



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CIVIL REVISION APPLICATION NO.1 OF 2005

1. The Maharashtra State Board of Wakfs
Through its Chief Executive Officer,
Panchakki, Aurangabad

2. District Wakf Officer,
Munir Khan s/o. Kasam Khan Pathan,
Age 46 years, Occu. Service,
R/o. Latur, District Latur

.. Petitioners
(Original Defendants
Nos. 1 and 7)

Versus

1. Arya Samaj Hisamabad (Ujed)
Through its officer bearers i.e.

A) Pradhan Mantri,
Shri Harischandra Ramrao
Suryawanshi Alias Swami
Shradhanand (Wanprasthi)
Age 80 years, Occu. Social
Service, R/o. Parali Vaijanath
(Arya Samaj), District Beed

B) Shri. Sugreev Baliramji Kale,
Mantri, Maharashtra Arya
Pratinidhi Sabha Maharashtra,
Age Major, Occu. Social Service,
R/o. Parali Vaijanath (Arya Samaj)
District Beed

.. (Original Plaintiff)

2. Secretary Govt. of Maharashtra,
Revenue and Forest Department,
Mantalay Bombay

3. Commissioner Aurangabad
Division Aurangabad

4. Collector, Latur, District Latur

5. Sub-Divisional Officer, Udgir,
District Latur
 6. Tahsildar Nilanga / Shirur Anantpal
District Latur
- .. Respondents
(Respondents No.2 to 6/
Original Defendants)

...

**WITH
SECOND APPEAL NO. 759 OF 2007
WITH CIVIL APPLICATION NO. 10765 OF 2007**

1. Dattu s/o Sadashiv Alias Bhimrao Marde,
Age : 74 Years, Occ. Agriculture,
R/o. Hisamabad (Ujed), Tq. Shiru Anantpal,
District Latur.
 2. Arya Samaj, Hisambad (Ujed)
Through its Office Bearer i.e. Mantri
R/o. Ujed (Hisamabad),
Tq. Shirur-Anantpal
- .. Appellants
(Original Defendants
Nos. 6 & 10)

VERSUS

1. Maharashtra Wakf Board,
Aurangabad through
Mohammad Asifoddin s/o Md. Ainoddin,
Age : 54 Years, Occ. District Wakf Officer,
R/o at present Latur (Original plaintiff)
2. State Government of Maharashtra
Through District Collector, Latur (Original Defendant No.1)
3. Sub Divisional Magistrate, Udgir (Original Defendant No.2)
4. Tahsildar, Nilanga (Original Defendant No.3)
5. Annarao S/o Yeshwantrao Birajdar
Age 74 years, Occu. Agriculture,
R/o. Ujed (Hisambad), Tq. Shirur Anantpal (Original Defendant No.4)
[Abated as per Court's order dated 18.07.2023]
6. Govindrao S/o Shankarrao Nalgir,
Age 62 years, Occu. Agriculture, (Original Defendant No.5)
R/o. As above Abated

7. Malikarjun s/o Yeshwant Birajdar,
Age 65 years, Occu. Agriculture, (Original Defendant No.7)
R/o. As above Abated
8. Shaikh Osmanali s/o Mehboobali
Age : 64 years, Occ. Agriculture
R/o. As above (Original Defendant No.8)
9. Khajapira s/o Sheikh Ahmedali,
Age : 64 Years, Occ. Agriculture, (Original Defendant No.9)
R/o as above. .. Respondents

Mr. S. S. Kazi, Advocate for Applicant in C.R.A. No.1 of 2005 and Respondents No.1, 8 and 9 in Second Appeal No.759 of 2007;
Mr. Ajit Kadethankar, Advocate for Appellants in S.A.No.759 of 2007;
Mr. Amit S. Deshpande, Advocate for Respondents No.1A & 1B in C.R.A. and Respondents No.3 to 6 served in C.R.A.;
Mr. A.B. Chate, A.G.P. for Respondent No.2 in C.R.A. and Respondents No.2 to 4 in S.A.No.759 of 2007

CORAM : S. G. MEHARE, J.

