

IN THE HIGH COURT OF ORISSA AT CUTTACK**W.P.(C) No.14469 of 2005*****Allabox Ali and others***

....

Petitioners***-versus-******Allabox Khan and others***

....

Opposite Parties**Appeared in this case:*****For Petitioners***

:

Mr. P.K. Rath-1, Advocate***For Opposite Parties***

:

**Md. Fayaz, Advocate
(For Opposite Party Nos.1 to 5)****CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAIAK****JUDGMENT
04.04.2022****Dr. S. Muralidhar, CJ.**

1. This writ petition challenges the judgment dated 20th October 2005 passed by the State Wakf Tribunal, Orissa, Cuttack ('Tribunal') in Case No. W.T.(O)/O.A.-02/2004. By the impugned judgment, the Tribunal dismissed the Petitioners' aforementioned suit and held that it was not maintainable.

2. One of the main reliefs sought in the said suit by the Petitioners, who were the Plaintiffs 1 to 5, was for a declaration that they were the Mutawallis of the Pir Saha Hyder Ali Bijee Rambhadeipur (Plaintiff No.2 and Petitioner No.3 herein) in respect of the suit

property on hereditary basis and Defendant Nos.1 to 5 were not the Mutawallis and had no right, title, interest and possession over the suit property. The Tribunal negatived the above prayer and the further prayer of the Plaintiffs to permanently injunct Defendant Nos.1 to 5 (Opposite Parties 1 to 5 herein) from alienating or coming into the suit property or interfering with the possession of the Plaintiffs (Petitioners and Proforma Opposite Parties 7 to 10 herein) over the suit property. Hereafter in this judgment the reference to the parties will as far as possible be to their description in the suit before the Tribunal i.e. as Plaintiffs and Defendants 1 to 5. The Wakf Board is referred to as such or as Defendant No.6.

Background facts

3. The background facts are that Plaintiff No.2 before the Tribunal was a deity Peer shown to be represented by its Marfatdar Syed Abbas Ali (Plaintiff), the father of the present Petitioner Nos.1 and 2 and Proforma Opposite Parties 8 to 10 and husband of Proforma Opposite Party No.7). The Orissa Board of Wakf was arrayed as Defendant No.6 before the Tribunal and Opposite Party No.6 in the present writ petition. It has been constituted to administer, manage and superintend Wakf properties in the State of Odisha. The Plaintiff who died during the pendency of the proceedings before the Tribunal was substituted by his sons (the present Petitioners 1 and 2) and his wife and daughters (Proforma Opposite Parties 7 to 10 herein) as Plaintiffs 1 (a) to (f). The Plaintiffs and the Defendants 1 to 5 are Sunni Muslims governed by the Hanafi School of Mohammedan Law.

Case of the Petitioners

4. The case of Petitioner Nos.1 and 2 is that their great great grandfather Pir Saha Hyder Ali was a pious, religious and noble Muslim person who had dedicated his life for religious charitable purposes for all the Muslim general public of the locality. He is said to have dedicated the suit property along with other properties in the name of the Almighty for religious purposes as well as for the Muslim public for their use.

5. It is stated that Pir Saha Hyder Ali appointed his son Rasuli Saha as the Muttawalli and divested himself from the ownership of the suit property. After the death of Pir Hyder Ali, his tomb was treated as spiritual and pious and the public started worshiping and offering prayer there. As a result, Pir Hyder Ali Saha became a 'Pir' and the properties were utilized for uplifting the spiritual and other aspects of the Muslim public in Odisha.

6. On the death of the son of Pir Hyder Ali, Asak Ali Saha became the Muttawalli and during the settlement operation of 1930, his name was noted in the settlement record of rights (ROR) of 1930. The suit property was in the 'Nijdakhal' of the institution i.e. Pir Saha Hyder Ali through its Marfatdar Asak Ali Saha, the father of Sayed Abas Ali in terms of the notification dated 18th March 1974 of the State Government. Pir Saha Hyder Ali Bije Rambhadeipur was recorded as

a tenant under the State having absolute right, title, interest and possession in the suit property.

7. The case of the Petitioners 1 and 2 is that after the death of Asak Ali Saha, the recorded Marfatdar of the 1930 settlement, his son Syed Abbas Ali and after his death, Petitioner Nos.1 and 2 together with Proforma Opposite Party Nos.7 to 10 had been administering the suit property as Muttawalli of the Pir [Petitioner No.3/Plaintiff No.2] and are in possession thereof. The expenses of the institution for offering daily Seva Puja and observing festivals and ceremonies as per Muslim religious customs and charitable purposes prevalent in the locality, maintaining the family expenses as per the customs and directions of the Wakf are stated to be met from the land in question and its usufructs.

