

(1999) 02 AHC CK 0048
In the Allahabad High Court
Case No : First Appeal No. 356 of 1993

Waqf Masjid Hauz Wali

APPELLANT

Vs

Arun and others

RESPONDENT

Date of Decision : 20-02-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8
Registration Act, 1908 — Section 17(1)
Uttar Pradesh Muslim Waqfs Act, 1960 — Section 2(1), 29, 29(1), 29(2), 29(7)

Citation : (1999) 2 AWC 1196

Hon'ble Judges : Palok Basu, J; P.K. Jain, J

Bench : Division Bench

Advocate : M.A. Qadeer, for the Appellant; B.D. Mandhyan, for the Respondent

Judgement

P.K. Jain, J.—The plaintiff-appellant filed Suit No. 636 of 1992 before Civil Judge, Muzaffarnagar, alleging that waqf in respect of mosque Hauz Wali and other lands described in paragraph 2 of the plaint and the disputed land was created orally. The waqf is entered in relevant records under the U. P. Muslim Waqfs Act, 1936. By a subsequent amendment, it was also stated that the waqf is also registered under the U. P. Muslim Waqfs Act, 1960 (hereinafter referred to as the Act). Further allegations are that Maulana Mohd. Irfan was appointed Mutawalli and Manager of the waqf property and is thus authorised to file the suit on behalf of the plaintiff-appellant. Certain people, namely, Akbar, Udai Ram and others had made unauthorised possession over part of the above property prior to 1883. Suit No. 841 of 1883 was filed in the Court of Munsif Deoband, district Saharanpur. During the pendency of the suit, a commission was issued and map as contained in Schedule A of the plaint was prepared by the Commissioner relating to the waqf properties. The suit was decided in favour of the plaintiff on 12th June, 1884. However, defendant Udai Ram continued to be in possession of the disputed land as tenant of the waqf and a document dated 9th March, 1885 was executed by Udai Ram in favour of the plaintiff. Thus, the plaintiff is owner of the disputed land and said Udai Ram was only tenant of the land and owner of

the structures standing thereon. The defendant Nos. 4 to 8 are heirs of Udai Ram and have no right to transfer the disputed land. However, they have transferred the part of the land to defendant Nos. 1 to 3 and defendant Nos. 9 to 12. Such transfers are not binding upon the plaintiff. The defendants have no right to raise constructions over the disputed land. However, defendant Nos. 1 to 3 and defendants Nos. 9 to 12 have unauthorisedly raised constructions without permission of the plaintiff. The plaintiff-appellant, therefore, prayed that :

(a) by a decree of mandatory injunction the defendants be directed to dismantle the constructions raised by them and in case they fail to do so the constructions be dismantled through Court ; and

(b) by a decree of permanent injunction the defendants be restrained from raising further constructions over land shown in Schedule B of the plaint.

The defendants filed written statements.

2. The defendant No. 3 denied to have purchased the land or to have raised any construction and stated that he has been wrongly impleaded as a party. Defendant Nos. 9 to 12 do not appear to have filed any written statement. Defendant Nos. 1, 2 and 4 to 8 filed separate written statements but appear to have contested the suit on similar grounds.

3. Defendant Nos. 1 and 2 in their written statements stated that the disputed land on which shops are constructed is not part of Khewat No. 38 and plaintiff has never been in possession or owner of the disputed land. Maulana Mohd. Irfan was never Mutawalli of the alleged waqf and, therefore, was not authorised to file suit. He had no right to file the suit. The disputed land was never registered as waqf property under the Muslim Waqfs Act. 1936 or under the U. P. Muslim Waqfs Act, 1960 and Maulana Mohd. Irfan was never appointed as Mutawalli of any waqf property registered with U. P. Sunni Waqf Board. Lucknow. He had also no right to file suit In his personal capacity as the suit has not been filed under Order 1, Rule 8, C.P.C. As regards the alleged Suit No. 841 of 1883 the same was collusive and from the facts the disputed land is not established to be part of the waqf known as Hauz Wali Masjid. The details of the property involved in Suit No. 841 of 1883 are not known and the map is not proved to be relating to the land of the waqf. The land In question was never recorded as waqf property in the revenue records. In the alleged deed of lease, there is no mention of the land in dispute. The land belonged to defendant Nos. 4 to 8 who were in possession of the same and defendant Nos. 1 and 2 had purchased part of it and now they are owners in possession of the said land. They have right to raise constructions. It was also stated that certain other persons had also purchased part of the disputed land from defendant Nos. 1 to 4 who have not been impleaded as parties. Defendant Nos. 4 to 8 in their written statements further stated that it is absolutely wrong to say that Maulana Mohd. Irfan is at all Mutawali of the said waqf or he is at all interested person who could have filed the suit on behalf of the alleged mosque. It was also stated that suit No. 841 of 1883 was not filed in

