

(1990) 09 P&H CK 0101

In the Punjab And Haryana At Chandigarh

Case No : Regular Second Appeal No. 243 of 1977

Shri Dwarka Dass and others

APPELLANT

Vs

The Punjab Wakf Board, Ambala Cantt. and others

RESPONDENT

Date of Decision : 04-09-1990

Acts Referred:

Evidence Act, 1872 — Section 3

Citation : AIR 1991 P&H 89 : (1991) 1 ILR (P&H) 512 : (1992) 101 PLR 352

Hon'ble Judges : G.R. Majithia, J

Bench : Single Bench

Advocate : M.L. Sarin, D.R. Mahajan and Miss Jaishree Thakur, for the Appellant; Hemant Kumar, Rajesh Kumar and Achra Singh, for the Respondent

Judgement

1. This Regular Second Appeal is directed against the judgment and decree of the first appellate Court reversing on appeal those of the trial Judge and dismissed the suit filed by the plaintiff-appellant for a decree of permanent injunction against defendants Nos. 1 to 3 directing them to vacate the disputed and.

2. The facts: The appellant (hereinafter referred to as "the plaintiff") filed a suit for mandatory injunction or in the alternate for possession against respondents Nos. 1 to 3 (hereinafter referred to as defendants Nos. 1 to 3) directing them to vacate the suit land measuring 16 Bighas 1 Biswa. It was stated in the plaint that the suit land was jointly owned by the plaintiff, defendants Nos. 4 to 13 and one Puran Devi who has since died and whose share was inherited by Nos. 4 to 13 being her legal heirs. The plaintiff had one half share in the suit land while Nos. 4 to 13 were owners of the remaining one-half share. The suit land was originally given to the Mahomedans as licensees by the fore-fathers of the plaintiff and defendants Nos. 4 to 13 who were the owners thereof at that time, with a permission to use the said land as a burial ground. While granting the said licence, it was clearly mentioned that the land could not be cultivated and the same could not be used for any other purpose except the one specified above.

The terms of the licence were mentioned in the Wajab-UI-Urz prepared at the time of settlement in the year 1964 BK of village Payal, which was previously known as Sahibgarh in district Amargarh. After the migration of the Mahomedans to Pakistan in the year 1947, the suit land remained no longer with the Mahomedans and the licence given to them for burial of their dead bodies stood terminated. In the year 1967-68, defendant No. 2 illegally and without any right, title or interest in the said land gave the same on lease to defendant No. 3 for cultivation at an yearly rent of Rs. 210/-. The plaintiff moved the Wakf Board through its Secretary who admitted vide order dated June 27, 1967, that the said land was not meant for cultivation and that the Wakf Board had no interest or right with regard to the said land and consequently, the aforesaid lease granted by defendant No. 2 in favour of defendant No. 3 was cancelled vide order dated June 27, 1967, and defendant No. 3 was informed accordingly by defendant No. 2 to take back his lease money. In spite of the above admission made by defendant No. 2 with regard to the nature and character of the suit land and the rights of the plaintiff and defendants Nos. 4 to 13, it again leased out the suit land for the year 1968-69 in favour of defendant No. 3 without any right or interest. Thus, defendant No. 3 interfered in the actual possession of the plaintiff though the lease in his favour was illegal and was not binding on the plaintiff and other co-owners. It was further alleged that although defendant No. 1 has been shown in the revenue record as "Muzara Awal" in possession of the land in dispute but as the suit land was Gair Mumkin (Qabristan) and not cultivable by its character and nature and was given to the Muhammadans to use the same as burial ground for their dead bodies, so according to law there could not be any tenant much less the custodian who had no right or interest left in the suit land after the migration of the Mahomedans to Pakistan in the year 1947, as the licence in their favour stood terminated because no Mahomedans were left to use the land as burial ground and consequently the entries in the revenue record about the custodian as the tenant-in-chief were absolutely wrong, illegal and not binding on the plaintiff and defendants Nos. 4 to 13 and custodian had no right to claim any interest in the suit land. As defendants Nos. 1 and 2 had no right or interest in the suit land, defendant No. 3 had no right to interfere in possession of the plaintiff over the suit land. On these premises the plaintiff prayed for a decree for mandatory injunction directing defendants Nos. 1 to 3 to vacate possession of the suit land and not to interfere in their actual possession.

3. The suit was contested by defendants Nos. 2 and 3. Defendant No. 2 maintained that the land in dispute was used as Muslim graveyard from the very outset and was used as such from time immemorial and that after the partition of the Country in the year 1947, Muslims continued to live in the village and the character of the land in dispute remained a grave yard. It was further asserted that the suit land vested in the Punjab Wakf Board and it has every right to use for any purpose, it thought fit, and that the lease granted by it in favour of defendant No. 3 was perfectly valid. The suit property firstly vested in the Custodian under the law as Trust for the Punjab Wakf Board and with the

Constitution of the Wakf Board, its management and control was transferred to it.

