

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Reserved on 08.11.2023
Pronounced on : 30.12.2023

CSA No. 29/2017

Jang Bhadur & anr.

.... Petitioner/Appellant(s)

Through:- Mr. Ajay Vaid, Advocate

V/s

Muslim Auqaf Jammu &ors.

.....Respondent(s)

Through:- Mr. A. G. Sheikh, Advocate
Mrs. Monika Kohli, Sr. AAG &
Mr. Bhanu Jasrotia, GA

CORAM :

HON'BLE MR. JUSTICE VINOD CHATTERJI KOUL, JUDGE

JUDGMENT

01. This Civil Second Appeal has been filed against the judgment and decree dated 05.08.2017 passed by the learned Second Additional District Judge, Jammu in File No. 21/56-Appeal titled '*Jang Bhadur&anr. Vs. Muslim Auqaf Jammu &ors*'. whereby the judgment and decree dated 27.01.2007 passed by the learned Sub-Judge (CJM), Jammu has been upheld.

02. Brief facts of the case are that the appellants herein are the grandsons of Late Kirpa, who was co-sharer with Lehnua of land measuring 14 kanals 10 marlas falling in Khasra Nos.2324, 2325, 2326,2327, 2328, 2329 & 2330 situated at Arnia. It is pleaded in the petition that one Raji & others were the occupancy tenants of the said land and entry to this effect was reflected in the missal hakikat as well as in Khasra Girdawari. The appellants are the only

legal heirs of their grandfather and the share of late Sh. Lehnua and late Sh. Gokli has also devolved upon the appellants.

03. It is averred in the petition that the occupancy tenants continued in possession of the aforesaid land till 1947 when they left the village during riots and were presumed to have migrated to Pakistan but the father of the appellants came to know that the said occupancy tenants were killed during riots, as such, he took possession of the said land after 1947. It is further averred that the Custodian Department took over the land which in fact is the proprietary land of the appellants and the respondents started getting usufruct of the said land under the impression that the erstwhile occupancy tenants had given the said land to respondent No.1 and started leasing out the same illegally to the cultivators. It is also averred that appellant No.1 also took the land on lease in 1972 from respondent No.1 under the wrong impression that the land belongs to Waqaf but during subsistence of lease, the appellants found that the said land has not been given to Waqaf and respondent No.1 had been playing fraud with the public.

04. It is pleaded in the petition that when the occupancy tenants of the appellants i.e. predecessors, had died, the said land reverted back to the appellants as its owners and they are in possession of the same as its owners till date but respondent No.1 illegally passed an ex-parte order of eviction of the appellants from the aforesaid land under Waqaf's Act. Aggrieved of the said order, the appellants filed an appeal which was transferred to the J&K Special Tribunal. The said appeal was dismissed in default of appearance. It is further pleaded that the restoration application was also dismissed and

thereafter, the appellants filed a writ petition bearing No.163 of 1989 challenging the order of dismissal of appeal but the said writ was also dismissed. The order of the learned Single Bench was also challenged by filing LPA which was also dismissed.

05. The respondent No.1 issued a certificate of recovery dated 11.01.1988 under Section 46 (2) of the Waqaf's Act, 1978 for an amount of Rs.20,820/- which was issued without any authority, as such, the appellants filed a suit for declaration to the effect that the plaintiffs are in possession as owners whereas Raji & others were occupancy tenants and defendant No.1 has no right or interest in the land in reference with consequential relief of perpetual prohibitory injunction restraining defendant Nos. 1, 2 and 4 from executing *abinitio* void orders of eviction of plaintiffs from suit land dated 13.10.1984 and order of recovery from plaintiffs dated 11.01.1998 which was transferred to the Court of Sub Judge, CJM Jammu in which the respondents/defendants filed their written statement raising preliminary objections with respect to the maintainability of the suit especially objection that the suit is not triable by civil court and is barred by resjudicata and the suit property is Waqaf property which was leased to plaintiff No.1 and he is stopped from denying the title of the defendants to the suit property.

06. The learned Sub Judge CJM framed issues in which issues No.2 & 3 were treated as preliminary issues and learned Sub Judge decided the same in favour of the defendants and dismissed the suit vide judgment dated 27.01.2007 which was challenged by filing an appeal by the appellants and the first appeal was transferred to the court of 2nd Addl. District Judge Jammu who

vide its judgment dated 05.08.2017 has dismissed the appeal of the appellants.