Reserved on : 03.10.2023

Pronounced on : 20.12.2023

JUDGMENT:-

1. The original defendants Nos. 6 and 10 have preferred this Second Appeal against the Judgment and decree of the learned Civil Judge, Senior Division, Nilanga, passed in Regular Civil Suit No.3 of 1998 (new) [Regular Civil Suit No. 177 of 1988 (old)], dated 26.09.2002 and Regular Civil Appeal No.55 of 2002 of the learned District Judge, Nilanga, dated 06.09.2007.

2. The appellants would be referred to as the defendants Nos. 6 and 10, respondent No.1 would be referred to as the plaintiff, which was the Marathwada Wakf Board duly constituted under the Wakf Act, 1954, and the remaining respondents would be referred to as the defendants.

3. The issues and the suit property involved in the second appeal and the Civil Revision application were the same. Hence, both matters have been taken up for hearing and decision together.

4. The brief facts of the case were that a plot in dispute was an open plot in the village. The defendants Nos. 6,10, 8 and 9 were claiming possession over the suit plot. The parties to the suit were the Hindus and the Muslims. Their quarrel over the suit plot went to the police. The police reported the matter to the Sub-Divisional Magistrate ("S.D.M.", for short). The S.D.M. registered a proceeding under Section 145 of the Code of Criminal Procedure ("Cr.P.C.", for short). He inquired and held that, soon before the quarrel, the suit plot was in possession of the defendants nos. 6 and 10. He passed prohibitory orders against the original defendant nos. 8 and 9 on 24.5.1979. In the Government Gazette dated 24.4.1980, the suit plot was listed as the Wakf Property. In 1988, The Marathwada Wakf Board filed a suit, through the District Wakf Officer, against the defendants in the Civil

Court for declaration and possession of the suit plot. The plaintiff had filed a suit for declaration that the order of the S.D.M., Nilanga passed in file No. 1974-SDM-16 under Section 145 of the Code of Criminal Procedure dated 24.5.1979 was not binding and possession. They had a case that on the suit plot, there was a Mosque since time immemorial, and it was in use by the Muslims. However, in 1948, during the Marathwada Mukti Sangram, the goons demolished it and made it an open plot.

5. The defendants Nos. 8 and 9 supported the plaintiff's claim. They admitted the dispute about the suit plot and the orders of the Sub-Divisional Magistrate, Udgir.

6. The defendants Nos.6 and 10 contested the suit. They had a defence that the suit plot was in possession of the Arya Samaj for many years. The Muslim people in the village tried to grab the suit plot under the garb that it was a Mosque and Dargah. The plot where the plaintiff says there was a Mosque and Dargah was different. They also impugned the legality and validity of the Government Gazette dated 24.04.1980.

7. The Court of First Instance believed the plaintiff and decreed the suit. He also held that the Civil Court had no jurisdiction to deal with

the Government Gazette dated 24.4.1980, inserting the suit plot as a Wakf property. The first appeal against the said decree was also dismissed. However, while the appeal was pending, the defendants had filed a suit bearing no. 7/2003 before the Wakf Tribunal impugning the legality and validity of the Government Gazette dated 24.4.1980. The plaintiff raised the objection that when the suit about Waqf's property was pending in the Civil Court, the Tribunal had no jurisdiction. The Tribunal did not accept the objection and decreed the suit, holding that the said Government Gazette is void *ab initio*.

8. Against the Judgment and decree of the Tribunal, the Wakf Board has preferred the Civil Revision Application No. 1 of 2005.

9. On hearing the respective counsels, this Court, by order dated January 3, 2023, framed the following substantial questions of law:-

- (i) Whether the Regular Civil Suit No. 177/1988, renumbered as Regular Civil Suit No.03/1998 filed by respondent No.1 is maintainable, as there is no specific prayer made for declaration of title of respondent No.1, though the title of respondent No.1 is seriously disputed?
- (ii) Whether the Regular Civil Suit No. 177/1988, renumbered as Regular Civil Suit No.03/1998 filed by respondent No.1 is maintainable as there is no amendment carried out by respondent No.1 for seeking declaration of title even after

the written statement filed by the appellants raised serious objection to the title of the respondent No.1?

