

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND  
HARYANA AT CHANDIGARH**

**RSA No.60 of 1992**

**Date of Decision.05.10.2016**

The Punjab Wakf Board

.....Appellant

Vs.

Hira Singh (since deceased) through LRs and others

.....Respondents

**2. COCP No.1327 of 2003**

Surinder Devi

.....Petitioner

Vs.

State of Punjab and others

.....Respondents

**3. COCP No.80 of 2002**

Faqir Mohammed

.....Petitioner

Vs.

Surindra Devi and others

.....Respondents

**4. COCP No.937 of 1998**

Surindera Devi

.....Petitioner

Vs.

Mohammad Taj Rana and others

.....Respondents

Present: Mr. G.N. Malik, Advocate  
for the appellant.

None for the petitioners in COCPs.

Mr. Kanwal S. Walia, Advocate  
for respondent No.1.

Mr. Nirbhay Singh Gill, Advocate for  
Mr. Munish Gupta, Advocate  
for respondent Nos.5 to 11.

Mr. P.S. Bajwa, DAG, Punjab.

**CORAM:HON'BLE MR. JUSTICE AMIT RAWAL**

**AMIT RAWAL J. (ORAL)**

This order of mine shall dispose of one second appeal and three contempt petitions.

The appellant-Wakf Board is in second appeal against the judgment and decree rendered by the lower Appellate Court whereby the suit of the respondents-plaintiffs seeking declaration that plaintiffs and defendant Nos.3 to 15 are owners in possession of the land comprising in Khata No.209/238, Khasra No.43/27(7-7), Khata No.209/239, 240 Khasra No.201(4-0), Khata No.209/241, Khasra No.202(1-12), Khata No.209/245, Khasra No.87//26(18-8), 189(1-18), 200(2) and Khata No.36/52, Khasra No.87//27(5-18) situation in village Sialba, Hadbast No.118, Tehsil Kharar as entered in the jamabandi of 1976-77 with consequential relief of injunction, has been decreed.

Mr. G.N. Malik, learned counsel for the appellant submits that the learned Additional District Judge has illegally accepted the appeal ignoring the fact that the land has been used for graveyard by one family, as such it cannot be terms to be a graveyard. The aforementioned judgment is against the finding rendered by the Hon'ble Supreme Court in **Syed Mohd. Salie Labbai (dead) by LRs and others Vs. Mohd. Hanifa (dead) by LRs and others AIR 1976 SC 1569.**

He further submits that the judgment and decree under challenge is based upon the surmises and conjectures. Notice Ex.P1 was not valid notice. The appeal of the plaintiffs has erroneously been accepted, though the trial Court, had dismissed the suit. There is no reasoning assigned for setting aside the well reasoned judgment of the trial Court. The lower Appellate Court had failed to rely upon Ex.D3. In the earlier suit

filed titled as “Hira Singh Vs. Fazal Mohd., the plaintiff Babu Singh made a statement that the land is a *kabristan*. The present suit was, thus, hit by doctrine akin to *res judicata*. The property aforementioned was declared wakf by notification dated 22.08.1977 after complying with the provisions of erstwhile Wakf Act of 1954. It is settled law that once a *kabristan* has been held to be the public graveyard, it vests in the public and constitutes as a wakf.

It is not a case where the property in dispute was dedicated to *dargah* or religious purpose and in this backdrop of the matter, the property was declared wakf. Jamabandies Ex.P3 and P4, no doubt, showed ownership of the respondents-plaintiffs but in the column No.8, it has been shown as “*gair mumkin kabristan*” in the year 1976-77. The plaintiffs have miserably failed to establish the possession. The lower Appellate Court ought not to have granted the decree of ownership and possession. *Simpliciter* suit for declaration in the absence of possession was not maintainable, thus, urges this Court for setting aside the judgment and decree passed by the lower Appellate Court by formulating the substantial question of law as drawn in the memorandum of appeal.

Per contra, Mr. Kanwal S. Walia, Advocate for respondent No.1, Mr. Nirbhay Singh Gill, Advocate for Mr. Munish Gupta, Advocate for respondent Nos.5 to 11 and Mr. P.S. Bajwa, DAG, Punjab submit that procedure as prescribed under Section 4 of the 1954 Act was not followed and therefore, the publication of the wakf as per Section 5 of 1954 Act was without jurisdiction.

It is conceded position on record which is evident from the testimony of DW1 and DW2 that there was no survey conducted before

causing the publication declaring the property as wakf. There was no record of survey, in essence, survey commissioner was never appointed. Wakf Board cannot declare the property wakf. On the contrary, the respondents-plaintiffs have been able to prove that they were/are owners in possession of the property. The expression "*kabristan*" would not be construed as public graveyard and would not fall within the scope of ratio decidendi culled out in the judgment relied upon by Mr. Malik referred to above. The witnesses of the Wakf Board had admitted that there are other villages Fatehpur and Miyanlava where many Muslims were residing and they had different *kabristans*, in essence, it has been proved through the testimony of defendant's witnesses that it was not a public graveyard and therefore, it could not have been declared as wakf. Even otherwise, the declaration of property in one stroke, in the notification, cannot be treated as wakf property as it is in violation of Article 300A of the Constitution of India, thus, urges this Court for confirming the finding under challenge.

