The Board shall examine the report forwarded to it under sub-section (1) and fordward it back to the Government within a period of six months for publication in the Official Gazette a list of Sunni auqaf or Shia auqaf in the State, whether in existence at the commencement of this Act or coming into existence thereafter, to which the report relates, and containing such other particulars as may be prescribed.

(3) The revenue authorities shall—

(i) include the list of auqaf referred to in sub-section (2), while updating the land records; and

(ii) take into consideration the list of auqaf referred to in sub-section (2), while deciding mutation in the land records.

(4) The State Government shall maintain a record of the lists published under sub-section (2) from time to time."

(emphasis supplied)

19. Before dealing with these Sections, we may notice the submission of Mr. A.S. Rawat. Mr. Rawat submits that the State Government is obliged to carry out a preliminary survey of all properties, which are being used for the purpose recognized by Muslim law, as pious,religious, or charitable, and upon survey, all such properties become Waqf properties.

20. A reading of Sections 4 and 5 of the Act, shows that the purpose of a preliminary survey, and publication of list, is not to confer the status on a property, as a Waqf property, or to deem it as a Waqf property, even when it does not satisfy the primary definition of a Waqf, as contained in Section 3(r) of the Act, as taken note of hereinabove. According to Mr. Rawat, it does not matter whether the property - which is put to use for a purpose – considered by the Muslim religion as pious, religious or charitable, is public, or Government land. According to him, once it is so used, as aforesaid, it qualifies as a Waqf property. This submission needs only to be noticed to be rejected. A plain reading of Section 3(r) shows that what is absolutely essential is the dedication of the property by its Muslim owner, for the purpose aforesaid. In fact, if the user ceases as prescribed, the property does not lose its character as a Waqf property, if it is a property dedicated by a Muslim for the purposes aforesaid.

21. The purpose of the survey, is only to survey the existing Waqf properties, i.e. properties, which satisfy the definition of Waqf, contained in Section 3(r) of the Act. This is evident from the plain reading of Sections 4 and 5 of the Act. We have consciously highlighted the relevant portion of these sections, to emphasize the words which leave no manner of doubt that the preliminary survey under Section 4, and the publication of the list under Section 5 can only be in respect of Auqaf, which satisfy the requirements of Section 3(r) of the Act. The purpose is not to create a list, and, thereafter, confer upon the enlisted properties the status of Waqf property, much less, when such properties do not satisfy the definition of Waqf, contained in Section 3(r) of the Act.

22. We may also notice Section 36 of the Act, which reads as follows :-

"36. Registration.--(1) Every waqf, whether created before or after the commencement of this Act, shall be registered at the office of the Board.

(2) Application for registration shall be made by the mutawalli:

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.

(3) An application for registration shall be made in such form and manner and at such place as the Board may by regulation provide and shall contain the following particulars:--

(a) a description of the waqf properties sufficient for the identification thereof;

(b) the gross annual income from such properties;

(c) the amount of land revenue, cesses, rates and taxes annually payable in respect of the waqf properties;

(d) an estimate of the expenses annually incurred in the realisation of the income of the waqf properties;

(e) the amount set apart under the waqf for--

(i) the salary of the mutawalli and allowances to the individuals;

(ii) purely religious purposes;

(iii) charitable purposes; and

(iv) any other purposes;

(f) any other particulars provided by the Board by regulations.

(4) Every such application shall be accompanied by a copy of the waqf deed or if no such deed has been executed or a copy thereof cannot be obtained, shall contain full particulars, as far as they are known to the applicant, of the origin, nature and objects of the waqf.

(5) Every application made under sub-section (2) shall be signed and verified by the applicant in the manner provided in the Code of Civil Procedure, 1908 (5 of 1908) for the signing and verification of pleadings.

(6) The Board may require the applicant to supply any further particulars or information that it may consider necessary.

(7) On receipt of an application for registration, the Board may, before the registration of the waqf make such inquiries as it thinks fit in respect of the genuineness and validity of the application and correctness of any particulars therein 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 hear him if he desires to be heard.

