

IN THE SUPREME COURT OF INDIA
(ORDER XXI RULE 3 (1) (a))
CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION
(Under Article 136 of the Constitution of India)
WITH PRAYER FOR INTERIM RELIEF

SPECIAL LEAVE PETITION (C) No. _____ OF 2017

POSITION OF PARTIES IN
Court Below This Hon'ble Court

BETWEEN

Shia Central Board of Waqf U.P.
through its Secretary
3, Nabiullah Road, Lucknow (UP)

Plaintiff

Petitioner

AND

Sunni Central Board of Wakf U.P.
through its Secretary
No.9, Neil Road, Lucknow (UP)

Defendant

Contesting
Respondent

To,
The Hon'ble the Chief Justice of India and
his companion Justices of the Supreme
Court of India.

The humble petition of the
above named petitioner

MOST RESPECTFULLY SHOWETH:

1. The petitioner above named respectfully submits this petition seeking special leave to appeal against the against final judgment dated 30.3.1946 passed by the Court of Mr. S.A.Khan, Civil Judge, Faizabad (UP) (for short the Trial Court) in Regular Suit No.29 of 1945 whereby the suit filed by the petitioner was erroneously dismissed seeking declaration that popularly known Babri Masjid is a *Shia Waqf*.

1A. Since the dispute about 'Babri Masjid' is pending consideration before this Hon'ble Court vidè CA Nos.10866-10867/2010, CA No. 821/2011, CA 2215/2011, CA No.2636 of

2011, CA No.2894/2011, CA No.4192/2011, Appeal Civil Diary No.D38217/2010, Appeal Civil Diary No.D38217/2010 and SLP Nos....CC3600/2011, SLP No.7815-7818 of 2011 against common judgment passed by the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in Suit Nos.1, 3, 4 and 5 of 1989 the petitioner, instead of approaching the High Court, is preferring this Special Leave Petition.

2. **QUESTIONS OF LAW:**

The following questions of law, without prejudice to each other, arise for consideration of this Hon'ble Court:

- (A) WHETHER the impugned judgment passed by the Trial Court is sustainable in law.
- (B) WHETHER the Trial Court was justified in rejecting petitioner's claim for declaration that the Babri Masjid is a *Shia Waqf*, while having accepted the pedigree from Mir Baqi to the last Mutawalli Kalab Hussain (1945-46) and also that Mir Baqi was an *Ispahani Shia* (from Persia) besides finding that it is settled practice amongst muslims that waqf created by a Wakif of one sect does not appoint Mutawalli of the other sect and, further finding that the 2nd Inscription on the pulpit of the Mosque elaborately mentioned that it was built by Mir Baqi?

[**Note:** After Kalab Hussain (shia), who was continuing as Mutawalli of the Mosque even at the time of pendency of Regular Suit No.29/1945, one Javed Husain (1948-49) became Mutawalli.]

- (C) WHETHER the Trial Court, having found that Mir Baqi, the Wakif of Mosque, was a shia, did not commit error in declining claim of the plaintiff/petitioner to declare Babri Masjid a *shia waqf*?
- (D) WHETHER the Trial Court itself having found that the 2nd inscription on the pulpit of the mosque elaborately described Mir Baqi (*shia*) as builder of the mosque, did not commit grave error in erroneously rejecting plaintiff's claim for declaring the mosque a *shia waqf*?
- (E) WHETHER the Trial Court was justified in rejecting petitioner's claim for declaring the mosque as a shia waqf, while having rejected respondent's contention that the mosque was a sunni waqf while deciding Issue No.3 in the impugned judgment as under:

" This issue relates to the use of mosque by the members of sunni sect for over 12 years but it was exceeded that mere use of the mosque would not make it sunni waqf. I am also of the opinion that mere use of mosque would not make it sunni waqf. I am also of the opinion that the evidence shows that the mosque has been used by members of both the sects. I, therefore, answer the issue in negative. "

- (F) WHETHER the Trial Court did not commit serious error in law in rejecting the claim of the plaintiff/petitioner that the Mosque was a *Shia Waqf* in the teeth of the above overwhelming findings wherein the suit deserved to be decreed?