respect of the land shown in the map at the end of the plaint. The property in dispute does not relate to any such plot number or alternatively if any part of the property in dispute is found to lie in any of such plot number, which is not admitted, then the same too is of no consequence, since the plaintiff has no concern with the same. The plaintiff has never been in possession and occupation over the disputed property and its title, if any, which is not admitted, stood extinguished by operation of the law of limitation. The document of perpetual lease. If any, is fictitious and ineffective and does not appear to have been executed on account of any decision in the alleged Suit No. 841 of 1883.

4. After written statements were filed by the defendant Nos. 1 to 8, the plaintiff moved an application for amendment which was allowed and defendant Nos. 9 to 13 were added as parties to the suit and by the amendment, it was stated that the waqf is now registered with defendant No. 13 U. P. Sunni Central Waqfs Board, Lucknow and Maulana Mohd. Irfan had been appointed Mutawalli by the Board. After amendment defendant Nos. 1 to 3 and 4 to 8 filed additional written statements and defendant Nos. 9 to 12 also filed written statements mainly stating that the registration of the waqf u/s 30 of the Act, 1960 would not make the suit to be instituted by the proper person.

5. On the pleadings of the parties, the trial court appears to have framed following preliminary issue.

"Whether Mohd. Irfan has a right to file suit?"

6. After considering the material on record and after hearing the learned counsel for the parties, the trial court found that on the date of the institution of the suit, Maulana Mohd. Irfan had no right to file the suit. It was observed that in the certificate dated 20.1.1993 paper No. 74C filed by the plaintiff-appellant, it was stated that Hauz Wali Masjid and its appurtenant land was governed by U. P. Muslim Waqfs Act, 1960 and was entered at Sl. No. 128 in the register of Waqf Board and Maulana Mohd. Irfan was authorised to file the suit and contest the same. There was another order dated 20.2.1993 Issued by the Managing Committee of the Waqf which is paper No. 75C whereby Maulana Mohd. Irfan was authorised by the U. P. Sunni Central Waqfs Board to institute the suit and he was also appointed member of the Managing Committee. The learned trial court observed that it is clear from these documents that at the time of the filing of the suit, Maulana Mohd. Irfan was not authorised to file the suit. The trial court also held that the documents do not show that the disputed property is part of the waqf property and the documents show that the disputed property is situated in Mohalla Beyarganj and not in Mohalla Parijadgan whereas according to the plaintiff, the waqf property is situated in Mohalla Parijadgan. The trial court, therefore, dismissed the suit as being not maintainable and holding that Maulana Mohd. Irfan had no right to institute the suit. It is this judgment and decree of the trial court dated 6.5.1993 which is being challenged in the present first appeal.

7. We have heard Sri M. A. Qadeer, learned counsel for the appellant and Sri B. D. Mandhyan, learned counsel for the defendants-respondents at length. Learned counsel for both the sides have also filed their written submissions.

