

(1989) 07 CAL CK 0034
In the Calcutta High Court
Case No : Matter No. 4535 of 1988

M/s. Murray and Co. Pvt. Ltd.

APPELLANT

Vs

Board of Wakfs and others

RESPONDENT

Date of Decision : 13-07-1989

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 11, 41, 58, 58(2)
Bengal Wakf Act, 1934 — Section 53, 54
Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Constitution of India, 1950 — Article 226
Specific Relief Act, 1963 — Section 9

Citation : AIR 1990 Cal 86

Hon'ble Judges : Bhagabati Prasad Banerjee, J

Bench : Single Bench

Advocate : R.C. Deb, Pradip Ghosh and Anindya Mitter, for the Appellant;
Dipankar Ghosh, C.N. Mukherjee, Saktinath Mukherjee, Miss. Shefali Sircar, B.C. Ghosh Roy, Miss. Sarda Parmer, Syed Mansur Habibullah and Miss. Gayatri Mukherjee, for the Respondent

Judgement

1. This writ petition was moved by the petitioner No. 1 who is the Company and the petitioner No. 2 who is the Director of the petitioner company praying for-

a) A writ in the nature of Mandamus and/or order or direction of like nature commanding the respondents Nos. 1 and 2 to forbear from treating the abovementioned premises No. 12, Gurusaday Road, Calcutta as a part of any Wakf Estate and further commanding the said respondents to withdraw, rescind and/or cancel any decision obtained or permission and/or sanction granted in respect of the said property to respondents Nos. 3, 4, 5 and 6 or any one of them and to forbear from giving any effect or further effect to any such decision and/or permission and sanction and further to forbear from granting any sanction or permission under Ss. 53-54 of Bengal Wakf Act 1934 in favour of any one and further to act in accordance with law in respect of the said property.

b) A writ in the nature of Certiorari and/or an order and/or direction of the like

nature commanding the respondents Nos. 1 and 2 to certify and transmit to this Hon'ble Court the records relating to the said premises so that conscionable justice may be administered and upon the records being so certified and transferred to quash the impugned decision and/ or permission and/ or sanction in respect of the said premises No. 12, Gurusaday Road, Calcutta and/or any order or documents or records that may be adverse to the petitioners' right, title and interest in respect thereof.

2. The case of the petitioners in short is that by a Deed of Wakf (referred to as "wakfnama") dt. 20th May 1946 one Rani Sayeeda Khatoon (referred to as "Wakifa") created a Wakf in respect of various properties including premises No. 12, Gurusaday Dutta Road, Calcutta. It is stated that the Wakf was created for the benefit of the wakifa and her descendants and for certain religious and charitable objects. It is stated that in the line of succession to the mutwalliship of the wakf estate laid down in the wakifa, she was to be the first mutwalli and she was to be succeeded by Kishwar Jehan alias Fahmida Khatoon and her descendants dying and after" her and/or her descendants, Kumar Sumare Singh alias Md. Muslim shall become mutwalli and after him his eldest male descendants and so on. It is stated that the said premises No. 12, Gurusaday Dutta Road was duly enrolled by the wakifa in the Office of the Commissioner of Wakfs, West Bengal in 1950, under the provisions of S. 44 of the Bengal Wakf Act 1934. It is stated that Clause 12 of the Wakfnama expressly authorised the mutwalli to transfer the wakf properties and that pursuant to such power, the wakifa herself by a duly registered Deed of Exchange dt. 6th March 1962 exchanged the above mentioned premises No. 12, Gurusaday Dutta Road, Calcutta for a property in Aurangabad in the District of Gaya in Bihar of equivalent value for convenience of management. The said Deed of Exchange was effected by the Wakifa between herself and her son, Kumar Fateh Singh. It is alleged that by virtue of the said Deed of Exchange, premises No. 12, Gurusaday Dutta Road, Calcutta was taken out of the purview of the wakf estate and ceased to be wakf property and the right, title and ownership of the said property came to be vested in Kumar Fateh Singh. It is further alleged that the wakifa gave due notice to the Commissioner of Wakf as provided under S. 53(2) of the Bengal Wakf Act. It is stated that after having acquired the premises No. 12, Gurusaday Dutta Road, Calcutta by the Deed of Exchange dt. 6th March 1962, Kumar Fateh Singh by a Conveyance dt. 14th Feb., 1963 which was duly registered before the Registrar of Assurances, Calcutta on 20th March 1963 sold and conveyed the said premises to the petitioner No. 1 Murray & Company subject to the lease granted in favour of Zulekha Begum and a sub-lease granted by the said lessee on 1st Dec., 1960 in favour of the respondent No. 7, Kumar Sumare Singh for a term of five years with option of renewal of three terms of five years each till the 20th year. It is stated that after purchase of the aforesaid property by the petitioner company, the said Zulekha Begum executed a Deed of Surrender of Lease on 23rd Oct., 1963 in favour of the petitioner company. It is further alleged that the respondent No. 7 who was the sub-lessee had been