3. **DECLARATION IN TERMS OF RULE 3 (2).**

That the petitioner states that no other petition seeking Leave to Appeal has been filed against the impugned final judgment dated 30.3.1946 passed by the Court of Mr. S.A. Khan, Civil Judge, Faizabad (UP) in Regular Suit No.29 of 1945.

4. **DECLARATION IN TERMS OF RULE 5:**

The no annexure has been produced along with the SLP at this stage.

5. **GROUND**

Leave to appeal is sought on the following amongst other grounds, which are in the alternative and without prejudice to each other.

(A) THAT the impugned judgment passed by the Trial Court is erroneous and contrary to findings recorded by the Trial Court hence not sustainable in law.

(B) THAT the Trial Court committed serious error in law in rejecting petitioner's claim for declaration that the Babri Masjid is a *Shia Waqf*, while having accepted the pedigree from Mir Baqi to the last Mutawalli Kalab Hussain (1945-46) and also that Mir Baqi was an *Ispahani Shia* (from Persia) besides finding that it is settled practice amongst muslims that waqf created by a Wakif of one sect does not appoint Mutawalli of the other sect.

[After Kalab Hussain (shia), who was continuing as Mutawalli of the Mosque even at the time of pendency of Regular Suit No.29/1945, one Javed Husain (1948-49) became Mutawalli.]

- (C) THAT having found that Mir Baqi, the Wakif of mosque, was a shia, the Trial Court committed serious error in erroneously declined to declare Babri Masjid a *shia waqf*.
- (D) THAT having found that the 2nd inscription on the pulpit of the mosque elaborately described Mir Baqi (*shia*) as builder of the mosque, the Trial Court committed grave error in perversely rejecting plaintiff's claim for declaring it a *shia waqf*.
- (E) THAT the Trial Court perversely rejected petitioner's claim for declaring Babri Masjid as a shia waqf, in as much as the Trial Court rejected respondent's contention that the mosque was a sunni waqf while deciding Issue No.3 in the impugned judgment by recording as under:

" This issue relates to the use of mosque by the members of sunni sect for over 12 years but it was exceeded that mere use of the mosque would not make it sunni waqf. I am also of the opinion that mere use of mosque would not make it sunni waqf. I am also of the opinion that the evidence shows that the mosque has been used by members of both the sects. I, therefore, answer the issue in negative. "

- (F) THAT the Trial Court committed serious error in law in rejecting the plaintiff's/petitioner's claim in the teeth of the above overwhelming findings recorded by it wherein the suit deserved to be decreed declaring the Mosque as a *Shia Waqf* .

(G) THAT even the High Court in its judgment (per Hon'ble Justice Sudhir Agarwal) (impugned in the above said batch of Civil Appeals and SLPs) has held (in para 80 Vol. I):

" 80.The waqf created by a shia waqif would be a shia waqf and could not be a sunni waqf. Admittedly, as per their case, the mosque was built by Mir Baqi who was a shia and that he being a waqif his heirs were the mutwallis one after the other, but the Shia Central Board of Waqfs U.P. did not agitate the case any further either because of negligence or collusion in those difficult days of communal conflict immediately before the partition."

(G) THAT similarly the High Court in its above said judgment (per Hon'ble Justice Sudhir Agarwal) (in Vol. I) in para 80 recorded:

" 80. According to the report dated 10.12.1949 of Mohd. Ibrahim, Waqf Inspector and an office note signed by the Secretary, Sunni Central Board of Waqfs, U.P. dated 25.11.1948, Sri Javed Husain, the Numberdar of village Sahanwa and in the line of descendants of Mir Baqi was the Mutwalli of the Waqf....."