8. The case of the Petitioners 1 and 2 is that the descendant of the Muttawalli has to hold that office hereditarily and continuously without any break. It is stated that Asak Ali Saha died in 1975 leaving behind his only son Syed Abbas Ali and three daughters. It is contended that Asak Ali Saha appointed Syed Abbas Ali as Muttawalli Marfatdar of the Peer as per the customs and that the daughters had no right to the office of Muttawalli; that the suit properties have been treated as Wakf properties since the time immemorial as per the custom and last Will of the dedicator.

9. It is claimed that during his lifetime, Syed Abbas Ali appointed his two sons i.e. Petitioner Nos.1 and 2 herein as Marfatdar Muttawallis

of the Pir Saha Hyder Ali and that they were discharging and performing duties as directed by the Wakf and their ancestors and continuing as such without a break.

10. The Petitioners 1 and 2 averred in the plaint that Syed Abbas Ali was "an illiterate rustic villager" and he was unable to properly "attend the settlement and consolidation authorities during their operations in the suit Mouza for recording his name as Marfatdar of the Pir in question in respect of the suit land." The Petitioners claimed that Syed Abbas Ali remained "with the hope and belief that the Wakf Board might have properly recorded the suit property in the name of Pir Saha Hyder Ali Marfat Syed Abbas Ali son of Asak Ali Saha of Rambhadeipur" thereby attesting to the fact that Syed Abbas Ali was performing his duties as Muttawalli of the Pir and enjoying the suit land without disturbance.

11. It is then stated that the dispute arose when after the super cyclone, in March 2000, when Opposite Party Nos.1 and 2 (Defendant Nos.1 and 2 in the suit) tried to interfere with the possession of Petitioner Nos.1 and 2 in the suit land and threaten to dispossess them with an intention to sell the suit property by negotiating with outsiders and projecting as if they were the Marfatdars. It is claimed that after their father Syed Abbas Ali made enquiries with the Office of Revenue Inspector, Tarikunda and obtained a copy of the ROR, it transpired in September 2000 that Opposite Party Nos.1 to 5 (Defendant Nos.1 to 5) had been illegally recorded as the Marfatdars of the Pir in the Hal Settlement Authority

and in Consolidation Authority in contravention of a circular dated 8th November 1977 of the Revenue authorities. It is claimed that this was done without notice to the "real persons" and was in ignorance of the entries in 1930 settlement ROR. According to Plaintiff Nos.1 and 2, Defendant Nos.1 to 5 and the others whose names are recorded in the ROR were not descendants of the ancestor of Plaintiff Nos.1 and 2 and were not the Marfatdars of the Peer. It is claimed that they were the complete strangers to the family of Plaintiffs as well as the suit property and not related either to the dedicator or the Plaintiffs' ancestor.

12. It was stated that by impersonation, a fraud had been practiced on the Settlement and Consolidation Authority by the Opposite Parties projecting themselves as successors of the Plaintiffs' ancestors. It was contended that the entries recording them as Marfatdars had been done in a casual manner without examining their status in relation to the suit land and such entries did not take away or extinguish the right, title, interest and possession of the Plaintiffs or create any corresponding title and interest in favour of Defendant Nos.1 to 5 in the suit property. It is further contended that irrespective of such wrong entries in the ROR, the Plaintiffs had been possessing the suit property peacefully and were in cultivating possession thereof.

13. In the plaint, it was stated that in the current consolidation ROR Khata No.86, an area of Ac.1.87 decimals had been recorded and from the note of possession in the remarks column, it transpired that certain Wakf properties had been alienated in favour of the strangers

contrary to law. It was sought to be explained in the plaint that the Plaintiffs were filing the suit in respect of the properties under Consolidation Khata No.86 and reserved their right to amend or to file a separate suit for other properties.

14. On 26th October 2000, when Defendant Nos.1 to 5 sought to allegedly alienate the suit properties to outsiders, Syed Abbas Ali filed T.S. No.266 of 2000 in the Court of Civil Judge (Senior Division), Jagatsinghpur. The said suit was subsequently transferred to the file of the learned Civil Judge (Junior Division), Jagatsinghpur and was renumbered as T.S. No.231 of 2001.

