Neutral Citation No. - 2025:AHC:76400

AFR
Reserved on 06.05.2025
Delivered on 12.05.2025

Court No. - 9

Case :- MATTERS UNDER ARTICLE 227 No. - 2495 of 2016

Petitioner :- Waqf Madarsa Qasimul Uloom
Respondent :- State Of U.P. And 2 Others
Counsel for Petitioner :- Ajay Kumar Singh,Ashish Kumar Singh,Janardan Mishra,Rajni Kant Chaube
Counsel for Respondent :- C.S.C.

Hon'ble Rohit Ranjan Agarwal,J.

1. The petitioner before this Court had instituted an Original Suit No.9 of 2011 against defendants-respondents No.1 to 3 claiming relief of permanent prohibitory injunction restraining them from demolishing the property in dispute and making new construction over the same.

2. In the plaint, it was averred that plaintiff is the owner and landlord of the property mentioned in the map marked as 'A', 'B', 'C' and 'D'. It has been let out to defendants No.1 and 2 on a monthly rent of Rs.34/- In para 2 of the plaint, it has been stated that in the aforesaid Madarsa, a Masjid has been constructed where poor children are given basic education and functioning of Madarsa depends upon contribution made. Further in para 3 of the plaint, it is stated that on the said property, a Police Chauki of P.S. Gagalheri is standing, and, as the new building of the police station has been constructed, the aforesaid police chauki has become out of use and a lock is hanging over the police chauki. Further it has been stated in para 4 that the defendants were removing the roof of the police chauki and were demolishing the structure standing therein.

3. The defendants-respondents contested the suit and filed their written statement on 08.03.2011 wherein only tenancy of Rs.34/- per month was accepted but rest of the contents of the plaint were denied. In the additional pleas, it was specifically stated in para 7 that the plaintiff had claimed the property to be a waqf property but

the same has not been registered as a waqf before the Waqf Board, thus the plaintiff had no right to maintain the said suit.

4. During pendency of the suit, an amendment application was moved by the defendants on 12.11.2014 for amending their written statement. The said application was allowed by the trial Court on 22.5.2015 against which the petitioner preferred a Revision No.107 of 2015 which has been dismissed vide order dated 18.3.2016, hence the present writ petition.

5. Learned counsel for the petitioner submitted that by the proposed amendment, defendants are trying to withdraw from the admission made in their written statement, which would result in change of defence and would affect the suit proceedings. According to him, the proposed amendment could not be allowed as the defendants have set up a new case that the plaintiffs have no right to prosecute the matter as they are not the owner of the same. Reliance has been placed upon decision of Hon'ble Supreme Court in case of **Hiralal vs. Kalyan Mal & Ors. 1998 AIR (SC) 618**.

6. Sri Sanjai Kumar Singh, learned Standing Counsel appearing for the respondents submitted that it is not a case of withdrawal of admission by the defendants. In fact, after filing of the written statement by the defendants in the year 2011, the defendants received a letter dated 18.9.2014 from Assistant Engineer, National Highway, P.W.D., Saharanpur requiring for removal of Police Chauki, which has been constructed on National Highway No.73, and according to the records, the width of highway is 135 ft.. The Highway was to be transferred to the National Highways Authority of India, Ministry of Road Transport and Highways, Government of India *(hereinafter called as "NHAI")*. Widening of the highways has been proposed by National Highways Development Programme, Phase-IV B. He then contended that another letter dated 26.9.2014 was received by the office of Assistant Engineer, National Highway Division, PWD, Saharanpur wherein it was requested that

unauthorized construction, standing on National Highway No.73, should be immediately stopped. On 13.10.2014, the Executive Engineer, National Highway Division, PWD, Saharanpur again wrote a letter addressed to the defendants requiring them to remove unauthorized constructions standing over the land of National Highways.

