

THE HON'BLE SRI JUSTICE T. VINOD KUMAR

Writ Petition No.s 3215 and 3234 of 2019

COMMON ORDER:

Both these Writ Petitions are filed to declare the Gazette Notification No.46-A, dt.20.12.2001 publishing the lands of petitioners in *WP.No.3215 of 2019* of an extent of Ac.2.39 guntas in Sy.No.906, Ac.2.35 guntas in Sy.No.907 and Ac.2.20 guntas in Sy.No.908, and of petitioners in *WP.No.3234 of 2019* of an extent of Ac.1.32 guntas in Sy.No.895/AA/2 and Ac.0.32 ½ guntas in Sy.No.896/AA, situated at Toopran Village and Mandal, Medak District as Wakf properties, as being illegal, arbitrary, null & void, and against the provisions of Wakf Act, 1995, with a consequential direction to the respondents to delete the subject lands of the petitioners from the above said Gazette Notification.

2. Heard counsel for the petitioners, learned Government Pleader for Revenue appearing for respondents 1, 2, 4 to 7 in both the writ petitions, and Sri Nazir Ahmad Khan, learned Standing Counsel appearing for the 3rd respondent in *WP.No.3215 of 2019* and Sri Mohd.Ismail, learned Standing Counsel appearing for the 3rd respondent in *WP.No.3234 of 2019*, and perused the record.

3. Petitioners contend that by the impugned Gazette Notification No.46-A, dt.20.12.2001, the above mentioned lands of the petitioners in both the Writ Petitions are shown as wakf properties without conducting any enquiry under the Wakf Act, 1995; that the said

Notification was issued, purportedly, on the basis of a survey conducted under Section 4(3) of the Wakf Act, 1954 in the year 1970 without any notice to the petitioners; that the said Wakf Act, 1954, under which the said survey was undertaken, having been repealed and in its place Wakf Act, 1995 having been enacted, the action taken under the repealed Act would not get saved by virtue of Section 112 of the Wakf Act, 1995; and that therefore the action of the respondents in issuing Gazette Notification No.46-A, dt.20.12.2001, showing the lands of the petitioners as wakf property and trying to dispossess the petitioners therefrom is illegal, arbitrary, violation of Articles 14, 21 & 300A of the Constitution of India and cannot be countenanced.

4. Learned counsel appearing for the petitioners would further submit that a similar issue fell for consideration before this Court in WP.No.33133 of 2014, and this Court having considered the provisions of the Act, and by referring to the judgment of the Hon'ble Supreme Court in **Tamil Nadu Wakf Board v. Hathija Ammal(Dead) by Lrs. Etc¹** wherein it was held that the survey of the lands conducted under the repealed Act of 1954, when the same was in force, does not confer any right on the Wakf Board to claim the said lands as wakf property in the absence of any notification issued under Section 5(2) of the said Act.

5. It is also contended that this Court in the above judgment also *held* that once the Wakf Act, 1954 was repealed, the enquiry conducted

¹ AIR 2002 SC 402

by the Survey Commissioner and the Report prepared under Section 4(3) of the said Act would not get saved, in the absence of notification issued under Section 5(2) thereof when the Act was repealed.

6. Learned counsel for the petitioners placing reliance on the recent judgment of the Hon'ble Supreme Court in **Waqf Board, Rajasthan v. Jindal Saw Limited and Others**² would contend that unless and until a fresh enquiry is undertaken under Section 40 of the Wakf Act, 1995, the enquiry conducted or the report submitted under the repealed Act, cannot be made use to claim the property to be the wakf property.

7. Counter affidavit on behalf of the 3rd respondent is filed and a reply thereto is also filed by the petitioner, in both the cases.

8. Learned Standing Counsel appearing for the 3rd respondent in the WP.No.3215 of 2019, while reiterating the averments of the counter, sought to distinguish the said decision of the Hon'ble Supreme Court **Waqf Board, Rajasthan's** case(2 supra) on the ground that, the issue under consideration therein relates to inclusion of certain extent of land in a notification already issued for it to be treated as wakf property, without conducting a survey, which was held to be not permissible by the Hon'ble Supreme Court. Learned Standing Counsel would further contend that since a survey was conducted under Section 4(3) of the Act during the subsistence of Wakf Act, 1954, the same would not get

² 2022(3) ALD 279(SC)

extinguished on account of notification not being issued under Section 5(2) of the Act, 1954. Thus, it is contended the ratio laid down by the Hon'ble Supreme Court in **Waqf Board, Rajasthan's** case (2 supra) would not be applicable to the facts of the present case. He would further contend that the respondents by issuing an Errata to the 2001 notification, have rectified the mistake that had crept into the Gazette Notification published in the year 2001 by correcting and mentioning the same as Wakf Act, 1995, and therefore no illegality can be found with the Gazette Notification No.46-A, dt.20.12.2001.

9. I have taken note of the respective submissions of the parties.

10. Admittedly, the issue raised in the present Writ Petition is squarely covered by the decision of this Court in WP.No.33133 of 2014, dt.22.09.2016, wherein a similar Gazette Notification, which was published in the year 2001 based on the survey conducted in the year 1963 under the repealed Act, fell for consideration. Further, this Court in the said decision had referred to the judgment of the Hon'ble Supreme Court in **Tamil Nadu Wakf Board's** case(1 supra) to conclude that the survey conducted under the repealed Act would not get saved by virtue of Section 112 of the Wakf Act, 1995.

