

HIGH COURT OF JAMMU AND KASHMIR

AT JAMMU

IA No.1/2017in OWP No. 663/2008, IA No. 01/2018 c/w

IA No.1/2017in OWP No. 342/2010

IA No.1/2017in OWP No. 715/2010

Date of order: 30.11.2018

Javed Iqbal and anr.

Vs.

State of J&K and ors.

Coram:

Hon'ble Mr. Justice Sanjay Kumar Gupta, Judge

Appearing counsel:

For Petitioner(s) : Mr. O. P. Thakur, Sr. Advocate with
Mr. R. K. S. Thakur, Advocate
For respondent (s) : Mr. Rahul Pant, Advocate.
Mr. Abdul Rauf Lone, Advocate.

- i) Whether to be reported in Digest/Journal : Yes/No.
ii) Whether approved for reporting in Press/Media : Yes/No.
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1. By way of the instant applications petitioners seek amendment of the main petitions.
2. From the perusal of OWP No.663/2008, it is evident that petitioners seek writ of Certiorari, thereby challenging order No. 98-104/AIR dated 25.07.2008 issued by respondent No. 2, by virtue of which the petitioners have been asked to vacate the land on which they have constructed the house and three Khokas in Khasra No.415 measuring 12 marlas situated at Village Rampur, Gujjar Mandi Rajouri terming it as Khasra No.432 and also writ of mandamus for directing the respondents not to evict them from this land.
3. At the time of entertaining of the main petition, this court vide order dated 08.09.2008 stayed the operation of the impugned order dated 25.07.2008. However, vide order dated 18.05.2009 passed in CMP

No.704/2009, the interim order dated 08.09.2008 was modified to the following extent:-

“ It is projected that the structure existing on the land measuring 12 Marlas covered by survey no. 415-min situated at Village Rampur, GujjarMandi, Rajouri, under the mistaken identity is attempted to be demolished.

Notice has been issued by the Administrator Auqaf dated 25th of July 2008 where under the petitioners have been asked to vacate the premises i.e. land covered by survey No. 432 measuring 04 Marlas when petitioners have got no concern with survey no. 432. The operation of the said notice stand stayed vides order dated 8th of September 2008 passed in CMP No981/2008.

Mr. Qazi, appearing on behalf of the respondents states that respondents have got no connection with the survey no 415 min, it is only the land covered under survey no. 432 (being Wakf Property) regarding which action has been taken.

Considered.

Status quo with regard to the land measuring 12 Marlas covered by survey no. 415 –min situated at village Rampur, GujjarMandi, Rajouri shall be maintained i.e. present prevalent position shall not be disturbed, same is not also opposed by Mr. Qazi, AAG.”

4. A perusal of the aforesaid order reveals that Administrator Auqaf-respondent No.2 has not laid any claim over the land falling under survey No.415-min measuring 12 Marlas situated at village Rampur, Gujjar Mandi, Rajouri.
5. After passing of above order, again a notice was issued. A perusal of the OWP No.342/2010, it appears that petitioners have challenged Order bearing No. 152-156/AIR dated 25.03.2010 issued by respondent No. 2 by virtue of which the petitioners have been asked to vacate the land on which they have constructed the house and three Khokas.
6. A perusal of the impugned order dated 25.03.2010, would reveal that petitioners have been asked to vacate the land falling under survey No. 432 measuring 04 Marlas in GujjarMandi Rajouri.
7. A perusal of another writ petition bearing OWP No. 715/2010, would reveal that petitioner-Javed Iqbal seeks writ of Certiorari for quashing the

Declaration dated 30.01.2001 issued by respondent No. 5-Special Officer, Auqaf, by virtue of which land falling under Khasra No.432 situated in village Rampur, Rajouri has been declared as Wakf Property and also for quashing the Notification dated 06.12.2006 bearing No. Rev(Auq) 47/2003 to the extent the land falling under Khasra No.432, measuring 04 marlas, situated in Village Rampur, Rajouri has been published in the list of Wakfs.

8. In objections filed, respondents have categorically taken a stand that writ petitions are not maintainable as there is remedy of appeal under section 54 of Waqaf Act as per law laid down in **Shafat Ahmed v . State and ors., 2016 (1) JKJ 433**. All these writ petitions have been clubbed together on 03.06.2017 and now petitioners have filed these three petitions for amendment of main petitions, wherein it is stated that in the reply filed by the respondent Nos.1 and 2, it has been stated that eviction orders were issued on 30.05.2007, 14.07.2008 and thereafter another eviction order dated 25.7.2008 was issued which has been challenged in the main petition titled Javed Iqbal and ors. vs. State of J&K and others. That before passing the eviction order dated 14.7.2008, notice dated 30.05.2007 under Section 45 of the J&K Wakafs Act, 2001 was issued. That said order dated 30.05.2007 was not the show cause notice, but the eviction notice, which shows that show cause notice was not issued; that the eviction order dated 25.07.2008, therefore, is *void ab initio*; that the eviction proceedings could be initiated under Chapter-V of the Act, as under the said Act, the Chairman of Tehsil Committee has been entrusted with the management of the Wakaf property falling within its jurisdiction; that Section 26 of the said Act clearly states that the Tehsil Committee should institute and defend the suit and proceedings in a court of law relating to Wakaf, thus, the Tehsil Commute is the party interested in respect of the Wakaf property under Chapter-V; the Tehsil Committee has been vested with the power of adjudication of the rights in case of