15. On 11th August 2001, Syed Abbas Ali died and Petitioner Nos.1 and 2 herein, Plaintiff Nos.1 (a) to 1(f) being his children were substituted in his place. During the pendency of the above suit, the Tribunal was constituted. The substituted Plaintiffs moved this Court in TRP(C) No.48 of 2003. During the pendency of the civil suit, the Tribunal was established under the provisions of the Wakf Act, 1995. By an order dated 7th February 2004, the Civil Judge (Junior Division), Jagatsinghpur returned the plaint in T.S. No.231 of 2001 to be presented before the Tribunal.

16. After carrying out corrections by way of amendments to the plaint, the prayer of Petitioner Nos.1 to 3 and Proforma Opposite Party Nos.7 to 10 was for declaration that they were the Muttawallis of Plaintiff No.2 in respect of the suit property on hereditary basis and that Opposite Party Nos.1 to 5 were not the Muttawalli of

Petitioner No.3 (Plaintiff No.2) and had no right, title or interest over the suit property.

The case of Defendants 1 to 5

17. While traversing amended plaint, Defendant Nos.1 to 5 contended in their written statement that the suit was not maintainable; the Plaintiffs had no cause of action of filing a suit; the Tribunal had no jurisdiction to take cognizance of the proceedings; the Tribunal had no territorial jurisdiction to try the suit; that the suit was bad as per the provisions of the Orissa Estate Abolition Act (OEA Act) since the suit lands were already settled in favour of Defendant Nos.1 to 5; the suit was hit by the law of estoppel, principles of res-judicata and bad for non-joinder of the necessary parties; it is bad for want of a statutory notice under Section 56 of the Wakf Act, 1954.

18. The further plea of the Defendants 1 to 5 was that the Pir i.e. Plaintiff No.2 was a religious and pious person who came from Kabul for preaching Islam. It was claimed that Asak Ali Saha was not the ancestor of the present Plaintiffs and that the averments that the family of Plaintiff Nos.1 and 2 were appointed as Muttawalli on hereditary basis was a false and preposterous claim. Specifically, it was contended by the Defendants that "there is no local custom in favour of the present Plaintiffs to bestow them any right to claim Muttawalliship of Plaintiff No.2 in respect of the suit property on hereditary basis."

19. Defendants 1 to 5 also claimed that in terms of a notification dated 18th March 1974 of Government of Orissa issued under the OEA Act, suit property had a 'be-bandobasti' status and that the land in question had vested with the Government of Odisha free from all encumbrances. The ancestor of the Defendants 1 to 5 had filed OEA Case No.917 of 1985. In terms of the orders passed by the OEA Collector, the suit lands were settled in favour of the Defendants 1 to 5 who were paying Salami and annual rent. Subsequently, the consolidation ROR was also published in favour of the Defendants 1 to 5. It was further averred by the Defendants/Opposite Party Nos.1 to 5 "The common ancestor of the Plaintiffs along with other co-ancestor has executed permanent lease deeds as well as Seva Samarpana Patras in favour of the ancestors of these defendants in respect of the entire suit properties vide registered instruments dt.14.11.35, 2.8.37, dt.14.12.1936, dt.2.12.40, dt.9.12.42 and 29.12.42 and delivered possession in favour of ancestors of these Defendants and as such the ancestors of these Defendants and thereafter the present defendants are the lessees of deity Peer in respect of the suit property." They also claimed that in terms of the orders passed in OEA Case No.917 of 1985, the rent had been fixed in favour of Defendant Nos.1 to 5 and a new vesting Patta had been issued in their favour under Khata No.719/3. The suit property had been recorded in favour of the Defendants 1 to 5 also in Consolidation Khata No.86 in the ROR published in 1996. Defendant Nos.1 to 5 claimed to be in possession of the suit land as tenants under the Government of Odisha.

20. The contention of Defendants 1 to 5 further was that after the Plaintiffs withdrew their suit from the Court of the Civil Judge (Junior Division), Jagatsinghpur and without an order of the High Court for transfer of such case, the application before the Tribunal was like a fresh suit with a fresh cause of action which was therefore liable to be dismissed.

