

HON'BLE SRI JUSTICE P.NAVEEN RAO

CIVIL REVISION PETITION No.668 of 2009

DATE: 13.06.2017

Between:

Sri Lal Bandala Rukman Rao, s/o. Prabhaji Rao,
Aged 59 years, Occ:Blacksmith, Sadasivpet,
Medak District.

.... Petitioner

and

A.P.Wakf Board, rep. by its Chief Executive Officer,
Razak Manzil, Opp:Public Gardens, Hyderabad
and others.

.... Respondents



The Court made the following:

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ORDER:

First defendant is revision petitioner. Suit filed by the A.P. State Wakf Board decreed holding that the suit land is wakf by user and issued direction to remove the alleged structures made by the petitioner and others and the Wakf Board to take possession of the suit schedule land.

2. The claim of plaintiff was that the suit schedule property is a registered wakf property by virtue of survey report of Commissioner of Wakfs; that defendants 1 to 3 have no concern with the said property; that they have encroached in the year 1997 and removed some of the graves; however, on protest, they stopped further action; that in July, 1998, they again encroached and constructed compound wall; that even though notice under Section 54(1) of the Wakf Act, 1995 was issued on 28.08.1998, they failed to remove the unauthorized structures made. Based on the said contentions, the suit was instituted praying to grant the relief as briefly noted above.

3. In his written statement, first defendant asserted that the Wakf Board has no title to the suit schedule property and merely because a survey was conducted cannot vest title on the Wakf Board. Even assuming that a survey was validly conducted, the property was not notified as wakf property and therefore, unless property is notified as wakf property, based on survey report, the Wakf Board cannot claim the suit schedule property as wakf property; that no prior notice or opportunity was afforded by the

Survey Commissioner before conducting the survey; that no encroachments were made by the first defendant; that there are no grave yards in the land, only couple of grave yards are situated on the eastern side of the plot ; that the first defendant was in possession of the property concerned for more than 70 years; that the said subject property is a Government land and Government issued notice under the Land Encroachment Act, later, Government agreed for regularization and negotiations were going on for regularization; that there is a serious dispute regarding existence of grave yard and adjacent property and a complaint was filed before the District Collector. The Additional District Collector held that the person, against whom complaint was filed, was in illegal possession of land belonging to the Government. He had also held that grave yard covers only Ac.0.03 gts. This finding of the Additional District Collector, Medak District, has become final as no challenge was made.

4. Based on the pleadings the Wakf Tribunal settled following issues for trial:

- 1) Whether the suit property is a Wakf property or not?
- 2) Whether the plaintiff is entitled for perpetual injunction as prayed for?
- 3) To what relief?

Additional issue:

Whether plaintiff is entitled for grant of mandatory injunction directing the defendants 1 to 3 to remove the compound wall and other constructions made in the Muslim grave yard in Survey No. 410 of Sadashivpet town ?

5. On behalf of plaintiff, 2 witnesses were examined and marked Exhibits A1 to A9. On behalf of defendants 1 to 3, DWs.1 and 2 were examined and marked Exhibits B1 to B22.

6. On the first issue, Tribunal held suit schedule land is wakf by user and is a wakf property. On issue no.2 and additional issue, Tribunal held that plaintiff is entitled to mandatory injunction and perpetual injunction.

7. Suit was decreed with costs against defendants 1 to 3 and dismissed against 4th defendant. 1st defendant was directed to remove the constructions made on the graveyard within one month. Failing which, the plaintiff was granted liberty to take steps to remove the constructions made on the grave yard by due process of law and defendants 1 to 3 are restrained from interfering with the peaceful possession of the plaint schedule grave yard by the plaintiff by means of perpetual injunction.

8. Heard learned counsel for petitioner Sri O.Manohar Reddy, Sri Farhan Azam Khan, learned Standing Counsel for the Wakf Board and Sri Mohd.Vasi Ahmed, learned counsel for 5th respondent.