4. On the pleadings of the parties, the following issues were framed:

1. Whether the plaintiff is the owner of the land in suit? OPP

2. If issue No. 1 is proved, whether the land in suit was given to the Mahomedans for the specific purpose of using it as a burial ground as a licensee? OPP

3. Whether the plaintiff is entitled to the injunction prayed for? OPP

4. Whether the suit is within limitation? OPP (onus objected to)

5. Whether the plaintiff has locus standi to file the suit? OPD3.

5A Whether the suit is barred by adverse possession, as alleged? OPD2

5B Whether the suit is property valued for purposes of Court-fee and jurisdiction? OPP

6. Relief.

5. Issues Nos. 1, 2 and 5 were disposed of together by the trial Judge and were decided in favour of the plaintiff. Issue No. 3 was answered against the plaintiff: Issues 4, and 5A were answered against the defendants. Issue No. 5B was not pressed by the defendants. In view of the findings on issue No. 6, the trial Court found that the plaintiff being a cosharer was entitled to a decree for possession of the suit land. On appeal, the first appellate Court reversed the decision of the trial Court under issues Nos. 1, 2 and 5 basically on the ground that the plaintiff had admitted in the plaint that the land was given by the owners to the Mahomedans for use as graveyard and that it was used as such till 1947, so the dedication of the property in dispute for graveyard by the owners and its use as such after several years stood established and the land in suit has to be treated as Wakf by user. The mere disuse of the property after 1947 as a graveyard cannot take away the character of the property.

6. The entire approach of the appellate Judge is erroneous. Under Mahomedans Law, Wakf cannot be created by user. It can only be created by dedication. Even though there may be no direct evidence of dedication to the public, it may be presumed to be a public graveyard by immemorial user i.e. where corpses of the members of the Mahomedans community have been buried in a particular graveyard for a large number of years without any objection from the owner. In order to prove that a graveyard 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 Mahomedans community had buried their corpses from time to time in the graveyard. Once this is proved, the Court will presume that the graveyard is public one. Where a burial ground is mentioned as a public graveyard in either a revenue or historical papers that would be a conclusive

proof to show the public character of the graveyard.

7. Abundant documentary evidence in the form of Jamabandis Exhibits P-13 to P-26 shows that the land reserved for use as a graveyard in the village out of the land of the different Pattis reverted to the proprietary body after 1947 since it had ceased to be used as a graveyard and a part of this land was allotted to different persons who migrated from Pakistan and the remaining was shown to be under cultivation of different persons. The land which was earlier used as graveyard of the Muslims by the Mahomed an reverted to the proprietors of the Patti and the character also changed since it was brought under cultivation after 1947 by its Hindu proprietors.

8. In the instant case, the trial Judge after referring to the voluminous documentary evidence came to the following conclusion:

(i) Extract from the Wajab-UI-Urz.

Exhibit P-13 proves that the area so reserved for use as a graveyard by the Muslims of the village was temporarily given to them as licensees, and no permanent dedication was made in their favour, since the usufruct of this land and the proprietary rights in the same were retained by the proprietors of the said Pattis with them. It was also clearly mentioned in Wajab-UI-Urz that the area so reserved was impartible; that no sole proprietor could reclaim it; that the trees grown in the said Shamilat area belong-ed to the proprietors unless any specific portion of the land was in exclusive possession of a single proprietor, that the trees standing in the area reserved for graveyard and cremation ground etc. could be used by the Mutwatli for the maintenance of the old existing house meant for the Mutwalli or a person who rendered services there; that such person or Mutwalli could not sell the trees and that the proprietors as a whole had a joint interest in the same and no proprietor alone without the consent of the others could sell the same. If any co-sharer in the Shamilat wanted to install a well or build a house for public use, he could do so without the consent of the other proprietors, but said well or a building would be deemed to be the property of the whole proprietary body. This Wajab-UI-Urz was attested by Hindus and Muslim respectables of the village on 27th Katik, Sammat 1964 Bk. in the presence of the Superintendent Bandobast.

(ii) Jamabandi Exhibit P-14 prepared at the time of Settlement indicates that land comprised in Khasras Nos. 2217, (20 Bighas 5 Biswas) and 2219 (6 Bigha 8 Biswas) was reserved for use as a graveyard for the Muslims by the proprietors of Patti Purian out of the Shamilat land of the said Patti. The land in suit is admittedly situated in Patti Purian. In the ownership column of Exhibit P-14, Shamilat Patti Hasab Rasad Khewat is entered as owner of the aforesaid land. The other entry in this column shows Dewa Dass son of Hari Singh to be the owner of 63/71 shares and Ghulam Hussan alias Gahi etc. Sheikh Puris as owners of 8/71 shares. This entry shows that Patti Purian comprised of Hindus and Muslims proprietors and their respective shares in the shamilat of this Patti

were as given in Exhibit P-14.