paying rent to the petitioner company after the tenancy was upgraded. The further case of the petitioner is that after acquiring the said property, the petitioner No. 1 got its name duly recorded in all the municipal records of the Calcutta Municipal Corporation and was paying municipal rates and taxes and that the petitioner company had filed a suit for ejectment against the respondent No. 7 M/s. Eastern Scales (P) Ltd. It is further stated that on or about 1983 the respondents Nos. 3 and 4 namely Raghu-bir Singh, a son of late Kumar Fateh Singh and Md. Shuja son of late Kumar Amar Singh filed a title suit No. 48 of 1983 against the respondent No. 5 Kumar Sumare Singh wherein the petitioner company was impleaded as defendant. The said suit was Instituted for a declaration that the Deed of Exchange dt. 6th March 1962 was illegal, void and of no legal consequence. The said suit was instituted in the court of Learned Sub-Judge Aurangabad, Bihar. The said suit was decreed ex parte on 30th Nov., 1984 and thereafter, the petitioner company filed an application under O.9, R. 13 of the Civil P.C. and that thereafter the said ex parte decree was set-aside by the order dt. 25th Feb., 1988. Ultimately the said suit was dismissed on the ground that the said suit was not maintainable in that court. It is stated that against the said order dt. 28th July 1988 by which the suit was dismissed as the Court had no jurisdiction, an appeal is pending before the High Court at Patna. Cause of action for moving the writ application as it is alleged by the petitioner is that the Commissioner of Wakf, West Bengal had granted permission for granting long term lease of premises No. 12, Gurusaday Dutta Road in favour of Lake View Properties Pvt. Ltd., the respondent No. 6 herein at the instance of mulwalli of the wakf estate, Musst. Sayeeda Khatoon.

3. It is contended on behalf of the petitioner company that the Commissioner of Wakf, West Bengal had no authority and/or jurisdiction to grant permission for teasing out the said premises to the respondent No. 6, inasmuch as, the said property was no longer the wakf property as premises No. 12, Gurusaday Dutta Road was exchanged by the Deed of Exchange dt. 6th March 1962 between Rani Sayeeda Khatoon of the one part and Kumar Fateh Singh of the other part by which the Kumar Fateh Singh who according to the petitioner was the mutwalli in respect of Aurangabad property in lieu of premises No. 12, Gurusaday Dutta Road whereby Kumar Fateh Singh became the owner of premises No. 12, Gurusaday Dutta Road and Rani Sayeeda Khatoon who was the mutwalli in respect of premises No. 12, Gurusaday Dutta Road became the owner of properties in Bihar. It was further contended that the petitioner was in possession of property in question since the transfer of the property and the name of the petitioner was duly recorded in the register of the Calcutta Municipal Corporation and that when the suit filed by the respondents Nos. 3 and 4 was dismissed by the learned Sub-Judge Aurangabad, it is no longer open to decide the question of right, title and interest of the petitioner by the Wakf Commissioner, It was further submitted that the property is ceased to be a wakf property and has become the absolute property of the petitioner company and as such the Commissioner of Wakf had no jurisdiction to interfere with the right, title and interest of the

petitioner company in the said property. It was further submitted that the said order of the Commissioner of Wakf would have the effect of dispossessing the petitioner from the property in question without due process of law.

