

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 1407/2003

TAJUDDIN & ORS.

..... Petitioner

Through Mr. Sudhir Nandrajog, Adv.

versus

D.D.A. & ORS.

..... Respondent

Through Ms.Saroj Bidawat, Adv. for UOI.

Mr.Gaurav Sarin, Adv. for DDA.

Mr.H.P.Sahu for Mr.Sanjay Poddar, Adv. for
Respondent no.3.

Mr.K.S.Bhati for Delhi Wakf Board.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

ORDER

% 26.03.2008

1. The petitioners claim to be the residents of village Begumpur and have filed the present petition for direction to the respondents including Delhi Wakf Board and DDA to maintain graveyard in khasra no.110 of village Begumpur, Delhi and not to use the said land as a park or garden. Direction is also sought to restrain DDA from taking possession of the graveyard and make a public park in the said area.
2. In the writ petition it is mentioned that the land in question was also subject matter of SLP (Civil) No.6757/1983 titled “Delhi Wakf Board vs. UOI and Ors.” which was disposed of on 10.04.1990 with a direction to Land Acquisition Collector to conduct a fresh enquiry and if he comes to a positive finding as to the existence of any tomb or graveyard or the like, he shall exclude such portion or portions from acquisition. One of the prayers made in the writ petition is that the Land Acquisition Collector, Union of India and GNCT of Delhi should enquire in terms of the directions issued by the Supreme Court.
3. The respondent/DDA in their additional affidavit filed on 17.8.2006 has clarified that the aforesaid SLP and Order dated 10.4.1990 related to village Lado Sarai and not village Begumpur. It is clear that the petitioners have made false and incorrect averments in the writ petition and have not come to the Court with clean hands. However, I have examined other contentions raised by the petitioners on merits.

4. By Order dated 30th April, 2007, file of WP(C) No.7589/2000 tilted 'Sakina Vs. UOI' was summoned. The file is available and I have examined the same. In the said writ petition also reference was made to SLP No.6757/1983 titled Delhi Wakf Board Vs. UOI & Ors. Ms. Sakina had filed the said writ petition as owner of Khasra no.110 of village Begumpur, Delhi, stating inter alia, that the village had been in existence since the time of Alauddin Khilji and the land has been shown in the revenue record as *Kabristan* where kabar/graves of the petitioner's ancestors exist and the said graveyard is adjoining residential premises of Abadi of the said village. Copy of the revenue records of the said village were also enclosed. This writ petition also mentions that Notification under Section 4 of the Land Acquisition Act was issued on 15.12.1961, for which declaration was made on 26.6.1962 and the Collector of Land Acquisition had made his Award on 31.10.1962. A Division Bench of this Court examined the contentions raised and dismissed the said writ petition observing as under :

“As per the affidavit filed on behalf of DDA possession of the land was taken over on 23.11.1962 which was followed by another notification issued under Section 22(1) of the Delhi Development Act on 3.1.1968 making over the land to the DDA. Challenge now made in this petition is not highly belated but without any substance. Learned counsel for the petitioner states that the petitioner was seeking her remedy before the Civil Court and was asked to avail remedy to challenge acquisition proceedings. Needless to add that the civil suit was also filed only in the year 1997 being civil suit

no.809/97 which was dismissed as withdrawn on 22.1.2001.
Dismissed.”

5. It is clear from the above findings of the Division Bench that this Court has held that Ms. Sakina should not be permitted and allowed to question and challenge Notification issued under Section 22 of the Delhi Development Act dated 3.1.1968 after lapse of 32 years in the year 2000. The Division Bench also noticed that Ms. Sakina had earlier filed civil suit but was not successful. The reasoning given by the Division Bench in the aforesaid writ petition no.7589/2000 is equally applicable to the present case also. I may note here that the present writ petition, in fact, was filed in the year 2003. The subject matter of the present writ petition is identical to W.P.No.7589/2000 i.e. the land is Kabristan and DDA should not develop the said land. However, one distinction may be noticed here, Ms. Sakina had stated that it was a personal graveyard and not a public Kabristan.
6. Learned counsel for the petitioner however, contends that the petitioners are not concerned with the land acquisition proceedings and are relying upon Gazette Notification dated 16th April, 1970 issued under Section 5(2) of the Wakf Act, 1954 by which khasra no.110 of village Begumpur measuring 2 bighas and 8 biswas was declared as a Wakf property. It is submitted that the respondent/DDA has not filed any civil suit questioning and challenging the said Notification even after the said Notification was

brought to their knowledge and thus, the land in question is conclusively established as a Wakf land. He also made reference to the affidavit filed by the revenue authorities of the GNCT of Delhi in which it is stated that as per *Jamabandi* land in question is recorded as graveyard.

