

(2023) 05 OHC CK 0244
In the Orissa High Court
Case No : W.P(C) NO. 8139 Of 2007

Mohammad Sha And Others

APPELLANT

Vs

Sayed Sindh Baig Peer Saheb And Kabarsthan, Bije Pipili
Sasan And Others

RESPONDENT

Date of Decision : 16-05-2023

Acts Referred:

Code of Civil Procedure, 1908 — Order 8 Rule 5(2), Order 9 Rule 9, Order 9 Rule 13,
Order 39 Rule 1, Order 39 Rule 2
Wakf Act, 1955 — Section 85, 87
Wakf Act, 1954 — Section 6(1), 25(8)

Citation : (2023) 05 OHC CK 0244

Hon'ble Judges : Dr. B.R.Sarangi, J;M.S. Raman, J

Bench : Division Bench

Advocate : S.K. Mishra, S.K. Samantray, A. Kejriwal, O.P. Sahu, Rati Mohanty,
Bikash Rath, Md. Fayaz, Md. Riaz

Final Decision : Disposed Of

Judgement

Dr. B.R. Sarangi, J

1. The petitioners, who were the defendants no. 1 to 8 before the State Wakf Tribunal, Odisha, Cuttack in Case No. W.T.(O)/O.A.6/2005, have approached this Court seeking to quash the judgment dated 12.06.2007 passed by the Wakf Tribunal in dismissing their counter claim filed against the plaintiff-opposite party no.2 and defendant no.9-opposite party no.3, despite the fact that the petitioners are recorded as Marfatdars in respect of suit schedule properties and the same had never been acquired or treated as wakf properties.

2. The factual matrix of the case, in brief, is that the land appertaining to plot no.7 measuring an area of Ac.0.53 dec. with noting as "Kabarsthan" and plot no.9 measuring an area of Ac.0.75 dec. with noting as "Peer Asthan" under khata no.164 as per 1927 Sabik Settlement ROR of Mouza-Pipili Sasan under 'Stitiban' status stood recorded in the name "Sindh Baig Saheb" marfat Boudi Sha and

Roshan Sha, both are sons of Munsab Sha (ancestors of present petitioners). The said suit plots correspond to 1966 hal settlement plot no.7 measuring an area of Ac. 0.53 dec. under kissam 'Debasthali' and plot no.9 measuring an area of Ac 0.80 dec. under kisam 'patita' status 'sthitiban' under khata no.213 which stood recorded in favour of Faizal Sha and Mahmad Sha both are sons of Baudi Sha. The aforementioned suit plots further correspond to plot no.6 measuring an area of Ac.0.53 dec. under kisam 'Kabarsthan' and plot no.7 measuring an area of Ac. 0.80 dec. under kisam 'Debasthali' under hal khata no.424 as per hal consolidation R.O.R finally published in the year 1994 which has been recorded in the name of the present petitioners, who had been arrayed as defendant nos.1 to 8 in the suit.

3.1 The aforesaid RORs consistently recognises the right, title and interest of the petitioners over the aforesaid properties and their long standing possession over the same. They have also planted trees over the suit properties in order to maintain the ecological balance and have been maintaining and utilising the graveyard for their own family purpose. The present petitioners' possession over the aforesaid properties is evident from the rent receipt granted by the State Government in lieu of payment of rent, who have also recognised their lawful ownership and possession of the land in question.

3.2 The opposite party no.2 along with some other persons tried to grab the aforesaid properties from the petitioners, though he has no manner of right either to represent the "institution" or to act as the President of the Managing Committee of the institution "Sayed Singh Baig Peer Saheb and Kabarsthan" bije Pipili Sasan. The opposite party no.2 along with his associates gave threat of interfering in the management and possession of the suit properties for which the petitioners instituted a suit to restrain opposite party no.2 and others permanently from interfering with their rights of Seva puja of the Peer, enjoyment, management and possession of the same. The said suit was registered as civil suit no. 15 of 2005 before the Civil Judge (Senior Division), Puri. With an ulterior motive, the opposite party no.2 in connivance with opposite party no.3, constituted a managing committee for the first time through a general meeting convened on 07.01.2005 headed by opposite party no.2 and the said committee was approved by opposite party no.3 on 18.01.2005. In the said committee, petitioners no.1 and 6 were included as members, though they had never given consent for the same.

3.3. The opposite party no.2, subsequent to the formation of the managing committee, instituted a suit vide W.T.(O)/O.A. No. 6/2005 before the Wakf Tribunal, Odisha, Cuttack claiming himself to be the representative of the "institution" impleading the present petitioners as defendants no.1 to 8 and opposite party no.3 as defendant no.9, praying for following reliefs.

