GAHC010236302019

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP/141/2019

XXX (Tanveer Rahman, deceased)
S/O- LATE KHAIRUR RAHMAN, RESIDENT OF J.C. DAS ROAD, FANCY BAZAR, GUWAHATI-01.

2: EKLIMUR RAMAN (INSANE)
S/O- LATE KHAIRUR RAHMAN
RESIDENT OF J.C. DAS ROAD
FANCY BAZAR
GUWAHATI-01. PETITIONER NO. 2 BEING OF UNSOUND MIND IS REPRESENTED BY HIS BROTHER ABEDUR RAHMAN (PETITIONER NO. 5).

3: ATIQUR RAHMAN (INSANE)
S/O- LATE KHAIRUR RAHMAN
RESIDENT OF J.C. DAS ROAD
FANCY BAZAR
GUWAHATI-01. PETITIONER NO. 3 BEING OF UNSOUND MIND IS REPRESENTED BY HIS BROTHER ABEDUR RAHMAN (PETITIONER NO. 5).

4: KHALIDUR RAHMAN
S/O- LATE KHAIRUR RAHMAN
RESIDENT OF J.C. DAS ROAD
FANCY BAZAR
GUWAHATI-01.

5: ABEDUR RAHMAN
S/O- LATE KHAIRUR RAHMAN
RESIDENT OF J.C. DAS ROAD
FANCY BAZAR
GUWAHATI-01.

6: NAWAZIZ ARA BEGUM
D/O- LATE KHAIRUR RAHMAN
RESIDENT OF J.C. DAS ROAD
FANCY BAZAR

GUWAHATI-01.

7: IFTIKAR ARA BEGUM
D/O- LATE KHAIRUR RAHMAN
RESIDENT OF J.C. DAS ROAD
FANCY BAZAR
GUWAHATI-01.

8: NIKAHAT ARA BEGUM
D/O- LATE KHAIRUR RAHMAN
RESIDENT OF J.C. DAS ROAD
FANCY BAZAR
GUWAHATI-01.

9: NAHID ARA BEGUM (INSANE)
D/O- LATE KHAIRUR RAHMAN
RESIDENT OF J.C. DAS ROAD
FANCY BAZAR
GUWAHATI-01. PETITIONER NO. 9 BEING OF UNSOUND MIND IS REPRESENTED BY HER BROTHER ABEDUR RAHMAN (PETITIONER NO. 5)

VERSUS

THE ASSAM BOARD OF WAKF
REPRESENTED BY ITS CHAIRMAN HAVING ITS REGISTERED OFFICE AT NOTBOMA ROAD, SIJUBARI, HATIGAON, GUWAHATI- 781038, DISTRICT-KAMRUP(M), ASSAM.

Advocate for the Petitioner : MR K K MAHANTA

Advocate for the Respondent : S ALI

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

JUDGMENT AND ORDER(CAV)

Date : 10-01-2023

Heard Mr. K. K. Mahanta, the learned senior counsel assisted by Ms. N. Begum for the petitioners and Mr. S. Ali, learned counsel appearing on behalf of the Respondent No. 1.

2. It appears from the records that on the submission made by the learned counsel appearing on behalf of the petitioners, the names of the respondent Nos. 2, 3 and 4 were deleted from the array of the parties vide an order dated 11.06.2020.

3. The instant application under Article 227 of the Constitution is directed against the order dated 21.8.2019 passed by the Wakf Tribunal of Assam (for the sake of convenience referred as 'the learned Tribunal') in Title Suit No. 1/2018 whereby the suit was dismissed by deciding preliminary issues against the plaintiffs/the petitioners herein.

4. It appears from a perusal of the instant application that a suit was initially instituted before the Court of the Civil Judge (Senior Division), Kamrup(Metro) at Guwahati which was registered and numbered as Title Suit No. 423/2004. The plaint of the said suit is enclosed as Annexure-1 to the instant application. A perusal of the plaint reveals that the said suit was filed seeking the following reliefs :

> ""(a) A decree declaring that the plaintiffs have acquired possessory right over the suit land.
>
> AND
>
> (b) A decree declaring that the interest of the defendants Nos. 1 & 2 over

the suit land stood extinguished by efflux of time and that the same have devolved upon/acquired by the plaintiffs.

AND

(c) A decree of confirmation of possession of the plaintiffs over the suit land.

AND

(d) A decree of permanent injunction restraining the defendants, their agents, servants, employees and/or any person or persons claiming to be under them from entering into/interfering with/encroaching upon the peaceful possession of he plaintiffs over the suit lands and properties.

AND

(e) Costs of the suit.

AND

(f) Any other relief or reliefs which the plaintiffs may be found to be entitled to and as to your Honour may deem fit and proper."

5. The facts leading to the filing of the said suit have been narrated in the plaint. It is however interesting to note that the Chief Executive Officer of the Assam Board of Wakf (the Respondent No. 1 herein) was however not arrayed as a party to the said suit. Be that as it may, from a perusal of the plaint, the

instant application as well as the impugned order, the following facts are discernible.

6. A plot of land measuring 14 Bighas 2 Kathas 0 Lecha covered by various Dags and Periodic Patta numbers of Guwahati Sahar Mouza- Guwahati 3rd Part in the district of Kamrup corresponding to Touzi No. 53 Patta No. 368 of 1889-90 settlement within Fancy Bazar Lot was owned and possessed by one Ohidur Rahman(since deceased). During the his life time, Late Ohidur Rahman, on 20/3/1890, executed and registered a wakf-nama whereby Lt. Ohidur Rahman created a waqf over his entire area of land along with one pucca house of 30 cubits length and 15/½ cubits breadth and one tin roofed Assam Type House of about 21 cubits long and 12 cubits wide. In terms of the said waqf-nama, the said Waqf Estate so created was for religious purpose only and Late Ohidur Rahman during his life time appointed himself as the mutawali of the said Waqf Estate.

