

Court No. - 9

Case :- MATTERS UNDER ARTICLE 227 No. - 3341 of 2017

Petitioner :- Anjuman Intazamia Masazid Varanasi

Respondent :- Ist A.D.J. Varanasi And Others

Counsel for Petitioner :- A.P.Sahai,A.K. Rai,D.K.Singh,G.K.Singh,M.A.

Qadeer,S.I.Siddiqui,Syed Ahmed Faizan,Tahira Kazmi,V.K. Singh,Vishnu Kumar Singh

Counsel for Respondent :- C.S.C.,A.P.Srivastava,Ajay Kumar Singh,Ashish

Kr.Singh,Bakhteyar Yusuf,Hare Ram,Prabhash Pandey,R.S.Maurya,Rakesh Kumar

Singh,V.K.S.Chaudhary,Vineet Pandey,Vineet Sankalp

Hon'ble Prakash Padia,J.

Heard Sri S.F.A. Naqvi, learned Senior Counsel assisted by Sri Syed Ahmad Faizan, learned counsel for petitioner, Sri Punit Kumar Gupta, assisted by Ms. Poorva Agarwal, learned counsel for petitioner, Sri Ajay Kumar Singh, Sri Vijay Shankar Rastogi, Sri Sunil Rastogi, Sri Tejas Singh, Sri Chandra Shekhar Seth and Sri Vineet Sankalp, learned counsel for contesting respondents, Sri Manoj Kumar Singh, learned counsel for respondent No.7 and Sri M.C. Chaturvedi, learned Additional Advocate General/Senior Advocate assisted by Navneet Chandra Tripathi and Sri Hare Ram Advocates for respondent No.8.

Today when the matter is taken up, a supplementary rejoinder affidavit, which is in reply to the counter affidavit, has been filed by Sri Punit Kumar Gupta, learned counsel for petitioner in Matter Under Article 227 No.234 of 2021 in the Court today, the same is taken on record.

Pursuant to the order dated August 30, 2022, an affidavit has been filed on behalf of respondent No.8 duly sworn by Sri Sanjay Prasad, at present posted as Principal Secretary, (Home), Government of U.P. Lucknow in the Court, the same is taken on record.

Insofar as the respondent No.7 is concerned, an application has been filed on behalf of respondent No.7/Director General, Archaeological Survey of India by Sri Manoj Kumar Singh, learned counsel for respondent No.7 in which a prayer has been made for grant of three weeks time for filing counter affidavit.

Sri S.F.A. Naqvi, learned Senior Counsel filed a paper titled "Questions Involved in the Petition", the same is taken on record. He also placed reliance upon a judgement of Hon'ble Supreme Court passed in ***Special Leave to Appeal***

(C) No.2177 of 2022 (H.S. Deekshit & another Vs. M/s Metropoli Overseas Limited & others) which is now converted into **Civil Appeal No.5300 of 2022**. He argued that at the time of considering application Under Order 7 Rule 11 only averments made in the plaint alone are to be examined. He relied upon following lines of the judgement which is reproduced below:-

"It is well-settled that while considering an application under Order 7 Rule 11 of the Code, the averments in the plaint alone are to be examined and no other extraneous factor can be taken into consideration."

It is argued by Sri Ajay Singh, learned counsel for contesting respondents that in paragraph No.3 of supplementary affidavit filed in Matter Under Article 227 No.234 of 2021, a reference of Gazette Notification dated 26.02.1944 which is wrongly typed as 26.12.1944 is made. It is argued that along with the said notification, a list of waqf properties has also been published. It is further argued that in the aforesaid list, the name of the Waqf Anjuman Intezamia was mentioned at Serial No.100 and the name of the property is mentioned as "Masjid Shahi Alamgiri Halka Chowck Banaras May Makanat (मस्जिद शाही आलमगीरी हल्का चौक बनारस मय मकानात), copy of the aforesaid Waqf is appended at Page No.16 of the aforesaid affidavit. On the basis of the aforesaid notification, it is argued that the aforesaid waqf is not related to the property in dispute more specially when no plot number has been mentioned. He relied upon a judgment of the Hon'ble Supreme Court in the case of Gulam Abbas and others Vs. State of U.P. and others reported in (1982) 1 SCC 71. It is argued that a doubt has been created by the Hon'ble Supreme Court itself on the aforesaid notification. He relied upon paragraph 18 of the aforesaid judgement which is reproduced hereinbelow:-

