

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.66 of 2012

Manohar Lal, S/o Bajamal Sindhi, Aged about years, R/o Near Khorbhara Hotel, Amapara Ward, Dhamtari, Tahsil & District Dhamtari (C.G.)

(Defendant)
---- Appellant

Versus

Anjuman Islamia Registered Wakf Sanstha, Through President, Anjuman Islamia, Dhamtari, Sadar Bazar, Dhamtari, Tahsil & District Dhamtari (C.G.)

(Plaintiff)
---- Respondent

For Appellant / Defendant: -

Mr. Kishore Bhaduri and Mr. Sabyasachi Bhaduri,
Advocates.

For Respondent / Plaintiff: -

Mrs. Hamida Siddiqui and Mr. Rahul Agrawal,
Advocates.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

15/03/2021

1. This second appeal preferred by the defendant / appellant herein was admitted for hearing on 25-4-2013 on the following substantial question of law:

“Whether suit and appeal filed by unregistered Wakf is bar under Section 87 of the Wakf Act, 1995?”

(For the sake of convenience, parties hereinafter will be referred as per their status shown and ranking given in the plaint before the trial Court.)

2. The plaintiff / respondent herein filed suit for ejectment of the suit accommodation stating inter alia that the plaintiff has given the suit accommodation to the defendant / appellant herein on

rent at the rate of ₹ 100/- per month which was according to the English calendar month. It was further pleaded that the suit house was bestowed on the respondent / plaintiff by grant dated 21-9-1961 given by Masoombi, wife of Mastana Mian. Thereafter, the monthly rent was enhanced to ₹ 150/- per month. The defendant stopped payment of rent from September, 1999 and notices dated 25-9-1999 and 2-7-2000 were served and the suit house was directed to be vacated for the need of the plaintiff Wakf and vacant possession was also directed to be given back to the plaintiff, but it was not handed-over, as such, tenancy was terminated and suit was filed for decree of eviction, ejectment and arrears of rent.

3. Resisting the suit, the defendant filed written statement stating inter alia that that the suit property is the Wakf property and jurisdiction of civil court is barred and as such, the plaintiff is not entitled for decree for ejectment.
4. The trial Court in order to decide the lis, framed as many as eleven issues and held that the plaintiff is the title holder of the suit land and the same was given on rent to the defendant for residential purpose in the year 1990, the suit accommodation is required for the bona fide need of the plaintiff, the defendant has not paid rent and has also not perfected his title by adverse possession and the suit is not barred by Section 85 of the Waqf Act, 1995. It was further held by the trial Court that from the date of registered Wakf deed dated 21-9-1961 (Ex.P-2), the plaintiff is landlord and owner of the suit accommodation and accordingly, granted decree for eviction.
5. Being aggrieved by the judgment & decree of the trial Court

granting decree in favour of the plaintiff, the defendant preferred first appeal before the first appellate Court and the first appellate Court by its impugned judgment & decree affirmed the judgment & decree of the trial Court decreeing the suit against which this second appeal has been preferred by the defendant in which one substantial question of law based on Section 87 of the Waqf Act, 1995 has been formulated which has been set-out in the opening paragraph of this judgment for the sake of completeness.

6. Mr. Kishore Bhaduri, learned counsel appearing for the appellant herein / defendant, would submit that the suit filed by the plaintiff is barred under Section 87 of the Waqf Act, 1995, as it was an unregistered Wakf which is barred by Section 87 of the said Act and therefore suit and appeal filed were not maintainable. Though issue was not framed by the trial Court on this question and both the Courts below have not dealt with the said issue, but in the light of the decisions of the Supreme Court in the matters of Bhagwati Prasad v. Chandramaul¹ and Bhanwar Lal v. T.K.A. Abdul Karim Through N.K. Mohd. Mustafa², the defendant is not barred from raising the question based on Section 87 of the Waqf Act, 1995, as such, the impugned decree deserves to be set aside and the second appeal deserves to be allowed.

7. Mrs. Hamida Siddiqui, learned counsel appearing for the plaintiff / respondent herein, would submit that this plea was never raised by the defendant in the written statement specifically before the trial Court and therefore no issue was struck by the

1 AIR 1966 SC 735

2 1993 Supp (1) SCC 626

trial Court and it has not been the subject matter of dispute between the parties, otherwise appropriate pleading could have been raised by way of amendment in the memo of appeal and no such ground based on Section 87 of the Waqf Act, 1995 was raised by the first appellate Court also. Finding no ground to challenge the judgment & decree of the first appellate Court as well as that of the trial Court, a new ground has been projected which cannot be taken cognizance of in this second appeal at the second appellate stage by taking the respondent / plaintiff at surprise, as such, the second appeal deserves to be dismissed.

8. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.
9. It was the case of the plaintiff before the trial Court that the suit property was held by Masoombi and by registered wakf deed, she made a Wakf in favour of the plaintiff which is registered wakf under the provisions of the Waqf Act, 1995 on the basis of which, the plaintiff is title holder of the suit land and in that capacity, the plaintiff is also landlord and the suit accommodation was let out to the defendant when rent was not paid, notices were served and tenancy was terminated and thereafter, suit for eviction was filed in which the defendant appeared and though in the written statement, halfhearted plea of non-registration of Wakf has been taken, but it appears to have not been pressed and consequently, no issue was struck by the trial Court and ultimately, the suit was decreed repelling all the grounds raised by the defendant holding the plaintiff as title holder and landlord of the suit accommodation and finding

that tenancy has been terminated and suit is not barred by Section 85 of the Waqf Act, 1995, suit for ejectment was decreed. Being aggrieved against the judgment & decree of the trial Court, the defendant preferred first appeal, even in the memo of appeal, ground under Section 87 of the Waqf Act, 1995 is absolutely missing and consequently, the first appellate Court dealt with all the points raised by the defendant and finding no merit in the appeal has dismissed the appeal. Ground under Section 87 of the Waqf Act, 1995 was not the subject matter of discussion before the first appellate Court and that is the reason why the first appellate Court did not deal with the point under Section 87 of the Act.

10. Section 87 of the Waqf Act, 1995 provides as under: -

“87. Bar to the enforcement of right on behalf of unregistered wakfs.—(1) Notwithstanding anything contained in any other law for the time being in force, no suit, appeal or other legal proceeding for the enforcement of any right on behalf of any wakf which has not been registered in accordance with the provisions of this Act, shall be instituted or commenced or heard, tried or decided by any court after the commencement of this Act, or where any such suit, appeal or other legal proceeding had been instituted or commenced before such commencement, no such suit, appeal or other legal proceeding shall be continued, heard, tried or decided by any court after such commencement unless such wakf has been registered, in accordance with the provisions of this Act.

(2) The provisions of sub-section (1) shall apply, as far as may be, to the claim for set-off or any other claim made on behalf of any wakf which has not been registered in accordance with the provisions of this Act.”

11. This provision emphasizes the importance of registration of wakfs under this Act. Registration is imperative under Section

36 of the Waqf Act, 1995 and failure to do so involves penal consequences under Section 61 of the said Act. This Section further bars the enforcement of any right on behalf of unregistered wakfs in any court of law. This provision is analogous to Section 69 of the Indian Partnership Act.

12. It is stated at the Bar that with effect from 1-11-2013, Section 87 of the Waqf Act, 1995 was repealed by the Wakf (Amendment) Act, 2013 (27 of 2013). Admittedly, the ground of suit being barred under Section 87 of the said Act was not pressed by the defendant before the trial Court while filing written statement, though initially it has been taken, but no issue was framed by the trial Court in this regard and the defendant participated in the proceeding of the suit and allowed the judgment to be delivered on all other grounds which he has raised and for which issues were framed by the trial Court including the ground under Section 85 of the Waqf Act, 1995 holding that the jurisdiction of trial Court is barred and ultimately, decree was passed on the basis of bona fide need of the plaintiff. In appeal, again, no such ground based on Section 87 of the Waqf Act, 1995 was raised before the first appellate Court at the time of argument inviting the attention of the first appellate Court that suit is barred by Section 87 of the said Act. Now, for the first time, this question of law has been formulated in this second appeal. The plea of bar under Section 87 of the Waqf Act, 1995 is a mixed question of law and fact. It is not the pure question of law.

13. In the matter of Krishnapasuba Rao Kundapur (dead) after him his I.r. and another v. Dattatraya Krishnaji Karani³, it has been

held by the Supreme Court that plea not raised in trial Court or first appellate Court, party cannot raise it for the first time before High Court.

14. In the matter of Chiman Ram Bhatar and others v. Ganga Saha and another⁴, the Orissa High Court while dealing with Section 69 of the Partnership Act, 1932, which is analogous to Section 87 of the Waqf Act, 1995, held that the plea that the suit is not maintainable by reason of Section 69 of the Partnership Act cannot be raised for the first time in second appeal and same is mixed question of law and fact, and it cannot be decided without a finding of fact whether the firm was or was not actually registered at the time of the institution of the suit unless it is pleaded in the written statement.

15. It is the case of the plaintiff that by registered wakf deed, the property has been made subject matter of wakf in favour of the plaintiff by Masoombi in the year 1961. Therefore, the defendant ought to have raised specific plea which has not been raised. Particularly when the suit is for ejectment and arrears of rent and the relationship of landlord and tenant between the parties and bona fide need as claimed have to be established for decree for ejectment. Finding that tenancy has been terminated and bona fide need of the plaintiff is established for residence of its nayab imam, the trial Court has granted decree which has been affirmed by the first appellate Court. The finding of relationship of landlord-tenant between the parties, termination of tenancy and need of the plaintiff has been found established by both the Courts below in suit for ejectment. As such, since initially the

4 AIR 1961 Orissa 94

defendant has not raised any specific ground under Section 87 of the Waqf Act, 1995, at the second appellate stage, he cannot be permitted to take new ground to the surprise of other side in absence of any factual foundation led before the trial Court, as Order 8 Rule 2 of the CPC provides that the defendant must raise, by his pleading, all matters which show the suit not to be maintainable and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise. The decisions cited by Mr. Bhaduri, learned counsel for the defendant, namely Bhagwati Prasad (supra) and Bhanwar Lal (supra), in any way, do not support him as parties did not go for trial on the issue based on Section 87 of the Waqf Act, 1995. As such, the defendant is barred from taking the plea based on Section 87 of the said Act in this second appeal. Consequently, the first appellate Court has not committed any legal error in affirming the judgment and decree of the trial Court. The substantial question of law is answered accordingly.

16. In the result, the second appeal is dismissed leaving the parties to bear their own cost(s).

17. Appellate decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge