
(2008) 12 P&H CK 0113
In the Punjab And Haryana At Chandigarh
Case No : R.S.A No. 4261 of 2006(O&M)

Kedar Nath

APPELLANT

Vs

Samra

RESPONDENT

Date of Decision : 19-12-2008

Acts Referred:

Citation : (2009) 2 RCR(Civil) 529

Hon'ble Judges : Ajay Tewari, J

Advocate : Harkesh Manuja, Advocate, Sandeep Punchhi, Advocate. For the Amicus Curiae, Mansur Ali, Advocate., Advocates for appearing Parties

Judgement

Ajay Tewari, J. (Oral)

1. This appeal has been filed against concurrent judgments of the Courts below dismissing the suit of the plaintiff for permanent injunction restraining defendants No.1 to 6 from interfering in his possession over the land in dispute on the ground that he was a lessee of the Punjab Wakf Board.
2. It may be mentioned that the dispute was raised by the respondents on the ground that the land in dispute was a part of a Muslim graveyard since time immemorial and that neither the appellant was an existing lessee nor in fact could the Wakf Board respondent No.7 grant any lease of this property to the appellant. Both the Courts have dismissed the suit on the preliminary finding that the appellant was not able to prove himself to be an existing lessee and that he did not prove himself to be in possession of the land in dispute.
3. Learned counsel for the appellant has not been able to persuade me that these findings of fact are either perverse or can be held to be not arising from the material on record. On this ground alone, the appeal is liable to be dismissed.
4. However, there is another disquieting feature which has emerged in this case; and that is the very act of respondent No.7 Wakf Board in claiming a right to lease out this property either to the appellant or to some other person. In my opinion, this is a complete perversion of the Act. In this connection, Section 32 of

the Wakf Act, 1995 (for short as 'the Act') is relevant and reads thus :

32. Powers and function of the Board.(1) Subject to any rules that may be made under this Act, the general superintendence of all wakfs in a State shall vest in the Board established or the State; and it shall be the duty of the Board so to exercise its powers under this Act as to ensure that the wakfs under its superintendence are properly maintained, controlled and administered and the income thereof is duly applied to the objects and for the purposes for which such wakfs were created or intended :

Provided that in exercising its powers under this Act in respect of any wakf, the Board shall act in conformity with the directions of the wakf, the purposes of the wakf and any usage or custom of the wakf sanctioned by the school of Muslim law to which the wakf belongs.

Explanation. For the removal of doubts, it is hereby declared that in this subsection, 'wakf' includes a wakf in relation to which any scheme has been made by any court of law, whether before or after the commencement of this Act.

(2) Without prejudice to the generality of the foregoing power, the functions of the Board shall be

- (a) to maintain a record containing information relating to the origin, income, object and beneficiaries of every wakf;
- (b) to ensure that the income and other property of wakfs are applied to the objects and for the purposes for which such wakfs were intended or created;
- (c) to give directions for the administration of wakfs;
- (d) to settle schemes of management for a wakf :

Provided that no such settlement shall be made without giving the parties affected an opportunity of being heard;

(e) to direct

- (i) the utilisation of the surplus income of a wakf consistent with the objects of a wakf;
- (ii) in what manner the income of a wakf, the objects of which are not evident from any written instrument, shall be utilized;
- (iii) in any case where any object of wakf has ceased to exist or has become incapable of achievement, that so much of the income of the wakf as was previously applied to that object shall be applied to any other object, which shall be similar, or nearly similar or to the original object or for the benefit of the poor or for the purpose of promotion of knowledge and learning in the Muslim community :

Provided that no direction shall be given under this clause without giving the

parties affected an opportunity of being heard.

Explanation. For the purposes of this clause, the powers of the Board shall be exercised

(i) in the case of a Sunni wakf, by the Sunni members of the Board only; and

(ii) in the case of a Shia wakf, by the Shia members of the Board only:

Provided that where having regard to the number of the Sunni or Shia members in the Board and other circumstances, it appears to the Board that the power should not be exercised by such members only, it may coopt such other Muslims being Sunnis or Shias, as the case may be, as it thinks fit, to be temporary members of the Board for exercising its powers under this clause;

(f) to scrutinise and approve the budgets submitted by mutawallis and to arrange for the auditing of account of wakfs;

(g) to appoint and remove mutawallis in accordance with the provisions of this Act;

(h) to take measures for the recovery of lost properties of any wakf;

(i) to institute and defend suits and proceedings relating to wakfs;

(j) to sanction any transfer of immovable property of a wakf by way of sale, gift, mortgage, exchange or lease, in accordance with the provisions of this Act :

Provided that no such sanction shall be given unless at least twothirds of the members of the Board vote in favour of such transaction;

(k) to administer the Wakf Fund;

(l) to call for such returns, statistics, accounts and other information from the mutawallis with respect to the wakf property as the Board may, from time to time, require;

(m) to inspect, or cause inspection of, wakf properties, accounts, records or deeds and documents relating thereto;

(n) to investigate and determine the nature and extent of wakf and wakf property, and to cause, whenever necessary, a survey of such wakf property;

(o) generally do all such acts as may be necessary for the control, maintenance and administration of wakfs.

(3) Where the Board has settled any scheme of management under clause (d) or given any direction under clause (e) of subsection (2), any person interested in the wakf or affected by such settlement or direction may institute a suit in a Tribunal for setting aside such settlement or directions and the decision of the Tribunal thereon shall be final.

