

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CIVIL REVISION APPLICATION NO. 158 OF 2012

- 1] Sunil s/o. Vasudeo Nirgude,
Age 35 years, Occ. Agri.
R/o. Dhamangaon, Tq. Achalpur,
Dist. Amravati.
- 2] Anil s/o. Vasudeo Nirgude,
Age 32 years, Occ. Agri.
R/o. Dharangaon, Tq. Achalpur,
Dist. Amravati.
- 3] Shrirang s/o. Sheruji Nirgude,
Age 61 years, Occ. Agri.
R/o. Dhamangaon, Tq. Achalpur,
Dist. Amravati.

.. APPLICANTS

VERSUS

- 1] Hasan Khan s/o. Maheboob Khan,
Age 42 years, Occ. Business,
R/o. Dhamangaon, Tq. Achalpur,
Dist. Amravati.
- 2] The Chief Executive Officer,
Maharashtra State Board of
Wakfs Panchakki at Aurangabad. **.. RESPONDENTS**

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Mr.V.J.Dixit, Senior Advocate i/b. Mr.L.V.Sangit, Advocate
for the applicants

Mr.S.S.Kazi, Advocate for the respondent no.1.

Mr.N.E.Deshmukh, Advocate for the respondent no.2.

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CORAM : ARUN R. PEDNEKER, J.

Reserved on : 06.07.2023

Pronounced on : 11.09.2023

JUDGMENT :

1] By the present Civil Revision Application, the applicants are challenging the judgment and order passed by the Presiding Officer, Wakf Tribunal at Aurangabad in Wakf Application No.8 of 2011, thereby the Tribunal was pleased to dismiss the application filed by the applicants. In the said Application, the applicants were seeking following relief :

B) The Judgment and Order dated 21-10-2009 passed u/s. 54 of the Wakf Act by the respondent no.2 in Case No. 54/27/2007 may kindly be quashed and set aside.

2] It is the case of the applicants that the applicant nos.1 and 2 are the owners of the suit land bearing Gat No.234/1/A admeasuring 1 H. 58 R. situated at village Dhamangaon, Taluka Achalpur, District Amravati and the applicant no. 3 is the owner of the suit land bearing Gat

No.234/1/B admeasuring 1 H. 21 R. situated at village Dhamangaon, Taluka Achalpur, District Amravati. The applicants are in peaceful possession of the suit land and cultivating the suit land as owners and possessors of the suit land. The ancestors of the applicants were the tenants of the suit land and were cultivating the said land and they became protected agricultural tenants of the land on the date of coming into force the Bombay Tenancy and Agricultural Lands [Vidarbha Region] Act, 1958 [for short "Vidarbha Region Tenancy Act of 1958"]. The said Act of 1958 is made applicable only to Vidarbha Region from 31.12.1958 and the ancestors of the applicants became statutory tenants under the provisions of Act of 1958 and later on the statutory ownership was transferred to the tenant under the provisions of Act of 1958 on payment of price, which amount was deposited by the tenants in the Court of the President, Agricultural Land Tribunal, Achalpur in R.V.C.No.2079/59 (13)/64-65, Dhamangaon Gadhi decided on 13.04.1970 and necessary purchase certificate about the transfer of ownership was issued by that Court in

the name of tenants and since then the tenants became the statutory owners of the said suit land. The statutory ownership of the suit land is transferred in the name of Vasudeao s/o. Sheruji Nirgude and after his death the suit property is inherited by the applicants. The applicant nos.1 and 2 are the sons of deceased Vasudeo and applicant no. 3 is the brother of the deceased Vasudeo.

3] It is further the case of the applicants that the respondent no.1 has no concern with the suit property but in order to grab the suit property by showing that the suit property as wakf property on Mahebood Subani [Gazimiya] Dargah Dhamangaon [Gadhi], Tq.Achalpur, Dist. Amravati filed application dated 16.04.2007 under Section 54 of the Wakfs Act, 1995 before the respondent no.2 [Chief Executive Officer] and claimed that the suit property is a wakf property and he is Mutawalli of the said Dargah and asked for possession of the suit property in his favour. The applicants resisted the claim of the respondent no.1 before the respondent no.2 and the respondent no.2, by order

dated 21.10.2009 under Section 54 of the Wakf Act, 1995, held that the suit property is wakf property and the applicants are the encroachers over the suit property.

4] Being aggrieved by the said order, the applicants filed suit No.134 of 2009 before the Wakf Tribunal at Aurangabad for declaration and perpetual injunction. In the said suit, the respondent no.1 moved an application under Order VII Rule 11 of the Civil Procedure Code for rejection of plaint on the ground that the suit was not filed within a period of 60 days as provided under Rule 50 Sub-rule (3) of the Wakf Rules, 2003 and as there was delay of 9 days the plaint was rejected by order dated 09.11.2010 passed by the learned Presiding Officer, Wakf Tribunal at Aurangabad.

5] The applicants challenged the order dated 09.11.2010 passed in Suit No.134 of 2009 by filing Civil Revision Application No. 2/2010 before this Court. The applicants withdrew the said Civil Revision Application, with liberty to file appropriate proceeding as permissible

under the provisions of law and liberty was granted by this Court by order dated 15.03.2011.

6] The applicants filed fresh application before the Tribunal challenging the order passed by the respondent no.2 Chief Executive Officer under Section 83 (2) of the Wakf Act, 1995. The Tribunal by impugned order dated 10.05.2012 held as under :

i] The Tribunal held that special remedy is provided under Section 54 (4) of the Wakf Act, 1995 to challenge the order of the Chief Executive Officer passed under Section 54 of the Wakf Act, 1995 and that application under Section 83 (2) of the Wakf Act is not maintainable to challenge the order under Section 54 as special remedy provided under Section 54 (4) of the said Act and the same will prevail upon general remedy provided under Section 83 (2) of the same Act. A superior remedy is provided under Section 54 (4) and an application under Section 83 (2) is not permissible to challenge the order passed under Section 54 (4) of the Wakf Act. The Tribunal further held that the

words “appropriate proceedings permissible under the provisions of law” whereby permission was granted by the High Court would not mean permission to file an application under Section 83 (2) of the Wakf Act and as such application under Section 83 (2) is not maintainable.

ii] The Tribunal held that an order passed under Section 54 (3) of Wakf Act cannot be challenged by an application under Section 83 (2) of the same Act in presence of specific remedy of suit provided by sub sec. (4) of Section 54 and thus it answered point no.1 in negative. As regards point nos.2 and 3 the Tribunal proceeded to decide the matter on merits assuming that the Tribunal had jurisdiction. The Tribunal held that wakf property is clearly not covered within the Bombay Tenancy and Agricultural Lands [Vidarbha Region] Act, 1958 as Section 129 of the said Act gives an exception to the property of the educational institution and religious trust.

7] Being aggrieved, the applicants challenged the order passed by the Wakf Tribunal in the present Civil

Revision Application.

8] The learned counsel for the applicants submits that the applicants filed earlier proceedings in the High Court and the same was withdrawn by the applicants with liberty to avail appropriate proceedings and that principle of *res judicata* does not come into play, as earlier proceedings were not decided on merits and the applicants were not prohibited to challenge the same in a subsequent application as there is no limitation provided for an application under Section 83 (2) of the Wakf Act and that since there was no judgment passed on merits in the earlier round and liberty was granted by the High Court, subsequent application under Section 83 (2) of the Wakf Act, 1995 was maintainable to challenge the impugned order. Therefore, the applicants have rightly moved appropriate application under Section 83 (2) of the Wakf Act and the same was wrongly dismissed by the Tribunal.

9] It is the contention of the applicants that the applicants are the statutory tenants and deemed owners of

the property much prior to the Wakf Act 1995 coming into force and that the ownership of the applicants cannot be adjudicated under Section 54 of the Wakf Act by the Chief Executive Officer. It is further the contention of the applicants that the Wakf Tribunal should have held that the authorities under the Wakf Act cannot adjudicate upon the issue of tenancy as the same is exclusively within the domain of the authorities constituted under the Bombay Tenancy and Agricultural Lands [Vidarbha Region] Act, 1958 and thus the order passed by the Chief Executive Officer under Section 54 of the Wakf Act is illegal and non est.

10] The learned counsel for the applicants submits that the Tenancy Act of 1958 being included in the Ninth Schedule of the Constitution of India, the Tribunal established under the 1958 Act is established by a superior legislation then a Tribunal established under the Parliamentary Legislation under Article 245 of the Constitution of India and thus the findings recorded by the

Tribunal under the 1958 Act will override findings by the Tribunal constituted under the Wakf Act and he relies upon the judgment of Calcutta High Court reported in **2018 AIR CC 1060 (CAL)** to that effect.

11] The learned counsel for the applicants also relies upon the judgments in the case of **Naranbhai Dayabhai Patel Vs. Suleman Isubji Dadabhai** reported in **1996 DGLS (Soft) 72**, in the case of **Government of Andhra Pradesh V. Smt. P. Laxmi Devi** reported in **AIR 2008 SC 1640**, in the case of **L. Jagannath ETC V. The Authorised Officer, Land Reforms, Madurai and another** reported in **AIR 1972 SC 425** and in the case of **Board of Wakfs, West Bengal V. State of West Bengal** reported in **2018 AIR CC 1060 (CAL)**.

12] *Per contra*, the learned counsel for the respondents submits that the order passed by the Chief Executive Officer under Section 54 of the Wakf Act was challenged by filing the suit before the Wakf Tribunal and the same was dismissed on account of being barred by

limitation and the same was challenged before the High Court and the same was dismissed with liberty to challenge the impugned order as may be available in law. As the liberty was granted by the High Court to file appropriate proceedings as may be available in law, the same does not permit the applicants to file second round of litigation before the same Tribunal to challenge the same order. The earlier order passed by the Tribunal is in force, as such, the Tribunal in the second proceedings under Section 83 (2) of Wakf Act has rightly dismissed the application filed by the applicants.