7. It was on the basis of letters received from the officials of the National Highway Division that amendment application was moved on 12.11.2014 for amending written statement. According to him the plaintiff- petitioner had encroached upon the land of National Highway and this Police Chauki alongwith other shops were constructed, which are required to be demolished in pursuance of the letters of official of the National Highway Division. Both the Courts below had rightly proceeded to allow the amendment application.

8. I have heard the respective counsel for the parties and perused the material on record.

9. It is a classic case where the land of NHAI has been encroached upon by the plaintiff and Madarsa along with Masjid and certain other constructions have been raised and the property is being claimed to be a 'waqf'.

10. Before adverting to decide the issue in hand, a cursory glance of some of the provisions of Waqf Act, 1995 *(hereafter called as "Act of 1995")* are relevant for the better appreciation of the case.

11. Section 3(a) of Act of 1995 defines "beneficiary", which reads as under :

> *"beneficiary" means a person or object for whose benefit a waqf is created and includes religious, pious and charitable objects and any other objects of public utility sanctioned by the Muslim law.*

12. Section 3(r) of Act of 1995 defines "Waqf", which reads as under :

> *"waqf" means the permanent dedication by any person, of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes—*
>
> *(i) a waqf by user but such waqf shall not cease to be a waqf by reason only of the user having ceased irrespective of the period of such cesser;*
>
> *(ii) a Shamlat Patti, Shamlat Deh, Jumla Malkkan or by any other name entered in a revenue record;*
>
> *(iii) "grants", including mashrat-ul-khidmat for any purpose recognised by the Muslim law as pious, religious or charitable; and*
>
> *(iv) a waqf-alal-aulad to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable, provided when the line of succession fails, the income of the waqf shall be spent for education, development, welfare and such other purposes as recognised by Muslim law,*
>
> *and "waqif" means any person making such dedication;*

13. Section 3(s) of Act of 1995 defines "waqf deed", which reads as under :

> *"waqf deed" means any deed or instrument by which a waqf has been created and includes any valid subsequent deed or instrument by which any of the terms of the original dedication have been varied."*

14. Chapter II of Act of 1995 provides for "Survey of Auqaf". Section 4 provides for preliminary survey of auqaf. Section 5 provides for publication of list of auqaf. It is on receipt of report under sub-section (3) of Section 4 of Act of 1995 that the State Government shall forward a copy of the same to the Board. The Board shall examine the report forwarded to it and forward it back to the Government within six months for publication in the Official Gazette. In case of dispute in regard to Auqaf, when a question arises whether a particular property specified as waqf property in the list of auqaf is waqf property or not or whether a waqf specified in such list is a Shia waqf or Sunni waqf, the Board or mutawalli of the waqf or any person aggrieved may institute a suit in a Tribunal for the decision of the question and the decision of the Tribunal shall be final.

15. Prior to commencement of Act of 1995, Waqf Act 1954, which was trice amended in 1959, 1964 and 1969 was governing the field. Prior to the Act of 1954, the enactments, which were governing the field, were :-

(i) The Mussalman Wakf Validating Act, 1913

(ii) The Official Trustees Act 1913

(iii) The Charitable and Religious Trusts Act, 1920

(iv) Mussalman Wakf Act, 1923

(v) The Hyderabad Endowments Regulation 1349 Fasli

(vi) Bihar and Orissa Mussalman Wakf Act, 1926

(vii) Bombay Mussalman Wakf Act, 1935

(viii) Bengal Wakf Act, 1934

(ix) Delhi Muslim Wakf Act, 1943

(x) United Provinces Muslim Wakfs Act, 1936

(xi) Bihar Wakf Act, 1947

16. Thus, from the combined reading of prior enactments on the subject of waqf, it is clear that 'waqf' means the permanent dedication by any person, of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable. According to Act of 1995, it includes a waqf by user, a Shamlat Patti, Shamlat Deh, Jumla Malkkan or by any other name entered in a revenue record; grants, including mashrat-ul-khidmat for any purpose recognised by the Muslim law as pious, religious or charitable; and a waqf-alal-aulad to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable, provided when the line of succession fails, the income of the waqf shall be spent for education, development, welfare and such other purposes as recognised by Muslim law. "Waqif" means any person making such dedication.

