
(2000) 05 P&H CK 0038

In the Punjab And Haryana At Chandigarh

Case No : Regular Second Appeal No. 946 of 1996

Abdul Rehman

APPELLANT

Vs

Khuda Bax and Others

RESPONDENT

Date of Decision : 18-05-2000

Acts Referred:

Citation : (2000) 126 PLR 743 : (2000) 3 RCR(Civil) 316

Hon'ble Judges : R.L. Anand, J

Bench : Single Bench

Advocate : S.C. Sibal and Deepak Sibal, for the Appellant; R.K. Jain, for the Respondent

Final Decision : Dismissed

Judgement

R.L. Anand, J.—This is a defendant's appeal and has been directed against the judgment and decree dated 11.1.1996 passed by the Court of Addl. Distt. Judge, Gurgaon, who accepted the appeal of the plaintiffs by setting aside the judgment and decree of the trial Court and decreed the suit of the plaintiffs for permanent injunction restraining the defendant (now appellant) from encoaching upon or raising any sort of construction on the suit land or from changing the nature of the suit property. The first Appellate Court set aside the judgment and decree dated 26.4.1995 vide which the suit of the plaintiffs was dismissed.

2. The pleadings of the parties can be described in the following manner:

Khuda Bax and Abdul Rajak filed a suit for injunction against Abdul Rehman-defendant (now appellant) that the land measuring 11 Kanals 15 marlas comprised in Khewat No. 527, Khatoni No. (sic), Khasra No. 117, situated in village Bhadas is owned and possessed by Punjab Wakf Board (hereinafter referred to as the Board) and is reserved for Kabristan. The plaintiffs are the inhabitants/bishwedars and voters of village Bhadas and they have every right to protect their religious feelings. The land in suit is being used by them and others for burial of the dead bodies from the time immemorial. Even during

consolidation the said land was reserved for that purpose. Graves of the forefathers of the plaintiffs and various persons of the village are existing in that graveyard. But the defendant is bent upon to encroach upon the suit land illegally by raising construction. Even he has started digging foundations and is destroying the graveyard and the acts of the defendant are likely to violate their sentiments with the damage of burial place where their ancestors are lying in the graves.

3. The notice of the suit was given to the defendant who denied that the plaintiffs are the inhabitants or Bishwedars of the village. He admitted that the land in question is owned by the Board. His stand is that Khasra No. 117 is not being used as graveyard for the last more than 40 years and he is the owner in possession of Khasra No. 465 which adjoins Khasra No. 117 and he has taken on lease 319 square yards of land of Khasra No. 117 from the Board and possession of the land has already been obtained by him. After taking the permission of the Board, he has constructed northern and southern boundary walls of the leased area in the month of June, 1990 and in this way he is in lawful possession of that portion of Khasra No. 117. He also pleaded that the suit of the plaintiffs is not maintainable and is bad for non-joinder of necessary parties and that the plaintiffs have no locus standi to file the suit.

4. The plaintiffs filed a re-joinder to the written statement in which they reiterated their allegations made in the plaint by denying those of the written statement and from the pleadings of the parties the following issues were framed:-

1. Whether the suit land described in para No. 1 of the plaint has been reserved for this purpose, if so to what effect? OPP

2. Whether the suit is not maintainable in the present form? OPD

3. Whether the plaintiff has no locus standi to file the present suit? OPD

4. Whether the defendant took on lease 319 sq.yards of the land comprised in Khasra No. 117 as alleged? OPD

5. Relief.

5. Both the parties led evidence in support of their respective cases and for the following reasons as given in paras No. 9 and 10 of the judgment dated 26.4.1995, the learned Addl. Senior Sub Judge, Ferozepur Jhirka dismissed the suit:

"9. After giving my considered thoughts to the respective contentions and the law cited at the bar, I observe that perusal of Ex. P1 (Jamabandi for the year 1984-85), Ex. P2 (Khasra girdawaries w.e.f. 10.10.85 to 31.3.87), Ex. P3 (Khasra girdawaries w.e.f. 14.10.87 to 15.3.90), Ex. P4 (Jamabandi for the year 1989-90), Ex.P5 (Jamabandi for the year 1984-85), Ex.P6 (Jamabandi for the year 1979-80), Ex.P7 (Jamabandi for the 1958-59), Ex.P8 (Khasra girdawaries

w.e.f. 10/84 to 28.3.95) reveals that the suit land comprised in Khasra No. 117 is "Gair Mumkin Kabristan". However, perusal of Ex. D1 (allotment letter No. 1.3.90) and Ex. D2 (site plan) reveals that the land measuring 319 sq.years comprised in Khasra No. 117 was leased out to the defendant and he is in possession thereof.

