

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

BEFORE

HON'BLE SHRI JUSTICE G. S. AHLUWALIA

ON THE 26th OF JULY, 2024

WRIT PETITION No. 13026 of 2015

ARCHAEOLOGICAL SURVEY OF INDIA

Versus

CHIEF EXECUTIVE OFFICER AND OTHERS

Appearance:

Shri K.N. Pethia – Advocate for the petitioner.

Shri Ukarsh Agrawal – Advocate for respondent No.1.

Ms. Sabhyata Yadav – Advocate for respondent No.2.

ORDER

This petition under Article 226 of Constitution of India has been filed seeking following relief(s):-

- (i) Call for the record pertaining to the instant controversy from the respondent No.3 and its subordinate concerned Authority;
- (ii) Quash the impugned order dated 19.7.2013 and declaration of the property of Khasra No.433 to be of the Wakf property be also quashed.
- (iii) Subject land Khasra No.433 of village Emagird, Patwari halka No.44A, Burhanpur, District Burhanpur having area of about 4.448 Hectares (10.99 Acres) be declared as the property of the petitioner.
- (iv) Any other relief this Hon'ble Court deems fit/proper, may also be granted to the petitioner with costs.

2. It is submitted by counsel for petitioner that Archaeological Survey of India is protecting the ancient monuments declared under the

Ancient Monuments Preservation Act, 1904 which was amended from time to time and was substituted by another Act. There are various ancient monuments and archaeological sites which are under the protection and conservation of petitioner in various places across the country which are glorious heritage of ancient time and history of country. Tomb of Shah Shuja, Tomb of Nadir Shah, Bibi Sahib's Masjid situated at the Fort of Burhanpur are also ancient and protected monuments.

3. By notification issued on 15/01/1913, Chief Commissioner in exercise of power under Section 1(1) of Ancient Monuments Preservation Act, 1904 was pleased to declare Tomb of Shah Shuja, Tomb of Nadir Shah, Bibi Sahib's Masjid, The Palace situated in the Fort of Burhanpur as Ancient monuments. Thereafter by notification published in Central Provinces Gazette dated 18/04/1925, His Excellency, The Governor in Council, in exercise of power conferred by sub-section (3) of Section 3 of Ancient Monuments Preservation Act, 1904 was pleased to declare the monuments mentioned in the aforesaid notification as protected monuments as per section 3(1) of Ancient Monuments Preservation Act, 1904. It is submitted by counsel for petitioner that by impugned order, CEO, M.P. Waqf Board has declared aforesaid protected and ancient monuments as waqf property. It is submitted by counsel for petitioner that once the property in dispute is already declared as ancient and protected monument under the Ancient Monuments Preservation Act, 1904, then the same cannot be declared as a waqf property.

4. It is submitted that as per section 11 of Ancient Monuments Preservation Act, 1904, Commissioner would be a guardian of the monument and for the purposes of maintaining such monument shall

have access to the monument at all reasonable times by himself and by his agents, subordinates and workmen, for the purpose of inspecting the monument and for the purpose of bringing such materials and doing such acts as he may consider necessary or desirable for the maintenance thereof. It is submitted that unless and until guardianship is relinquished under Section 14 of Ancient Monuments Preservation Act, 1904, the same cannot be declared as a waqf property. It is further submitted that for declaring any property as waqf property, the property must be existing waqf property on the date of commencement of the Waqf Act so as to entitle the waqf Board to exercise power under the same. Once the property has been acquired by Government of India under the Ancient Monuments Preservation Act, 1904 and has been entered in the register of Ancient protected monuments long back and Government of India is in absolute ownership and continuous possession thereof for the last several years, then the said property cannot be said to be an existing waqf property, therefore Waqf Board cannot exercise any right over the same. To buttress his contentions, counsel for the petitioner has relied upon the judgment passed by Supreme Court in the case of **Karnataka Board of Wakf Vs. Government of India and others** reported in **(2004) 10 SCC 779**.

5. In reply, it is submitted by counsel for the respondents that since the aforesaid property was declared as a waqf property, therefore CEO had no option but to direct the petitioner to vacate the same. It is further submitted that the order under challenge is an appealable order and petitioner should have approached the Waqf Tribunal.

6. Considered the submissions made by counsel for the parties.

7. It appears that by notification issued under Section 5(2) of Waqf Act, 1995 monuments in question were declared to be a waqf property.

Although respondents have filed a part of such notification but the complete notification has not been placed on record.

