HIGH COURT OF MADHYA PRADESH

BENCH AT GWALIOR

SINGLE BENCH

BEFORE JUSTICE S.K.AWASTHI

CIVIL REVISION No.113/2011

Rambharose Rathor

Versus

Madhya Pradesh Waqf Board
and others

Shri J.P.Sharma and Shri M.K.Gupta, Advocate for the applicant.
Shri R.S.Sharma, Panel Lawyer for the respondent/ State.
Shri Prakash Bararu, Advocate for the respondent No.1.
Shri H.K.Agarwal, Advocate for the respondent No.4.
Shri F.A.Shah, Advocate for the respondent No.5.

O R D E R
(05.06.2017)

The instant civil revision takes exception to the order dated 20.5.2011 passed in Case No.54/2008 by M.P. State Waqf Tribunal, Bhopal, whereby the declaration sought by the applicant with respect to the eviction order passed by the Waqf Board regarding the property in question has been declined, which has exposed the present applicant to the possibility of ouster from the property in question.

2. Consciously stated, the facts relevant for the adjudication of the present case are that the present applicant claims to be in possession of the shop situated at Mirjapur Mosque which has registration

number as “Waqf Property No. 308/120” in the capacity of a tenant since the year 1960 when the father of the present applicant was given possession at Rs.150/- per month. According to the applicant, he is continuously making payment of the rent to the earlier President of the Managing Committee, Shri Najir Khan. However, the respondents attempted to take forcible possession of the property in question which was called in question by the present applicant by filing a suit seeking permanent injunction to protect his possession. This suit was filed before the Court of Civil Judge Class-2, Gwalior and was registered as Civil Suit No. 27A/2005.

3. It has been further stated that the possession of the present applicant was protected by the Court and the applicant specifically pleaded that the present applicant is residing in the capacity of a tenant which was found to be prima facie correct and, therefore, the Civil Court passed an order granting temporary injunction on 25.7.2006 to restrain the respondents from taking away the possession of the applicant.

4. The applicant is complaining that while the protection granted by the Civil Court was in vague, the respondents moved under Section 54 of the Waqf Act, 1995 (for short, the 'Act of 1995') by making an application on 20.4.2007 before the Chief Executive Officer ODF Madhya Pradesh Waqf Board and branded the present applicant to be an encroacher upon the property in question which is

described as a portion of Bulbulpura Mosque situated at Ghasmandi, Gwalior which has been notified as waqf property in Gazette Notification published on 25.8.1989 in which the property in question is reflecting at serial No.135. On the application by the President of the Tahsil Waqf Committee Gwalior, which has been conferred with responsibility of management of the property in question, the Waqf Board exercised its powers conferred under Section 54 of the Act of 1995 and passed the order dated 27.3.2008 for directing the present applicant to vacate the encroached premises within a period of 30 days failing which the Board shall exercise powers under Section 55 of the Act of 1995. The perusal of the order dated 27.3.2008 clearly reflects that the Board was conscious about the order of temporary injunction in favour of the applicant.

5. According to the remedy prescribed under the Act of 1995, the order of the Waqf Board can be called in question by filing a case before the State Waqf Tribunal Bhopal constituted under Section 85 of the Act of 1995. Consequently, the present applicant moved to the Tribunal to challenge the decision dated 27.3.2008 on the ground that the powers available under Section 54 of the Act of 1995 can only be exercised with respect to trespasser and not against a tenant who is protected under the provisions of M.P. Accommodation Control Act, 1961. This case was registered as Case No. 54/2008

and the present respondents were invited to file their written statement.

6. In the intervening period, parallel proceedings pending before the Civil Court also invoked by the present applicant, reached to its logical conclusion and the judgment dated 20.12.2010 was passed by which the Civil Court did arrive at a definite conclusion with respect to the nature of possession of the present applicant that the applicant was in possession of the property in question in the capacity of a tenant. Consequently, the decree was drawn in favour of the present applicant and the respondents were restrained from taking forcible possession of the property in question without following the due course of law from the applicant.

7. Thereafter, on 20.5.2011, the impugned order has been passed by the Waqf Tribunal and the question which was framed by the Waqf Tribunal as to whether the applicant is an encroacher or a tenant has been answered in negative by concluding that the applicant is an encroacher and, therefore, the Tribunal concluded that no interference can be made with the discretion of the Waqf Board under Section 54 of the Act of 1995 to deal with the encroachers. Learned counsel for the applicant submits that the order passed by the Court below is per se illegal as the same is in clear conflict with respect to outcome regarding the nature of possession of the present applicant as held by the Civil Court in Civil Suit No. 27A/2009 vide judgment

dated 20.12.2010. This submission is further compounded by placing reliance on the finding recorded by the Civil Court in its judgment dated 20.12.2010 with respect to issue No.1 as to whether the plaintiff i.e., the present applicant is in possession of the property in question in the capacity of tenant. This issue has been answered in affirmative. Thereafter, learned counsel for the applicant has invited the attention of this Court to the finding recorded by the Waqf Tribunal in para 13 in which the present applicant has been held to be an encroacher and not a tenant. Apart from it, several other contentions have been raised which are touching on the merits of the findings recorded by the Tribunal that the documents submitted by the applicant have not been considered as well as the fact regarding payment of regular rent has been ignored. It has also been contended that the property in question as pleaded by the respondents is different from the one for which the suit has been preferred by the present applicant, therefore, he seeks that the present revision be allowed and the impugned judgment be set aside.