10. During the course of arguments, it has also been brought to my. notice that one Chappar and pucca boundary wall of the defendant are existing on the suit land and also his some stones are lying thereon. The aforesaid Chappar is being used by the defendant to tether his cattle etc. I am of the strong opinion that in view of the provisions contained in Section 66(2) of the Punjab Wakf Act, 1954, the Civil Court has no jurisdiction to entertain this suit. Issues are decided accordingly."

6. Aggrieved by the judgment and decree of the trial Court, the plaintiffs filed first appeal before the Learned Addl. District Judge, Gurgaon, who for the following reasons as given in paras No. 12,13 and 14 of the judgment dated 11.1.1996 allowed the appeal of the plaintiffs and decreed the suit as stated above and this time the defendant has come in the present appeal.

"12. Ex.P1 and Ex.99 are the copies of jamabandies for the year 1984-85 & Ex.P4 and P8 are the copies of Jamabandi for the year 1989-90. Ex.P2 is the copy of Khasra girdawari for the period Kharif 1985 to Rabi 1987 and Ex.P3 is the copy of Khasra girdawari for the period Kharif 1987 to Rabi 1990. In all these documents, Punjab Wakf Board is recorded to be the owner of suit land of Khasra No. 117. Possession of Ahle Islam has been recorded. This land has been described to be gair mumkin kabristan. Similarly in the copy of Jamabandi Ex.P6 which is for the year 1979-80 the suit land, described as gair mumkin kabristan, has been shown to be the ownership of Gram Panchayat. In view of the oral evidence on record coupled with the entries in the revenue record, there can be no doubt about the fact that the land in dispute is being used as grave yard since long and was meant for that purpose. Learned counsel for the appellants-plaintiffs pointed out that according to copy of Sharat Wazib-ul-urj Ex.PX only the land other than grave yard could be partitioned. Thus, the land under grave yard was made impartible. This Wazib-ul-urj relates to the year 1938-39.

13 However, learned counsel for defendant contended that the Punjab Wakf Board had not been made a party to the suit and civil court has no jurisdiction in the matter. He submitted that if there is any complaint about the administration of the Wakf, complaint can be made u/s 44 of the Wakf Act, 1954 and inquiry can be held u/s 45. He further referred Sec. 66F which lays down that notwithstanding anything contained in any other law for the time being in force, no suit or other legal proceedings in respect of the administration of management of Wakf, or any other matter or dispute for the determination or decision of which, provisions have been made in this Act shall be instituted in any Court or Tribunal except under, and in accordance with the provisions of the Act.