07. The present appeal has been filed precisely on the following grounds:-

- (i) That the First Appellate Court was under an obligation to decide all issues afresh but the learned Second Addl. District Judge Jammu has not decided the same which were decided by the trial Court.*
- (ii) That the learned CJM Jammu has illegally decided the issue i.e. "whether the suit of the plaintiff is hit by resjudicata as matter in issue has since been set at rest by this court" against the plaintiffs/appellants and the previous judgments have not been decided on merits but the authority under Waqaf Act has passed an ex-parte order without summoning the appellants herein and the appeal challenging the order passed by authority has been dismissed in default and the writ and thereafter LPA challenging the same order have been dismissed but no judgment on the merits and issues involved in the case has been passed.*
- (iii) That the plaintiffs have challenged the validity of Sections 5, 38, 45, 46, 48, 56 and 62 of the J&K Waqaf Act 2001 in the suit filed by them and such estates can be decided by the civil court and the authorities under the Waqaf Act cannot grant such relief. The learned trial court has decided another issue i.e. whether the suit is not cognizable by the civil court as suit property is a Waqaf property" against the plaintiffs and the said issue has been decided incorrectly by the learned trial court and has also been upheld without deciding it afresh. The learned first appellant Court have challenged the validity of the provisions of J&K Waqaf Act, therefore, the authorities under Waqaf Act were incompetent to decide such issue and the trial Judge should have made a reference to question with respect to the validity of challenge to the provisions of Section 113 of CPC and such power can be exercised suo-moto by the Court but the trial court has failed to exercise power as the validity of the provisions of Waqaf Act was raised in the case.*

- (iv) *That the provisions laid down in Sections 5, 38, 45, 46, 48, 56 and 62 of the J&K Waqaf Act 2001 are illegal as the said provisions are in violation of the cardinal principle of law that no one can be judge in his own case and the validity of the aforesaid provisions has not been upheld by the Hon'ble Court or the Hon'ble Supreme Court of India."*

08. The appellants have proposed the following questions as substantial questions of law:-

- (i) *When the earlier case has been dismissed in default, whether the principles of res judicata would be applied in the subsequent suit?*
- (ii) *When the authority under J&K Waqaf Act 2001 are incompetent to decide the issue of validity of provisions of Sections 5, 38, 45, 46, 48, 56 and 62 of the J&K Waqaf Act 2001, whether in such case the jurisdiction of the civil court is barred?*
- (iii) *That in case validity of Section 5, 38, 45, 46, 48, 56 and 62 of the J&K Waqaf Act 2001 has been challenged in the suit, whether the trial judge could have suo-motu exercise the power and made reference to the Hon'ble High Court by formulating the question of validity of Sections 5, 38, 45, 46, 48, 56 and 62 of the J&K Waqaf Act 2001?*
- (iv) *That in case the civil court was not having jurisdiction, whether the trial court should have returned the suit to the plaintiffs to file the same before the authority appointed by the J&K Waqaf Act for adjudication of the claim of the plaintiffs?*
- (v) *Whether the provisions of Sections 5, 38, 45, 46, 48, 56 and 62 of the J&K Waqaf Act 2001 are ultra virus of the Constitution as being violative of Article 14 of the Constitution as also are violating the cardinal principles that no one can be judge in his own cause?*

09. I have considered the arguments put forth by learned counsel for the

parties and gone through the trial Court's as well as the appellate Court's judgments.

10. Mr. Ajay Vaid, learned counsel appearing on behalf of the appellants submits that the aforesaid substantial questions of law arise in this appeal which are required to be determined/decided by this Court.

11. On the other hand, Mr. A. G. Sheikh, learned counsel appearing on behalf of respondent No. 1 submits that no substantial question of law arises in this appeal and the proposed substantial questions of law are neither substantial nor such questions arise for determination in this case.

12. Recently, the Hon'ble Supreme Court discussed that *under the Code of Civil Procedure, 1908 (CPC), could a Second Appeal be entertained by the Appellate Court without involvement of a substantial question of law?* This was the basic controversy involved in the case of *Nazir Mohamed v. J. Kamala & Ors.*, reported as (2020) SCC OnLine SC 676. The Hon'ble Supreme Court discussed the mandate of Section 100 of CPC and postulated various interpretations.

“100. Second Appeal.— (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.”

13. The provision, as contained in Section 100 of CPC, restricts the right of second appeal to only those cases where a substantial question of law is involved. The existence of a ‘substantial question of law’ is *sine qua non* for existence of jurisdiction under Section 100 of the CPC.

14. The second appeal, thus, can be admitted when a substantial question of law arises for consideration in the said appeal. A substantial question of law is a question of law which is debatable, which has not been previously settled by the law of land or a binding precedent and such question must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned.

15. To be a question of law "involving in the case" there must be first, a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. Until and unless substantial question of law is involved, second appeal cannot be entertained.