13] The respondent submits that the purported certificate issued on 13.04.1970 under Section 46 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 was produced before the respondent no.2. The cursory perusal of the said certificate showed that the Tribunal constituted under the Vidarbha Region Tenancy Act of 1958 was aware that the land belonged to a religious institution i.e. the Balepper and Ghazimiyan Dargah and

therefore the name of said Dargah is mentioned as landlord in the certificate. Section 129 of the Bombay Tenancy and Agricultural Lands Act, 1958 specifically makes the Chapter III inapplicable to the lands belonging to religious institutions. Therefore, once it is found that any land is shown as property of religious institution in revenue record the Agricultural Land Tribunal's jurisdiction to exercise powers under the Act of 1958 to deal with any question relating to statutory transfer of ownership of such land is automatically taken away. Even if the Tribunal exercises such non-existent jurisdiction and passes any order relating to such lands, such exercise would be without jurisdiction and the orders are null and void and of no effect. The learned counsel for the respondents submits that if any authority, Tribunal or Forum having no jurisdiction, exercise any such jurisdiction would be treated as nullity.

14] The learned counsel for the respondent no.1 has relied upon the judgment in the case of **Maroti Sansthan, Tiwsa Vs. Gulab Haribhau Jirapure (dead) and others**

reported in **2006 (6) Mh.L.J. 367** wherein it has been held that claim for exemption under Section 129 (b) by a trust, the registration of trust under Bombay Public Trusts Act on tillers' day is not necessary. Only requisite is that the entire income of said land should be appropriated for the purpose of the trust.

15] The learned counsel for the respondent no.1 has also relied upon the judgment in the case of **Abdul Hamid Shaikh Safdar Vs. Darushifa Masjid Farmanpura & another** in Civil Revision Application No.116 of 2008, decided on 3rd July, 2009 wherein it is held that section 56 of the Wakf Act provides that a lease or sub-lease of a period exceeding three years shall be void and no effect shall be given for creation of lease for the period exceeding one year.

16] The learned counsel for the respondent no.1 has also relied upon the judgment in the case of **Shriram Mandir Sansthan @ Shri Ram Sansthan Pusda Vs. Vatsalabai & Ors.** Reported in **1999 (1) LJ (S.C.) 145** wherein it has been held that Section 129 is to protect certain lands from

tenancy legislation where the lands or income from such lands is being utilised for public purposes set out there. In this context, the tenancy of trust covered under Section 129 of the Tenancy Act 1958 are not made heritable. The Court has held that under Section 54 expressly makes the tenancy non-inheritable. An express provision in the Act which excludes the operation of certain provisions, cannot be made nugatory by resorting to general law.

17] It is the contention of the respondents that the Wakf Tribunal is within its jurisdiction to determine that the wakf property is exempted under Section 129 of the Bombay Tenancy and Agricultural Lands [Vidarbha Region] Act, 1958 and that the Act of 1958 is not applicable to the same and that under the provisions of Wakf Act there can be no tenancy beyond period of 3 years and any tenancy beyond period of three years is void.

18] In view of the direct prohibition, no tenancy can be created on the wakf property beyond period of 3 years and that Section 129 of the Bombay Tenancy and

Agricultural Lands [Vidarbha Region] Act, 1958 exempts wakf property from the applicability of the Bombay Tenancy and Agricultural Lands [Vidarbha Region] Act, 1958. The Tribunal has rightly decided that the applicants are the encroachers of the suit property.

19] Having heard the learned counsel for the parties, the following points arise for consideration :

i] Whether the Tenancy Act of 1958 being included in the Ninth Scheduled to the Constitution of India will have overriding effect over the provisions of Wakf Act, 1995 ?

ii] Whether Section 56 of the Wakf Act 1995 has overriding effect on the provisions of Sections 6, 7, 9 and 46 of the Bombay Tenancy and Agricultural Lands [Vidarbha Region] Act, 1958?

iii] Whether the Chief Executive Officer under Section 54 of the Wakf Act, 1995 or the Wakf Tribunal under the Wakf Act, 1995 has jurisdiction to decide legality

of the purchase certificate granted under the provisions of Bombay Tenancy and Agricultural Lands [Vidarbha Region] Act, 1958 ?

iv] What is effect of dismissal of the first order of the Tribunal, dismissing the suit filed by the plaintiffs and whether liberty granted by the High Court without setting aside the order of the Tribunal, permits the applicants to raise second application before the same Tribunal under Section 83 (2) of the Wakf Act ?

v] Whether order under Section 54 of the Wakf Act passed by the Chief Executive Officer under the Wakf Act 1995 has to be necessarily challenged under Section 54 (4) of the Wakf Act and there can no challenge to the order passed by the Chief Executive Officer under Section 83 (2) of the Wakf Act, 1995 ?

20] In the instant case, from the record produced before this Court the facts that are necessary to be noticed for determination of the issues involved in the present

matter are as under :

a) On 28.05.1937 the suit land were dedicated for the services of Dargah of Bale Peer and Gazimiyan. From 1952 till 1978-79, the name of Kabjeddar of institution Balepeer and Gazimiya Dargah is shown in the revenue record. In the year 1958, the land was in possession of tenants on the date of coming into force of the Bombay Tenancy and Agricultural Lands [Vidarbha Region] Act, 1958. On 01.04.1961, the applicants' ancestor had become statutory owners. On 13.04.1970, the statutory ownership conferred on the tenant under the said Act and ownership is issued in File No.R.V.C.No.2070/59 (13)64-65.

b] On 02.02.2002, the suit properties are registered under Section 19 of the Bombay Public Trusts Act, 1950, by filing application by respondent no.1 on 11.10.2001. After coming into force of the Wakf Act, 1995, the Wakf become deemed registered under Section 43 of the Wakf Act and the suit property is entered in the record register in Kitabul Awkaf under Section 37 of the said Act.

On 16.04.2007, the application is filed for removal of encroachment under Section 54 before the Chief Executive Officer of Wakf Board contending that the suit properties are dedicated for the Service of the Religious Institution Dargah Mahboobd Subhani (Gazimiyan) of Dhamangaon Gadhi, Tq. Achalpur. On 21.10.2009, the Chief Executive Officer passes an order directing eviction of the applicants under Section 54 (3) of the Wakf Act, 1995.

c] On 31.12.2009, the suit is filed under Section 54 (4) of the Wakf Act bearing Wakf Suit No.134/2009 before the Wakf Tribunal, Aurangabad. The said suit is rejected under Order VII Rule 11 as barred by limitation of having been filed beyond 60 days as prescribed in Rule 50 (3) of the Wakf Rules. On 05.01.2011, the applicants filed Civil Revision Application before this Court under Section 83 (9) of the Wakf Act, 1995. The said application before this Court was withdrawn with liberty to file appropriate proceedings as permissible under the provisions of law. On 30.03.2011, the applicants filed Wakf Application

No.08/2011 challenging the order passed by the Chief Executive Officer dated 21.10.2009 before the Wakf Tribunal. There is no limitation provided for the applications under Section 83 (2) of the Wakf Act. The Wakf Tribunal dismissed the Wakf Application by the impugned order.

21] Relevant provision of the Vidarbha Act of 1958 and the Wakf Act, 1995 [before the 2013 Amendment] necessary to decide the present petition are quoted below :

Section 6, 7, 9, 46 and 129 of the Maharashtra Tenancy and Agricultural Lands [Vidarbha Region] Act, 1958 are as under :

6. *Persons deemed to be tenants.* (1) *A person lawfully cultivating any land belonging to another person shall be deemed to be a tenant if such land is not cultivated personally by the owner and if such person is not -*

(a) a member of the owner's family, or

(b) a servant on wages payable in cash or kind but not in crop share or a hired labourer cultivating the land under the personal supervision of the owner or any member of the owner's family, or

(c) a mortgagee in possession.

(2) For the purposes of this Act, a person shall be recognised to be a protected lessee if such person was immediately, before the commencement of this Act, deemed to be a protected lessee under section 3 of the Berar Regulation of Agricultural Leases Act, 1951.

(3) For the purposes of this Act a person shall be recognised to be an occupancy tenant, if such person was immediately before the commencement of this Act deemed or declared to be an occupancy tenant under section 169 of the Code.

Explanation. - A person to whom only the right to cut grass or to graze cattle or to grow singhara (Trapa bipinosa) or to propagate or collect lac is granted in any land shall not be deemed to be a tenant for the purposes of this Act.

7. Certain persons deemed to be tenants for purposes of this Act. *(1) Every person who by himself or through his predecessor-in-interest-*

(a) held alienated land for a continuous period of three years immediately before the year 1950-51 from, superior holder as an annual tenant within the meaning of section 74 of the Berar Land Revenue Code, 1928, as then in force or as an ordinary tenant within the meaning of section 60 of the Berar Alienated Villages Tenancy Law, 1921 as then in force, or

(b) held as a tenant land belonging to any public trust of a religious or charitable nature for a continuous period of three years immediately before the 1st day of April 1957,

and

(c) is in possession of the land referred to in clause (a) or as the case may be, clause (b) on the appointed day or was dispossessed from the said land at any time but has been re-instated under sub-section (2),

shall be deemed to be a tenant of the said land for the purposes of this Act.

