

**S.K.MISHRA, J.**

CIVIL REVISION PETITION NO.18 OF 2007(Decided on 26.04.2010)

**ASRAF ALI KHAN & ORS.** ..... Petitioner

.Vrs.

**MASTAN DARGHA & ORS.** ..... Opp. Parties

**WAKF ACT, 1995 (ACT NO. 43 OF 1995) – SEC.51, 107.**

For Petitioners – M/s. Pratap Ku.Mishra, Bibhuti Bhusan Dash.

For Opp.Parties – M/s. C.A.Rao, S.K.behera, S.K.Purohit & A.K.Rath

(For Opp.Party No.1)

M/s. Mira Ghose, Rati Mohanty, & B.Rath

(For Opp.Party No.3)

M/s. Bishnupriya Biswal, C.R.Jethi

(For Opp.Party No.4).

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**S.K.MISHRA, J** This is an application under Section 83(9) of the Wakf Act, 1995. The defendant no.3 in W.T. (O)/O.A. No.05/2005 of the State Wakf Tribunal, Orissa has filed this revision application challenging the Judgment of the Tribunal dated 25.01.2007, wherein the Tribunal decreed suit of the plaintiff, i.e., respondent no.1 and declared that the suit schedule property is wakf property and the registered sale deed executed by one Wahab Manawar and his wife Najimun Nissa Bibi in favour of the defendants 1 to 3 to be null and void. The Tribunal also passed the order of recovery of the possession of the suit property.

2. The case of the plaintiff in brief is that the suit schedule property recorded in Unit No.17, Hal Malik Khata No.7, Sikimi Khata No.1, Hal Plot No.534 measuring Ac.0.92 decimals corresponding to C.S. Khata No.37, Plot No.26 belonged to the plaintiff institution. The schedule property was originally recorded in the name of deity Mastan Saheb situated at Buxi Bazar, Cuttack. The property was duly surveyed, registered and notified as Wakf property in the Official Gazette vide Orissa Gazette notification No.1248/OBW, dated 08.11.1968. The Wakf Board, Orissa (that is defendant No.4) is looking after the management of suit property through a Managing Committee, namely, "Mastan Dargha and Jadu Bangala Managing Committee" duly approved and recognized by it. One Wahab Manawar was appointed as mutawalli with respect to the suit property. He and his wife Nazimun Nissa Bibi having no manner right or interest on the property illegally executed a sale deed in favour of defendants 1 to 3, in respect of suit property vide R.S.D. No.1564, dated 06.03.1960. Being emboldened with such fraudulent and illegal sale deed Defendants 1 to 3 managed to record their names in the Hal R.O.R. as sikkim tenants. During November, 2004 defendants 1 to 3 in order to sale away the suit property made negotiations with the prospective purchasers and when this fact came to the knowledge of the Secretary of the plaintiff institution he objected to it and on enquiry he ascertained that defendants 1 to 3 have purchased the suit property from Wahab Manawar under a registered deed of sale. The Secretary of the plaintiff institution immediately applied for a certified copy of the alleged sale deed and after

obtaining the same on 18.12.2004 filed the suit for declaration that the suit property is wakf property, sale deed no.1564 dated 06.03.1960 executed by Wahab Manawar and his wife in favour of defendants 1 to 3 is null and void, and permanent injunction/recovery of possession.

3. Defendant no.4 has filed written statement supporting the case of the plaintiff. The Wakf Board has pleaded that the plaintiff institution is a Muslim religious public institution all along managed by a Managing Committee represented through its Members/Secretary. The suit property was recorded in the name of the plaintiff institution in Sabik R.O.R. published in 1932 in "Sthitiban" status and the property was surveyed and notified as Wakf property vide the Gazette notification in the year 1968. The plaintiff institution being a minor the property was in khas possession of Wahab Manawar, who was a mutawalli. It is further pleaded under the Mohammedan law a mutawalli is merely a Manager of the institution and he cannot alienate the wakf property without prior sanction of the Kazi or the District Judge or the Wakf Board, as the case may be. Since Wahab Manawar alienated property without prior sanction from competent authority, sale deed in question is void, illegal and inoperative in law. The defendant no.4, therefore, prayed that the suit of the plaintiff be decreed.

