

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CIVIL APPLICATION NO. 4946 of 2009

FOR APPROVAL AND SIGNATURE:

HONOURABLE DR. JUSTICE A. P. THAKER

Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

ISLAHUL SUNNI MUSLIM KHIDMAT TRUST, THRO MANAGING TRUSTEE
 Versus
 COLLECTOR

Appearance:

MR MTM HAKIM(1190) for the Petitioner(s) No. 1

MR NIKUNJ KANARA, AGP for the Respondent(s) No. 1

CORAM: HONOURABLE DR. JUSTICE A. P. THAKER

Date : 02/02/2022

ORAL JUDGMENT

1. By filing this petition, the petitioner-Trust has prayed to quash and set aside order passed by Collector on 16.9.2006, which is at Annexure-F.

2. Brief facts of the case are that by Revenue Entry No.246 posted in August 1947, the land bearing Survey No.1 of Village

Champaner admeasuring 2 acres 25.5 Gunthas was allotted for the graveyard (Kabrastan) in the village Form No.6 after following procedure prescribed under the Bombay Land Revenue Code. It is further the case that entry No.246 was posted, which also reflects the order dated 3rd March, 1947 passed by Collector for the allotment of such land to use the same for the purpose of Kabrastan. On 31st October, 1950 entry No.283 came to be recorded and said survey No.1 was bifurcated into land survey numbers namely 1/1/A and 1/1/B. 1/1/A was admeasuring acres 4096.18 Gunthas while survey No.1/1/B which was allotted to the Kabrastan was admeasuring 2 acres and 27 Guthas. Accordingly, in the Form No.7/12 also said land is shown as Kabrastan.

2.1 The petitioner trust was registered in the year 1996. After forming of the petitioner-Trust and on making an application to the revenue authorities, by entry No.689 dated 22.7.1997 the name of the trust was entered into village Form No.6. The name of the trust was shown against the property bearing survey No.1/1/B. Since 1997, the petitioner trust is taking care of all affairs of the property situated in survey No.1/1/B. Since 1997 the petitioner trust has seen so many dead bodies being buried in the land bearing survey No.1/1/B (Kabrastan). In 2004-2005 and very recently in August, 2008 dead bodies of Muslims staying in and around Champaner are brought to Champaner and have been buried in the Kabrastan. Some of the instances of burial can be seen from the certificates issued by Panchayat showing the burial. The petitioner trust is having possession of the land in question. Despite the above undisputed facts, the respondent passed an order on 16.9.2006 and snatched away the Kabrastan land. It is

pertinent to note that entry No.783 dated 142.2007 was also posted in the revenue record.

3. Heard Mr.Hakim, learned advocate for the petitioner and Mr.Nikunj Kanara, learned AGP for the respondent-State at length.

4. Mr.Hakim, learned advocate for the petitioner has submitted that the respondent authority, while passing the impugned order has exceeded the jurisdiction vested in them and thereby committed an illegality and/or irregularity and if the impugned order is allowed to stand, then the same will cause gross miscarriage of justice and, therefore, the order impugned in the present petition is liable to be quashed and set aside. He has further submitted that the order impugned is misuse of power done by Collector by ignoring normal and regular procedure prescribed by law and the Collector has not even bothered to follow the constitutional mandate. He has submitted that the impugned order suffers from a clear breach of principles of natural justice and equity. The petitioner submits that the name of the trust was recorded in the revenue record in the year 1996. In this regard, he has relied upon annexure-D to the petition. He has also produced village form No.7-12 showing entries that the land in question is "kabrastan". He further submitted that inspite of this fact the respondent did not bother to call upon and provide hearing to the trust before passing the impugned order.

4.1 He further submitted that even otherwise the perusal of the impugned order makes it clear that the Collector had initiated the proceedings unilaterally and the same were

concluded unilaterally. It clearly appears from the impugned order that the Collector did not thought it fit to verify the fact regarding use of the Kabrastan and only relied on the letter of the Mamlatdar.

4.2 He also submitted that the Collector had committed grave error in vesting the Kabrastan land in the Government. It is submitted that as pronounced by this Hon'ble Court as well as the settled principle of law is that once a Kabrastan is always a Kabrastan. The certificate issued by local Panchayat establishes the fact that even today also use of the land in question is for the purpose of Kabrastan. Such use cannot be closed and even if the use is closed the status of the land cannot be changed. He further submitted that even the respondents have admitted in their affidavit in reply that the land in question is used for the purpose of graveyard. He further submitted that bare reading of the impugned order makes it clear that though burial had taken place in past, this fact was ignored and with a view to deprive Muslim community of their last resting place various non existing reasons are mentioned in the impugned order. He also submitted that the entry of the impugned order was posted without following statutory requirement and the same requires to be quashed and set aside.