7. It has also been mentioned in the plaint that at the time of death of Late Ohidur Rahman, he left behind his widow, his minor son and one daughter and the lands belonging to late Ohidur Rahman devolved upon his legal heirs. It was also mentioned in the plaint that Late Ohidur Rahman's son Khan Saheb Khalilur Rahman became the absolute owner of all the property left behind by

his father Late Ohidur Rahman after his sister one Samsunnessa Bibi had on 30/11/1931 relinquish her share over the properties. Further to that as would be seen from the plaint, during the life time of Khan Saheb Khalilur Rahman, he had erected several permanent structures upon the said land and leased/let out on rent to various persons, some of whom were predecessors in interest of the Proforma Defendant Nos. 5 to 130 in the suit and enjoyed the said properties as his own individual property, collecting rents, paying revenue and taxes regularly and continuously without any interruption from any corner whatsoever.

8. It is further stated in the plaint that Khan Saheb Khalilur Rahman had two sons namely Khaliqur Rahman and Khairur Rahman. The plaintiffs in the suit are the descendants of the sons of Late Khan Saheb Khalilur Rahman. It has also been mentioned that on 16/8/1956 Late Khan Saheb Khalilur Rahman made a family settlement by executing a deed of family settlement being Deed No. 4588 by which the entire properties of Late Khan Saheb Khalilur Rahman were distributed amongst his two sons and their respective wives and their respective eldest sons.

9. Subsequent thereto, on 8/1/1958, a notification was issued and published in the Assam Gazette showing and publishing the aforesaid plot of land which originally belonged to Late Ohidur Rahman as Wakf Estate, viz., Ohidur Rahman

Wakf Estate (Religious Purpose) and Late Khalilur Rahman was shown as the mutawali. The said notification was put to challenge by Late Khalilur Rahman along with his two sons i.e. Late Kholiquor Rahman and Late Khairur Rahman and his grand sons i.e. Mosadiquor Rahman and Atikur Rahman by filing a Title Suit being Title Suit No.110/1958 (later renumbered as Title Suit No. 4/1963) before the Court of the Subordinate Judge, Lower Assam, District which was subsequently transferred to the Court of the Additional District Judge No. 2, Kamrup, Guwahati seeking the following reliefs.

> "A declaration of their personal and secular rights, title and interest in the property in the suit.
>
> i) Permanent injunction restraining the defendant Nos. 1 & 2 from claiming the property-in-suit as Wakt property, and from collecting rents from the tenants and/or otherwise disturbing or interfering with the plaintiffs' peaceful enjoyment and possession thereof.
>
> ii) Mandatory injunction directing cancellation of the notification regarding the property-in-suit in the Assam Gazette dated 8th January, 1958.
>
> iii) Temporary injunction in terms with prayer (ii) above.
>
> iv) Cost of the suit against the defendants.
>
> v) Such other or further relief or reliefs as the plaintiffs may be entitled to have."

10. At this stage, it may be relevant herein to mention that during the pendency of Title Suit No. 4/1963 Late Khaliur Rahman expired and the said suit was continued by the rest of the plaintiffs. The said suit was however dismissed vide a judgment and decree dated 23/4/1975.

11. Being aggrieved, the plaintiffs in the said suit preferred an appeal before the Court of the District Judge, which was registered and numbered as Title Appeal No. 5/1975. The First Appellate Court decreed the suit by a judgment and decree dated 03/1/1983 in favour of the plaintiffs/ the appellants therein holding inter alia that the suit properties were personal properties and there was no trust or Wakf as allegedly created by Late Ohidur Rahman. Therefore, vide the judgment and decree dated 3/1/1983, the First Appellate Court set aside the judgment and decree passed by the Trial Court dated 23/4/1975.

12. The Assam Board of Wakf who was the defendant in the said suit preferred a Second Appeal before this Court against the judgment and decree dated 3/1/1983 passed by the First Appellate Court in Title Appeal No. 5/1975. The said appeal was registered and numbered as Second Appeal No.44/1983. This Court vide a judgment and decree dated 24/8/1983 allowed the appeal by setting aside the judgment and decree passed by the First Appellate Court and thereby restoring the judgment and decree of the learned Trial Court. In allowing the Second Appeal, this Court came to a finding that the Wakf was validly created as per law by registered deed and as such the property passed to God. It was also held that the Wakif by appointing himself as the mutawalli treated the property as a wakf property. Further to that, this Court held that by the registered wakf deed the wakif had not only clearly stated that the deed

was a wakf-nama but had also indicated that the Wakf was made in respect of two houses and the land in the name of Allah for religious purpose. It was observed that the expression used in the wakf-nama is for pious work. In other words, the income from the Wakf property was to be utilized for pious work under the Muslim law. It was further observed that the wakif Late Ohidur Rahman got himself divested of the property, the moment the Waqf-nama was executed and registered and named himself as Mutawali. It was observed that the evidence on record clearly showed that Lt. Ohidur Rahman before his death used to spend money for religious purposes recognized by Muslim law such as sending persons for Haj, incurring expenditure for burial of poor Muslim persons and also for conversion. The plea of adverse possession which was taken by the plaintiffs in the said suit was negated by this Court holding inter alia that Section 217 of Mulla's Principles of Mohammadan Law would not apply as the Mutawali's possession cannot be adverse to the wakf. In the penultimate paragraph of the said judgment, this Court also observed that the control of the Wakf Board in the wakf property shall be confined only in respect of those two houses and the income derived therefrom as mentioned in the wakf deed and such control shall be exercised under the provisions of the Wakf Act, 1954.

13. A review application was filed against the judgment and decree dated

24/8/1993 passed in Second Appeal No. 44/1993. The said Review Application was registered and numbered as Review Application No. 9/1993. This Court by an order dated 14/9/94 had reviewed the earlier judgment and decree dated 24/8/1993 by holding that the entire land of 14 bighas 2 kathas 0 lechas is the wakf property. At this stage, it may be relevant to mention that the said land measuring 14 Bighas 2 Kathas 0 Lechas is the Schedule-I property as described in the plaint of Title Suit No. 423/2004. It is also admitted at the bar that the order dated 14/9/94 had attained finality and as such as on 14/9/94, it can be assumed that the dispute as to whether the Schedule-I property is a wakf property or not had been conclusively held to be a wakf property.