7. I have examined the contentions raised by learned counsel for the petitioners. Pursuant to Orders passed by this Court the revenue authorities were asked to inspect the area in question. Inspection was conducted on 17.5.2004 by the Land Acquisition Collector, SDM, South District and others. The findings given by them are as under :

“ At the site some graves were also found and they have also been depicted in the Naksha Nazaria. 03 pakka graveyards exist at this kh. No. It is not possible to ascertain the age of these graveyards, but they have not been constructed in the recent past. Apart from this, 02 graveyards were found demolished at the site. The photographs of the temporary encroachment, pakka construction, temple, graveyards is also enclosed along with report.”

8. It is clear from the above findings that only 3 pucca graves exist in the said khasra but it was not possible for the officers concerned to ascertain the age of the said graves, though the graves are not of recent past. Apart from three graves, there were two more graves which were found demolished at the site. The question which arises for consideration is whether the said alleged graveyard was/is a public graveyard and

therefore a Wakf property or a graveyard used by a family or a private graveyard. Reference can be made to the judgment of the Supreme Court in 'Syed Mohd. Salie Labbai Vs. Mohd. Hanifs' reported in (1976) 3 SCR 721. In the said judgment, the Supreme Court noticed distinction between a public graveyard which has been used by the public for burial and a private graveyard. User in cases of public graveyard should be immemorial. Private graveyard on the other hand is confined to burial of corpses of the founder, members of family or descendents. The Supreme Court also noticed that to give a finding that a graveyard is a public graveyard, it should be proved and established by instances adequate in character, number and extent. Only when there is evidence then the presumption will be that the dedication was complete and the property had become a public graveyard, where the public has a right to bury their dead. Once it is established that the graveyard in question is a public graveyard, it would vest with the public and constitute Wakf. Accordingly four rules were laid down as under :

“ The following rules in order to determine whether a graveyard is a public or a private one may be stated :

1. That 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 Mahomedan community have been buried in a particular graveyard 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 graveyard is a private a family graveyard 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 graveyard members of the public are allowed to bury their dead, the private graveyard sheds its character and becomes a public graveyard;
 3. That 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 Mahomedan community had buried their corpses from time to time in the graveyard. Once this is proved, the Court will presume that the graveyard is a public one; and
 4. That where a burial ground is mentioned as a public graveyard in either a revenue or historical papers that would be a conclusive proof to who the public character of the graveyard.”
9. The case of Syed Mohd Salie (supra) related to disputes between two sections of the muslim community. The Supreme Court noticed that there was overwhelming oral and documentary evidence to prove that the land in question was a public graveyard by immemorial user. Supreme Court quoted with approval the decision of the Privy Council in Ballabdas versus Noor Mohd. reported in AIR 1936 PC 8,3 wherein reference with approval to following observation in the case of Sheoraj Chamar versus Muder Khan reported in (1934) ALJ 809 by Allahabad High Court was made :-

“ But in cases where a graveyard has existed from time immemorial or for a very long time, there can be a presumption of a lost grant. It is open to a court to infer from circumstances that a plot of land covered by graves, which has been used as a graveyard, is in fact a graveyard and had been set apart as such by the original owners and made a consecrated ground even though a registered document is not now forthcoming.”

10. The Supreme Court also approved of the observations made by Madhya Pradesh High Court in the case of Mohd. Kassam versus Abdul Gafoor reported on AIR 1964 MP 227 in which it was held as under:-

“ On this point suffice it to say that we are of the view that a kabaristan cannot be a private kabaristan unless it is used for the family members exclusively. Once the public are allowed to bury their dead it ceases to be private property.... There was no discrimination about the user.

It was being used by the predecessors of the defendants as well as by the public. This will indicate that it was not a private kabaristan.

Under the Mohammadan law if a land had been used from time immemorial for burial ground then the same may be called a wakf although there is no express dedication.”

