

(2015) 06 GAU CK 0047

In the Gauhati High Court

Case No : Regular Second Appeal No. 220 of 2012

Uma Kanta Banik

APPELLANT

Vs

Ratan Lal Banik and Others

RESPONDENT

Date of Decision : 02-06-2015

Acts Referred:

Assam Non-Agricultural Urban Areas Tenancy Act, 1955 — Section 2, 6
Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2015) 06 GAU CK 0047

Hon'ble Judges : Suman Shyam, J

Bench : Single Bench

Advocate : R. Choudhury, for the Appellant; P.K. Deka, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Suman Shyam, J—This Second Appeal has been preferred against the concurrent judgment and decree dated 29.06.2012 passed by the learned Additional District Judge, Cachar, Silchar dismissing the Title Appeal No. 10/2006 thereby affirming the judgment and decree dated 08.03.2006 passed by the learned Civil Judge (Senior Division) No. 1, Cachar, Silchar in Title Suit No. 84 of 2002.

2. The plaintiffs' case, stated in brief, may be noticed as follows. The suit schedule land and property belongs to Haji Abdul Rahman Barlaskar Wakf Estate represented by its Mutawalli Aatur Rahman Barlaskar (proforma defendant No. 2). One Sri Lakshmi Kanta Singh Choudhury took settlement of the land measuring 1B 3K 9Ch 12G appertaining to dag No. 533 of R.S. Patta No. 41 surveyed in 2nd R.S. Patta No. 84 of Dag No. 1233 of Mouza Silchar Town, Malugram, Ph-Barakpar, district Cachar on behalf of himself and his three brothers from the proforma defendant No. 2 vide registered lease deed dated 22.06.1977 for period of 21 years. As such Lakshmi Kanta Singh Choudhury and his brothers, pursuant to the said settlement, were possessing the land as non-evictable tenants by constructing permanent dwelling houses over a portion of

the land and also by paying annual rent to the landlord i.e. the proforma defendant No. 2. Subsequently, the said Lakshmi Kanta Singh Choudhury and his three brothers had executed a registered sale deed dated 21.03.1979 selling the tenancy right over 7 katha vacant land out of the said 1B 3K 9Ch 12G land in favour of plaintiff Nos. 1 and 3 for valuable consideration and delivered possession in respect thereof with specific boundary. After purchase of the tenancy right in respect of the said plot of land covered by dag No. 1233 of 2nd R.S. Patta No. 84 of Mouza- Silchar Town, Ph- Barakpar, the plaintiff Nos. 1 and 3 took settlement of the aforesaid land from the proforma defendant No. 2 for a period of 21 years on condition of paying annual rent at the rate of Rs. 50/- per year as per the Bengali Calendar on the basis of registered lease deed which was executed on 12.04.1979. Besides the above, Chandra Kanta Singh Choudhury had executed another registered deed of sale dated 02.08.1979 thereby transferring by way of sale, the tenancy right in respect of another plot of land measuring 4 kathas covered by dag No. 1233 of 2nd R.S. Patta No. 84, Mouza- Silchar Town in favour of plaintiff Nos. 1 and 2 within specific boundary which land is adjacent to the aforementioned plot of land measuring 7 Kathas. Pursuant to the execution of the registered deed of sale dated 2.8.79, Chandra Kanta Singh Choudhury had delivered possession of the aforesaid plot of land measuring 4 katha to plaintiff Nos. 1 and 2 whereafter, the said plaintiffs also took oral settlement of the 4 katha land from the proforma defendant No. 2 on condition of paying annual rent at the rate of Rs. 20/- per year as per Bengali Calendar. In this way the plaintiffs claimed to have become tenant under the proforma defendant No. 2 in respect of total area of land measuring 11 katha described in Schedule-I of the plaint on condition of payment of annual rent at the rate of Rs. 70/- per year.

3. The plaintiffs' further case is that after getting settlement in respect of the aforementioned plot of land measuring 11 kathas they had got their names mutated in respect of holding Nos. 117A and 118A of Ward No. 2, Silchar Municipal Board. Thereafter, the plaintiffs constructed one RCC building in the front portion of the Schedule-I land and completed the ground floor leaving the backside in the possession of the plaintiff No. 1 and the other rooms remained in possession of the plaintiff No. 3. Subsequently, in the year 1984, the plaintiffs had constructed another two storied RCC building over the land covered under Holding No. 118A after obtaining due permission from the concerned authorities. However, due to financial constraints, the plaintiffs could not proceed with the construction work. Subsequently, both the holding Nos. 117A and 118A of Ward No. 2 of Silchar Municipal Board had been converted into a single holding bearing No. 414 of the said Ward standing jointly in the name of the plaintiffs. In this manner, the plaintiffs have been enjoying the possession in respect of the Schedule-I land since the year 1979 as tenant under the proforma defendant No. 2 thereby acquiring the status of non evictable tenants.

