

(2023) 05 MP CK 0031

In the Madhya Pradesh High Court

Case No : ??Second Appeal No.785 Of 2023

Rakesh Kesharwani And Others

APPELLANT

Vs

Imam Bada Shahedaan Karbala

RESPONDENT

Date of Decision : 02-05-2023

Acts Referred:

Waqf Act, 1995 — Section 83, 83(1), 83(5), 85
Code Of Civil Procedure, 1908 — Section 100
Terrorist And Disruptive Activities (Prevention) Act, 1987 — Section 20(4)
Code Of Criminal Procedure, 1973 — Section 167(2)
Prevention Of Corruption Act, 1947 — Section 5(3), 6(1), 7(1)
General Clauses Act, 1977 — Section 5(3), 6
Code Of Civil Procedure, 1908 — Section 100

Citation : (2023) 05 MP CK 0031

Hon'ble Judges : Gurpal Singh Ahluwalia, J

Bench : Single Bench

Advocate : Mukhtar Ahmad, Kaustubh Tiwari, Atul Anand Awasthy

Final Decision : Allowed

Judgement

Gurpal Singh Ahluwalia, J

1. This appeal being arguable is admitted on the following substantial question of law:-

“Whether the Civil Court has jurisdiction to try the suit for eviction in the light of the amendment in Sections 83 and 85 of the Waqf Act.”

2. Since the respondent is being represented by its counsel, therefore the appeal is heard finally.

3. This Second Appeal under Section 100 of CPC has been filed against the judgment and decree dated 21/03/2023 passed by District Judge (13th) Jabalpur in RCA No.109/2021 arising out of judgment and decree dated 17/12/2021 passed by 17th Civil Judge Class-1, Jabalpur in Civil Suit No.2800140/2015, by which a decree for possession and payment of arrears of rent from 01/08/1987

till 31/07/1990 at the rate of Rs.450/- and notice expense, was passed.

4. The undisputed fact is that a suit was filed for eviction from waqf property. The only contention made by the counsel for the appellants is that by amendment dated 01/11/2013 in Sections 83 and 85 of the Waqf Act, the jurisdiction has been vested with the Waqf Tribunal and since the amendment of change of forum is procedural law therefore, it would be retrospective in operation because there is nothing in the amendment to indicate that it is prospective in nature.

5. Per contra, it is submitted by the counsel for the respondent that the amendment in procedural law is always prospective in nature unless and until it is made retrospective.

6. Heard the learned counsel for the parties.

7. The only question for consideration is as to whether the change of forum is a procedural law or it is a substantive law and whether the amendment in procedural law is prospective in nature or is retrospective in nature.

8. The Supreme Court in the case of Ramesh Kumar Soni Vs. State of Madhya Pradesh reported in (2013) 14 SCC 696 has held as under:-

11. In *Hitendra Vishnu Thakur v. State of Maharashtra* [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087], one of the questions which this Court was examining was whether clause (bb) of Section 20(4) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 introduced by an Amendment Act governing Section 167(2) CrPC in relation to TADA matters was in the realm of procedural law and if so, whether the same would be applicable to pending cases. Answering the question in the affirmative this Court speaking through A.S. Anand, J. (as His Lordship then was), held that Amendment Act 43 of 1993 was retrospective in operation and that clauses (b) and (bb) of sub-section (4) of Section 20 of TADA apply to the cases which were pending investigation on the date when the amendment came into force.

The Court summed up the legal position with regard to the procedural law being retrospective in its operation and the right of a litigant to claim that he be tried by a particular Court, in the following words: (SCC p. 633, para 26)

“(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

14. The amendment to the Criminal Procedure Code in the instant case has the effect of shifting the forum of trial of the accused from the Court of the Magistrate, First Class to the Court of Session. Apart from the fact that as on the date the amendment came into force no case had been instituted against the appellant nor had the Magistrate taken cognizance against the appellant, any amendment shifting the forum of the trial had to be on principle retrospective in nature in the absence of any indication in the Amendment Act to the contrary. The appellant could not claim a vested right of forum for his trial for no such right is recognised. The High Court was, in that view of the matter, justified in (sic not) interfering with the order passed by the trial court.

16. In *Manujendra Dutt* case [*Manujendra Dutt v. Purnendu Prosad Roy Chowdhury*, AIR 1967 SC 1419] the proceedings in the Court in which the suit was instituted had concluded. At any rate, no vested right could be claimed for a particular forum for litigation. The decisions of this Court referred to by us earlier settle the legal position which bears no repetition. It is also noteworthy that the decision in *Manujendra Dutt* case was subsequently overruled by a seven-Judge Bench of this Court in *V. Dhanapal Chettiar v. Yesodai Ammal* [(1979) 4 SCC 214] though on a different legal point.