21. On the other hand, in their reply to the written statement, the Plaintiffs 1 (a) to (f) maintained that the alienations relied upon by Defendant Nos.1 to 5 was void ab initio "since the suit lands are surveyed and registered as Wakf properties and are duly notified as such in the Orissa Gazette notification of the year 1978. Such Gazette notification dated 19th May 1978 having not been challenged before any competent authority within the statutory period has become final and conclusive which is binding on all concerned". It was claimed that the revenue Courts or the OEA authorities have no right to adjudicate on the character of the Wakf property. That had to be decided under the provisions of Wakf Act. A finding which was contrary to law could not operate as *res judicata* in a subsequent suit filed before the competent authority, including the Tribunal.

Issues framed by the Tribunal

22. On completion of pleadings, the Tribunal framed the following issues for consideration:

- "(1) Is the suit maintainable in the eye of law?
- (2) Have the Plaintiffs any cause of action to bring the suit?

- (3) Has this Tribunal jurisdiction to adjudicate this suit?
- (4) Is this suit hit under the provision of OEA Act?
- (5) Is the suit hit by law of estoppel and res-judicata?
- (6) Is the suit bad for non-joinder of necessary parties?
- (7) Is the Plaintiff No.1 the lineal successor of Peer Saha Hyder Ali?
- (8) Whether the Plaintiff No.1 or the Defendant Nos.1 to 5 are Mutawallis of the suit property?
- (9) Whether the Plaintiff No.1 or the Defendant Nos.1 to 5 have any manner of right, title, interest or possession over the suit land?
- (10) Whether the ancestor of Plaintiff No.1 along with others had legally alienated the suit property in favour of the ancestors of Defendant Nos.1 to 5 with the strength of permanent registered lease deeds in between the year 1936-1942?
- (11) Whether the defendants have perfected their title in respect of the suit land by way of adverse possession?
- (12) Are the Plaintiffs entitled for a decree of permanent injunction against the Defendant Nos.1 to 5 as prayed for?
- (13) To what other relief, if any, the Plaintiffs are entitled?

Additional Issues Dated 28.10.2004

- (14) Is the suit barred by law of limitation?
- (15) Is the suit bad for want of statutory notice to Defendant No.6 as per provision of the Wakf Act, 1995?
- (16) Is the suit bad for want of any Wakf deed or any other document creating the Wakf institution as is being claimed by the Plaintiffs?"

Findings of the Tribunal

23. Taking up the Issues 4 to 12 and 16, the Tribunal concluded that the suit properties are Wakf properties belonging to Plaintiff No.2. Referring to the decision of Supreme Court of India reported in ***Sayyed Ali v. Andhra Pradesh Wakf Board AIR 1998 SC 972***, it was held "once a Wakf always a Wakf". Further relying on the decision of this Court in ***Imdad Ali Khan v. Sardar Khan AIR 1954 Orissa 15***, it was observed that once a Wakf was validly created, the properties vest in the Almighty. Extensive reference in this regard was made by the Tribunal to the commentary titled *Mulla's Principles of Mohammedan Law* (19th edition) and to Section 202 therein. The further conclusions drawn by the Tribunal were that "the suit properties are agricultural lands and that Defendant Nos.1 to 5 are not the members of the Plaintiffs family and that no Wakf deed is executed in relation to the suit properties and that there is no document disclosing any modality for appointment of Muttawalli of Plaintiff No.2." The Tribunal observed that Section 206 of *Mulla's Mohammedan Law* does not recognize any right of inheritance to the office of the Muttawalli. However, the office could become hereditary by custom, in which case the custom must be followed. The fact that such custom was opposed to general law must be supported by strict proof.

24. The Tribunal proceeded to examine whether the Plaintiffs 1 (a) to (f) had proved that by custom they had the right to be recognized as Muttawalli of Plaintiff No.2 on hereditary basis. PW-1 admitted in his cross examination that the original Plaintiff Syed Abbas Ali was

his father-in-law; he testified that he had not seen any document whereby Defendant Nos.1 to 5 were appointed as Muttawalli of Plaintiff No.2 including any ROR. He admitted being present when the plaint was prepared. The Tribunal therefore discarded his evidence as being that of an interested witness and “not beyond reproach”.