4. The defendant No. 1 being the eldest brother of the plaintiffs, who was serving in Indian Army, was dismissed from service. He had created certain problem with

his wife as a result of which a criminal case had to be instituted and thereafter his wife had deserted him and started residing with her mother in her matrimonial home. The defendant No. 1 was somehow managing to carry on with his livelihood by residing in various rented houses from time to time and in the year 1993 the defendant No. 1 had approached the plaintiff No. 3 in a helpless condition with a request to permit him to stay in a portion of her dwelling house situated in the front side of the Schedule-I premises for a month or two with a promise to vacate the same after finding out an alternative rented accommodation so as to shift along with his family. Taking note of the precarious condition of the defendant No. 1 and also believing the assurance given by him, the plaintiff No. 3 allowed the defendant No. 1 to stay for two months in the ground floor of the room, more fully described in Schedule-II to the plaint. However, instead of honouring his commitment of vacating the premises after two months, the defendant No. 1 continued to occupy the suit premises on one pretext or the other. Such being the position, the plaintiff No. 3 had issued a notice dated 25.7.95 asking him to vacate the said premises. However, despite receipt of the said notice the defendant No. 1 refused to comply with the same and on the contrary started picking up quarrels with the plaintiffs on flimsy issues. Not to speak of vacating the premises, the defendant No. 1 had even made attempts to forcibly occupy the ground floor vacant portion from the backside of the RCC building by illegally placing split bamboo walls and when an objection was raised on behalf of the plaintiffs, the defendant No. 1 had filed a case against the plaintiff No. 1. The defendant No. 1 had also disconnected the cable line and refused to vacate the suit premises. As such, the plaintiffs were compelled to institute the above mentioned suit, inter alia, praying for a decree declaring their tenancy right over the Schedule-I land; for eviction of the defendant No. 1 from the Schedule-II rooms; for permanent injunction and for other consequential reliefs.

5. Upon receipt of summons in connection with Title Suit No. 84/2002, the defendant No. 1 had entered appearance but as he could not file his written statement within the time, hence the suit proceeded ex parte against him. The proforma defendant No. 2 did not contest the suit despite receipt of summons.

6. The plaintiffs' side adduced evidence and the defendant No. 1 was allowed to cross-examine such witnesses. Eventually, on appreciation of the pleadings as well as the materials available on record the learned trial Court had passed the judgment and order dated 08.03.2006 decreeing the suit in favour of the plaintiffs.

7. Being aggrieved and dissatisfied with the judgment and decree dated 08.03.2006 passed in Title Suit No. 84/2002 the defendant No. 1 as appellant has preferred Title Appeal No. 10/2006 in the Court of learned Additional District Judge, Cachar, Silchar. After hearing the learned counsels for the parties and on evaluating the evidence available on record, the learned first appellate court had passed judgment and order dated 29.06.2012 dismissing the Title Appeal No.

10/2006 filed by the defendant No. 1 thereby affirming the judgment and decree dated 08.03.2006.

8. Being aggrieved by the aforesaid judgment and decree dated 29.06.2012 passed by the learned First Appellate Court in Title Appeal No. 10/2006, the defendant No. 1 as appellant had preferred RSA No. 220/2012 before this Court which was admitted by this Court to formal hearing by framing the following substantial question of law:

"Whether the judgment and decree passed by the Court below is valid in the absence of any notice to the Board as required under Section 57 of the Wakf Act, 1954?"

Subsequently, when the matter was taken up for hearing, this Court by the order dated 12.03.2015, had framed two more substantial questions of law after due notice to the other side. The aforesaid two additional substantial questions of law are as follows:-

"(1) In view of the admitted position of fact that the subject matter of the suit is a wakf property in respect of which a lease for 21 years had been granted by the Mutawalli without taking the previous sanction of the Board, whether the transaction itself would be void in view of the provisions contained in Section 36A of the Wakf Act, 1954?

