

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

CR No.2844 of 2016

Date of Decision:- 10.08.2017

The Tomb/Makbra of Late Faquir Nazir Ahmad Chisti Sabri

....Petitioner

vs.

Union of India and others

....Respondent

CORAM:- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present:- Mr. Sunil Chadha, Sr. Advocate with
Mr. Chetan Mittal, Advocate,
for the petitioner.

Mr. Anil Chawla, Advocate,
for respondent No.1.

Mr. B.S. Thind, Advocate,
for respondents No. 2 and 3.

Ms. Bhupinder Kaur, Advocate for
Mr. Kapil Kakkar, Advocate,
for respondents No. 4 and 5.

DAYA CHAUDHARY, J.

Petitioner has approached this Court by way of filing the present revision petition under Article 227 of the Constitution of India for setting aside impugned judgment and decree dated 19.1.2016 passed by the Court of learned Waqf Tribunal-cum-Additional District Judge, Chandigarh whereby suit filed by the petitioner-plaintiff against the respondents-

defendants has been dismissed.

Briefly, the facts of the case, as made out in the present petition, are that the petitioner-plaintiff filed a suit for declaration to the effect that notification dated 3.2.2006 issued under Section 5(2) of the Waqf Act, 1995 (hereinafter referred to as 'The Act') be declared as null and void and is inoperative as no statutory provisions of Section 4(3) of the Act have been complied with. It was also mentioned in the suit that land measuring 1 kanal 16 marlas in Khasra No. 48/26, in village Burail, UT, Chandigarh was a tomb of Faquir Nazir Ahmed Chisti Sabri was the ancestral property of Faquir Nazir Ahmed and not the property of Waqf Board. It has also been prayed in the suit that defendant Nos. 1 to 5 be restrained from interfering in the peaceful possession of the plaintiff-petitioner over the suit property.

As per case of the plaintiff, he was appointed as Khalifa by Aia Chisti on 20.10.2007 for the tomb of Faquir Nazir Ahmad Chisti Sabri through its Khalifa Nahim Chisti Sabri, Sector 45, Burail Chandigarh. Said Khalifa Nazir Sabir was a legally appointed Khalifa of his Takia where his tomb was built as per his last wish to be buried in the Takia itself. Said tomb was earlier run and controlled by Khalifa Nazir Shah since the year 1975 and after his death on 20.1.2007, the plaintiff was appointed as Khalifa and was controlling the same. There was no alleged notification dated 3.2.2006. Subsequently, the plaintiff-petitioner came to know that suit property was taken over by the Waqf Board vide notification dated 3.2.2006 and proceedings were initiated before the Competent Authority in Chandigarh. As per case of the plaintiff, said notification dated 3.2.2006 is

not sustainable in the eyes of law having been passed without following the statutory provisions of Section 4(3) of the Act. Said statutory proceedings are not only mandatory but also quasi judicial in nature. The principles of natural justice were also required to be followed while conducting an inquiry under Section 4(3) of the Act. However, the suit filed by the petitioner-plaintiff was dismissed with costs vide judgment dated 19.1.2016 passed by the learned Additional District Judge, Chandigarh, which is being challenged by way of filing the present revision petition.

Learned Sr. counsel for the petitioner submits that the learned Tribunal dismissed the suit on the ground of limitation, whereas, the petitioner-plaintiff, while filing the suit also moved an application for condonation of delay. Said application was filed under the provisions of Order 7 rule 6 read with Section 151 CPC and a specific ground was taken therein that no notice was ever issued by any Commission of Waqf Board and delay was liable to be condoned. Learned counsel also submits that the suit was filed on 14.6.2010 which was within the period of limitation of one year but issue No.1 was decided against the petitioner-plaintiff by holding that the suit was time barred. Learned counsel also submits that a wrong finding has been given by the learned Tribunal that the suit was not maintainable as mandatory notice under Section 89 of the Act was not given. Learned counsel also submits that the petitioner-plaintiff also filed a separate application under Section 151 read with Section 80 of CPC seeking exemption from sending notice before filing of the suit against respondent-defendants. Even an exemption was sought for filing suit without issuance of prior notice under Section 89 of the Act. Learned

