

(2001) 01 AHC CK 0108
In the Allahabad High Court
Case No : C.M.W.P. No. 32167 of 1996

Veena Gupta

APPELLANT

Vs

U.P. Central Sunni Waqf Board and others

RESPONDENT

Date of Decision : 12-01-2001

Acts Referred:

Constitution of India, 1950 — Article 226
United Provinces Muslim Wakf Act, 1936 — Section 31, 33, 40(2), 57A
Uttar Pradesh Muslim Waqfs (Recovery of Waqf Property) Rules, 1972 — Rule 9(1)

Citation : (2001) 1 AWC 725

Hon'ble Judges : Lakshmi Behari, J; Binod Kumar Roy, J

Bench : Division Bench

Advocate : Umesh Narain Sharma, for the Appellant; S.C. and Anand Prakash Srivastava, for the Respondent

Final Decision : Dismissed

Judgement

Binod Kumar Roy and Lakshmi Bihari, JJ.—The petitioner has come up with a prayer to quash the order, the office memo and the letter as contained in Annexures-7, 8 and 9.

1.1. Annexure-7 reads as follows :

"Seen the report of A.S.I. The proposal is approved. The order will take effect if there is no order from any Court contrary to it.

Sd/- Nayaz Ahmad

Controller

6.6.1996"

1.2. Annexure-8 shows that vide office memorandum dated 19.6.1996, the Secretary of the Waqf Board informed respondent No. 4 that the earlier order dated 22.3.1990 deleting the property of Pilikothi in Waqf No. 346-Agra, Firozabad has been recalled by the Controller vide his order dated 6.6.1996.

1.3. Annexure-9, shows, inter alia, that the Secretary of the Board through his letter dated 19.6.1996 requested the District Magistrate, Firozabad to pass an order for entering the entire property of the waqf as such in the records of Nagar Palika, Tundala in backdrop that the property Pilikothi is part of Waqf Mohsin Ali Khan situated at Tundala, district Firozabad is registered as purely charitable waqf at serial No. 346 of the records.

2. The Pleadings :

2.1. The petitioner asserts to this effect : A proceeding u/s 57A of the U. P. Muslim Waqf Act (hereinafter referred to as the Act) was instituted by the Waqf Board for eviction of Suraj Chand Vaish, her father-in-law from his Pilikothi ; Shiv Gopal Gupta, elder brother of her husband Girdhar Gopal Gupta, filed an application on behalf of his father Suraj Chand Vaish u/s 33 of the Act before the Controller, U. P. Central Sunni Waqf Board as he was informed that his house known as "Pilikothi" situated in Tundala, district Firozabad has been included as waqf property by the Waqf Board stating, inter alia, that out of plot No. 472 the recorded owner Bal Mukund Singh had executed a sale deed on 18.3.1933 in respect of one bigha of land in favour of the applicant and so far as Pilikothi is concerned, it was purchased by him from its owner Sahu Jagdeshwar Nath and Sahu Rameshwar Nath which is apparent from the copy of the sale deed, which was also filed ; in the said proceeding respondent No. 4 the Secretary of the Waqf Jama Masjid, Tundala contended that the said property belonged to Hasan Ali Khan, who was given a permanent lease by the Zamindar Bal Mukund Singh, and after him, his son Mohsin Ali Khan became its owner who created a waqf Al-ul-aulad by means of a waqf the said proceeding was dropped by the Controller, vide his order dated 22.3.1990 (Annexure-1) holding Suraj Chand Vaish as owner of the property having acquired it in a legal manner noting that in the sale deed dated 22.7.1920 there was no reference of Pilikothi and the description mentioned therein does not tally besides that in his affidavit respondent No. 4 has stated that in the year 1930 the name of Pilikothi had figured whereas the application for registration of the waqf was filed in 1943 without mentioning Pilikothi therein ; against the order aforementioned respondent No. 4 and few others filed a reference (Annexure-2) u/s 7 of the Act before the Tribunal ; even a civil suit was also filed in 1990 along with an application for grant of interim injunction in which the prayer for injunction after exchange of affidavits, was rejected vide order dated 5.8.1992 (Annexure-5) ; in the reference 5 issues stated in Paragraph 6 of the writ petition were framed vide order dated 27.10.1994 (Annexure-3) and thereafter the Tribunal directed the parties to file necessary documents and summoned the records from the Waqf Board ; in the meantime in 1995 the application (appended as Annexure-6) was filed for recalling the order dated 22.3.1990, in the reference the applicant did not appear and ultimately it was dismissed in default by the Tribunal on 11.1.1996 (copy of the order-sheet of the Tribunal containing orders passed from 22.11.1994 to 11.1.1996 appended as Annexure-4 about which the petitioner could not know as the male members of her family were doing pairvis : respondent No. 1 has acted