- (iii) Whether the suit as framed by respondent No.1 can be decreed in view of the law laid down by the Hon'ble Supreme Court in the case of ***Anathula Sudhakar Versus P Buchi Reddy (Dead) By Lrs and Others 2008 A.I.R. (SC) 2033***, that where the title of plaintiff is under a cloud or in dispute and he is not in possession, necessarily the plaintiff will have to file a suit for declaration?
- (iv) Whether the suit as framed can be decreed on the basis of issue of title of the plaintiff framed and decided in favour of the plaintiff, without there being any prayer for declaration of title?

10. In a suit of the defendants bearing No. 7 of 2003 before the Wakf Tribunal, the plaintiff's sole objection was that the Tribunal had no jurisdiction to entertain the suit as barred under Section 7(5) of the Wakf Act, 1995. ("The Act 1995", for short). The Tribunal had no jurisdiction to determine any matter which is a subject of any suit instituted or commenced in a Civil Court or appeal pending before the commencement of the Act 1995. Section 7 of the Act 1995 speaks of the powers of the Tribunal to determine the disputes regarding the wakf, including its property.

11. Per contra, the learned counsel for the defendants nos. 6 and 10, argued that the Civil Court had recorded the findings in the impugned Judgment and decree that the Civil Court had no jurisdiction to deal with the legality and validity of the Government Gazette dated 24.4.1980. The R.C.S. No. 3/1998 (R.C.S. 177/ 19988 old) was decided after the Wakf Act 1954 (The Act 1954, for short) was repealed. The Act 1995 was in force, and the respondents had no option except to file an application before the Wakf Tribunal, impugning the legality and validity of the Government Gazette dated 24.5.1980 under the Act 1995.

12. Considering the submissions of both learned counsels, the sole question that arises for consideration in the revision application is;

“Was the suit of the respondents not maintainable before the Wakf Tribunal as barred under Section 7(5) of the Waqf Act, 1995?”

13. The learned counsel for the appellants, Shri. Kadethankar submits that in view of Section 6 of the Act 1954, the Civil Court had no jurisdiction to deal with the dispute whether it was a Wakf property. The S.D.M., Udgir had correctly held that the Hindu community was the owner and possessor of the suit plot. The plaintiff pleaded that

they had lost possession of the suit plot in 1948. Therefore, the suit was barred by limitation as it was not filed within 30 years as provided under Section 66 (G) of the Act 1954. He added that the order of the S.D.M., Udgir passed under Section 145 of the Cr. P. C., was not impugned before the proper forum; hence, it could not have been the subject matter of the suit. The entry in the Wakf register was not conclusive proof of title.

14. He also argued that the First Appellate Court did not consider the Judgment and order of the Wakf Tribunal passed in Suit No. 7 of 2003 wherein the suit of the appellants was decreed and Government gazette part I bearing No. WKF/END/3182, dated 24.04.1980, was declared null and void, and entry in the said Gazette on the basis of which the plaintiff claimed was cancelled. The first appellate Court also did not consider that the plaintiff never sought the declaration of the title; hence, the suit was not tenable in view of the law laid down by the Hon'ble Supreme Court in the case of Anathula Sudhakar Vs. P. Buchi Reddy (supra). He relied on the order of the S. D. M. and claimed that the defendants No. 6 and 10 were interruptedly in possession of the suit plot on the basis of the entry in the village panchayat record of the year 1960.

