

**(1970) 12 OHC CK 0023**  
**In the Orissa High Court**  
**Case No : Second Appeal No. 110 of 1967**

Bano Bibi

APPELLANT

Vs

Orissa Board of Wakfs and Others

RESPONDENT

**Date of Decision :** 09-12-1970

**Acts Referred:**

Limitation Act, 1908 — Article 134A, 134B  
Orissa Tenancy Act, 1913 — Section 1(3), 236, 236(1)  
Waqf Act, 1954 — Section 15, 15(1), 15(2), 26, 36B

**Citation :** (1971) 37 CLT 66

**Hon'ble Judges :** R.N. Misra, J

**Bench :** Single Bench

**Advocate :** L.K. Dasgupta and J.K. Misra, for the Appellant; Sk. Rahenoma and B.C. Das, for the Respondent

**Final Decision :** Dismissed

## Judgement

R.N. Misra, J.—The Defendant is in appeal against a reversing decision of the learned Fifth Additional Subordinate Judge, Cuttack in a suit for ejectment against the Appellants brought by the Orissa Board of Wakfs from a homestead within the outer compound of the Kadam Rasool located in the town of Cuttack.

2. The Defendants 2 to 2 (d) were, the ad-matwalis of the wakf the Kadam Rasool and the Defendants 2(e) to 2(g) are members of the committee set up by the District Judge of Cuttack according to the provisions of Act 20 of 1863. In 1948, the Matwalis admitted the Defendant No. 1 into tenancy for residential purposes in respect of the disputed property. The wakf Board came into existence some time in March, 1961 under the provisions of the Wakfs Act of 1954. On 14th July, 1962 the present suit was instituted by the Board for the ejectment of the Defendant No. 1 from the lease-bold on the contention that the lease created in her favour was illegal, unauthorised, inoperative and did not bind the Board of Wakfs. From the plaint it appears that the Defendant No. 1 had been called upon to show cause as to why she may not be evicted and she came

up with an explanation that she had taken lease of a ditch and with enormous expenditure improved it and had ultimately set up a house. The Board was, however, not satisfied with the explanation and as the location of a residential house within the Kadam Rasool itself was vitiating the religious atmosphere and was therefore, against the interest of the Wakf, the suit was instituted pursuant to the decision of the Plaintiff. Board taken on 1-2-1962.

3. Two sets of written statements were filed one by the Defendant No. 1 Appellant and the other by the Darogas (Mutwalis). The Defendant No. 1 contended that the property belonged to the Darogas and not to the Wakf itself, having been set apart for their maintenance. It was further alternatively contended that the land was lying fallow as useless; for the benefit of the Kadam Rasool, the lease was granted and after taking permission of the Municipal authorities, the Defendant No. 1 raised the construction and has, been residing there already for more than 15 years prior to the institution of the suit. The Defendant No. 1 claimed to have acquired non-evictable occupancy right in respect of the disputed property.

The Darogas pleaded that the alienation was not illegal, the lease is not against the interest of the Wakf in any manner; the lease had been granted for the interest of the Kadam Rasool and the institution has indeed benefited by the lease the disputed property being located beyond the inner compound which contains the main shrine of the Kadam Rasool, the residential use by the Defendant No. 1 does not interfere with the religious activities. A claim also made that the lands including the disputed property which are located between the inner compound and the outer compound of the Kadam Rasool are Madat Mash lands of the Darogas and they have hereditary right of enjoyment thereto. It was also pleaded that the disputed property was a ditch and water from the Cuttack Jail compound which flowed into it ultimately proved to be a nuisance. The Defendant No. 1 who undertook to fill up the ditch in order to have the nuisance abated has done so at enormous expenditure and has also raised a house. The waste and unproductive land which had hitherto become a nuisance to the Wakf and in fact was interfering with the religiousness of the Kadam Rasool has been rendered useful and thus the process of leasing out was a beneficial one for the Wakf. The Plaintiff was thus not entitled to ejectment.