without jurisdiction and authority in passing the impugned order after a lapse of almost more than five years in the absence of any specific provision for review under the Act about which she was apprised by one of the lawyers looking after Court cases that some kind of notice has been received in the office of District Magistrate and thereafter she started making enquiries in August, 1996 and obtained relevant documents and, therefore, some delay has been caused in filing this writ petition which be condoned in the interest of justice.

2.2. Respondent No. 4 alone has filed a counter-affidavit stating inter alia, that correct facts have been suppressed and material facts misrepresented ; Annexure-1 was passed on wrong information given by the petitioner, the statement that no notice of the petition was ever given is absolutely false ; the impugned order was passed after setting up of a proper enquiry in the review application and after giving an adequate opportunity ; Girdhar Gopal Gupta, the husband of the petitioner, had full knowledge about all proceedings, who had himself filed writ petition in the name of his father Suraj Chand Vaish, which is still pending but these facts have been concealed and on account of pendency of that writ petition, the instant petition on same facts is not maintainable and is liable to be dismissed with heavy cost ; the impugned order has become final u/s 40 (2) of the Act, as the petitioner has not challenged it before the Tribunal, which is an alternative remedy ; Suraj Chand Vaish has transferred the disputed property to Smt. Prabha Gupta wife of Om Prakash, who in her turn has transferred the disputed land to one Smt. Rameshwari Devi wife of Shanker Lal, resident of Tundala, district Firozabad and the petitioner, who has no concern at all with the waqf property, cannot have any grievance after transfer of the property though in an illegal manner during the pendency of the writ petition and the civil suit.

2.3. A rejoinder to the aforementioned counter-affidavit has been filed on 16.3.2000 after serving its copy on 15.3.2000 and appending a copy of the waqf deed dated 18.12.1917 in which it has been clearly mentioned that the property is situated at Mauja Mohammadabad, Tahsil Itmadpur, district Agra whereas the disputed property Pilikothi is situated at Mauja Tundala which was also never mentioned in the deed and thereby the property mentioned in the deed was a different property ; facts have been twisted and are being denied : the allegation regarding transfer of the property is denied clarifying that a very limited portion of it was transferred in favour of other persons appending a map as Annexure-RA 2 ; her father-in-law Suraj Chand Vaish had filed writ petition in 1993 whereas the petitioner is challenging the order passed in the year 1996 after having learnt of the proceedings after the death of her husband of which earlier she had no knowledge : and that as the writ petition contains good grounds, the same deserves to be allowed with cost.

The Documents :

3. Having reproduced the pleadings, let us have a look at the documents brought on the record by both parties in form of annexures.