15. Per contra, the learned counsel for the plaintiff would submit that Section 6(1) of the Waqf Act, 1954 was not applied to the other religious persons. To bolster his argument, he relied on case laws. He would also argue that the order of S. D.M. under Section 145 of the Cr. P. C does not confer a title. It is an interim arrangement to prevent a breach of the peace. It is always subject to a Civil Court's decision. If the party's title to such proceeding is proved in a Civil Court, the order under Section 145 of the Cr. P. C. becomes defunct. He would submit that the order of the Wakf Tribunal was apparently against the rights declared in the Civil suit. The defendants had filed the said suit after the decision of the civil suit under the Act 1995. In fact, the cause of action arose before the Act 1995 was enacted. The suit was to be dealt with as per the then existing law. At the time of the alleged cause of action, the Act 1954 was in force. All disputes about the Wakf properties were to be filed in a Civil Court of competent jurisdiction for the decision of questioning or the dispute regarding the Wakf property. Therefore, the Civil Court had correctly entertained the suit. Since the Civil Court had decided the title in favour of the respondents, the Wakf Board had no jurisdiction to deal with the same issue under the new Act 1995. The learned Wakf Tribunal did not consider Section 7(5) of the Waqf Act, 1995, which bars its jurisdiction to determine any matter

that was a subject matter of any suit instituted under Section 6(1) of the said Act 1954 before its commencement. The suit was not tenable as the appeal against the Judgment passed in favour of the respondent was pending. He also argued that in view of the legal provisions, the appellant had no voice to say that the Judgment of the Wakf Tribunal, Aurangabad, passed in Suit No.7 of 2003 had an effect on the earlier suit decided in favour of the contesting respondents.

16. The learned counsel, Mr. Kadethankar, would submit that the revision of the respondents is bad in law. The Wakf Tribunal has correctly made an enquiry about the Government gazette dated 24.04.1980 under the Act 1995. The Civil Court, in the earlier Act 1954, had no jurisdiction to determine the legality and validity of the entry of Wakf property in the Government gazette. The order of the Wakf Board had an effect on the appeal; therefore, the First Appellate Court ought to have allowed the appeal and set aside the impugned Judgment and decree passed in favour of the plaintiff. He would refer to Section 6-A of the Act 1954 and vehemently argue that the power to determine the disputes regarding the Wakf property was given to the Tribunal. Therefore, the Civil Court had no jurisdiction for the reason that the plaintiff's suit was filed after the amendment of 1984.

17. The respective parties have referred to the two Waqf Acts of 1954 and 1995. Admittedly, the suit was filed in 1988. At that time, the Waqf Act 1954 was in force. However, the Act 1954 was amended in 1984.

18. Both parties to the suit were claiming the rights over the suit plot on the basis of the revenue entries. The plaintiff had an additional document, i.e., the Government Gazette of 24.04.1980. The cause of action for the plaintiff as pleaded, was the order of the attachment dated 24.05.1979 by the S.D.M. and his notice dated 31.12.1987. The suit plot was shown as Wakf property in the Government Gazette dated 24.04.1980. Before the suit land was declared Wakf property in the Government gazette dated 24.04.1980, both parties had only the record of the village panchayat entry. Both were claiming long-standing possessory title. It is not disputed that the appellants were entered into the Village panchayat record in the year 1960. However, the plaintiff's name was entered into the same record for the years 1952, 1957, 1958 and 1959.

19. While decreeing the suit, the Court of First Instance held that the Government Gazette issued by the Government under the Wakf Act cannot be challenged before the Civil Court. Admittedly, the defendant nos. 6 and 10 moved an application before the Wakf Tribunal objecting

to the Government gazette dated 24.04.1980, including the suit land as a Wakf property after the suit was decreed under the Act 1995. In the year 2003, when the appeal was pending, the Wakf Tribunal allowed the application and declared that the entry at Sr. No. 92 published in Government gazette Part A bearing WKF/END/3182 dated 24.04.1980, is null and void, and he cancelled it.

20. The First Appellate Court, in its Judgment and decree dated 06.09.2007, confirmed the findings of the Court of First Instance that the Government Gazette, dated 24.04. 1980, could not be challenged in Civil Court for the reasons that, as per Section 6 of the Act, 1995, the Tribunal had jurisdiction to decide whether the suit plot was a Wakf property or not, and the decision of the Tribunal was final. As per Section 6(5) of the Act 1995, on and from the commencement of the Waqf Act 1995, no suit or other legal proceeding shall be instituted or commenced in a Court in that State in relation to any question referred to in sub-section (1).

21. Before dealing with the substantial questions of law framed in the second appeal, the Court takes the issue of the jurisdiction of the Court impugning the Government Gazette for adjudication first, as it relates to the questions involved in the appeal and the Civil Revision Application.