14. The contention of learned counsel for the plaintiffs is that it is a suit for

prohibitory injunction and complaint of the plaintiff is only against the defendant who is bent upon to make encroachment in the grave yard and as such Punjab Wakf Board cannot be said to be a necessary party. Moreover, he submitted that point was not pressed before the learned trial Court and no issue was framed. Keeping in view the nature of relief sought for, I am inclined to agree with the contention of learned counsel for the plaintiffs. The suit cannot be held to be bad due to non-joinder of Board. Regarding jurisdiction, he contended that the act of the Board in leasing out the land in favour of the defendant is ultra vires and illegal and therefore the jurisdiction of the Civil Court is very much there. He has referred to 1992(1) RL.R. 467. Punjab Wakf Board v. Smt. Simli and Ors. Learned counsel pointed out that in that case, the decision of Hon"ble Supreme Court in Syed Mohd. Salie Labbai (Dead) by L.Rs. and Others Vs. Mohd. Hanifa (Dead) by L. Rs. and Others, was relied upon which is to the effect that once a property is proved to be grave yard and for burial of general public, the same does not lose its character. Another authority of Hon"ble Supreme Court 1988 P.L.J 436 S.C. ,Punjab Wakf Board v. Bachan and was referred in that judgment to the effect that jurisdiction of the Civil Court is not barred in respect of the property held to be Wakf property. It was concluded by Hon"ble High Court that a graveyard is inalienable, even if after it has ceased to be so and because the Wakf is inalienable. The Wakf Board u/s 15 of the Wakf Act has no power to use part of the land for purposes other than the Wakf. This authority goes to support the case of the plaintiffs on all force. In the present case, as observed above, the suit land stands proved to be grave yard. Wakf Board thus has no right to allow the change of its user and similarly, the defendant has no right to raise any construction and change the user of that land. Learned trial Court instead of giving specific findings on these issues answered the same against the plaintiffs observing that the civil Court has no jurisdiction. In view of the discussion above, I reverse the findings of learned trial Court and hold that the suit land has been reserved for Kabristan and is being used for that purpose and defendant has no right to change its user."

7. I have heard Mr. S.C. Sibal, Senior Advocate on behalf of the appellant, Mr. R.K. Jain, Advocate for the respondents and with their assistance have gone through the records of the case.

8. First of all, it may be mentioned that during the pendency of this appeal, the defendant filed two applications - one under Order 1 Rule 10 CPC and other under Order 41 Rule 27 CPC. Vide order dated 1.2.2000 the application under Order 1 Rule 10 CPC has already been dismissed. The application under Order 41 Rule 27 CPC also deserves the same fate because apart from the fact that it has been filed at a belated stage, the documents sought to be produced by the appellant could be produced with due diligence in the trial Court. Even otherwise, these documents are not required to be necessary for the purpose of present appeal. A reading of Order 41 Rule 27 CPC would show that additional evidence cannot be allowed as a matter of right. It can only be accepted into evidence if the litigant brings his case within clauses (a), (aa) and (b) of Rule 27 of Order 41

CPC. If the Board had been granting lease of the land of Kabristan, it cannot detract the plaintiffs to establish that Khasra No. 117 was a kabristan of the Mohammedans residing in the village. For any illegal action of the Board, the plaintiffs are not bound by it. Resultantly, the application under order 41 Rule 27 CPC stands dismissed.

9. The only point which requires consideration is whether Khasra No. 117, which is in dispute, was a Kabristan and whether it is being used as such by the inhabitants of the village. Even in the written statement it has been admitted by the defendant that the suit land was owned by the Board. But this Khasra No. 117 was not being used as graveyard for the last more than 40 years, meaning thereby, that prior to 40 years even this land comprised in Khasra No. 117 was being used as Kabristan. Keeping in view the fact that this property was a Kabristan, the control of this property has gone to the Board. The plaintiffs in order to prove that Khasra No. 117 was a kabristan have led ample evidence on the record in the shape of documents Exhibits P-4, P-5, P-6 and P-7. Exhibits P-1 and P-9 are the copies of jamabandies for the year 1984-85 and Exhibit P-4 and P-8 are the copies of the jamabandies for the year 1989-90. Exhibit P-2 is the copy of Khasra girdawari for the period Kharif 1985 to Rabi 1987 and Exhibit P-3 is the copy of Khasra girdawaries for the period Kharif 1987 to Rabi 1990. A perusal of these documents would show that in the column of ownership. Board has been recorded as owner and in the column of possession, it is mentioned that Khasra No. 117 is in possession of the Ahle Islam and the nature of the land has been described as Gair Mumkin Kabristan. In view of this overwhelming evidence in the shape of revenue entries, a reasonable inference can be drawn that the land composed in khasra No. 117 was a Kabristan and it was being used as such. Not only this, even the entry of Sharat Wazib-ul-urj, Exhibit PX shows that only the land other than the grave yard can be partitioned. If all the old revenue record is consulted in this regard, there will be indefeasible inference that the land comprised in Khasra No. 117 was an old Kabristan of the village.