(2) (a) Any person who held any alienated land as provided in clause (a) or any land belonging to a trust as provided in clause (b) of sub-section (1) but who has been dispossessed subsequently may, if the said land is in the actual possession of the superior holder or his successor-in-interest or as the case may be of the trust and is not put to a non-agricultural use on or before the appointed day apply [before the expiry of a year from the date of commencement of the Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) (Amendment) 1962 Act, 1961] to the Tahsildar to be placed in possession of the said land.

(b) The Tahsildar shall, after holding an inquiry, restore possession to such person as tenant.

(3) Any suit or other proceeding pending on the date on which this Act comes into force in which any person is sought to be ejected from any alienated land on the ground that he had ceased to be a tenant of such land on the expiry of the agricultural year 1950-51, shall be referred under section 125 to the competent authority and decided as if this section were in force on the date of the institution of such suit

or proceedings.

(4) In this section -

(a) "alienated land" means land which immediately before the coming into force of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 was alienated land as defined in sub-section (1) of section 3 of the Berar Alienated Villages Tenancy Law, 1921 and in clause (2) of section 2 of the Berar Land Revenue Code, 1928;

(b) "superior holder" means a person who immediately before the coming Act into force of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950, held alienated land and who became an occupant under section 68 of that Act and has become a Bhumiswami under section 146 of the Code and includes his successor-in-interest.

9. Tenancy not to be terminated by efflux of time. *No Tenancy of any land [other than the tenancy of land duly sanctioned under section 36 or section 36A of the Maharashtra Land Revenue Code, 1966)] shall be terminated merely on the ground that the period fixed for its duration whether by agreement or otherwise has expired.*

46. Transfer of ownership of land to tenants from specified date. *(1) Notwithstanding anything in this Chapter or any law for the time being in force or any custom, usage, decree, contract or grant to the contrary, with effect on and from the first day of April 1961, the ownership of all lands held by tenants which they are entitled to purchase from their landlords under any of the provisions of this*

Chapter shall stand transferred to and vest in, such tenants and from such date such tenants shall be deemed to be the full owners of such lands :

Provided that if on such date any such tenant is of the following category, namely:--

(a) a minor,

(b) a widow,

(c) a serving member of the armed forces,
or

(d) a person subject to any physical or mental disability, the ownership of the land shall stand transferred -

(i) to the tenant on the expiry of one year from the date on which the tenant of category (a) attains majority, the tenant of category (c) ceases to serve in such force, the tenant of category (d) ceases to be subject to such disability; and

(ii) in the case of a widow to her successor-in-title on the expiry of one year from the date on which the widow's interest in the land ceases to exist:

Provided further that where in respect of any such land, any proceeding under sections 19, 20, 21, 36 or 38 is pending on the date specified in sub-section (1) the transfer of ownership of such land shall take effect on the date on which such proceeding is finally decided and the tenant retains possession of the land in accordance with the decision in such proceeding.

[(1A) (a) Where a tenant who is evicted from the land before the 1st day of April 1961 and not in possession thereof on that date, has made or makes an application for possession of the land within the period specified in sub-section (1) of section 36, then if the application is allowed by the Tahsildar, or in appeal by the Collector, as the case may be, or in revision by the Maharashtra Revenue Tribunal, the ownership of such land shall stand transferred to and vest in the tenant on the date on which the final order allowing the application is made.

(b) Where such tenant has not made the application within the period aforesaid or the application is finally rejected under this Act, and the land is held by any other person as tenant on the date of expiry of the said period or on the date of final rejection of the application, then the ownership of the land shall stand transferred to and vest in such other person on the relevant date aforesaid.]

(2) In respect of the land the ownership of which stands transferred to and vest in a tenant under sub-section (1) the tenant shall continue to be liable to pay to the landlord the rent of such land until the amount of the purchase price payable by the tenant to the landlord is determined under section 48.

22] Section 129 (b) and Explanation to Section 129
of the Bombay Tenancy and Agricultural Lands [Vidarbha
Region] Act, 1958 reads as under :

129. Exemption from certain provisions to lands held by local authorities Universities, trusts, etc. *Nothing the foregoing provisions except section 2, the provisions of Chapter II (excluding sections 21, 22, 23, 24 and 37) and section 91 and the provisions of Chapters X and XII in so far as the provisions of the said Chapters are applicable to any of the matters referred to in sections mentioned above, shall apply -*

(b) to lands which are the property of a trust for an educational purpose, hospital, Panjarpole, Gaushala, or an institution for public religious worship, provided the entire income of such lands is appropriated for the purpose of such trust; and

Explanation. *- For the purpose of clause (b), a certificate granted by the Collector, after holding an inquiry, that the conditions mentioned in the said clause are satisfied by a trust shall be the conclusive evidence in that behalf.*

23] Section 5, 54 and 56 of the Wakf Act, 1995
prior to the Amendment Act, 2013 are as under :

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.

54. Removal of encroachment from wakf property - *(1) Whenever the Chief Executive Officer considers whether on receiving any complaint or on his own motion that there has been an encroachment on any land, building, space or other property which is wakf property and, which has been registered as such under this Act, he shall cause to be served upon the encroacher a notice specifying the particulars of the encroachment and calling upon him to show cause before a date to be specified in such notice, as to why an order requiring him to remove the encroachment before the date so specified should not be made and shall also send a copy of such notice to the concerned mutawalli.*

(2) The notice referred to in sub-section (1) shall be served in such manner as may be prescribed.

(3) If, after considering the objections, received during the period specified in the notice, and after conducting an inquiry in such manner as may be prescribed, the Chief Executive Officer is satisfied that the property in question is wakf property and that there has been an encroachment on any such wakf property, he may, by an order, require the encroacher to remove such encroachment and deliver possession of the land, building, space or other

property encroached upon to the mutawalli of the wakf.

(4) Nothing contained in sub-section (3) shall prevent any person aggrieved by the order made by the Chief Executive Officer under that sub-section from instituting a suit in a Tribunal to establish that he has right, title or interest in the land, building, space or other property:

Provided that no such suit shall be instituted by a person who has been let into possession of the land, building, space or other property as a lessee, licensee or mortgagee by the mutawalli of the wakf or by any other person authorised by him in this behalf.

56. Restriction on power to grant lease of wakf property.- (1) *A lease or sub-lease for any period exceeding three years of any immovable property which is wakf property shall, notwithstanding anything contained in the deed or instrument of wakf or in any other law for the time being in force, be void and of no effect.*

(2) A lease or sub-lease for a period exceeding one year and not exceeding three years of immovable property which is wakf property shall, notwithstanding anything contained in the deed or instrument of wakf or in any other law for the time being in force, be void and of no effect unless it is made with the previous sanction of the Board.

(3) The Board shall, in granting sanction for lease or sub-lease or renewal thereof under this section review the terms and conditions on which the lease or sub-lease is proposed to be granted or renewed and make its approval

subject to the revision of such terms and conditions in such manner as it may direct.

24] Now I deal with the question, whether the the Bombay Tenancy and Agricultural Lands [Vidarbha Region] Act, 1958 being included in the Ninth Schedule of the Constitution of India will override the Wakf Act of 1995.

25] The Vidarbha Tenancy Act 1958 is included in the 9th Schedule of the Constitution of India at serial No.135. The effect of the inclusion of any Act in the 9th Schedule of the Constitution as has been observed in the case of **I. R. Coelho (Dead) by LRS. Vs. State of T.N., (2007) 2 SCC 1**, as under:

133. Every amendment to the Constitution whether it be in the form of amendment of any article or amendment by insertion of an Act in the Ninth Schedule, has to be tested by reference to the doctrine of basic structure which includes reference to Article 21 read with Article 14, Article 15, etc. As stated, laws included in the Ninth Schedule do not become part of the Constitution, they derive their validity on account of the exercise undertaken by Parliament to include them in the Ninth Schedule. That exercise has to be tested every time it is undertaken. In respect of that exercise the principle of compatibility will come in. One

has to see the effect of the impugned law on one hand and the exclusion of Part III in its entirety at the will of Parliament.

26] The Hon'ble Supreme Court in the case of **UCO Bank and another Vs. Dipak Debbarma and others** reported in [2017] 2 SCC 585 while considering repugnancy between the Central Act and the State Act [which is included in the Ninth Schedule] while dealing the repugnancy between the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and Section 187 of the Tripura Land Revenue and Land Reforms Act, 1960 has held at para no.3 as under :

3. It will not require much appreciation or scrutiny to come to the conclusion that the High Court was wholly incorrect in answering the writ petition and striking down the Sale Notification dated 26-6-2012 on the above basis. Article 31-B of the Constitution, on the very face of the language contained therein, is self-explanatory and provides protection / immunity to a legislation from challenge on the ground that it violates any of the provisions of Part III of the Constitution. Inclusion of the Tripura Act, 1960 in the Ninth Schedule by itself, would, therefore, not confer immunity to the said legislation from being overridden by the provisions of a parliamentary statute.

27] The Tenancy Act of 1958 is a State Legislation which is included in the Ninth Schedule of the Constitution of India. However, the inclusion of the Act does not make it a part of the Constitution. By inclusion in the Ninth Schedule the Act gets protection from challenge to its validity on the ground that it violates fundamental rights, unless the violation is such that it alters the basic structure of the Constitution. Although the constitutional protection is granted to the 1958 Act, nevertheless it remains a State Legislation relatable to List II of the Seventh Schedule and thus the State Legislation should not be repugnant to the Parliamentary Legislation. The reliance placed by the learned counsel for the applicants on the Division Bench Judgment of the Calcutta High Court in the case of **Board of Wakf, West Bengal Vs. State of West Bengal** reported in **2018 AIR CC 1060 (CAL)** to contend that the Act placed in Ninth Schedule will prevail over the parliamentary legislation cannot be accepted.

