

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

WP(C) No. 1044/2023 c/w
CCP(S) No. 181/2023

Reserved on: 14.08.2023
Pronounced on: 06 .09.2023.

Intizamiya Committee Dargah through ...Petitioner(s)

Haji Abdul Ahad Akhoon and another

Through: Mr Jehangir Iqbal Ganai, Sr. Advocate with
Mr R. A. Bhat, Advocate.

Vs.

Union Territory of J&K and Ors. ...Respondent(s)

Through: Mr Mubeen Wani, DyAG
Mr M. I. Dar, Advocate with
Mr Ruaani A. Baba, Advocate.

CORAM:

HON'BLE MR JUSTICE JAVED IQBAL WANI, JUDGE

JUDGEMENT

1. In the instant petition the petitioner has questioned order No. 03 of 2023 dated 01.04.2023 (for short the impugned order) issued by the Jammu and Kashmir Wakaf Board (for short the Board) whereby the management of **Ziyarat Sharief Syed Khazir Sahab at Rayil, Gund Kangan** and its allied properties ("for short the Ziyarat") have been ordered to be taken over by the Board in terms of Sections 67, 68 & 69 of the Waqf Act, 1995 (for short the Act of 1995) besides having thrown challenge to order No. 17/JKWB of 2022 dated 17.12.2022 issued by the Board whereby it came to be provided that the Board has taken over all the control and management of the Shrines/Ziyarats including the assets/properties in the whole of Union Territory of Jammu and Kashmir and any Association or local Auqaf in respect of such Wakfs shall be void-ab-initio.

The petitioner has also questioned letter dated 08.04.2023 addressed by the Board to the petitioner informing him about taking

over of the Ziyarat on 08.04.2023 and further calling upon him not to spend any income on the same and in the event of breach, action under Act would be initiated.

It is significant to note here that in view of the challenge thrown to the order impugned dated 01.04.2023, the validity or otherwise of the aforesaid consequential orders is not required to be adverted to.

2. The petitioner has challenged the order impugned dated 01.04.2023 fundamentally on the ground that the Ziyarat including the land underneath thereto is proprietary land of the petitioner and has never been donated to any Wakaf or Ziyarat and that its use has only been allowed for the charitable purposes.
3. It is being claimed by the petitioner that **Ziyarat** has not been declared as a “Wakaf Property” in terms of Sections 5 and 6 of the Jammu and Kashmir Wakaf Act of 1978 (for short the Act of 1978) and in absence of any such declaration, respondent Board could not take recourse to Sections 67 to 69 of the Act of 1995, as such, the action of the respondent Board is illegal, arbitrary and unconstitutional.
4. It is being further urged by the petitioner that respondent Board declaring a particularly property as a Wakaf Property, a definite procedure as prescribed is required to be followed which includes conducting of a survey and holding an enquiry in tune with the principles of natural justice and that since such course has not been adopted by the respondent Board while issuing impugned order, same violates the rights enshrined under the Article 226 and 30 of the Constitution of India.
5. **Per contra**, objections to the petition have been filed by the respondent Board wherein it is being averred that the subject matter of the petition had been declared as a Wakaf in the year 1985 under the Act of 1978 and that a formal declaration in this regard thereof has been made by the Government of Jammu and Kashmir. The respondent Board has placed on record SRO 510 dated 11.12.1985 issued by the Government of Jammu and Kashmir whereby amongst others **Ziyarat Sharief Syed Khazir Sahab at Rayil, Gund Kangan** has been declared as a Wakaf property in the year 1985 in terms of

Act of 1978 *supra* which was in vogue then and that no new or further proceedings in this regard were required to be undertaken under the Act of 1995, as action taken under the Act of 1978 is deemed to have been taken under the Act of 1995.

Heard counsel for the parties and perused the record.

6. Before proceeding to deal with the issues raised in the instant petition, it would be appropriate to give a brief background of the **Wakaf law** in the Jammu and Kashmir being relevant and germane herein.

Initially in the erstwhile State of Jammu and Kashmir, **Jammu and Kashmir Wakaf Act 1978** came to be enacted on 09.05.1978 (for short the Act of 1978) providing for the better administration and supervision of the Wakfs in the State. The said Act was repealed by **Jammu and Kashmir Wakafs Act 2001** (for short the Act of 2001) enacted on 16.04.2001.