8. A preliminary objection is raised by Sri Mandhyan that u/s 30 of the Act of 1960, the waqf is required to be compulsorily registered within certain period from the date of applicability of the provisions of these Acts and in the instant case, the waqf was not got registered in the stipulated period. Hence, there was no waqf at all and the Courts cannot recognise the waqfs which are not registered in accordance with the statutory provisions. It is submitted that the existence of the waqf cannot be presumed or established if it is not registered u/s 30 of the Act. Sri Qadeer, learned counsel appearing for the plaintiff-appellant, on the other hand, submits that such contention is without substance since under the Mahomedan Law, waqf can be created orally and by non-registration of already existing waqf under the provisions of the Section 29 of the Act, the existing waqf shall not become non-existent.

9. Having given our anxious consideration to the submissions made on behalf of the parties, we find that there is no substance in the preliminary submission made by Sri Mandhyan, Act of 1960 (U. P. Muslim Waqfs Act, 1960) was enacted to provide for better governance, administration and supervision of certain classes of waqfs in Uttar Pradesh. Section 2 of sub-section (1) of the Act provides that "save as herein otherwise specifically stated, this Act shall apply to all waqfs, whether created before or after the commencement of this Act, any part of the property comprised which is situate in Uttar Pradesh, and to all the waqfs which at the time of coming into force of this Act were under the superintendence of the Sunni Central Board or the Shia Central Board constituted under the U. P. Muslim Waqfs Act, 1936 (U. P. Act No. XIII of 1936)." From perusal of the various provisions of the Act, it is evident that the Act does not provide as to how waqf shall be created. The Act applies equally to the existing waqf and waqf created after commencement of the Act. Under the Mahomedan Law, waqf is a permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman Law as religious, pious or charitable. A waqf may be made in writing or by dedication which may be oral and it may also be created by a will. It can also be created by immemorial user. If certain landed property has been used from time immemorial for a religious purpose, e.g., for a mosque, or a burial ground or for the maintenance of a mosque, then the land is by user waqf although there is no evidence of an express dedication. In *Mohd. Rustam Ali v. Mushtaq Husain* (1920) 47 IA 224 : 42 All 609 : 57 IC 329, it was held that every Wakfnama, that is, a document creating a waqf, operates to extinguish the ownership of the waqf if in the waqf property and, therefore, requires registration u/s 17(1)(b) of the Registration Act. However, where the waqf is created orally, then no such registration is necessary. So far as the present case is concerned, the plaintiff's allegations are that the waqf was created by the owners and on 28th June, 1835, one Saiyed Gulam Rasul executed a deed in Persian language recognising the

existence of the waqf. Therefore, according to the plaint allegations, prima facie waqf appears to have been created orally and in the year 1835, a document purporting to be a memo of waqf was executed. In *Anjuman Islamia v. Mohd. Khair Husain* 1983 All U 1120, it was held that :

"Another proposition which also admits of no doubt is that a waqf may be orally created. If it is so created, the waqf would be valid. The distinction between an instrument creating a waqf and a document recording a transaction in the nature of waqf which had taken place earlier by words of mouth is some times difficult to make out but it is nevertheless a real distinction."

10. The preliminary objection is to the effect that Section 30 of the Act requires registration and since waqf has not been registered, it cannot be recognised as waqf by the Courts. We may at the outset point out that the registration as required by Sections 29 and 30 of the Act is not a registration under the provisions of the Indian Registration Act but it was required to be registered with the waqf Board created under the Act. Section 29(1) of the Act provides that every other waqf (not registered before commencement of the Act under the Muslim Waqfs Act. 1936), whether subject to this Act or not and whether created before or after the commencement of this Act, shall be registered at the office of the Board of the sect to which the waqf belongs. Sub-section (2) of Section 29 of the Act further provides that application for registration shall be made by the Mutawalli within three months of his entering into possession of the waqf property ; provided that such application may be made by the waqf if or his descendants or a beneficiary of the waqf or any Muslim belonging to the sect to which the waqf belongs. Sub-section (8) of Section 29 of the Act further provides that any person aggrieved by an order of the Board under sub-section (7) may, by application within 90 days from the date of that order, refer the dispute to the Tribunal which shall give its decision thereon. Thus, the order by which the waqf has been registered with the Waqfs Board u/s 29 of the Act could have been challenged by the defendants-respondents by moving an application to refer the dispute to the Tribunal. The defendants-respondents cannot be permitted to submit that by non-registration of the waqf within the period as provided under sub-section (2) of Section 29 of the Act, the waqf will become nonexistent or it cannot be recognised by the Courts. The consequences of non-registration are provided u/s 54 of the Act. Sub-section (1) (a) of Section 54 of the Act provides that if a Mutawalli fails without reasonable cause or excuse, the burden of proving which shall be upon him to apply for registration of a waqf as provided in Section 29 ; he shall be liable to pay such penalty, not exceeding rupees fifty for the first contravention and rupees two hundred and fifty for every subsequent contravention, as the Board may determine. Thus failure of the Mutawalli to get the waqf registered in accordance with the provisions of Section 29 of the Act without sufficient cause may make him liable for penalty as provided u/s 54 of the Act but would not make the already existing waqf as non-existent. u/s 55 of the Act, after Mutawalli is fined on more than one occasion, he may be removed from his office. No other consequence would follow. Therefore, in our view, the

