

Syed Maqbool Shah and ors. Vs. State and ors.

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Court : Jammu and Kashmir

Decided On : May-30-2003

Reported in : AIR2004J& K52,2003(3)JKJ473

Judge : V.K. Jhanji, A.C.J. and; S.K. Gupta, J.

Acts : Jammu and Kashmir Muslim Wakf Act, 1978 - Section 2

Appeal No. : LPA No. 283/98 and LPA No. 68/2000

Appellant : Syed Maqbool Shah and ors.

Respondent : State and ors.

Advocate for Def. : G.A. Lone,; A.G. Sheikh,; S.K. Anand and;

Advocate for Pet/Ap. : A.H. Naik,; D.S. Thakur and; D.S. Chouhan, Advs.

Disposition : Appeal dismissed

Judgement :

V.K. Jhanji, A.C.J.

1. By this common order We propose to dispose of LPA(OW) No. 68/2000 and LPA(OW) No. 283/1998.

2. LPA(OW) No. 68/2000 is directed against order dated 10.02.2000 of the Learned Single Judge passed in OWP No. 97/1979 whereby the property in dispute has been held to be a wakf property. LPA(OW) No. 283 is directed against order dated 10.09.1998 passed in OWP No. 520/1982 whereby order dated 30.04.1982 passed by the Deputy Minister, Aukaf Affairs in so far it directed the payment of 25% of the total offerings (Nazur-I-Niaz) to the appellants on humanitarian grounds has been set aside and the property has been held to be a trust property which cannot be utilized for any other purpose other than prescribed in the Jammu & Kashmir Wakafs Act.

3. In brief the facts are that Shah Farid-ud-din, a saint and his son Shah Assrar-ud-din also a saint lived in the area of Kishtwar. Shah Farid-ud-din died in 1725 AD, whereas his son pre-deceased him. After their demise their graves became a place of worship for those who had faith in them. These places are called 'Ziarat of Shah Farid-ud-din' and 'Ziarat of Shah Assrar-ud-din'. It is the admitted case of the parties that both the Ziarats were being managed by the Sajjad Nisheens Syed Lutfullah Shah and Peer Nizam-ud-din. On coming into force of the Jammu & Kashmir Muslim Wakfs Act, 1959 under Section 4(3) of the Act a Special Officer was appointed to make a report pertaining to the wakfs properties situate at Kishtwar. The Special Officer in his report dated 09.08.1969 stated as follows:

'The details of immovable and movable properties with estimated Value thereof belonging to the wakf mentioned in the enclosed statement along with the receipt and expenditure and other particulars thereof in terms of reference fixed under Notification No. SRO 35 dated 12th Feb. 1964 are given therein.

The committee of wakfs for this area has not so far been established by the Government as provided under Section 7 of Jammu and Kashmir Muslim Wakf Act, 1959 which requires to be done as early as possible, so that proper management of these wakfs is ensured and accounts thereof are maintained and not audited properly as required under Sections 30 and 31 of the said Act.

Both the shrines i.e. Hazrat Shah Asrar-ud-din and Hazrat Shah Faru-ud-Din(Hazrat Shah Asrar-ud-din) S/o Hazrat Shah Feru-ud-din are being managed by Sajada Nishin Shah and Mutwali Syed Hussain Shah Sahjb, Chairman Notified

Area Committee, Syed Nizam-ud-din, 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 Feru-ud-din in accordance with a deed. These Sajada Nisheens hold the charge of both the Ziarats independently since about 600 years back, whatever the income whether donated through of springs or Najur-u-Nayaz that is being spent by these Sajada Nisheens on the maintainance and repairs etc. on the Ziarats. The said Ziarats have thus attended a separate and independant position and should continue as such. The committee to be established a fresh will have nojurisdiction to the maintenance and other affairs of the wholly shrines. The Sajada Nisheen were, however, agreeable to establish a wakf committee to be recognised by the Government under the Muslim Wakf Act. The names of these Sajada Nishehen has representatives of these two shrines have, therefore, been included in the penal of members submitted separately for the Tehsil Wakf Committee.

It may be mentioned here that in 1963 Dargah Asrar-i-Sharief caught fire coinciding with the disappearance of the holy relic at Hazratbal, Srinagar. The State Government is believed to have sanction a huge amount for reconstruction and renovation of the shrine building. The construction work executed directly by the P.W.D is almost complete. The Shrine are locally known as Dargahi Bala and Dargahi Pain. All Hindu and Muslims have great respect and reverence for the Ziarats and go there for prayers and see benediction.

At both the places, Bhaderwah and Kishtwar, small buildings attached to Jama Mosques have been accompanied by Pelibicite front and Jamati Islamia for their offices. On enquiry we were told that there were no agreement to this effect allowing these parties to occupy the buildings.'

4. Subsequently, The Act of 1959 was repealed by the new Act known as Jammu & Kashmir Wakaf Act, 1978 being Act No. XI of 1978 which came into force on 9th May, 1978. Under The provisions of the new Act the Government in Exercise of its powers appointed Sh. A.W. Kripak, Superintending Engineer as Administrator of Wakf Committee, Kishtwar. The Administrator issued two proclamations. In one it was brought out that Ziarats of Shah Farid-ud-din and Ziarat of Shah Assrar-ud-din

are wakf properties and in the second he mentioned that he has been appointed as Administrator for the management of the said two Ziarats. Syed Lutfullah Shah and Peer Nizam-ud-din, stated to be managing the affairs of the Ziarats challenged the appointment of A.W. Kripak as administrator of the Wakf committee, Kishtwar by means of Writ Petition OWP No. 97/79. While the writ petition was pending, the Government issued one Notification under Section 6 of the J&K; Wakaf Act, 1978 vide SRO No. 619 dated 15.11.1979 publishing the list of the Wakf properties situate in Kishtwar. The list included both the Ziarats. Peer Nizam-ud-din and one Syed Maqbool Shah son of Syed Mubarik Shah alleging themselves to be the Shajjad Nisheen of the Ziarats filed appeal under Section 6(2) of 1978 Act before the Minister-in-Charge, Muslim Auqaf Affairs, Jammu who had been vested with the powers of Appellate Authority. The appeal came to be dismissed on 30.04.1982. In order to challenge the order of the Appellate Authority, writ petition OWP No. 97/79 was got amended, to challenge the report of the Special Officer dated 5.8.79, Notification SRO No. 619 dated 15.11.1979 and order dated 30.4.1982 of the Appellate Authority.

5. The challenge was inter alia on the following grounds; that the Special Officer appointed under the J&K; Muslim Wakf Act, 1959 in his report dated 9.8.1969 found two Ziarats out of the purview of Wakf Act; the report of the Special Officer had become final under Section 61 of the Wakf Act as no appeal was filed against it; the report of the Special Officer dated 5.8.1979 is based on no evidence as he neither invited objections nor heard the writ petitioners; SRO 619 of 1979 is invalid as it is based on the report of the Special Officer who did not follow the procedure prescribed under the Wakf Act; the declaration of shrines as Wakf properties is a malafide act; the shrines are not Wakf because land was granted by Hindu Raja of the time.

6. On the other hand the Chairman, Wakf Committee, Kishtwar in its counter affidavit took the plea that writ petitioner No. 1 was only the Manager of the Ziarat and so neither he nor his family members have better right than what he had in the Wakf. It was also stated that the report of the Special Officer and the order passed by the Appellate Authority are in accordance with the provisions of the J&K; Wakaf Act, 1978 and are not liable to be interfered with.

7. Writ Petition OWP No. 520/1983 was filed by the Administrator, Wakf Committee in which challenge was made to the order of the appellate authority dated 30.04.1982 so far as it directed the payment of 25% of the total offerings (Nazre-I-Niaz) on humanitarian grounds to the Sajjad Nisheens.

8. Learned Single Judge after scanning the record and hearing the learned counsel for the parties did not find merit in any of the grounds on the basis of which challenge was made to order dated 30.04.1982 of the appellate authority. On the basis of the un-disputed record grant of land was held in favour of the Ziarats and it was also held that the writ petitioners were only Sajjad Nisheens and cannot claim ownership of the Ziarats. The Ziarats were also held to have become Wakf by user. Accordingly the Learned Single Judge dismissed the writ petition OWP No. 97/79. However, the writ petition (OWP No. 520/1983) filed by the Administrator, Wakf Committee, Kishtwar was accepted and the order of the appellate authority whereby it had directed payment of 25% of the total offerings (Nazre-I-Niat) on humanitarian grounds to the Sajjad Nisheens was set aside.