14. It is the case of the plaintiffs that in spite of those orders being passed, holding inter alia that the entire property is a wakf property but the predecessors in interest of the plaintiffs as well as the plaintiffs have been enjoying the said waqf estate as their personal and private properties in an open, continuous and hostile manner and thereby have acquired a possessory right over the suit land and the properties. As such, it is the case of the plaintiffs that their possession over the suit land and the properties standing thereon had become adverse to the right and interest of the defendant Nos. 1 & 2 and the right and interest of the defendant Nos. 1 and 2 have already stood

extinguished due to long efflux of time and the same have devolved upon the plaintiffs and the plaintiffs have acquired the right over the suit properties by way of long possession adverse to the interest of defendant Nos. 1 & 2.

15. At this stage, it may also be relevant to take note of that an incident of vital importance occurred on 23/9/2000, a devastating fire broke out in some portion of the suit property whereby the buildings standing thereon were fully gutted and were totally destroyed. The plaintiffs have applied for permission before the concerned authorities for erection of common structures thereon and it has been further mentioned that the appropriate authority had issued a non-encumbrance certificate in favour of the plaintiff No. 1. However, on 27/9/2002, the Chief Executive Officer of the defendant No. 1 issued some notices to the tenants to show cause on what authority they were occupying and possessing the suit properties and thus tried to interfere with the peaceful possession and enjoyment of the plaintiffs over the suit properties. Further to that, it has also been alleged that on 9/5/2004 some agents of the defendants Nos. 2, 3 and 4 entered into the Schedule Q properties and tried to erect the sign board of the defendant No.3 on the basis of the agreement entered into between them by the respondent No. 2 on 13/11/2003. On the basis of the cause of action which had accrued on 27/09/2002, 13/11/2003 and 9/5/2004, the suit was filed by the plaintiffs/the petitioners herein with the reliefs as already quoted herein above.

16. At this stage, it may be relevant herein to mention another important development. The petitioner No. 1 herein (who recently expired on 03/10/2021) prior to filing of the said suit, had filed a writ petition before this Court which was registered and numbered as C.R. No. 1221/1996 seeking a direction that the Respondent Authorities therein should not correct the land records pursuant to the judgment and decree passed in Second Appeal No.44/1983 dated 22/8/1993 as well as R.A. No. 9/93 dated 14/9/94 on the ground that the said judgment was not applicable against him as he was not a party to the appeal. The said writ petition was, however, dismissed by an order dated 4/10/2001. Being aggrieved, the petitioner No. 1 herein had preferred a Writ Appeal being Writ Appeal No.6/2002. The said Writ Appeal, however, was withdrawn with liberty to avail such remedies as available under law. It is therefore, on the basis of the said liberty, the petitioner No. 1 along with others have jointly filed a Title Suit being Title Suit No.423/2004 in the Court of the Civil Judge (Senior Division), Kamrup, Guwahati.

17. The defendants in the said suit appeared and filed written statement along with written objection. The defendants in the suit also filed an application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (for short 'the Code') for rejection of the plaint inter alia on the ground that the Civil Court had no jurisdiction to try the suit. The said application under Order VII Rule 11 CPC

was registered and numbered as Misc. (J) Case No.202/2008.

18. It appears from the records that there were various litigations pursuant to the orders being passed in the said miscellaneous application registered under Order VII Rule 11 of the Code. Finally vide an order dated 13/6/2016, the Court of the Civil Judge No. 2, Kamrup(Metro) at Guwahati observed that the plaintiffs ought to have moved the Tribunal under the Wakf Act of 1995 (for short 'the Act of 1995') for the reliefs sought in the plaint. The Court of the Civil Judge No. 2, Kamrup (Metro), Guwahati therefore instead of rejecting the plaint, returned the plaint under Order VII Rule 10 to the plaintiffs so as to present the same before the Tribunal constituted under the Act of 1995.

19. Subsequent thereto, in the year 2018, the petitioners as plaintiffs re-filed the plaint before the learned Tribunal of Assam which was registered and numbered as Title Suit No.1/2018. Along with the said plaint an injunction application was also filed seeking an injunction against the respondents from entering into the suit premises described in Schedule A to A3 and/or from disturbing the peaceful possession of the petitioners/plaintiffs, their tenants and/or from collecting rents from the petitioners' tenants and/or causing any inconvenience/ impediment in running their business/establishment and/or disturbing them in any way from conducting their day to day business from the

suit premises. The said injunction application was registered and numbered as W.T. Misc. No. 1/2018. The learned Tribunal rejected the said injunction application vide an order dated 29/10/2018. Being aggrieved, the petitioners herein challenged the way of a Civil Revision being registered and numbered as CRP(IO) No. 4365/2018 wherein this Court passed an order for maintaining status quo to the parties.

20. The defendant/Assam Board of Wakf filed a written statement. In the written statement various preliminary objections were taken against the maintainability of the suit. An application was filed by the Respondent No. 1 herein under Order XIV Rule 2 of the Code for framing of preliminary issues in the said suit and for disposal of the suit on preliminary issues. The Petitioners herein as Plaintiffs objected to the same. The learned Tribunal vide an order 15/11/2018 framed three preliminary issues which were :-

(i) Whether the suit is bad and not maintainable in view of non-service of notice under Section 89 of the Wakf Act, 1995 ?

(ii) Whether the suit is bared by the principle of res-judicata as contemplated under Section 11 of the Code ?

(iii) Whether a declaratory decree can be granted in favour of the plaintiffs seeking possessory right by way of adverse possession ?

21. The learned Tribunal vide the impugned order dated 21/8/2019 dismissed the suit on preliminary issues holding that the suit was not maintainable in view of the non-service of notice under Section 89 of the Act of 1995. It was further held that in view of Section 107 and 108A of the Act of 1995, the relief so prayed for i.e. the declaratory decree seeking possessory right by way of adverse possession cannot be granted in the suit. Under such circumstances, the Tribunal below had dismissed the suit on the said two preliminary issues. Being aggrieved and dissatisfied, the instant revision application has been filed under Article 227 of the Constitution.