"18. As against the aforesaid material respondents 5 and 6 and through them the Sunni community have relied upon a Notification dated February 26, 1944 issued by the Sunni Central Wakfs Board under Section 5(1) of the U.P. Muslim Wakfs Act, 1936 following upon the receipt of the Report of the Chief or Provincial Commissioner of Wakfs in respect of mosque in Doshipura showing the same as Sunni Wakfs, copy whereof has been annexed as Annexure S-2 to the affidavit dated February 6, 1980 of Mohd. Basir Khan filed on behalf of the Sunni Central Wakfs Board as its "Pairokar". This Notification on which reliance has been placed by the Sunnis appears to us of doubtful validity and probative value for the reasons which we shall presently indicate. Though issued and published earlier in point of time than the Notification of Shia Central Wakfs Board, it is admittedly not based on Appendices VIII and IX annexed to the Chief Commissioner's Report dated October 28/31, 1938 but on the basis of some Registers of Wakfs (meaning

lists of wakfs) said to have been received by the Sunni Board from the Commissioner of Wakfs. Curiously enough the Sunni Central Wakfs Board had stated through two affidavits dated January 6, 1980 and January 9, 1980 of their Pairokar Mohd. Basir Khan that along with the copy of the Commissioner's Report Registers of wakfs were received but no appendices like Appendices VIII and IX were received from the Commissioner, that according to the Registers of Wakfs there were 245 charitable Sunni Wakfs in the District of Benaras which were covered by the 1936 Act and all such wakfs were accordingly notified by the Sunni Board in the Government Gazette by issuing the Notification dated February 26, 1944 under Section 5(1) of the Act. The original Report of the Commissioner does not refer to anything like Registers of Wakfs but, as stated earlier, it refers to Appendices VIII, IX, X & XI and the endorsement on the slip under the signature of the Chief Commissioner shows that the former two appendices were sent to the Sunni Board and the latter two to the Shia Board. In face of this endorsement and having regard to the fact that the Shia Board had received Appendices X and XI along with the Commissioner's Report which that Board offered to produce, it is difficult to accept the statement of the Pairokar of the Sunni Board that no appendices were received by the Board along with a copy of the Commissioner's Report. It seems the relevant appendices, though received, are being withheld as their production would be adverse to the Sunnis. Apart from that aspect it is clear on their own admission that the Notification under Section 5(1) of the 1936 Act was issued by the Sunni Central Wakfs Board not on the basis of Appendices VIII and IX which formed part of the Commissioner's Report but on the basis of some Registers of Wakfs said to have been received by it. The Notification regarding the Sunni Wakfs issued on the basis of material which did not form part of the Chief Commissioner's Report would be in violation of Section 5(1) of the Act which required issuance of a Notification thereunder 'according to' the Commissioner's Report and as such the Notification dated February 26, 1944 relied upon by respondents 5 and 6 and members of the Sunni community would be of doubtful validity. "

Learned counsel for the parties have consented that they have concluded their arguments Matter Under Article 227 No.3341 of 2017, Matter Under Article 227 No.1521 of 2020 and Matter Under Article 227 No.234 of 2021.

Since the respondent No.7/Director General, Archaeological Survey of India seeks time to file counter affidavit, in the interest of justice, two weeks and no more time is granted to file counter affidavit.

It is made clear that in case, on the next date fixed in the matter, i.e., on 28.09.2022, the counter affidavit is not filed, the respondent No.7/Director General, Archaeological Survey of India shall remain present before this Court.

List this case on 28.09.2022 at 2:00 p.m.

Order Date :- 12.9.2022/saqlain