22. The prime question that appears was which of The Waqf Act was in force when the plaintiff opened the litigation. The plaintiff's suit was based on the Government Gazette dated 24.04.1980. It was a document prepared after the survey by the survey Commissioner. The defendants Nos.6 and 10, had impugned the legality and validity of the said Government Gazette. To ascertain which Court had jurisdiction to decide the legality and validity of such Government Gazettes that declared the properties as Waqf prperties, some dates, i.e. the cause of action, the date of filing the suit, and the law in force at the time of filing suit, were relevant.

23. For the first time, the dispute arose in 1974. In the proceeding before the S.D.M., the plaintiff was not the party. S.D.M. passed an attachment order under Section 146 of Cr.PC. on 19.06.1974. The plaintiff filed the suit on 3.3.1988, which was decided on 26.09.2002. The defendants filed a suit before the Wakf Tribunal on 28.03.2003, which was decided on 21.09.2004.

24. The Act 1954 was in force when the plaintiff had filed the suit against the defendants. Section 6-A was inserted, and sub-section 5 to Section 6 of the said Act was added by amendment of 1984 w.e.f. October 10, 1984. Section 6-A of the said amendment provides that

the question whether a particular property specified as Wakf property in a list of wakf published under sub-section (2) of Section 5 is a Wakf property or not shall be decided before the Tribunal. However, under sub-section 5 of Section 6-A, all the suits and appeals filed and preferred in the Civil Court before the said amendments were saved, and no jurisdiction was conferred on the Tribunal to deal with the issues involved in those suits and appeals. Sub-section (5) of Section 6 of the amended Act barred the jurisdiction of the Civil Court relating to the disputes of wakfs and its properties. The Act 1954 was repealed by the Act 1995 and was brought into force w.e.f. November 22, 1995. Section 6 of the said Act provides for the disputes regarding waqfs. It provides that any question that arises whether a property notified as Waqf property is a Waqf property or not shall be instituted before the Tribunal, and the decision of the Tribunal shall be final. Section 7(5) of the Act 1995 provides that the Tribunal shall not have jurisdiction to determine any matter which is a subject matter of any suit or proceeding instituted or commenced in a Civil Court before commencement of the Act 1995, and if any suit has been instituted in any Civil Court prior to coming into force of the Act of 1995, then the Tribunal will have no jurisdiction to decide such matter and continue and conclude as if the said Act had not come into force. The suit and

the appeals were also saved if pending on coming to the Act 1995 into force.

25. Considering the parties to the suit and dispute between the two persons from different religions, no party had raised the objection, and the suit was entertained. As discussed above, after the observation of the Civil Court that it had no jurisdiction to deal with the issue of notifying the suit plot as Wakf property in the Government Gazette, an application under the Act 1995 was filed. Simultaneously, the appeal against the said. Judgment and decree was also pending when suit no. 7/2003 was filed before the Tribunal.

26. Reading Section 6-A (5) of the Act 1954 and Section 7 (5) of the Act 1995, it is explicit that when the plaintiff had opened the litigation, the Civil Court had jurisdiction to decide the dispute or question regarding the Wakf and Wakf property. Therefore, the Judgment of the Tribunal in Suit No. 7/2003 dated 21.09.2004 was without jurisdiction.

27. The claim of the defendant nos. 6 and 10 in the Second Appeal was based upon the order passed by the learned S. D. M. under Section 145 of the Code of Criminal Procedure. In that case, the plaintiff was not the party. Respondents Nos. 8 and 9 were the