16. The question arises as to whether, after going through the record of the case and the appeal, substantial questions of law arise in this case for consideration or not, and if so, whether the proposed questions amount to substantial questions of law., which is to be seen as to whether any substantial question of law arises in this case for determination of the Court. In case, any question arises as to whether substantial questions of law proposed by the appellant would be substantial questions of law for consideration. From the record, it reveals that the reference was made to the eviction authority under J&K Waqafs Act, 1978 on 05.09.1981 and the said reference was decided by the authority on 13.10.1984 and by virtue of the said order, the appellants herein or any other person or persons who were in occupation of the Waqafs property or any party thereof were to vacate the said premise within 15 days of the receipt of the order, failing which, Collector of the district was to take the eviction directive to make the eviction coercive means in terms of Section 44 (2) and Section 45 of the Act.

17. Notice was issued to the appellants in terms of Section 41(1) of the Act.

The said order of eviction passed by the authority under the J&K Waqfs Act was challenged by the appellants herein in a revision petition before the J&K Special Tribunal and the said order of eviction was upheld and the said revision petition came to be dismissed by the Tribunal vide its order dated 30.11.1998. The said order of the Tribunal again came to be challenged in the writ petition by the appellants in WP(C) No. 163/1989 and the said writ petition came to be dismissed by the High Court on 08.11.1990. The appellants, thereafter, approached the Division Bench by filing the LPA and the said appeal also came to be dismissed and the order of eviction was upheld.

18. What was held by the trial court was that the property in question was the Waqfs property and was illegally occupied by the appellants herein. These findings have been upheld up to the High Court in the first round of litigation. What has been held is that the appellants were in illegal occupation and, therefore, eviction was ordered by invoking the provisions of the J&K Waqfs Act. After having failed in the first round of litigation, the appellants approached civil court by filing a civil suit. The trial court framed 8 issues and treated issue No. 2 and 3 as preliminary issue. The preliminary issues framed by the trial court are as under: -

2. *Whether suit is not cognizable by the civil court as suit property is Waqaf property?*
3. *Whether suit of the plaintiff is hit by res-judicata as matter in issues has since been set at rest by various courts?*

19. The trial Court while dealing with these issues decided the same in favour of the defendants and dismissed the suit. The relevant portion of the judgment passed by the trial court is as follows:-

“In the present case Authorities under the Waqafs Act have decided that suit property is a Waqaf property and an order of eviction was passed against plaintiffs by the Competent Authority. This order was challenged in appeal by the plaintiffs before the Special Tribunal, which was dismissed. Plaintiffs filed a writ petition before the Hon'ble High Court challenging the said decision of appellate authority but the writ petition was also dismissed. Even the LPA against the order of Id. Single Judge has been dismissed. these are all admitted facts. Even if it is assumed that plaintiffs did not raise the contentions, which have been raised in the present suit, before the Authorities, which decided the earlier round of litigation between the parties, yet it will be deemed that the contentions raised in this suit were directly and substantially in issue in that round of litigation. Explanation IV to S.11 CPC is very clear about it. The Authorities under the Waqafs Act cannot be termed as Court and the proceedings before these authorities cannot be called as a suit, yet the said Authorities are Courts of limited jurisdiction and by virtue of Explanation VI to S.11 CPC, a decision of said authorities on an issue will operate as res-judicata in a subsequent suit. The questions raised in the present suit pertain to status of suit property and the validity of the orders of eviction passed under the provisions of Waqafs Act. Both these question are deemed to have been decided by the Eviction Authority, Special Tribunal and the Hon'ble High Court and said decision has attained finality. These issues cannot be reopened by way of present suit in view of the provisions of S.11 of CPC.”

20. Thus, it is clear from the judgment passed by the trial court that the suit was triable by the authority under J&K Waqafs Act and trial by the

civil court was barred. It was also held by the trial court that the suit was hit by explanation under Section 11 of the Code of Civil Procedure.

21. The said findings of the trial Court were challenged in appeal which was filed by the appellant before the Appellate Court on 14.03.2007, and the said appeal was dismissed by the appellate court on 05.08.2017, and the judgment and decree of the trial court was upheld.

22. Now the issues which were to be considered in these proceedings were whether the property was Waqafs property and whether the appellants were in illegal occupation and whether the suit was hit by Section 11 of the Code of Civil Procedure. There is no dispute with regard to the fact that proceedings were initiated by the respondents Muslim Auqaf Jammu by making a reference under Section 43 of the J&K Waqafs Act. The appellant did not contest the said proceedings and after having recorded the evidence, the trial court held that the property in question was Waqafs property and appellants were in illegal occupation and, therefore, order of eviction was passed against them. The said order of eviction has been upheld by the Division Bench of this Court in LPA filed by the appellant. This finding is being challenged by the appellant in second round of litigation by claiming that he is seeking a declaration that the eviction order passed in 1981 was bad and is required to be set aside.