3.1. Firstly those brought on the record by the petitioner Annexure-1 contains the order dated 22.3.1990 passed by Farhat Ali, Controller, U. P. Sunni Central Board of Waqf. Lucknow in relation to the application filed u/s 33 of the Act. It recites and holds, inter alia, to this effect : A waqf in Agra was created by one Mohd. Mohsin Ali Khan, which was registered in the office of the Waqf Board bearing registration No. 9A, Agra ; on the report dated 23.12.1980 of the Superintendent of Waqf it was converted as a purely charitable waqf and given registration No. 346 and at that very time the property known as Pilikothi was included in the waqf and the register of waqfs was also amended u/s 31 of the Act ; thereafter proceedings u/s 57A of the Act were initiated against Suraj Chand Vaish, reported to be in an authorised occupation of Pilikothi : a notice under Rule 9(1) of the U. P. Muslim Waqfs (Recovery of Waqf Property) Rules was served on Suraj Chand Vaish to which he submitted a reply ; on his behalf his son Shiv Gopal Gupta moved the application u/s 33 of the Act for determination whether the property in question was really a waqf property? : on receipt of that application the Controller passed an order dated 14.12.1988 that the said application should be disposed of first and only thereafter, if necessary, proceedings u/s 57A of the Act be continued ; the parties filed affidavits and copies of number of documents to support their respective cases ; after hearing the learned counsel for both parties and going through the record the Controller observed and held that it is the Secretary of the Management of the Charitable Waqf who has been contesting the case against Suraj Chand Vaish no copy of the permanent lease by which it was claimed that the land on which the house stood has been given to Ali Hasan Khan, father of Mohsin Ali Khan, after whose death he had become its owner rather merely a reference of the lease has been made in the sale deed dated 22.7.1920 said to have been executed by Bal Mukund Singh, the owner of the land which neither mentions the plot number nor boundary of the plot, which was subject matter of the sale rather mentions only the area of the land as 2 bighas 5 biswas whereas it is admitted by both parties that the number of the plot in question was 472 whose new number was 533 and a perusal of the extract of the Khatauni relating to years 1309 Fasli, 1329 Fasli, 1334 Fasli and 1341 Fasli shows that the total area of this plot was 5 bighas only and thus obviously if Bal Mukund Singh sold 2 bighas 5 biswas of land it meant that it was some other plot which he had sold and not plot No. 472--it is important that the name of Mohsin Ali Khan was never mutated in respect of the said plot and thus had he really purchased the plot and became its owner, there was no reason why his name could not have been mutated in the revenue records--for these reasons it is doubtful whether the plot on which Pilikothi stood was really the property of Mohsin Ali Khan--the written waqf deed, by which this waqf was created dedicating the property permanently, does not specify any particular house property rather only this much has been stated that the Mutwalli will have a right to get partitioned the property, house, grove and trees which formed the subject-matter of the waqf--the explanation furnished that when the waqf was created it was not known that the house was known by the name of Pilikothi and the name Pilikothi came in vogue around 1930, but strangely

enough the application moved in the year 1943 for registration of this waqf does not mention Pilikothi--in regard to the claim that Mohsin Ali Khan had come to know after the partition when this property was allotted in his share, he could have given its complete details in the column provided in the application for registration of the waqf property as by that time he had come to know of the name and its absence in mentioning in two applications moved by Mohsin Ali Khan and his wife Smt. Safdar Jahan Begum make it all the more doubtful whether Pilikothi really formed part of the waqf property--on the other hand the case of Suraj Chand Vaish is that the recorded owner of the plot Bal Mukund Singh on 18.3.1933 had executed a sale deed in respect of one bigha of land out of it and the building known as Pilikothi was purchased by Suraj Chand Vaish from its owners Sahu Jagdishwar Nath and Sahu Rameshwar Nath and since then he has been in exclusive possession thereof is clearly shown from the sale deeds executed in his favour--from the Khewat for the years 1330 to 1341 Fasli, filed by the Secretary, it appears that the name of Suraj Chand Vaish was also mutated therein--further Nagar Palika. Tundala has certified that it was Suraj Chand Vaish, who was the owner of the Pilikothi--it would thus appear that it is extremely doubtful whether the property known as Pilikothi is really a waqf property, whereas the evidence filed by Suraj Chand Vaish indicates that it is his personal property, which he had acquired in a legal manner--it is, therefore, decided u/s 33 of the Act that it is not waqf property and consequently the entry in the register of waqfs showing the property in question as waqf property will have to be deleted and the proceedings u/s 57A of the Act will have to be dropped.

3.2. Annexure-2 contains copy of the waqf reference No. 82 of 1990 filed against the order as contained in Annexure-1 before the Tribunal which shows, inter alia, respondent No. 4 as petitioner No. 2 and U. P. Sunni Central Board of Waqf as respondent No. 1 and Gopal Gupta as respondent No. 2

3.3. Annexure-3, the order-sheet of the Court of Civil Judge, Agra in Suit No. 82 of 1992, shows that vide order dated 27.10.1994 issues were framed ; vide order dated 10.1.1995 the records were summoned fixing 8.2.1995 for evidence and vide order dated 11.1.1996 ultimately the suit was dismissed.

