
(1996) 12 P&H CK 0083
In the Punjab And Haryana At Chandigarh
Case No : C.W.P. No. 4138 of 1980

Punjab Wakf Board

APPELLANT

Vs

State of Punjab and Others

RESPONDENT

Date of Decision : 16-12-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, 80
Constitution of India, 1950 — Article 226

Citation : (1997) 116 PLR 215 : (1997) 3 RCR(Civil) 65

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

Bench : Single Bench

Advocate : S.K. Pipat and Sanjiv Pandit, for the Appellant; M.L. Sarin and Alka Sarin, for the Respondent

Final Decision : Dismissed

Judgement

R.L. Anand, J.—Punjab Wakf Board, Ambala Cantt. (hereinafter called the Board), has filed the present writ petition under Articles 226/227 of the Constitution of India against the State of Punjab, The Custodian General of Evacuee Property, Punjab and Rakesh Kumar praying for the issuance of a writ in the nature of certiorari for the quashment of the impugned orders Annexures P.2 to P.4 and for declaration that sale of the disputed property in favour of respondent No. 3 was illegal, null and void and that the Board is the authority to manage the disputed property, the same being wakf property and as such it vests in the Board petitioner.

2. The case set up by the Board is that there is land in the revenue estate of Dina Nagar bearing old khasra Nos. 31 (9-16), and 21 (-6-17), Post consolidation Nos. 35 (8-13) and 34 (5-11). Originally this land was owned by Mohammadons and they converted it as Kabristan and in the Jamabandi for the year 1910-11 it was recorded as grave yard Ahle Islam. According to the marked entries of the owners thus property continued to be described in the revenue record as Ghair Mumkin Kabristan of Ahle Islam, meaning thereby that Mohammadonion

Community without any restriction by the owner thereof had been burying their dead bodies and had become the grave yard due to its use for a long time by Mohammadons and same state was reflected in the Jamabandi for the year 1961-62. The consolidation took place and the entries in the Jamabandis showed in the column of ownership for the year 1961-62, Central Governments as its owner though entries in all other columns remained the same as before. The petitioner Board has been managing the property and leased out this property to one Ganda Mal of Dina Nagar, who was in cultivating possession of the property under the petitioner and this fact was verified by him and mutation has also been decreed in favour of the petitioner. At the spot some of the portion of the grave yard has been left for the present need along with the building of mosque as it existed and rest was in the possession of the lessee Ganda Mal. That in the year 1976, Tehsildar (Sales-cum-Managing Officer,) auctioned this property on 28.12.1976 in favour of Rakesh Kumar, treating it as Central Govt. acquired evacuee property. The petitioner filed a suit for declaration that the property was of the petitioner and also brought therein for the injunction restraining the respondent from taking the possession of the land from the lessee Ganda Mal, but on objection of the other side that the Civil Court had no jurisdiction, the suit of the petitioner Board was dismissed as withdrawn. The petitioner filed objection petition against the said auction before the Settlement Commissioner, which was decided vide order dated 16.5.77 who set aside the sale qua khasra No. 35 but dismissed the objection for khasra No. 34 vide orders Annexure P.2. The objections were dismissed as according to the Settlement Commissioner the same lay before the Custodian General Punjab, as the property has been shown that of Central Government evacuee property. The petitioner Board filed a revision before the Custodian General Punjab and after review of the entries and report came to the conclusion that the land was acquired evacuee property. Hence the revision was also dismissed. The petitioner moved the Financial Commissioner, Punjab and Secretary Rehabilitation Punjab Government u/s 54 of the Administration of Evacuee Property Act, 1950, who also dismissed the revision vide orders dated 13.5.1980 Annexure P.4 holding that the property was not wakf property and is an evacuee property and the petitioner was not in possession of the same. Rather Ganda Mal was the lessee of the Central Government. In the present writ petition, the challenge has been given to the orders Annexure P.2, P.3 and P.4 on the ground that these orders are illegal because till the year 1961-62, the property was shown to be kabristan Ahle Islam and that no Central Govt. was shown as owner of the property. It was only in the year 1961-62 after consolidation, the Central Govt. was shown as owner and on that basis it was treated as an evacuee property of compensation pool. At no stage, the property was declared as evacuee property and it always remained as Ghair Mumkin Kabristan of Ahle Islam as mentioned in the revenue record. The property was managed and controlled by the petitioner and lessee Ganda Mal had specifically stated before the Custodian that he was lessee of this property under the Board and it was in his possession as such. The property having attained the nature of wakf by its long user and described as such, could