22. I have heard the learned counsel for the parties and have also perused the materials on record.

23. At the outset, it is relevant to take note of that taking into account that the preliminary issue No. (ii) which pertains to whether the suit was barred by the principles of res-judicata on account of being mixed question of law and fact, the learned Tribunal below did not consider the same to be a preliminary issue that can be decided sans any evidence of the parties. However, on the preliminary issue Nos. (i) and (iii) above, the Tribunal below dismissed the suit.

24. Let this Court, therefore take into consideration as to whether the learned Tribunal was justified in dismissing the suit on the said two preliminary issues ?

The preliminary issue No. (i) pertains to as to whether the suit is bad and not maintainable in view of not effecting service of notice as mandated under Section 89 of the Wakf Act, 1995. For the purpose of deciding issue, it is relevant to take note of Section 89 of the Act of 1995 and as such the same is reproduced below :-

> 89. **Notice of suits by parties against Board**—No suit shall be instituted against the Board in respect of any act purporting to be done by it in pursuance of this Act or of any rules made thereunder, until the expiration of two months next after notice in writing has been delivered to, or left at, the office of the Board, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

25. A perusal of the above quoted provision mandates that no suit shall be instituted against the Board in respect of any act purporting to be done by it in pursuance to the Act of 1995 or any Rules framed thereunder until the expiration of 2 months next after notice in writing has been delivered to, or left at, the office of the Board, stating the cause of action**,** the name, description and place of residence of the plaintiff and the relief which the plaintiffs claims; and the plaint shall contain a statement that such notice has been so delivered or left.

26. It is apparent from a perusal of the said provisions that the requirement of notice would arise only in a case where the act complained of is an act purporting to be done by the Board in pursuance to the Act or any Rules framed

thereunder. A perusal of the Act of 1995 would show that Board has been defined in Section 3(c) of the Act of 1995 to be a Board of Wakf constituted under Sub-Section (1) or as the case may be, under Sub-Section(2) of Section 13 and shall include a common Wakf Board established under Section 106 of the Act of 1995. It is also relevant to take note that the Chief Executive Officer have been defined in Section 3(d) to mean the Chief Executive Officer appointed under Section 23(i) of the Act of 1995. Likewise, mutuwali has been separately defined in Section 3(i) of the Act of 1995 to mean a person appointed either verbally or under any Deed or instrument by which a wakf is created or by a competent authority. Therefore, the Act of 1995 have treated the terms 'Board', ' Chief Executive Officer' as well as 'Mutuwali' differently at the outset itself. The differential treatment given to the "Board', " Chief Executive Officer' as well as 'Mutuwali' can be further discerned from the provisions of the Act of 1995.

27. It would also be relevant to take note of that Section 13 of the Act of 1995 stipulates the incorporation of the Board and Section 14 stipulates the manner of composition of the Board. On the other hand, Section 23 stipulates the appointment of the Chief Executive Officer and his term of office and other conditions of service. In terms with Section 23 of the Act of 1995, the Chief Executive Officer of the Board has to be appointed by the State Government by notification in the official Gazette from a panel of two names suggested by the

Board and who shall not be below the rank of the Deputy Secretary to the State Government and in case of non-availability of a Muslim Officer of that rank, a Muslim Officer of equivalent rank may be appointed on deputation. In terms to Sub-Section (3) of Section 23 of the Act of 1995, the Chief Executive Officer shall be the ex-officio Secretary of the Board and shall be under the administrative control of the Board. In contradistinction to Section 23, Section 24 stipulates that the officers and other employees of the Board to be determined by the Board in consultation with the State Government and their appointment, their terms of office and other conditions of service shall be such as may be provided by the Regulation. It may not be out of place to mention at this juncture that in terms with Section 110 of the Act of 1995, it is the Board who with the previous sanction of the State Government has the power to make Regulations which however cannot be inconsistent with the Act of 1995 or the Rules framed thereinunder for carrying out its functions under the Act of 1995. Therefore, it would be seen that while the Chief Executive Officer of the Board is being appointed by the State Government, the other officers and employees of the Board are to be appointed by the Board in consultation with the State Government. Now coming to Section 26 of the Act of 1995, it would show that the Chief Executive Officer has the power to question a resolution passed by the Board in the circumstances mentioned in Sub-Clause (a), (b) (c) and (d) of

Section 26 and has the further power to send it for re-consideration of the Board and even after the voting made by the Board, after such reconsideration, has the power to refer the matter to the State Government along with its objections to the order or resolution and the decision of the State Government thereon shall be final.

28. Furthermore, Section 32 of the Act of 1995 enumerates the various powers and functions of the Board. The power of inspection so given to the Chief Executive Officer or persons authorized by him under Section 33 is subject to prior approval of the Board. Section 54 of the Act of 1995 is very relevant for the purpose of the instant case. The said Section is reproduced below :

> "**54. Removal of encroachment from** [1] **[waqf] 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 waqf 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 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.

(4) The Tribunal, upon receipt of such application from the Chief Executive Officer, for reasons to be recorded therein, make an order of eviction directing that the waqf property shall be vacated by all persons who may be in occupation thereof or any part thereof, and cause a copy of the order to be affixed on the outer door or some other conspicuous part of the waqf property:

Provided that the Tribunal may before making an order of eviction, give an opportunity of being heard to the person against whom the application for eviction has been made by the Chief Executive Officer.

(5) If any person refuses or fails to comply with the order of eviction within forty-five days from the date of affixture of the order under sub-section *(2)*, the Chief Executive Officer or any other person duly authorised by him in this behalf may evict that person from, and take possession of, the waqf property."