8. It is also undisputed fact that said notification was not challenged by any of the parties.

9. Be that as it may.

10. The property in question was already declared as ancient monument and protected monument under sections 1(1) and 3(1) of Ancient Monuments Preservation Act, 1904. After the property is declared as ancient monument and protected monument, the same comes under the guardianship of Commissioner and property can be released from his guardianship only after following the procedure as laid down under Section 14 of Ancient Monuments Preservation Act, 1904. There is nothing on record to show that Commissioner had ever relinquished his guardianship over the property in dispute.

11. The Supreme Court in the case of **Karnataka Board of Wakf (supra)** has held as under:-

"8. Pertaining to the ownership claim of appellants over the suit property there is no concrete evidence on record. The contention of the appellants that one Arabian saint Mahabari Khandayat came to India and built the Mosque and his lineal descendents possessed the property cannot be accepted if it is not substantiated by evidence and records. As far as a title suit of civil nature is concerned there is no room for historical facts and claims. Reliance on borderline historical facts will lead to erroneous conclusions. The question for resolution herein is the factum of ownership, possession and title over the suit property. Only admissible evidence and records could be of assistance to prove this. On the other hand, Respondent produced the relevant copy of the Register of Ancient Protected Monuments maintained by the Executive Engineer in charge of

the Ancient Monuments (Ext. P-1) wherein the suit property is mentioned and the Government is referred to as the owner. Since the manner of acquisition is not under challenge the entry in the Register of Ancient Protected Monuments could be treated as a valid proof for their case regarding the acquisition of suit property under the appropriate provisions of the Ancient Monuments Act. Gaining of possession could be either by acquisition or by assuming guardianship as provided under section 4 thereof. Relevant extracts of Ext. P-2, CTS records fortify their case. It shows that the property stands in the name of respondent. Moreover, the evidence of Syed Abdul Nabi who is the power-of-attorney holder (of defendants 2A and 2B in the Original suit) shows that the suit property has been declared as a protected monument and there is a signboard to this effect in the suit property. He also deposed that the Government is in possession of the suit property and the Government at its expenditure constructed present building in the suit property. On a conjoint analysis of Exts. P-1, P-2 and deposition of Syed Abdul Nabi, it could be safely concluded that the respondent is in absolute ownership and continuous possession of the suit property for the last about one century. Their title is valid. The suit property is government property and not of a Wakf character."

12. Thus, it is clear that the property in question is an ancient and protected monument duly notified under the Ancient Monuments Preservation Act, 1904 and therefore, CEO, M.P. Waqf Board committed a material illegality by directing the petitioner to vacate the same.

13. Now the only question for consideration is as to whether in absence of any challenge to the notification by which the aforesaid property was declared as waqf property, the order dated 19/07/2013 passed by CEO, M.P. Waqf Board in case No.254/2011 can be quashed because the said order has been passed merely on the basis of

notification issued under the Waqf Act.

14. As already held that the property in dispute was already declared as ancient monument and protected monument in the year 1913 and 1925. Thus, after the issuance of said notifications, property is now under the guardianship of Commissioner and the property is of Central Government. Since the said property cannot be said to an existing waqf property on the date of commencement of Waqf Act, 1995 therefore even if a notification was issued thereby declaring it to be a waqf property, then the only question which would arise is as to whether such notification would automatically nullify the notifications issued under the Ancient Monuments Preservation Act, 1904 or not?

15. Counsel for the respondents could not point out any provision of law by which notification issued under the Ancient Monuments Preservation Act, 1904 would stand nullified without release of the property by Central Government or by the Commissioner.

16. An erroneous notification issued in respect of property which is not an existing waqf property on the date of commencement of Waqf Act, would not make it a waqf property thereby giving jurisdiction to the waqf Board to seek eviction of the Central Government from ancient and protected monuments.

17. Since the notification issued under Waqf Act, 1995 would not take away the ownership of Central Government over the property in dispute, therefore even in absence of any challenge to the notification by which property in dispute was declared as waqf property, this Court is of considered opinion that it cannot be said that by virtue of notification issued under the Waqf Act, the property in dispute has become a waqf property.

18. Under these circumstances, the order dated 19/07/2013 passed by

CEO, M.P. Waqf Board in case No.254/2011 is hereby **set aside**.

19. Petition succeeds and is hereby **allowed**.

(G.S. AHLUWALIA)
JUDGE

S.M.