counsel further submits that suit should not have been dismissed only on the ground of non-issuance of notice under Section 89 of the Act. It was also maintainable in view of the provisions of Section 80 of the CPC. Learned counsel submits that as per notification dated 3.2.2006 relied upon by learned Tribunal, the suit property was held to be Waqf property, whereas, the issuance of notification under Section 5 of the Act is not conclusive and is not binding upon third party and suit property cannot be held to be a Waqf property simply on the basis of publication made by Waqf Board. A wrong finding has been given by learned Tribunal by relying upon the entry of Peer Khana in the jamabandi for the year 1982-83 which is contrary to definition of "Waqf" as mentioned in Section 3 (r) of the Act (prior to amendment of 2013). Learned counsel also submits that as per admission of defendants' own witness DW-1, namely, Ms. Meghna Nijhawan, Senior Law Officer, originally Bakhtawar Singh was the owner of the property in dispute as per record and later, it was transferred in favour of ancestors of the petitioner in the revenue record. A wrong finding has been given by the learned Tribunal that no document was shown for transfer of ownership by Bakhtawar Singh in favour of the petitioner or his ancestors. A wrong finding has also been recorded by the learned Tribunal that plaintiff has failed to show that the suit property was an ancestral property and same was devolved upon him by way of Will or any other mode. It was for the Tribunal to see as to whether any Will in favour of the petitioner qua suit property was there or not. The findings recorded by the Tribunal are contrary to revenue record and is result of misleading, mis-interpretation and misconstruction of the provisions of the Act. At the end, learned

counsel for the petitioner submits that there is no evidence, oral or documentary, to establish that the suit property is Waqf property except impugned notification dated 3.2.2006. Said notification is also result of non-compliance of mandatory provisions of Section 4 of the Act.

Petitioner being Peer Khana has been performing its duties on various occasions like Moharram and even the permission was granted by the Chandigarh Administration also. Certain functions were performed, whereas, there was no provision of conducting any such programmes under Sunni Muslim Law. Persons belonging to different religions visit that place and it cannot be said to be Waqf property in any manner. Learned counsel has also relied upon the judgments passed by Hon'ble the Apex Court in *The Board of Muslim Wakfs, Rajasthan vs. Radha Kishan and others*, 1979 AIR (SC) 289, *Punjab Wakf Board vs. Gram Panchayat @ Gram Sabha*, 2000 (1) RCR (Civil) 283 and judgments of this Court passed in *Punjab Wakf Board vs. Yogesh Kumar and others*, 2014(2) LAR 552, *Dev Raj and others vs. Teja Singh and others*, 2004 (2) RCR (Civil) 753, *The Punjab Wakf Board and another vs. Kashmir Singh and others*, 2012(4) PLR 793, and a judgment of Himachal Pradesh High Court passed in *Punjab Wakf Board, Ambala and another vs. Gram Sabha, Basoli and another*, 1986 AIR (H.P.) 23 in support of his arguments.

Learned counsel for the respondents submit that judgment of learned Tribunal is well reasoned and is based on proper appreciation of evidence. There is no evidence on record to prove that the property in dispute is not the waqf property.

Furthermore, the plaintiff has challenged the notification dated

15.4.2010, vide which the suit property was declared as wakf property. The only grouse of the plaintiff was that no notice was served upon them before declaring the suit property as 'wakf'. On the other hand, the counsel for the defendants submitted that the list of Wakf property, was surveyed by Survey Commissioner under Section 4 and further the publication of such list under Section 5 and notification was issued on the basis of the list of the wakf. No doubt, it was admitted by the defendants that no notice was served upon the parties after survey report by Survey Commissioner under Section 4 was published. There was no necessity for issuance of a notice because nature of the property in the revenue record was shown as Peer Khana. It is also an admission on the part of the plaintiff that the suit property was being used for religious purpose. The photographs Exhibit DW1/B to DW1/F also showed that it was being used for religious purpose and not by the members of one single family, but by people at large. Certainly, the suit property being used for religious purpose by the muslim vests in the 'wakf'. The plaintiff cannot claim that the suit property was his ancestral property and there was necessity for serving him notice because he himself admitted that the nature of the suit property was Peer Khana. His ancestors were shown as Khidmatgar and not the owners. Thus, there was no violation of any rules and regulations governing the declaration of the property as a wakf because the suit property was admittedly being used for religious purpose by all the Muslims. Thus, the plaintiff-petitioner has failed to show that the notification was illegal and the same was not made in accordance to the provisions of the Wakf Act. Hence, these issues are decided against the plaintiff and in favour of the defendants.