not be of any different nature as principle has been settled that once the property becomes a public wakf nature the same would continue irrespective of its use for the same or not. In short the contention of the Board is that the property in dispute was a Kabristan of Ahle Islam and it was being managed by the Board either personally or through its lessee. With the above averments, the prayer has been made for the quashment of orders Annexure P.2 to P.4.

3. Notice of the writ petition was given to the respondents. Respondents No. 1 and 2 filed separate written statement and denied the averments of the writ petition. According to these respondents, the disputed land though recorded in the column of "Kisham Arazi" as grave yard, yet it was owned by one Mohd. Din son of Chirag Shah, in his individual capacity and as such, it being a personal property of a Muslim migrant, vested in the Central Government. The petitioner has no concern with the property of a Muslim migrant, and as such cannot invoke the provisions of Articles 226/227 of the Constitution of India. The land in question was under a private grave yard and in cultivating possession of the land owners for their use. According to the remarks given in the Jamabandi for the year 1943, the land in question was under a private grave yard and in cultivating possession of the land owners for their use. According to the remarks given in the Jamabandi for the year 1943, the land comprised in Kh. No. 31 was mutated in the names of Sarvshri Fazal Din and Lal Din sons of Mohd. Din, original land owners, in equal shares. Had it been a public grave yard as claimed by the petitioner, the question of transfer of this land in the names of sons of Mohd. Din, original owner, did not arise. In the jamabandi for the year 1961-62 which was prepared subsequent to the consolidation new khasra No. 35/77 was formed and ownership divested in the Central Government. In the jamabandi for the year 1967-68, the land in dispute has been shown under cultivation of Ganda Mal and as per jamabandi for the year 1972-73 the "Kisam Arazi was changed from "Grave yard" to "Barani Awal. It is thus apparent that the disputed land was owned by a private Muslim migrant and it could have been used as grave yard for his family members only at that time. At present no grave yard is existing and the land is being cultivated. The petitioner Board has no concern with the private property of Muslim migrant and as such has no right, title or interest in the land. It was further pleaded that the land in question was never described as Ghair Mumkin Kabristan of Ahle Aslem but was and might have been used as private grave yard by Mohd. Din, the original owner. Had it been a public grave yard, it could not be mutated in favour of the sons of the owner and even the "Kisham Arazi" could not be changed in the year 1972-73. The petitioner did not agitate the change of kind of soil in the revenue record nor against its ownership in favour of the Central Government up to 1976 with a clear understanding in the mind that it was an evacuee property. The petitioner raised from the slumber only after the auction of the land, started making futile attempts to fish in the troubled water. Respondents No. 1 and 2 being the lawful owner of the disputed land had correctly disposed of it in favour of respondent No. 3 in the year 1974 and the auction purchaser was put into possession of the land which was sold to

him. The petitioner Board has no authority to lease it out in favour of Ganda Mal. This fact has no bearing on the case and does not create any right in favour of petitioner Board to claim relief as the land in dispute was in peaceful possession of the auction purchaser who had paid the entire sale consideration and to whom, even the sale certificate has been issued by the respondents.

4. Respondent No. 3 Rakesh Kumar filed a separate written statement and he has also denied the averments made in the writ petition. According to this respondent, the petitioner Board has alleged several, times in the writ petition by stating that the land in dispute was a grave yard dedicated to Ahle Islam or that it was a public grave yard but the revenue entries do not support this fact. In fact, the land in dispute has been shown all along owned and possession by private persons. In the year 1943-44, on the death of Mohd. Din Khasra No. 31 was mutated in favour of his sons Fazal Din and Lal Din vide No. 902. The land has been rightly shown in the ownership of Central Government being an evacuee property. Khasra No. 35 which was purchased by this respondent in the open auction from the Central Govt. for a sum of Rs. 16,600/- has never been mutated in favour of the petitioner. In fact, the same has been mutated in favour of respondent No. 3. vide mutation No. 1421 sanctioned on 22.10.1977. It was further pleaded by this respondent that earlier the petitioner Board filed a civil suit and said suit was dismissed because the Board did not serve any notice u/s 80 C.P.C. In these circumstances, the present writ petition is barred under Order 23 Rule 1 C.P.C. It is wrong to allege that sale regarding khasra No. 35 in favour of respondent No. 3 was set aside. Rather the sale in favour of respondent No. 3 with regard to this khasra number was confirmed and sale certificate was also issued in favour of this respondent. Supporting orders Annexures P.2 to P.4, this respondent prayed for the dismissal of the writ petition.