19. Even otherwise the Full Bench failed to notice the law declared by this Court in a series of pronouncements on the subject to which we may briefly refer at this stage. In *Nani Gopal Mitra v. State of Bihar* [AIR 1970 SC 1636 : 1970 Cri LJ 1396], this Court declared that amendments relating to procedure operated retrospectively subject to the exception that whatever be the procedure which was correctly adopted and proceedings concluded under the old law the same cannot be reopened for the purpose of applying the new procedure. In that case the trial of the appellant had been taken up by Special Judge, Santhal Paraganas when Section 5(3) of the Prevention of Corruption Act, 1947 was still operative. The appellant was convicted by the Special Judge before the Amendment Act repealing Section 5(3) was promulgated. This Court held that the conviction pronounced by the Special Judge could not be termed illegal just because there was an amendment to the procedural law on 18-12-1964. The following passage is, in this regard, apposite: (AIR p. 1639, paras 5-6)

"5. ... It is therefore clear that as a general rule the amended law relating to procedure operates retrospectively. But there is another equally important

principle viz. that a statute should not= be so construed as to create new disabilities or obligations or impose new duties in respect of transactions which were complete at the time the amending Act came into force (see *A Debtor, In re, ex p Debtor* [(1936) 1 Ch 237 (CA)] and *Attorney General v. Vernazza* [1960 AC 965 : (1960) 3 WLR 466 : (1960) 3 All ER 97 (HL)]). The same principle is embodied in Section 6 of the General Clauses Act which is to the following effect:

* * *

6. The effect of the application of this principle is that pending cases, although instituted under the old Act but still pending, are governed by the new procedure under the amended law, but whatever procedure was correctly adopted and concluded under the old law cannot be opened again for the purpose of applying the new procedure. In the present case, the trial of the appellant was taken up by the Special Judge, Santhal Parganas when Section 5(3) of the Act was still operative. The conviction of the appellant was pronounced on 31-3-1962 by the Special Judge, Santhal Parganas, long before the amending Act was promulgated. It is not hence possible to accept the argument of the appellant that the conviction pronounced by the Special Judge, Santhal Parganas, has become illegal or in any way defective in law because of the amendment to procedural law made on 18-12-1964. In our opinion, the High Court was right in invoking the presumption under Section 5(3) of the Act even though it was repealed on 18-12-1964 by the amending Act. We accordingly reject the argument of the appellant on this aspect of the case.” (emphasis supplied)”

9. The Supreme Court in the case of *Rashid Wali Beg Vs. Farid Pindari and Others* reported in (2022) 4 SCC 414 has held as under:-

“64. We have already seen that it is not as though there was no provision in the Waqf Act conferring jurisdiction upon the Tribunal in respect of the waqf property. We can break the first part of Section 83 into two limbs, the first concerning the determination of any dispute, question or other matter relating to a waqf and the second, concerning the determination of any dispute, question or other matter relating to a waqf property. After Amendment Act 27 of 2013, even the eviction of a tenant or determination of the rights and obligation of the lessor and lessee of such property, come within the purview of the Tribunal. Though the proceedings out of which the present appeal arises, were instituted before the Amendment Act, the words “any dispute, question or other matter relating to a waqf or waqf property” are sufficient to cover any dispute, question or other matter relating to a waqf property. This is why *Ramesh Gobindram v. Sugra Humayun Mirza Wakf*, (2010) 8 SCC 726 was sought to be distinguished both in *W.B. Wakf Board v. Anis Fatma Begum*, (2010) 14 SCC 588 and *Punjab Wakf Board v. Pritpal Singh*, 2013 SCC OnLine SC 1345 and such distinction was taken note of in *Akkode Jumayath Palli Paripalana Committee v. P.V. Ibrahim Haji*, (2014) 16 SCC 65. Additionally, this Court in *Kiran Devi v. Bihar State Sunni Wakf Board*, (2021) 15 SCC 15, refused to apply the ratio of *Ramesh Gobindram*, on the ground that the suit was originally instituted before the civil court, but

was later transferred to the Waqf Tribunal and that after allowing the order of transfer to attain finality, it was not open to them to resurrect the issue through Ramesh Gobindram.

