

**ORISSA HIGH COURT
CUTTACK**

CRP NO.17 OF 2005

From the order dated 31.12.2004 passed by Sri Saroj Kumar Paty, O.J.C. (I), Presiding Officer, Wakf Tribunal Orissa, Cuttack in Case No.W.T., (O)/O.A.-06/2004.

Nayimul Hasan & others Petitioners

Versus

Peer Hazarat Laskari Mastan
Sahed and another Opp. parties

For petitioner : M/s B.H. Mohanty, J.K. Bastia,
R.K. Nayak, D.P. Mohanty,
T.K. Mohanty, S.Burma,
B. Biswal.

For opp. parties : M/s P.K. Mishra and B.B. Dash
(O.P. No.1)

M/s Mira Ghose, A. Das and
R. Mohanty.
(O.P. No.2)

PRESENT :

THE HONOURABLE MR. JUSTICE PRADIP MOHANTY

Date of hearing and judgment : 14.02.2007

PRADIP MOHANTY, J. In this revision, petitioners challenge the order dated 31.12.2004 of the Presiding Officer, Wakf Tribunal Orissa, Cuttack passed in Case No. W.T.(O)/OA-06/2004. The plaintiff-opposite party no.1 filed the aforesaid case for a declaration that the suit property is WAKF property, for avoiding the compromise decree in T.S. No.4 of 1997 and for recovery of the property from the contesting defendants.

2. The case of the plaintiff before the Wakf Tribunal is that the suit land situated at Machhua Bazar, Cuttack along with other properties of the Peer Hazrat Lashkari Mastan Saheb have been duly surveyed and notified by the Board of Wakfs, Orissa (defendant no.8) as Wakf property in the Orissa Gazette dated 8.11.1968. Such gazette notification has never been challenged since its publication for which it has reached its finality. The suit property is always managed by a duly constituted managing committee known as Mastan Dargha and Jadu Bangala Managing Committee, which is approved and recognized by defendant no.8. The suit land relating to Hal Plot Nos.529 and 532 measuring Ac.0.06 decimals and Ac.0.18 decimals respectively under Hal Khata no.7 corresponding to Sabik Plot No.28 has been recorded in favour of the Peer in the settlement operation. Defendant no.7 alleging to be the Mutawalli of the suit Peer filed R.P. Case No.121265 of 1995 in the court of the learned Commissioner of Land Records and Settlement and by act of manipulation and fraud he managed to get his name recorded as a Mutawalli of the plaintiff-Peer and with the strength of such erroneous record attempted to interfere in the management of the institution. Defendant nos. 1 to 6 on some false and frivolous grounds filed T.S.No.4 of 1997 before the Court of the learned Civil Judge (Senior Division), 1st Court, Cuttack for a declaration that they are the Sikim tenants of the present suit property with alternative prayer for declaration of their title over the suit property on the basis of adverse possession. On coming to know of the initiation of T.S. No.4 of 1997, the plaintiff filed a petition under Order-1, Rule-10,C.P.C. and got itself impleaded as a party. Defendant nos. 1 to 6 being aggrieved by such order preferred Civil Revision No.406 of 1998 before this Court which was dismissed vide order dated 10.07.2000. That suit was subsequently transferred to the court of the Civil Judge (Senior Division), 1st Court, Cuttack. Since defendant nos. 1 to 6 forcibly collected rent from 5 shop rooms situated over the suit land, the plaintiff filed misc. case no.12 of 2002 under Order-40, Rule 1, C.P.C. for appointment of receiver in T.S.

No.4 of 1997. Thereafter, defendant nos. 1 to 6 colluded with defendant no.7 and filed a compromise petition wherein defendant no.7 admitted the right, title, interest and possession of defendant nos. 1 to 6 over the suit land. Then defendant nos. 1 to 6 withdrew T.S. no.4 of 1997 against the rest of the defendants including the plaintiff, but such compromise is illegal as defendant no.7 has no manner of right, title and interest in relation to the suit property. He has no legal authority to represent the plaintiff-Peer. Since the suit property is a Wakf property, the said compromise is hit under the provisions of Sections 60 and 36-A of the Wakf Act,1954. The impugned compromise has been effected behind the back of the present plaintiff. Defendant nos. 1 to 6 are also attempting to interfere in the management of suit property on the basis of such illegal compromise. Therefore, the plaintiff filed the original application for declaration that defendant nos. 1 to 6 have got no manner of right, title, interest and possession over the suit land and recovery of the property.

3. Defendant nos. 1 to 6 filed their joint written statement contending therein that the suit is not maintainable in the eye of law and facts and that it is barred by law of limitation and it is hit under the principle of res judicate as well as for non-joinder of necessary parties. It was also contended that the plaintiff has no manner of right, title, interest or possession over the suit land and that the Gazette notification does not take away the title of these defendants along with their other co-shares. It is asserted by these defendants that they are the owner in possession of the suit land since more than last 80 years. The plaintiff as well as defendant no.8 have admitted in the R.P. Case No.1265 of 1995 that the suit property does not belong to them. Defendant no.8 had filed misc. case no.313 of 1995 against the order dated 9.8.1995 passed in the said R.P. Case but that misc. case was dismissed on 29.11.1996. The Tribunal has no jurisdiction to correct the Hal ROR, which has been rectified as per the order in R.P. Case and the same operates as res judicate for