5. I have heard Shri S.K. Pipat, Senior Advocate, on behalf of the petitioner; Shri P.S. Chhinna Sr. DAG(P), on behalf of respondents 1 and 2 and Mr. M.L. Sarin, Advocate, on behalf of respondent No. 3 and with their assistance have gone through the record of this case.

6. A preliminary objection has been raised by the learned counsel appearing on behalf of respondent No. 3 that the present writ petition is barred under Order 23 Rule 1 of the CPC as the Board earlier filed a civil suit which was ordered to be dismissed for want of notice u/s 80 C.P.C. There is force in the argument raised by the learned counsel for respondent No. 3. Order 23 Rule 1 sub Rule (3) lays down: "that where the court is satisfied that a suit must fail by reason of some formal defect or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of the claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

7. Sub Rule (4) of Rule 23 further lays down: "That where the plaintiff abandons any suit or part of the claim under Sub-rule (1) or withdraws from his suit or part

of the claim without the permission referred to in Sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

8. A reading of the above provisions would show that with the dismissal of the suit of the Board for want of notice u/s 80 C.P.C, present writ under Article 226 of the Constitution of India is also barred.

9. It has been held in (1982) 84 P.L.R. 160 Teja Singh v. The Union Territory of Chandigarh, that the provisions of Order 23, Rule 1 of, the CPC would apply to the writ proceedings and that a petition which has simply been got dismissed as withdrawn would be a bar to the filing of a second petition on the same facts and in respect of the same cause of action.

10. This part of the averments made by respondent No. 3 in his written statement that earlier petitioner filed civil suit which was dismissed as withdrawn for want of notice u/s 80 C.P.C. had not been denied by the Board. The effect of dismissal of the suit is that the present writ petition is liable to be dismissed, on this short ground.

11. Even on merits, the petition has no case. The case set up by the petitioner is that the land in dispute was dedicated to Ahle Islam and that it was being used as a Kabristan and under these circumstances, it vests in the Board. As per jamabandi for the year 1909-10, khasra No. 31 was shown the ownership of one Mohd. Din son of Chirag Shah and against this khasra number it has been recorded as Ghair Mumkin grave yard. From this entry the Board cannot take the advantage that it was a public grave yard and that it was dedicated to Ahle Islam. There is not an iota of evidence supporting any revenue entry that the residents of the village who are the Mohammadan community had been using the land comprised against this khasra number as grave yard. It must be a private grave yard of the family of the owner of this khasra number and it must be in possession of the owner as self-cultivation. In order to prove that it was a public grave yard, it was incumbent on the part of the Board to establish from the revenue entries that the land comprised against this khasra number was ever dedicated in the name of Islam so that it may be used as grave yard by all and sundry. In the jambandi for the year 1943-44, there is a note in the remarks column vide mutation No. 919 vide which the inheritance of this number had been mutated in favour of Fazal Din and Lal Din sons of Mohd. Din, who was the original owner of the land. The above mutation entry would show that khasra No. 31 was never a public grave yard nor it was being used as such. In the year 1961-62, khasra No. 31 changed to 35 and its area was only 8 kanals and 1 marla. The area of the land itself suggests that it was a small piece of land and it could hardly be used as a public grave yard. As per the jamabandi for the year 1961-62, in the column of ownership the name of the Central Govt. figures. In the year 1966-67 it is recorded that this property bearing khasra No. 35 belongs to Central Government and one Ganda Mal has been shown as tenant at will under the Central Govt. In the jamabandi for the year 1972-73, the kind of land