23. The appellants have proposed following questions which he claims to be substantial questions of law to be decided by this Court in exercise of its powers under section 100 of the CPC.

24. The first question that the appellants have so proposed reads as under:

“When the earlier case has been dismissed in default, whether the principles of res judicata would be applied in the subsequent suit?”

25. The record of the entire proceedings conducted before the authority under the Waqaf Act and before the Trial Court and First Appellate Court would show that Authority under the Waqaf Act has passed an ex-parte order of eviction against the appellants from the aforesaid land. The appellants, having felt aggrieved of the said order, had challenged it in appeal which was transferred to the J&K Special Tribunal. The Tribunal would dismiss the appeal in default of appearance of the appellants. The appellants had then filed a restoration application before the J&K Special Tribunal, which was also dismissed. The appellants had then filed a Writ Petition bearing No.163 of 1989 challenging the order of dismissal but the said writ petition was also dismissed. The appellant had then challenged the order of the Ld. Single Bench by filing LPA, which was also challenged. The state of proceedings would show that the appellants have challenged the order of dismissal of the appellants before the High Court both in writ petition and LPA but the High Court has dismissed the writ petition and LPA. It would suggest that the order passed by the authority under the Waqaf Act has attained finality and the round of litigation has come to an end. The legal principle that litigation must come to an end would find application in the instant case that litigation must come to an end in the interest of public is also the principle on which the concept of res judicata is

founded. That the principle of res judicata contained in Section 11 of the CPC may not strictly apply in the instant case but given the facts and circumstances of the case and the issues raised in the suit, the conclusion that can be drawn is that the trial having borrowed the aid of explanation 4 to Section 11 CPC, can be justified. The Trial Court has held that even if it has assumed that the plaintiffs did not raise the contention which have been raised in the present suit before the authority which decided the earlier round of litigation between the parties, yet it will be deemed that the contention was raised in the suit while directly or substantially in issue in that round of litigation. This Court is satisfied that the questions raised in the suit pertaining to the status of the suit property and validity of the orders of eviction passed under the provisions of the Wakf's Act, the questions are deemed to have been decided by the eviction authority, Special Tribunal and the High Court and they cannot be re-opened in the suit. Further the Trial Court has not the authority to sit on the appeal against the order of the authority constituted under the Wakf Act. Thus, the question framed by the appellants cannot be said to be a substantial question of law requiring indulgence of this Court.

26. The appellants have proposed the 2nd question which reads as under:

“When the authority under J&K Waqaf Act 2001 are incompetent to decide the issue of validity of provisions of Sections 5, 38, 45, 46, 48, 56 and 62 of the J&K Waqaf Act 2001, whether in such case the jurisdiction of the civil court is barred?”

27. This question cannot be said to be constituted a substantial question of law requiring the indulgence of this Court. The appellants have denied the validity of 5, 38, 45, 46, 48, 56 and 62 of the J&K Waqaf Act 2001 in the suit instituted by them and contended that the validity of such sections can be decided by the Civil Court. The contention of the appellants does not appear to be justified in view of the law contained in the Waqf's Act. The Wakf Act is a self-contained code and contains provisions which deal with the power to decide if the property is a Wakf's property and contains procedure for eviction of unauthorized occupants of the Waqaf powers/properties. Section 62 of the Act relates to bar on jurisdiction of Civil Courts and provides that Section 62 of Wakf's Act, which reads as under:

***“62. Bar on jurisdiction of Civil Courts
Notwithstanding anything contained in any other law for the time being in force, no suit or other legal proceedings shall lie in any civil court or tribunal in respect of any dispute, question or other matter relating to the title of any Waqaf or Waqaf property or any other matter which is required by, or under, this Act to be determined by the authorities under the Act.”***

28. Thus, it can be said that the civil court is debarred under the provisions of S.62 to deal with any dispute, question or other matter relating to the title to any Wakf's Act or any other matter which is required by or under the Act to be determined by the Authorities under the Act. The question so framed as to whether the jurisdiction of the civil Court to decide the issue of validity of the provisions of Sections 5, 38, 45, 46, 48, 56 and 62 of the J&K Waqaf Act 2001, cannot constitute a

substantial question of law in view of the facts and circumstances of the case and in view of the perpended on the subject.