29. A perusal of the said Section empowers the Chief Executive Officer upon his consideration (but not upon the directions of the Board) whether on receiving any complaint or on its own motion that there has been an encroachment on any land, building, space or other property which is the waqf property and which has been registered as such under this Act, the Chief Executive Officer to serve upon the encroacher a notice specifying the particulars of 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 mutawali. Sub- Section (3) of Section 54 of the Act of 1995 further mandates that if after considering the objections, received during the period specified in the notice and after conducting an enquiry in such manner as may be prescribed, the Chief

Executive Officer is satisfied that the property in question is a wakf property and that there has been an encroachment on any such waqf property, the Chief Executive Officer may make an application to the Tribunal for grant of an order of eviction for removing such encroachment and deliver possession of the land, building, space or other property encroached upon to the mutawali of the waqf. In terms with Sub-Section (4) of Section 54 of the Act of 1995 the Tribunal upon receipt of such application from the Chief Executive Officer for reasons to be recorded therein make an order of eviction directing the waqf property shall be vacated by all persons who may be in occupation thereof or any part thereof, and cause a copy of the order to be affixed on the outer door or some other conspicuous part of the waqf property. The proviso to Sub-Section (4) of Section 54 is also relevant in as much as the Tribunal before making an order of eviction give an opportunity of hearing to the person. Therefore, on the basis of this Section, encroachment upon a wakf property can be removed and it is not necessary for filing a suit for removal of the encroachment, if the Chief Executive Officer considers it necessary to do so in terms with the said Section.

30. In the backdrop of the above provisions and taking note of the facts involved, as would appear from paragraph No. 17 of the plaint, the action complained of is not an action of the Board but is an action of the Chief

Executive Officer of the Board who in pursuance to section 54 of the Act of 1995 had issued notice. The cause of action in so far as 13/11/2003 and 9/5/2004 are concerned are in relation to defendant Nos. 3 and 4 having taken action in pursuance to the agreement entered into by the defendant Nos. 2 with the defendant Nos. 3 and 4. Under such circumstances, it cannot be said that the actions complained of in the suit are acts purporting to be done by the Board inasmuch as the powers and functions of the Chief Executive officer is not akin to the powers and functions of the Board. The duties of the mutawali have been specified in Section 50 of the Act of 1995. The question as to whether the mutawali had acted in pursuance to the directions of the Board in entering into the agreement on 13/11/2003 with the defendant Nos. 3 and 4 and as to whether the defendant Nos. 2, 3 and 4 had erected the sign board in pursuance to orders passed by the Board cannot be said to be acts purporting to be done by the Board sans any evidence being brought on record. Further to that, it is also relevant to take note of that the reliefs which have been sought for as already quoted herein above in the plaint are reliefs sought for on the basis of the purported right which has accrued upon the plaintiffs by efflux of time. The same also cannot be termed to be an act purporting to be done by the Board in pursuance to the act or the rules framed thereinunder. Under such circumstances, this Court is of the view that Notice under Section 89 of the Act

of 1995 is not required merely because the Board has been arrayed as a defendant.

31. In view of the above, therefore, this Court is of the opinion that the learned Tribunal erred in law in holding that the suit was not maintainable for want of notice under Section 89 of the Act of 1995.

32. The preliminary issue No. (iii) on the basis of which the suit was held to be not maintainable is as to whether a declaratory decree can be granted in favour of the plaintiffs seeking possessory right by way of adverse possession. To appreciate the said preliminary issue, it is relevant to understand the concept of adverse possession. The statute does not define adverse possession. It is a common law concept, the period of which has been prescribed statutorily by Article 65 of the Limitation Act, 1963 as 12 years. Adverse possession requires all the three classic requirements to co-exist at the same time namely *nec vi* i.e adequate in continuity, *nec clam* i.e. adequate in publicity and *nec precario* i.e. adverse to a competitor in denial of title and his knowledge. Visible, notorious and peaceful so that if the owner does not take care to know notorious facts, knowledge is attributed to him on the basis that but for due diligence he would have known it. *Animus possidendi* under hostile colour of title is required. Therefore, a trespasser's long possession is not synonymous with adverse

possession. The trespasser's possession is construed to be on behalf of the owner, the casual user does not constitute adverse possession. The owner can take possession from a trespasser at any point of time. It is also well established that adverse possession is heritable and there can be tacking of adverse possession by two or more person as the right is transmissible one.

33. As already stated above, the laws of limitation do not define adverse possession. This common law concept in terms with the Limitation Act, 1963 stipulates a period in Article 65 as 12 years. Therefore, the laws of limitation though do not define the concept of adverse possession nor anywhere contains the provision that the plaintiff cannot sue based on adverse possession but it deals with limitation to sue and extinguishment of right. In other words, the provisions of the Limitation Act more particularly Article 65 only restricts a right of the owner to recover possession before the period of limitation fixed for extinction of his right expires. Once the right is extinguished, another person acquires prescriptive right which cannot be defeated by re-entry by the owner or subsequent acknowledgement of his rights. In such a case, suit can be filed by a person whose right is sought to be defeated.

34. The Supreme Court in the case of **Ravindra Kaur Gerwal and Ors. Vs.Manjit Kaur & Ors**. reported in (**2019**) **8 SCC 729** observed that Section

27 of the Limitation Act, 1963 provides for extinguishment of right on the lapse of limitation fixed to institute a suit for possession of any property, the right to such property shall stand extinguished. It was observed that the concept of adverse possession as evolved goes beyond it on completion of period and extinguishment of right confers the same right on the possessor, which stood extinguished and not more than that. It was observed that the person in possession cannot be ousted by another person except by due process of law and once 12 years period of adverse possession is over, even the owner's right to eject him is lost and the possessory owner acquires right, title and interest possessed by the outgoing person/the owner as the case may be against whom he has prescribed. It was further observed that once the right, title or interest is acquired, it can be used as a sword by the plaintiff as well as shield by the defendant within ken of Article 65 of the Limitation Act and any person who has perfected title by way of adverse possession, can file a suit for restoration of possession in case of dispossession. The Supreme further in the said judgment and more particularly in paragraph No. 63 observed that law of adverse possession may cause harsh consequences and hence observed that it would be advisable that concerning such properties dedicated to public cause, it is made clear in the statute of limitation that no right can accrue by adverse possession.