4. Defendants 1 to 3 have filed a joint written statement denying the averments made by the plaintiff that the suit property is a wakf property. They specifically pleaded that the suit property was recorded in the name of Wahab Manawar in the Sabik R.O.R. of 1931, who had occupancy right over the same. At the time of his marriage Wahab Manawar gifted suit land to his wife Nazimum Nissa Bibi and thereafter resided there peacefully. Due to legal necessity Wahab Manawar and his wife sold the suit land to defendants 1 to 3 by executing sale deed no.1564 dated 06.03.1960 and delivering possession thereof. After purchase defendants 1 to 3 constructed a single storied house in the year 1965 and possessed the land openly, peacefully and uninterruptedly to the knowledge of all including the plaintiff. On 21.06.1983 defendants 1 to 3 made a division of the suit property among themselves by registered deed of partition. The defendant no.1 constructed a three storied building of his share of property with approval of plan from the Cuttack Development Authority on dated 21.01.1992. Thus, defendants 1 to 3 on the basis of their long possession beyond statutory period have acquired title over the suit land by adverse possession. The contesting defendants also raised objections as to the maintainability of the suit land on the ground of limitation.

5. The defendant no.5 pleaded that he has purchased the suit land from defendant no.1. He filed a separate written statement supporting the sale in his favour on 18.02.2005.

6. On such pleadings, the learned Tribunal cast as many as thirteen issues and addressed itself to decide questions like maintainability of the suit, existence of cause of action, limitation, jurisdiction of the Tribunal, valuation of the suit, non-joinder of necessary parties, adverse possession. It also framed issues to determine whether the suit property is wakf property, whether the respondents 1 to 3 have any manner of right, title, interest or possession of the suit land, whether the applicant is entitled to relief of recovery of possession and whether the sale deed in questions are illegal and void and if the relief prayed for can be granted in favour of the plaintiff.

7. The learned Tribunal deciding issue no.7 has come to the finding that the suit property is a wakf property. Learned Tribunal further held that it has jurisdiction to decide

the suit and the suit is maintainable. He further held that Wahab Manawar was a sikkim tenant in respect of the suit schedule property but he had no saleable interest in the suit property and hence, the sale deed executed by him and his wife is void. On the question of adverse possession, the Tribunal held that the defendant had not acquired right over the suit property by adverse possession. Taking note of Section 107 of the Wakf Act, 1995, learned Tribunal has held that the Limitation Act is not applicable to the suit relating to recovery of possession of immovable property comprised in any wakf and hence, he held that the suit is not barred by limitation. Thus, holding the learned Tribunal decreed the suit on contest against the defendants 1 to 3 and 5 and on admission against the defendant no.4. Such decree is under challenge in this revision.

8. In course of hearing of the revision, learned counsel for the petitioners, inter alia, submitted that the findings recorded by the learned Tribunal, the property is a wakf property by user is incorrect as there is no pleading nor any evidence regarding such wakf by user.

The learned counsel for the petitioners also submitted that once the Tribunal has held that W. Manawara was a sikkimi, the property being homestead property, the right of the sikkim is both heritable and transferable. It is further submitted that the suit is barred by limitation and Section 107 of the Wakf Act, 1995 does not apply to the present suit, as right has vested. Learned counsel for the petitioners also submitted that the notification no.68 did not include the suit land. He also contended that as per Section 40 of the Wakf Act, plaintiff should have approached the Board only then he can approach the Tribunal.

Learned counsel for the opposite party no.1 and counsel appearing for the Wakf, on the other hand, supported the findings recorded by the learned Tribunal and prayed to dismiss the revision.

9. It is evident from the impugned judgment that the learned Tribunal has come to the finding that the property is a Wakf property by user. Section 4 of the Muslim Wakf Act, 1954 (No.29 of 1954) (hereinafter referred to as the "Old Wakf Act" for brevity), provides for preliminary survey of Wakf. Under Sub-section (1), it is provided that the State Government may, by notification in the Official Gazette appoint for the State a Commissioner of Wakfs and as many additional or Assistant Commissioners of Wakfs as may be necessary for the purpose of making survey of wakf properties existing in the State on the date of the commencement of that Act. Sub-Section (3) provides that the Commissioner shall, after making such enquiry as he may consider necessary, submit his report to the State Government contending the particulars. Sub-section (1) of Section 5 provides that 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. Sub-Section (2) of Section 5 further provides that the Board shall examine the report forwarded to it under sub-section (1) and publish in the Official Gazette a list of wakfs existing in the State containing such particulars as may be prescribed.

