

THE HON'BLE SRI JUSTICE M.S. RAMACHANDRA RAO

CIVIL REVISION PETITION No.6248 of 2009

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ORDER:

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This Civil Revision Petition is filed under Section 83(9) of the Wakf Act, 1995 challenging the order dt.13-11-2009 in O.S.No.64 of 2007 of the A.P. Wakf Tribunal, Hyderabad.

2. Heard Sri Harender Pershad and Sri D.Jagan Mohan Reddy, learned counsel for petitioners, Sri A.M.Qureshi, learned counsel for 1st respondent and Sri M.A.K. Mukheed, learned counsel for 2nd respondent.

3. The above suit was filed by 1st respondent claiming to be the person-interested in the plaint schedule property alleging that it is Wakf property; that there is a grave yard known as "Graveyard Muslim Khakrooban" situated at Mangal Hat, Old City area of Hyderabad of area 22,966 sq. yds situated at Dilawar Gunj at Door No.3-1-59; that it is a surveyed, registered and gazette notified wakf institution; that in March, 2007, the 1st respondent/plaintiff and another were informed by the local residents of Razdrakhan Pet that there are encroachments in this grave yard and houses have been constructed; that the plaint schedule property appears to have been grabbed; then plaintiff and another visited the said grave yard and on local enquiry came to know that petitioners herein were visiting the subject property and when they contacted the petitioners, 1st respondent was informed by them that they are not

encroachers and that the plaint schedule property belongs to them. The 1st respondent alleged that although he informed the 2nd respondent by a letter dt.02-04-2007 to take steps for eviction of petitioners, no action was taken by 2nd respondent and therefore the suit was filed for protection of the plaint schedule property. The 1st respondent therefore sought for recovery of possession of the plaint schedule property from petitioners and for delivery of the same to 2nd respondent and for a perpetual injunction restraining the petitioners or anyone else claiming through them or on their behalf from alienating by way of sale, mortgage, gift or in any manner the plaint schedule property or any part thereof in favour of third parties and for costs.

4. The schedule to the plaint described the property as follows:

“SCHEDULE OF PROPERTY

All that part and parcel of Graveyard Muslim Khakrooban situated at Door No.13-1-59, Mangal Hat, Seetarampet, Hyderabad, admeasuring 400 square yards, lying on the South Western side of the entire graveyard area, within the following boundaries, and shown as per enclosed rough sketch in red colour boundary.

North : Lane

South : Neighbour's property

East : Graveyard area

West : Graveyard area”

5. Written statement was filed by defendant Nos.1 and 2, who contended that they are owners and occupants of Door No.13-1-13/2/44 of area 413 sq. yds having purchased the same under a registered sale deed Ex.B-1 dt.31-07-2006 from one

Chanda Bai and Raja Bai; that the husband of Misrilal Saheb purchased this property under a registered sale deed Ex.B-3 dt.11-07-1973 from one Shantha Bai and the said Shantha Bai in turn had purchased the property under a sale deed Ex.B-5 dt.17-11-1962 from Smt.Rehman Bee. It is specifically contended by petitioners that the gazette notification Ex.A-1 dt.21-03-1983, on the basis of which the

1st respondent had filed the suit, mentions at Sl.No.1794 property having door No.3-1-59 as wakf property and since the petitioners' property is having municipal Door No.13-1-13/2/44, the documents filed by 1st respondent do not pertain to the property claimed by petitioners. It is further alleged that on 06-10-2006, the Municipal Corporation of Hyderabad mutated the petitioners' name in its records also. They therefore contended that they are not encroachers and are not liable to be evicted.

6. The 2nd respondent/3rd defendant Wakf Board filed a written statement supporting the 1st respondent. It specifically averred that there is no dispute with regard to the description of the property. It denied that it did not take any action against encroachers.