17. 'Waqf deed' means any deed or instrument by which a waqf has been created and includes any valid subsequent deed or instrument by which any of the terms of the original dedication have been varied.

18. Thus, essential feature for a valid waqf, which culls out is that, there must be dedication of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings.

19. Syed Ameer Ali, one of Muslim Scholar has said as under :

> *"the Mohammadan law owes its origin to a rule laid down by the Prophet of Islam; and means; the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings. As a result of the creation of a wakf, the right of wakf is extinguished and the ownership is transferred to the Almighty. The manager of the wakf is the mutawalli, the governor, superintendent, or curator. But in that capacity, he has no right in the property belonging to the wakf; the property is not vested in him and he is not a trustee in the legal sense."*

20. From the reading of the plaint, it transpires that over the waqf madarsa, a masjid has been constructed along with certain other structures, one of which has been let out to the defendants. There is no disclosure as to how the property in question is a waqf and when was it registered. The defendants, in their written statement, has clearly stated in additional pleas that there is no registration of the said waqf nor there is any disclosure in the plaint.

21. It was the subsequent event, which had taken place in the year 2014, where the national Highway Authority took steps for road widening and it required defendants to stop construction being made on the land of National Highway No.73 and also for removing the same as the NHAI was proceeding under the National Highways Development Programme, Phase-IV B, for widening of national highways and the illegal constructions, which were standing, such as the Police Chauki and the other shops, need to be demolished. Letter addressed to the Station House Officer, Gagalheri on 18.09.2014,

26.09.2014 and 13.10.2014 of National Highway Division in this regard are extracted hereas under :

"सेवा में,

थानाध्यक्ष,
थाना गागलहेडी,
जिला- सहारनपुर।

महोदय,

अवगत कराना है कि पुलिस विभाग द्वारा राष्ट्रीय मार्ग सं . 73 (नया रा.मा. सं. 344) के किमी. 36. चैनेज 35.772 पर मार्ग के बांयी तरफ पुलिस चौकी का निर्माण कर लिया गया है। यह पुलिस चौकी का निर्माण राष्ट्रीय मार्ग सं. 73 (नया रा.मा. सं. 344) की भूमि पर स्थित है। अभिलेखों के अनुसार यहां पर "राईड ऑफ वे" (मार्ग की भूमि की चौड़ाई) 135 फीट है।

शीघ्र ही निकट भविष्य में यह मार्ग भारतीय राष्ट्रीय राजमार्ग प्राधिकरण, सड़क परिवहन एवं राजमार्ग मंत्रालय, भारत सरकार को हस्तान्तारित किया जाना प्रस्तावित है। भारतीय राष्ट्रीय राजमार्ग प्राधिकरण, द्वारा एन.एच.डी.पी. फेज-4 बी (National Highways Development Programme, Phase-IV B) के अन्तर्गत इस मार्ग का चौड़ीकरण व सुदृढ़ीकरण प्रस्तावित है जिसके लिये निविदा शीघ्र ही फ्लोट की जाने वाली है।

उपरोक्त के दृष्टिगत अनुरोध है कि उक्त स्थान पर निर्मित की गयी पुलिस चौकी को शीघ्र ही हटाने की कार्यवाही करने का कष्ट करें। सूचनार्थ व आवश्यक कार्यवाही हेतु प्रेषित है।

सहायक अभियंता
राष्ट्रीय मार्ग खण्ड, लो०नि०वि०
सहारनपुर
दिनांकः 18/09/2014"

"दिनांक 26/09/2014

सेवा में

थानाध्यक्ष,
थाना गागलहेडी,
जिला- सहारनपुर।

विषय- राष्ट्रीय मार्ग सं. 73 (नया रा.मा. सं. 344) के चैनेज किमी. 35.800 पर मार्ग के बांयी तरफ गागलहेडी में राष्ट्रीय मार्ग की भूमि पर किये जा रहे अवैध निर्माण को रोकने के सम्बन्ध में !