28] Thus, the Hon'ble Supreme Court has held

merely because Act is included in the Ninth Scheduled it does not override the Central Act. However, repugnancy between the laws made by State Legislation and Parliamentary Legislation has to be tested on well settled principles as has been laid down in the case of **State of W.B. v. Kesoram Industries Ltd., reported in [2004] 10 SCC 201.**

29] As regards the next question whether the Wakf Act, 1995 would override the provisions of the Vidarbha Region Act of 1958 and whether the Tribunal constituted under the Wakf Act can go into the validity of the ownership certificate granted under Vidarbha Region Tenancy Act of 1958, has to be tested on the well settled principles of repugnancy of laws, between the laws made by the State Legislation and the Parliament.

30] The Wakf Act is referable to entry 10 of the concurrent list [List III] of the Seventh Schedule of the Constitution of India while the Vidarbha Region Tenancy Act of 1958 is referable to entry 18 of list II of the Seventh Schedule of the Constitution of India. Under entry 18, List

II, the State Legislation can extinguish or restrict subsisting rights in land or provides for statutory purchase of land by tenant in occupation [AIR 1959 SC 459].

31] In the case of **State of W.B. v. Kesoram Industries Ltd.**, reported in [2004] 10 SCC 201 the Hon'ble Supreme Court dealing with repugnancy of legislation between the law made by State Legislation and the Parliament has observed as under :

31. Article 245 of the Constitution is the fountain source of legislative power. It provides — subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the legislature of a State may make laws for the whole or any part of the State. The legislative field between Parliament and the legislature of any State is divided by Article 246 of the Constitution. Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule, called the “Union List”. Subject to the said power of Parliament, the legislature of any State has power to make laws with respect to any of the matters enumerated in List III, called the “Concurrent List”. Subject to the abovesaid two, the legislature of any State has exclusive power to make laws with respect to any of the matters

enumerated in List II, called the “State List”. Under Article 248 the exclusive power of Parliament to make laws extends to any matter not enumerated in the Concurrent List or State List. The power of making any law imposing a tax not mentioned in the Concurrent List or State List vests in Parliament. This is what is called the residuary power vesting in Parliament. The principles have been succinctly summarised and restated by a Bench of three learned Judges of this Court on a review of the available decision in *Hoechst Pharmaceuticals Ltd. v. State of Bihar* [(1983) 4 SCC 45 : 1983 SCC (Tax) 248] . They are:

(1) The various entries in the three lists are not “powers” of legislation but “fields” of legislation. The Constitution effects a complete separation of the taxing power of the Union and of the States under Article 246. There is no overlapping anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the States.

(2) In spite of the fields of legislation having been demarcated, the question of repugnancy between law made by Parliament and a law made by the State Legislature may arise only in cases when both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List and a direct conflict is seen. If there is a repugnancy due to overlapping found between List II on the one hand and List I and List III on the other, the State law will be ultra vires and shall have to give way to the Union law.

(3) Taxation is considered to be a distinct matter for purposes of legislative competence. There is a distinction made between general subjects of legislation and taxation. The general subjects of legislation are dealt with in one group of entries and power of taxation in a separate group. The power to tax cannot be deduced from a general legislative entry as an ancillary power.

(4) The entries in the lists being merely topics or fields of legislation, they must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. The words and expressions employed in drafting the entries must be given the widest-possible interpretation. This is because, to quote V. Ramaswami, J., the allocation of the subjects to the lists is not by way of scientific or logical definition but by way of a mere simplex enumeratio of broad categories. A power to legislate as to the principal matter specifically mentioned in the entry shall also include within its expanse the legislations touching incidental and ancillary matters.

(5) Where the legislative competence of the legislature of any State is questioned on the ground that it encroaches upon the legislative competence of Parliament to enact a law, the question one has to ask is whether the legislation relates to any of the entries in List I or III. If it does, no further question need be

asked and Parliament's legislative competence must be upheld. Where there are three lists containing a large number of entries, there is bound to be some overlapping among them. In such a situation the doctrine of pith and substance has to be applied to determine as to which entry does a given piece of legislation relate. Once it is so determined, any incidental trenching on the field reserved to the other legislature is of no consequence. The court has to look at the substance of the matter. The doctrine of pith and substance is sometimes expressed in terms of ascertaining the true character of legislation. The name given by the legislature to the legislation is immaterial. Regard must be had to the enactment as a whole, to its main objects and to the scope and effect of its provisions. Incidental and superficial encroachments are to be disregarded.

(6) The doctrine of occupied field applies only when there is a clash between the Union and the State Lists within an area common to both. There the doctrine of pith and substance is to be applied and if the impugned legislation substantially falls within the power expressly conferred upon the legislature which enacted it, an incidental encroaching in the field assigned to another legislature is to be ignored. While reading the three lists, List I has priority over Lists III and II and List III has priority over List II. However, still, the predominance of the Union List would not prevent the State

Legislature from dealing with any matter within List II though it may incidentally affect any item in List I.

(emphasis supplied)

In a nutshell

129. *The relevant principles culled out from the preceding discussion are summarised as under:*

(5) The entries in List I and List II must be so construed as to avoid any conflict. If there is no conflict, an occasion for deriving assistance from non obstante clause “subject to” does not arise. If there is conflict, the correct approach is to find an answer to three questions step by step as under:

One — Is it still possible to effect reconciliation between two entries so as to avoid conflict and overlapping?

Two — In which entry the impugned legislation falls by finding out the pith and substance of the legislation? And

Three — Having determined the field of legislation wherein the impugned legislation falls by applying the doctrine of pith and substance, can an incidental trenching upon another field of legislation be ignored?

32] The Hon’ble Supreme Court in the case of **UCO Bank** [supra], while deciding with the repugnancy of the parliamentary statute under List I of the Seventh Schedule

and Section 187 of a State Act under List II and included in the Ninth Schedule of the Constitution of India held at para no. 18 as under :

18. The 2002 Act is relatable to the entry of banking which is included in List I of the Seventh Schedule. Sale of mortgaged property by a bank is an inseparable and integral part of the business of banking. The object of the State Act, as already noted, is an attempt to consolidate the land revenue law in the State and also to provide measures of agrarian reforms. The field of encroachment made by the State Legislature is in the area of banking. So long there did not exist any parallel Central Act dealing with sale of secured assets and referable to Entry 45 of List I, the State Act, including Section 187, operated validly. However, the moment Parliament stepped in by enacting such a law traceable to Entry 45 and dealing exclusively with activities relating to sale of secured assets, the State law, to the extent that it is inconsistent with the 2002 Act, must give way. The dominant legislation being the Parliamentary legislation, the provisions of the Tripura Act, 1960, pro tanto, (Section 187) would be invalid. It is the provisions of the 2002 Act, which do not contain any embargo on the category of persons to whom mortgaged property can be sold by the bank for realisation of its dues that will prevail over the provisions contained in Section 187 of the Tripura Act, 1960.

33] The Hon'ble Supreme Court in the case of **Central Bank of India V. State of Kerala** reported in 2009 (4)

SCC 94 while considering repugnancy between the State Act [Bombay Sales Tax Act] referable to list II of the Seventh Schedule of the Constitution of India and the Central Act [the Recovery of Debts Due to Banks and Financial Institutions Act] and the Securitisation Act 2002 relatable to list III of the Seventh Schedule of the Constitution of India the Hon'ble Supreme Court has held that it is not possible to read inconsistency between Section 28-C of the Bombay Stamp Act and non obstante clause contained in Section 34 (1) of the D.R.T. Act and Section 35 of the Securitisation Act to declare the first charge created under the Bombay Sales Tax Act would not operate qua the proceedings initiated by the banks under the D.R.T. Act or the Securitisation Act. The Court held that the Parliament was aware of the State Act yet it has not incorporated the provisions to override State Act on creation of first charge. In the case of ***Central Bank of India Vs. State of Kerala and Others***, reported in (2009) 4 SCC 94, the Hon'ble Supreme Court has held as under :-

“The questions which arose for determination

in the present appeals were whether Section 38-C of the Bombay Sales Tax Act, 1959 (the Bombay Act) and Section 26-B of the Kerala General Sales Tax Act, 1963 (the Kerala Act) and similar provisions contained in other State legislations by which a first charge was created on the property of the dealer or such other person, who was liable to pay sales tax, etc. were inconsistent with the provisions contained in the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (the DRT Act) for recovery of “debt” and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the Securitisation Act) for enforcement of “security interest” and whether by virtue of non obstante clauses contained in Section 34 (1) of the DRT Act and Section 35 of the Securitisation Act, the two Central legislations had primacy over State legislations.”

“While enacting the DRT Act and Securitisation Act, Parliament was aware of the law laid down by the Supreme Court wherein priority of the State dues was recognised. If Parliament intended to create first charge in favour of banks, financial institutions or other secured creditors on the property of the borrower in priority over the first charge created under State legislations, then it would have incorporated provisions similar to those contained in section 14-A of the Workmen’s Compensation Act, 1923, Section 11 (2) of the EPF Act, Section 74(1) of the Estate Duty Act, 1953, Section 25 (2) of the Mines and Minerals

(Regulation and Development) Act, 1957, Section 30 of the Gift Tax Act and Section 529-A of the Companies Act, 1956 and ensured that notwithstanding series of judicial pronouncements, dues of banks, financial institutions and other secured creditors should have priority over the State's statutory first charge in the matter of recovery of the dues of sales tax, etc. However, no such provision has been incorporated in either the DRT Act or the Securitisation Act. In the absence of any specific provision to that effect, it is not possible to read any conflict or inconsistency or overlapping between the provisions of the DRT Act and the Securitisation Act on the one hand and Section 38-C of the Bombay Act and Section 26-B of the Kerala Act on the other and the non obstante clauses contained in Section 34 (1) of the DRT Act and Section 35 of the Securitisation Act cannot be invoked for declaring that the first charge created under the State legislation would not operate qua or affect the proceedings initiated by banks, financial institutions and other secured creditors for recovery of their dues or enforcement of security interest, as the case might be."