9.1. Learned counsel for petitioner Sri O.Manohar Reddy submitted that the suit is filed for declaration and to remove the structures made in the grave yard and to restrain defendants 1 to 3 from interfering with peaceful possession of suit schedule property.

9.2. Sri O Manohar Reddy would further submit that the order of the Additional District Collector, Medak (Ex.B-8) would disprove

the contention of the plaintiff that the entire land to an extent of Ac.0.20 gts is grave yard and at the most, their claim is only confined to Ac.0.03 gts. He would further submit that even though the contentions of the petitioner herein were accepted on all aspects, still the Wakf Tribunal holds that the suit schedule land is wakf by user and passed erroneous decree directing them to remove constructions made and ordering eviction.

9.3. Referring to the issues framed and the findings recorded by the Tribunal, he would submit that the findings recorded against issue No.1 are contrary to the findings recorded by the Tribunal on issue Nos.2 and 3. Against issue No.2, the Tribunal held, accepting the contention of the petitioner, that no notice was given before conducting survey and that the survey conducted by the officials of the Wakf Board is not binding on the defendants. Whereas against issue No.1, by relying on the very same survey report, the Tribunal held that the petitioners are in unauthorized occupation of the Wakf land.

9.4. He would further submit that though specific plea was raised that no burials have taken place for the past 40 years in the said grave yard and therefore, it cannot be treated as grave yard and the Board cannot claim as grave yard, the same was rejected on the ground that once a Wakf, it is always a Wakf and merely because property is not put to use, it does not lose the status of Wakf property. He would further submit that even though the Tribunal agrees with the contention that as no Gazette Notification was produced, the property cannot be treaded as Wakf property,

the Tribunal relied on the photo copy of the report of the surveyor (Ex.A-9) to hold the land as Wakf land.

9.5. He would further submit that no evidence was brought on record to show that public was permitted to use the said land as grave yard. He would submit that unless the public are permitted to use the land as grave yard continuously for long time, it cannot acquire the status of burial ground and describe as Wakf by user. Merely because few tombs exist in the land, it cannot be described as wakf by user. In support of his contention, he placed reliance on the decision of the Supreme Court reported in ***Syed Mohd.Salie Labbai (dead) by L.Rs and others Vs. Mohd. Hanifa and others***¹.

9.6. He would further submit that in fact, the suit itself was not maintainable on the ground that no declaration of title was sought and that the State was not arrayed as defendant, more so when the Tribunal recorded the finding that the land belongs to the Government. In the absence of Government as a defendant, no relief as sought for could have been granted. He would submit that in the facts of the case relief of mandatory and perpetual injunctions could not have been granted. In support of the said contention, he placed reliance on the decision of the Supreme Court in ***Anathula Sudhakar Vs. P Buchi Reddy (dead) by L.Rs and others***².

9.7. He would further submit that no evidence was brought on record to show that the petitioner has encroached into the land belonging to the wakf. Unless the factum of ownership of suit

¹ 1976 (4) SCC 780

² 2008(4) SCC 594

schedule land and encroachment is established, the question of eviction and removal of the alleged illegal structures does not arise. Before giving finding on these factual aspects, the Tribunal erroneously declared the suit schedule property as wakf by user.

10.1. By extensively referring to the depositions in the plaint as well as written statement of the 1st defendant, learned standing counsel would contend that admittedly graves were existing in the suit schedule property. When graves are existing, it becomes a wakf property by virtue of wakf by user principle and therefore the petitioner has no manner of right to occupy the land which is classified as Wakf land by means of wakf by user. Even admittedly petitioner was not the owner of the land and the owner of the land is Government. Even Government has proceeded against the petitioner under the Land Encroachment Act. Petitioner cannot illegally occupy wakf property. It cannot be the concern of the petitioner to contend that it is a Government land and therefore, Wakf Board has no authority to claim. If at all there is dispute regarding the extent of land classified as wakf by user and the ownership, it would be between the Government and the Wakf Board. Once petitioner admits that he is in occupation of the Government Land, even assuming that the suit schedule land is not wakf land, he has no manner of right to occupy the Government land and claim as his own.

