

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

Decided on: 08.09.2017

+ **W.P.(C) 12409/2004, C.M. APPL.2550-51/2005, 11638/2006, 10522/2009 & 7476/2010**

MUJEEB AHMAD AND ORS. Petitioners

Through: Petitioner in person.

versus

DDA AND ORS. Respondents

Through: Sh. Rahul Sharma and Sh. C.K. Bhatt,
Advocates, for L&DO.

Sh. Hashmat Nabi with Sh. Abhinav Thareja,
Advocates, for DWB.

Ms. Shobhana Takiar, Advocate, for DDA.

Sh. Sanjeev Sabharwal, Advocate, for SDMC.

SI Ashok Kumar, Delhi Police.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE S.P. GARG

MR. JUSTICE S. RAVINDRA BHAT

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C.M. APPL.2550/2005 & W.P.(C) 12409/2004, C.M. APPL.2551/2005, 11638/2006, 10522/2009 & 7476/2010

1. This judgment will dispose of C.M. Appl.2550/2005 as well as the writ petition. The application seeks recall of the judgment of this Court dated 03.11.2004 disposing of the writ petition.

2. In the writ petition, said to be in public interest, the claim made was for a direction to the first respondent – Delhi Development Authority (DDA) to remove alleged encroachment by demolishing structures from the northern portion of the graveyard (hereafter referred to variously as

“Qabristan/graveyard”) and also to restrain the fourth respondent (hereafter referred to as “the Arya Samaj Shamshan”) from using the northern portion of the said graveyard. Further direction was sought against the sixth respondent, i.e. Delhi Police to enjoin them from using Khasra No.529 for parking purposes. The petitioner had alleged that in March 2004, the DDA, acting in connivance with other respondents started construction by encroaching upon the northern portion of the *qabristan* which resulted in the filing of an earlier proceeding, being W.P.(C) 3811-13/2004 [*Mujeeb v. DDA and Ors*]. That writ petition was disposed of on 17.03.2004, directing the respondents to examine the pleading in the writ petition as a representation and take an appropriate decision in accordance with law.

3. The petitioner also alleged that the DDA did not heed to the Court’s order which led to the filing of further representation. With these allegations, the reliefs claimed were sought. The petitioner had relied principally upon a suit filed by the Delhi Wakf Board (DWB) against the then Municipal Corporation of Delhi (MCD), being Suit no.60/1971 titled *Delhi Wakf Board v. MCD* before the Sub-Judge which was decreed on 12.09.1975. The said judgment returned a finding that based upon the documents presented by the plaintiff, i.e. the DWB, that the land in question i.e. 7 bighas formed part of Khasra No.529, a decree for permanent injunction was, therefore, granted.

4. The MCD’s appeal, i.e. RCA 77/1977 to the Additional District was dismissed on 05.01.1978. The petitioner also relied upon certain other documents, including copies of the representations. The petition was listed on 28.07.2004, 10.08.2004 and 25.08.2004. On all these dates of hearing, notice to show cause was not issued to the respondents. On 03.11.2004, the

Court noticed the judgment of the Sub-Judge as well as the outcome of the appeal filed by the MCD, and allowed the writ petition in the following terms:

“1. This petition is confined to the 7 bighas of land which forms part of khasra no.529. There is a decree made by the Court in Suit No.60 of 1971 by Sub-Judge, Delhi against which an appeal was preferred being RCA No.77 of 1997, which was dismissed by the District Judge. Thus it is very clear that so far as 7 bighas forming part of Khasra No.529 is concerned, that must be maintained as a “Qabrisatan”. For the purpose of clarity, we would like to refer to para 17 of the Court’s order, which reads as under:-

“In the result, the defendant Corporation is permanently restrained from filling up of the pits, leveling of the ground and from erecting the boundary wall and from causing interference in any way, without the consent and convenience of the plaintiff upon the land of qabristan known as “Qabristan Panj piaran” Link Road, Delhi, which measures 7 bighas in area and forms part of khasra No.529 and on whose one side there runs a nala and on the other side there runs a Link Road and on the 3rd side the same is bounded by the line D.C. as shown in the site plan Ex.PW.3/1 and which has been coloured in red colour. The position of the line/AB in the site plan.