(2) Whether the suit itself would not be maintainable in view of the provisions contained in Section 2 of the Assam Non-Agricultural Urban Areas Tenancy Act, 1955?"

9. I have heard Ms. R. Choudhury, learned counsel for the appellant. Also heard Mr. P.K. Deka, learned counsel appearing on behalf of the respondents/plaintiffs.

10. Ms. R. Choudhury, learned counsel for the appellant, at the very outset, questioned the maintainability of the suit as well as the validity of the judgment and decree passed by the Court below primarily contending that in view of the provisions of Section 6 of the Wakf Act, 1995 the plaintiffs suit itself was not maintainable as the said dispute could have only been entertained by a Tribunal constituted within the meaning of Wakf Act, 1995. She further submits that under Section 36A of the Wakf Act, 1954 lease of any property of wakf granted for a period extending three years in case of agricultural land or for a period exceeding one year in case of non agricultural land or building would be void if the same is done without the previous sanction of the Wakf Board. Section 56 of the Wakf Act, 1995 is pari-materia with the provisions of Section 36A of the Act of 1954. On the own showing of the plaintiffs, the purported lease and/or settlement was granted in the year 1979 i.e. during the period when the Act of 1954 was holding the field. The plaintiffs have failed to plead and establish that such a lease and/or settlement was granted in their favour with the prior sanction of the Wakf Board. Such being the position, the lease and/or settlement will be void ab-initio in the eye of law and as such cannot confer any right upon

the plaintiffs entitling them to a decree of declaration as prayed for in the suit. Hence, question of eviction of the defendant being a relief of consequential nature would be dependent upon the declaration of right and title of the plaintiffs over the Schedule-I land. In that view of the matter, the judgment and decree passed by the Court below would not be sustainable in the eye of law on such count alone.

11. Ms. Choudhury further submits that Section 90 of the Wakf Act, 1995 makes it clear that in every suit or proceeding relating to a title to or possession of a wakf property the Court or Tribunal is required to issue notice to the Board at the cost of the party instituting the suit or the proceeding. In the instant case neither the Wakf Board had been impleaded as a party respondent nor was any notice issued to the Board. As such, the proceedings in Title Suit No. 84/2002 having been conducted in contravention of section 90 of the Wakf Act, 1995 the judgment and decree passed in the said proceeding stands vitiated on such count alone.

12. In response to a specific query made by this Court as to whether any objection was raised by the appellant in the Courts below regarding the contravention of Section 56 of the 1995 Act (equivalent to Section 36A of the 1954 Act), Ms. R. Choudhury, submits that although no such objection had been raised by and on behalf of the appellant during the proceedings before the Courts below, yet the same being a pure question of law, such a question of law can be raised and successfully urged by the appellant even at the stage of Second Appeal. In support of her aforesaid argument Ms. Choudhury has relied upon the judgment and decision of the Hon'ble Supreme Court of India in the case of *Arsad Sk. and Another Vs. Bani Prosanna Kundu and Others*, (2014) AIRSCW 2631 : (2014) 5 SCALE 495 as well as an unreported decision of this Court rendered vide judgment dated 31.01.2015 in CRP No. 38/2008.

13. Per contra, Mr. P.K. Deka, learned counsel for the respondents, submits that the defendant No. 1 was allowed to occupy the Schedule-II premises as a permissive occupier under the plaintiffs. As a permissive possessor the appellant/defendant No. 1 was bound to vacate the premise immediately after a notice to vacate had been served upon him by the plaintiffs. However, instead of doing so, the defendant No. 1 continued to occupy the suit premises by causing harassment as well as disturbance in the enjoyment of the right of the plaintiffs over the tenanted property as a result of which the Title Suit had to be instituted primarily seeking eviction of the appellant/defendant No. 1 from the tenanted premises.

14. Referring to the arguments made by Ms. Choudhury regarding maintainability of the suit, Mr. Deka had placed reliance on a decision of the Allahabad High Court reported in *Yashpal Lala Shiv Narain Vs. Allatala Tala Malik Waqf Ajakhan Mus*, AIR 2006 All 115 to contend that suit for eviction of the defendant No. 1 is not a dispute falling within the ambit of Section 6 of the Wakf Act, 1995 since the same is not a dispute in respect of title to a wakf property or regarding any

dispute in respect of possession of a wakf property or regarding any dispute in respect of a Mutawalli or beneficiary. In that view of the matter, the decision and conclusion recorded by the learned Court below rejecting the objection raised by the appellant as regards maintainability of the suit does not suffer from any infirmity warranting interference from this Court.