9. The present appeals are filed by Syed Lutfullah Shah & others and Syed Mabool Shah and another challenging the order dated 10.2.2000 and 10.9.1988 passed by the learned Single Judge in OWP No. 97/79 and OWP No. 520/1982, respectively.

10. Learned counsel appearing on behalf of the appellants submitted that the survey held by the Special Officer in 1969 was final and the subsequent survey under 1978 Act was totally illegal. Further according to him the Special Officer appointed under 1969 Act in his report dated 9.8.1969 gave a specific finding that the two shrines do not come within the definition of the Wakf properties. Further according to him the report of the Special Officer being a decision in law, the same became final and binding and the matter could not be re-opened under any circumstances nor the report of the Special Officer appointed under the 1978 Act can be considered. Learned counsel further contended that under Section 4 of 1978 Act Special Officer while making the survey of Wakf Properties perform quasi judicial functions and is required to give opportunity to the parties to examine the witnesses and even to appear through pleader, but in the present case neither any

inquiry was held nor any opportunity of hearing was given to the parties. He also submitted that the Special Officer did not give any definite finding or referred to any proof that as to how two Ziarats constitute the wakf property. The Special Officer did not make any detailed inquiry to determine whether the property was owned by the writ petitioner as it had come to them through their ancestors. Learned counsel further contended that the learned Single Judge committed error in law in relying upon the judgement in Civil Appeal No. 1484/1974 titled Anayat and Ors. v. Commissioner of Wakafs decided on 7.2.1991. According to him the said judgement is not at all relevant and the facts of that case were totally different to the facts of this case.

11. On the other hand the learned counsel for the Administrator, Wakf committee submitted that the Special Officer appointed under 1959 Act in his report dated 9.8.1969 no-where indicated that the property of the two Ziarats belong to the writ petitioners or their predecessor-in-interests. He further submitted that no action could be initiated on the said report because firstly the report was required to be examined under Sub-section (2) of Section 5 and secondly it was required to be published in the Government Gazette. Since there was no committee so neither the report came to be examined nor was published in the Government Gazette and therefore, was no report in the eye of law. As regards the report dated 5.8.1979 and SRO No. 619 of 1979 whereby the property in question was declared as Wakf property, the learned counsel contended that the revenue record duly pointed out that the property did not belong to the writ petitioners or their predecessors-in-interest. He submitted that the stand taken by the writ petitioners is contradictory in as much as in one place it is stated that the property attached to two Ziarats was gifted to the ancestors of the writ petitioners, whereas at another place they have stated that they being Sajjad Nisheens their right is heritable. As regard the objection that no enquiry was held by the Special Officer or any opportunity of hearing was provided to the writ petitioners, learned counsel submitted that the Special Officer appointed under the 1978 Act not only issued the notices to the persons concerned, but in response to the notices the writ petitioners alleging themselves to be the Sajjad Nisheens of the Ziarats appeared and claimed themselves to be the owners of all the properties attached to the Ziarats and also the proprietors of the two Ziarats. Further according to the learned

counsel, the writ petitioners did not produce any evidence showing that the properties were owned by them or their predecessors-in-interest. According to him the grievance now made in this appeal by the writ petitioners is an after thought and cannot be taken note of. He submitted that the findings of the appellate authority and the learned Single Judge being based on proper appreciation of evidence not be interfered in appeal.

12. We have heard the learned counsel from the parties and have through the record of the case. Section 2(d) of 1978 Act defines as under:

'Wakf means the permanent dedication by a person professing Islam of any property movable or immovable for any purpose recognized by Muslim Law or usage as religious, pious or charitable and includes-

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

(ii) a Wakf-ul-Aulad.

(a) for the maintenance and support, wholly or partially of his family, children or antecedents; or

(b) for the maintenance of the Wakf or for the payments of his debt out of the rents and profits of the property dedicated.