34] It is required to be noticed that a wakf or a trust having characteristic of a wakf and irrespective of whether it is registered under the Maharashtra Public Trusts Act is governed by the Wakf Act, 1995. If the trust satisfies the

characteristic of a Wakf as defined within the provisions of Wakf Act, 1995, the Wakf Act, 1995 would be applicable to the Trust. Section 3 (r) of the Wakf Act reads as under :

(r) “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;]

35] It is not necessary that the wakf has to be

registered for the applicability of the Wakf Act, 1995. Section 56 of the Wakf Act bars for creation of tenancy beyond the period of three years over the wakf property and if created it is declared void. Thus, the question arises whether Section 6, 7 and 9 of the Vidarbha Tenancy Act of 1958 which protects agricultural tenancy and Section 46 which grants deemed ownership is in conflict with Section 56 of the Wakf Act, 1995, which bars tenancy beyond 3 years and declares it void.

36] Mr.Kazi and Mr.Deshmukh, learned counsel appearing for the respondents relies upon the judgment in the case of **Sayyed Ali & others Vs. Andhra Pradesh Wakf Board** reported in **1998 (2) SCC 642** and submit that a wakf is a permanent dedication of property for purposes recognized by Muslim law as pious religious or charitable and the suit property having been found as Wakf property would always retain its character as a Wakf property. Once Wakf is always a Wakf and that property never changes its character. After a Wakf is created, it continues to be so for

all time to come and further continues to be governed by the provisions of the Wakf Act. In the said judgment, it was held that the Tahsildar has no jurisdiction to enquire into and adjudicate upon the character of the Wakf property mentioned in the list of Wakfs published in the official gazette under sub-Section (2) of Section 5 of the Wakf Act and the finding by the Tahsildar that the property was not wakf property was wholly beyond jurisdiction.

37] In the instant case, the property is wakf property. From the definition under the Wakf Act, indispensable requirement of an wakf is that there must be a dedication of property. Dedication must be by a person who is the owner of the property. Dedication must be permanent and perpetual. Wakf cannot be revoked. The property which is subject matter of Wakf cannot be alienated and the object of Wakf must be for purpose recognised by the Muslim Law as religious, pious or charitable. Since wakf is dedication made of a property, the ownership of the wakf property is transferred to God. The permanent ownership is transferred to Almighty God and

the Mutawalli [Manager of the Wakf] is thus prohibited from transferring the wakf property to a third person. A property of trust is ordinarily vested in the trustees who can transfer the same subject to approval of concerned authority. However, since the ownership of wakf property is vested in God, the same cannot be transferred by a mutawali [manager of a wakf].

38] In the case of *Maharashtra State Board of Wakfs Vs. Shaikh Yusuf Bhai Chawla and Ors.*, reported in **2022 LiveLaw (SC) 1003**, the Hon'ble Supreme Court has discussed the essential nature of wakf and has held that the wakf property cannot be alienated by its mutavalli [manager]. It has also discussed the scope of Section 51 and amended Section 104-A of the Wakf Act, 1995 and has held that the wakf property cannot be alienated and has held as under :-

“66. What is relevant from Section 36 is that in the case of a public trust which includes a wakf under the Bombay Public Trust Act, the property of the wakf can be sold, the only requirement thereunder being the previous sanction of Charity Commissioner. We may at

this juncture observe that it does not harmonise with one of the indispensable requirements of a wakf under the Act that the property of the wakf cannot be alienated. Section 37 deals with the power of inspection and supervision.

76. It is at once to be noticed that the Act shall apply to wakfs which were created 'before the Act' was passed and it is also to apply to wakfs which were brought into existence after the Act.

92. Section 51 deals with alienation of wakf property. It reads as under:

"51. Alienation of wakf property without sanction of Board to be void. —

(1) Notwithstanding anything contained in the waqf deed, any lease of any immovable property which is waqf property, shall be void unless such lease is effected with the prior sanction of the Board: Provided that no mosque, dargah, khanqah, graveyard, or imambara shall be leased except any unused graveyards in the States of Punjab, Haryana and Himachal Pradesh where such graveyard has been leased out before the date of commencement of the Wakf (Amendment) Act, 2013 (27 of 2013).

(1A) Any sale, gift, exchange, mortgage or transfer of waqf property shall be void ab initio : Provided that in case the Board is satisfied that any waqf property may be

developed for the purposes of the Act, it may, after recording reasons in writing, take up the development of such property through such agency and in such manner as the Board may determine and move a resolution containing recommendation of development of such waqf property, which shall be passed by a majority of two- thirds of the total membership of the Board : Provided further that nothing contained in this subsection shall affect any acquisition of waqf properties for a public purpose under the Land Acquisition Act, 1894 (1 of 1894) or any other law relating to acquisition of land if such acquisition is made in consultation with the Board: Provided also that—

(a) the acquisition shall not be in contravention of the Places of Public Worship (Special Provisions) Act, 1991 (42 of 1991);

(b) the purpose for which the land is being acquired shall be undisputedly for a public purpose;

(c) no alternative land is available which shall be considered as more or less suitable for that purpose; and

(d) to safeguard adequately the interest and objective of the waqf, the compensation shall be at the prevailing market value or a suitable land with reasonable solatium in lieu of the acquired property.”

96. Section 104A inserted by Act 27 of 2013

prohibits sale, gift, exchange, mortgage or transfer of wakf property, movable or immovable to any other person. This is notwithstanding anything contained in the Act itself or any other law for the time being in force. Section 104B deals with restoration of wakf property in occupation of the Government to the wakf Board. Lastly, we may only notice Section 112 since it deals with repeal and savings. It reads as under:

“112. Repeal and savings. —

(1) The Wakf Act, 1954 (29 of 1954) and the Wakf (Amendment) Act, 1984 (69 of 1984) are hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said Acts shall be deemed to have been done or taken under the corresponding provisions of this Act.

(3) If, immediately before the commencement of this Act, in any State, there is in force in that State, any law which corresponds to this Act that corresponding law shall stand repealed: Provided that such repeal shall not affect the previous operation of that corresponding law, and subject thereto, anything done or any action taken in the exercise of any power conferred by or under the corresponding law shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act as if this Act was in force on the day on which such things were done or action was taken.”

119. It is, therefore, clear that nothing in the Trust Act would apply to the Wakf. Nor would the provisions of the Trust Act as such apply to public or private religious or charitable Trusts.

*125..... But the Mahommedan law relating to trusts differs fundamentally from the English law. It 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.” When once it is declared that a particular property is wakf, or any such expression is used as implies wakf, or the tenor of the document shows, as in the case of *Jewan Doss Sahu v. Shah Kubeeruddin* that a dedication to pious or charitable purposes is meant, the right of the wakf is extinguished and the ownership is transferred to the Almighty. The donor may name any meritorious object as the recipient of the benefit. The manager of the wakf is the mutawalli, the governor, superintendent, or curator. In *Jewan Doss Sahu's Case* the Judicial Committee call him “procurator.” That case related to a khankah, a Mahommedan institution analogous in many respects to a math where Hindu religious instruction is dispensed. The head of these khankhas, which exist in large numbers in India, is called a sajjadanishin. He is the teacher of religious doctrines and rules of life, and the manager of the institution and the administrator of its charities, and has in most cases a larger interest in the usufruct than an*

ordinary mutawalli. But neither the sajjadanishin nor the mutawalli has any right in the property belonging to the wakf; the property is not vested in him and he is not a “trustee” in the technical sense.”

130.....In the case of a Wakf, however, undoubtedly the principle is well entrenched and it is integral to the very concept of a Wakf, wherein, upon a dedication there is an implied transfer of the property to the Almighty, which would in law render any alienation impermissible. The property would remain inalienable. However, interestingly, we may notice the following discussion in Mulla Principles of Mahomedan law:

“207. Power of mutawalli to sell or mortgage. A mutawalli has no power, without the permission of the Court, to mortgage, sell or exchange waqf property or any part thereof, unless he is expressly empowered by the deed of waqf to do so.”

132. Therefore, whatever may have been the position prior to 1995, under the Act, a sale is absolutely prohibited. We draw support from Section 104A of the Act which, inter alia, prohibits alienation.

135. Finally, we may take up the last distinction which is highlighted by Dr. Singhvi that it relates to the powers of the Mutawalli being very limited as compared to the powers of a Trustee. It is true that Mutawalli is

essentially a manager and administrator of the property which vests in Almighty. A Trustee, on the other hand, is the person in whom the property vests. In the case of a private Trust, no doubt, as in respect of public Trust, it consists of an obligation annexed to the ownership of property and arises from out of confidence reposed in a person or persons. They are the trustees. In the case of a private Trust, there must be a written document which must be registered in terms of Section 5 of the Act. In a public religious or public charitable Trust, there need not be any document as such to create a public charitable trust. The foundation, however, remains the confidence which is reposed in the Trustee/Trustees and the apparent ownership that he possesses by having legal ownership being vested in him/them. The most significant aspect, however, would be that in the case of a Mutawalli of a Wakf or Manager of a Wakf or other person in charge of a Wakf, he can only be the manager of the property. This distinction we must not overlook forms the subject matter of the discussion in paragraph 20 of the judgment of this Court in **Nawab Zain Yar Jung (Since Deceased) and Others v. Director of Endowments and Another** (supra) which we have referred to. We have noticed that in the said case what was involved was a trust deed where property was vested with the trustee, no doubt, for the purposes mentioned therein. It is this which must indeed be the indispensable hallmark to distinguish a Trust from a Wakf. This distinction cannot be overlooked. A power of sale, being located appears incompatible

with a Wakf but the same is not incongruous with a Trust.