4.3 He has also relied upon a Judgment in the case of **Syed Mohd. Salie Labbai (D), by Lrs. and Ors. v. Mohd. Hanifa (D) By Lrs. and Ors.** reported in [1976] 4 SCC 782 to contend that once property became Wakf property it would continue to be Wakf property notwithstanding non-user by the Muslim community.

4.4 He has further submitted that the respondent has no jurisdiction to pass such an order as he lacks jurisdiction of switching over of the property and subsequent conversion. The Collector has tried to play with the sentiments of persons whose relatives have been buried in the said Kabrastan. That the respondent has vested the land in Government with an ulterior motive of allotting the said land to the builder lobby in coming years. In view of above, he has prayed to allow present petition.

5. *Per contra*, learned AGP, Mr.Kanara for the respondent-State has submitted that the impugned order is of 2006, while present petition is filed in 2009, therefore, there is delay of three years in filing present petition. He also submitted that Circle Officer, Champaner had made spot inspection and it was found that there are five graves (Kabars), which are 20 years old and rest of the land is lying vacant. He submitted that it appears that the land is lying idle and, therefore, looking to the future need for development of Pavagadh, the land in question was vested in Government. In this regard, he has also relied upon page 33, which is a Government Gazette with regard to publication of transaction of The Champaner Pavagadh Archaeological Park World Heritage Area Management Authority Act, 2006. He has also relied upon page 48, which is a letter dated 23.4.2006 for Denotifying the land in question for the purpose of development of the area. He has also relied upon further reply filed in compliance of order dated 20.2.2014 and submitted that there are only two muslim families in Champaner village. It is also submitted by him that no land is available which can be allotted to the petitioner-Trust for the

purpose of graveyard as most of the land is of the ownership of the Forest Department. In view of these, he has prayed to dismiss present petition.

6. Considering the submissions made on behalf of the parties and the materials placed on record. From the document at Annexure-D, it is clear that the name of the trust was recorded in the revenue record in the year 1996. Even the entries of village form No.7-12 show that the land in question is "kabrastan".

6.1 In the case of **Syed Mohd. Salie Labbai (D), by Lrs.** (Supra) it is held as under:-

"We are of the view that once a Kabarstan has been held to be a public graveyard then it vests in the public and constitutes a wakf and it cannot be divested by non-user but will always continue to be so whether it is used or not.

The following rules in order to determine whether a graveyard is a public or a private one may be stated:

(1) that even though there may be no direct evidence of dedication to the public, it may be presumed to be a public graveyard by immemorial user i.e. where corpses of the members of the Mahomedan community have been buried in a particular graveyard for a large number of years without any objection from the owner. The fact that the owner permits such burials will not make any difference at all;

(2) that if the grave-yard is a private a family grave-yard then it should contain the graves of only the founder, the members of his family or his descendants and no others. Once even in a family grave-yard members of the public are allowed to bury their dead, the private graveyard sheds its character and becomes a public grave-yard;

(3) that in order to prove that a graveyard is public by dedication it must be shown by multiplying instances of the character, nature and extent of the burials from time to time. In other words, there should be evidence to show that a large number of members of the Mahomedan community had buried their corpses from time to time in the graveyard. Once this is

proved, the Court will presume that the graveyard is a public one; and

(4) that where a burial ground is mentioned as a public graveyard in either a revenue or historical papers that would be a conclusive proof to show the public character of the graveyard.

Applying these principles to the facts of the present case, it is clear that there are graves and even in the revenue records, it is shown as "kabrastan". Considering all these aspects, present petition is allowed."

6.2 As held in aforesaid case, the certificate issued by local Panchayat establishes the fact that even today also use of the land in question is for the purpose of Kabrastan. Not only that the respondents have also admitted in their affidavit in reply that the land in question is used for the purpose of graveyard. It also appears that the respondent did not give opportunity of hearing to the trust before passing the impugned order. It also found that the observations made by the authority are neither relevant nor rational. It is observed by the authority that there are less graves in the graveyard inspite of observing that only two Muslim families are residing in the nearby vicinity. One cannot expect that graveyard should be full always and if there are less graves, it cannot be said to be a ground to vest the land in Government.

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7. Considering all these aspects, present petition is allowed. Order dated 16.9.2006 passed by Collector, Panchmahal-Godhra, Annexure-F to present petition, is quashed and set aside. Rule is made absolute accordingly. No order as to costs. Direct service is permitted.

R.S. MALEK

Sd/-
(DR. A. P. THAKER, J)