4. Mr. Dipankar Ghosh learned Advocate appearing on behalf of the respondents Nos. 3 and 4 submitted that the writ petition did not disclose certain important facts which were very much relevant for the purpose of determining the real question at issue. The case of the respondents Nos. 3 and 4 is that on 4th May 1946 Rani Sayeeda Khatoon created a wakf in respect of several properties situated in Bihar, including her Shahpur property in Aurangabad, which is mentioned in item 169 of the Schedule of the Wakf Deed. The Shahpur property is hereinafter referred to as the Gaya property. This wakf was registered with the Office of the Bihar State Sunni Wakf Board, Patna and numbered as Wakf No. 360. Under this deed, Rani Sayeeda Khatoon was to be the first Mutwalli, after that her three sons Amar Singh, Fateh Singh and Sumare Singh were to be joint mutwallis. Thereafter in July 1948 Rani Sayeeda Khatoon went to Karachi. In December 1948, Rani Sayeeda Khatoon came back to India on a temporary permit. In April 1949, Rani Sayeeda Khatoon returned to Pakistan. On 21-6-49 the Bihar Administration of Evacuee Property Ordinance was promulgated whereby all evacuee property situated in the Province of Bihar vested in the Custodian. Thereafter, on 2-9-1949 a notification was issued by Deputy Custodian of Evacuee Property under S. 6 of the said Ordinance, declaring that the properties comprised in the Wakf Deed dt. 4-5-1946 had vested in the Custodian. In 1950 the Administration of Evacuee Property Act was passed by the Parliament.

5. Thereafter, the matter went to Supreme Court of India and the question before the Supreme Court was what was the effect of passing of Bihar Administration of Evacuee Property Ordinance, 1949 on the wakf property at Aurangabad, Bihar. This case namely *The State of Bihar Vs. Kumar Amar Singh and Others*, it is relevant to set out the fact found by the Supreme Court in this connection.

(Para 2)

"Kumar Rani was admittedly born in the territory of India and claims to be the lawfully wedded wife of Captain Maharaj Kumar Gopal Saran Narayan Singh of Gaya by virtue of an alleged marriage between them in 1920 according to Arya Samaj rites and subsequently according to Muslim rites. She owned and possessed considerable properties. In 1946 she created a wakf of her properties consisting of 427 villages for the maintenance and support of herself, her sons and their descendants, by executing a deed of Wakf-ulal-Aulad dt. 4-5-1946, by which she divested herself of all her interest in the said properties and vested them in Almighty God. She appointed herself as the sole mutawalli for her lifetime or until relinquishment and her three sons to succeed her as joint mutwallis. The deed also provided that the net income was to be spent for the maintenance of herself and her three sons with the direction that not more than

half should be spent by the wakifa for her own use. In July 1948, Kumar Rani went to Karachi. In December, 1948 she returned to India from Pakistan on a temporary permit and went back to Pakistan in April, 1949. On 21-6-49 the Bihar Administration of Evacuee Property Ordinance, 1949 (Bihar Ordinance No. 3 of 1949) came into force. The Deputy Custodian of Evacuee Property issued a notification on 2-9-49 under S. 5 of this Ordinance, declaring all the properties comprised in the abovementioned wakf estate to have vested in the Custodian as being evacuee property. He took possession thereof between the 20th Sept. and 2-10-1949.

On 14-5-50 Kumar Rani again came back to India under a permanent permit obtained from the High Commissioner for India in Pakistan. This permit was, however, cancelled on 12-7-1950 by the Deputy High Commissioner, on the ground that this was wrongly issued, without the concurrence of the Government, as required by the rules made under the Influx from Pakistan (Control) Act, 1949. In view of this cancellation, the Sub-Inspector of Police, Gaya, issued notice to Kumar Rani directing her that since her permanent permit had been cancelled, she should leave India by 31-7-1950.