2. Thus, these 7 bighas indicated clearly in the order which require to be protected. On behalf of the respondent Delhi Development Authority, it is submitted that “Qabristan” is in khasra No.529/1. However, we note that the court has referred to the land in question as part of khasra No.529. Further, there is a site plan Ex.PW.3/1, which is clear from the order which we have reproduced hereinabove. Thus, the land which is required to be protected is 7 bighas mentioned therein. Therefore, all the parties are restrained from interfering with the possession of the said 7 bighas of land, which is in the

possession of Delhi Wakf Board. The petition stands disposed of.”

5. The DDA, which was represented but not given the opportunity to file its counter affidavit or opposition to the writ proceedings, preferred C.M. Appl.2550/2005, contending that material facts were suppressed from the Court. It urges that Khasra nos.365, 527, 360 min, 366 min, 529 and 530 min were recorded in the *jamabandi* for 1971-72. As regards Khasra no.528 and 529/1, the ownership was of the Land & Development Office (L&DO) through the Chief Commissioner of Delhi, i.e. Union of India (UOI) which too was transferred to the DDA by Notification No.1810 dated 12.07.1974. Column 9 of the *jamabandi* in respect of Site no.33 reflected that Khasra no.529/1 was shown to be “*cremation ground Link Road*”. It is further stated that khasra no.360 min, 366 min and 530 min were recorded in favour of “*construction Division No.5, Department of PWD, through Chief Commissioner, Delhi*”. Importantly, DDA states that Khasra nos. 529, 529/1, 527, 528, 530, 360, 368 & 366 were not recorded as graveyard in *jamabandi* and that the entire Khasra nos.529 (12-18) was utilized for road, clearly reflected in column 9 of the *jamabandi* for 1971-72. The copy of the *jamabandi* has been placed on the record.

6. DDA explains the previous suit by highlighting that though DWB filed it, only the MCD was impleaded and that the object of that suit was to prevent that defendant from constructing a boundary wall on the alleged *qabristan*. It is stated that the decree was obtained by concealing material facts, such as the land ownership of the DDA and the relevant title documents as well as the *jamabandi*, and also by misleading the civil court. The DDA further mentioned about the earlier writ petition, i.e. W.P.(C)

3811-13/2004 and states that the Court had disposed of that petition on 17.03.2004, requiring it (i.e. DDA) to respond to the petitioner. It is stated that the DDA in fact responded - disclosing all the material facts to the petitioners on 10.08.2004 through a letter. A copy of the letter has been produced; the same reads as follows:

“To,

*Shri Mujeed Ahmad
S/o Late Shri Habib Ahmad
R/o ½ Panj Peeran
Nizamuddin
New Delhi.*

Sub: Compliance of order of Hon'ble High Court dated 17.3.2004 in CWP 3811-13/2004.

Sir,

Please refer to the orders of the Hon'ble High Court dated 27.3.2004 in the CWP mentioned above. The matter was examined by the Department. In this connection, it is to inform you that the land bearing Kh. No.365, 527, 360 min, 366 min, 529 & 530 min has been recorded in the name of DDA in the jamabandi 1971-72. In respect of Kh. Nos. 528, 529/1 the same has been recorded in favor of L&DO through Chief Commissioner of Delhi and has been transferred to DDA vides notification no.1810 dated 12.7.74 as site No.33 but in column no.9 of Jamabandi, this Kh. No.529/1 has been shown as “Cremation ground Link Road”. Similarly, Kh. No.360 min, 366 min & 530 min has been recorded in favor of “Construction Division No.5 Department PWD through Chief Commissioner of Delhi”, showing as road in column no.9 of the Jamabandi. Thus it reveals that Kh. No.529, 529/1, 527, 528, 530, 360, 365 & 366 are not recorded as graveyard in Jamabandi. Moreover, the entire land of Kh. No.529 (12 bigha-

18 biswa) has been utilized in road, and mentioned as such in column no.9 of Jamabandi 1971-72.