10. In pursuance of such provision, some of the wakfs properties has been surveyed and it has been notified in the Official Gazette of the year 1968. The said Notification provides for existence of a Wakf by the name of "Mustana Dargha and Jadu Bangala Managing committee". The notification further reveals that such Wakf has been recognized for the purpose of cremation of people belonging to Islamic faith and providing shelter to Travelers/outsideers. Learned counsel for the petitioner submitted that the land recorded in the said Notification is not the suit land. Such a plea has not been taken in the written statement. In fact, there is no dispute regarding the identity of the suit land. It is in fact admitted that the land was covered under the Gazettee Notification, 1968. Yet the defendant claimed that the said Waheb Manohar has the exclusive right

thereon, whereas the plaintiff and the Wakf Board maintained that land to be Wakf properties.

11. Section 6 of the Old Act provides for disputes regarding Wakfs. In sub-section (1), it is provided that if any question arises, whether a particular property is Wakf property or not or whether a Wakf is Shia wakf or Sunni wakf, the Board or the mutawalli of the wakf or any person interested therein may institute a suit in the Civil Court of the competent jurisdiction for the decision of the question and the decision of the civil court in respect of such matter shall be final. It is further provided that no such suit shall be entertained by the civil Court after expiry of one year from the date of publication of the list of Wakfs under Sub-section (2) of Section 5. Thus, if the defendants claim that they have purchased the property in the year 1960 from Waheb Manohar and his wife and the property was declared to be of Wakf property in the year 1968 Gazette Notification, then the defendants should have preferred a suit under section 6 of the Old Act, within one year of publication of such list, under sub-section (2) of Section 5 of the old Act. The defendants having not done so are precluded at this stage to raise the plea that the property was not wakfs property.

12. There is also other material on record which shows that the properties in question are wakf properties. The witnesses to defendants No.1 to 3 have admitted that the suit properties are wakf properties and their vender was Mutawalli. D.W. 1 has also admitted that the suit properties are utilized for the cause of the institution. Both the defendants and the plaintiff claim that in 1931, the Record of Right was prepared in the name of Mustana Dargha and Jadu Bangla in Stitiban status. It is clear from the evidence of defendant no.1 who has stated in his examination-in-chief that the Record of Rights dated 30.10.1931 was in the name of the Waheb Manohar, even though the Deity Mastana Saheb recorded under Khata no.35, Plot nos. 24, 25,28 and 37 were its niz dakhil land. The examination-in-chief further shows that the plaintiff has led into the evidence, Ext.A i.e. the Record of Rights issued in the year 1931, but strangely, such Record of Rights has not been exhibited. It does not find place in the list of Exhibits nor the same has been considered by the learned Tribunal while deciding the issue. Since the defendant no.1 himself has relied on the document and in fact the same was in his possession and has gone onto swear the affidavit (examination-in-chief) indicating that the said document should be marked as Ext. A, but the same has been withheld, this Court comes to the conclusion that an adverse inference regarding withholding of such evidence shall be drawn against the defendant no.1. From such evidence it is clear that the land was recorded in the name of the Deity Mustana Saheb. The Defendant's witnesses also admitted that Waheb Manohar was acting as Mutawalli of the said wakf. Thus, it is immaterial that there is no pleading regarding 'Wakf by user' and there is insufficient evidence of the user. Keeping in view the peculiarity of the case, this court comes to the conclusion that the evidence on record clearly established that the property was Wakfs property.

13. Mulla's principle of Mahammadan Law, edited by M.Hidayatullah in XXI Edition, 2001 at paragraph 207 reflects that a Mutawalli has no power, without the permission of the Court, to mortgage, sell or exchange Wakf property or any part thereof, unless he is expressly empowered by the deed of Wakf to do so. The Wakf Act, 1995 (Act 43 of 95) (hereinafter referred to as the 'Act' for brevity), at section 51 provides that alienation made without sanction of the Board is void. No such provision is there in the Old Act. In view of such provision, the Law as enumerated by Mulla in the aforesaid book has to be taken into consideration. It may be noted that the said book is an Authority in Mahammadan Law and can always be referred to understand the principles governing the people of the country who follow Islamic faith. On the basis of the aforesaid discussion, this Court comes to the conclusion that the property was Wakf property and

the same was sold by Waheb Manohar in 1960 without any valid permission and therefore the same is void. Any subsequent transfer of the property by the purchasers from Waheb Manohar shall also derive no title.