(H) THAT the Trial Court in the impugned judgment *inter alia* recorded:

" After the enactment of Muslim Waqf Act (XIII of 1936) the mosque was included amongst the Sunni Waqf, a list which was prepared by the Chief Commissioner of Waqf under Section 4 of

the Act and published in the Govt Gazette dated 26.2.1944 (and has been under the defendant's superintendence since then). "

- (I) Thus, admittedly ever since before 26.2.1944 the mosque was under the superintendence of Shia Central Waqf Board, U.P., which after its erroneous enlistment as Sunni Waqf by the Commissioner that Sunni Central Waqf Board, U.P. started interfering in its superintendence, driving the petitioner to approach the Court seeking declaration that the mosque was a shia waqf.
- (J) It is submitted that it was only after wrong enlistment of mosque as sunni waqf on 26.2.1944 by the Commissioner under Muslim Waqf Act, 1936 that Sunni Central Waqf Board U.P. started claiming it as sunni waqf thereby pushing the petitioner to seek declaration from the Court that it is a shia waqf. Otherwise, it was never in dispute that the mosque was a shia waqf.
- (K) It is submitted that it is the wrong enlistment by the Commissioner which provided genesis for the frivolous dispute raked up by Sunni Central Waqf Board U.P., respondent herein. Before the aforesaid wrong declaration there was never any dispute, ever since its creation, about the mosque being SHIA WAQF.

By rightly finding that the mosque is not a sunni waqf the Trial Court perversely went on to hold that it was not proved that it was a shia waqf, thereby keeping the dispute alive, leading to serious miscarriage of justice to the petitioner.

- (L) THAT the High Court in the in Suit No.5 had framed Issue No.25 as under:

“ **ISSUE NO. 25** Whether the judgment and decree dated 30th March 1946, passed in suit no. 29 of 1945, is not binding upon the plaintiffs as alleged by the plaintiffs?

High Court (per Hon'ble Justice Dharm Veer Sharma) recorded its findings:

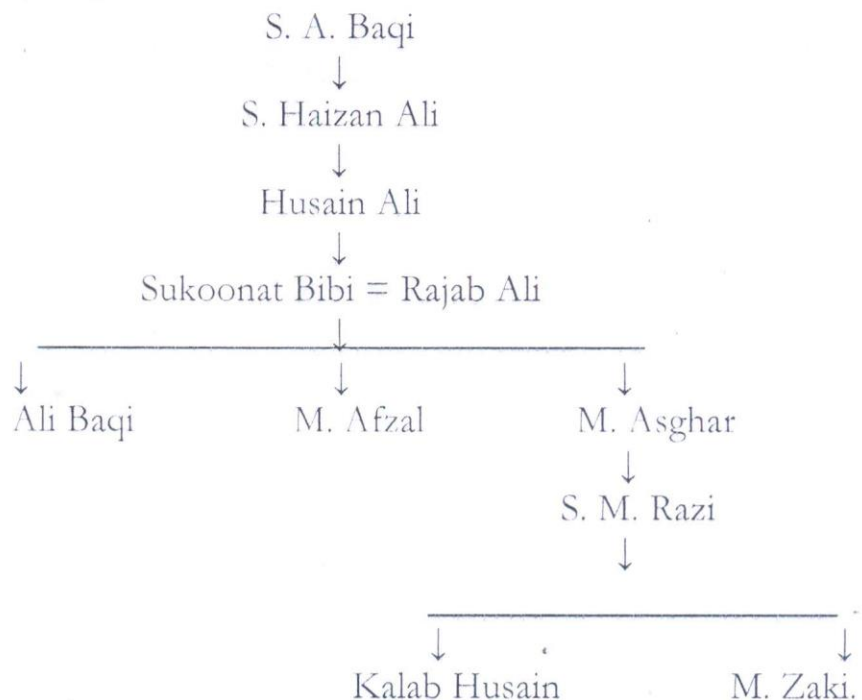
“ **Findings** It further transpires from reading of the above judgment and also from the plaint of O. S. No. 12 of 1961 i.e, O.O.S.No. 4 of 1989 that waqf of Babri mosque was Sunni waqf and its Mutwallis were Shias. This position seems to be in comprehensible in law in as much as a waqf created by Shia would be a Shia waqf and could not be a Sunni waqf. According to the Muslims, the mosque was built by Mir Baki and he was a Shia and that he being waqif, his heirs were Mutwallis. Shia Central Waqf Board U.P. did not agitate the case in any appellate court as the suit was collusive and this judgment is not binding on the plaintiffs.”

