

A-13

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of decision: 20.09.2016*

+ CM(M) 1184/2015
M/S HIGHWAY SERVICE STATION Petitioner
Through Mr.Sanat Kumar, Sr.Advocate with
Mr.Sunil Kumar Jha, Advocate

versus

BHARAT PETROLEUM CORPORATION LTD
& ANR Respondent
Through Mr.Sanjeev Sindhvani, Sr.Advocate
with Mr.Anil K.Batra and Mr.Lakhi
Singh, Advocatesfor R-1
Mr.Abhay Singh, Advocate for R-2

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. By the present petition the petitioner seeks to challenge the order dated 15.10.2015 dismissing the application under Order 47 of the Code of Civil Procedure, 1908 filed by the petitioner for review of the order dated 20.11.2009.
2. The petitioner filed a suit for declaration and permanent injunction. A decree of declaration was sought that the petitioner is the sole proprietor of M/s.Highway Service Station, Rohtak Road, Delhi and a deemed licensee of the respondent corporation. A permanent injunction was sought to restrain the respondent corporation from interfering in the peaceful

possession/operation of the retail outlet in the name and style of M/s.Highway Service Station.

3. Alongwith the plaint the petitioner filed an application for interim injunction. The trial court vide order dated 7.10.2005 passed an injunction order restraining the respondents from interfering in the peaceful possession of the petitioner of the outlet situated at the said service station. The trial court noted that it was the stand of the petitioner that it has been running the service station since 1998 as a sole proprietor. The plaint admits that the initial allotment was in the name of M/s.Capital Land Builders (Pvt.) Limited of which the petitioner was a Director. Subsequently, the company resolved to authorize the petitioner to run the outlet as a sole proprietor. Respondent was said to have been accordingly informed. It was in this factual background that the trial court came to the conclusion that apart from the question of waiver and estoppel, it was a case of passive acquiescence on behalf of the respondent and the said interim order was passed.

4. The respondent filed an appeal. The appellate court noted the objections of the petitioner that the suit is not maintainable. Further, it noted the submission of the respondent that the agreement with the original licensee M/s. Capital Land Builders (Pvt.) Ltd. does not authorize the said company to transfer any interest in the said agreement and the alleged transfer as claimed by the petitioner is contrary to the agreement. The appellate court concluded that as per the agreement the petitioner had no right to run the business from the premises. Accordingly, the appeal was allowed and the interim order was vacated vide order dated 20.11.2009.

5. Against the order dated 20.11.2009 the petitioner filed a review under Order 47 CPC on the ground that the appellate court had no jurisdiction to

entertain the appeal and hence the order passed by the Court dated 20.11.2009 was a nullity. It was urged that the said order be set aside. The appellate court noted that in view of Notification dated 11.8.2000 of this Court and keeping in view the fact that the suit has been valued under Rs.500/- the jurisdiction to hear appeal from orders or decree passed by the Civil Judge would be with the Senior Civil Judge and hence the Court which passed the order dated 20.11.2009 had no jurisdiction to entertain the appeal. The appellate court, however, declined to exercise its review powers noting lack of jurisdiction would not be a ground to exercise powers of review. Hence, it held that there is no error apparent on the face of the record justifying exercise of review powers.

6. Learned senior counsel appearing for the petitioner has vehemently argued that the suit has been valued for the purpose of court fee and jurisdiction at Rs.200 and Rs.130. Accordingly, it was urged that the appeal against the order of the trial Court granting injunction to the petitioner dated 7.10.2005 would lie to the court of Sr.Civil Judge and not to the Court of Additional District Judge (hereinafter referred to as ADJ) which has heard and passed the order dated 20.11.2009. It is stated that the Court which passed the order dated 20.11.2009 had no jurisdiction to hear the appeal and hence the order passed by the court dated 20.11.2009 is liable to be set aside as the court concerned had no jurisdiction. Reliance is placed on judgment of the Supreme Court in *Union of India vs. Sube Ram and Others*, (1997) 9 SCC 69 and *Budhia Swain and Others vs Gopinath Deb and Others*, (1999) 4 SCC 396 to support the contention. It is further argued that while the review filed by the petitioner against the said order dated 20.11.2009 was pending, the respondents have dispossessed the petitioners and taken over possession

of the petrol pump. Hence, it is urged that this Court may also order restitution of the property under Section 144 CPC. It is lastly urged that a detailed and well reasoned order passed by the Civil Judge on 7.10.2005 has been set aside by the appellate court without giving any reasons whatsoever. Reliance is placed on the judgment of the Supreme Court in *Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing, Kota Vs. Shukla and Brothers, 2010 (4) SCC 785* to contend that it was mandatory for the appellate court to have given reasons for allowing the appeal of the petitioner.