14. The next contention is that Waheb Manohar was a Sikkim tenant and, therefore, has heritable and alienable right over the property. It is true that in the year 1988, the Record of Rights has been prepared in favour of Mastana Saheb and the opposite party Bijaya Singh Jena and others have been recorded as tenants therein. However, such preparation of Record of Rights does not create any title with the contesting defendants. The said defendants do not claim that they were tenants under Mastana Saheb, rather they have claimed to have purchased the suit property from Waheb Mahohar. It is already noted that the original R.O.R. of 1931 has not been produced by the Defendant to prove that Waheb Manohar was a Sikkimi tenant and adverse inference has been drawn. That being so, the contesting defendants again claimed that they are Sikkimi tenants under the Deity, which was accepted by the Tribunal. Neither Waheb Manohar nor the subsequent purchasers were Sikkimi tenants. To that extent, the finding of the learned Tribunal is erroneous.

15. Learned counsel for the petitioner further submitted that under Section 40 of the Act, the Board is to decide, whether a property is a Wakf property or not. Section 40 provides for decision, if the property is Wakf property. Sub-section (1) provides that the Board may itself collect information regarding any property which it has reasons to belief to be Wakf property and if any question arises, whether a property is Wakf property or not etc. it may after making such enquiry as it may deem fit, decide the question. Sub-section (2) provides that the decision of the Board on a question under sub-section (1) shall unless revoked or modified by the Tribunal, be final. A plain reading of the section reveals that the mandate of law does not require that before instituting a suit before the Tribunal, the institution should first approach the Wakf Board. It simply empowers the Wakf Board to declare any property as Wakf and in such case, its decision is final unless it is set aside or modified by the Tribunal. It is not necessary for the plaintiff-Institution to approach the Wakf Board first for a decision on the said question and therefore, the contention raised by the learned counsel for the petitioner that the suit must fail, because there are no such application to the Board by the plaintiff-Institution is without any substance. Moreover, the Board itself has appeared in the suit and filed written statement. The Board does not raise any objection regarding maintainability of the suit. In such case, the contesting defendants have no locus standi to raise such technical plea.

16 Only other point canvassed by the learned counsel for the petitioner is that the suit is barred by limitation. Admittedly, the first sale took place on 06.03.1960 by the Mutawalli Waheb Manohar and his wife. The Limitation Act, 1908 was in force at that time. Article 134 A provides for the limitation to set aside a transfer of immovable property comprised in any Hindu, Mahammadan or Sikh religion or charitable endowment to recover possession of immovable property comprised in the endowment, which has been transferred by a previous Manager for a valuable consideration to be twelve years from the date of death, resignation or removal of the transferor. Article 134-C provides that the Limitation for a suit by the Manager of a Hindu, Mahammadian or Sikh religion or charitable endowment to recover possession of immovable property comprises in the endowment, which has been sold by a previous Manager for a valuable consideration to be 12 years from the death, resignation or removal of the seller.

17. In this case, no evidence is forthcoming when the Waheb Manohar ceases to become a Mutawalli nor there is any evidence of death or resignation of the said Muttawalli. When the matter stood thus, the Limitation Act, 1963 came into force. Section 31 of the new Limitation Act provides that:

**“31. Provisions as to barred or pending suits, etc.-** Nothing in this Act shall,-

- (a) enable any suit, appeal or application to be instituted, preferred or made, for which the period of limitation prescribed by the Indian Limitation Act, 1908, expired before the commencement of this Act; or
- (b) affect any suit, appeal or application instituted, preferred or made before, and pending at, such commencement.”

In essence, this section provides that whenever the period of limitation has expired, the passing of new act will not revive the right already extinguished. In this case, admittedly the period of limitation is twelve years and in worst case also the same was not completed before passing of the 1963 Act. Furthermore, it is seen that in the year 1984, an amendment was brought into the old Wakf Act, wherein Section 66-G was introduced, which prescribed the limitation for recovery of Wakf property to be thirty years and such period shall begin to run when the possession of the defendants becomes adverse to the plaintiff.