8. Learned counsel for the respondents submitted that the contention raised by the present applicant with respect to the finding of the Tribunal and the Civil Court deserves to be repelled as under Section 85 of the Act of 1995 there exists a bar on the jurisdiction of the Civil Courts and the adjudication of dispute can only be done by the Tribunal under

the Act of 1995 with respect to the waqf properties. It was further contended that so far as the question that the property in dispute is a waqf property or not, the same is undisputed from the memo of revision itself that the property in dispute is a waqf property. Therefore, he submitted that this issue raised by the applicant has no life in it. The respondents also addressed on the merits of the case.

9. I have considered the rival contentions of the parties and have perused the record.

10. Although there are several contentions advanced by the parties touching on the merits of the case, however, this Court is of the considered opinion that before adverting to these contentions, the veracity of the findings recorded by the Waqf Tribunal are to be first examined, on the preliminary issue as to whether it was open to the Tribunal to record finding with respect to the nature of possession of the applicant when the Civil Court in its judgment dated 20.12.2010 has already concluded that the nature of possession of the applicant is that of a tenant.

11. In order to deal with the preliminary issue, this Court is required to consider the correctness of contentions of the respondents that by virtue of Section 85 of the Act of 1995, the findings recorded by the Civil Court are a nullity as the jurisdiction of Civil Court has been expressly barred. Therefore, the findings of the Civil Court are to be ignored.

12. For the aforestated purpose, it will be appropriate to reproduce Section 85 of the Act of 1995 for convenience, which envisages as under:-

> ***"85.*** *Bar of jurisdiction of Civil Courts - No suit or other legal proceedings shall lie in any civil court, revenue court and any other authority in respect of any dispute, question or other matter relating to any wakf, wakf property or other matter which is required by or under this Act to be determined by a Tribunal.*"

The reproduced portion clearly entrusts powers of adjudication to the Waqf Tribunal with respect to the property belonging to the waqf registered under the Act of 1995. Learned counsel for the respondents has rightly contended that it is undisputed that the property in dispute is a waqf property, therefore, the Civil Court had no jurisdiction under which it could have pronounced the judgment and decree dated 20.12.2010.

13. This finding of the Civil Court now leads to the contention of the applicant that the subsequent Court i.e., Waqf Tribunal could not have ignored the judgment of the Civil Court because the same renders the proceedings before the Waqf Tribunal barred by Section 11 of CPC. This argument has been further sought to be compounded by the fact that the judgment dated 20.12.2010 was not challenged by filing any appeal and the same has attained finality. The contention canvassed by the learned counsel for the applicant is very intriguing but the law holding this field is well settled. In this

regard, it is appropriate to refer to the judgment of Hon'ble Supreme Court in the case of **Swamy Atmananda and others vs. Sri Ramakrishna Tapovanam and others (2005) 10 SCC 51**, in which the Hon'ble Supreme Court has made following observations:-

> **"41.** It is, however, beyond any doubt or dispute that if a court lacks inherent jurisdiction, its judgment would be a nullity and, thus, the principle of res judicata which is in the domain of procedure will have no application. [See Mohanlal Goenka (supra), Ashok Leyland Ltd. vs. State of Tamil Nadu and Another, (2004) 3 SCC 1 and Sonepat Cooperative Sugar Mills Ltd. vs. Ajit Singh, 2005 (2) SCALE 151 : 2005 (3) SCC 232]."

14. On an identical issue the Hon'ble Supreme Court in another judgment in the case of **Union of India vs. Pramod Gupta (2005) 12 SCC 1**, has held as under:-

> **"31.** It may be true that the principles of res judicata may be applicable in respect of the question of title but even for the said purpose it was obligatory on the part of the High Court to refer to the previous judgments whereupon reliance had been placed by the Respondents for the purpose of arriving at a decision as to whether they have been rendered by a competent court or not. The question as to whether a civil court will have jurisdiction in respect of declaration and / or cancellation of bhumidhari right was not adverted to by the High Court. We may notice that this Court in Gaon Sabha vs. Nathi (2004) 12 SCC 555, held that in terms of the provisions of the Delhi Land Reforms Act, 1954 a person can either be a Bhumidhar

or Asami and there is no other class of proprietors or tenure-holder after coming into force of the said Act. It was further opined:

> "*11.1. Therefore, the legal position is absolutely clear that a person can be either a bhumidhar or an asami of the agricultural land in a village. He can also be an owner of the property of the type which is enumerated in Section 8 of the Act, like private wells, tanks, groves, abadis, trees and buildings. Except for these, all other kinds of lands and property would vest in the Gaon Sabha. The proprietors and the concept of proprietors of land stands totally abolished with the enforcement of the Act. The respondents neither claimed to be bhumidhar nor asami of the land which has been acquired. The acquired land does not come within the purview of Section 8 of the Act. In such circumstances the only inference possible is that the land stood vested with the Gaon Sabha on the date of the commencement of the Act and it was the Gaon Sabha which was the owner thereof and was entitled to receive the entire amount of compensation*."