7. Learned senior counsel appearing for the respondents has strongly contended that the licensee of the respondents was M/s.Capital Land Builders (Pvt.) Limited, a corporate entity. The petitioner cannot claim to have inherited the said license rights without the consent of the respondents and contrary to the terms of the agreement. He submits that even if the ADJ had no powers to entertain the appeal, that at best would be an irregularity and would not be a case of lack of jurisdiction. Merely because a superior Court hears the matter would not mean that the judgment is liable to be set aside. He relied upon judgment of this court in *Shriram Pistons & Rings Ltd. vs. Mrs. Manju Awasthy, 68 (1997) DLT 112* and judgment of the Rajasthan High Court in *Abdul Wahid vs. Ram Narain Verma, 1997 (3) CCC 188 (Raj.)*.

8. The appellate court has vide the impugned order dated 15.10.2015 accepted that it had no powers to hear the appeal in view of the Notification dated 11.08.2000 issued by the High Court. The appropriate court to hear the appeal was the court of Senior Civil Judge and not the Court of ADJ.

Learned senior counsel appearing for the respondent has not refuted this conclusion.

9. Reference may be had to Section 15 and 99 of CPC which read as follows:-

“15. Court in which suits to be instituted.

Every suit shall be instituted in the Court of the lowest grade competent to try it.

....

99. No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.

No decree shall be reversed or “substantially varied, nor shall any case be remanded in appeal on account of any mis joinder ¹[or non-joinder] of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court.

¹[Provided that nothing in this section shall apply to non-joinder of a necessary party.]”

10. This court in *Shriram Pistons & Rings Ltd. vs. Mrs. Manju Awasthy* (*supra*) held as follows:-

“8 Coming to the objection raised by Mr. Endlaw that the transfer of the suit from the Court of the Civil Judge to the Court of the Additional District Judge violated Section 15 of the Code of Civil Procedure, which enjoined the filing of the suit in the lowest grade competent to try it which was being Court of the Civil Judge. This question had come up for consideration before the Division Bench in *Dronavajjula Vidyamba v. Vallabhajosyula Kakshmi Venkayamma*: AIR 1958 A.P.218. A suit had been transferred under Section 24, Civil Procedure Code from the District Munsif's Court to that of the Subordinate Judge. The decree passed by the Subordinate Judge was assailed as null and void on the ground that he had no jurisdiction to try the suit having regard to the

provisions of Section 15, CPC. The Court observed that it cannot be held that the Subordinate Judge had no jurisdiction to try the suit. What Section 15 provides is that every suit shall be instituted in the Court of the lowest grade competent to try it. Competency contemplated by the section is only pecuniary competency. It has been held by the Madras High Court in *Augustine v. Medlycot* ILR 15 Mad 241(B), that there was no lack of jurisdiction for the superior Court to try the suit. The Court reviewed the case law and noted with approval the above interpretation of Section 15, CPC. *Gaurachandra Patnaikudu v. Vikramadeo*, reported at 23 Mad 367 held Section 15 to be a rule of procedure and not of jurisdiction, a direction to the suitor and not an absolute rule binding on the Court. The Court held that Section 15 lays down a rule of procedure and not of jurisdiction and there is no ouster of the jurisdiction of the superior Court in such cases. Following the above decisions, it is held that the transfer of ejectment suit from the Court of Civil Judge to the District Judge will not be on account of non-compliance with Section 15, CPC. The Additional District Judge, whose pecuniary jurisdiction is higher will have the jurisdiction and competency to try the suit.”

11. Similarly, the Rajasthan High Court in *Abdul Wahid vs. Ram Narain Verma (supra)* held as follows:-

“16. In the instant case, the petitioner has not filed any written statement. In his application also, he has not clearly admitted his status as tenant of the plaintiff. It is trite law that the rule requiring every suit to be instituted in the court of lowest grade is only a rule of procedure and not of jurisdiction. The District Judge and the Subordinate Judge have jurisdiction over all original suits cognizable by the Civil Court. The object of Section 15, CPC is that the courts of the higher grade shall not be over-crowded with suits and also to afford convenience to the parties and witnesses who may be examined by them. The institution in a court of a higher grade of a suit, which ought to have been instituted in a court

of lower grade, is only an irregularity in procedure covered by Section 99, CPC and does not affect the jurisdiction of the Court. Where a suit which sought to have been instituted in a court of a lower grade is instituted in a court of a higher grade, the latter cannot be said to have no jurisdiction to try the suit.”