Section 94 of the Act of 2001 provided for repeal and read as under: -

- (1) the Jammu and Kashmir Waqf Act 1978 is hereby repealed.
- (2) Notwithstanding such repeal anything done or any action taken under the said Act, shall be deemed to have been done or taken under the corresponding provisions of this Act.

The Act of 2001 was followed by (**The Jammu and Kashmir Muslim Specified Wakafs) and Specified Wakafs Properties (Management and Regulation) Act 2004** (for short the Act of 2004) dated 16.01.2004 and it did not repeal the Act of 2001 instead repealed the Jammu and Kashmir Specified Wakfs Ordinance of 2003.

7. In the year 2019 the erstwhile State of Jammu and Kashmir came to be reorganized resulting into the creating of present Union Territory of Jammu and Kashmir w.e.f. 31.10.2019 and upon the application of the **Jammu and Kashmir Reorganization Act, 2019 (for short the Re-organization Act of 2009)** both the Act of 2001 as well as the Act of 2004 came to be repealed under Section 95 of the Reorganization Act of 2019 and the Waqf Act 1995 enacted by the parliament came to be extended to the Union Territory of Jammu and

Kashmir besides the Union Territory of Ladakh whereby Section 112(3) of the said Act occupied the filed which is extracted and reproduced here under: -

.....

112 (3) If, immediately before the commencement of this Act, in any State, there is in force in that State, any law which corresponds to this Act that corresponding law shall stand repealed:

Provided that such repeal shall not affect the previous operation of that corresponding law, and subject thereto, anything done or any action taken in the exercise of any power conferred by or under the corresponding law shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act as if this Act was in force on the day on which such things were done or action was taken.

Thus, the aforesaid proviso makes it clear that any action taken under the corresponding repealed law of any State shall be deemed to have been taken under the Waqf Act of 1995 *supra*, meaning thereby that even though the Waqf Act of 1995 *supra* came to be extended to the Union Territory of Jammu and Kashmir upon coming into being of Reorganization Act of 2019 w.e.f. from 31.10.2019, the actions taken under the Act of 1978, 2001 or 2004 are saved and are deemed to have been taken under the Waqf Act 1995.

8. It is manifest from the above that the respondent Board has claimed that since the Ziyarat along with its allied properties had been already declared as a Wakaf property therefore, the respondent Board invoked the provisions of Section 67 to 69 of the Waqf Act 1995 in line with the provisions of Section 112(3) of the Act of 1995. The position seemingly is correct and legally sound. Therefore, in view of this manifest position of law the order impugned dated 01.04.2023 cannot by any stretch of imagination said to be illegal, arbitrary or issued without any competence or jurisdiction.
9. The issue raised by the petitioner that the respondent Board did not publish the Ziyarat being a wakaf in terms of Section 6 of the Act of 1978 and, as such, cannot be deemed to have been declared as the Wakf property under the Act of 1978. Indisputably the Ziyarat has

been declared as a wakaf property after the Government had received a report of enquiry in this regard from the Special Officer appointed under Section 4 of the Act of 1978 which report/decision of the Special Officer under Section 5 of the Act of 1978 has been provided to be a final decision and providing a remedy of appeal to any person thereto against that decision before the Government within 60 days from the date of the order. Though Section 6 of the Act 1978 required the Government to publish list of the Wakafs in Government Gazette, yet, the question that would arise in view of the issue raised by the petitioner would be as to whether the publication of the list of Wakaf in the Government Gazette would denude the Wakaf property of its character and status as decided by the Special Officer under Section 4 of the Act and would make the decision of the Special Officer less binding under the circumstances when such decision of the Special Officer had assumed finality under Section 5 of the Act.

A reference here to Section 4 to 6 of the Act of 1978 becomes imperative here under: -

4. Preliminary Survey of Wakafs.—(1) The Government may, by notification in the Government Gazette, appoint one or more Special Officers, as may be necessary, for the purpose of making a survey of Wakafs in any area in which this Act is in force.

(2) Such appointment may be terminated by the Government at any time for reasons to be recorded.

(3) The Special Officer shall, after making such inquiry as he may consider necessary, submit his report to the Government containing the following particulars in respect of Wakafs, namely: -

- (a) the number of Wakafs in the area;
- (b) the nature and object of each Wakaf;
- (c) the gross income of the property comprised in each Wakaf;
- (d) the amount of land revenue cesses, rates and taxes payable in respect of such property;
- (e) the expenses incurred in the realization of the income and the pay or other remuneration of the Mutawalli of each Wakaf; and
- (f) such other particulars relating to each Wakaf as may be prescribed.