(iii) The entries in Jamabandis Exhibits P-1 and P-13 prove that portion of Shamilat land in each Patti of this village was reserved by the proprietors of the Patti for use for various public purposes, though the proprietary rights were retained by the proprietors and the usufruct of the land so reserved was also retained by them accordingly.

9. The essential ingredients for establishing a public graveyard are non-existent in the instant case. A somehow identical question arose in Panchayat Deh and Gram Sabha, Garhi Brahman Vs. Punjab Wakf Board, Ambala and Another, , where it was held thus (at page : AIR 1969 P&H 347) :

"The entries in the Jamabandis carry a presumption of correctness but in this case the Jamabandis for the years 1957-58 and 1960-61 cannot be said to be correct because the old entries were repeated although since 1947 no Muslim is living in this village and the land in dispute was never used as a graveyard. It had been encroached upon by the defendants in the suits other than the Gram Panchayat and the Gram, Panchayat itself filed applications for their ejection after the land had vested in the Panchayat. The entries in the other Jamabandis produced in the suits do not prove that the dedication had been by any Muslim. It has also not been shown that any mutawalli had ever been appointed to look after the wakf property and to arrange for the burial of the dead bodies in this land."

This judgment was affirmed by the Letters Patent Bench in The Punjab Waqf Board, Ambala Vs. The Panchayat Deh and Another, , wherein it was held thus (at page ; Sadhu Sukh Ram Vs. The State of Punjab and Others, :

"On the basis of the entries in the records of rights it can be said that a few dead bodies had been buried in this piece of land during a period of 35 to 40 years before the partition of the country but the circumstances are such that we can believe that the user of this land for this particular purpose had discontinued for about two decades after the partition of the country apparently because the minority community had evacuated from the village. It cannot be said that the user before the partition of the country had lasted up to a point of no return and if the land could assume a certain character by user over a period of years, then the discontinuation of that user at a particular time could have cured the land of its consecrated character as waqf so as to justify the vesting of this land in the Gram Panchayat for the benefit of the present residents of the village. The minority community that could have occasion to use the land as a graveyard having evacuated from the village and the particular user having discontinued, there is no point in maintaining or administering the land as a graveyard. The consecration of the land by the burying of a few dead bodies has come to an end with the desecration and obliteration of all traces of these graves and the land has been cured by continued disuser of the character that it may have acquired by indifferent user as a graveyard for a few decades before the partition of the

country."

10. The learned counsel for the respondents relied upon Syed Mohd. Salie Labbai (Dead) by L.Rs. and Others Vs. Mohd. Hanifa (Dead) by L. Rs. and Others, , and contended that in the present case, the Wakf was created. In this judgment, it was held that under Mahomedan Law, Wakfs can only be created by dedication, although dedication can be inferred by long user and the other question which arose as to what was the distinction between a private and public graveyard. In view of my finding above that there was no dedication, the ratio of this judgment does not apply to the instant case. The learned counsel for the respondents also relied upon Punjab Wakf Board v. Chhailu 1986 PLJ 455. The learned Judge in view of the observations an Syed Mohd. Labbai's case (supra) disposed of the appeal. He did not rely upon the judgment in Panchayat Deh's case (supra), which was affirmed by the Letters Patent Bench. The Letters Patent Bench's judgment was not brought to the notice of the learned single Judge. The judgment rendered by the Division Bench in The Punjab Wakf Board's case (supra) is binding on me sitting singly. In Pritam Kaur v. Surjit Singh, reported as 1984 PLR 202, a Full Bench of this Court held thus 1984 PLR 208:

"From the above, it would follow as a settled principle that the law specifically laid down by the Full Bench is binding upon the High Court within which it is rendered and any and very veiled doubt with regard thereto does not justify the reconsideration thereof by a larger Bench and thus put the law in a ferment afresh. The ratios of the Full Benches are and should be rested on surer foundations and are not to be blown away by every side wind. It is only within the narrowest field that a judgment of a larger Bench can be questioned for reconsideration. One of the obvious reasons is, where it is unequivocally manifest that its ratio has been impliedly overruled or whittled down by a subsequent judgment of the superior Court or a larger Bench of the same Court. Secondly, where it can be held with certainty that a co-equal Bench has laid the law directly contrary to the same. And, thirdly, where it can be conclusively said that the judgment of the larger Bench was rendered per incuriam by altogether failing to take notice of a clear-cut statutory provision or an earlier binding precedent. It is normally within these constructed parameters that a smaller Bench may suggest a reconsideration of the earlier view and not otherwise. However, it is best in these matters to be neither dogmatic nor exhaustive, yet the aforesaid categories are. admittedly the well accepted ones in which an otherwise binding precedent may be suggested for reconsideration."

In view of the judgment in Pritam Kaur's case (supra) the single Judge judgment in Chhailu's case (supra) cannot be preferred over the Division Bench judgment in The Punjab Waqf Board's case (supra), which has not been rendered per incuriam.

11. For the reasons aforementioned, the judgment and decree of the first appellate Court are set aside and those of the trial Court are restored but with no order as costs.

12. Appeal allowed.