65. It is well settled that the court cannot do violence to the express language of the statute. Section 83(1) even as it stood before the amendment, provided for the determination by the Tribunal, of any dispute, question or other matter (i) relating to a waqf; and (ii) relating to a waqf property. Therefore to say that the Tribunal will have jurisdiction only if the subject property is disputed to be a waqf property and not if it is admitted to be a waqf property, is indigestible in the teeth of Section 83(1).

66. In fact, Section 83(5) of the Act makes it clear that the Tribunal shall be deemed to be a civil court and shall have the same powers as may be exercised by a civil court under the CPC, while trying a suit or executing a decree or order.

This is why this Court held in *Mohideen v. Ramanathapura Peria Mogallam Jamath* (2010) 13 SCC 62 that the Waqf Tribunal will have power to issue temporary injunctions under Order 39 Rule 1 CPC.

67. We must also point out at this stage that all the 14 decisions which we have tabulated in para 35 above, except the one at Sl. No. 13, namely, *Kiran Devi v. Bihar State Sunni Wakf Board*, are decisions of two-Member Benches. *Kiran Devi* was a decision of a three-Member Bench of this Court. In *Kiran Devi*, an objection to the maintainability of the proceeding before the Waqf Tribunal was raised on the basis of the decision in *Ramesh Gobindram*. But this Court refused to accept it on the ground that once the order of transfer of the suit from the civil court to the Waqf Tribunal had attained finality, the question of jurisdiction cannot be raised. If Waqf Tribunal had no jurisdiction at all, this Court could not have held in *Kiran Devi* that the order of transfer already passed cannot be undone by accepting this plea. The decision of the three-Member Bench in *Kiran Devi* is significant in the sense that it recognised the fact that *Ramesh Gobindram* cannot be used as a magic wand to toss the proceedings relating to a waqf property from one forum to another.

68. The dichotomy created in some decisions of this Court, between the properties which are admitted to be waqf properties and properties which are disputed to be so, is on account of the misapplication of the two limited questions in Sections 6(1) and 7(1) to the whole of the Act including Section 83. At the cost of repetition we should point out that Section 83(1) provides for the determination of any dispute, question or any other matter, (i) relating to a waqf and (ii) relating to a waqf property. This prescription cannot be taken to have been curtailed or circumscribed by Sections 6(1) and 7(1), to come to the conclusion that the Tribunal will assume jurisdiction only when a property is disputed to be a waqf property.

69. In the case on hand, the property is admitted to be a waqf property. Therefore, to allow the plaintiff to ignore the Waqf Tribunal and to seek a decree

of permanent injunction and mandatory injunction from a civil court, would be to ignore the mandate of Sections 83 and 85 which speak of any dispute, question or other matter relating to a waqf or a waqf property. There is also one more issue. In the written statement, Defendant 1 has admitted the existence of the waqf and also admitted that the father of the plaintiff by name Riyaz Ahmad is the mutawalli. But the claim of the plaintiff that he is the beneficiary of the waqf has been denied. Therefore, a question as to the nature of the waqf and whether the plaintiff is a beneficiary of the waqf, has also arisen in this case. This question has necessarily to be decided by the Tribunal and not the civil court.

70. In view of the above, the appeal is allowed and the judgment and decree of the High Court are set aside. The trial court shall return the plaint to the plaintiff, for presentation to the jurisdictional Waqf Tribunal. Since pleadings are complete, the Waqf Tribunal shall proceed from the stage of framing of issues and dispose of the suit within a period of 6 months. There will no order as to costs."

10. In view of the law laid down by the Supreme Court in the case of Rashid Wali Beg (supra) coupled with the fact that the change of forum is a procedural law, this Court is of the considered opinion that after the amendment in Sections 83 and 85 of the Waqf Act, the Civil Court lost its jurisdiction to entertain the Civil Suits concerning Waqf property.

11. Accordingly, the substantial question of law is answered in affirmative.

12. Ex consequenti, the judgment and decree dated 21/03/2023 passed by District Judge (13th) Jabalpur in RCA No.109/2021 arising out of judgment and decree dated 17/12/2021 passed by 17th Civil Judge Class-1, Jabalpur in Civil Suit No.2800140/2015, are hereby set aside.

13. The Trial Court is directed to return the plaint to the plaintiff for presentation to the jurisdictional Waqf Tribunal. Since the pleadings are complete, the Waqf Tribunal shall proceed from the stage of framing of issues and shall dispose of the suit within a period of six months.

14. The appeal succeeds and is hereby allowed.