has been recorded as Barani Aval, Treating it as a property of the Central Govt. it was auctioned on 28.12.76 and possession was delivered to respondent No. 3 on 24.6.77 and sale certificate was also issued on 12.7.77. It is evident that after the issuance of the sale certificate, the Board filed civil suit in the Court of Senior Sub Judge, Gurdaspur on 26.6.77 and that suit was dismissed. In order to constitute a wakf property it is incumbent on the part of the Board to establish a permanent dedication by a person professing Islam of any movable or immovable property for any purpose recognised by the Muslim Law as pious, religious or charitable and it also includes wakf by user. In the present case, the Board has failed to lead any evidence prima facie to establish that the original owner of the land ever wanted to dedicate the land in question to Ahle Islam for public grave yard or that the land in question was ever used by the Mohammedans as a whole for burrying the dead bodies. Public grave yard has to be understood different from private grave yard. It is equally possible that the original owner Mohd. Din might have ear-marked some parcel of land in order to bury the corps of his own family members but that would not constitute a public grave yard till a satisfactory evidence is prima facie led by the Board to establish that the Mohammadon community had been using the parcel of this land as public grave yard or that Mohammadons of the village had been burrying the dead bodies of their relations and kith and kins. Before the Financial Commissioner, who affirmed the orders Annexures P.2 and P.3, this point was also raised that khasra number in dispute was the public grave yard and that the property vests in the wakf board but both the contentions were rejected by the Financial Commissioner while passing order Annexure P.4. Three points were raised before the Financial Commissioner:

- (i) Whether the property in dispute was an acquired evacuee property or was Wakf property?
- (ii) Whether the petitioner is proved to be managing this property since 1964-65 to 1976-77 as Wakf Property or the Rehabilitation Department was in occupation of it as acquired evacuee property; and
- (iii) Whether the petitioner u/s 54 of the Evacuee Property Act is competent and whether the Financial Commissioner was competent to declare the land in dispute as evacuee property.

Dealing with the first point the learned Financial Commissioner has held as under:-

"The Wakf Board is the creation of this Act, and it started functioning in the State of Punjab in the year 1960-61. Before publication of notification of Wakf Properties u/s 5(2) of the Act, u/s 4 preliminary survey of such properties is to be made by the State Government in respect of those properties existing in the State at the date of the commencement of this Act. After this elaborate enquiry and survey u/s 5, and determination of disputes, if any, resort is to be made to the publication of Wakf properties in the Gazette of India. Perusal of the notification Ex.P.1 reveal that in the original notification No. 1384, dated

30.9.1972 issued regarding Wakf properties of Gurdaspur district, the land in dispute was never included. Notification was made only on the 21st September, 1977, published in the Gazette of 15th October, 1977. The moot point for decision is under what circumstances that property was not included in the original notification, if it were really a Wakf Property and, as alleged by the petitioner, it was being managed by the Wakf Board right from 1964-65 to 1976-77.

Moreover, no material has been placed on record to show that in the original survey made u/s 4, this property was included in this list of Wakf Properties prepared by the State Government. The corrigendum in regard to this property issued by the Wakf Board was presumably to circumvent the provisions of the Wakf Act of 1954, because u/s 6(4) the list once published u/s 5(2) shall be final unless it is modified in pursuance of a decision of Civil Court. Section 6 of the Act clearly lays down that disputes regarding the fact whether any property is Wakf Property or not is within the competence of civil court. The plain reading of Section 5 and 6 leads to the only conclusion that the publication of list is an administrative act and the list of wakfs published in the Gazette shall be final and conclusive qua the Board, the Mutawall-is etc., but it cannot be said that third persons are also bound by the aforesaid notification. In the instant case, the property was never declared as Wakf property till its final disposal, and the revenue record from the very beginning records it acquired evacuee property under the control of the Central Govt. A perusal of copy of khasra girdawari entries at page 113 of the file of Court of Assistant Custodian General reveals that the land in dispute is recorded as evacuee property, and held by one Hazari Lal Patadar; and only an area measuring 9 marlas is recorded as Ghair Mumkin Kabristan and Berian, and not the whole khasra number. It is thus not established on record that the land in dispute is a Wakf property within the meaning of Section 3 of the Wakf Act of 1954".