Heard arguments of learned counsel for the parties and have also perused the impugned judgment passed by the learned Tribunal as well as other documents available on the file.

Filing of suit by the petitioner-plaintiff and dismissal thereof is not disputed.

In the suit, filed by the petitioner, the following issues were framed:-

- “1. Whether the suit is within limitation? OPP
2. Whether the suit is maintainable? OPD
3. Whether the petitioner is entitled to the declaration to the effect that notification No. CWP/Publication/2280/206 dated 3.2.2006 issued under Section 5(2) of the Wakf Act, 1995 is null and void? OPP
4. Whether the petitioner is entitled to the declaration to the effect that land bearing 1 kanal 16 marlas falling in Khasra No. 48/26 is the ancestral property of Faquir Nazir Ahmed ? OPP
5. Relief.”

The Waqf Act, 1954 was enacted to provide for the better administration and supervision of the Waqfs. The object and purpose of the Act was to bring the management of the Waqfs subject to supervision of the State. The scheme of the Act is necessary to be mentioned. Section 2 makes the Act applicable to all Waqfs in India except to Durgah Khawaja Sahab Ajmer. Section 3 defines certain terms and the term “Waqf” and the expression “person interested in a waqf” have been defined as under:-

"3 (h) 'person interested in a wakf' means any person who is entitled to receive any pecuniary or other benefits from the wakf and includes,-

(i) any person who has a right to worship or to perform any religious rite in a mosque, idgah, imambara, dargah, Khangah, maqbara, graveyard or any other Religious institution connected with the wakf or to participate in any religious or charitable institution under the wakf;

(ii) the wakif and any descendant of the wakif and the mutawalli.

(1) 'wakf' means the permanent dedication by a person professing Islam of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes

(i) a wakf by user;

(ii) grants (including mashrut-ul-khidmat) for any purpose recognised by the Muslim law as pious, religious or charitable; and

(iii) a wakf-alal-aulad to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable;

and 'wakif' means any person making such dedication."

The suit filed by the petitioner was dismissed on the ground that he failed to give sufficient reasons in not challenging the notification of the suit property regarding declaration of pious property which was issued vide notification dated 3.2.2006. The suit was not filed within the period of limitation of one year and was filed after four years of the issuance of the notification. As per provisions of Section 89 of the Act, two months

notice was mandatory before filing of the suit against the Waqf Board but no such notice was served. The learned Tribunal while dismissing the suit has held that the onus was upon the plaintiff to prove that the property in dispute was ancestral and plaintiff was the owner of the same. Only on the basis of entries in the jamabandis for the year 1982-83 wherein it was shown that Khalifa Nazir Shah, was the owner of the land in dispute, a right has been claimed. It has been held that jamabandi is not the only document to prove the title of the property unless it is supported by any title deed or relevant document. The plaintiff-petitioner failed to prove any document of ownership or transfer by Bakhtawar Singh, who was original owner of the property. The plaintiff is claiming to be owner only on the basis of Will but no such Will was produced on record by him during the pendency of the trial. Even he admitted in his cross-examination that he did not produce any copy of the Will neither in the Court of SDM nor before the trial Court. He has also admitted that suit property was neither transferred in his name nor in the name of his mother on the basis of Will. He has also admitted in his statement that he never mentioned about the Will in the present case also. As per statement of plaintiff, Bakhtawar Singh was a Sikh or a Hindu and he was original owner of the suit property. He further admitted that ancestors of said Bakhtawar Singh were Khidmatgars of the suit property but there was no writing or document showing the appointment of his ancestors as Sewadars of the suit property by original owner Bakhtawar Singh. On the basis of statement and documents available on the record, the plaintiff-petitioner could not prove that the suit property was his ancestral property and same was devolved