25. PW-2, a neighbour of Plaintiff Nos.1 (a) to (f) stated that the suit properties were originally dedicated by Asak Ali Saha in favour of Plaintiff No.2 as Wakf. This was inconsistent with the case of the Plaintiffs. Further, he could not state anything about the Hal settlement ROR or consolidation ROR. PW-3 failed to deny the suggestion on behalf of Defendant Nos.1 to 5 that they were Marfatdars in respect of the suit property. PW-5 did not have any personal knowledge regarding the Defendants having obtained the RORs through impersonation. PW-6 admitted in cross-examination that Sayed Abas Ali was his maternal uncle and that the Plaintiffs 1 (a) to (f) were his relations. His evidence regarding the appointment of Marfatdars of the Peerstan on hereditary basis was also not convincing according to the Tribunal. PW-7 was unclear about the exact location of Plaintiff No.2. PW-6 claimed that it was situated over suit Khata No.8 at Mouza Jaisol whereas PW-10 claimed that there was no Peerstali at Rambhadeipur, but at Fakirtakia. PW-12 was also unconvincing as he had written the names of Pir on his left palm while adducing evidence before the Tribunal. The evidence of PWs 6 and 13 were also inconsistent as regards the exact location.

26. The Tribunal then discussed the evidence of PW-8 who was a 'summoned witness'. He was a Muttawalli of Pir Dargha Hazrat Gaus-Pak of Mouza-Praharajpur under Kishannagar Police Station in Cuttack District. In the cross-examination, he admitted to not having seen the suit land or any document relating to Plaintiff No.2. Although, he claimed to be Muttawalli of Gaus-Pak Pir by succession as per custom, in his cross-examination he testified that he had not given any statement or return to the Wakf Board. PW-8 also claimed that the general custom was that Muttawalli would be appointed by way of succession whereas the case of the Plaintiffs 1 (a) to (f) was that they were appointed by their predecessor. Accordingly, the Tribunal rejected the testimony of PW-8 as being inconsistent with the case of the Plaintiffs.

27. PW-11 was a teacher in a Madrasa who in his cross-examination admitted not to have seen any document. He also testified that Asak Ali was the first Muttawalli when in fact he was not. PW-12 was a retired Assistant Engineer, but appeared to have noted the names of the Pir in his palm while he was adducing evidence looking at the palm. PW-13 deposed in his cross-examination that the term Muttawalli means owner whereas under Section 202 of *Mulla's Mohammedan Law* the expression Muttawalli essentially means a manager who has no right to the Wakf property. It also envisaged that a Muttawalli cannot appoint his successor if the Office went by hereditary right. Thus, it was concluded by the Tribunal that the case of Plaintiff Nos.1 and 2 regarding their appointment as Muttawalli by the predecessor was contrary to Section 205 of *Mulla's*

Mohammedan Law. Reference was made to the decision of this Court in ***Hajee Sheikh Ali v. Mohemmed Yusuf AIR 1962 Orissa 111*** that a Muttawalli cannot appoint his successor while he is in health as distinguished from death illness.

28. The Plaintiffs sought to project Defendant Nos.1 to 5 as belonging to the Wahabi sect and therefore incompetent to perform the duties of Muttawalli of any Pir since according to them Wahabi Muslims, belong to the Deobandi group who believe in Allah directly and do not pray or worship any Pir. However, PW-11 deposed that the word 'Sunni' or 'Wahabi' does not find place in the Koran or Hadis; there was no difference between a Wahabi and a Sunni in the Koran or the Hadis, and that such factions had been initiated to effect groupism amongst the Muslims. The Hal ROR relating to the suit property stood recorded in favour of 'Ali and Khan Muslims'. Further, DW-1 deposed that Marfatdar Asak Ali Saha, the predecessor of the Plaintiffs, along with other Marfatdars alienated the suit property in favour of the predecessors of Defendant Nos. 1 to 5 by way of permanent Chasa Pattas (Exhibits- A, C and E) as well as the Seva Samarpan Patras (Exhibits-B and D) which were all executed between 1936 and 1942. DW-1 also proved the proper custody of the documents in terms of the Section 90 of the Indian Evidence Act. The Tribunal then concluded that if indeed the Defendant Nos. 1 to 5 were incompetent to work as Mutawalli, the Plaintiff could not have executed Exhibits-B and D.

29. PW-13 in his cross-examination admitted that in the plaint the fact of difference between Deobandi and Bareilvi was not pleaded. PW-13 in his cross-examination debunked the 1930 settlement ROR as a fabricated document and that the recorded owners therein were not the owners or the Marfatdars of the suit property. The entries in the remarks column of the ROR under Exhibit-2 disclosed the number of illegal purchases. The Plaintiffs 1 (a) to (f) had no explanation how such alienations could be effected if their family was the only Mutawalli of Plaintiff No.2. As per Exhibit-1, the suit property was recorded under Be-bandobasti Khata. The Plaintiffs were unable to explain if any of their family members had taken steps to record the suit land in favour of Plaintiff No.2 or to pay rent in respect of such suit lands.