"It be declared that the suit properties are (public) wakf properties and the suit institution is being represented and managed by duly constituted Managing Committee headed by Plaintiff No.2 as is President.

It be declared that the Consolidation R.O.R. in favour of the Defendant No.1 to 8 deleting the real owner 'the institution' prepared on 1.4.1994 as void, inoperative and violation of principles of natural justice and statute.

It be declared that the Defendant No.1 to 8 have no semblance of personal right, title or interest over the suit schedule property.

The defendant no.1 to 8 be permanently enjoined from alienating the suit properties or any portion thereof as well as from cutting trees or changing the nature of land."

3.4 The plaintiff-opposite parties no.1 and 2 contended that the parties being Suni Muslims are governed under principles of Hanafi School of Mohammedan Law. The suit properties described in the plaint were recorded in favour of the plaintiff no.1 in 1927 Settlement ROR, The Peersthan of plaintiff no.1 situates over suit plot No.9. The adjoining suit plot no.7 is used by the local Muslims as Kabarstahan. There exist two Jack-fruit trees, one Neem tree and one Kasi tree over plot no.7 and one Banayan tree, one Bel tree, four Date trees and six palm trees over suit plot no.9. Plot no.7 measuring an area of Ac. 0.53 dec. became insufficient as burial ground by efflux of time due to the rising population. The local Muslims are using the adjoining (Gochar-Anabadi) plot no.5 measuring an area of Ac. 0.97 dec. as well as plot no.8 measuring an area of Ac. 0.14 dec under khata no. 619 as their graveyard amalgamating the same with their original graveyard relating to suit plot no. 7 and this possession is within the knowledge of the Government.

3.5 The further contention of the plaintiffs was that in 1927 Settlement ROR the plaintiff no.1-Peer was represented through Baudi Sha and Roshan Sha, sons of Munsab Sha and after their death one Sk. Mussair, son of S.K. Karhu was appointed as Marfatdar of plaintiff no.1. Defendants no. 1 to 8 are the successors of the Sabik recorded Marfatdars. Sk. Hussain managed the institution for sometime but, later on, remained indifferent for which local Muslims suo motu offered prayers, but name of Sk. Hussain remained recorded as Marfatdar for name sake only. According to the plaintiffs, after constitution of Wakf Board, the suit properties were surveyed, registered and notified in the Odisha Gazette dated 20.02.1976 as Wakf properties. The said gazette notification having not been challenged has been crystallised as final and conclusive.

3.6 It is further pleaded that though civil suit bearing C.S. No. 15 of 2005 was filed by the defendants no. 1 to 8 before the Court of Civil Judge (Sr. Division), Puri, but the Wakf Board was not made a party to the suit. For the first time from the suit, the plaintiffs came to know that the father of defendants no. 1 to 4 and defendant no.5 in collusion with the settlement authorities managed to record their names in 1966 ROR deleting the name of the plaintiff no.1. Since the civil suit had been filed much after establishment of the Wakf Tribunal, the same was not maintainable in view of bar under Section 85 of the Wakf Act, 1955. Since the consolidation ROR is void and illegal and the local villagers brought the

aforesaid facts to the knowledge of Wakf Board, the opposite party no.3, after proper inquiry, advised the villagers to constitute a managing committee. Accordingly, a general meeting of the local Muslims was convened on 07.01.2005, which formed a managing committee consisting of 13 members headed by plaintiff no.2 as its President as the same was approved by the opposite party no.2 on 18.01.2005. Therefore, contended that the petitioner-defendants no.1 to 8 had no semblance of exclusive right, title and interest over the suit properties, the right of Mutawalliship is not inherited but the petitioners are trying to interfere in the management of the institution.

3.7 Along with the suit, the plaintiffs also filed a petition under Order 39 Rules 1 and 2 of the C.P.C. vide I.A. No. 3 of 2006 with a prayer to restrain the petitioners from alienating the suit land, cutting the trees from the suit land and changing the nature and character of the suit land pending disposal of the suit. The present petitioners, being the defendants no.1 to 8, filed their objection stating that though no temporary injunction was granted in I.A. No. 5 of 2005 (arising out of C.S. No. 5 of 2005), but the learned District Judge, Puri granted order of status quo in F.A.O. No. 40 of 2005, which was filed against the order of dismissal passed in I.A. No. 5 of 2005. However, the said appeal was dismissed subsequently. The Wakf Tribunal passed an order on 02.07.2005 directing both the parties to maintain status quo over the suit land and not to change the nature and character of the suit lands and not to cut or sale any tree from the suit land till the disposal of the Original Application.