parties. As per Section 145 of the Cr. P.C., the Executive Magistrate, may, upon satisfaction from a report of a Police Officer or upon other information that a dispute is likely to cause a breach of the peace exists concerning any land or water, without reference to the merits or the claims of any parties to a right to possess the disputed land who was and which party was in possession of the disputed land on the date of the order made by him. The order under Section 145 of the Cr. P. C. is the temporary arrangement to protect the person who was immediately in possession before the dispute arose by such order. The orders of the S.D.M. do not bar a title suit in the Competent Court of law. When the competent Court determines the rights of the parties thereto and the person entitled to possession thereof, then obviously, the possession has to be restored in favour of the party whom the competent Court has determined to be the rightful claimant. The possession has to follow such determination, and attachment has to be listed in favour of the emerging successful party before the Civil Court. In other words, once the Civil Court decides the right of the parties legally entitled to have possession, the effect of the orders under Section 145 of the Cr. P.C. ceases automatically. Therefore, merely an order under Section 145 of the Cr P.C. would not be conclusive proof of

the ownership of the land of a person who was held in possession at the time of passing an order under Section 145 of the Cr.P.C.

28. The defendants had expressly denied the plaintiff's title on the basis of the Government Gazette. In the recent Judgment of ***Salem Muslim Burial Ground Protection Committee v State of Tamilnadu and Ors, AIR 2023 SC 2769***, the Hon'ble Supreme Court held that the entry in the Government Gazette is not conclusive proof of Waqf property. The declaration of the property as Waqf property in the Government Gazette has to be in consonance with the Waqf Act, 1954, or Act, 1995, and mere issuance of notification was not sufficient for the purpose. It was admitted that there was a dispute regarding the title of the suit plot, and suddenly, the suit plot was notified in the Government Gazette as Wakf property. It cited the case of ***State of Andhra Pradesh vs A.P. State Wakf Board and Ors, 2022 SCC OnLine SC 159***, to emphasize that the notification, if any, published in the official Gazette at the behest of the Wakf Act giving the lists of the wakfs is not conclusive proof that a particular property is a wakf property especially, when no procedure as prescribed under Section 4 of the Wakf Act has been followed.

29. Before the Civil Court, there was nothing whether the procedure under section 4 of the Act 1954 was followed. It was the question

that goes to the root of the dispute. However, both Courts have conveniently avoided determining the dispute of the title and nature of the suit plot, observing that the Civil Court had no jurisdiction. These observations were perverse.

30. The substantial question of law framed in the Second appeal was regarding the prayer for the declaration of title and the effect of the failure of respondents No.1 and 2 to make a prayer for the declaration of title in view of the law laid down by the Hon'ble Supreme Court in the case of *Anathula Sudhakar Versus P. Buchi Reddy (Dead) By Lrs and Others, 2008 A.I.R. (SC) 2033*.

31. The learned counsel for the defendants would submit that the suit was not tenable unless the specific prayer for declaration of title was made. Barely on the basis of the Government Gazette, the plaintiffs' claim that it was a Wakf property could not be decided.

32. Per contra, the learned counsel for the plaintiff would submit that the suit of the plaintiff was based upon the title as the property was declared Wakf property in the Government gazette dated 24.04.1980, and it was never impugned before the competent authority, so the presumption of the title of the Wakf board on the basis of the Government Gazette had not been rebutted. No

appropriate steps were taken to impugn the said Government gazette. Besides the Government gazette, there were old entries in the revenue record showing that Muslims were using the suit plot for prayers, and it was a graveyard and Mosque. Based on the facts, it is also proved that the defendant Nos. 6 and 10 were not in long-standing possession of the suit plot.

33. Admittedly, in the plaintiff's suit, the declaration of title was not prayed for. The defendants did not raise specific objections in their written statement by the appellants. That being a question of law may be considered in the present appeal. In Anathula Sudhakar's case (*supra*), the Hon'ble Supreme Court discussed the nature of the suit simplicitor for injunction and declaration. The Hon'ble Supreme Court framed the questions when the suit for injunction, declaration, and possession should be filed. In paragraph No. 11, sub-clause 11.3, it has been observed that 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.