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognized by the Muslim Law as a religious pious or charitable purpose of a permanent character.

(iii) a grant, endowment or dedication of any property movable or immovable, made by the Government or any person or ruler for any of the aforesaid purpose.'

13. According to the statutory definition 'Wakf means a permanent dedication by a person professing Islam of any property movable or immovable property for any purpose recognized by Muslim Law or usage as religious, Pious or charitable. Wakf by user is a unique feature of 1959 and 1978 Acts. A wakf by user is one

which is not expressly dedicated as wakf but has been in long use as such. Because of long use such property is deemed to be wakf by user.

14. In *Mekraj Din v. Ghulam Muhammad and Ors.*, AIR 1931 Lahore 607, a Division Bench of the Lahore High Court while dealing with the question whether the property in dispute is a wakf held that, 'When a long period has elapsed since the origin of the alleged wakf, user can be the only available evidence to show if the property is or is not wakf. Where there is no evidence to show how and when the alleged wakf was created, the wakf may be established by evidence of user.'

15. In *Munshi Abdul Rahim Khan and Ors. v. Faqir Mohammad Shah and Anr.*, AIR (33) 1946 Nagpur 401 a Division Bench had gone to the extent of saying that, 'The mere fact that a person is described in the record of rights as owner or describes himself as mutawalli of a private mosque or Imambada will not make that property his own if there is evidence on record to prove that the property was wakf by user.'

16. In *Ramzan Momin and Ors. v. Desratha Raut and Ors.*, AIR 1953 Patna 138, it was held that, 'If land had been used from time immemorial for a religious purpose, such as a Moslem burial ground, the land is constituted wakf, though there is no evidence of express dedication. The title of the original owner is extinguished and the ownership of the property vests in God.'

17. In *Khati and Ors. v. Mirza Hussain Beg and Ors.*, AIR 1962 Orissa 95, it was held that, 'A wakf normally requires express dedication, but where there is no evidence to show how and when the alleged wakf was created, the wakf may be established by evidence of user; if land had been used from time immemorial for religious purpose, such as Masjid, the land is constituted wakf, though there is no evidence of express dedication; the title of the original owner is extinguished and the ownership of the property vests in God and accordingly the public character of the institution may be presumed.'

18. The primary question to be considered is as to whether two Ziarats have become wakf by user and whether the findings of the Appellate Authority and the learned Single Judge are correct in law and on facts.

19. It is not in dispute that saint Farid-ud-din died in 1725 AD, whereas his son saint Asrar-ud-din died in 1765. On their demise at the places of their burial two mausoleums were built. Both the Ziarats are being visited by thousands of devotees on their death anniversaries falling on 7th Har (Bikrimi) and 25th Kartik (Bikrami) every year. Urs of saint Farid-ud-din is a public holiday for Tehsil Kishtwar and Urs of Saint Asrar-ud-din is a public holiday for the District of Doda. The Appellate authority in its order dated 30.04.1982 took note of the undisputed revenue record i.e. record of rights of the year 1970-71 (Bikrami) and 1979-80 (Bikrami) showing that the entire landed property was dedicated for the benefit and management of the two Ziarats. Register of 'Muaffi' containing Settlement Reports dated 12th chet 1971 (Bikrami) and 30th Phagun, 1971 (Bikrami) indicated that the landed property donated to the Ziarats were exempted from the payment of land revenue. The appellate authority also noticed that the land measuring 37 Kanals out of the total land was gifted by one Mohtamim to his relative Noor-ud-din, but the mutation was rejected by the Revenue authorities. The Prime Minister of the State also had the occasion to consider the said mutation and he too on 17th Bhadon (Bikrami) agreed with the report of the revenue authorities. The mutation was rejected solely on the ground that Mohtamim was charged only with the management of the properties and had no right to transfer the same in any manner whatsoever. Revenue record further revealed that the ancestors of the petitioners were only Mohtamims and were charged with the management of the property of the Ziarats. The appellate authority also took note of order dated 5th Sawan, 1927 (Bikrami) of the then Revenue Minister whereby on the demise of one Ghulam Mohi-ud-din, his sons were appointed as Mohtamims of the Ziarats.