In view of these happenings two applications were filed before the High Court of Patna, one dt. 5-7-1950, challenging the validity of the action taken by the Deputy Custodian declaring the wakf estate as evacuee property and taking possession thereof on the basis of that declaration and another application dt. 28-7-1950 challenging the validity of the order of the Sub-Inspector of Police, Gaya directing Kumar Rani to leave India. The first of these applications was filed by Kumar Rani along with her three sons as petitioners and the second by Kumar Rani alone. Both these applications were allowed by the High Court and hence these appeals and hence these appeals by the State on leave granted by the High Court. These two connected appeals came up for hearing before this Court on the 26th and 27-10-1953.

This Court after hearing counsel on both sides was of the opinion that one of the essential facts (to be mentioned in detail hereinbelow when dealing with Appeal No. 97) requisite for a proper decision of Appeal No. 97 had been assumed without investigation and that it was necessary to have finding thereupon after taking evidence. This court accordingly remanded Appeal No. 97 to the High Court to submit a finding and directed that on the receipt of the findings both the appeals (Appeals Nos. 97 and 98) should be heard together. The finding has now been received and the appeals have been reheard. It is necessary at this stage to mention that the Advocate who appeared for the respondents in both the appeals at the prior hearing appeared before us at this hearing and stated that he had been instructed to withdraw his appearance in these appeals and to allow the hearing to proceed ex parte".

6. Ultimately in that judgment Supreme Court held that Rani Sayceda Khatoon was not a citizen of India and was an evacuee and by virtue of the provisions of Bihar Administration of Evacuee Property Ordinance, 1949, the said property

stood vested with the Custodian appointed under the said Act. In this connection it was observed by the Supreme Court that *The State of Bihar Vs. Kumar Amar Singh and Others*,

"It is clear that, as already found above, Kumar Rani "migrated" to Pakistan from India after 1-3-1947. In view of the fact that her plea as to the reason for such migration has not been accepted, she can well be taken to have left India for Pakistan in the circumstances set out in this definition, and after the prescribed date. She has, therefore, been rightly taken to be an "evacuee" by the Custodian. As regards the second point, the alleged relinquishment of the office of "mutwalli" by Kumar Rani and the vesting of the interest in the "wakf" property in her three sons, respondents 1 to 3, as joint "mutwallis" thereof, by virtue of the terms of the deed of "wakf" is based on a letter addressed to the second respondent, her second son Kumar Fateh Singh, purporting to have been written by her and dated 2-6-1949."

7. Supreme Court also observed that the said Bihar Ordinance was repealed by the Central Act and the vesting in the Custodian was allowed to be continued by the Act. In this connection reference was made to the provisions of S. 11 of the Administration of Evacuee Property Act, 1950 which came in effect on and from April 1950 and this Act repealed the Bihar Ordinance. Section 11 of the said Act is as follows :

"Special provisions with respect to certain trust properties -- Where any evacuee property which has vested in the Custodian is property in trust for a public purpose of a religious or charitable nature, it shall be lawful for the Central Government notwithstanding anything contained in the instrument of trust or any law for the time being in force, to appoint, by general or special order, new trustees in place of the evacuee trustees and the property shall remain vested in the Custodian only until such time as the new trustees are so appointed; and pending the appointment of such new trustees the trust property and the income thereof shall be applied by the Custodian for fulfilling, as far as possible, the purpose of the trust.

(2) In respect of any wakf-alal-aulad -

(a) where the mutwalli is an evacuee, the property forming the subject matter of the wakf shall vest in the Custodian subject to the rights of the beneficiaries under the wakf, if any, who are not evacuees;

(b) where not all the beneficiaries are evacuees, the rights and interests of such of the beneficiaries as are evacuees shall alone vest in the custodian."

