

Rafiq Ahmad Siddiqui & others Vs Venkat Pundir & others

Court: Uttarakhand High Court

Date of Decision: March 21, 2017

Acts Referred: [Code of Civil Procedure, 1908](#), [Order 39Rule 1](#), [Order 39Rule 2](#), [Order 39Rule 4](#), [Order 39Rule 3](#), [Order 43Rule 1\(r\)](#), [Order 39Rule 10](#)

Hon'ble Judges: U.C. Dhyani

Bench: Single Bench

Advocate: R.C. Arya

Final Decision: Dismissed

Judgement

1. By means of present writ petition, the petitioners seek following reliefs, among others:

(i) Issue a writ, order or direction restraining the respondents from in any way causing any damage demolition or digging of any of the

graves, making any plotting documentation or raising of any construction and in any way change the nature and character of the

Qabristan and protecting the burial rights of the petitioners and the Muslim community in the plots no. 904, 905 and 907 (907/3)

situated at village Kanwli, Tehsil and District, Dehradun and thereby to maintain status quo until the final disposal of the petition / suit

no. 752 / 2003, Rafiq Ahmad Siddiqui and others vs Venkat Pundir & others, pending before the Waqf Tribunal / Civil Judge (Sr.

Div.), Dehradun.

(ii) Issue a writ, order or direction in the nature of certiorari quashing and setting aside the impugned order dated 22.12.2003, passed

by Waqf Tribunal / Civil Judge (Sr. Div.), Dehradun, in the petition / suit no. 752 / 2003 (Annexure 12 to the petition) further

directing to allow the petitioners' application under Order 39 Rule 1&2 C.P.C. read with Section 151 C.P.C. filed in the same

petition / suit.

2. The genesis of present writ petition can be traced to various orders passed by this High Court and learned Waqf Tribunal / Civil Judge (Sr.

Div.), Dehradun, in the language of the petitioners which has been narrated by deponent / petitioner no. 1 in his affidavit accompanying the writ

petition, as below:

a) On 22.12.2003, the deponent (petitioner no. 1) alongwith the petitioners no. 2 and 3 pursuant to the orders of this Hon"ble Court

dated 14.11.2003, passed in P.I.L. Misc. Writ Petition no. 388 (M/B) of 2003, Rafiq Ahmad & others vs State of Uttaranchal &

others had filed a petition / suit before the Waqf Tribunal / Civil Judge (Sr. Div.), Dehradun, in respect of the waqf property which is

the Qabristan of the Muslim community in which dead body of Muslims are burried since time immemorial which situates at village

Kanwli, Tehsil and District, Dehradun.

b) The said Qabristan is a public Qabristan which is measuring about 6.34 acres bearing plot nos. 904, 905, 907 (907/3) which is

registered at no. 137 as public Qabristan under the U.P. Muslim Waqf Act with the Waqf Board and is also notified and published in

the U.P. Govt. Gazette Notification dated 29 March 1986 on the basis of the report of the Govt. Waqf Department dated 17

October, 1984.

c) Petitioner no. 1, being the Sadar, and the petitioner nos. 2 and 3, being other office bearers of the said waqf Qabristan have been

managing the entire affairs of the said Qabristan inasmuch as the petitioners forefathers as well as the forefathers of other local

habitants of the Muslim community of village Kanwli at large are engraved and burried exercising their lawful burial right in respect of

the same since hundreds of years, i.e. since time immemorial and there is no other public Qabristan of the Muslim community in the

village Kanwli, except the Qabristan in dispute detailed above.

d) The said Qabristan is the waqf property which was dedicated hundred years back for the purpose of using it as public Qabristan

and there are thousands of graves of the dead bodies of the Muslim community in it.

e) There are various reports of the authorities as well as that of waqf Commissioner, Dehradun about the existence of graves

inasmuch as the graveyard is also recoded in the revenue records. The relevant documents regarding the Qabristan in question are

already filed herewith alongwith present petition as various annexures which conclusively prove the existence of the public Qabristan

in question as well as the exercise of burial rights in respect of the same by the Muslim community since time immemorial and the

deponent relies upon the same documents for the purpose of present affidavit for making out strong prima facie case, balance of

convenience in favour of the petitioners for the purpose of grant of interim injunction as is being prayed through a separate

application. It may be noted here that in case interim injunction as is being prayed through a separate application is not granted and

the property in dispute (Qabristan) is not protected then the purpose of the present petition as well as that of the petition / suit before

the Waqf Tribunal, Dehradun shall be defeated and frustrated and the petitioners as well as the Muslim community as a whole shall

suffer irreparable loss.

f) In order to protect their burial rights from the illegal land grabbers in collusion with the local administration the petitioners had filed a

PIL Civil Misc. Writ Petition no. 388 (M/B) of 2003, Rafiq Ahmad and others vs State of Uttaranchal and others, before this

Hon"ble Court. In the said writ petition, the Hon"ble Court has been pleased to grant an interim injunction vide order dated

09.05.2003, protecting the petitioners' right of burial of the dead bodies in respect of the Qabristan in question.

g) In said writ petition, the respondent no. 1 had intervened and alleged the Qabristan in dispute to be his property alongwith

respondent no. 2 and had as such intervened as respondent no. 10 therein. This Hon"ble Court, however, vide order dated

14.11.2003, finally disposed of the said writ petition relegating to petitioners to the efficacious alternative remedy available under the

Muslim Waqf Act of 1995 directing the petitioners to file the petition before the learned Tribunal upto 31.12.2003 and to apply the

petitioners for interim relief from the Tribunal. This Hon"ble High Court had further been pleased to order for maintaining status quo in

the facts and circumstances of the case. A copy of the order of this Hon"ble High Court dated 09.05.2003 and 14.11.2003 are

being filed herewith and are marked as Annexure nos. 1 and 2 respectively to the present petition.

h) Pursuant to the orders of this Hon"ble High Court the petitioners within the given time on 22.12.2003 filed the petition before the

learned Tribunal with the requisite necessary relief and also filed an application for interim relief alongwith an affidavit on the same

date pressing and praying for the grant of ex parte interim injunction to protect the property in dispute and the burial right in respect of

the same. The said petition of the petitioners was registered as suit no. 752 / 2003, Rafiq Ahmad and others vs Venkat Pundir and

others and the injunction application marked as paper no. 6C and the affidavit accompanied therewith as paper no. 7C and the list of

the documents filed alongwith the petition was marked as paper no. 8C.