3.8 The present petitioners could not file their written statement in time and, as such, they were set ex-parte and on the basis of the petition filed by the plaintiffs under Order 8, Rule-5 (2) of the C.P.C., the suit was decreed by State Wakf Tribunal on 30.08.2005 in favour of the plaintiffs. But the suit of the plaintiffs filed for declaration that the consolidation ROR in respect of suit plot nos. 5 and 8 issued in favour of the petitioners deleting the name of the real owner as void was dismissed.

3.9 The petitioner-defendants no. 1 to 8, who were set ex-parte, filed a petition vide I.A. No. 8 of 2005 under Order-9, Rule-13 C.P.C. for setting aside the ex-parte judgment dated 30.08.2005, but the same was dismissed by the Wakf Tribunal vide order dated 13.01.2006. As a consequence thereof, the petitioners moved this Court by filing W.P.(C) No. 1171 of 2006 challenging the order dated 13.01.2006 as well as the judgment dated 30.08.2005 passed by the Wakf Tribunal.

3.10 This Court, after hearing both the parties, vide order dated 04.09.2006, allowed the writ petition, quashed the impugned order dated 13.01.2006 and directed restoration of W.T. (O)/O.A. No. 6 of 2005 of the State Wakf Tribunal, Odisha, Cuttack to file, subject to payment of cost of Rs.2000/- to the plaintiff-opposite parties no.1 and 2 and to file written statement by 18.09.2006. It was further directed that the trial of the suit be expedited so as to complete the same within a period of six months.

3.11 The petitioners filed their written statement within the time stipulated by this Court refuting the averments made in the plaints and also lodged a counter claim. Though the plaintiffs had undertaken before this Court to participate and cooperate in the case for early disposal of the same, but in fact tried to delay the proceeding on one plea or other, for which the suit was dismissed for default vide order dated 20.01.2007 by the Wakf Tribunal, Cuttack. The plaintiffs then filed a petition under Rule 12 of the Wakf Tribunal Rules read with Order 9 Rule 9 of the C.P.C. to restore the suit, i.e., W.T. (O)/O.A. No.6 /2005 to file. After hearing the parties, the Wakf Tribunal, vide order dated 12.04.2007, held that there was no sufficient cause preventing the plaintiff-opposite parties no. 1 and 2 to remain absent on the date of hearing on 20.01.2007, therefore, the application of the plaintiff-opposite parties no. 1 and 2 for restoration of the suit was rejected being devoid of any merit.

3.12 Notwithstanding the fact that the suit filed by the plaintiffs dismissed for default, the Wakf Tribunal proceeded with the hearing of the counter claim filed by the present petitioners. In the written statement, the defendants no. 1 to 8, the petitioners herein, challenged the maintainability of the suit being hit by law of limitation, cause of action, barred under the provisions of the Odisha Consolidation of Holding and Prevention of Fragmentation of Land Act, 1972, res judicata and want of locus standi. The present petitioners stated that their ancestors had installed the Tomb of Sindh Baig Peer Saheb, who was a Muslim Saint. As the ancestors were disciples of the aforesaid Saint, after his demise, they buried the said Saint in plot no.9 and in his memory they installed the tomb over the grave of the Saint. They usually performed the rituals by offering prayer of Fatiha Daroed and Seerini besides the tomb on each 'Thursday' and observed the ceremony 'Urs Mubark' every year. The present petitioners, being the successors, enjoyed the suit property subsequently as 'Marfatdars' and their performance of Sevapuja is hereditary with the knowledge of every one. It was further pleaded in the written statement that the settlement and consolidation authorities have recognised their right, title, interest and possession over the suit land and such recording in Sabik and Hal R.O.Rs have never been challenged by any one at any point of time. Therefore, the notification dated 20.02.1976 was passed behind the back of the present petitioners without conducting proper inquiry and, as such, the same is not binding on them and over the property which exclusively belonged to the present petitioners. Consequently, the managing committee constituted and approved by opposite party no.3 on 18.01.2005 is illegal. It was further specifically stated that there exist two other Kabarsthan in the locality where the villagers of Pipil Sasan were buried. The present petitioners in their written statement also raised counter claim against the plaintiff-opposite parties which reads as under:-

"The Govt. Notification dated 20.2.1976 in respect of the suit property be declared as illegal, inoperative and void.

The Managing Committee of Sayed Sindh Baig Peer Saheb and Kabarsthan Bijje

Pipili Sasan constituted and approved by Defendant No.9 on 18.1.2005, by the Muslim villagers in their general meeting dated 7.1.2005 be declared illegal.