10. It has been submitted that the trial Court has dismissed the suit of the plaintiff mainly on the ground that the civil court has no jurisdiction to entertain this type of suit. This argument is not acceptable to this Court. The case set up by the plaintiff is that the land in question was being treated as Kabristan from the time of their ancestors and the graves of their ancestors are also lying there. It is also the case of the plaintiffs that the defendant is trying to change the nature of the property and the defendant himself admits that he had taken part of khasra No. 117 on lease from the Board and he had dug certain foundations there. In these circumstances, the cause of action always arose to the plaintiffs to approach the civil court. When the property was a grave yard and its nature could not be changed even by the Board and if the Board acts against the Act, such action on the part of the Board can also be challenged. The first Appellate Court rightly remarked that once a property is proved to be a graveyard for burial of general public, the same does not, lose its character. Recently the Hon'ble Supreme Court of India has held in Sayyed Ali v. Andhra Pradesh Wakf

Board, Hyderabad 1999(2) R.C.R.(Civil) 32, that a Wakf is a permanent dedication of property for purposes recognized by Muslim Law as pious, religious or charitable and the property having been found as Wakf would always retain its character as Wakf. Once a Wakf always a Wakf. Grant of patta in favour of Mokhasadar under the Inams Act does not, in any manner, nullify the earlier dedication made of property and will not change its original character or title. Support can be taken from this judgment for the purpose that once it is established that the property was a Kabristan its character cannot be changed with the passage of time. In the present case, it is also established that there was a cluster of graves.

11. It was then submitted by the learned counsel for the appellant that the suit of the plaintiffs was bad for non-joinder of necessary parties as the Board has not been added as party.

12. Again I find this contention of the learned counsel for the appellant devoid of any merit. The plaintiffs are the beneficiaries of the graveyard and their sentiments are being hurt by the action of the defendant, who claims himself to be the lessee of a portion of the suit property. The plaintiffs are not claiming any ownership or put any adverse title or right against the Board. It is the common case of the parties that the management of the Kabristan is with the Board. In the absence of any relief being claimed for by the plaintiffs, no findings can be given in favour of the appellants that the suit of the plaintiffs was bad for non-joinder of necessary parties. Even the Board did not want to become a party in the appeal as would be clear from its reply dated 17.1.2000 filed in the High Court to the application under Order 1 Rule 10 CPC, because the Board was never a party to the suit and it never got any opportunity to rebut the case of the plaintiffs.

13. The learned counsel for the appellants relied upon Section 85 of the Wakf Act, 1995 and submitted that as per this section, no suit or other legal proceedings are maintainable in any civil court in respect of any dispute, question or other matter relating to any wakf, wakf property or other matter which is required by or under this Act to be determined by a Tribunal. According to Mr Sibal, the controversy involved in the suit is to be disposed of by the Tribunal.

14. Again there is a lack of merit in the argument of the learned counsel for the appellants. Before benefit of Section 85 of the Wakf Act, 1955 may be taken by the appellants, it is necessary to prove that the present controversy which only pertains to a limited aspect that the defendant is trying to change the user of the property is required to be determined by the Tribunal under the Wakf Act, 1995. The answer of this court is in the negative.

15. It was then submitted by the learned senior counsel that the suit of the plaintiffs was void u/s 89 of the Wakf Act 1995. This argument is again totally misconceived. In this case no relief has been claimed by the plaintiffs in respect

of any act purporting to be done by it in pursuance of this Act nor the Board is a party to the suit. The case of the plaintiff is very simple and can be described in the simplest form by stating that the property in question i.e. Khasra No. 117 was a graveyard of the Mohammedans since the time immemorial and it should be used as such and nobody has the right to change its user.

16. Another argument was raised by the learned counsel for the appellant that the Board is a necessary party to the present suit. I have already rejected this argument. Reliance on Section 92 of the Wakf Act, 1995 is not helpful to Mr. Sibal because this section gives a discretion to the Board which may appeal and plead as a party to the suit or pleadings in which controversy relates to with respect to a Wakf or any wakf property. I have already stated above that the Board does not want to become a party to the present suit.

In this view of the matter, I do not see any merit in this appeal. The same is hereby dismissed with no order as to costs.