35. In the backdrop of the above, let this Court therefore take into

consideration the preliminary issue No.(iii). The facts above mentioned would show that on 8/1/1958 a notification was issued and published in the Assam Gazette showing and publishing that the entire 14 bighas 2 kathas of land which is the Schedule-I land to the plaint and the properties standing thereon as the Wakf Estate being "Ohidur Rahman Wakf (Religious Purpose)". The said notification was put to challenge in the year 1958 itself by filing a suit which was registered and numbered as Title Suit No. 110/1958 (later on renumbered as Title Suit No. 4/1963). The said suit was initially dismissed vide a judgment and decree dated 23/4/1975. Thereupon the First Appellate Court in its judgment and decree dated 3/1/1983 in Title Appeal No.5/1975 had set aside the said notification dated 8/1/1958 holding inter alia that the suit property are the personal properties and there was no trust of wakf created by Late Ohidur Rahman. This judgment and decree dated 3/1/1983 was put to challenge before this Court in Second Appeal No. 44/1983. Vide the judgment and decree dated 24/8/1993, this Court upheld the notification dated 8/1/1958 thereby setting aside the first appellate decree and restoring the decree passed by the Trial Court. However, in the said judgment and decree dated 24/8/1993 this Court limited the waqf property to be confined only in respect to two houses and the income derived therefrom. Subsequently, in the judgment and order dated 14/9/1994 passed in Review Application No. 9/1993, it was held that the wakf

property would be the entire 14 bigha 2 kathas of land and the properties standing thereon. Therefore, it would be seen that the dispute as to whether the Schedule-I property would be a waqf property or not was finally settled on 14/9/1994 by this Court in Review Application No. 9/1993. These are admitted facts in the Plaint of Title Suit No.1/2018.

34. At this stage, it may also be relevant to take note of that the Act of 1995 came into force w.e.f. from 1/1/1996. In terms with the Act of 1995 and more particularly Section 54 of the said Act, power is vested upon the Chief Executive Officer to initiate action for removal from encroachment of the wakf property. It appears that on 27/9/2002, the Chief Executive Officer has resorted to Section 54 of the Act of 1995. Thereupon the instant suit was filed in the year 2004 claiming declaration that the plaintiffs have acquired possessory right over the suit land and the interest of the defendant Nos. 1 & 2 over the suit land stood extinguished by efflux of time and the same has been devolved and acquired by the plaintiffs along with the further declaration for confirmation of possession of the plaintiffs over the suit land. As already observed hereinabove the Limitation Act of 1963 does not define adverse possession but the period of which have been prescribed statutorily in the said Act in Article 65 is 12 years when the possession of the defendant becomes adverse to the plaintiff. It is well settled that it is only upon the extinguishment of the right of one person, the other

person who is in possession acquires prescriptive right under the Limitation Act of 1963. This aspect of the matter is clear from Section 27 of the Limitation Act, 1963, which stipulates that at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished. However, sans Section 27 and Article 65 being applicable, the right to file a suit based on title for recovery of possession is absolute and would continue irrespective of number of years of possession, hostile or otherwise. Therefore, it is only when the period prescribed under Article 65 of the Limitation Act is over by operation of law under Section 27 of the Limitation Act, the person is stopped from instituting a suit for possession of any property and his right to such property shall be extinguished.

35. In the backdrop of the above, let this Court take into consideration Section 107 of the Waqf Act, 1995. The same being relevant is quoted herein below: -

> "107. **Act 36 of 1963 not to apply for recovery of [waqf] properties**. -- Nothing contained in the Limitation Act, 1963 shall apply in any suit for possession of immovable property comprised in any [waqf] or for possession of any interest in such property."

36. A perusal of the said Section would show that nothing contained in the Limitation Act, 1963 shall apply in any suit for possession of immovable property comprised in any waqf or for possession of any interest in such property. Therefore, in terms with Section 107, Section 27 and Article 65 are

taken out of the fold and in absence of Section 27 and Article 65, the respondent/Waqf Board's right to file a suit to recover possession is absolute for all times to come. Therefore, the natural corollary would be that the plaintiff cannot seek any declaration of prescriptive right in terms to Article 65 or Section 27 of the Limitation Act, 1963. It is also relevant to take note again paragraph 63 of the judgment of the Supreme Court in the case of Ravinder Kaur Grewal (supra) wherein it was observed that it would be advisable that concerning such properties dedicated to public cause, it should be made clear in the statute of limitation that no rights can accrue by adverse possession. In the instant case, Section 107 of the Act of 1995 therefore excludes the Limitation Act, 1963 and consequently in view of what has been observed, there can be no claim for adverse possession mentioned in the present facts.

37. At this stage, this Court would also like take note of some of the judgments of the Supreme Court in this regard. The Supreme Court in the case of **T.Arivandandam Vs. T.V. Satyapal** & Anr. reported in (**1977**) **4 SCC 467** observed that if on a meaningful-- non formal --reading of the plaint, it is manifestly vexatious and meritless, in the sense of not disclosing a clear right to sue, the power under Order VII Rule 11 of the Code should be exercised by nipping in the bud at the first hearing by examining the party searchingly under Order X CPC . Paragraph 5 of the judgment being relevant is quoted herein

below :-

> "**5.** We have not the slightest hesitation in condemning the petitioner for the gross abuse of the process of the court repeatedly and unrepentently resorted to. From the statement of the facts found in the judgment of the High Court, it is perfectly plain that the suit now pending before the First Munsif's Court, Bangalore, is a flagrant misuse of the mercies of the law in receiving plaints. The learned Munsif must remember that if on a meaningful — not formal — reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order 7, Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order 10, CPC. An activist Judge is the answer to irresponsible law suits. The trial courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage. The Penal Code is also resourceful enough to meet such men, (Cr. XI) and must be triggered against them. In this case, the learned Judge to his cost realised what George Bernard Shaw remarked on the assassination of Mahatma Gandhi."
>
> "It is dangerous to be too good."