7. On the basis of the above pleadings, the following issues were framed by the Wakf Tribunal :

“ i) Whether the suit schedule property is wakf and part of notified Gazette notification No.12-A, dt.21-03-1985 at page No.3, Sl.No.1794?

ii) Whether the plaintiff is entitled for possession as prayed for?

iii) To what relief?”

8. The first respondent/plaintiff examined P.W.1 and marked Exs.A-1 to A-7. The petitioners examined D.Ws.1 and 2 and marked Exs.B-1 to B-18.
9. An Advocate-Commissioner had also been appointed by the Tribunal to record the physical features of the plaint schedule property and he submitted a report, which is marked as Ex.C-1. In the said report, it is stated that both the parties identified the plaint schedule property; that the plaint schedule property is an open land; that there is no specific door No.13-1-1959 at the plaint schedule property; there were eight stones embedded in the earth standing above the earth at various places and there a neem tree, under which is a small deity structure. He stated that the schedule property is an open site surrounded by 64 houses. He also stated that door No.13-1-13/2/44 was not visible at the site.
10. By order dt.13-11-2009, the said suit was decreed by the Wakf Tribunal. It held that the Advocate-Commissioner had identified the property as an open site surrounded by other houses; no objections were filed to the Advocate-Commissioner's report; that the Commissioner had noticed stones embedded in the ear in the property and this is evidence of graves and suggests that Muslim bodies were buried in the property. The Tribunal also held that the plaint schedule property is part and parcel of the extent of 22,966 sq. yds notified in the gazette Ex.A-1 and since the Advocate-Commissioner did not notice any house in the plaint schedule property as claimed by petitioners/defendants, it cannot be the private property of defendants.
11. Challenging the same, this Revision is filed.

12. It is the contention of the learned counsel for petitioners that the Tribunal had erred in placing reliance on the Advocate-Commissioner's report in decreeing the suit; that the property described as the wakf property in the gazette Ex.A-1 had a door No.3-1-59 while the plaint schedule mentions the door number as 13-1-59; that the boundaries of the plaint schedule property do not tally with the boundaries of the wakf property shown in the gazette; merely because certain stones were found to be embedded in the earth in the property to which the Advocate-Commissioner visited, it cannot be said that they were Muslim graves. He further contended that no attempt was made to correct the plaint schedule by 1st respondent or 2nd respondent, and therefore, the Tribunal erred in decreeing the suit. He further contended that this being a suit for declaration, the 1st respondent/plaintiff should succeed on the strength of his own case and not on the basis of any weakness of the defendants' case and that the Tribunal overlooked this fundamental principle of law in decreeing the suit.

13. Sri A.M.Qureshi, learned counsel appearing for 1st respondent contended that the door No.13-1-59 mentioned in the plaint schedule is incorrect and it should have been mentioned as 3-1-59 which is mentioned in Ex.A-1 gazette publication. He contended that on the basis of the evidence of graves found by the Advocate-Commissioner, the Tribunal has rightly held that the plaint schedule property is a Wakf property. He also contended that the petitioners/defendant Nos.1 and 2 miserably failed to prove that the subject property belongs to them; that the Advocate-Commissioner found the plaint schedule property to

be a vacant site and also found that the Municipal No.13-1-13/2/44 does not exist in the site; and therefore, the Revision be dismissed.

14. Sri M.A.K.Mukheed, learned counsel appearing for 2nd respondent contends that there is a property bearing No.13-1-59 as per the Survey Commissioner's report; that there is no dispute that a mistake in the list of wakfs in Ex.A-1 published in the gazette; that the survey Commissioner's report will prevail over the gazette notification; and merely because there is some error in the description of the property, the plaintiff cannot be denied relief.

15. I have noted the submissions on both sides.

16. Admittedly, Ex.A-1 i.e. gazette notification containing the list of wakfs published under the Wakf Act, 1954 and it mentions the wakf property as having door No.3-1-59 at Sl.No.1794 therein. The Survey Commissioner's report Ex.A-2 does not mention any door number.