15. Raising strong objection to the new plea taken by the appellant for the first time to the effect that the lease and/or settlement granted in favour of the plaintiffs being beyond the period of three years was null and void on account of the express provision of Section 56 of the Wakf Act, 1995, Mr. Deka submits that since such a plea was never raised by the appellant either before the trial Court or before the First Appellate Court it would not be open to the appellant to raise such a plea for the first time before this Court during the course of hearing of a Second Appeal. To buttress his argument, Mr. Deka has relied on the following judgments:-

- 1) Mossmt. Kalchibon Nesson and Others Vs. Mossmt. Samitra Bibi and Others, (2011) 1 GLR 280
- 2) Niranjan Deb Vs. Nibaran Ch. Deb, (2006) 2 GLR 781 : (2006) GLT 356 Supp
- 3) Mamata Bezbora Legal Heirs of Prabir Bezbora and Others Vs. Jayashree Chaliha and Others, (2006) 2 GLT 189 .
- 4) Rahimuiddin Ahmed (MD) Vs. Hamid Ali Saikia and Others .
- 5) 2002 (1) GLT 209 (Sachindra Mohan Deka Raja vs. Sat Ram Bora and others).
- 6) Bharatha Matha and Another Vs. R. Vijaya Renganathan and Others, AIR 2010 SC 2685 : (2010) 5 JT 534 : (2010) 6 SCALE 53 : (2010) 11 SCC 483 : (2010) AIRSCW 3503 : (2010) 4 Supreme 433 .

16. Relying on a decision of this Court rendered in the case of Jolly Sharma and others vs. Govinda Narayan Tribedi and others, reported in 2013 (5) GLT (TR) 41, Mr. Deka further submits that both the Courts below have recorded concurrent finding of fact to the effect that the plaintiffs have been in occupation of the suit premises since 1979 by paying rent to the proforma defendant No. 2. It has also been found that the defendant No. 1 was a permissive occupier who did not have any semblance of right, title or interest over the suit property and on the basis of such finding the decree for eviction have been passed by the Court below. Such concurrent finding of fact does not suffer from any perversity. In that view of the matter, there is no justification for causing interference with such concurrent finding of fact recorded by both the Courts below.

17. I have considered the submissions made by the learned counsels for the parties and have also perused the materials available on record. From a perusal of the pleading contained in the plaint as well as the judgment and order passed by the Court below it is apparent that the suit of the plaintiffs was basically for eviction of the defendant No. 1 from the Schedule-II premises who was originally

inducted as a permissive occupier under the facts and circumstances narrated in the plaint. The defendant No. 1/appellant has nowhere disputed the fact that he had been allowed to reside in the suit premises for a period of two months as a permissive possessor under the plaintiff No. 3. He has also not set up any claim of title over the suit property. Such being the position, it is apparent that the dispute between the parties is not one falling within the scope and ambit of Section 6 of the Wakf Act, 1995 and the same was a bilateral dispute between the plaintiffs and the defendant No. 1.

18. In the case of Yashpal Lala Shiv Narain (*supra*) the learned Single Judge of the Allahabad High Court has observed as follows:-

"152. Such a suit for eviction is not a suit or proceeding regarding any dispute in respect of title to a wakf property or regarding any dispute in respect of possession of a wakf property or regarding any dispute in respect of the right of a mutawalli or beneficiary. No dispute of title to a wakf property or possession of a wakf property or the right of a mutawalli or beneficiary is involved in such a Suit for eviction of tenant/lessee after determination of tenancy/lease. The dispute involved in such a Suit for eviction is in regard to eviction of the tenant/lessee from the wakf property in view of the determination of his tenancy/lease.

153. Hence, Section 90, sub-section (1) of the Wakf Act, 1995 is not applicable to the present case."

19. In the judgment rendered by this Court reported in *Aminul Islam Vs. Bijoya Prava Barua and Others*, (2008) 3 GLT 109 this Court has held that the Tribunal did not have jurisdiction to entertain any dispute not falling within the ambit of Section 6 of the Act of 1995. As has been held herein before, the present dispute is not one raising question as to title to the wakf property or regarding any dispute in respect of possession of wakf property or regarding dispute in respect of right of a mutawalli or beneficiary. As such, the Tribunal would not have jurisdiction to entertain the dispute involved in the present suit. In that view of the matter, the suit was maintainable in the Civil Court and has been rightly held so by the learned Courts below.