(8) In the case of auqaf created before the commencement of this Act, every application for registration shall be made, within three months from such commencement and in the case of auqaf created after such commencement, within three months from the date of the creation of the waqf:

Provided that where there is no Board at the time of creation of a waqf, such application will be made within three months from the date of establishment of the Board."

(emphasis supplied)

23. Section 36 requires that "every waqf, whether created before or after the commencement of the Act, shall be registered at the office of the Board". This means that every property, which is dedicated as Waqf by the owner of the

property, necessarily, has to be registered with the Waqf Board.

24. This section also makes it clear that the Waqf– of which registration is sought, should be created either by an express deed executed by the owner of the property, or there should be clear evidence of its origin, nature and object.

25. The purpose of filing this Writ Petition by the petitioner, really, appears to be to call upon the State to prepare a list, upon a survey of all properties, which are being put to use for a purpose, recognized by Muslim law as pious, religious, or charitable, and, thereafter, to claim that they are Waqf properties. We say this, because the petitioner has himself placed on record the photographs (Annexure No. 14), of what is claimed to be a Masjid situated on forest land, in respect whereof, notice has been issued by the Forest Range Officer, Ramgarh Range, Rajaji Tiger Reserve on 08.05.2023. The said notice reads as follows:-

26. When we asked Mr. A.S. Rawat to show, as to what material is placed on record to show that the said Masjid is a Waqf property, Mr. Rawat has sought to place reliance on Page No. 234 of the record. He claims that, at Serial No. 144, the aforesaid Masjid, in respect whereof the photographs have been filed, and notice has been issued, has been listed.

27. We cannot make head or tail out of the said document, which is incomplete, and only an extract. It is not clear as to for what purpose this list was prepared. Inclusion of the said Masjid in any list cannot confer on the said Masjid the status of a Waqf property. We, therefore, cannot place reliance on the said document for any purpose whatsoever. It appears to us that there is nothing to show that the said Masjid could possibly be classified as a Waqf property, since there is nothing to show that the said property was owned by any individual; that it was dedicated by him/ her for use as per Muslim law, which is considered pious, religious, or charitable, and; there is nothing to show that any application was made for registration under Section 36 of the Act to the Waqf Board at any stage whatsoever, or that the Board has registered the said property as a Waqf property. Since the land, on which the structure is situated is forest land, it possibly cannot be classified as a Waqf property, as it could not have been dedicated by any individual for creation of a Waqf. The petitioner does not claim a grant in respect of the said property, and does not claim that there is any revenue record to establish the recognition/ existence of a mosque.

28. Another submission of Mr. A.S. Rawat, in relation to second relief, is that unless the survey is completed under Sections 4 and 5, and the list is prepared of all the Waqf properties, the State should not remove the encroachments on public land.

29. We do find any merit in this submission. The purpose of preparation of the preliminary list, on survey, under Sections 4 and 5, appears to be only to manage those properties, which are Waqf properties. The purpose is to ensure that properties, which are Waqf properties, as defined under the Act, are not dissipated or misused for any purpose, which is not considered, under the Muslim

law, as pious, religious or charitable. The purpose of the survey, as we have already observed, is not to create a ground for anyone to claim any property, as a Waqf property, only on the basis of user, when the same does not meet the requirements of Section 3(r) of the Act.

30. Mr. Rawat has not been able to point out even a single instance, where a property, which is a Waqf property in terms of Section 3(r), has been demolished, or is proposed to be demolished by the State, in pursuance of the notice issued to remove encroachment.

31. We may take note of the recent pronouncements of the Supreme Court in State of Andhra Pradesh (Now State of Telangana) v. A.P State Wakf Board and Ors., 2022 SCC OnLine SC 159, and Salem Muslim Burial Ground Protection Committee v. State of Tamil Nadu and others, 2023 SCC OnLine SC 656, wherein the Supreme Court dealt with the essential requirement of dedication and the wakf by user.

32. For the aforesaid reasons, we find no merit in this Writ Petition, and dismiss the same.

33. Consequently, pending applications, if any, also stand disposed of accordingly.