17. According to Section 6 of the Wakf Act, 1995 which is in paramateria with similar provision in Wakf Act, 1954, a survey is to be conducted by a Commissioner appointed by the Wakf Board and the said survey is supposed to cover wakfs existing at the time of survey. He would then forward his report to the State Government, which would then be publish the list of wakfs and forward the said list to the Board. Section 6(1) of the Wakf Act, 1995 states that if any question arises whether a particular property specified as wakf property in the list of wakfs is wekf property or not or whether a wakf specified in such list is a Shia

wakf or Sunni wakf, the Board or the mutawalli of the wakf or any person interested therein may institute a suit in a Tribunal for the decision on the question and the decision of the Tribunal in respect of such matter shall be final.

18. In the present case, the basis of the claim of plaintiff/1st respondent and 2nd respondent herein is Ex.A-1 list of wakfs published in the gazette. While the gazette publication mentions the door number as 3-1-59, the plaint schedule mentions a totally different door Number as 13-1-59. No steps have been taken by the respondents to correct the door number in the plaint schedule. While the learned counsel for 1st respondent alleges that correct door number is 3-1-59, learned counsel for 2nd respondent alleges that D.No.13-1-59 is correct. If the contention of the learned counsel for 1st respondent is accepted as correct, then the plaint schedule is wrong. On basis of an incorrect door number mentioned therein, his suit cannot be decreed. Since plea of 2nd respondent is different and contrary to plea of 1st respondent, even if it is correct, unless the Gazette notification Ex.A-1 is corrected to reflect the door number of the property as 13-1-59, no relief can be granted in favour of Wakf Board. So either way the petitioners' position is strong in law.

19. The Advocate-Commissioner in his report has categorically stated that the schedule property is a vacant site and there is no specific Door No.13-1-59 in it. It may be that both parties

identified the property visited by the Advocate-Commissioner as the disputed property. But the Advocate-Commissioner's report does not show that the disputed property forms part of the property notified in the gazette as the wakf property. Also, the Advocate-Commissioner stated that 8 stones were found embedded in the earth standing one foot above the earth in the property. From this, the Tribunal drew a conclusion that these 8 stones represent 'Muslim' graves. The Advocate-Commissioner however did not state that the stones found embedded in the earth in the property which he visited contain the names of the persons who are buried there. So the Tribunal could not have concluded that graves belong to persons professing Muslim faith.

20. The Tribunal overlooked the statement of Advocate-Commissioner that there is also a deity structure under a neem tree in the property. Since structure of a deity is found under the neem tree in the property, it is safe to presume that even if 8 stones found therein represent graves, they may not be Muslim graves because idolatry is opposed by Islam and not accepted. There is every possibility that the 8 stones represent the graves of Hindus who might have been buried there. Therefore, the finding of the Tribunal that the graves with 8 stones represent Muslim graves, is without any basis and it is perverse.

21. The 1st respondent had filed a suit for eviction of petitioners on the basis that the plaint schedule property is a wakf property. Therefore, he must succeed on the strength of his own case but not on the weakness of petitioner's case (See **Brahmanand Puri Vs. Mathrua Puri**). The Tribunal totally lost sight of this

principle while decreeing the suit on the ground that the case pleaded by petitioners/defendant Nos.1 and 2 is not found true. So even if the petitioners' case that the plaint schedule property has

D.No.13-1-13/2/44 is not established, still they are entitled to succeed.

22. Having regard to the above circumstances, I am of the opinion that the judgment of the Tribunal cannot be sustained.

23. Therefore, the Civil Revision Petition is accordingly allowed, and the judgment dt.13-11-2009 in O.S.No.64 of 2007 of the A.P. Wakf Tribunal, Hyderabad is set aside. No costs.

24. As a sequel, miscellaneous petitions pending, if any, shall stand disposed of.

JUSTICE M.S. RAMACHANDRA RAO

Date: 04-06-2015

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