11. Another interesting aspect which is to be taken note of from the contentions urged by the learned Standing Counsel appearing for the 3rd respondent in WP.No.3215 of 2019 is, as to issuance of an 'errata' by the respondents to the Gazette Notification published in the year 2001.

12. Though it is contended by the learned Standing Counsel that by issuing the so called '*errata*', respondents-authorities have rectified the omission, the same does not impress upon this Court for acceptance, for the reason that exercise of the power to issue an '*errata*' is always to correct an error that has crept in.

13. On the other hand, the errata said to have been issued, purportedly is to correct the year of enactment of Wakf Act as mentioned in the Gazette Notification No.46-A, dt.20.12.2001, to '1995' in place of '1954', whereunder various properties including the properties of petitioners herein have been notified as wakf properties under Section 5(2) of the 1954 Act, pursuant to the survey conducted in terms of Section 4(3) of the 1954 Act, in the year 1970.

14. Be as it may, the exercise of power to issue an '*errata*' is always to correct an error that has crept in. If the respondents claim that by issuing '*errata*' they have corrected the Wakf Act as '1995' in the place of '1954', it is to be noted that in such a situation, there should have been a survey conducted under the corresponding provisions of the 1995 Act. Without undertaking survey under the provisions of Wakf Act, 1995, after its enactment, by putting all the parties on notice, the claim of the respondents that the survey conducted in the year 1970 under the repealed Act would get saved for being considered as a valid survey conducted under the new enactment, cannot be accepted. Further, it is also to be noted that the provisions conferring power to conduct survey, declare a particular property as wakf property, and

issue a notification under the Wakf Act, 1995 are not same as under the Wakf Act, 1954. Moreover, neither a copy of the said errata nor the details thereof, were furnished for consideration of this Court. Further, by the time respondents issued 'errata', the Act of 1954 itself stood repealed, the errors crept thereunder cannot be sought to be corrected by exercising the powers conferred under the new Act.

15. Further, a reading of Section 5(2) of the Act, 1954 would indicate that upon undertaking a survey in terms of Section 4(3), a notification is required to be issued notifying the properties as wakf properties. Though no time is specified for issuing such notification, by taking note of the intent of the enactment and the survey conducted thereunder, it is concomitant that the notification under Section 5(2) is required to be issued immediately upon completion of survey under Section 4(3) of the 1954 Act. The affect of issuance of such notification under Section 5(2) would result in, the property apart from being notified as wakf property would also be entered in the revenue records and in the prohibited list of properties, preventing any transactions being undertaken in relation thereto, reflecting the encumbrance.

16. In the facts of the present case, mere conduct of survey under the repealed Act, 1954 in 1970 and keeping quiet for 30 long years without taking concrete steps to get the same notified in the Gazette by the Wakf Board as required under Section 5(2) of the said Act, for declaring a property as Wakf property, cannot confer any right or interest in the respondent-Wakf Board to claim such properties to be wakf properties,

when the respondent-Board by their own conduct allowed creation of third party interest thereon, which in the view of this Court as noted above would be bonafide transactions.

17. In similar circumstances, a learned Single Judge of this Court in WP.No.9378 of 2009, dt.06.02.2012, referring to the judgment of this Court in **B.Gowra Reddy v. Government of Andhra Pradesh**³ observed that publication of notification after the survey must be soon, though not immediate, for the reason that, any events, that occur between the date of survey and date of publication of notification would render the very exercise futile and if any substantial development takes place between the two events, the survey conducted cannot constitute the basis for publication, and the unreasonable delay would defeat the very objective underlying the provision. The said judgment of the learned Single Judge was confirmed by the Division Bench of this Court in WA.No.1010 of 2012, dt.07.11.2013, and the same became final.

18. In the said Writ Petition, the survey was conducted in 1960 and the notification was issued in the year 1989.

19. Though it is sought to be contended by the learned Standing Counsel appearing for the 3rd respondent in both the Writ Petitions that against the order in WP.No.33133 of 2014, the respondents herein having preferred a Writ Appeal, it is to be seen that there is no

³ AIR 2002 A.P.313

suspension of the order passed by this Court in the said Writ Appeal, and hence, the ratio laid down therein, in the view of this Court, would apply in all force to the facts of the present case.

20. In the facts of the present case, the period between survey conducted under Section 4(3) of the Act in the year 1970 and the Gazette issued under Section 5(2) of the Act in 2001 is more than 30 years, during which period, even the Act under which the survey was conducted stood repealed. Thus, the principle laid down in the above judgment covers the facts of this case also.

21. Thus considered from any angle, the impugned Gazette Notification No.46-A, dt.20.12.2001, is unsustainable insofar as the subject lands of the petitioners in both the Writ Petitions are concerned.

22. For the foregoing reasons, the Writ Petition are allowed; the impugned Gazette Notification No.46-A, dt.20.12.2001, is set aside, insofar as the subject lands of the petitioners in both the Writ Petitions are concerned. No order as to costs.

23. Miscellaneous petitions, if any, pending in this writ petition shall stand closed.

19th September, 2022

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T. VINOD KUMAR, J

THE HON'BLE SRI JUSTICE T. VINOD KUMAR

Writ Petition No. 36017 of 2022

Dt.19.09.2022

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