30. Relying on the decision in ***Pramod Kumar Sahu v. Baidyanath Mishra*** 66 (1988) CLT 432, the Tribunal concluded that when proper custody of a 30-year old document is proved, the presumption under Section 90 of the Evidence Act extends to the execution of the documents i.e. signature, attestation etc., but not the truth of its contents. Further, recitals in such documents were admissible under Section 32(2) of the Evidence Act. On this basis, the Tribunal concluded that the execution of Exhibits A to E had been proved in favour of Defendant Nos.1 to 5. The parties to such documents were all dead and therefore, all those documents were held admissible under Section 32 of the Evidence Act.

31. As regards Exhibits 1 and 2, the Tribunal was not prepared to examine the allegations of the illegality since neither the concerned authorities were examined as witnesses nor the Government of Orissa had been impleaded as parties. As regards Exhibits-A to E, although the Tribunal concluded that a transfer thereunder was without the permission of the Court or the Wakf Board and therefore are void and invalid as per Section 207 of *Mulla's Mohammedan Law*. They could not be brushed aside *in limine* till they were avoided by any competent authority subject to limitation. The attempt by the Plaintiffs to have the plaint amended to declare Exhibits-A to E to be void had been rejected by the Civil Judge (Junior Division), Jagatsinghpur by an order dated 20th August 2003 on the ground of limitation. That order had not been challenged.

32. The Plaintiffs tried to prove that the consolidation ROR was not conclusive since a restoration application had been filed in Consolidation Revision case which is still pending. The Tribunal concluded that if the consolidation ROR in Ext-3 was reversed, it could not be ignored. The Tribunal further found that the Ext-F, the vesting Patta, had been issued in favour of the Plaintiff No.2 and not Defendant Nos. 1 to 5 with any exclusive interest. Thus, Plaintiff No.2 had been accepted as a tenant under the Government. As regards Exhibit-28, relied upon the Plaintiffs, this was the Xerox copy of an entry relating to survey of the suit property granted by the Survey Commissioner, Wakf Board. This referred to Asak Ali Saha as the Marfatdar. The Tribunal questioned how the name of Abbas Ali could be incorporated therein if Asak Ali was alive when it was

prepared i.e. in 1974 that this document was held not to help the case of the Plaintiffs. It was held that the Plaintiffs having failed to prove their case, could not rely on the weakness in the Defendant's evidence to prove their case. The evidence laid regarding the customary practices through PW-4 was found to be unconvincing. Even as regards the possession, both PWs-2 and 3 could not deny the suggestion that the Defendants were in possession of the suit lands. On the other hand, both DWs-1 and 2 supported the stand of the Defendant Nos.1 to 5. The Defendants had proved the rent receipts under Exhibit-G series and the vesting Patta under Exhibit-F. Exhibits-2 and 3 being the Hal settlement and consolidation documents had also not been set aside. Thus, it was concluded that the Exhibits-2, 3, F and G series established that the Defendant Nos. 1 to 5 were looking after the suit property and could be safely concluded to be in possession thereof.

33. Accordingly, the Tribunal concluded that the oral testimonies relied upon by the Plaintiffs were "prevaricating and inconsistent with each other" and have failed to establish the case of the Plaintiffs of having become Mutawallis on hereditary basis by way of custom. The Defendants not having filed any document regarding Wakf or any donation, the Tribunal concluded that the suit property was a Sunni Wakf by user. Further, the Tribunal held that the Plaintiffs had failed to prove their possession over the suit properties and were therefore not entitled to any order of permanent injunction. Issues 7, 8 and 12 were answered against the Plaintiffs and Issues 11 and 16 against Defendant Nos.1 to 5. Issue No.9 was answered in favour of

Defendant Nos.1 to 5 to the extent that they were found to be in possession of the suit lands as Mutawalli of Plaintiff No.2. Issue No.10 was answered to the extent that the alienations under Exhibit-A to E were made without sanction of the competent authority but they were not avoided till date. Further since Defendant Nos.1 to 5 failed to establish any exclusive right, title and interest over the suit property which were Wakf property, the suit could not be said to be bad under any provision of the OEA Act. Issue No.4 was accordingly answered against Defendant Nos.1 to 5. The contention that the suit was bad for non-joinder of the family members was not acceptable. The Tribunal refrained from returning a finding on the validity of Exhibits-2 and 3. Issue No.8 was answered in favour of Defendant Nos.1 to 5.