10.2. He further contended that once the land is recognized as wakf property, the Board has full authority to initiate proceedings for eviction of unauthorized occupants, in accordance with the provision contained in Section 54 of the Wakf Act. Under Section

54 (1) of the Wakf Act notice was issued for eviction of petitioner. Since petitioner did not comply with notice of eviction from the suit schedule property, the suit was instituted.

10.3. On oral instructions, he would further submit that this graveyard is in use and it is used for burial of stillborn and infants. He would further submit that even according to the revenue authorities graves exist and therefore, it is a graveyard and as it is put to use for burial of dead bodies, it becomes wakf by use. By referring to the Full Bench judgment of this Court in ***Vinjamuri Rajagopala Chary and others Vs State of Andhra Pradesh***³, he would submit that Wakf Board becomes the owner once a property is classified as wakf by user. Once it is the wakf property, even the revenue authorities have no competence to interfere.

10.4. He would further submit that the cause of action for initiation of proceedings for institution of suit was illegal construction of boundary wall, disturbing the graves. Even according to the Municipal authorities no permission was granted to the petitioner for construction of boundary wall and permission was granted only for the purpose of construction of building. As it was noticed that while constructing the boundary wall illegally, the petitioner encroached into the land of the wakf Board and disturbing the graves, the suit was instituted.

10.5. He therefore, submitted that there is no illegality in institution of the suit in view of the fact that even according to the Government graves are existing on the schedule property and can no more be treated as Government land and therefore, merely

³ 2016 (1) ALT 550 (FB)

because Government was not arrayed as defendant in the suit, the suit proceedings cannot be vitiated on that ground.

10.6. Finally he would submit that even assuming that Government ought to have been arrayed as a defendant and Government is proper and necessary party, matter may be remitted to the Wakf Tribunal and Wakf Board would take steps to implead the State as defendant and to prosecute the suit.

11. The following issues fall for determination:

1. Whether the suit schedule property is a wakf property?
2. Whether non-joinder of State of Telangana is fatal to the maintainability of the suit?
3. Whether Tribunal erred in issuing mandatory and perpetual injunction?

12. The facts relevant to note are as under:

The land in Sy.No.410 of Sadasivpet village is Government land. Wakf Board claim that there is a Muslim Graveyard in the said survey number. 1st defendant claims that he is in occupation of piece of land for several years and constructed house in the same survey number. Alleging that there is a Muslim graveyard in an extent of 0.20 guntas in the said survey number and that 1st defendant encroached into the grave yard land, dismantled graves and was constructing compound wall, this suit was instituted by then A.P.Wakf Board (presently Telangana State Wakf Board).

13. To appreciate rival contentions, it is useful to extract the relevant findings of Tribunal on the issues framed by the Tribunal:

“3.....The plaintiff filed survey commissioner report, Ex.A9 into Court to show that the suit land is a grave yard and it is notified as wakf property. ***I agree that the plaintiff failed to produce Gazette notification to show that it is published in the official Gazette.*** Simply because it is not published in the Gazette, it may

not cease to be a wakf by user. ***I agree that there is no evidence about the dedication of the suit land as grave yard. It is also true that the land in survey No. 410 is a government land. It is also not in dispute that there is a muslim grave yard in survey No. 410 and it is the suit property.*** The admissions made by the parties and the photos filed by the plaintiff show that suit property is a grave yard and even not number of graves are existing. ***Though there are no burials for the past so many years the land may not lose the character of a wakf by user.*** In the case relied upon by the defendants there was no evidence as to number of dead bodies that had been buried in the disputed land. But in the present case there are graves visible on the land and the sanctity of graves should be preserved. ***I am of the opinion that simply because no dead body is buried in recent times. It can not lose the character of grave yard and no body can trespass and make constructions on the grave yard land.*** For the foregoing reasons, I have no hesitation in coming to conclusion that the subject grave yard is a wakf by user and it is a wakf property and the wakf Tribunal has got jurisdiction to entertain the suit. I accordingly answer this issue.