12. Keeping in view the legal position as stated above, the fact that the appeal was instituted at a higher court whereas it ought to have been instituted in a lower court is only an irregularity of procedure and would be covered by Section 99 CPC. The order suffers from an irregularity. It cannot be said that the superior court of ADJ which heard the appeal inherently lacked jurisdiction to try the appeal. There was no ouster of jurisdiction of the said Court. On account of this irregularity the order cannot be reversed merely because it was heard by the court of ADJ.

13. Reference may be had to the judgment relied upon by the petitioner in the case of *Budhiya Swain and Others vs. Gopinath Deb and Others* (*supra*) where the Supreme Court had noted as follows:-

8. In our opinion a tribunal or a court may recall an order earlier made by it if

(i) the proceedings culminating into an order suffer from the inherent lack of jurisdiction and such lack of jurisdiction is patent,

(ii) there exists fraud or collusion in obtaining the judgment,

(iii) there has been a mistake of the court prejudicing a party or

(iv) a judgment was rendered in ignorance of the fact that a necessary party had not been served at all or had died and the estate was not represented.

The power to recall a judgment will not be exercised when the ground for re-opening the proceedings or vacating the judgment was available to be pleaded in the original action but

was not done or where a proper remedy in some other proceeding such as by way of appeal or revision was available but was not availed. The right to seek vacation of a judgment may be lost by waiver, estoppel or acquiescence.

9. A distinction has to be drawn between lack of jurisdiction and a mere error in exercise of jurisdiction. The former strikes at the very root of the exercise and want of jurisdiction may vitiate the proceedings rendering them and the orders passed therein a nullity. A mere error in exercise of jurisdiction does not vitiate the legality and validity of the proceedings and the order passed thereon unless set aside in the manner known to law by laying a challenge subject to the law of limitation. In *Hira Lal Patni v. Sri Kali Nath*: [1962]2SCR747, it was held:-

“The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject matter of the suit or over the parties to it.”

14. Hence, it is only those matters where there is an inherent lack of jurisdiction that an order passed by such a court would be treated as a nullity or void. A mere error in exercise of jurisdiction would not vitiate the legality or validity of the proceedings.

15. In the light of the above legal position, in my opinion, merely because the higher court of ADJ heard the matter would not be a ground to set aside the order dated 20.11.2009.

16. As far as the other contention of the petitioner is concerned, namely, that the order of the appellate court is without cogent reasons, in my opinion,

in the facts and circumstances of the case the present argument would not help the petitioner. It is true that the order of the appellate court could have been worded in a better fashion. The order comes to a conclusion that as per the agreement between the respondent and M/s. Capital Land Builders (Pvt.) Limited, the petitioners had no right to run the business since the agreement is only between M/s.Capital Land Builders (Pvt.) Ltd. and M/s.Bharat Petroleum Corporation Ltd. The agreement provides that the business cannot be transferred in favour of anybody. It also holds that because there is a long tenure in using the premises by the petitioner no rights can accrue to the petitioner inasmuch as he has no legal case. Hence the said order set aside the order of the trial court dated 07.10.2005.

17. There are no grounds to challenge the said conclusion of the appellate order. The brief facts show that the said company M/s.Capital Land Builders (Pvt.) Limited was appointed as a licensee vide letter dated 8.5.1974. Thereafter an agreement is executed on 17.5.1974 permitting the said company to run and operate the retail outlet. It is stated that the respondents were always dealing with the Director of the said company Shri Janardan Rai. On 29.4.2005 the Board of Directors informed that the said Shri Janardan Rai had ceased to be a Director of the company. Later it was revealed that w.e.f. 01.04.1998 without prior consent of the respondent and in violation of the agreement the company had parted with possession of the outlet. It was the contention of the respondent that the said action of the said company was in violation of the agreement which specifically states that the licensee could not assign the license or any part or grant a sub license to any person from the company. The action of the petitioner prima facie is contrary

to the Agreement. There are no grounds to interfere with the conclusion of the appellate court.

18. Apart from the above, I may note, that the appeal was allowed on 20.11.2009. We are today in 2016. I am told that even evidence of the petitioner has not yet commenced. Instead of leading his evidence the petitioner is only trying to hold on to the possession of the premises on which he has prima facie no rights. On this ground itself the petitioner is entitled to no interim relief at this stage.

19. In the light of the above, there is no merit in the present petition. The same is dismissed. All pending applications, if any, also stand disposed of accordingly.

(JAYANT NATH)
JUDGE

SEPTEMBER 20, 2016

n