29. The 3rd question proposed as substantial question of law by the appellants reads as under:

That in case validity of Sections 5, 38, 45, 46, 48, 56 and 62 of the J&K Waqaf Act 2001 has been challenged in the suit, whether the trial judge could have suo-motu exercise the power and made reference to the Hon'ble High Court by formulating the question of validity of Sections 5, 38, 45, 46, 48, 56 and 62 of the J&K Waqaf Act 2001?

30. The provision that deals with making reference to the High Court is contained in Section 113 of the Code of Civil Procedure, which reads as under:

“Section 113. Reference to High Court;- Subject to such conditions and limitations as may be prescribed, nay Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit.

Provided that where the Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation or of any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of opinion that such Act, declared by the High Court to which that Court is subordinate or by the Supreme Court, the Court shall state a case setting out its opinion and the reasons therefore, and refer the same for the opinion of the High Court.”

31. The said question as proposed by the appellants to be a substantial question of law cannot be accepted. The jurisdiction of the Trial Court to deal with the questions arising in the suit relating to Waqaf's

property and dispute relating to the title to Waqaf's property is expressly debarred under section 62 of the Waqaf's Act. The validity of Sections 5, 38, 45, 46, 48, 56 and 62 of the J&K Waqaf Act 2001, could not, thus, arise before the Civil Court for its determination. The jurisdiction of the Trial Court to deal such question being expressly barred under law containing S. 62 of the Waqaf's Act, had thus, made it unnecessary for the Civil Court to refer matter to the High Court. When the Civil Court/Trial Court had not a jurisdiction to deal with the matter in issue in the suit, the question that it should have referred the matter for the opinion of the High Court cannot be contemplated.

32. The 4th question proposed by the appellants as substantial question of law reads as under:

That in case the civil court was not having jurisdiction, whether the trial court should have returned the suit to the plaintiffs to file the same before the authority appointed by the J&K Waqaf Act for adjudication of the claim of the plaintiffs?

33. The Trial Court has dismissed the suit of the appellants by deciding the preliminary issue of whether the suit is not cognizable by the Civil Court as suit property is Waqf's property and whether the suit of the plaintiff is hit by res judicata is matter in issue has since been set at rest by various Courts. The Trial Court has, thus, decided the suit of the appellants/plaintiffs on the aforesaid preliminary issue and dismissed the same. The Trial Court had the jurisdiction under Rule 2 of Order 14 to decide the case on preliminary issue. **Order 14 Rule 2** reads as

under:

***“2. Court to pronounce Judgment on all issues:-
 (1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.
 (2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-
 (a) the jurisdiction of the Court, or
 (b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.”***

34. Thus, the law contained in Rule 2 of Order 14 clearly empowers the civil Court to dispose of a case of preliminary issue if that issue relates to the jurisdiction of the Court or a bar to the suit created by any law for the time being in force. The Trial Court in the instant case has postponed the settlement of other issues after it framed its opinion that the suit can be decided on an issue of law relating to the jurisdiction of the Court and a bar to the suit created by the Waqaf's Act for the time being in force. The law on the subject is, thus, expressly laid down in the statute. The Trial Court was under no obligation to return the suit to the appellants/plaintiffs for being filed before the Authority constituted under the Waqaf's Act.

35. The 5th question proposed on substantial question of law by the appellants reads as under:

“Whether the provisions of Sections 5, 38, 45,

46, 48, 56 and 62 of the J&K Waqaf Act 2001 are ultra virus of the Constitution as being violative of Article 14 of the Constitution as also are violating the cardinal principles that no one can be judge in his own cause?

36. The Trial Court could not assume the jurisdiction to deal with the constitutional question to declare as ultra virus the provisions of Section 5, 38, 45, 46, 48, 56 and 62 of the J&K Waqaf Act 2001. The question relating to the constitutional validity or otherwise of the Waqaf's Act can be decided by the High Court in exercise of its constitutional powers. The question to whether the provisions of 5, 38, 45, 46, 48, 56 and 62 of the J&K Waqaf Act 2001 are ultra virus to the constitution was having a question before the Trial Court and could not have been decided by the Trial Court. Hence, the proposition that question No.5 is substantial question of law cannot be accepted.

37. In view of the facts and circumstances of the case, in opinion of this Court the appellants have failed to satisfy this Court that any substantial question of law arises in this appeal. As such, the instant appeal is not maintainable and the same is, accordingly, dismissed.

(VINOD CHATTERJI KOUL)
JUDGE

JAMMU
RAM MURTI/PS
30.12.2023

<i>Whether the order is speaking</i>	:	<i>Yes/No</i>
<i>Whether the order is reportable</i>	:	<i>Yes/No</i>