the present suit. Defendant no.8, who filed separate written statement before the Wakf Tribunal, only supported the case of the plaintiff. It was contended therein that on the application of one Waheb Mannuwer, the only surviving member of the managing committee of the suit institution formed in the year 1940, the registration proceeding was initiated and ultimately the suit property along with other properties were notified as Wakf properties vide Gazette notification no.1248/OBW dated 5.11.1968 and this notification has never been challenged within the stipulated period which has become final and conclusive. The suit institution was all along managed by the managing committee selected/elected by the local inhabitants and the managing committee has been renewed at different times. The 1932 ROR reveals that the suit Peer was represented through SK.Riazuddin and Abdul Aziz. The suit institution is presently being managed by the managing committee through the plaintiff as its Secretary. The name of defendant no.7 or that of SK. Riazuddin and Abdul Aziz being recorded in the settlement RORs do not create or extinguish the right, title and interest of the suit Peer. The alleged factum of hereditary mutawaliship is not permissible under Mohamodan Law unless and until it is proved by the local custom and no custom is available in respect of the present suit institution. Neither defendant no.7 nor defendant nos. 1 to 6 has any manner of right, title or interest over the suit land.

4. Considering, the pleadings of the parties, the following issues were framed by the Tribunal :-

- “(1) Whether the suit as laid is maintainable in the eye of law. ?
- (2) Whether the plaintiff has any cause of action to bring this suit ?
- (3) Whether the suit is barred by the law of limitation ?
- (4) Whether the suit is barred under the principles of res-judicate ?

- (5) Whether the suit is bad for non-joinder of necessary parties?
- (6) Whether the plaintiff has any right, title, interest or possession over the suit property ?
- (7) Whether the defendants are sikim tenants or alternatively they have perfected their title over the suit land by way of adverse possession ?
- (8) Is the plaintiff entitled for a decree of recovery of possession as prayed for ?
- (9) Is the plaintiff entitled for declaration that the compromise decree passed in T.S. No.4 of 1997 amongst the defendant nos. 1 to 7 before the learned Civil Judge (Senior Division), 1st Court, Cuttack is illegal ?
- (10) To what other relief, if any, the plaintiff is entitled ?”

5. The Wakf Tribunal, who tried the case, considered the issues and delivered the judgment in favour of the plaintiff and declared its right, title and interest over the suit property. The Tribunal directed defendant nos. 1 to 6 to give delivery of possession of the suit land in favour of the plaintiff by judgment dated 31.12.2004. Against the said judgment of the Wakf Tribunal, the petitioners-defendant (1 to 6) have preferred this revision under Sections 7 (5) and 83 (9) of the Wakf Act, 1995.

6. In the midst of hearing before this Court, contentions were raised by Mr. Mohanty, learned counsel for the petitioners that the petitioners (defendant nos. 1 to 6) have claimed the status of Sikim tenants acknowledging the superior tenancy right of the deity (plaintiff), who is recorded as a stitiban tenant. The Board of Wakf is only a supervising authority. The proprietary right of the suit property vests either with the stitiban tenant, the plaintiff deity, or with the Sikim tenants, defendant nos. 1 to 6. The fact that the suit land was settled with Fatma Bibi in 1947 is not disputed. Fatma Bibi

is the predecessor in interest of defendant nos. 1 to 6 (petitioners). Therefore, the necessary inference is that defendant nos. 1 to 6 inherited the Sikim right which their predecessor Fatma Bibi had.

7. In view of the above, the question that arises for consideration is whether the rayati right can be obliterated an account of declaration of the Wakf Board under Section 5 of the Wakf Act, 1995. The Act of 1995 replaced the Old Act of 1954. Section 5 of the new Act is quoted below :-

“Section 5 Publication of list of Wakfs-

- (1). On receipt of a report under Sub-section (3) of Section 4, the State Government shall forward a copy of the same to the Board.
- (2) The Board shall examine the report forwarded to it under sub-section (1) and publish in the official Gazette a list of Sunni wakfs or Shia wakfs in the State, whether in existence at the commencement of this Act or coming into existence thereafter, to which the report relates, and containing such other particulars as may be prescribed”

8. The Wakf Board is to act under this Section after receipt of a copy of the report under sub-section(3) of Section 4. Sub-Section (3) of the Section 4 does not deal with any particular property. It deals with the nature and number of Wakfs in the State. Usually, while making a declaration under Section 5, a list of properties belonging to the Wakfs is given. But this does not mean that once the Wakf is notified under Section 5, the nature and status of property is changed or the right of any tenant is obliterated.

9. During the course of argument, learned counsel for the Wakf Board submits that there is no dispute with regard to jurisdiction of the Wakf Board over the property. There is also no dispute with regard to notification of the Wakf Board. She also stated that defendant nos. 1 to 6 have already acknowledged rayati right of the

plaintiff deity. Therefore, it is no more necessary to answer the other issues posed by the defendant nos. 1 to 6. Basing on the legal position regarding Wakf property, the concession of the Board of Wakf and admission of the petitioners, it is reasonable to conclude that defendant nos. 1 to 6 are tenants in respect of Hal Settlement Plot nos.529 and 532 under Hal Khat no.7 of Mouza-Machhua Bazar, Unit No.17 in Cuttack town under the plaintiff. They will continue to hold the land as tenants under the plaintiff deity.

10. With the aforesaid observation, the civil revision is disposed of.

.....
PRADIP MOHANTY, J.

Orissa High Court, Cuttack
 February, 14th. 2007/ *Routray*