संदर्भ- इस कार्यालय के नोटिस का पत्रांकः 43/2 सी-कैम्प-2, दिनांक 10.08.2014, पत्रांकः 14/2 सी-कैम्प ए.ई.-11. दिनांक 03.04.2014 एवं पत्रांकः 58/2 सी (कैम्प ए.ई. द्वितीय), दिनांक 26/09/2014

महोदय,

कृपया उपरोक्त विषय के सम्बन्ध में अवगत कराना है राष्ट्रीय नार्ग सं . 73 (नया रा.मा. सं. 344) के चैनेज किमी. 35.800 पर मार्ग के बांयी तरफ मध्य से 53 फीट की दूरी पर श्री मौ . तहसीन, कासिममुलउलूम मदरसा अधिकारी, गागलहेडी, जिला सहारनपुर द्वारा अनाधिकृत निर्माण किया जा रहा है जो कि अतिक्रमण की श्रेणी में आता है। इससे पूर्व इनके द्वारा दुकानों का निर्माण किया गया था जो कि रोड साइड लैन्ड कन्ट्रोल एक्ट 1945 का उल्लंघन है क्योंकि उनके द्वारा कलेक्टर / जिलाधिकारी की अनुमति नहीं ली गयी है। इस कार्यालय के नोटिस पत्रांक: 43/2 सी-कैम्प-2, दिनांक 10.08.2014, पत्रांकः 14/2 सी-कैम्प ए.ई - 11. दिनांक 03.04.2014 एव पत्राकः 58/2 सी (कैम्प ए.ई-द्वितीय) दिनांक 26.09.2014 द्वारा पूर्व में सम्बन्धित को नोटिस दिया जा चुका है।

अतः अनुरोध है कि राजकीय भूमि पर उक्त अवैध निर्माण को रूकवाने का कष्ट करें। जिसगे राजकीय भूमि पर अतिक्रमण रोका जा सके।

Sd/-
सहायक अभियन्ता राष्ट्रीय मार्ग खण्ड,
लो० नि० वि०
सहारनपुर"

"दिनांक 13/10/2014

सेवा में,

थानाध्यक्ष,
थाना गागलहेडी,
जिला- सहारनपुर।

विषयः राष्ट्रीय मार्ग संख्या-73 (नया राष्ट्रीय मार्ग संख्या-344) के चैनेज किमी 35.800 पर मार्ग के बांयी तरफ गागलहेडी में राष्ट्रीय मार्ग की भूमि पर किये जा रहे अवैध निर्माण को रोकने के सबन्ध में।

***संदर्भः** इस कार्यालय के सहायक अभियन्ता का पत्रांक 59/2 सी कैम्प-2, दिनांक 26.09.14*

महोदय,

कृपया उपरोक्त संदर्भित पत्र का अवलोकन करने का कष्ट करें जिसके द्वारा सूचित किया गया था कि राष्ट्रीय मार्ग संख्या-73 (नया राष्ट्रीय मार्ग संख्या-344) के चैनेज किमी 35.800 पर (किमी. 35.790 से किमी. 35.826) मार्ग के बांयी तरफ लेपित मार्ग (लेपित मार्ग की कुल चौड़ाई 7.00+5.80= 12.80 मीटर) के किनारे से 13.50 मीटर (44 फीट 3 इंच) की दूरी पर श्री मौहम्मद तहसीन, कासिममुलउलूम मदरसा अधिकारी, गागलहेडी, जिला सहारनपुर द्वारा अनाधिकृत निर्माण किया जा रहा है। अभिलेखों के अनुसार यह निर्माण राष्ट्रीय मार्ग की भूमि पर हो रहा है जो कि अतिक्रमण की श्रेणी में आता है।