3. One of the pleas which was taken in the writ petition was that the respondents, being moneyed persons, having illegal physical force at their

command, illegally and forcibly intend to grab the Qabristan land and to damage, demolish, eradicate the existing graves and to illegally make

documentation and transfer the graveyard land, to make illegal constructions by changing the nature and character, status of the graveyard forcibly

in collusion with the local administration and various colonizers and the land grabbers against the lawful right and possession of the petitioners as

well the Muslim community as a whole of village Kanwli and thereby to somehow manipulate to usurp the Qabristan property to which they have

no right, title or interest whatsoever in respect of the Qabristan land in dispute and have no right to cause any interference or to change the

character and nature of the same in any manner.

4. It is also one of the grounds that learned Tribunal without considering and without recording any reason, arbitrarily passed the impugned order

ex parte in favour of the petitioners.

5. By the impugned order, the learned Waqf Tribunal did not grant ad interim ex parte order in favour of the petitioners and issued notices to the

defendants / respondents.

6. Vide impugned order dated 22.12.2003, learned Waqf Tribunal directed issuance of notices to the defendants / respondents on temporary

injunction application of the petitioner and, therefore, as stated above, present writ petition was filed assailing the said order.

7. A reference of Amendment Application no. 9752 of 2003, passed in Civil Writ Petition no. 388 (M/B) of 2003 was given in the order of

learned Waqf Tribunal. It has also been mentioned that vide order dated 14.11.2003, parties were directed to maintain status quo by the High

Court till 31.12.2003. On 31.12.2003, following order was passed by the Court:

Issue notices to the respondents. The question whether the appeal lie against the impugned order or not is left open which shall be

considered after the respondents put in appearance. Put up after vacation.

Meanwhile, the parties shall maintain status quo in respect to the graveyard in dispute and the waqf Commissioner and S.S.P.,

Dehradun are directed to ensure the protection of burial rights of the petitioners.

8. This order was challenged before the Hon"ble Apex Court in Civil Appeal no. 8122 of 2004. No one appeared either on behalf of the

appellants or the respondent nos. 1, 2 and 3 before the Hon"ble Apex Court.

9. The Hon"ble Apex Court observed that ""?...at any rate, if the matter is still pending before the High Court, it would do well to take up and

dispose the same of on merits and expeditiously as possible. In that view, we do not see any reason to keep this case on our board. While we

continue the interim order of stay granted by us by our order dated 9.2.2004 for a period of six months, we request the High Court to dispose of

the writ petition itself at an early date, if not already disposed of?..

10. Accordingly, this Court proceeds to decide the present writ petition. Since nobody is present for the petitioner and only Shri R.C. Arya,

Standing Counsel is available to assist the Court on behalf of the State / respondent no. 5, therefore, this Court has taken valuable assistance from

Shri Lok Pal Singh, Advocate, who was waiting for his turn to come in a writ petition listed before the Court. The Court records its appreciation

for the valuable assistance given by Shri Lok Pal Singh, Advocate, as well as Shri R.C. Arya, learned Standing Counsel for the State in deciding

present writ petition.

11. The first question which arises for consideration is - whether, the appeal will lie against the impugned order, or not? The impugned order was

passed under Order 39 Rule 3 C.P.C., which says that the court shall in all cases, except where it appears that the object of granting the injunction

would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party. The

order impugned was not passed under Order 39 Rules 1&2 C.P.C. Any order passed under Order 39 Rule 3 C.P.C. is non-appellable order in

view of Order 43 Rule 1(r), according to which, an order under Rules 1, Rule 2, Rule 2-A, Rule 4 or Rule 10 of Order 39 C.P.C. will alone be

appellable order. Hence, this Court comes to the conclusion that the order impugned is not appellable and, in that contingency, only remedy which

is available to the plaintiffs-petitioners, is to file present writ petition or else to place the arguments before the trial court / Waqf Tribunal on the next

date fixed when the respondents will also enter their appearance and argue their case.

12. It might be the contention on behalf of the petitioners that graveyard is recorded as public graveyard in revenue records bearing nos. 904, 905

and 907 (907/3), measuring 6.34 acres, but no document has been filed in support thereof to show that the petitioners have been managing the

affairs of graveyard. Said case has been filed by the plaintiffs-petitioners before the Waqf Tribunal in their representative capacity.

13. Issuance of notice under Order 39 Rule 3 CPC is a rule. When an application for temporary injunction under Order 39 Rules 1&2 CPC is

filed, grant of ad interim injunction is an exception. The mandate of Rule 3 is issuance of notice to the respondent unless the court records the

reasons for coming to the conclusion that the object of granting the injunction would be defeated. Learned Waqf tribunal has, therefore, not

committed any illegality in issuing notices to the respondents when an application for temporary injunction was filed by the plaintiffs-petitioners. The

order impugned is not interferrable.

14. Writ petition, therefore, fails and is dismissed.