34. Issue No.3 was also answered against Defendant Nos.1 to 5 by holding that the Tribunal had jurisdiction to entertain the matter. Issue No.15 regarding compliance to the requirement of Section 56 of the Wakf Act, 1954 was also answered against Defendant Nos.1 to 5. As was Issue No.14 under which it was held that the suit was not barred by limitation. It was held on Issue Nos. 1, 2 and 13 that the Plaintiffs had no cause of action to file the suit and therefore, the suit was not maintainable in the eye of law. The suit was accordingly dismissed.

35. This Court has heard the submissions of Mr.P.K. Rath-1, learned counsel appearing for the Petitioners and Mr. Md. Fayaz, learned counsel appearing for the Opposite Parties.

Submissions of counsel

36. Learned counsel for the Petitioners submitted that Defendant Nos.1 to 5 had not filed any order passed by any authority under the Orissa Survey Settlement Act, 1958 (OSS Act) or the Orissa Consolidation of Prevention of Fragmentation Act, 1972 (OCPF Act) to substantiate entries in Exhibits.2 and 3. On the other hand, he relied on the Survey Register and Gazette Notification which had been proved by the Official Witness PW-14 the Wakf Inspector of Wakf Board. Reliance was placed on the Exhibits-27, 28 and 29 and the Gazette Notification published under Section 6 of the Wakf Act, 1956. The entries therein had not been set aside or challenged by the Defendants or their ancestors. Therefore, the entries in the Gazette Notification and the Survey register maintained by the Wakf Board were binding and admissible under Section 74 of the Evidence Act and this should be presumed to be correct as regards proof of custom, right of inheritance of succession of Mutawalli and several generations of the Plaintiffs.

37. According to learned counsel for the Petitioners, the Tahasildar had no power or jurisdiction to record the name of the Defendants 1 to 5 as Marfatdars in the vesting Patta (Exhibit-F) in proceedings under the OEA Act. According to him, the question of the documents being declared void does not arise as the issue had to be adjudicated in the light of Sections 36 and 56 of the Wakf Act. According to him, no Mutawalli could have given permanent Chasa Patta or any Seva Samarpan Patra without the leave of the Court or the Wakf Board.

According to him, there were no documents of conveyance in favour of the Defendant Nos. 1 to 5. He pleaded that the defendants were in the same footing as the Plaintiff. The difference being that the Defendants were successors and the illegal purchasers whereas the Plaintiffs 1 (a) to (f) were the successors of the Sabik Marfatdar. The Tribunal ought not to have presumed that the Defendants 1 to 5 were the Marfatdars without their making a specific averment to that extent.

38. Learned counsel for the Petitioners then argued that the Tribunal did not consider the oral evidence adduced by the Plaintiffs and all the documents exhibited by it and that it had opted a pick and choose method. The Tribunal had taking note of the materials evidence and came to an erroneous conclusion of facts. The decisions relied upon by the Tribunal are alleged to have been misapplied.

39. On the other hand, Mr. Md. Fayaz, learned counsel for the Opposite Party Nos.1 to 5 defended the impugned order of the Tribunal by submitting that it was based on a thorough analysis of the evidence on record and suffered from no legal error. He relied on Ex. A to E produced by Defendants 1 to 5 which had been proved to the satisfaction of the Tribunal and which showed their possession over the suit property. He again referred to the decision in ***Pramod Kumar Sahu v. Baidyanath Mishra*** (*supra*) and submitted that when the proper custody of a 30-year old document is proved, the presumption under Section 90 of the Evidence Act extends to the execution of the document i.e. signature, attestation etc.

Analysis and reasons

40. The above submissions have been considered. At the outset it must be noted that in exercise of its writ jurisdiction under Articles 226 and 227 of the Constitution of India, this Court is, while reviewing the decision of the Wakf Tribunal, not acting as a first appellate Court. In ***Kiran Devi v. Bihar State Sunni Wakf Board*** 2021 SCC Online 280, the Supreme Court explained:

“20. Therefore, when a petition is filed against an order of the Wakf Tribunal before the High Court, the High Court exercises the jurisdiction under Article 227 of the Constitution of India. Therefore, it is wholly immaterial that the petition was titled as a writ petition. It may be noticed that in certain High Courts, petition under Article 227 is titled as writ petition, in certain other High Courts as revision petition and in certain others as a miscellaneous petition. However, keeping in view the nature of the order passed, more particularly in the light of proviso to sub-section (9) of Section 83 of the Act, the High Court exercised jurisdiction only under the Act. The jurisdiction of the High Court is restricted to only examine the correctness, legality or propriety of the findings recorded by the Wakf Tribunal. The High Court in exercise of the jurisdiction conferred under proviso to sub-section (9) of Section 83 of the Act does not act as the appellate court.”