However, as per the decree passed in the court of Additional district Judge, Delhi dated 05.01.1978 in the RCA No.77/77 titled MCD v. Delhi Wakf Board the Quabristan covered only 07 Bigha of the land in Khasra No.529, where as, on site verification it has been noticed that as on date 8.00 Acres (approx) of Govt. land has been encroached in the shape of grave yards which falls in khasra no.529/1. Thus it is evident that more area has been encroached on the Govt. land for which Govt. is entitled to remove the encroachments on its land.

Sh. Jagmohan Ex-Minister of Tourism and Culture placed an amount of Rs.10 lacs from his MP LAD funds for providing amenities including rain shelters and development of open space of the cremation ground. It has been reported that the development work was executed and no tree was removed at any place in the cremation ground. The existing boundary wall was raised up to the height of approx. 7 ft. No fresh boundary wall was constructed by DDA. No super structure was constructed, but only parking space has been developed to cater to the requirement of general public.

*Sd/-
(S.P. PADHY)
DIRECTOR (LM), HQ”*

7. This Court heard the arguments of both the parties on 10.08.2017. The parties reiterated their submissions in the pleadings. It was stated by learned counsel for the writ petitioner that the earlier order allowing the writ petition should not be interfered with and that in the guise of seeking clarification, the DDA should not be allowed to urge grounds that required review of the order. Learned counsel submitted that the dispute with respect to the title etc.

on behalf of the DDA, are untenable, given the state of the record. Heavy reliance was placed on the judgment and decree of the civil Court as well as the appellate decree of the Additional District Judge. Learned counsel also pointed to orders made during the interregnum which required demarcation of the land and urged that in view of these circumstances, the Court should reject the request for recall/modification/clarification.

8. The DDA, on the other hand, urges that the facts brought to light by it are such that not only should the previous order and judgment disposing of the writ petition be recalled but that the writ petition itself should be dismissed. It was urged firstly that the petitioner obtained the order by materially suppressing that the previous litigation was only between the DWB and the MCD. The party likely to be adversely affected was the owner, i.e. DDA or the UOI in the case of some portions of their lands. It was furthermore submitted that the decree, in any event, could not be construed as binding upon the DDA which was shown as the owner in the *jamabandi* as far back as in 1971-72 in respect of portions that belonged to the UOI, which were in fact transferred subsequently in 1974. These facts were withheld from the civil Court.

9. It is argued that secondly, the decree of the Court cannot be conclusive. This Court's order, it was highlighted, presumes the record and the facts to be conclusive as between the DWB and the MCD whereas the real dispute as to the ownership and possession of the lands which are the subject matter of the present petition - Khasra no.529 - necessitates involvement of the DDA in any legal proceeding. It is also highlighted that there were major clashes with respect to the land between the two

communities which led to the setting-up of the *Gujral Commission* which had furnished its report. These facts too are relevant. It was lastly argued that the petitioner cannot, in the guise of a public interest litigation seek civil remedies in respect of disputed questions of law, especially based upon a decree in respect of a proceeding in which he was not a party but rather where DWB was the plaintiff.

10. It is apparent from the above factual discussion that there is dispute as to the ownership and possession of Khasra No. 529. The DDA asserts ownership over that parcel of land, as indeed several other parcels of neighbouring and adjoining lands. It relies upon extracts of *jamabandi* records, to evidence its ownership; it also premises its claim upon the notification issued by the Union Government, transferring lands to it, in 1974. A plain look at the civil court's findings, rendered in 1975, and endorsed by the appellate court, show that these extracts were not considered by it. More crucially, the DDA was not impleaded in the suit, either out of ignorance or design.