(4) Where the Board is satisfied that any wakf land, which is a wakf property,

offers a feasible potential for development as a shopping centre, market, housing flats and the like, it may serve upon the mutawalli of the concerned wakf a notice requiring him within such time, but not less than sixty days, as may be specified in the notice, to convey its decision whether he is willing to execute the development works specified in the notice.

(5) On consideration of the reply, if any, received to the notice issued under subsection (4), the Board, if it is satisfied that the mutawalli is not willing or is not capable of executing the works required to be executed in terms of the notice, it may, with the prior approval of the Government, take over the property, clear it of any building or structure thereon, which, in the opinion of the Board is necessary for execution of the works and execute such works from Wakf funds or from the finances which may be raised on the security of the properties of the wakf concerned, and control and manage the properties till such time as all expenses incurred by the Board under this section, together with interest thereon, the expenditure on maintenance of such works and other legitimate changes incurred on the property are recovered from the income derived from the property :

Provided that the Board shall compensate annually the mutawalli of the concerned wakf to the extent of the average annual net income derived from the property during the three years immediately preceding the taking over of the property by the Board.

(6) After all the expenses as enumerated in subsection (5) have been recouped from the income of the developed properties, the developed properties shall be handed over to mutawalli of the concerned wakf.? (Emphasis supplied).

It is the case of the appellant and respondent No.7 that under clause (j) of subsection (2), read with subsections (4) and (5), the Wakf Board has a complete and unfettered right to transfer any immovable property by way of sale, gift, mortgage, exchange or lease. It may be noticed, however, that both learned counsel for the appellant and respondent No.7 have completely overlooked the substantiv provisions of subsection (1) and the last words of subclause (j), namely, "...in accordance with the provisions of this Act". It is also sought to be argued that under subclause (e)(iii) of subsection (2), the Act itself provides that in any case where any object of the Wakf Board has ceased to exist then the income of the Wakf Board as was previously applied to that object shall be applied to some other object. It may be noticed, however, that the only thing which is envisaged by this Section is the diversion of wakf income from one purpose or the other and not the diversion of the wakf property as such from one user to another. It has to be kept in mind that the Wakf Board is essentially an ecclesiastical institution meant for maintenance of Trust Properties for the benefit of Muslims. The argument of learned counsel for respondent No.7, if stretched to its logical conclusion would enable the Board, for instance, to demolish a historical mosque to make way for a shopping mall. It is one thing to make changes in a wakf property in the interest of better management without

violating its basic nature and some thing totally different to desecrate it for the purpose of earning income therefrom.

5. Learned Amicus Curiae has referred me to a decision of the Hon''ble Supreme Court in Syed Mohd. Salie Labbai (Dead) by L.Rs and others v. Mohd Hanifa (Dead) by L.Rs and others, AIR 1976 SC 1569, wherein the Hon''ble Supreme Court held as follows :

¶32. We are of the view that once a Kabardstan has been held to be a public graveyard then it vests in the public and constitutes a wakf and it cannot be divested by nonuser but will always continue to be so whether it is used or not.?

6. Learned counsel has also referred me to a latest decision of the Hon''ble Supreme Court rendered in Civil Appeal No.4816 of 2000, Chhedi Lal Misra (Dead through L.Rupess) v. Civil Judge, Lucknow and others, wherein the Hon''ble Supreme Court held as follows :

¶6. Counsel appearing for the Shia Central Board, on the other hand, contended that the writ petition filed by the appellant herein had been rightly dismissed upon a correct understanding of the law relating to the creation of Wakfs. It was submitted that the Allahabad High Court had very correctly held that after the execution of the Wakf Deed the properties in question vested in the Almighty in perpetuity and neither the Wakif, Mirza Mohammed Haider, nor the Mutwalli, Piarey Mirza, had any authority to transfer the said properties to the appellant as the Wakif as well as the Mutwalli ceased to have any right over the property. It was urged that the status of Mutwalli is like that of a manager appointed to look after the wakf properties but not to treat the same as his personal properties. The collusive decree between the Wakif and his son was patently a void transaction and could not be acted upon in law.

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8. Lastly, we do not also find any force in the submission that since the revenue records were altered to show the properties to be the secular properties of the appellant, the wakf character of the properties had been obliterated. The law is well settled that once a wakf is created it continues to retain such character which cannot be extinguished by any act of the Mutwalli or anyone claiming through him.?

7. Learned counsel has further referred me to 9th report of the Joint Parliamentary Committee on Wakf wherein the following has been noticed:

¶3.43 The Punjab Wakf Board is one of the largest Wakf Boards with a large number of Wakf properties. The Committee expresses its deep concern about the way the Punjab Board is functioning, and the way valuable Wakf properties are leased out for a negligible consideration. The Committee is given to understand that land mafia is in hand in glove with the Wakf Board officials who are bartering away lot of Wakf properties because of the weak set up of the Board and absolute neglect of the Wakf Board by the State Government. It is pertinent

to mention here that in the website of the Government of Punjab under the property registration information system module it has been mentioned that Registration Office has acquired a bad reputation in the eyes of the public due to various reasons one among them is the loot of Government land, evacuee property, Nazool land, Wakf property, village common lands. This admission in the Manual that among the land looting, Wakf property is one among them is a serious matter to be pondered over.?

In the circumstances, it is held that the Wakf Board did not have the right to lease out the property in dispute. In my opinion, there is no such untrammelled right conferred by the Act on the Board to deal with wakf property in any manner and it would always be open to any beneficiary to successfully maintain an action for setting aside any arbitrary or, what may be called sacreligious diversion of wakf property, in the facts and circumstances of the case. Consequently, this appeal is dismissed with no order as to costs.

This Court places on record its appreciation of the assistance rendered by learned amicus curiae.