any dispute. It is further stated that under Section 45 of the Act, the show cause notice for eviction is issued by the Chairman of the Tehsil Committee. The further ground taken for amendment of the main petition is that the Committee headed by the Chairman is managing the Wakaf property within its jurisdiction; Section 25 envisages that the Tehsil Committee should institute and defend the suit and proceedings in the court of law regarding to the Wakaf property. Thus, it is apparent that the Chairman, Tehsil Committee has been entrusted the power of prosecutor as well as the adjudicator of the rights of the parties. Such a provision is unconstitutional and deserves to be struck down. It is stated that otherwise also, it is settled principle of law that a person cannot act as a Judge in its own cause. Admittedly, the Wakaf property is vested with the Tehsil Committee and the said properties are managed and controlled by the said Tehsil Committee. In these circumstances, the judicial /quasi-judicial power cannot be conferred upon the said authority for determination of any dispute; therefore, such a provision is again constitutional and deserves to be struck down. It is stated that apart from that, Sections 4, 5 and 6 of the J&K Wakafs Act, 2001 are also unconstitutional being unreasonable and vague. Section 4 provides that the Government may by notification in the Government Gazette appoint for the State one or more special officers for the purpose of making survey of Wakafs in any area in which the act is in force. It further provides that the Special officer shall after making such enquiry as he may considers necessary, submit his report to the Government containing the particulars in respect of the wakaf properties. It is further averred in this application that Section 5 of the Act provides that the decision of the special officer where the particular property is or is not a Wakaf property should, subject to any order made by the appellate authority be final. It is stated that the aggrieved person could prefer an appeal to the appellate authority within 30 days from the date of order. The Jurisdiction of the

civil court, however, has been barred under Section 5 of the Act to settle, decide or deal with and question any matter which is by or under the Act is required to be settled, decided or dealt with or to be determined by special Officer. The appellate authority under the Act is the Chairman of the said Wakaf council established under Section 7 of the Act (Minister In-charge) of Hajj and Auqaf Department. Section 6 of the Act provides that on receipt of the report under Sub-section 3 of Section 3, the Government shall, after consulting the concerned Tehsil Committee cause the list of Wakafs published in the Government gazette or in some local newspapers having wide circulation in the area.

9. It has further been averred that the Special Officer has been conferred with the power to decide, if any, property is a Wakaf property or not without there being any procedure further prescribed for exercising such power. The exercise of the jurisdiction by the Special Officer is not based on any intelligible criteria nor is it indicative of any such satisfaction which should satisfy the rest of reasonableness and fair play. Thus, the provisions contained under Sections 4, 5 and 6 of the Act are unconstitutional and deserve to be struck down.
10. From the bare perusal of these contents of the petition, it is apparent that, by seeking amendment to writ petition, petitioners are challenging certain provisions of Waqaf Act as ultra vires to Constitution.
11. Respondents have not filed any objections to the instant applications seeking amendment, but orally argued that present applications are not maintainable, because all the writ petitions are not maintainable, as there was alternate remedy available to the petitioners for filing appeals against the impugned orders. The further contention of the learned counsel for the respondents is that when the question of maintainability of the writ petitions is pending, application for amendment cannot be

allowed. He has also argued that applications for amendment are not maintainable unless it is accompanied with an amended petition.

12. I have considered the rival contentions. Law with regard to amendment of pleadings is now well settled that court cannot allow amendment, by virtue of which real controversy between parties get changed. The provisions of amendment of pleadings are very important, but it can be observed that this is one of the most misused provisions of the Code for dragging the proceedings indefinitely, particularly in the Indian Courts which are otherwise heavily overburdened with the pending cases. In present case, petitioners have filed three writ petitions one after another with regard to same subject matter and approximately with regard to same controversy. In terms of section 54 of Waqaf Act, the petitioners have remedy of filing appeal before authority mentioned in the Act, so maintainability of writ petitions is arguable point at this stage. When question /issue of maintainability of writ petitions is pending, I am of view that applications for amendment, thereby challenging the vires of certain provisions including that of section 54 of Act, would not be maintainable. The amendment sought has nothing to do with real controversies between parties, which are subject matter in these writ petitions. By filing these applications, petitioners have only aim to prolong the matter with regard to maintainability of writ petitions. Law is clear that the court which does not have jurisdiction to try the matter due to statutory bar, certainly would have no jurisdiction to allow the amendment. Further, OWP No. 663/2008 has been filed in 2008 and other two OWP No. 342/2010 and OWP No. 715/2010 have been filed in 2010, but amendment applications have been filed after considerable long time i.e. in 2017, and no reasons have been given as to why these pleas were not taken at the time of filing of writ petitions; this shows that

petitioners have only aim to prolong the matter and misuse process of law.

13. In view of above, all these three applications are **dismissed** at this stage.

(Sanjay Kumar Gupta)
Judge

Jammu
30.11.2018
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