8. Relying on this provision it was submitted by Mr. Ghosh that where the mutwalli was an evacuee, the property formed being part of the subject matter of the wakf property . subject to the right of beneficiaries under the wakifa who were not the evacuees or in other words, Rani Sayeeda Khatoon was divested for her right and her right in term vested to the Custodian appointed under the said

Act. It is the specific case of the respondents Nos. 3 and 4 that when the property had remained under the custody and control of the Custodian appointed under the said Central Act, the purported Deed of Exchange was entered into by and between the parties on 6th March 1962 whereby Kumar Fateh Singh purported to transfer Gaya property to Rani Sayeeda Khatoon in exchange of premises No. 12, Gurusaday Dutta Road, Calcutta treating the Gaya property as his personal property. In this connection reference was made to the provision of S. 41 of the Administration of Evacuee Property Act, 1950 which is as follows:

"Transactions relating to evacuee property void in certain circumstances subject to the other provisions contained in this Act, every transaction entered into by any person in respect of property declared or deemed to be declared to be evacuee property within the meaning of this Act, shall be void unless entered into by or with the previous approval of the Custodian."

9. Relying upon the provisions of S. 41 of the said Act Mr. Ghosh submitted that the said Deed of Exchange purporting to transfer the wakf property to Rani Sayeeda Khatoon in exchange of premises No. 12, Gurusaday Dutta Road, Calcutta on 6th of March 1962 was void, illegal and inoperative, inasmuch as, the said property was transferred at a point of time when the property remained under the custody and control of the Custodian appointed under the Central Act and S. 41 of the said Act provides that in respect of any property declared or deemed to be declared to be evacuee property within the meaning of the said Act, the transfer of such property shall be void unless entered into by and with the previous approval of the Custodian. Admittedly, in the instant case, the property was transferred in violation of the provisions of S. 41 of the said Act. It may be mentioned that only on 12th April 1962 after one month from the date of execution of the Deed of Exchange, an order was passed by the Government of India, Ministry of Rehabilitation, Office of the Regional Settlement Commissioner that "the entire Wakf-alal-aulad properties belonging to the Evacuee Rani Sayecda Khatoon have been released in favour of the non-evacuee co-sharer S/ Shri Kumar Fateh Singh & Others in the light of Govt. Circular No. 2/17/57 Prop. dt. 9-9-60".

10. Mr. Ghosh further submitted that it is clear that on 6th March 1962 when the said Deed of Exchange was executed in respect of Gaya properties, Gaya properties stood vested in the Custodian appointed under the said Act and Kumar Fateh Singh did not have any right, title and interest in the same. It was only on 12th April 1962, the property was released in favour of non-evacuee beneficiaries, i.e., Amar Singh, Fateh Singh and Sumare Singh. Kumar Fateh Singh died in the year 1975 and Rani Sayecda Khatoon died in the year 1978. On 21st March 1983 the order of the Bihar State Sunni Wakf Board mutating the name of the joint mutwallies in place of the deceased father Kumar Fateh Singh in respect of the said wakf was made. There was a similar order dt. 30th April 1984 mutating the name of the Md. Suja as joint mutwallies in place of the deceased father Kumar Amar Singh. So far as the premises No. 12, Gurusaday

Dutta Road, Calcutta is concerned, it is stated that on 20th May 1946 the wakf was created by Rani Sayecda Khatoon in respect of properties including premises No. 12, Gurusaday Dutta Road, Rani Sayeeda Khatoon was the first mutwalli, and that on 5-10-1950 the Calcutta property was registered as Wakf Properly with the Board of Wakf, West Bengal and that on 6th March 1962 the Calcutta property was exchanged with the Gaya property as herein-before stated and that on 14-2-63 Kumar Fateh Singh purported to sell Calcutta property to the petitioner company with the existing lessee Eastern Scales (Pvt.) Ltd. and ultimately an ejectment suit was filed by the petitioner company against the Eastern Scales (P) Ltd.

