

Sk. Jamaitullah and ors. Vs. Sk. Jayakatullah and ors.

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Court : Orissa

Decided On : Nov-17-1995

Reported in : 81(1996)CLT114; 1996(I)OLR98

Judge : S. Chatterji, J.

Acts : [Wakf Act, 1954](#) - Sections 3, 9(1), 9(2), 10, 55 and 57; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 100A

Appeal No. : Second Appeal No. 56 of 1985

Appellant : Sk. Jamaitullah and ors.

Respondent : Sk. Jayakatullah and ors.

Advocate for Def. : D.R. Patnaik, Adv.

Advocate for Pet/Ap. : Mira Ghose, Adv.

Judgement :

S. Chatterji, J.

1. The present Second Appeal arises out of the judgment dated 29-9-1984 passed by the learned Additional District Judge, Puri in Money Appeal No. 12/14 of 1983/82 arising out of the judgment dated 21-6-1982 passed by the learned Additional Subordinate Judge, Puri in OS No. 1/220 of 1982/78-III. A short but

interesting point is argued by the learned advocate for the appellants before this Court. In fact the suit had been brought by the plaintiffs praying inter alia, for a decree against the defendants or any of them to render accounts to the plaintiffs; to direct the defendants to handover the documents, title deeds, resolution books and accounts papers; to appoint a commissioner to finalise the accounts if the defendants fail to comply with the preliminary decree within a stipulated period and for other incidental reliefs as permitted under law. The case of the plaintiffs is that they and the defendants are interested in the management of the mosque and welfare of the Mahammadan community and there is substantive income out of the scheduled property. A committee was formed in the year 1972 in which defendant No. 1 was the President, defendant No. 2 was the Vice-President, defendant Nos. 3 and 4 were respectively the Secretary and Assistant Secretary, defendant No. 5 was the Cashier and defendant Nos. 6 to 11 were the members of the committee. Essentially the suit was filed seeking relief in the representative capacity under Order 1, Rule 8 of Civil Procedure Code. It is submitted before this Court that in such a suit where there are allegations against the Board of Wakfs, presence of the Board is necessary, otherwise the suit will be taken to have not been properly framed and the matter has to proceed accordingly. In particular, attention of this Court is drawn to Sections 55 and 57 of the Wakf Act and the embargo to bring the suit excepting in the prescribed manner. For better appreciation and ready reference Sections 55 and 57 of the Act are quoted hereinbelow :

'55. Institution of suits under Section 92 of the Code of Civil Procedure, 1908:

(1) A suit to obtain any of the reliefs mentioned in Section 32 of the Code of Civil Procedure, 1908 (5 of 1908), relating to any waqf may, notwithstanding anything to the contrary contained in that section, be instituted by the Board without obtaining the consent referred to therein.

(2) No suit to obtain any of the reliefs referred to in Section 92 of the Code of Civil Procedure, 1908, relating to any waqf shall be instituted by any person or authority other than the Board without the consent in writing of the Board and for the institution of any such suit, it shall not be necessary to obtain the consent referred to in that section, notwithstanding anything contained therein :

Provided that nothing in this sub-section shall apply in relation to any such suit against the Board. 57. Notice of suits, etc., by Courts--

(1) In every suit or proceeding relating to a title to waqf property or the right of a mutawalli, the Court shall issue notice to the Board at the cost of the party instituting such suit or proceeding.

(2) Whenever any waqf property is notified for sale in execution of a decree of a Civil Court or for the recovery of any revenue, cess, rates or taxes due to the Government or any local authority, notice shall be given to the Board by the Court, Collector or other person under whose order the sale is notified.

(3) In the absence of a notice under Sub-section (1), any decree or order passed in the suit or proceeding shall be declared void, if the Board, within one month of its coming to know of such suit or proceeding, applies to the Court in this behalf.

(4) In the absence of a notice under Sub-section (2), the sale shall be declared void, if the Board, within one month of its coming to know of the sale, applies in this behalf to the Court or other authority under whose order the sale was held.'

2. Admittedly, in this case the Board of Waqf was not party when the suit was filed. Subsequently, however, by way of amendment the Chairman and Secretary of the Board were brought on record. Attention of the Court is drawn to the definition clause of Section 3 of the Waqf Act, 1954 which provides inter alia that 'Board' means a Board of Waqf established under Sub-section (1), or as the case may be, under Sub-section (1-A), of Section 9. Section 9 similarly indicates inter alia that with effect from such date as the State Government may, by notification in the official gazette, appoint in this behalf, there shall be established a Board of Waqf under such name as may be specified in the notification. Section 9(2) of the Act indicates that the Board shall be a body corporate having perpetual succession and a common seal with power to acquire and hold property and to transfer any such property subject to such conditions and restrictions as may be prescribed and shall by the said name sue and be used. It is very much clear from the said definitions in Section 3 as well as Sections 9(1) and 9(2) of the Waqf Act that the Board is a legal entity and can sue or be sued upon in the name of the Board. The

composition of the Board as per Section 10 of the Waqf Act is that the Board shall consist of eleven members, in the case of a State and the Union territory of Delhi and five members, in the case of any other Union territory. There shall be a Chairman of the Board who shall be elected by the members from amongst themselves. Framing of a suit with the nature of relief sought for as in the instant case is not available in absence of the Board as Board is found to be not only a proper party, but a necessary party. In absence of such necessary party, the suit cannot proceed, nor the reliefs claimed are available to the plaintiffs even on merit.

3. On perusal of the materials on record, this Court finds that both the Courts below have not considered this aspect as to the nature of the suit, framing of the suit and the legal requirement that the suit cannot proceed in absence of the Board which is a necessary party. There cannot be effective adjudication of the dispute between the parties and for a comprehensive adjudication the suit remains defective in absence of such a party. Learned counsel for the respondents has, however, submitted in his usual fairness that this point had not been raised specifically during the trial before the appellate Court, but for the first time this point is raised by the appellants before this Court. With great caution this Court considered the points raised on behalf of the appellants and the points argued by the learned counsel for the respondents. This Court is of the view that if the law demands that the suit can be framed in a prescribed manner and presence of the Board in the instant case is necessary, this is a substantial point of law and even without taking this plea specifically either in the trial Court or in the lower appellate Court the appellants are not precluded to raise this point in the Second Appeal for an effective adjudication of the dispute. Since framing of the suit goes to the root of the matter and this is an essential point of law, in fitness of things this Court deems it proper to set aside the judgment of both the Courts below and send the matter on remand to the trial Court for giving opportunity to the plaintiffs to take proper steps for amendment and impleading the Board as a party to the suit whereafter the matter shall proceed in accordance with law. Any decision in absence of the Board either in the trial Court or the appellate Court or any observation by this Court during disposal of the Second Appeal will neither prejudice the plaintiffs nor the defendants in any manner, nor will the same influence the trial Court to arrive at its proper conclusion by considering the

evidence already on record and further evidence, if adduced by the parties. If the Board appears, it will also be entitled to file pleadings, adduce evidence, examine witnesses and recall the witnesses for cross-examination as required under law. The Second Appeal is thus allowed to the extent as indicated above. Considering the peculiar facts and circumstances of the case, parties are to bear their own respective costs.

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