[सहारनपुर देहरादून मार्ग, राष्ट्रीय मार्ग सं 73 व 72ए यू.पी. रोड साईड लैण्ड कन्ट्रोल एक्ट के तहत नोटिफाईड है। राष्ट्रीय ,मार्ग 73 के चैनेज 35.800 पर लेपित मार्ग की चौड़ाई 7.00+5.80=12.80 मीटर है तथा मार्ग भूमि "आर.ओ.डब्ल्यू" की कुल चौड़ाई 41.20 मीटर है उक्त स्थान पर 7 मीटर चौड़े लोपित मार्ग के दायीं तरफ 5.80 मीटर चौड़ाई में "वाइडनिंग" काफी समय पूर्व की.....के अनुसार संज्ञान में लाया गया है कि उक्त चैनेज पर लोपित सतह , कुल चौड़ाई 12.80 मीटर, के मध्य से मार्ग के बांयी तरफ राष्ट्रीय मार्ग की भूमि 24.90 मीटर (81 फीट 8 इंच) है व लेपित मार्ग के किनारे से बांयीं तरफ यह 18.50 मीटर (60 फीट 8 इंच) है]

यह भी संज्ञान में लाया गया है कि कई वर्ष पूर्व इनके द्वारा स्वयं की भूमि पर दुकानों का निर्माण किया गया था परन्तु उत्तर प्रदेश रोड साइड लैन्ड कण्ट्रोल एक्ट 1945 की धारा -5 के अनुसार जिलाधिकारी / कलैक्टर की अनुमति नहीं ली गयी थी। उक्त एक्ट की धारा -13 के अनुसार, बिना अनुमति कराये गये निर्माण को हटाने / दण्ड लगाने का तथा इस कार्य के लिये लगी धनराशि को " लैण्ड एरियर राजस्व" की तरह रिकवर करने का प्राविधान है।

उपरोक्त के दृष्टिगत अनुरोध है कि श्री मौ. तहसीन द्वारा राष्ट्रीय मार्ग की भूमि पर किये जा रहे निर्माण (अतिक्रमण) को तुरन्त प्रभाव से रूकवाने का कष्ट करें।

Sd/-
(ओ.पी. सिह)
अधिशासी अभियन्ता
राष्ट्रीय मार्ग खण्ड,
लो.नि.वि.
सहारनपुर"

22. From the reading of these correspondence, it is clear that the entire constructions, which has been raised by the plaintiff, stands upon the land of National Highway No.73 and in the garb of waqf property, the petitioner is claiming right. The defendants had rightly moved amendment application for amending the written statement on the ground that it is the National Highway Authority, who is the owner of land in question as the constructions are standing over the National Highway No.73 which does not belong to the plaintiffs. Reliance placed upon decision rendered in case of **Hiralal (supra)** is distinguishable in the present set of case as the defendants have not resiled from their admission made earlier.

23. In fact, the defendants were never aware of the fact that the Police Chauki, which was functioning was constructed over the land of National Highway No.73. It was in the year 2014 when these correspondence were made by the officials of the National Highway Division with the Station House Officer, Gagalheri, defendant No.2 that the true picture came in light. The trial Court rightly allowed the amendment application as it does not set up a new case of the defendants. The defendants had been paying rent of Rs.34/- per month for a long time unknowingly, accepting the fact that the structure standing therein was the property of the plaintiff. Once it was revealed that the constructions were unauthorized, standing over the land of National Highway 73 that the amendment was sought.

24. This Court is surprised to note that the plaintiff has made construction over the land of National Highways and had let out the structure to different persons and is realizing the rent treating it to be property of waqf Madarsa. It cannot be said to be a case of 'waqf by user' as the owner of the property in dispute is the National Highway Authority of India, which is under the control of Central Government, Ministry of Road Transport and Highways.

25. Considering the facts and circumstances of the case, I find that no interference is required in the order passed by the trial Court allowing the amendment application filed by the defendants-respondents under Order VI, Rule 17 C.P.C. as well as order passed by revisional Court.

26. Writ petition fails and is hereby **dismissed**.

Order Date :- 12.5.2025
Kushal