11. Mr. Sakti Nath Mukherjee the learned Advocate appearing on behalf of the respondent No. 5 adopted the argument of Mr. Ghosh and further submitted that in the writ petition the petitioner has suppressed the material fact namely the Bihar property was wakf property and the facts stated by the respondents Nos. 3 and 4 in respect of affidavit have been suppressed before this court. Mr. Mukherjee further submitted relying upon the decision of the Supreme Court in the case of The State of Bihar and Others Vs. Charusila Dasi, that the wakf under which the Calcutta property is included was also registered in Bihar and that on proper construction for the Bihar Ordinance and the Administration of Evacuee Property Act, 1950 it must be held by the Court that Calcutta property also became under the custody and control of the Evacuee appointed under the Act, inasmuch as, it was submitted that the aim that will be sought to be achieved was over the persons and if apart of the wakf property is situated outside the State of Bihar in that event, that part which is situated outside Bihar must be deemed to be also a wakf property within the territorial jurisdiction of the State of Bihar for the purpose of Administration of Evacuee Property Act in question. It is not necessary to decide this question in this case because of the reasons given by me herein.

12. Mr. Anindya Kumar Mitra with Mr. Pradip Ghosh appearing on behalf of the petitioner contended that the petitioner could not be dispossessed from the property in question except in due course of law and in support of their contention reliance was placed on the decision of the Supreme Court in the case of Lallu Yeshwant Singh v. Rao Jagdish Singh reported in AIR 1968 SC 620 wherein the decision of the Privy Council in the case of Midnapur Zamindary Co. Ltd. v. Naresh Narayan Roy reported in 51 Ind App 293 : (AIR 1924 PC 144) as also the decision of Chagla, C. J. in the case of K.K. Verma and Another Vs. Union of India and Another, was approved. In Midnapur Zamindary"scasc Privy Council held that --(at p. 147):

"In India persons are not permitted to take forcible possession, they must obtain such possession as they are entitled to through a court".

In K. K. Verma"s case (supra) Chagla, C. J. observed :-- (at p. 360)

"Under the Indian Law the possession of a tenant who has ceased to be a tenant

is protected by law. Although he may not have a right to continue in possession after the termination of the tenancy his possession is juridical and that possession is protected by statute. u/s 9 of the Specific Relief Act a tenant who has ceased to be a tenant may sue for possession against his landlord if the landlord deprives him of possession otherwise than in due course of law, but a trespasser who has been thrown out of possession cannot go to court u/s 9 and claim possession against the true owner."

13. Relying on the aforesaid decisions it was submitted on behalf of the petitioner that the order of the Commissioner of Wakf passed in this case will have the effect of dispossessing the petitioner from the possession at the instance of a third party who is not in possession thereof. It was further submitted that this Court is also competent to decide and can protect the possession of the petitioner which is sought to be dispossessed by the respondents in the manner stated. Further it was submitted that the Wakf Commissioner had passed an order at the instance of the mutwalli for transfer of the property in favour of the respondent No. 7 at a point of time when the suit filed in Aurangabad Court was decreed ex parte and that the Wakf Commissioner was aware that the petitioner company had purchased property on the basis of the said Deed of Exchange. It was submitted that the Wakf Commissioner had no jurisdiction to interfere with the property in question so long as the title of the petitioner in the property is not declared by any competent court and that further the appeal is pending before the Patna High Court against the order passed in the suit which was filed to nullify the Deed of Exchange. From the pleadings and (the documents placed before (his Court it appears that it cannot be disputed that both the Calcutta property and the Aurangabad property were wakf property. Further it appears that on 6th March 1962 the Deed of Exchange was executed by which Calcutta property was exchanged with the Aurangabad property. At that point of time the wakf properties in Bihar stood vested in the Custodian and that under S. 41 of the Evacuee Properties Act, any property which vested in the Custodian could not be transferred and if such transfer is made, the same would be void ab initio. This fact could not be disputed that when the property was lying vested in the Custodian under Evacuee Properties Act, 1950, the Deed of Exchange was executed on 6th March 1962. The question is whether on the basis of such a Deed of Exchange the Calcutta property could be exchanged with the Bihar property which stood vested in the Custodian under the law and whether the same could be transferred at all.