They further submit that burial of dead body in the land in dispute by one family was permissive. It cannot be termed and clothed with the status of public graveyard and therefore, it is out of the domain of wakf notification, thus, was not valid in law.

I have heard learned counsel for the parties and appraised the paper book. The law regarding definition of the wakf and declaration of the property particularly as *kabristan*/graveyard used for public is no longer *res integra* as per ratio decidendi culled out in **Syed Mohd. Salie Labbai's case** (supra). For the sake of brevity, para 32 of the judgment reads as under:-

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

*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 grave-yard is a 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 graveyard sheds its character and becomes a public grave-yard;*

*(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 show the public character of the graveyard.”*

Applying these principles to the facts and circumstances of the present case i.e. whether both the parties have been able to rebut each other's arguments to enable this Court to agree with the finding rendered by the lower Appellate Court or the trial Court and the answer, after examination the record of the Courts below, is in favour of the respondents-

plaintiffs, in essence, Section 4 of the 1954 Act prescribes that the State Government may, by notification in the Official Gazette, appoint for the State a Commissioner of Wakfs and as many additional or assistant commissioners of wakfs as may be necessary for the purpose of making a inquiry as it may consider necessary and submit its report in respect of existing wakfs or the number of wakfs as the case may be, nature and objects of each wakf and whether the property is wakf or not. The cross-examinations of DW1 and DW2 have been read by Mr. Kanwal S. Walia, learned counsel appearing for respondent No.1 in Court to contend that the Wakf Board had no record with regard to the survey conducted before promulgating the area in dispute as wakf property. The jamabandies for the year 1976-77, Ex.P3 and P4, shown the ownership of respondents-plaintiffs. Though the nature of land as indicated above is for *gair mumkin kabristan*, there is no evidence that the aforementioned land has been used as public graveyard or it would fall within the aforementioned parameters. A solitary graveyard made by a particular family would not clothe the property to be a public graveyard as the DWs have admitted that there are as many as 30-35 Muslims living in the adjoining property and they have their separate *kabristan* for all intents and purposes. The land in dispute cannot be said to be used for public graveyard and therefore, it was never dedicated for this purpose. Even the presumption would not be drawn in view of the candid admission of the defendant's witnesses.

I am of the view that there is no force and merit in the submission of Mr. Malik that the property has been rightly declared as wakf. The lower Appellate Court being the last court of fact and law has examined the evidence threadbare. By promulgating the notification in one

stroke, the plaintiffs cannot be made strangers and deprived of their ownership without compensation. There is no direct evidence or a presumption can be drawn to form an opinion with regard to user of the property as public graveyard. Rather the evidence brought on record was that except one family, all the other Muslims used to bury the dead bodies in their own lands. It is permissible in law to bury dead body in their own land and therefore, the property in dispute cannot be said to be a public graveyard. In my view, the trial Court has wrongly held the respondents-plaintiffs to be out of possession of the property other than khasra No.202 by relying upon the notification D1 and Jamabandi D2. In my view, the Appellate-Wakf Board has not been able to rebut by leading direct, cogent, much less, corroborative evidence to show that the suit land was rightly declared as wakf as it was being used for public graveyard.

Mr. Ghulam Nabi Malik, learned counsel appearing for the appellant has also relied upon judgment rendered by Hon'ble Supreme Court in **Mohammad Shah Vs. Fasihuddin Ansari and others AIR 1956 SC 713** wherein it has been held that wakf can be only created when the suit land has been used for time immemorial for religious purposes or as such graveyard. For the sake of repetition, no evidence has been led that property in dispute was used since time immemorial as graveyard i.e. by the Muslim inhabitants of the village.

For the reasons aforementioned, I do not find any reason to differ with the findings rendered by the lower Appellate Court below, much less, no substantial question of law arises for consideration. No ground for interference is made out. The second appeal is dismissed.

The contempt petitions had been filed for violation of the ad

interim order dated 30.11.1994 whereby this Court while admitting the appeal had passed the following order:-

*“Admitted.*

*In view of the status quo order which was passed by the Bench before whom the matter had come up for hearing earlier, it is hereby ordered that in view of the order passed by the Addl. District Judge, Ropar, holding the present respondent in possession of the suit property, that status quo shall continue till the disposal of the appeal. Dasti.”*

Once, I have already upheld the judgment and decree passed by the lower Appellate Court, I am of the view that interim order also goes and therefore, cannot be violated or there is any willful disobedience of the interim order.

The second appeal and the contempt petitions are dismissed.

**(AMIT RAWAL)**  
**JUDGE**

**October 05, 2016**  
Pankaj\*

Whether reasoned/speaking      Yes

Whether reportable      Yes