.....

6. ***From the evidence on record, it is clear that 1st defendant is occupying 500 sq yards of land and 2nd defendant is occupying 500 sq yds of land in survey No.410 of Sadashivpet town which is a Government land. The Wakf Board is not concerned with it and it is the matter between the Government and defendants 1 and 2 and other occupants.*** Admittedly, there is a muslim grave yard in Sy No.410. The Wakf Board is concerned with it being the custodian of wakf properties in the State of Andhra Pradesh. ***According to Survey Commissioner report the extent of the grave yard is 0.20 guntas, whereas the defendants are contending that the extent of grave yard is 0.03 guntas and not 0.20 gunta as alleged by the plaintiff.*** They are relying on the orders passed by the Additional District Collector, Medak in file NO. 113/LA/59 dated 13.10.1960 and it is marked as Ex.B.8. ***The Additional District Collector observed that the disputed site in question in the appeal before him is quite adjacent to the grave yard and no grave is coming under the proposed construction and granted permission to Garella Radhaiah to construct the house.....***

7. ***I agree with the learned counsel for the defendants. In the present case there is no evidence that any notice was given to the defendants, before conducting survey by the officials of the Wakf Board and in view of the decision cited above, survey conducted by the officials of the Wakf Board is not binding on the defendants. Further Officer into the court nor relying on it.***

8. In the present case the plaintiff is not disputing the possession of defendants 1 and 2 in survey No. 410. Similarly defendants are not denying the existence of grave yard in Survey No. 410 on the eastern side of their houses. Therefore we need not to go into the aspect whether the extent of the grave yard is 0.20 guntas or 0.03 guntas. All we have to consider is whether the defendants encroached into the grave yard land and whether the constructions made by them is on the grave yard land.

9. Either plaintiff or the defendants 1 to 3 did not take steps for appointment of an Advocate Commissioner to inspect the subject grave yard and to note the physical features to ascertain whether the construction of the compound wall was made on the grave yard land and whether any graves were damaged.”

(emphasis supplied)

ISSUE No.1

14. It is not the case of plaintiff that house was constructed by petitioner on burial ground. Plaintiff only alleges that compound wall of the house was constructed by damaging existing graves. Plaintiff admits that entire extent of land is government land. No evidence is brought on record to show that entire extent of suit schedule land has become wakf by user and is classified as Mohammedian burial ground. The Ex.B-8 only recognizes that in Ac.0.3 guntas of land there are few graves existing. The contents of the report are not controverted. The State of Telangana who is the owner of the suit schedule land is not a party to the suit. Petitioner claims that the land occupied by him is regularized by the government; that he was granted building permission by the Municipal Corporation and he built house as per the permission granted. Contention of the petitioner that he has been in possession and occupation of said portion of land, is not controverted. The Tribunal holds that to the extent of land occupied by defendants 1 and 2, the Wakf Board is not concerned and the matter is between Government and the defendants 1 and 2. As noted above occupation and construction of houses by defendants 1 and 2 are not disputed by plaintiff. The only grievance was that a compound wall was constructed by damaging existing graves.

15. To establish that compound wall was constructed by petitioner on a wakf property by damaging the graves, the plaintiff has to prove that the subject land has been in use as burial ground by Mohammedians from times immemorial and

Mohammedian public have right to use the land without any restriction/hindrance and the property is in possession of Wakf Board. Revenue records disclose existence of few graves in Ac.0.3 guntas of land. No material is brought on record to show that entire extent of the suit schedule land has been in use by Mohammedian public as grave yard. Heavy reliance was placed on alleged survey conducted by officials of Wakf Board. P.W.1, who was working as Inspector of Audit in A.P. Wakf Board (presently Telangana Wakf Board) at the relevant point of time admitted that there was no proof of service of notice on petitioner. He admitted that sending of notices to defendant and panchanama drawn on the day when survey was conducted are not marked as exhibits in the suit. He admitted of not filing any other record and not reporting to Municipal Corporation and Revenue authorities on encroachment into grave yard and damage of graves. The Tribunal records that no prior notice was issued to petitioner and Government was not involved while conducting survey. Tribunal holds the report of survey is not binding on petitioner and the Government. There is no other material in support of its finding that the suit schedule property is Wakf property.