“147..... 11.....

12. Upon the enforcement of the Wakf Act, 1995 it has become necessary for the Charity Commissioner's office to bifurcate such Muslim Wakfs from the Muslim trusts. Instead of undertaking such exercise the Charity Commissioner proceeded to treat all the endowments/ charities registered in "B" category as Muslim Wakfs and issued a circular dated 24th July, 2003, bearing No. 307 of 2003 whereby it directed its office not to exercise or deal with any of the Muslim Public Trusts. The said circular inter alia stated that according to Section 43 of the Wakf Act, 1995, Wakfs registered as the Public Trust should not be tried under the Bombay Public Trust Act, 1950 and that the further orders might be awaited. After issuance of this circular the office of the Charity Commissioner refused to entertain any application in respect of the Muslim Public Trusts, which are registered with it. Hereto annexed and marked as Exhibits 'G' & 'G-1' are the copies of the circular dated 24th July, 2003 bearing No. 307 of 2003 issued by the Charity Commissioner along with its English translation.”

174. Since under Section 2 of the Act, the Act applies to every Wakf which is created, whether before or after the Act came into force, it means that whatever is Wakf as defined in the Act

which is made at any point of time, be it before or after 01.01.1996 must be registered under the Act [See Section 36]. Registration is intended to bring Wakfs under the close scrutiny of the competent authority, be it the Board or the executive officers. The whole history of the legislation of Wakfs reflects the perception of the legislature that property which is dedicated to the Almighty for charitable, religious and pious purposes should be protected. The protection must be extended against the Mutawallis and others who may deal with the property and thereby, completely destroy the very original purpose of the founder. What would be used for public welfare, be it even of sections of a community for certain cases, would all be covered thereunder as provided in the Act.

183. We articulate the choices which are available before us. It is the appellant's case that Wakf properties need to be rigorously and lawfully regulated. However, there are public Trusts registered under the 1950 Act which are in fact, Wakf which fall under Section 28 of the 1950 Act. They must undoubtedly come within the regime of the Central Act viz., the Wakf Act, 1995. The converse also must be stated and highlighted viz.; a Muslim Public Trust registered under the 1950 Act need not be a Wakf under the Act. It would be certainly contrary to the unbroken line of judgments of this Court which contemplate such a division between two categories to paint all Muslim public Trusts with the same brush and glean

them as Wakfs. We have elucidated the position however with reference to the impact of the amendment to Section 3(a) of the Wakf Act, 1954.”

39] In the instant case the parliament while enacting the Wakf Act 1995 was well aware of the Vidarbha Tenancy Act of 1958 whereby tenants of agricultural land are protected even over the wakf property subject to Section 129 of the Vidarbha Region Tenancy Act of 1958. Even though the Parliament was fully aware of the 1958 Act, the Parliament has not opted to insulate Section 56 of the Wakf Act by declaring that the tenancy on the wakf property cannot be created beyond three year even by legislation. Although there is a bar for alienation of the wakf property, the wakf property can still be lost by operation of law as explained later in this judgment. Even under the Wakf Act, the wakf property can be sold with the permission of the Board under Section 51 of the Wakf Act.

40] Section 51 of the Wakf Act, 1995 is as under :

51. Alienation of [waqf] property without sanction of Board to be - [(1) Notwithstanding anything contained in the waqf deed, any lease immovable property which is waqf property, shall be void unless such lease is effected with the prior sanction of the Board :

Provided that no mosque, dargah, khanqah, graveyard, or imambara shall be leased except any unused graveyards in the States of Punjab, Haryana and Himachal Pradesh where such graveyard has been leased out before the date of commencement of the Wakf (Amendment) Act, 2013.

(1-A) Any sale, gift, exchange, mortgage or transfer of waqf property shall be void ab initio.

Provided that in case the Board is satisfied that any waqf property may be developed for the purposes of the Act, it may, after recording reasons writing, take up the development of such property through such agency and in such manner as the Board may determine and move a resolution containing recommendation of development of such waqf property, which shall be passed by a majority of two-thirds of the total membership of the Board:

Provided further that nothing contained in this sub-section shall affect any acquisition of waqf properties for a public purpose under the Land Acquisition Act, 1894 (1 of 1894) or any other law relating to acquisition of land if such acquisition is made in consultation with the Board:

41] Amended Section 104-A, [as amended by Amendment Act, 2013] of the Wakf Act, 1995 also does not make difference to the legal position as regards the transfer by operation of law / legislation. The words used in Section 104-A of the Wakf Act are “no person shall sell, gift, exchange, mortgage or transfer”. Amended Section 104-A of the Wakf Act, 1995 reads as under :

[104-A. Prohibition of sale, gift, exchange, mortgage or transfer of waqf property. - (1) Notwithstanding anything contained in this Act or any other law for the time being in force or any waqf deed, no person shall sell, gift, exchange, mortgage or transfer any movable or immovable property which is a waqf property to any other person.

(2) Any sale, gift, exchange, mortgage or transfer of property referred to in sub-section (1) shall be void ab initio.]

42] Thus although the wakf property cannot be alienated, it can be lost by adverse possession or by application of law of limitation so also in case where the State in exercising power of eminent domain acquire the wakf lands and thus there is no bar in the Wakf Act, 1995 to

create protected tenancy or deemed purchase of the wakf property under the Vidarbha Region Act of 1958. By the Legislation under Entry No.18 of List II of Seventh Schedule, the State can extinguish or restrict subsisting rights of the land and provide for statutory purchase of land by tenant.

43] In case of **Sabir Ali Khan Vs. Syed Mohd. Ahmad Ali Khand and others** [supra], the Hon'ble Supreme Court has protected title of beneficiary of a wakf by adverse possession over wakf property. While dealing with the contention of the appellant therein at para 9 (v) below the Supreme Court at para nos.65 and 66 has observed as under :

9 (v) Appellant would further contend that respondents being beneficiaries, could not acquire title, by adverse possession, of the waqf property.

...

65. Can it be said that a beneficiary of a waqf is a fiduciary or that there is a fiduciary relationship and, therefore, he cannot acquire title to the property of the waqf by adverse possession?

66. ... The beneficiary of a waqf is endowed with rights in terms of the waqf deed. We are unable to cull out any duty, as such, to protect the interest of another. No doubt, it could be said that as the property in a waqf, vests in the Almighty, there must be a concern and, undoubtedly, a moral duty to act in a manner that the object of the wakf is fostered. But a beneficiary is not like a Trustee, who assumes possession in his character as a Trustee, coming under the restraint of discarding his character as Trustee and donning the robes of an encroacher or a person asserting hostile title.

72. Even in regard to a proceeding under the Act be it Section 52 if as on the date the action is taken, the title in the property stood vested with the person in possession by virtue of Section 27 of the Limitation Act then it may not be permissible to ignore the right which had been acquired. The decision in T. Kaliamurthi (supra) would apply in the facts and the action is barred.

44] In the case of ***Maharashtra State Board of Wakfs Vs. Shaikh Yusuf Bhai Chawla and Ors.***, reported in **2022 LiveLaw (SC) 1003**, while considering alienation of wakf property, by operation of law the Hon'ble Supreme Court at para 178 has held as under :

178. We are not for a moment commenting on the aspect about acquisition of title by adverse possession. Nor are we going into the question which can be raised as a result of Section 107 of the Act by which Limitation Act has not been

made applicable in respect of a suit for recovery of possession but otherwise, we must hold that sans such features, the Wakf would continue and it would remain perpetual, inalienable and irrevocable. Therefore, what was once a Wakf before the 1950 Act, if it is registered under the 1950 Act, with the commencement of the Act, such a public Trust would necessarily come under the ambit of the Wakf Act, 1995.

45] Thus, both the Acts i.e. Section 56 of the Wakf Act, 1995 and Section 6, 7, 9 and 46 of the 1958 Act are not in conflict. The Act of 1958 can grant protection to a lawful tenant of a wakf property who was cultivating the land on the date when the 1958 Act came in force and can also grant ownership certificate to the tenant. Thus, Section 56 of the Wakf Act does not have overriding effect on the provisions of Vidarbha Region Tenancy Act, 1958.

46] This brings me to the next question, whether wakf can claim exemption under Section 129(b) of the 1958 Act.