4. The learned trial Judge found: (1) the Plaintiff failed to establish that the disputed property was the Wakf property of the Kadam Rasool endowment; (2) the disputed property was an agricultural holding and the Defendant No. 1 was protected from eviction u/s 236 of the Orissa Tenancy Act; (3) applying the provisions of the Public Wakf (Extension of Limitation) Act of 1959, he came to find that the suit was not barred by Imitation; (4) he upheld an objection to the maintainability of the suit by holding that the Wakf Board was entitled to act u/s 36-B of the Act of 1954 and a suit directly in the Civil Court for ejectment was not maintainable. On these findings he dismissed the suit.

5. The Plaintiff-Board appealed and that appeal eventually came to be disposed

of by the learned Additional Subordinate Judge. The lower appellate Court came to hold that the property belonged to the Wakf and was not the Madat Mash lands as claimed by the marfatdars. In coming to so hold, the appellate Court relied upon the record of rights (Ext. 3). Then he proceeded to consider the application of Section 236 of the Orissa Tenancy Act and came to hold that since the creation of the tenancy was unauthorised and the Darogas could not have created such a tenancy, Section 236 of the Orissa Tenancy Act had no application to the matter. On these two findings alone, in a somewhat critic judgment the lower appellate Court reversed, the decree and directed the Plaintiff to recover possession by evicting the Defendant No. 1 from the premises. It is against this reversing decree of the lower appellate Court that the Defendant No. 1 is in second appeal.

6. Mr. Dasgupta for the Appellant contends that the suit is barred by limitation and the 1959 Extension of Limitation Act has no application to the facts of the present case. He next contended that relief of rejeatment was not available as Section 236 of the Orissa Tenancy Act would directly apply. His third contention was that in view of the provisions of Section 36-B of the Wakfs Act, 1954, the suit by the Wakf Board did not lie, and was therefore, liable to be dismissed.

7. Let me proceed to examine the correctness of these contentions of Mr. Dasgupta. The trial Court had upheld the objection raised by the Defendant about maintainability of the suit on account of the provisions of Section 36-B of the Wakf Act. That section is to the following effect:

36-B (1). If the Board is satisfied, after making an enquiry in such manner as may be prescribed, that any immovable property of a Wakf entered as such in the register of Wakfs maintained u/s 26, has been transferred without the previous sanction of the Board in contravention of the provisions of Section 36-A, it may send a requisition to the Collector within whose jurisdiction the property situate to obtain and deliver possession of the property to it.

The remaining provisions of that section provide the process of working out the requisition and clothe the affected party with a right of appeal to the District Court and ultimately attach finality to the appellate decision. The Defendant No. 1, however, is not entitled to the benefit of this section as I find that this section was inserted into the Act by an amendment under Act 34 of 1964. The suit was filed in 1962, about two years earlier to the amending Act. The amending Act does not appear to have any retrospective effect. Thus, on the date when the suit was filed, the provisions of Section 36-B of the Act were not in existence and to a pending action, by application of the amending Act, objection on the question of maintainability cannot be extended. This objection of Mr. Dasgupta to the maintainability of the suit must, therefore, be negatived. The learned trial Judge had erroneously upheld the objection and the appellate Court had not touched it.

8. Now Jet me examine the applicability of Section 236 of the Orissa Tenancy

Act. The land is admittedly situated within the municipal limits of Cuttack. The first aspect to decide is as to whether the provisions of the Orissa Tenancy Act would apply to such land. Section 1(3) of the Orissa Tenancy Act, 1913, provides,

It shall extend to the districts of Cuttack, Puri and Balasore in the State of Orissa except any area or part of an area which is constituted a Municipality under the Bihar and Orissa Municipal Act, 1922 and which is specified in this behalf by notification issued by the State Government.