14. With regard to the submission made by the petitioner that the writ court should protect the possession of the persons even though he is a trespasser, in my view, this point has got some difficulties and the question is whether the writ jurisdiction could be invoked at the instance of trespassers. It is one of the cardinal principles that one who seeks to invoke the writ jurisdiction must come with clean hand. In K.K. Verma and Another Vs. Union of India and Another, Chagla, C. J. observed that "Under S. 9 of the Specific Relief Act a tenant who has ceased to be a tenant may sue for possession against his landlord if the

landlord deprives him of possession otherwise than in due course of law, but a trespasser who has been thrown out of possession cannot go to court under S. 9 and claim possession against the true owner". This observation of Chagla, C. J. of Bombay High Court had been approved by the Supreme Court in the case of *Lallu Yeshwant Singh v. Rao Jagdish Singh* reported in AIR 1968 SC 620. If the position is that if a trespasser who had been thrown out of possession cannot go to court for restoration of possession, in that event, in my view, a trespasser cannot move the court for protection of his possession. The only protection which the trespasser can get is that if the trespasser can establish that he has acquired title by adverse possession. Writ proceeding is not available to validate and/or to protect any unlawful and forcible possession. Writ Court, in my view, cannot go into that question. If a trespasser is evicted or sought to be evicted, in that event, he can file a suit and can get relief in case he can establish that he has acquired title by adverse possession or otherwise. On the basis of materials on record and proposition of law discussed above, it cannot be said that the petitioner is in lawful possession which could be protected by the writ court.

15. Before a writ or an appropriate order can be issued in favour of a party, it must be established that the party has a right and the said right is illegally invaded or threatened. The existence of right is the foundation of a petition under Art. 226 of the Constitution of India. *State of Orissa Vs. Ram Chandra Dev and Mohan Prasad Singh Deo*, and *State of Orissa and Others Vs. Rajasaheb Chandanmull Indrakumar (P) Ltd. and Others*,

16. Following these Supreme Court decisions, a Division Bench of this Court has held in *The Corporation of Calcutta and Others Vs. Dharendra Nath Sen and Others*, "In order to be entitled under Art. 226 of the Constitution of India to get relief against interference with his property, the petitioner must establish a legal right to the property in question. If the petitioner asserts such a right which prima facie establishes a legal right and which requires adjudication then the Court must enquire into that right and if the right is established then interference with that right in appropriate cases should be prevented by appropriate orders under Art. 226 of the Constitution of India. If, however, the petitioner's right is not established or is not found to be tenable, then the petitioner is not entitled to any relief under Article 226 of the Constitution of India". This decision was followed in a subsequent judgment of this Court reported in the case of (1976) 1 Cal LJ 558 (*Keshab Chandra Ghose v. State of West Bengal*). (Underlined by me).

17. In the present case, admittedly the Calcutta property was a wakf property. The petitioner claims that by reason of the Deed of Exchange dt. 6-3-62, the Calcutta Property lost its character as a wakf property and became the personal property of Kumar Fateh Singh. As the petitioner purchased the property from Kumar Fateh Singh by a Conveyance dt. 14-2-63 it claims that it has title to the Calcutta property.

18. It is obvious that the question as to whether the petitioner has acquired title to the Calcutta property or not, depends on the validity of the transaction of

exchange on 6-3-62 by which Kumar Fateh Singh got the Calcutta property. If this transaction is void then Kumar Fateh Singh never became the owner of the Calcutta property and hence he could not pass any title to Murray & Co. by the subsequent Conveyance dt. 14-2-63.

19. Admittedly the Gaya property was a wakf property, which had vested in the Custodian of Evacuee Property under S. 5 of the Administration of the Evacuee Property Ordinance, 1949. This Ordinance was repealed by S. 58(2) of the Administration of Evacuee Property Act, 1950, but by S. 58(2) of the 1950 Act the property was deemed to have vested in the Custodian under the Central Act.