11. Applying the aforesaid tests to the present case and in the light of the factual findings mentioned in the inspection report dated 17.5.2004, it cannot be said that the graveyard, is a public graveyard. Only 5 graves were found. Immemorial user as a public graveyard has not been established by instances adequate in character, in number and extent. Ms. Sakina's contentions and statements made in W.P.(C) No.7589/2000 were to the contrary. Ms. Sakina was the owner of the land.
12. As far as revenue entries are concerned the same were also relied upon by Ms. Sakina in her Writ Petition no.7589/2000. A Division Bench of this

Court did not find any merit in the same. Moreover she had also filed a civil suit relying upon the said revenue entries but did not succeed. The Civil Judge noticed that many of the revenue entries were made in 1996. The revenue entries do not establish and prove that the land is a general or a public Kabristan. Kabristan may be private or public but a private Kabristan is not a Wakf.

13. I may also refer here judgment of the Supreme Court in Board of Muslim Wakf Vs. Hadi Begum AIR 1993 Suppl. (1) SCC 192 in which reference was made to earlier judgment of the Supreme Court in the case of Board of Muslim Wakf versus Radha Kishan reported in (1979) 2 SCR 148 in which it was observed as under:-

“.....The right, title and interest of a person who is non-Muslim and is in possession of certain property is not put in jeopardy simply because that property is included in the list published under sub-section (2) of Section 5 and he is not required to file a suit in a civil court for declaration of his title within the period of one year and the list would not be final and conclusive against him. Sub-section (4) of Section 6 makes the list final and conclusive only between the Board, the mutawalli and the person interested in the wakf.”

14. In the case of Board of Muslim Wakfs v. Radha Kishan, reported in (1979) 2 SCC 468 it was observed by the Supreme Court as under :-

“**39.** It follows that where a stranger who is a non-Muslim and is in possession of a certain property his right, title and interest therein cannot be put in jeopardy merely because the property is included in the list. Such a person is not required to file a suit for a declaration of his title

within a period of one year. The special rule of limitation laid down in proviso to sub-section (1) of Section 6 is not applicable to him. In other words, the list published by the Board of Wakfs under sub-section (2) of Section 5 can be challenged by him by filing a suit for declaration of title even after the expiry of the period of one year, if the necessity of filing such suit arises.”

15. By virtue of notification issued under Section 22(1) of the DDA Act on 3.1.1968, the land in question was handed over to the DDA and vests in the said authority. Delhi Wakf Board in spite of repeated opportunities has failed to file its counter affidavit and place on record relevant documents in support of the Notification. The proceedings under Section 4(3) of the Wakf Act, 1954 have not been placed on record. In the present case there is no evidence or material to show that any notice was issued to the Government of India or the GNCTD during the course of enquiry under Section 4 of the Act. Therefore, Explanation to Section 6(1) of the Wakf Act, 1995 will also not be applicable. It is not pleaded by the petitioner that respondent no.1-UOI or the GNCTD were issued notice in the enquiry proceedings. There is no evidence of dedication to Wakf. The only allegation is of immemorial user as a public graveyard.
16. I may here refer to the judgment of the Punjab and Haryana High Court in “Punjab Deh and Gram Sabha Vs. Punjab Wakf Board and Ors.” reported in AIR 1969 Punjab and Haryana 344. In the said case the land in question

was described as *Gair Mumkin Kabristan* and was recorded as Shamlal Deh in Jamabandi for the year 1910 and 1945-46. A Single Judge of Punjab and Haryana High Court held that there was no evidence to establish intention of anyone whatsoever to dedicate of the property and the nomenclature of the Jamabandi entries of the property, without proof of the user was not sufficient. Reference was made to “Mohd. Shah Vs. Faizuddin Ansari” AIR 1956 Supreme Court 713 in which it was held as under:-

“.....it can also be accepted as a matter of law that a Wakf normally requires expressed dedication but if land has been used from time to time immemorial for religious purpose, then the land used by user Wakf although there is no evidence of express dedication”.

17. Reference was also made to “Jeevan Singh Vs. Karandi” reported in AIR 1927 Lahore 664 in which it was held that “*nobody can acquire by prescription a right to bury the dead in the land belonging to other persons, such an easement being unknown to law.*” Similar view was again expressed by Lahore High Court in “Kripa Singh Vs. Nabivak Baksh” reported in AIR 1932 Lahore 256 that a right to bury or burn out bodies on land belonging to other person is not an easement recognized by law and cannot be acquired by prescription. Therefore, immemorial user as a general or public Kabristan has to be established.

18. In view of the reasoning given above, I do not find any merit in the present writ petition and the same is accordingly dismissed. However, the respondent-DDA will ensure that the graves are not demolished and proper respect is given to the said graves while constructing and converting the said land to a park. No costs.

SANJIV KHANNA, J.

MARCH 26, 2008

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