20. As regards the plea of lease and/or settlement being void on the ground of being in breach of Section 56 of the Act of 1995, it may be mentioned herein that the proforma defendant No. 2 being the mutawalli was a party to the suit but chose not to contest the same. It is true that any lease or sub-lease of a wakf property for a period exceeding three years if granted without the approval of the Board would be void in the eye of law and hence would not confer any title upon the lessor. However, in the instant case whether or not the said settlement/lease was granted with the approval of the Board is a matter which falls in the realm of factual enquiry.

21. Under Section 52 of the Act of 1995 the Board is empowered to make an enquiry as to whether any immovable property of a wakf is entered as such in the register of wakf maintained under Section 36 and has been transferred

without the previous sanction of the Board in contravention of the provision of Section 51 (or Section 56) and thereafter it may send a requisition to the Collector within whose jurisdiction the property is situate so as to obtain delivery of possession of the property to it. From the above, it is clear that if a property of a wakf has been entered in the list of wakf property as included in the register maintained under Section 36 then it will be open to the Board to take appropriate action for recovery of possession of the said property under Section 52 of the Act of 1995. There is nothing on record to indicate as to whether the property in question being wakf property had been entered in the register maintained under Section 36. Since no issue was raised before the Court below as regards the aforementioned aspects, hence, there was no occasion for the learned trial Court as well as the Court of First Appellate jurisdiction to make any enquiry into such factual aspects nor was there any scope for the plaintiffs to lead evidence in respect thereof. A plea not raised earlier cannot be allowed to be taken in a Second Appeal for the first time as the Court cannot record a finding of fact on fresh appreciation of the evidence on record nor would the Court in exercise of powers under Section 100 of the CPC be entitled to reopen the evidence to record a finding different from what the Courts of facts have arrived at. The aforementioned question raised by the appellant being a mixed question of fact and law, this Court is not inclined to permit the appellant to take such a plea for the first time at the stage of Second Appeal.

22. Besides the above, it is also evident that the plaintiffs have been paying rent to the proforma defendant No. 2 for enjoying the possession in respect of the Schedule-I land. The proforma defendant No. 2 being the mutawalli is the manager and custodian of the wakf property. The proforma defendant No. 2 or the Wakf Board has not initiated any action for eviction of the plaintiffs from the suit property. As such, even assuming that the lease and/or settlement granted in favour of the plaintiffs was in contravention of Section 51 and/or 56 of the Act of 1995, even in that case the plaintiffs would at least have the status of a licensee in respect of the suit premises and would continue to enjoy such a status until the time they are evicted by following the due process of law. The defendant No. 1 having been put in permissive possession of the suit Schedule-II premises without any compensation was a gratuitous licensee under the plaintiffs. As such, the Plaintiffs would be entitled to maintain the suit for eviction against the defendant No. 1, being a gratuitous licensee, on the basis of their better possessory right over the suit land which would not stand extinguished until the time the plaintiffs are evicted from the suit land under a decree passed by a competent court. Moreover, there is no challenge made to the settlement and/or lease granted in favour of the plaintiffs in respect of the suit land. The defendant No. 1 has also not claimed any Title over the suit premises. Therefore, the question as to the validity of the lease/settlement granted in favour of the plaintiffs can neither be raised by the appellant/defendant No. 1 nor is there any necessity to go into that aspect of the matter at the instance of the defendant No. 1 in the facts of the present case.

23. Sub-section (3) of Section 90 of the Wakf Act clearly provides that if a decree or order is passed in a suit or proceeding involving wakf property without serving prior notice to the Board then the Board within a period of six months of its coming to know of such suit or proceeding can apply to the Court on its behalf for setting aside such a decree. There is nothing on record to indicate as to whether the Board has exercised such a right or not. In the absence of any such right exercised by the Board under Section 90(3) of the Act of 1995 the judgment and decree passed by the Courts below cannot be rendered as null and void merely on the ground of non-issuance of notice under Section 90 of the Act of 1995.

24. In view of what has been discussed herein before, this Court is of the opinion that the judgment and decree passed by the Courts below does not suffer from any infirmity warranting interference by this Court. The questions of law framed by this Court stands answered against the appellant and in favour of the respondents.

25. In the result, the Second Appeal stands dismissed. However, having regard to the facts and circumstances of the case, there will be no order as to cost.

Registry to send back the LCR.