12. The learned counsel for the petitioner has not been able to show how the conclusion drawn by the learned Commissioner is wrong and illegal. With regard to the 2nd point the learned Financial Commissioner categorically held in para No. 6 of the impugned order Annexure P4, that the entries made in the revenue record totally belie the case of the Board that the property in dispute was ever managed by it. The learned Financial Commissioner also stated that account statement of income relied upon by the Board was a piece of such evidence which was created by it for its own benefit in connivance with Ganda Mal and in the absence of any documentary proof, the Rehabilitation Department was not bound by such created evidence. The third point was also decided against the Board by holding that petition u/s 54 of the Administration of Evacuee Property Act, 1950 does not lie in that Court.

13. It has been held in Syed Mohd. Salie Labbai (Dead) by L.Rs. and Others Vs. Mohd. Hanifa (Dead) by L. Rs. and Others, . that under the Mohammedan Law the grave-yards may be of two kinds a family or private graveyard and a public

grave-yard. A grave-yard is a private one which is confined only to the burial of corpses of the founder, his relations or his descendants. In such a burial ground, no person who does not belong to the family of the founder is permitted to bury his dead. On the other hand, if any member of the public is permitted to be buried in a grave-yard and this practice grows so that it is proved by instances adequate in character, number and extent, then the presumption will be that the dedication is complete and the grave-yard has become a public grave-yard where the Mohammedan public will have the right to bury their dead. It is also well settled that a conclusive proof of the public grave-yard is the description of the burial ground in the revenue records as a public grave-yard.

14. Thus, a perusal of the above ratio laid down by the Hon"ble Supreme Court would show that it is incumbent upon the Board to establish by instances adequate in character and proof and extent before drawing any presumption in its favour that the land in dispute was being treated as a public grave-yard. By making a bald assertion without getting corroboration from any revenue record, it cannot be said that the land in question, the area of which is similar, was a public grave-yard or that it was being managed by the Board and as such it could not vest in the Central Govt.

15. The Hon"ble Supreme Court, in this very judgment while determining whether a grave-yard in public or private, laid down the following guide-lines :-

"(1) that even though there may be no direct evidence of dedication to the public, it may be presumed to be a public grave-yard by immemorial user, i.e. where corpses of the members of the Mohammedan community have been buried in a particular grave-yard for a large number of years without any objection from the owner. The fact that the owner permits such burials will not make any difference at all; (2) that if the grave-yard is private or a family grave-yard then it should contain the graves of only the founder, the members of his family or his descendants and no others. Once even in a family grave-yard members of the public are allowed to bury their dead, the private grave-yard sheds its character and becomes a public grave-yard; (3) that in order to prove that a grave-yard is public by dedication it must be shown by multiplying instances of the character, nature and extent of the burials from time to time. In other words, there should be evidence to show that a large number of members of the Mahomedan community had buried their corpses from time to time in grave-yard. Once this is proved, the Court will presume that the grave-yard is a public one; and (4) that where a burial ground is mentioned as a public grave-yard in either a revenue or historical papers that would be a conclusive proof to show the public character of the grave-yard".

16. If the averments of the writ petition are read in the light of the dictum laid down by the Supreme Court, the only inference would be that the Board petitioner has not been able to establish that at any relevant point of time the land in question was dedicated to the Wakf or that it was being used as a public grave-yard or that it was ever managed by the Board or that it ever vested in the

Board as per its own notification which was issued vide notification No. 1384 dated 30.9.1972.

17. There is another angle to look in this case. It is settled law that disputed question of fact cannot be agitated in the writ jurisdiction. The case of the petitioner Board throughout is that the land in dispute is a Wakf property being used for such purposes. Whether it was a public grave-yard or a family grave-yard could be established only by leading full evidence before the trial Court. The Board opted to file a civil suit but withdraw the suit having a formal defect. The Board thereafter did not pursue the proper remedy by serving a notice upon the Govt. u/s 80 of the Code of Civil Procedure. Rather, it opted to file the present writ petition, which is barred by the principles of res judicata in view of the judgment reported as (1982) 84 P.L.R. 160 (Supra).

18. In this view of the matter, this Court is of the opinion that the present writ petition is devoid of any merit and the same is liable to be dismissed and I order accordingly. No order as to costs. Petition dismissed.