upon him by way of Will or any other mode. From his admission, it appears that ancestors of the plaintiff-petitioner were only Khidmatgars i.e. Care taker and as such, care-taker cannot be vested with the right of ownership in the suit property. The suit property has been shown as Gair Mumkin Peer Khana and same has been admitted by the petitioner in his cross-examination that it has been mentioned as Gair Mumkin Peer Khana in the jamabandi for the year 1955-56. It has also been proved on record that the suit property was not used personally but it was used by the Muslim community for religious purposes. Even the mutation which was standing in the name of ancestors of the plaintiff-petitioner was set aside by the order of the Assistant Collector dated 15.4.2010 and thereafter, final mutation of the land in dispute was sanctioned in the name of Chandigarh Waqf Board vide order of even date. The appeal filed against said order was also dismissed on 10.9.2014. The notification on the basis of which the suit land was de-notified was on the ground that it was a religious property and not the self-acquired property of the ancestors of the plaintiff-petitioner.

On the basis of evidence available on record, it was proved that it was not the ancestral property of the plaintiff and it was never used for any religious purpose.

An argument has also been raised by learned counsel for the petitioner that no notice was served upon him before declaring the suit property as Waqf property, whereas, as per stand of defendants, the list of Waqf property was surveyed by the Survey Commissioner under Section 4 of the Act and publication of said list was made under Section 5 of the Act and thereafter notification was issued on the basis of list of the Waqf. No

doubt, no notice was served upon the parties after survey report by the Survey Commissioner under Section 4 of the Act but no such notice was required to be issued because of nature of property which was shown to be Peer Khana in the revenue record.

The suit was filed by petitioner on the ground that the suit property was ancestral and he was the owner of the same. He claimed ownership only on the basis of entry in the jamabandi for the year 1982-83. Being plaintiff, the onus was upon him to prove that the suit property was ancestral. Jamabandi is not the document of title unless the same is supported by the title deed or any other relevant documents. Petitioner-plaintiff did not produce any document showing transfer of ownership by Bakhtawar Singh, the original owner of the property in his favour or his ancestors. He also failed to bring on record any document to show that he was owner of the suit property. Even in his cross-examination, he has admitted that he became owner of the suit property by virtue of the Will but no Will was produced on record at any point of time during proceedings of the Court. He also admitted in his cross-examination that he did not produce copy of the Will even in the Court of SDM. It was also admitted by him that suit property was neither transferred in his name nor in the name of his mother on the basis of Will. It was also admitted that he was not having any writing or document made by original owner Bakhtawar Singh whereby he was given any right over the suit property. The trial Court while dismissing the suit has categorically held that the plaintiff had failed to show that the suit property was ancestral property. It was only proved on record that his ancestors were only Khidmatgars (Care-takers). A caretaker

cannot be vested with the right of ownership of the property in dispute. Accordingly, on the basis of entry in the jamabandi, he could not be declared as owner or having any right of ownership. The property has been shown to be *gair mumkin Peerkhana*. This fact has also been admitted by the plaintiff-petitioner. From the evidence available on record, it was proved on record that the suit property was not used personally but it was used by the Muslims at large for religious purposes. The final mutation of the land was also sanctioned in the name of Chandigarh Waqf Board vide order dated 15.4.2010. The appeal filed against said order was also dismissed on 10.9.2014. Notification, on the basis of said order, was notified but it was thereafter de-notified on the ground that it was a religious property and not a self-acquired ancestral property of the plaintiff-petitioner. The argument that plaintiff-petitioner was not given any opportunity or any notice before issuance of Notification dated 15.4.2010, does not carry any weight as list of Waqf property was surveyed by Survey Commissioner under Section 4 and publication was made under Section 5 of the Act. Though there was no requirement for issuance of any notice as in the entry it was reflected as property in dispute as Peerkhana. It can easily be concluded that the learned Additional District Judge, Chandigarh has dismissed the suit of the plaintiff-petitioner by holding that the property in dispute was Peerkhana and his ancestors were only Khidmatgars and not the owners. There was no violation of any Rules and regulations governing the declaration of the property as Waqf as the suit property was being used for religious purposes by all the muslims. The plaintiff-petitioner has failed to show that the notification was illegal in any manner and it was not issued in

accordance with the provisions of Waqf Act.

In view of facts and law position as discussed above, there is no merit in the contentions raised by learned counsel for the petitioner and revision petition being devoid of any merit is hereby dismissed.

August 10, 2017
poonam

(DAYA CHAUDHARY)
JUDGE

Whether speaking/reasoned

Yes

Whether Reportable

Yes