47] The learned counsel for the applicants has contended that all trust [including wakf registered as trust under the Maharashtra Public Trust Act] has to fulfill twin

conditions mentioned in Section 129 of the 1958 Act, and the wakfs cannot be treated separately and relied upon the judgment in the case of **Shri Nivruttinath Yatra Khajur Donation Trust, Dist. Nashik Vs. The Sub-Divisional Officer, Dist.-Dahanu & Others** reported in 2005 [1] ALL MR 341 at para no.4 has held as under :

4. *The law is well settled that a Trust cannot claims exemption certificate under section 88-B in respect of the lands which had already become the property of its tenant before the right of exemption was acquired by the trust. That is why the trust in the present case, having become entitled to claim exemption under section 88-B, for the first time in 1969, cannot get exemption in respect of a land which had gone into the ownership of the respondent-tenant on 1-4-1957. This position in law is settled by this Court in Laxminarayan Temple, Kothure Vs. Laxman Mahadu Chandore, AIR 1970 Bombay 23. In yet another judgment in Chhatrapati Charitable Devasthan Trust Vs. Parisa Appa Bhoske & Ors. 1979 Mh.L.J. 163, this Court was considering the similar submissions as advanced by Ms.Deshpande, learned Counsel for the petitioner. This Court after considering the provisions of sections 18, 19, 20 and 21 of the Bombay Public Trusts Act, 1950 (for short, "the Trust Act") observed that 'If these provisions are read together, the trust cannot be said to be registered merely when an application under section 18 is filed. On the contrary, registration is effected only after the order is passed by the competent authority under section 20 and the entry is taken in the*

register. In the present case, admittedly, the trust was registered in 1969 and in view thereof the trust cannot claim that the date of registration relates back to the date of their application seeking registration of the trust. In the said judgment, this Court reiterated the law laid down in the case of Laxminarayan Temple Kothure Vs. Laxman Mahada Chandore. A categorical finding has been recorded in the said judgment that the trust was not entitled to apply for exemption till 31-5-1959, the date of registration of the trust in that petition, since before that on 1-4-1957 the tenant had become the owner of the lands. It was further observed that the order of registration of the trust could not have the effect of extinguishing the tenant's vested right nor of reviving the extinguished or lost claim of the trust. In any case, the trust was not entitled to exemption under section 88-B in respect of the lands which were no longer owned by it. In view of the well settled position in-law, in my opinion, the trust, in the present case, is not entitled for exemption certificate under section 88-B, since the respondent-tenant on 1-4-1957 had become the owner of the lands. The right of the tenant did not get extinguished on the date of registration of the trust in 1969.

48] The learned counsel for the applicants has also relied upon the judgment of the Division Bench of the Bombay High Court in the case of **Chhatrapati Charitable Devasthan Trust Vs. Parisa Appa Bhoske and others, 1979** (1) **Mh.L.J. 163**, relying upon the earlier Judgment of this

court wherein it has held that the object of the Maharashtra Tenancy and Agricultural Lands Act is to confer ownership right on the tillar of the land and that the exemption i.e. available to the registered Trust under Section 88-B of the said Act would be if it fulfills 2 conditions; firstly, the Trust must be deemed to be registered under the Bombay Public Trusts Act and, secondly, the entire income of the property is appropriated for the purpose of the Trust. A Trust is not entitled to exemption till it fulfills the 2 requirements mentioned in the proviso. The High Court at paragraphs no.5 and 6 has held as under:

“5. ...The Division Bench while construing the provisions of the Bombay Public Trusts Act, 1950 as well as section 88B of the Tenancy Act, in the said decision observed as under:-

“Clause (b) grants exemption to the properties of certain types of trusts and the proviso lays down two conditions for the acquisition of the exemption, the conditions being firstly that the trust must be or must be deemed to be registered under the Bombay Public Trusts Act and secondly, that the entire income of the property is appropriated for the purposes of the trust. A trust is not entitled to the exemption till it fulfills the two requirements mentioned in the proviso. It must follow that the trust in the present case was not entitled to exemption under section 88B till 28th March 1958 when it

was registered under the Bombay Public Trusts Act. Before that date however, respondent No.1 had already become the owner of the land by virtue of the provisions contained in sections 32 to 32R of the Act. The petitioners cannot get exemption in respect of a land which had ceased to be the property of the trust on the date on which the trust became entitled to claim that exemption.

6. We are, however unable to accept the view of the Maharashtra Revenue Tribunal that the trust ought to have been a registered trust on 1st August 1956 on which date section 88B came into force, in order that the land may be entitled to exemption under that section. There is nothing in the terms of clause (b) of section 88B(1) which requires its operation to be confined to the properties of those trusts which were already in existence when section 88B came into force. The exemption granted by section 88B is not confined to the operation of section 32 to 32R of the Act, but extends to the operation of several other provisions of the Act. A trust may be created after section 88B came into effect and still the lands of the trust would be entitled to the exemption given by that section. A trust, however, cannot claim an exemption under that section in respect of lands which had already become the property of the tenants before the right of exemption was acquired by the trust. That it is why the trust in the present case having become entitled to claim exemption under section 88B for the first time on 28th March 1958 cannot get exemption in respect of a land which had gone into the ownership of respondent No.1 on 1st April, 1957.”

Vs. Gulab Haribhau Jirapure (Dead) and others, 2006 (6)

Mh.L.J. 367, this Court while considering exemption under Section 129 of the 1958 Act para nos.8 to 10 has held as under:

8. Perusal of the judgment of the Division Bench of this Court reported in Eknath Bhiku Yadav and another vs. Ganpatrao Shankarrao Dhawan and others; (supra) reveals that after considering section 88-B of the 1948 Act, the Division Bench also relied upon two earlier judgments which are reported in Laxminarayan Temple vs. Laxman M. Chandore, 1969 Mh.L.J. 476 = AIR 1970 Bom. 23 and Chhatrapati Charitable Devasthan Trust vs. Parsia Appa Bhoske and ors. 1979 Mh.L.J. 163. These rulings are again on section 88-B of the 1948 Act. Section 88-B read as under

88-B. [(1)] Nothing in the foregoing provisions except sections 3, 4B, 8, 9, 9A, 9B, 9C, 10, 10A, 11, 13 and 27 and the provisions of Chapters VI and VIII insofar as the provisions of the said Chapters are applicable to any of the matters referred to in the sections mentioned above shall apply.

(a) to lands held or leased by a local authority, or University established by law in the (Bombay area of the State of Maharashtra); and

(b) to lands which are the property of a trust for an educational purpose, [a hospital, Panjarapole, Gaushala] or an institution for public religious worship.

Provided that —

(i) such trust is or is deemed to be registered

*under the Bombay Public Trusts Act, 1950, and
(ii) the entire income of such lands is appropriated for the purposes of such trust;*

*[(c) to lands assigned or donated by any person before the 1st day of August, 1956 for the purpose of rendering any of the following services useful to the community, namely :—
maintenance of water works, lighting or filling of water troughs for cattle;]*

[(d) to lands taken under management temporarily by the Civil, Revenue or Criminal Courts by themselves, or through receivers appointed by them, till the decision of the title of the rightful holders;

Provided that, from the date on which the land referred to in clause, (d) is released from management, all the foregoing provisions of this Act shall apply thereto, but subject to the modifications that in the case of a tenancy, not being a permanent tenancy, which on that date subsists in the land.

(i) the landlord shall be entitled to terminate the tenancy under section 31 (or under section 33B in the case of a certificated landlord) within one year from such date; and

(ii) within one year from the expiry of the period during which the landlord or certificated landlord is entitled to terminate the tenancy as aforesaid, the tenant shall have the right to purchase the land under section 32 (or under section 33-C in the case of an excluded tenant), and

(iii) the provisions of sections 31 to 31-D, (both inclusive) (or sections 33-A and 33-B in the case of a certificated landlord) and sections 32

to 32-R, (both inclusive) or sections 33-A and 33-C in the case of an excluded tenant) shall, so far as may be applicable, apply to the termination of a tenancy or the right to purchase the land, as aforesaid.

Provided further that,—

(a) in the case of a permanent tenancy the permanent tenant shall be entitled to purchase the land held by him on permanent tenancy,—

(i) within one year from the date on which the estate or land is released from management, or

(ii) where such estate or land was released from management after the tiller's day but before the commencement of the Bombay Tenancy and Agricultural Lands, (Amendment) Act, 1960, within one year from such commencement, and

(b) where such permanent tenant is desirous of exercising the right conferred on him under this proviso, he shall accordingly inform the landlord and Tribunal in the prescribed manner within the said period of one year and the provisions of sections 32 and 32-R shall, so far as may be applicable, apply to the right of the permanent tenant to purchase the land.)

[(2) For the purpose of this section, a certificate granted by the Collector, after holding an inquiry, that the conditions in the proviso to sub-section (1) are satisfied by any trust shall be conclusive evidence in that behalf.]

In view of this it is apparent that the exemption given by section 88-B of the 1948 Act, is available only to a trust, which is or is deemed to be registered under the Bombay Public Trust Act 1950. Thus, mere

existence of Trust is not sufficient to qualify for exemption and, there is further rider that the Trust must be either registered or deemed to be registered under the Bombay Public Trust Act, 1950. Perusal of section 28 of the Bombay Public Trust Act, 1950 reveals that a trust registered under the provisions of enactments specified in Schedule "AA" thereof are deemed to have been registered thereunder. It is, therefore, clear that if the trust is registered under any of the enactments in Schedule A or AA of the Bombay Public Trust Act, 1950, the said trust deemed to be registered even under the Bombay Public Trust, 1950. The perusal of schedule AA reveals that a trust registered under the Madhya Pradesh Public Trust Act, 1950 is deemed to be registered under the provisions of the Bombay Public Trust Act, 1950.

9. *The Division Bench in ruling reported in Eknath Bhiku Yadav and another vs. Ganpatrao Shankarrao Dhawan and others (supra), therefore, has found that the trust, before it namely Shri Maruti Deo Trust Pimpli Limtek was registered, for the first time on 8-8-1984 and the tenant was in possession of the lands on the tillers day i.e. 1-4-1957 (for the purpose of the 1948 Act). In view of these facts and requirements of section 88-B it has been concluded that the trust could not have claimed exemption under section 88-B of The Bombay Tenancy and Agricultural Lands Act, 1948 as it was not registered before 1-4-1957. The Division Bench has held that if the trust was not so registered on 1-4-1957, the tenant would become a deemed purchaser on that date and once the deemed ownership of the land vested in him on 1-4-1957 it cannot be divested by subsequent registration of the trust. In paragraph 4,*

the Division Bench has held that exemption granted under section 88-B to a public trust is subject to two conditions namely (i) a trust may be registered or deemed to be registered under the Bombay Public Trust Act, 1950 and (ii) entire income of such lands should be apportioned for the purpose of the trust.