20. There was a litigation about the Bihar Wakf Properties created by Rani Sayeeda Khatoon which ended with the decision of the Supreme Court, in the case of The State of Bihar Vs. Kumar Amar Singh and Others, . In this judgment Supreme Court held that all the properties comprised in the Wakf Deed dt. 4-5-46 executed by Rani Sayeeda Khatoon (which includes the said Gaya Property) had vested in the Custodian of Evacuee Property, and that the said properties had been declared to be Evacuee Property.

21. Section 41 of the Administration of Evacuee Property Act, 1950 states that every transaction in respect of the property declared to be Evacuee Property shall be void, unless entered into by or with the previous approval of the Custodian. (Underlined by me).

22. On 6-3-62 when the said transaction of exchange took place between Sayeeda Khatoon and Kumar Fateh Singh, the Gaya property stood vested in the Custodian of Evacuee Property appointed under 1950 Act and had been declared to be evacuee property.

23. That being so, on that date Kumar Fateh Singh had no title to the Gaya property and hence he was not competent to transfer the same.

24. Further, by reason of S. 41 of 1950 Act, the entire transaction of Exchange was void because no previous approval of the Custodian had been obtained.

25. Therefore, on admitted facts and without going into any disputed question of fact, it is clear that the writ petitioner did not acquire any title to the Calcutta property. The writ petitioner has, therefore, failed to establish any right which has allegedly been interfered with or infringed by the action of the Commissioner of Wakf. As the petitioner's right is not established and not found to be tenable, he is not entitled to any relief in this application under Art. 226 of the Constitution of India.

26. It is to be noted that it is petitioner itself which has asked for relief on the footing that it has title to the property. It is the petitioner's contention that the property lost its character as a Wakf property by reason of Deed of Exchange dt. 6-3-62. If the Court finds that these claims are not tenable on admitted facts, the Court can certainly decide the question of title. As stated earlier there is no absolute rule in the matter. It all depends on the facts of a particular case.

27. The petitioner has submitted that the question of title cannot be decided in a writ application. This proposition is put too widely. In the facts of a given case a court may come to the conclusion that the question of title cannot be tried in a writ application. In the facts of another case the Court may come to the conclusion that there is no difficulty in trying that question in the writ application.

28. Consequently if the petitioner is right, then it follows that no right can be postulated in favour of the petitioner on the basis of which a writ can be issued in its favour under Art. 226 of the Constitution of India. In *State of Orissa Vs. Ram Chandra Dev and Mohan Prasad Singh Deo*, the Supreme Court observed "where, therefore, in such case the grantee moves the High Court under Art. 226 of the Constitution of India for a writ against the State and the High Court comes to the conclusion that the question of title cannot be tried in the writ proceedings, it follows that no right can be postulated in favour of the grantee on the basis of which the writ can be issued in their favour under Art. 226 of the Constitution of India."

29. All other questions canvassed by the petitioner do not arise. There is no pleading of title by adverse possession. It is well settled that without pleading of adverse possession, this question cannot be agitated. There is no allegation that the public respondents are trying to dispossess the petitioner by force. The question of natural justice also does not arise. As the petitioner has failed to establish any legal right, the question of infringement of that right does not arise. The proceedings in the Patna High Court are irrelevant and cannot in any way decide the fate of the present application. This is an application by the petitioner in which the petitioner is asserting a particular right. If the Court finds that right does not exist, that is the end of the matter and the petition must be dismissed.

30. In the result, I am of the view, the petitioner is not entitled to relief in the writ application.

31. In the result, writ petition fails and is accordingly dismissed. This order is passed without prejudice to the rights and contentions of the parties in any other pending proceeding and/or future proceeding. I make it clear that I have not adjudicated any of the questions relating to the right, title and interest of the parties in the property in question which are left open. On the basis of the materials on record I have held that in the writ jurisdiction the petitioner is not entitled to relief because of the reasons given above.

32. On the prayer of the learned Advocate appearing on behalf of the petitioner, let there be a stay of operation of the order passed today for a period of four weeks.

33. Petition dismissed.