38. In another judgment of the Supreme Court in the case of **Pearlite Liners (P) Ltd. Vs. Monorama Sirsi** reported in (**2004**) **3 SCC 172**, the Supreme Court observed that when none of the relief sought for in the plaint can be granted to the plaintiff under the law, then it is a fit case that such a suit should be thrown out at the threshold. Paragraph 10 of the said judgment is quoted herein below :-

> "**10.** The question arises as to whether in the background of the facts already stated, such reliefs can be granted to the plaintiff. Unless there is a term to the contrary in the contract of service, a transfer order is a normal incidence of service. Further, it is to be considered that if the plaintiff does not comply with the transfer order, it may ultimately lead to termination of service. Therefore, a declaration that the transfer order is illegal and void,

in fact amounts to imposing the plaintiff on the defendant in spite of the fact that the plaintiff allegedly does not obey order of her superiors in the management of the defendant Company. Such a relief cannot be granted. Next relief sought in the plaint is for a declaration that she continues to be in service of the defendant Company. Such a declaration again amounts to enforcing a contract of personal service which is barred under the law. The third relief sought by the plaintiff is a permanent injunction to restrain the defendant from holding an enquiry against her. If the management feels that the plaintiff is not complying with its directions it has a right to decide to hold an enquiry against her. The management cannot be restrained from exercising its discretion in this behalf. Ultimately, this relief, if granted, would indirectly mean that the court is assisting the plaintiff in continuing with her employment with the defendant Company, which is nothing but enforcing a contract of personal service. Thus, none of the reliefs sought in the plaint can be granted to the plaintiff under the law. The question then arises as to whether such a suit should be allowed to continue and go for trial. The answer in our view is clear, that is, such a suit should be thrown out at the threshold. Why should a suit which is bound to be dismissed for want of jurisdiction of a court to grant the reliefs prayed for, be tried at all? Accordingly, we hold that the trial court was absolutely right in rejecting the plaint and the lower appellate court rightly affirmed the decision of the trial court in this behalf. The High Court was clearly in error in passing the impugned judgment whereby the suit was restored and remanded to the trial court for being decided on merits. The judgment of the High Court is hereby set aside and the judgments of the courts below, that is, the trial court and the lower appellate court are restored. The plaint in the suit stands rejected." (emphasis made upon the underlined portion)

39. Further in the judgment of the Supreme Court of **Rajendra Bajoria & Ors. Vs. Hemant Kr. Jalan** & Ors. reported in **(2021) SCC Online SC 764**, it was observed that a duty is cast upon the Court to determine whether the plaint discloses a cause of action by scrutinizing the averments made in the plaint, read in conjunction of the documents relied upon or whether the suit is barred under law. It was further observed that the underlying object of Order VII Rule 11 of the Code that when a plaint does not disclose a cause of action, the Court would not permit the plaintiff to unnecessarily protract the

proceedings. It was further observed that in such a case, necessity demands to put an end to the sham litigation so that judicial time is not wasted. In the same case, the Supreme Court upheld the judgment of the Division Bench of the High Court wherein it was observed that even after taking the averments of the plaint at the face value if no relief claimed in the plaint can be granted, the question of sending the party to trial does not arise inasmuch as it will be an exercise in futility. Paragraph 17 to paragraph 20 of the said judgment being relevant are quoted herein below :-

> "17. It could thus be seen that the court has to find out as to whether in the background of the facts, the relief, as claimed in the plaint, can be granted to the plaintiff. It has been held that if the court finds that none of the reliefs sought in the plaint can be granted to the plaintiff under the law, the question then arises is as to whether such a suit is to be allowed to continue and go for trial. This Court answered the said question by holding that such a suit should be thrown out at the threshold. This Court, therefore, upheld the order passed by the trial court of rejecting the suit and that of the appellate court, thereby affirming the decision of the trial court. This Court set aside the order passed by the High Court, wherein the High Court had set aside the concurrent orders of the trial court and the appellate court and had restored and remanded the suit for trial to the trial court.
>
> 18. Therefore, the question that will have to be considered is as to whether the reliefs as claimed in the plaint by the plaintiffs could be granted or not. We do not propose to do that exercise, inasmuch as the Division Bench of the High Court has elaborately considered the issue as to whether, applying the provisions of the said Act read with the aforesaid clauses in the Partnership Deed, the reliefs, as claimed in the plaint, could be granted or not. The relevant discussion by the High Court reads thus:
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> > "(31) Let us take the prayers one by one. The first prayer is for a declaration that the plaintiffs and the defendants are entitled to the assets and properties of the said firm as the legal heirs of the original partners. It is trite law that the partners of a firm are entitled only to the profits of the firm and upon dissolution of the firm they are entitled to the surplus of the sale proceeds of the assets and

properties of the firm, if any, after meeting the liabilities of the firm, in the share agreed upon in the partnership deed. The partners do not have any right, title or interest in respect of the assets and properties of a firm so long as the firm is carrying on business. Hence, the plaintiffs as legal heirs of some of the original partners cannot maintain any claim in respect of the assets and properties of the said firm. Their prayer for declaration of co-ownership of the assets and properties of the said firm is not maintainable in law. The second prayer in the plaint is for a declaration that the plaintiffs along with the defendants are entitled to represent the firm in all proceedings before the concerned authorities of the State of Bihar for the acquisition of its Bhagalpur land. The framing of this prayer shows that this is a consequential relief claimed by the plaintiffs which can only be granted if the first prayer is allowed. Since, in our opinion, prayer (a) of the plaint cannot be granted in law, prayer (b) also cannot be granted. Prayer (c) is also a consequential relief. Only if the plaintiffs were entitled to claim prayer (a), they could claim prayer (c). We are not on whether or not the plaintiffs will succeed in obtaining prayer (a). According to us, the plaintiffs are not even entitled to pray for the first relief indicated above as the same cannot be granted under the law of the land. Consequently, prayer (c) also cannot be granted. Prayers (d) and (e) both pertain to dissolution of the firm. Prayer (e) is for a decree of dissolution and for winding up of the affairs of the firm. Prayer (d) is for full accounts of the firm for the purpose of its dissolution (emphasis is ours). However, it is settled law that only the partners of a firm can seek dissolution of the firm. Admittedly, the plaintiffs are not partners of the said firm. Sec. 39 of the Partnership Act provides that the dissolution of partnership between all the partners of a firm is called 'the dissolution of the firm'. Sec. 40 provides that a firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners. Sec. 41 provides for compulsory dissolution of a firm. Sec. 42 stipulates that happening of certain contingencies will cause dissolution of a firm but this is subject to contract between the partners. A partnership-at-will may be dissolved by any partner giving notice in writing to the other partners of his intention to dissolve the firm, as provided in Sec. 43 of the Act. Sec. 44 empowers the Court to dissolve a firm on the grounds mentioned therein on a suit of a partner. Thus, it is clear that it is only a partner of a firm who can seek dissolution of the firm. The dissolution of a firm cannot be ordered by the court at the instance of a non-partner. Hence, the plaintiffs are not entitled to claim dissolution of the said firm. Consequently, they are also not entitled to pray for accounts for the purpose of dissolution of the firm.