By necessary implication, reference has now to be made to the Orissa Municipal Act of 1950 in place of the Bihar and Orissa Act referred to above. It is contended by Mr. Dasgupta that two notifications would really be necessary one incorporating the area within a municipality and another withdrawing the application of the Orissa Tenancy Act, 1913. To this effect, some decisions which were placed before me have taken this view as would appear from a judgment of the Patna High Court in a matter which arose from this area in the case of Radhamohan Jiu v. Kasinath Das 1 C.L.T. 28. Ross, J. followed a principle laid down in the case of Kali Sahu v. Giridhari Mistri and Ors. AIR 1919 Pat. 68, and held:

Then the question arises to the construction of Section 1(3) of the Orissa Tenancy Act. The language is 'It shall extend to the districts of Cuttack, Puri and Balasore in the Orissa Division, except any area which is constituted a Municipality under the Bengal Municipal Act, 1884 and which is specified in this behalf by notification issued by the local Government.' On the corresponding section of the Bengal Tenancy Act, the construction has been placed that to exclude an area from the operation of the Act two things are necessary it must be constituted a Municipality and it must be gazetted out of the Act...The meaning is quite clear that there are two requisites for the exclusion of land from the operation of the Act - (i) it must be constituted a Municipal area and (ii) it must also have been specified in a notification by the Government in this behalf. Now it is admitted that there has been no such notification in respect of the town Cuttack. Consequently, this land being agricultural land is governed by the Tenancy Act and the present suit therefore ought to have been brought in the Revenue Court.

On the authority of these decisions Mr. Dasgupta contends that until it is shown by the Plaintiff that the two notifications which are requisite for keeping out the application of the Orissa Tenancy Act to the disputed land the provisions of that Act apply. I find substantial force in this contention.

9. The trial Court found the disputed property to be an agricultural holding. The learned appellate Judge never applied his mind to that aspect; Whether the disputed property is agricultural holding on account of the fact that in the settlement records plot No. 506 was recorded as Barihar Mahasul is certainly a question of fact. The learned appellate Judge should have examined that aspect in order to ultimately determine the application of the Limitation Act. The learned

appellate Judge came to his abrupt conclusion against the application of Section 236 of the Orissa Tenancy Act by saying:

Section 236 is not applicable to this case as it is not a tenancy created between landlord and tenant. Here, landlord is Kadam Rasool and this is an authorised transfer by agent to which landlord is not bound. So the Orissa Tenancy Act cannot take away the right of the Plaintiff and the above decision does not apply to the facts of the present case. Therefore, the Defendant No. 1 is not protected under law from eviction...

This appears to be more or less summary conclusion by the final Court of fact. The appellate Court did not find that the Mutwalis did not have a right to lease out. Mr. Rahenoma, however, contends that a lease for agricultural purposes up to 3 years and for residential purposes upto one year is permitted even under the general Mohammedan Law and in respect of a Wakf property, there could not be a lease beyond the period. In Section 36-A which came into the Act by the same amending Act of 1964, this has also been now incorporated in the statute. It is contended on behalf of the Board by Mr. Rahenoma that in view of the fact that a perpetual lease was given in favour of the Defendant No. 1 it was unauthorized and the Defendant cannot be said to have been admitted into tenancy. Section 236 of the Orissa Tenancy Act provides as hereunder:

(1) Notwithstanding anything in this Act, the incidents of tenancy of any tenant, including the holder of a service tenure, in respect of the homestead in which such tenant ordinarily resides, shall be regulated by provisions of this Act applicable to land held by an occupancy raiyat....

Mr. Rahenoma contends that induction into tenancy must be by a person competent to so induct. As the Darogas who were the lessors of the Defendant No. 1 were not competent to ore ate such a lease, no tenancy came into existence and the Defendant No. 1 is not entitled to claim the protection of Section 236 of the Orissa Tenancy Act in such circumstances. The contention of Mr. Rahenoma has substantial force. Unless there has been a valid tenancy, the question of application of Section 236(1) of the Orissa Tenancy Act would not apply and there can be no protection claimed by the Defendant No. 1 in his Case. The contention of Mr. Dasgupta about a further examination of the question as to whether the Defendant No. 1 is entitled to benefit of the Orissa Tenancy Act upon remand does not arise. It must be held that the Defendant No. 1 is not entitled to such protection from eviction.

10. The question that remains now for consideration is about limitation. Admittedly, the lease is for 1948 and the suit came in 1962, more than 12 years after the Plaintiff came into possession. Mr. Rahenoma did not rely upon the provisions of the Public Wakf (Extension of Limitation) Act, 29 of 1959 and contended that the present suit even if governed by the ordinary law of limitation is not barred and the Plaintiff is entitled to a decree. According to him, to this case Article 134-A of the old Limitation Act of 1908 applies. That provision may

now be extracted:

134. A. To set aside a transfer of immovable property comprised in a Hindu, Mohammanan or Budhist religious or charitable endowment made by the manager thereof for a valuable consideration. Twelve years. When the transfer becomes known to the Plaintiff.