3.4. Annexure-5 contains the order dated 5.8.1992 passed by the Civil Judge, Firozabad in Suit No. 204 of 1990 Waqf Mohsin Ali Khan v. Suraj Chand Vaish, which shows rejection of the plaintiff's application for grant of temporary injunction for various reasons mentioned therein and recording of the findings that there is no prima facie case in favour of the plaintiff, that it is not the case of the plaintiff that the sale deed of 1934 through which the disputed property has been purchased, was annulled and the balance of convenience appears to be in favour of the defendant, since it is claimed that he is in continuous possession since 1934.

3.5. Annexure-6 is the copy of the review/recall application dated 25.1.1995 filed by respondent No. 4 against the order u/s 33 of the Act.

3.6. Annexure-RA 1 contains photocopy of the waqf deed.

3.7. Annexure-RA 2 is photocopy of the map showing location of the disputed house and possession thereof.

3.8. The only document filed by respondent No. 4, Annexure-C.A. 1, is copy of the notice issued to him by this Court in C.M.W.P. No. 37913 of 1993.

4. The Submissions :

4.1. Sri U. N. Sharma, learned counsel appearing in support of this writ petition, prayed to allow it with cost contending as follows :

(i) The proceeding under the Act being quasi-Judicial and no review jurisdiction having been vested under the Act, the review/recall petition filed by respondent No. 4 after a long lapse of 5 years, was illegally entertained and disposed of by the impugned order in excess of jurisdiction and thus liable to be quashed.

(ii) Respondent No. 4 having moved the reference and allowed the same to be dismissed for default vide order dated 11.1.1996 (Annexure-4) and that injunction petition having been rejected by the civil court, respondent No. 1 could not have proceeded to entertain the review application.

(iii) Even assuming that the respondent No. 1 stands vested with powers to review or recall his earlier order, law being well settled under what circumstances a review or recall is permissible, nothing having been spelled in the impugned order, which is utterly cryptic, it is liable to be quashed for this reason as well.

4.2. Sri Anand Prakash Srivastava, learned counsel appearing on behalf of respondent No. 4, on the other hand, contended as follows :

(i) Since the petitioner has nothing to do with the property in question, therefore, her writ petition is thoroughly misconceived and is liable to be dismissed with heavy cost.

(ii) In any view of the matter the instant writ petition is in fact a second writ petition on same facts and is thus not maintainable.

(iii) The impugned order has not been passed on the review application and thereby there is no merit in the submission of Mr. Sharma that the impugned order is really a review order.

4.3. Sri Sharma in reply contended reiterating his submissions that there is no force in the submission of Sri Srivastava and that the deceased father-in-law's writ petition, which has been dismissed for default by us has no bearing on the instant writ petition of the petitioner.

5. Our Findings :

5.1. Following questions crop up for our consideration :

(i) Whether the petitioner has locus to file this writ petition on the ground that

she has nothing to do with the property in question?

(ii) Whether the instant writ petition is in fact a second writ petition on same facts and is thus not maintainable?

(iii) Whether the impugned order has been passed on the review/ recall application of respondent No. 4?

(iv) Whether respondent No. 1 is vested with powers of review/recall under the Act? and even assuming that respondent No. 1 was vested with powers of review/ recall the earlier order, whether without being satisfied of the well settled grounds for review/recall can be entertained he correctly proceeded to pass the impugned cryptic order in August, 1996 specially when the prayer for injunction was rejected by the civil court in 1992 and reference moved by respondent No. 4 before the Tribunal was allowed to be dismissed, though for default in January, 1996?

(v) Whether this writ petition should be allowed or dismissed with costs?

5.2. Re-question No. (i) :

We do not find a categorical denial of the claim of petitioner in the counter-affidavit except a bald averment to the effect that the statements made in paragraph 2 of the writ petition are absolutely misconceived and wrong and as such they are denied. From the pleadings it is clear that no document has been brought on the record by respondent No. 4 to show that the entire disputed property stood transferred to Smt. Prabha Gupta, who in her turn had transferred to Smt. Rameshwari Devi though these transfers were made illegally. The relevant statements made in paragraph 8 of the counter-affidavit were denied by the petitioner in her rejoinder as incorrect with this clarification that a very limited portion of the property in dispute was transferred in favour of other persons. The map attached as Annexure-RA2 does support the stand aforementioned.

The petitioner claims herself to be a legal heir and passing of the impugned order without notice. Her husband and father-in-law both had died. Thus, we hold that she has an interest in defending the property in question as well as having been validly transferred by her father-in-law.