10. *When the provisions of section 129 of the 1958 Act are looked into in this respect, section 129 reads as under :—*

129. *Exemption from certain provisions to lands held by local authorities, Universities, trust, etc.*

— Nothing in the foregoing provisions except section 2, the provision of Chapter II (excluding sections 21, 22, 23, 24 and 37) and section 91 and the provisions of Chapters X and XII insofar as the provisions of the said Chapters are applicable to any of the matters referred to in sections mentioned above shall apply,—

(a) to lands held or leased by a local authority, or university established by law in the State;

(b) to lands which are the property of a trust for an educational purpose, hospital, panjarpole, Gaushala, or an institution for public religious worship, provided the entire income of such lands is appropriated for the purposes of such trust; and

(c)

(d)

Explanation. — For the purpose of clause (b), a certificate granted by the collector after holding any inquiry, that the conditions mentioned in the said clause are satisfied by the trust shall be the conclusive evidence in that behalf.

Thus the exemption under section 129(b) is available to the lands, which are property of a trust for educational purposes, hostel, hospital, panjarpole, Gaushala or an institution for public religious worship provided the entire income of such lands is permitted for the purpose of said trust. It is, therefore, apparent that section 129(b) of the 1958 Act does not require any registration as contemplated under section 88-B of the 1948 Act. Only requisite under section 129(b) is that the entire income of said land should be appropriated for the purpose of the Trust. The requirement that trust should be registered or should be deemed to have been registered under the Bombay Public Trust Act, 1950 is nowhere reflected in section 129(b) of the 1958 Act. When the particular requirement is not provided for by the Legislature in section 129(b), it is not for the Court to read such a condition in it and therefore, it cannot be held that the petitioner-trust must be registered on the tillers day for the purpose of claiming exemption under the 1958 Act. It is an admitted position that the petitioner trust has been registered on 19-9-1962 and the tillers day is 1-4-1961.

50] Thus, the authorities constituted under the 1958 Act can grant an exemption to the wakf property in the event the entire income of wakf land is appropriated for the purpose of the Wakf although the wakf may not be registered. Thus, the Mutawalli of wakf will have to lead evidence and establish before the authority concerned

under the provisions of the Maharashtra Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 that the entire income of the agricultural lands of the wakf, which are sought to be exempted are appropriated for the purpose of the wakf. In the event, the lands, which are covered within the definition of the Maharashtra Tenancy and Agricultural Lands (Vidarbha Region) Act are held to be not fulfilling the above conditions, the authority constituted under the Act is within its jurisdiction to grant protection of tenancy and ownership declaration under the 1958 Act to the tenants and also grant ownership certificate. The prohibition under section 56 of the Wakf Act is for creation of a tenancy by the mutawalli or a manager of a Wakf but it does not override the provisions of the Maharashtra Tenancy and Agricultural Lands (Vidarbha Region) Act.

51] The tenancy protected under the 1958 Act can only be inquired and adjudicated upon by the authorities constituted under the Act of 1958. Civil Courts jurisdiction is barred in deciding the issue of tenancy under the 1958

Act. The wakf Tribunal can only decide issues relating to Wakf and cannot decide the issue of tenancy under the 1958 Act.

52] Thus, from the above discussion it can be inferred that unless the ownership certificate granted under the provision of the Maharashtra Tenancy and Agricultural Lands (Vidarbha Region) Act is quashed by the appellate authorities constituted under the 1958 Act or the High Court, no proceedings qua the same lands can be initiated under the Wakf Act for eviction of the protected tenants / deemed owners declared under the 1958 Act.

53] As regards question of law Nos.(iii), (iv) and (v) framed at para 19, it is to be noticed that the proceedings for eviction were initiated by the respondent no.1 before the Chief Executive Officer under Section 54 of the Wakf Act. The Chief Executive Officer under Section 54 of the Wakf Act deals with the complaint or on it's own motion direct for removal of encroachment of land or any building which is wakf property and which has been registered as such under

the Wakf Act. Thus, the jurisdiction of the Chief Executive Officer to pass the order under Section 54 of the Wakf Act relates to the wakf property, which is registered under the Wakf Act as wakf property.

54] Section 54 (3) of the Wakf Act 1995 after the amendment in the year 2013 reads as under :

54. Removal of encroachment from [waqf] property. -

(3) If, after considering the objections, received during the period specified in the notice, and after conducting an inquiry in such manner as may be prescribed, the Chief Executive Officer is satisfied that the proerty in question is [waqf] property and that there has been an encroachment on any such [waqf] property, [he may, make an application to the Tribunal for grant of order of eviction for removing] such encroachment and deliver possession of the land, building, space or other property encroached upon to the mutawalli of the [waqf].

55] Thus, after amendment, there is no power in the Chief Executive Officer to evict the unauthorized occupant of the wakf property and he has to apply to the

Tribunal for eviction of unauthorized occupants of wakf property and the tribunal, decides the application by notice to the occupants of the wakf property.

56] The predecessors in title of the applicants were held deemed owners of the suit property under the Act of 1958. The declaration of deemed ownership is granted of agricultural lands on 13.04.1970 and in terms of the declaration, purchase price is also paid by the predecessor in title of the applicants.

57] The question therefore arises whether the Chief Executive Officer was entitled to initiate any action on the land which was purchased by the predecessor in title of the applicants having been declared as deemed owners of the property.

58] Although the wakf had lost it's title to the suit land, the Chief Executive Officer nevertheless proceeded to pass an order of eviction of the applicants and thus the applicants filed a suit before the Wakf Tribunal seeking

declaration, challenging the order passed under Section 54 of the Act of 1958, the same was held to be barred by limitation. Since the suit was delayed by few days, the same was held to be barred. The applicants filed an appeal before the High Court and thereafter it was withdrawn with liberty to file such proceedings as may be available in law and the appeal was dismissed accordingly with liberty as above.

59] Thereafter the applicant had filed application under Section 83 (2) of Wakf Act, 1995 for declaration that the order passed under Section 54 is bad in law as the applicants are the deemed owners of the suit property and the declaration under the Act of 1958 cannot be disturbed by the authorities under the Wakf Act. In the earlier round of litigation, the proceedings were not decided on merits and the same were dismissed on the ground of limitation. Thus subsequent application was filed under Section 83(2) of the Wakf Act 1995. The earlier proceedings under Section 54(4) were not decided on merits, thus the order of the Chief Executive Officer could be challenged under Section

83(2) of the Wakf Act. When the same Act provides for multiple remedies, then the remedy under Section 54 (4) cannot be said to be overriding the remedy under Section 83 (2). Exhausting the remedy available under Section 54 (4) could have barred the remedy of 83 (2) only in the event the earlier adjudication was on merits and the order of the Chief Executive Officer under Section 54 was replaced with the order of the Tribunal after adjudication on merits.

60] However, even if it is held that the order passed by Chief Executive Officer under Section 54 (3) and the Tribunal under Section 82 (2) has attained finality for the reason that it is not challenged within time, I hold that the orders of the Chief Executive Officer and the Tribunal cannot be executed unless the ownership certificate granted under the Tenancy Act of 1958 is set aside by the authorities constituted under the 1958 Act or the High Court.

61] The Hon'ble Supreme Court was faced with a similar situation in the case of **Saraswatibai Trimbak**

Gaikwad Vs. Damodhar D. Motiwale and others, 2002 (3)

Mh.L.J. 69. In the said case, the decree of the civil court was passed against a tenant, as he had not raised objection before the civil court that she is a protected tenant of the agricultural property. The tenant subsequently moved an independent application before the authority constituted under the Bombay Tenancy and Agricultural Lands Act for declaring herself to be a tenant of the suit property. The Authority constituted under the Tenancy Act held her to be the protected tenant and a deemed owner of the suit property, while the civil court had passed a decree of eviction against the tenant. The Hon'ble Supreme Court in this fact situation held that, so long as the declaration granted of the authority constituted under the Agricultural and Tenancy Acts stands, the decree passed by the Civil Court cannot be executed against the tenant. It is only if the respondents succeeds in getting the ownership certificate set aside in their pending revision before the authorities constituted under the Tenancy Act that they could execute the Civil Court's decree. The Hon'ble Supreme Court at

paragraphs no.24 and 25 of the judgment in the case of

Saraswatibai Trimbak Gaikwad [supra] has held as under:-

“24. ...The Civil Court would have had to refer the issue to the appropriate authority and then abide by its decision. A decree passed without the consideration of the provisions of the said Act must be subject to orders of the appropriate authority in the proceedings under the said Act.

25. Thus so long as the certificate stands the decree cannot be executed against the appellant. It is only if respondents 1 and 2 succeed in getting the certificate set aside, in their pending revision, that they can execute the decree. It would be open for respondents 1 and 2 to pursue the revision filed by them against the order dated 23-11-2000...”

62] Thus, even if it is held that the order under section 54 for any technical reason has attained finality on account of being not challenged within time, the same cannot be executed unless the ownership certificate granted under the Maharashtra Tenancy and Agricultural Lands (Vidarbha Region) Act is set aside by competent authority as noticed above.

63] In view of the same, the Civil Revision Application is allowed and the judgment and order dated 21.10.2009 passed by the Chief Executive Officer, Maharashtra State Board of Wakf Panchakki at Aurangabad in Case No.54/27/2007 and the impugned judgment and order dated 10.05.2012 passed by the Presiding Officer, Wakf Tribunal at Aurangabad in Wakf Application No.8 of 2011 are set aside.

[ARUN R. PEDNEKER]
JUDGE

DDC