(4) The Special Officer in making such inquiries shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure, Samwat 1977 (Act X of Svt. 1977) in respect of the following matters, namely:-

- (a) summoning and examining witnesses;
- (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 witnesses and accounts;
- (e) making any local inspection or local investigation;
- and
- (f) any other matter which may be prescribed.

(5) If, during any such inquiry, any dispute arises as to whether a particular Wakaf is a Wakaf within the meaning of this Act and there are clear indications in the deed of Wakaf as to its nature, the dispute shall be decided on the basis of such deed.

5. Decision of the Special Officer.—(1) The decision of the Special Officer whether a particular property is or is not Wakaf property shall, subject to any order made by the Government on appeal be final.

(2) Any person aggrieved by an order of the Special Officer may prefer an appeal to the Government within 60 days from the date of the order and there shall be no further appeal.

(3) Notwithstanding anything contained in any law for the time being in force and save as otherwise provided in this Act, no Civil Court shall have jurisdiction to settle, decide or deal with any question or to determine any matter which is by or under this Act required to be settled, decided or dealt with or to be determined by Special Officer.

6. Publication of the list of the Wakafs.—(1) On receipt of a report under sub-Section (3) of Section 4, the Government shall after consulting the concerned committee public the list of Wakafs in the government Gazette.

(2) The list of Wakafs published under sub-section (1) shall, unless it is modified in pursuance of a decision of the Government in appeal, be final and conclusive.

A bare perusal of the aforesaid provisions of the Act of 1978 would suggest that the scheme of Sections supra make it clear that initially there has to be a survey by a Special Officer followed by a decision in the shape of a report under sub Section 3 of Section 4 by such Special Officer as to whether a particular property is or is not a Wakaf property followed by the decision of such Special Officer under Section 5 as to whether any property is or is not a Wakaf property being a final decision thereof though subject to an appeal by an aggrieved person to the Government. The arrangement of Section 6 of publication of the lists of Wakaf's on a bare perusal thereof would reveal that the said arrangement have had only an evidentiary value to notify the public and all concerned that a decision has been rendered qua a property being Wakaf property under the Act of 1978.

A distinction has to be drawn here between a notification required to be published in the Government Gazette that creates or extinguishes a right or liability and the one requiring furnishing of an information to the public about an existing fact, while in the former case the publication of a notification in the Government Gazette may be mandatory, whereas in the later case it can safely said to be directory in nature.

In the instant case publication of a notification in the Government Gazette had not by itself created or extinguished a right or liability but only would have to be stated and narrated an existing fact that a particular property has been declared as Wakaf property by the Special Officer and failure to publish such a notification in the Government Gazette would not thus said to be denuding or changing the nature, status and character of the property declared as a Wakaf property by the Special Officer under Section 5 of the Act of 1978.

10. A bare perusal of the SRO 510 supra tends to show that the Special Officer has given his declaration/decision about the status of the Ziyarat and its allied properties in question being a Wakaf property only and thus an inescapable inference of the fact that can be drawn therefrom is that the Ziyarat and its allied properties had been declared as a Wakaf property in terms of the Act of 1978 and report in this regard had been accepted by the Government without there-being

any person aggrieved thereof including the petitioner herein. It being so the respondent Board can rightly be said to have resorted to the provisions of the Waqf Act of 1995 having regard to Section 12(3) supra of the said Act. The issue *supra* raised by the petitioner thus in view of above analysis is misconceived and not legally tenable.

11. Furthermore Since SRO 510 dated 11.12.1985 as also the decision of the Special Officer having declared the Ziyarat and its allied properties as a Wakaf property under the Act of 1978 is not under challenge, as such, this Court is refraining from expressing any opinion thereto.
12. For what has been observed, considered and analyzed hereinabove, the petition fails and accordingly is **dismissed**, as a corollary whereof, the contempt notices are recalled, proceedings dropped and petition disposed of.
13. Original record produced by Mr M. I. Dar, is returned back to him.

(JAVED IQBAL WANI)
JUDGE

SRINAGAR

06.09.2023

Ishaq

Whether approved for reporting? Yes