18. Learned counsel for the petitioner submitted that Section 66-G of the Old Act, as amended by the Wakf (Amendment) Act, 1984 is not applicable to the State of Orissa. The confusion has been created because of Section 2 of the Amendment Act, which aims to amend Section 1. It has to be understood with reference to Sub-section (3) of Section 1 of the original Muslim Wakfs Act, 1954. Sub-section (3) of Section 1 provides that the Act shall come into force in a State to which this Act extends on such date as the Central Government may, by notification in the Official Gazette, appoint in this behalf for that State; and different dates may be appointed for different States. It further provides that in respect of any of the states of Bihar, Delhi, Uttar Pradesh and West Bengal, no such notification shall be issued except on the recommendation of the State Government concerned. So the original Act has an application to the State of Orissa by virtue of the Central Government Notification. No additional recommendation of the State Government is required in its applicability to Orissa.

19. In the amendment, Sub-section (3) of Section 1 has been substituted, which reads as follows:

“Provided that, as soon as may be, after the commencement of the Wakf (Amendment) Act, 1984, the Central Government may, by notification in the Official Gazette, appoint a date on which the provisions of this Act, as amended by the Wakf (Amendment) Act, 1984, shall come into force in the States of Uttar Pradesh and West Bengal and in those parts of the States of Gujarat and Maharashtra in which the provisions of this Act do not apply, and different dates may be appointed for different States or for different areas, and for the different provisions of this Act, as so amended, and, on and from the date so appointed, the corresponding law, applicable to wakfs in force in that State or in any part thereof, or, as the case may be in such area, shall cease to operate, and, on such cesser, such corresponding law shall be deemed to have been repealed by an Act enacted by the Legislature of that State, but such cesser shall not affect the previous operation of such corresponding law, and subject thereto, anything done or any action taken in exercise of any power conferred by or under any such corresponding law shall be deemed to have been done or taken in the exercise of powers conferred by or under this Act, as amended by the Wakf (Amendment) Act, 1984, as if this Act, as so amended, were in force on the date on which such thing was done or action was taken.”

In the original Act, Section 2 also provides that the Old Act shall not apply to Durgah Khawaja Saheb, Ajmer. In order to remove the anomaly, Sub-section (2) of the Amendment Act, 1984 has been introduced, so that the Central Government may in the Official Gazette by Notification appoint different dates for application of the Wakf Act as amended in 1984 to the States of West Bengal, Uttar Pradesh, Gujarat and Maharashtra, to which the Act itself was not applicable in absence of recommendation by the State Government. In essence, the Amendment obviates the need of recommendation of the State Government provided in the original provision. It is also noted that because of reorganization of the State, the States of Gujarat and Maharashtra were created from the erstwhile State of Bombay. In view of such facts, the contention that the Amendment Act is not applicable to Orissa is wholly unjustified and incorrect.

20. In the year 1995, the Act came into force. Section 107 of the Act provides that nothing contained in the Limitation Act, 1963 (36 of 1963), which applied to any suit for possession of the immovable property comprised in any Wakf or for possession of any interest in such property. In the new Limitation Act, Article 96 provides for limitation for recovery of Wakf property, but the date of starting of limitation has been stipulated to be the date of death, resignation or removal of the transferer or the date of appointment of the plaintiff as the manager of Endowment, whichever is later. In this case, it is seen that the Secretary of the plaintiff-institution has been examined as P.W. 1 and he has stated that he was working as the Secretary of the Institution since 1997.

21. In such factual backdrop, in the year 1995 the Wakf Act came into force, which prescribes that there shall be no limitation for recovery of the Wakf property. Learned counsel for the petitioner has submitted that such provision shall not restore any right already extinguished by Law of Limitation. Keeping in view the peculiar facts of the case, this Court is of the opinion that the limitation had not expired on the date of coming into force of the Wakf Act, 1995. Thus, the provision of Section 107 of the New Act shall apply to the case in hand.

22. The Supreme Court in **C.Beepa Thuma and others v. Delha Sari Shankar Narayan Kaduru Boli Thaya and others**, AIR 1965 SC 241 has held that the law of Limitation is a procedural law and the provisions existing on the date of suit apply to it. Thus, in this case, the Court is of considered opinion that the suit filed by the plaintiff is not barred by limitation.

23. Accordingly, the findings recorded by the learned Tribunal are confirmed and the Revision Petition is dismissed. However, there shall be no order as to costs.

Revision dismissed.