Mr. Rahenoma contends that the Wakf Board came into existence in March, 1961, and sometime in July of that year, the Wakf Board became aware of this invalid alienation. The suit having been filed in July, 1962, the litigation has commenced well within the period of limitation. It is next contended that a right to institute the suit having been created under the Wakfs Act. It fresh period of limitation must be taken to have occurred in favour of the Plaintiff Board. He refers to Section 15 which provides for the functions of the Board and mainly relies upon Sub-section (1) and Sub-section (2)(i) and (0). These provisions are to the following effect:

(1) Subject to any rules that may be made under this Act, the general superintendence of all Wakfs in a State shall vest in the Board established for the State; and it shall be the duty of the Board so to exercise its powers under this Act as to ensure that the Wakfs under its superintendence are property maintained, controlled and administered and the income thereof is duly applied to the objects and the purposes for which such Wakfs were created or intended ... (2) Without prejudice to the generality of the foregoing power, the functions of the Board shall be (i) to institute and defend suits proceedings in a Court of law relating to Wakfs; (o) generally do all such acts as may be necessary for the due control, maintenance and administration of Wakfs.

Mr. Rahenoma emphatically contends that in view of the fact that these are the functions of the Board it must be taken as a legislative intendment that the period of limitation, so far as the duties cast on the Board under the aforesaid provisions are concerned, is to count from the date the Board came into existence and became operative. Thus, according to him, Article 134-A of the old Limitation Act which is applicable clearly would make this litigation within time.

11. I find this contention difficult to accept. Admittedly, the statute does not indicate expressly such intention of the legislature. It is one of the well accepted rules of statutory Interpretation that an Act which affects concluded rights of parties is not ordinarily retrospective and normally Courts lean against retrospective effect. If the contention of Mr. Rahenoma is accepted, century-old alienations would also be opened to dispute by applying Article 134-A of the Limitation Act of 1908, and holding that the Plaintiff-Board having knowledge of the alienation at some point of time after its constitution in March, 1961, all such suits are within limitation. This would lead to unsettling transactions which by lapse of time must be taken to have become final and on the basis of such transactions innumerable rights in favour of original alienees and their subsequent transferees must have worked out. By the principle of legislative

intendments no such extension can, on principle, ever be contemplated. I have no hesitation in my mind that such an interpretation would work out injustice and could never have been contemplated. I would, therefore, rule out this contention of Mr. Rahenoma and hold that Article 134-A has no application. The proper Article to apply to such a case would really be Article 134-B of the Old Limitation Act which is to the following effect:

134. B. By the manager of a indu, Muhammadan or Budhist religions or charitable endowment to recover possession of immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration. Twelve years, The death, resignation or removal of the transferor.

If this article is to apply the present suit seems to be premature. There has been no death, resignation or removal of the lessors. The cause of action for a suit of this type would arise only in the event of any of three eventualities indicated in the third column. There would be no question of any adverse possession as against the Wakf itself, because a fresh period of limitation would start to run when the eventuality in the third column works out. The Wakf Board which steps into tile management or superintends the management of the Wakf and statutorily gets the right to come as a Plaintiff to protect the interest of the Wakf would then be entitled to institute a suit for adequate relief. In the circumstances indicated above, the present suit would, however, not be maintainable. The Defendant No. 1 would be entitled to continue until a property constituted suit in accordance with law is instituted for her eviction on the ground that there has been an invalid transfer and there be a decree for eviction.

12. No other question was canvassed in the Second appeal. On these conclusions of mine I would allow the appeal, reverse the decree of the lower appellate Court and direct that the suit should stand dismissed.

As it was an action between the Wakf Board which came to institute the suit bona fide and the Defendant No. 1 is a lessee claiming under the Board, the proper direction about costs should be both parties to bear their own throughout.