15. It is abundantly clear that an order to attract bar under Section 11 of CPC it is imperative that the previous judgment referred in the facts of the present case must be by the competent court whereas in the facts of the present case it is clear that Section 85 of the Act of 1995 clearly bars the jurisdiction of the Civil Court. In view thereof, this Court has no hesitation in concluding that the

judgment dated 20.12.2010 passed in Civil Suit No. 27A/2009 by Civil Judge Class-2 Gwalior was a nullity and will not bar the trial of same issue by the Waqf Tribunal.

16. Now to deal with the second limb of contention canvassed by the applicant that the judgment dated 20.12.2010 ought to have been challenged by filing the appeal and since the steps were not taken by the respondents, the judgment dated 20.12.2010 has attained finality, in this regard it is appropriate to rely on the observations made by the Hon'ble Supreme Court in the case of **Sonepat Cooperative Sugar Mills Ltd. vs. Ajit Singh (2005) 3 SCC 232,** in which the following observation has been made :-

> *"26. It is true that the appellant did not challenge the judgment of the learned Single Judge. The learned Judge in support of his judgment relied upon an earlier decision of the High Court in Rajesh Garg Vs. Punjab State Tubewell Corpn. Ltd., (1984) 3 SLR 397 (P&H), but failed to consider the question having regard to the pronouncements of this Court including H.R. Adyanthaya vs. Sandoz (India) Ltd., (1994) 5 SCC 737. Rajesh Garg (supra_ was rendered following S.K. Verma vs. Mahesh Chandra (1983) 4 SCC 214, which being not a good law could not have been the basis therefor.*
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> *27. The principle of res judicata belongs to the domain of procedure. When the decision relates to the jurisdiction of a court to try an earlier proceeding, the principle of res judicata would not come into play. (See Mathura Prasad Bajoo Jaiswal vs. Dossibai N.B. Jeejeebhoy (1970)*

1 SCC 613).

28. An identical question came up for consideration before this Court in Ashok Leyland Ltd. Vs. State of T.N. (2004) 3 SCC 1, wherein it was observed: (SCC p.44, para 118)

> *"118. The principle of res judicata is a procedural provision. A jurisdictional question, if wrongly decided, would not attract the principle of res judcata. When an order is passed without jurisdiction, the same becomes a nullity. When an order is a nullity, it cannot be supported by invoking the procedural principles like estoppel, waiver or res judcata."*

29. It would, therefore, not be correct to contend that the decision of the learned Single Judge attained finality and, thus, the principle of res judicata shall be attracted in the instant case."

17. The Hon'ble Supreme Court in an unambiguous manner has concluded that merely because the judgment was not challenged by filing the appeal, the same will not bar the subsequent proceedings by operation of principle of res judicata as the subsequent Court has enough latitude to examine whether the previous judgment relied upon by the party is pronounced by the competent court or not ?

18. In the light of the above primary contentions of the applicant regarding finality of the judgment dated 20.5.2011 that the same is barred by principle of res judicata is hereby rejected.

19. Now the only factor which deserves consideration of the Court is whether the Court

erred in examining the documents filed by the present applicant to establish the fact that he is a tenant ?

20. In order to answer this contention, I have duly examined the documents brought on record by the present applicant which are marked as Exts. P/1 to P/16. The perusal of Exts. P/3 to P/13 indicates that although the applicant is claiming the same to be the rent receipts, however the same are only of the period 2008-2009 and they do not bear the signatures of the members of the Managing Committee which clearly means that the findings recorded by the Waqf Tribunal is just and proper. These documents also demonstrate the fact that the applicant does not possess any credible evidence and has failed to satisfy the standard of proof which may compel this Court to overturn the decision of the Waqf Tribunal. Further, the applicant has pleaded from very inception that his father entered into the tenancy agreement with the so-called President of the Managing Committee Mr. Najir Khan. However, the perusal of such rent agreement demonstrates that Mr. Najir Khan has not affixed his signature on the document. Apart from it, the document is relating to the property which is different from the property in dispute which also meets a blow on the stand taken by the present applicant. These circumstances rendered the findings recorded by the Waqf Tribunal in paras 8 and 9 of the judgment unassailable.

21. Therefore, the learned counsel for the applicant has not been able to make out the case for showing any indulgence or for taking a view that the nature of possession of the present applicant is that of a tenant.

22. Taking this view of the matter, the instant revision application is dismissed being devoid of merits.

(S.K.Awasthi)
Judge

yogesh/