- (M) THAT the High Court (per Hon'ble Justice Sudhir Agarwal) in para 80 Vol-I found:

“ 80. A judgment dated 30.3.1946 of Sri S.Hasan, Civil Judge, Faizabad in suit no. 29 of 1945 where Shia Central Board of Waqfs U.P. was plaintiff and the Sunni Central Board of Waqfs U.P. was the defendant, has been produced in this context although

the judgment has not been relied on or referred in the plaint of suit no. 12 of 1961 to show that Waqf of Babri Masjid was a Sunni Waqf and its Mutwallis were Shias. This position is incomprehensible in law. *The waqf created by a Shia Waqif would be a Shia Waqf and could not be a Sunni Waqf.* Admittedly, as per their case, the mosque was built by Mir Baqi who was a Shia and that he being a Waqif his heirs were the Mutwallis one after the other, but the Shia Central Board of Waqfs U.P. did not agitate the case any further either because of negligence or collusion in those difficult days of communal conflict immediately before the partition. In any case, the judgment is not binding. *According to the report dated 10.12.1949 of Mohd. Ibrahim, Waqf Inspector and an office note signed by the Secretary, Sunni Central Board of Waqfs, U.P. dated 25.11.1948, Sri Javed Husain, the Numberdar of village Sahanwa and in the line of descendants of Mir Baqi was the Mutwalli of the Waqf though he did not act and submit to the jurisdiction of the Waqf Board."*

- (N) THAT the Trial Court rightly accepted the pedigree of the then Mutawalli originating from its creator (Wakif) to 1945-46 submitted by the plaintiff/petitioner, as given herein below, but committed serious error in declining declaration in favour of the plaintiff/petitioner that the mosque was a shia waqf:



(O) THAT since the mosque in dispute is not a shia waqf the High Court rightly dismissed Suit No.4 filed by Sunni Central Waqf Board UP, which is now pending adjudication in the aforesaid batch of Civil Appeals and SLPs.

(P) THAT in muslim law every mosque is a waqf be it shia waqf or sunni waqf. It is incomprehensible that is not a waqf. Not only the Trial Court but the High Court also found that the last Mutawalli was a shia and further that a mutawalli is always of the sect of its creator (wakif). High Court also categorically found that it is incomprehensible that a sunni waqf would be having a shia mutawalli (and vice-versa). Since it has been held that the last Mutawaali was a shia, the valid presumption is that its creator (wakif) was a shia and the waqf created by him is a shia waqf. No other inference could be deduced or arrived at to hold to the contrary. Moreover, before the Trial Court the plaintiff/petitioner led overwhelming evidence that the mosque was a shia waqf and the Trial Court committed serious error in perversely declining relief of declaration to the plaintiff, the Shia Central Board of Waqf UP, thereby leading to serious miscarriage of justice.

(Q) THAT the petitioner craves leave of this Hon'ble Court to raise such other and further grounds as may be available to the petitioner at the time of hearing.

6. **GROUND FOR INTERIM RELIEF:**

No grounds for interim relief at this stage.

7. **MAIN PRAYER**

It is, therefore, most humbly and respectfully prayed that this Hon'ble Court may be pleased to:

7.1 Grant Special Leave to Appeal against the against final judgment dated 30.3.1946 passed by the Court of Mr. S.A. Khan, Civil Judge, Faizabad (UP) (for short the Trial Court) in Regular Suit No.29 of 1945; and may also

7.2 pass such other or further order or orders or such directions as this Hon'ble Court may deem fit and proper in the interest of justice.

8. **PRAYER FOR INTERIM RELIEF**

No prayer for interim relief at this stage.

DRAWN AND FILED BY

Drawn on: __ .7.2017

Filed on: ____ .7.2017

(M.C. DHINGRA)
ADVOCATE FOR THE PETITIOER