The right of the Defendant Nos. 1 to 8 be declared as lawful for the purpose of Sevapuja of the Peer Sayed Sindh Baig, enjoyment, management and possession of the property under Hal Khata No.424 as per consolidation R.O.R. of the year 1994.

The Institution, i.e. Peer Sayed Sindh Baig Saheb and the Kabarsthan as recorded in Hal Consolidation Khata No. 424 under Plot No.6 and 7 be declared as private institution of Defendant nos. 1 to 8.

The Plaintiff be permanently restrained from interfering with the possession of the defendant Nos. 1 to 8 in respect of the suit property as per the counter claim schedule.”

3.13 The opposite party no.2 filed written statement to the counter claim filed by the present petitioners challenging the same on the ground of law of limitation and principles of estoppels and being hit by the provisions of Wakf Act. He contended that neither the civil court nor the revenue court have jurisdiction to adjudicate any dispute relating to Wakf property as provided under Section 85 of the Wakf Act.

3.14 The opposite party no.3, who was defendant no.9, did not file written statement to the counter claim filed by the present petitioners, but was allowed to participate in the hearing of the counter claim.

3.15 The Wakf Tribunal, on the basis of the pleadings available, framed as many as nine issues for consideration. During course of hearing of the counter claim, the plaintiff-opposite parties no. 1 and 2 examined five witnesses including opposite party no.2 himself as P.W.2 and also proved certain documents to establish their claim marked as Exts.1 to 9. The present petitioners examined three witnesses, including defendant no.3 himself as D.W.1, and also proved certain documents marked as Exts.A to D. The opposite party no.3 also examined one witness as D.W.4, who happens to be the Wakf Inspector, Odisha Board of Wakf and also proved certain documents marked as Exts. A-9 to D-9.

3.16 On the basis of the pleadings available on record and documents produced by the parties both documentary and oral, the Wakf Tribunal came to the following findings in its order 12.06.2007 by dismissing the counter claim filed by the present petitioners.

“The evidence of D.W.1 is not helpful for contesting defendants.

The application submitted by Faijalli Sha and Ahmad Sha for registration of Wakf is marked as Ext. A-9. Defendant Nos. 1 to 8 have raised objection to this document as it was produced from the custody of Defendant No. 9 (Orissa Board of Wakf) who support the case of the plaintiffs. Defendant No. 9 is a statutory body. Ext. A-9 is a document more than 30 years old maintained during official

course of business. So, it cannot be lightly brushed aside for mere objection by Defendant Nos. 1 to 8.

The document inspires confidence that the registration was made at the instance of Faijalli Sha and Ahmad Sha who were ancestors of Defendant Nos. 1 to 8. Defendant Nos. 1 to 8 cannot change the official act of their ancestors at a later stage like this and they are stopped to do so.

It cannot be said that Defendant Nos. 1 to 8 had no prior knowledge of the Gazette Notification dated 20.02.1976 and only came to know after receipt of summon from this Tribunal.

Defendant Nos. 1 to 8 are not only interested in property but also with the Wakf and therefore, the limitation of one year as contemplated under Section 6 (1) of the Wakf Act, 1954 is applicable to them.

Counter claim is not hit U/S. 89 of the Wakf Act, 1995.

Orissa Gazette Notification dated 20.2.76 notifying the suit property except property under Khata No. 619 as Wakf property and managing Committee formed under approval of Defendant No.9 on dated 18.1.2005 are according to law.

Suit property under Consolidation Khata No. 424 appertaining to Plot No. 6 and 7 are not private properties of Defendant No.1 to 8.

Counter claim is hit by law of limitation provisions of Wakf Act and principle of estoppels.

Defendant Nos. 1 to 8 cannot claim title by way of adverse possession.

Plaintiffs are not entitled to any relief as prayed for by them."

3.17 Hence, against dismissal of their counter claim, the petitioners have filed the present writ petition impugning the judgment dated 12.06.2007 passed by the State Wakf Tribunal, Odisha, Cuttack in Case No. W.T.(O)/O.A.6/2005.