20. Submission of the learned counsel for the writ petitioner that the revenue record does not reflect the correct position cannot be accepted merely because it is so stated. Reading of the order of the Special Officer shows that not only the writ petitioners appeared before the Special Officer, but also claimed themselves to be Shajjad Nisheens of the Ziarats and also stated that they are owners and the proprietors of the two Ziarats. However, the learned counsel for the writ petitioners has failed to point out as to on what basis the writ petitioners claimed themselves to be the owners of the properties of the Ziarats. In the memorandum of appeal filed before the appellate authority the writ petitioners stated that the properties of

the Ziarats are their personal properties and they are in the possession of all the documents showing that the same were gifted to their ancestors by the authorities of the time. However, despite specific averments that they are in possession of documents of title, but no document was annexed with the memorandum of appeal nor any application was filed before the appellate authority to produce and prove the documents. So much so they also did not indicate as to the nature of the documents.

21. The reference made by the learned counsel for the writ petitioners to the copy of the 'Khilafat Nama' alleged to have been executed by Syed Akhryar-ud-Din Qadri in favour of Hafiz Anayatullah, 'Ahad Nama' alleged to have been executed by Raja Kirat Singh and the copy of the 'Grant' executed by Raja Teg Bahadur Singh in favour of Molvi Hifizullah, is totally irrelevant because the said documents were never produced or proved before the Special Officer or the appellate authority. There is no reference of these documents in the revenue record nor these documents can be said to be authentic. In the absence of any compelling evidence showing the properties of the Ziarats to be the properties of the writ petitioners, which allegedly was gifted to their ancestors by the then Rulers, We are of view that the findings of the appellate authority and also of the learned Single Judge that the two Ziarats are existing since long and have become wakf by long user deserve to be accepted. We also do not find any merit in the contention of the learned counsel for the writ petitioners that no detailed inquiry was made by the Special officer or they were not given any opportunity of being heard. The reading of the order of the appellate authority does not indicate that such a grievance was made in this regard at the time of hearing of the appeal. In fact the para 6 of the memorandum of appeal, the writ petitioners averred that the properties attached to the Ziarats have been gifted to their ancestors and such are their personal properties. They had also averred that they are in possession of documents showing that the properties were gifted to their ancestors by different ruler and authorities of the time. As already noticed above, neither the nature of the documents was indicated nor such document was annexed with the appeal nor any application was filed for permitting them to produce and prove the documents of ownership. It is now too late in the day for the writ petitioners to state that if the documents in their possession had been considered, the result would have been

different. They are also estopped by their act and conduct to contend that the entries in the revenue record are not correct. We may add that at no stage i.e. either before the Special officer or before the appellate authority or in any other forum, may be the revenue authorities any challenge was made by the writ petitioners to the correctness of the entries in the revenue record though the same were existing since long.

22. As regards the contention of the learned counsel for the appellant that the writ petitioners being Sajjad-Nisheens the right in the property is heritable and they have become owners of the Ziarats, it is only to be stated that Sajjadnashin discharges spiritual functions as a curator of a Dargah or Shrine and holds the governance of endowment in his hands. He imparts spiritual instructions. A Sajjadnashin has no right in property belonging to wakf and property does not vest in him. He is not trustee in a technical sense.

23. In view of the above, we are of the view that the finding of fact recorded by the appellate authority and the learned Single Judge that the two Ziarats and the properties attached thereto are Wakf properties, call for no interference. Accordingly, the appeals are dismissed. No order as to costs.

24. Vide interim order dated 16.09.1998 passed in LPA (OW) No. 283/98 & CMP No. 353/98, it was ordered that the appellants shall not remove the iron safes and the Administrator, Aukaf Committee Kishtwar will not do anything which may infringe the rights of the appellants to collect offerings from the pilgrims; keys of the iron safes were to remain with the Sub-Judge, Kishtwar who was to open the same at regular intervals and deposit the offerings with a Nationalised Bank to ensure for the benefit of the successful party. Since the appeals are being dismissed, the offerings which may have been deposited with the Nationalised bank shall go to Aukaf Department. The appellant shall render account of the income of the properties and the offerings, which they may have received during the pendency of the appeals. Connected CMP's are also disposed of.