34. The facts of the case at hand were that the possession of the suit land was handed over to the appellants by the order of the S.D.M. under Section 145 of the Cr. P. C. After passing the order under Section 145 of the Cr. P.C., the suit plot was inserted in the Government gazette dated 24.04.1980, and after eight years, the plaintiff filed a suit for possession and injunction. The plaintiff's suit was based upon the Government gazette only, which is not a conclusive proof that it was a Wakf property. Admittedly, when the suit was filed, the plaintiff was not in possession of the suit plot. At the same time, the defendant had claimed the possession based on the revenue entries. Both sides had no title document recognized by the law. The revenue entries do not prove the title. Those are only for the fiscal purposes. There is little difference in the case at hand; both parties claim that the suit plot was used for religious purposes. But the fact remains that the title of both parties was under a cloud and in dispute. Considering the nature of the dispute, the Court believes that the plaintiff should have filed a suit for declaration, possession and injunction. The plaintiff also had to get the plaint and prayer clause amended in view of the objection raised by the defendants disputing the title based upon the Government gazette.

35. This Court observed that at the relevant time the Civil Court was the only competent Court to determine the dispute regarding the Wakf properties. On the one hand, the core issue of the title that was to be determined by the Court had been left unanswered, and the Government Gazette dated 24.04.1980 was believed. To hold a particular property to be a Wakf property, it is to be proved that the property was dedicated to public Wakf or that the same was being used as a Wakf property for a long time. Unless and until the said evidence is led, a property cannot be held to be a Waqf property. Merely on the basis of the Government Gazette, the property cannot be held to be a Wakf property, unless proper notice of hearing is given to the person in possession and claiming an interest in the property. Whether the Survey Commissioner had followed the appropriate procedure laid down in Section 4 of the Act 1954 before inserting the suit plot in the Government gazette is a question of fact, and unless the Court of first instance has dealt with the said question fact, it would be inappropriate to deal with these issues in the second appeal. The Court of First Instance and the First Appellate Court did not consider the provisions of Act 1954 and erroneously held that the Civil Court had no jurisdiction to determine the legality and validity of the Government Gazette dated 24.04.1980.

36. On discussing the law and considering the substantial questions of law formulated in the appeal, the Court answers the substantial question No.(iii) that the suit of the plaintiff as framed could not be decreed in view of the law laid down in the case of *Anathula* (supra). The question no.(i) is answered that since the defendants had raised a serious objection to the Government Gazette and the title of the plaintiff, it had to amend the prayers. Such a mistake may be rectified in view of the fact the Court was to determine the legality and validity of the said Government Gazette, the title and rights of the parties to the suit. The answers to these questions cover the questions of law nos.(ii) and (iv). Hence, they have not been separately answered.

37. The learned Court of First Instance as well as the First Appellate Court, left the question of title unanswered, which goes to the root of the dispute. Therefore, both impugned judgments and decrees deserve to be set aside, and the case is to be remitted to the Court of First Instance to decide the suit afresh considering the following issues:-

- (i) Did the survey commissioner follow the due procedure prescribed under Sections 4 and 5 of the Act 1954 before listing the suit plot as Waqf property in the Government gazette dated 24.04.1980?
- (ii) Whether the suit plot was Waqf property?
- (iii) Was a Mosque/Kabrastan in existence as the plaintiff claims?

38. Thus, the Court passes the following order:-

ORDER

- (1) The second appeal is allowed.
- (2) The judgments and decrees of the learned Civil Judge Senior Division, Nilanga passed in Regular Civil Suit No.3 of 1998 (new) [R.C.S.No.177 of 1988 (old)], dated 26.09.2002 and confirmed by the learned District Judge-1, Nilanga, in Regular Civil Appeal No. 55 of 2002, dated 06.09.2007, are set aside.
- (3) The case is remitted to the Court of Civil Judge Senior Division, Nilanga, for the decision afresh on the issues framed in the body of the Judgment by this Court by granting the opportunity to produce the documents and evidence afresh with consequential amendments relevant to the subject in the suit and written statement.
- (4) The R and P be returned to the Court of Civil Judge, Senior Division, Nilanga.
- (5) Both parties shall appear before the Court of First Instance on 22.01.2024.
- (6) The Civil Revision Application is allowed.
- (7) The Judgment and decree of the learned Tribunal passed in R.C.S.No.7 of 2003, dated 21.09.2004 is quashed and set aside.
- (8) The R and P be returned to the Tribunal.
- (9) There shall be no orders as to costs.

(S. G. MEHARE)
JUDGE