41. It is the Plaintiffs that came to before the Tribunal with a case that they were the Marfatdars of Plaintiff No.2 by way of custom. The case was that they had inherited the Mutawalliship from the predecessor and father Syed Abbas Ali. They examined a large number of witnesses who did not support their case. Although, before this Court, learned counsel for the Petitioners sought to build

up a different case based on Exhibits-27, 28 and 29 which according to him were proved by PW-14, the Wakf Inspector, the approach before the Tribunal was entirely different. An attempt was made to have them speak about the custom in terms of which the Mutawalliship became hereditary. None of the Plaintiffs witnesses could support that case. They were either related and interested witnesses or they spoke inconsistently or were easily contradicted in their cross-examination thus rendering them unreliable.

42. The Tribunal has undertaken a thorough analysis of the deposition of each of the witnesses carefully and has arrived at an objective conclusion regarding their trustworthiness and veracity. Even the evidence of the PW-14 has been discussed in great detail in paragraph-19 of the impugned judgment as under:

"19. The Plaintiffs have proved the certified Xerox copy of the entry relating to survey of the suit property granted by Survey Commissioner, Wakf Board as Ext.27 which is the same document as Ext.28 and the Gazette notification as Ext.29 by calling for the same from the Office of the Defendant No.6 and proving the same through their witness PW-14. PW-14 is an official witness who has admitted in his cross-examination that the entries in Exhibit-28 are not made in his presence. PW 14 has also deposed in chief-evidence that in Exhibit-28 there is reference that Asak Ali Saha is the marfatdar of the present suit property and that there has been some illegal alienations in favour of one Sovan Khan who is admittedly the predecessor of Defendant Nos.1 and 2."

43. Thus, apart from the fact that it is incorrect on behalf of the Petitioners to urge that the Tribunal has ignored the evidence of PW-

14, the Tribunal has drawn conclusions from the complications brought to light by such evidence. In the first place the person making the entries was not himself examined. These entries per se did not make Exhibits-A to E illegal. As far as Exhibit-28 is concerned, again the following conclusions of the Tribunal in relation thereto appear to be unassailable:

"So far as the entry in relation to the name of Abas Ali in Exhibit-28 is concerned, it is the case of the Plaintiffs that the Mutawallis are appointed on hereditary basis and at paragraph 5 of the plaint they have pleaded that Asak Ali died in the year 1975. There is no explanation from the Plaintiffs as to how the name of Abas Ali could be incorporated in Exhibit 28 if Asak Ali the then Marfatdar was alive till 1974. Accordingly such circumstance does not reinforce the case of the applicants in any manner."

44. Acknowledging the weakness of the evidence of the Plaintiffs, a consorted attempt was sought to be made by learned counsel for the Petitioners before this Court to confine the submissions to a small set of documents which was sought to be proved by PW-14. However, there appears to be no answer to the fact that a large number of Plaintiffs' witnesses were found to be untrustworthy and did not establish the main plank of the Plaintiff's case namely that they had inherited the Mutawalliship of Plaintiff No.2 on hereditary basis through succession. The attempt to project this as customary, miserably failed.

45. The Tribunal appears to have adopted a balanced approach. It disagreed with the Defendant Nos. 1 to 5 on many of the preliminary and technical objections regarding jurisdiction of the Tribunal, but on merits it found that the Plaintiffs had failed to establish their case. An elaborate exercise had been undertaken by the Tribunal to analyze the evidence. The conclusions reached by it flow from the evidence itself and are not shown to be perverse or illogical.

46. The Court is not satisfied, therefore, that the Petitioners have made out a case for interference with the impugned judgment of the Tribunal. The writ petition is accordingly dismissed, but in the circumstances, with no order as to costs.

(S. Muralidhar)
Chief Justice

(R.K. Pattanaik)
Judge

S.K. Guin/Sr. Steno