Accordingly, we further hold that she has a locus to institute this proceeding under Article 226 of the Constitution of India. The objection raised by Mr. Srivastava is thus rejected.

5.3. Re-Question No. (11) :

In the instant writ petition, the petitioner asserts, inter alia, non-issuance of any notice explaining how she came to know of the impugned order, etc. whereas her father-in-law had moved this Court through C.M.W.P. No. 37913 of 1993 for quashing (i) the order dated 9.1.1991 passed by the Officer Incharge, Waqf and (ii) the order dated 24.7.1993 passed by the Additional Commissioner, Waqf

appending them as Annexures-3 and 4 respectively. Vide order dated 9.1.1991 (communicated through letter dated 11.1.1991) Suraj Chand Vaish was restrained from alienating the shop and house, etc. connected with Pilikothi on account of pendency of Suit No. 82 of 1990 in the Court of Civil Judge, Agra which was filed in connection with sale deeds and the agreement to sell. The order dated 24.7.1993 shows that the issue raised in the application dated 21.7.1992 of Suraj Chand Vaish were studied but for the present, it is not possible to recall the order dated 9.1.1991. Thus, it is clear that what was put under challenge by Suraj Chand Vaish in his writ petition, which we had dismissed today for abatement/default, was an order of restraint issued by the Officer Incharge Waqf whereas in the instant writ petition what is under challenge is the order of the Controller and office memorandum and the communication of the Secretary. Thus, the cause of action is not the same and we hold that this writ petition is not a second one based on same cause of action. The second objection of Sri Srivastava is also overruled.

5.4. Re-Question Nos. (iii) to (v) :

These questions being interlinked are considered together.

It is well-known that unless specifically conferred by the Statute, review jurisdiction cannot be exercised. It can be exercised on the principles analogous to those enumerated under the provisions of Order XLVII of the CPC which can also be resorted to under inherent powers if the Court is satisfied that a fraud was played on it or it had committed an apparent mistake in the interest of justice as acts of Court prejudices none (*actus curie neminem gravabit*) and that too after recording a finding in this regard. The impugned order, as already noted, is cryptic. It does not show that any notice was issued and served as alleged. Even otherwise also, it can be shown to be without Jurisdiction. It does not even state the claim set forth by respondent No. 4. Significantly in Suit No. 204 of 1990 filed by Waqf Mohsin Ali Khan against Suraj Chand Vaish, the waqfs injunction petition (Paper No. 15/c) was rejected after giving an elaborate reason and perusal of documents filed by one or the other party. We do not know what fate this suit or even the review petition otherwise met. The Controller has merely stated that he has seen the report of A.S.I. and the proposal is approved clarifying that this will take effect. If there is no order from any Court contrary to it. Unfortunately, the Controller has not cared to appear before us to explain his order. The report of the A.S.I. has not been brought on the record by respondent No. 4. From the statements made in paragraph 5 of the counter-affidavit of respondent No. 4, we find that respondent No. 1 had set up an enquiry in the review application. Thus, it appears that the order has been passed on the review application of respondent No. 4. Respondent No. 1 was discharging his quasi-Judicial functions. He has not been vested with jurisdiction to review the earlier orders passed under the Act or even under the Waqf Act, 1995. The fact that the review application was filed during pendency of reference, after a long delay and to which the Controller was party, was not considered. It is also not

understandable that when the reference moved by respondent No. 4 was allowed to be dismissed for default, how he could have passed his order. Accordingly, we overrule the submissions of Mr. Srivastava that the impugned order has not been passed on the review application of respondent No. 4. We find merits in the submission of Mr. Sharma and accept them. Refusal to exercise our jurisdiction will result in failure of justice.

6. The Result :

For the reasons aforementioned, we are of the view that the petitioner is entitled to the reliefs prayed for. Accordingly, we allow this petition and quash the impugned order as contained in Annexure-7, the office memorandum as contained in Annexure-8 and the communication made by the Secretary of the Waqf as contained in Annexure-9.

In the peculiar facts and circumstances we further hold that the petitioner is entitled to cost from respondent No. 4, however, which we quantify to Rs. 1,000 only.

7. Let a writ of certiorari issue accordingly.