11. In *J.S. Yadav v. State of U.P. & Anr.* 2011 (6) SCC 570, the Supreme Court held as follows:-

“No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice. The principles enshrined in the proviso to Order 1 Rule 9 of the Code of Civil Procedure, 1908 provide that impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, the petitioner-plaintiff may not be entitled for the relief sought by him. The litigant has to ensure that

the necessary party is before the court, be it a plaintiff or a defendant, otherwise the proceedings will have to fail. ’’

12. Learned counsel for DWB, which was also impleaded as a party respondent, could not state why as plaintiff, the DDA was not arrayed as defendant in the suit; his stand, however, was that the benefit of perusal of the records was with the civil court and the defect, if any, in procedure, was amply taken care of. This Court is, however, of the opinion that the said position is untenable. The assertion of ownership or possession or both, by a party, who does not sue the party most likely to be affected, i.e. the owner and/or the person in possession, would be fatal to the proceeding; in any case, there is no gainsaying that the decree cannot bind the true owner. Such being the case, the reliance placed on the civil court’s decree in this case, is inconsequential. That decree cannot be construed as determinative of the parties’ rights.

13. As far as the contentions on behalf of the petitioner that demarcation reports are available on the record, as they were called during pendency of the applications are concerned, this Court is of opinion that the determination as to title or boundaries cannot be the subject matter of miscellaneous proceedings, when the correctness or efficacy of the main order (i.e. the judgment disposing of this writ petition) is under cloud. Here, the court recollects the decision of the Supreme Court in *Budhia Swain v. Gopinath Deb* 1999 (4) SCC 396, which held as follows:

‘What is a power to recall? Inherent power to recall its own order vesting in tribunals or courts was noticed in Indian Bank Vs. M/s Satyam Fibres India Pvt. Ltd. 1996 (5) SCC 550. Vide para 23, this Court has held that the courts have inherent power

to recall and set aside an order (i) obtained by fraud practised upon the Court, (ii) when the Court is misled by a party, or (iii) when the Court itself commits a mistake which prejudices a party. In A.R. Antulay Vs. R.S. Nayak & Anr. AIR 1988 SC 1531 (vide para 130), this Court has noticed motions to set aside judgments being permitted where (i) a judgment was rendered in ignorance of the fact that a necessary party had not been served at all and was shown as served or in ignorance of the fact that a necessary party had died and the estate was not represented, (ii) a judgment was obtained by fraud, (iii) a party has had no notice and a decree was made against him and such party approaches the Court for setting aside the decision ex debito justitiae on proof of the fact that there was no service. In Corpus Juris Secundum (Vol. XIX) under the Chapter "Judgment- Opening and Vacating" (paras.265 to 284 at pages 487-510) the law on the subject has been stated. The grounds on which the courts may open or vacate their judgments are generally matters which render the judgment void or which are specified in statutes authorising such actions. Invalidity of the judgment of such nature as to render it void is a valid ground for vacating it at least if the invalidity is apparent on the face of the record. Fraud or collusion in obtaining a judgment is a sufficient ground for opening or vacating it."

14. In the present case, clearly the previous order of the court, disposing of the writ petition was based on an incomplete set of facts, since the response of the DDA by way of counter affidavit, etc was not forthcoming; in fact even show cause notice had not been issued. In these circumstances, the Court is of opinion that the DDA's application needs to succeed. Furthermore, the petition involves adjudication of disputed questions of fact; if indeed the land belongs to the DWB, the appropriate proceeding to be availed by that body, would be to approach the civil court, or the Wakf Tribunal, as the case may be, to agitate its rights. In such event, the question

of title and possession can be appropriately considered after parties lead their evidence in a trial.

15. For the above reasons, C.M. Appl. 2550/2005 is allowed. The writ petition is, for the said reasons, dismissed. All pending applications are also disposed of. There shall be no order on costs. Order *dasti*.

S. RAVINDRA BHAT
(JUDGE)

S.P. GARG
(JUDGE)

SEPTEMBER 08, 2017



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