16. There is no second opinion on the proposition of law that once a wakf always a wakf. However, the suit schedule land is not a notified wakf property. It is claimed as wakf property on the principle that it is 'wakf by use'. Unless it is established that suit schedule property has become wakf property by virtue of 'wakf by use', the settled principle of law that 'once a wakf always a wakf' has no application.

17. In **Syed Mohd.Salie Labbai**, Supreme Court described vividly on the status of a grave yard in Mohammedan law. Supreme Court observed:

“28.....Under the Mahomedan Law the graveyards may be of two kinds — a family or private graveyard and a public graveyard. A graveyard 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 graveyard 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 graveyard has become a public graveyard** where the Mahomedan public will have the right to bury their dead. **It is also well settled that a conclusive proof of the public graveyard is the description of the burial ground in the revenue records as a public graveyard.**

.....

.....

31.....We are of the view that once a kabaristan 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 graveyard is a private or 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 show the public character of the graveyard.” (emphasis supplied)

18. In the instant case, revenue records do not describe the land as burial ground. The suit schedule property is not gazetted as required by the Wakf Act, 1995. No evidence is placed on record to show that it is put to use continuously for large number of years as burial ground by Mohammadian community, except existence of few graves on a small piece of land (A.0.3 guntas). It is not shown how compound wall was constructed by encroaching into Wakf land and by damaging graves.

19. Thus findings arrived at by the Tribunal holding the entire suit schedule land as wakf property are contrary to evidence on record and is erroneous in law and on facts.

ISSUE No.2

20. Plaintiff, defendants and Tribunal agree that suit schedule land is Government land. State never declared the suit schedule land as wakf land. In the absence of owner of the land, third parties cannot settle among themselves ownership claims and seek to resolve boundary dispute to such property. State being the owner of the property, it is a necessary and proper party and Tribunal erred in granting declaration affecting the State of Telangana.

ISSUE No.3

21. In substance claim of plaintiff Wakf Board is petitioner encroached into Wakf land, removed existing graves and constructed compound wall on the wakf land. Claim of Wakf Board that entire extent of land in Survey No.410 is wakf land is in cloud and when serious objection is raised by petitioner herein on

ownership claim, appropriate relief that can be sought is declaration of title and consequential injunction. In absence of prayer for declaration of title, no relief of mandatory and perpetual injunction can be granted.

22. In **Anathula Sudhakar**, Supreme Court explained the scope of appropriate remedy for various classes of cases. Supreme Court observed as under:

“13.3. Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from the defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. **Where the title of the plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.**

14. We may, however, clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to the plaintiff's title raises a cloud on the title of the plaintiff to the property. **A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property.** On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. Where the plaintiff, believing that the defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raise a serious dispute or cloud over the plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised only the issue of possession and not any issue of title.”
(emphasis supplied)

23. Even assuming a portion of land in Survey NO. 410 is wakf land, no material is brought on record to show that the petitioner encroached into wakf land. A person can be ordered to vacate the land and restrain from interfering from possession and enjoyment only if ownership is not in dispute and it is proved that defendant is allegedly in unauthorized occupation of such land.

24. In the above analysis of facts and law and in view of principles delineated by Supreme Court in **Anathula Sudhakar**, no mandatory and perpetual injunction could have been granted in the facts of this case.

25. Having regard to the above findings, CRP deserves to be allowed. It is accordingly allowed.

26. However, it is made clear that the findings recorded herein do not take away the competence of Government in declaring entire extent of land in Sy.No.410 or part thereof as burial ground and to protect the Government land and/or land identified as burial ground from encroachment and/or to remove any encroachments.

Miscellaneous petitions if any pending shall stand closed.
There shall be no order as to costs.

JUSTICE P.NAVEEN RAO

Date: 13.06.2017
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