4. Mr. S.K. Mishra, learned counsel appearing for the petitioners contended that the Wakf Tribunal, while scrutinizing the materials available on record, failed to appreciate the correct proposition of law vis-a-vis Section 6(1) of the Wakfs Act, 1954 to the extent that the limitation of one year, as prescribed under the Act, is not at all applicable to the present petitioners, as they are not interested in the Wakf. He further contended that the Wakf Tribunal has misconstrued the provisions of Sub-section (8) of Section 25 of the Wakfs Act, 1954 together with the Gazette Notification dated 20.02.1976, which was published after the registration. Though Sub-section (8) of Section 25 of the Act stipulates that in case of Wakf created before the commencement of the Act, every application for registration shall be made within three months from such commencement, and in case of Wakf created after such commencement, within three months from the date of the creation of the Wakf, but, in the instant case, the aforesaid provisions

have not been followed. The reason being, in the case at hand, the application was filed on 16.04.1968, the suit property was allegedly registered as Wakf property on 14.03.1974 and the notification was published on 20.02.1976. Therefore, the notification is vitiated. It is further contended that Section 25 of the Wakfs Act, 1954 specifically provides that the application under Section 25(1) has to be filed by the 'Mutawallis', but the petitioners or for that matter, their ancestors, being not the 'Mutawallis' but 'Marfatdars', the application purportedly filed by the ancestors of the petitioners cannot be sustained. Though several other grounds have been urged in the petition, but Mr. Mishra, while addressing the Court, confined his contention to the aforementioned grounds.

5. Though opposite parties no.1 and 2 had entered appearance through M/s. Mira Ghose, R. Mohanty, B. Rath, N.S. Ghose and M. Roula, but during pendency of this writ petition Mira Ghose left for her heavenly abode. Even though the names of her associates are reflected in the cause list and opposite parties no.1 and 2 are represented by them, they did not appear in spite of several opportunities given to them, nor any other counsel represented opposite parties no.1 and 2. Since it is an old matter of the year 2007, this Court is not inclined to grant any adjournment to enable opposite parties no.1 and 2 to appear and participate in the hearing. But, as it appears, opposite parties no.1 and 2 have filed their counter affidavit justifying the stand of Wakf Tribunal and have contended that the order passed by the Wakf Tribunal is well justified and does not require any interference by this Court.

6. Md. Fayaz, learned counsel appearing for opposite party no.3 contended that the stand taken by the opposite parties no.1 and 2 in their counter affidavit is well justified and, thereby, the dismissal of the counter claim filed by the present petitioners cannot be said to illegal or illogical and, therefore, sought for dismissal of the writ petition.

7. Therefore, having heard Mr. S.K. Mishra, learned counsel appearing for the petitioner and Md. Fayaz, learned counsel appearing for opposite party no.3 and upon perusing the records, more particularly, the counter affidavit filed on behalf of opposite parties no.1 and 2, since pleadings between the parties have been exchanged, the writ petition is being disposed of finally at the stage of admission with the consent of learned counsel appearing for the parties.

8. During the course of hearing, it was strenuously urged by Mr. S.K. Mishra, learned counsel appearing for the petitioners that the Wakf Tribunal has misconstrued the provisions of Sub-section (8) of Section 25 of the Wakfs Act, 1954 together with the Gazette Notification dated 20.02.1976, which was published after the registration. To appreciate the legality of such contention, Section 25(8) of the Wakfs Act, 1954 is extracted hereunder:-

"In the case of wakfs created before commencement of this Act, every application for registration shall be made within three months from such commencement and, in the case of wakfs created after such commencement,

within three months from the date of the creation of the wakf.”

On perusal of the aforesaid provision, it is made clear that every Wakf, whether created before or after commencement of the Act, shall be registered at the office of the Board and in case the Wakfs created before the commencement of the Act, every application for registration shall be made within three months from such commencement and in case of Wakf created after such commencement within three months from the date of creation of the Wakf. Therefore, by the above provision, a mandate has been put that Wakf has to be registered within a period of three months. Nothing has been placed on record to show that the Wakf has been registered within three months. Even after amendment to the Act, the provision, with regard to the bar to the enforcement of right on behalf of unregistered wakfs, as contained in Section 87 of the Wakf Act, 1995, has been omitted with effect from 01.11.2013. Though such a plea was advanced by the present petitioners by filing their written statement and also contending the same in the counter claim, but the Wakf Tribunal has not dealt with the very same provision. Thereby, the findings arrived at by Wakf Tribunal, without considering such provision, cannot be sustained in the eye of law.

9. In view of such position, the judgment dated 12.06.2007 passed by the State Wakf Tribunal, Odisha, Cuttack passed in Case No. W.T.(O)/O.A.-06/2005 is hereby quashed and matter is remitted back to the Wakf Tribunal for re-adjudication of the counter claim of the petitioners taking into consideration the provisions contained in Section 25(8) of the Wakf Act, 1954 by affording opportunity of hearing to all the parties.

10. The writ petition stands disposed of accordingly. However, there shall be no order as to costs.

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