(32) What should the Court do if it finds that even taking the

averments in the plaint at face value, not one of the reliefs claimed in the plaint can be granted? Should the Court send the parties to trial? We think not. It will be an exercise in futility. It will be a waste of time, money and energy for both the plaintiffs and the defendants as well as unnecessary consumption of Court's time. It will not be fair to compel the defendants to go through the ordinarily long drawn process of trial of a suit at huge expense, not to speak of the anxiety and un-peace of mind caused by a litigation hanging over one's head like the Damocles's sword. No purpose will be served by allowing the suit to proceed to trial since the prayers as framed cannot be allowed on the basis of the pleadings in the plaint. The plaintiffs have not prayed for leave to amend the plaint. When the court is of the view just by reading the plaint alone and assuming the averments made in the plaint to be correct that none of the reliefs claimed can be granted in law since the plaintiffs are not entitled to claim such reliefs, the Court should reject the plaint as disclosing no cause of action. The reliefs claimed in a plaint flow from and are the culmination of the cause of action pleaded in the plaint. The cause of action pleaded and the prayers made in a plaint are inextricably intertwined. In the present case, the cause of action pleaded and the reliefs claimed are not recognized by the law of the land. Such a suit should not be kept alive to go to trial…..”

19. We are in complete agreement with the findings of the High Court. Insofar as the reliance placed by Shri Jain on the judgment of this Court in the case of Dahiben (supra), to which one of us (L. Nageswara Rao, J.) was a member, is concerned, in our view, the said judgment rather than supporting the case of the plaintiffs, would support the case of the defendants. Paragraphs 23.3, 23.4, 23.5 and 23.6 in the case of Dahiben (supra) read thus:

> “23.3. The underlying object of Order 7 Rule 11(a) is that if in a suit, no cause of action is disclosed, or the suit is barred by limitation under Rule 11(d), the court would not permit the plaintiff to unnecessarily protract the proceedings in the suit. In such a case, it would be necessary to put an end to the sham litigation, so that further judicial time is not wasted.
>
> 23.4. In Azhar Hussain v. Rajiv Gandhi this Court held that the whole purpose of conferment of powers under this provision is to ensure that a litigation which is meaningless, and bound to prove abortive, should not be permitted to waste judicial time of the court, in the following words : (SCC p. 324, para 12)
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> > “12. … The whole purpose of conferment of such powers is to ensure that a litigation which is meaningless, and bound to prove abortive should not be permitted to occupy the time of the court, and exercise the mind of the respondent. The sword

> of Damocles need not be kept hanging over his head unnecessarily without point or purpose. Even in an ordinary civil litigation, the court readily exercises the power to reject a plaint, if it does not disclose any cause of action."
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> 23.5. The power conferred on the court to terminate a civil action is, however, a drastic one, and the conditions enumerated in Order 7 Rule 11 are required to be strictly adhered to.
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> 23.6. Under Order 7 Rule 11, a duty is cast on the court to determine whether the plaint discloses a cause of action by scrutinising the averments in the plaint [Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I, (2004) 9 SCC 512], read in conjunction with the documents relied upon, or whether the suit is barred by any law."
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> 20. It could thus be seen that this Court has held that the power conferred on the court to terminate a civil action is a drastic one, and the conditions enumerated under Order VII Rule 11 of CPC are required to be strictly adhered to. However, under Order VII Rule 11 of CPC, the duty is cast upon the court to determine whether the plaint discloses a cause of action, by scrutinizing the averments in the plaint, read in conjunction with the documents relied upon, or whether the suit is barred by any law. This Court has held that the underlying object of Order VII Rule 11 of CPC is that when a plaint does not disclose a cause of action, the court would not permit the plaintiff to unnecessarily protract the proceedings. It has been held that in such a case, it will be necessary to put an end to the sham litigation so that further judicial time is not wasted."

40. In the backdrop of the above law laid down by the Supreme Court and taking into consideration that the relief sought for under no circumstances can be granted in the instant case, in view of the fact that the plaintiffs cannot claim any right by way of adverse possession in the present facts and circumstances of the case, this Court is of the opinion that sending the parties back to trial would not only be an exercise in futility, but it would also be a complete waste of time, money and energy for both the plaintiffs and the defendants as well as unnecessary consumption of precious judicial time of the Court. It would also not be fair to compel the defendants to go through the ordinarily long drawn

process of trial of a suit at huge expenses, not to speak of the anxiety and disturbance of the peace of mind caused by the litigation hanging over one's head.

41. In view of the above, this Court though interferes with the findings arrived by the learned Tribunal in so far as the preliminary issue no. (i) is concerned, but on the preliminary issue No. (iii), this Court is of the opinion that the learned Tribunal was justified in dismissing the suit on the said preliminary issue. Accordingly, this Court is not inclined to interfere under Article 227 of the Constitution.

42. For the reasons stated above, the instant petition therefore stands dismissed. However, in the facts of the instant case, this court is not inclined to impose any cost.

JUDGE

Comparing Assistant