preliminary submission made by Sri Mandhyan on behalf of the respondents is without any force.

11. Learned counsel for the appellant has challenged the Impugned order on the ground that the trial court was required to frame all the issues and to decide the same and even in case issue No. 1 was to be decided as preliminary issue, all the issues should have been framed and that Maulana Mohd. Irfan claimed to be entitled to file the suit as Mutawalli of the waqf as he was actually managing the affairs of the waqf and also in his capacity of a Muslim being interested in waqf as he was worshipper in the mosque which were question of facts and required evidence of the parties. The trial court did not afford any opportunity to adduce evidence on these questions of facts and, therefore, committed grave " error. The trial court committed error in holding that on the date of filing of the suit, Maulana Mohd. Irfan was not Mutawalli as he was appointed Mutawalli later on that is, on 23.1.1993. Sri B. D. Mandhyan, learned counsel appearing for defendant-respondent contends that the appellant never objected to deciding the issues as preliminary issue and also did not pray for opportunity to adduce evidence on the question of facts and, therefore, the trial court committed no error.

12. We have already held above that non-registration of the waqf u/s 29 (1) of the Act shall not make the waqf non-existent and consequently, in our view, if a waqf is found to be non-existent from before its registration u/s 29 of the Act, a person who claims to be a Mutawalli cannot be held to have become Mutawalli only on the date of registration of the waqf. The question whether a person was Mutawalli of the waqf or not is the question of fact and could not be disposed of on mere ground that the waqf was registered subsequent to the filing of the suit whereby Maulana Mohd. Irfan was authorised to file the suit. Even though the plaintiff had not prayed for an opportunity to adduce evidence, yet the question of fact could not have been disposed of by the trial court on mere assumption that with the registration of the waqf u/s 29 of the Act, Maulana Mohd. Irfan was conferred the right of the filing of the suit. In case an issue requires evidence to be led by the parties, it was for the trial court to have afforded the parties proper opportunity of adducing evidence. There is nothing before us to show that at any stage of trial of issue No. 1, the trial court called upon the parties to adduce evidence. We find from the plaint allegations that the claim of the plaintiff is that Maulana Mohd. Irfan was appointed Mutawalli and Manager of the waqf property. Besides this, it was further averred that he was actually managing the affairs of the waqf and further that being a Muslim, he was interested in the affairs of the waqf. Such questions of fact could only be decided after the contesting parties are permitted to adduce evidence. In our view, therefore, the trial court's decision on the preliminary issue cannot be affirmed and the case has to be sent back to the trial court for decision afresh after affording parties proper opportunity of leading evidence.

13. We may observe here that no issue was framed by the trial court other than

the preliminary issues, therefore, any other finding of the trial court on any other point cannot be affirmed.

14. In view of the foregoing discussions, the appeal is allowed and the judgment and decree of the trial court is set aside. The case is remanded to the trial court to decide the preliminary issue in the suit afresh in accordance with law. We make no order as to costs of this appeal.