

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (227) No. 357 of 2018****Judgment reserved on 10.01.2019****Judgment delivered on 06.02.2019**

Sharad Bhanu Pandya, S/o Late Bhanu Shankar Pandya, aged about 48 years, R/o – Ramaiya Ward, Jagdalpur, District – Bastar, (C.G.)

----Petitioner/Plaintiff**Versus**

1. Mutwaley Islamiya Committee, Jagdalpur, District – Bastar (C.G.)
2. Chief Executive Officer, Chhattisgarh State Wakf Board, Raipur (C.G.)
3. State of Chhattisgarh, Through Collector – Jagdalpur, District Bastar (C.G.)

---- Respondents/Defendants.

For Petitioner	:	Shri Neeraj Choubey, Advocate
For Respondent No. 1	:	None, though served.
For Respondent No. 2	:	Shri Prateek Sharma & Shri Tribid Bhattacharya, Advocate.
For Respondent No. 3	:	Shri Vimlesh Bajpai, Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal**Judgment (C.A.V.)**

(1) The petitioner/plaintiff filed a suit for declaring the order dated 5.2.2010 passed by Waqf Board as null & void and also sought that order of the Sub Divisional Officer dated 27.06.2011 be declared void.

(2) The civil suit was filed on 29.06.2011, in which respondent No. 1 - Mutwaley Islamiya Committee, Jagdalpur, District – Bastar filed an objection that with effect from 1.11.2013 Waqf Act, 1995 has been amended and by virtue of

Section 85 of the Waqf Act, 1995 jurisdiction of Civil Court has been barred and the matter is cognizable by the Waqf Tribunal.

(3) The trial Court, by its order dated 29.09.2017, sustained that objection and dismissed the suit and returned the plaint invoking Order 7 Rule 10 & 10(A) of the CPC.

(4) The plaintiff preferred miscellaneous appeal under Order 43 Rule 1(d) of the CPC there-against. The Misc. appellate Court, by its impugned order dated 3.2.2018, has upheld the order of the trial Court and dismissed the miscellaneous appeal leading to filing of this writ petition under Article 227 of the Constitution of India.

(5) Mr. Choubey, learned counsel appearing for the petitioner/plaintiff would submit that since the amendment came into force with effect from 1.11.2013, suit filed by the petitioner/plaintiff on 29.6.2011 is not covered by said amendment as the said amendment is prospective in nature and relied upon the judgment of the Supreme Court in **Sardar Khan & others Vs. Syed Najmul Hasan (Seth) & others**¹ in support of his submission and, as such, the order passed by both the courts below are liable to be set aside.

(6) None present for respondent No. 1, though served.

(7) Mr. Sharma, learned counsel appearing for respondent No. 2 while supporting the impugned order would submit that impugned order is just & proper, which does not call for any interference under Article 227 of the

¹ AIR 2007 SC 1447

Constitution of India.

(8) I have heard learned counsel appearing for the parties, considered their rival submissions made hereinabove and went through the record with utmost circumspection.

(9) It is not in dispute that civil suit for declaring the order dated 5.2.2010 passed by Waqf Board and order dated 27.06.2011 passed by the Sub Divisional Officer to be void, was filed on 29.06.2011 and amendment in the Waqf Act, 1995 barring the jurisdiction of the Civil Court came into force with effect from 1.11.2013.

(10) The petitioner/plaintiff principally filed suit seeking that order passed by respondents No. 1 & 3 i.e. Mutwalli, Islamiya Committee, Jagdalpur, and Chhattisgarh State Waqf Board, Raipur dated 5.2.2010 be declared void and not binding on the plaintiff and also sought permanent injunction that defendants be restrained from evicting the petitioner/plaintiff pursuant to the order dated 5.2.2010 passed by the Chhattisgarh State Waqf Board.

(11) Section 83 of the Wakf Act, 1995 prior to amendment states as under:-

“83. Constitution of Tribunal, etc.- (1) The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a wakf or wakf property under this Act and define the local limits and jurisdiction under this Act of each of such Tribunals.”

(12) Section 83 of the Act, 1995 suffered amendment by the Wakf (Amendment) Act, 2013 with effect from 20th September, 2013, which states as

under :-

“(1) The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a waqf or waqf property, eviction of a tenant or determination of rights and obligations of the lessor and the lessee of such property, under this Act and define the local limits and jurisdiction of such Tribunals;”

(13) Section 85 of the Wakf Act, 1995 prior to amendment was as under:-

“85. Bar of jurisdiction of civil court.- No suit or other legal proceedings shall lie in any civil court 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.”

(14) Section 85 of the Act, 1995 suffered amendment by the Wakf (Amendment) Act, 2013 with effect from 20th September, 2013, which states as under :-

“Amendment of section 85.- In section 85 of the principal Act, for the words “civil court”, the words “civil court, revenue court and any other authority” shall be substituted.”

(15) A careful perusal of Section 83 of the Wakf (Amendment) Act, 2013 would show that the question regarding eviction of tenant or determination of rights and obligations of the lessor and the lessee of such property has been conferred to the Waqf Tribunal by Wakf (Amendment) Act, 2013, which has been brought into force with effect from Notification dated 29.10.2003 and the said amendment has come into force w.e.f. from 1st November, 2013.

(16) In the instant case, the civil suit was admittedly filed on 29.06.2011, which is for declaration that order passed by the Chhattisgarh State Waqf Board dated

5.2.2010 is null & void and not binding on the plaintiff.

(17) The question for consideration would be whether the amendment so made with effect from 1.10.2013 would be prospective or it would have retrospective operation.

(18) In order to unlock the question so posed for consideration, it would be appropriate to consider the principles of Statutory Interpretation:-

“(1) The legislature has plenary power of legislation within the fields assigned to them, it may legislate prospectively as well as retrospectively. It is a settled principle of statutory construction that every statute is *prima facie* prospective unless it is expressly or by necessary implications made to have retrospective operations. Legal Maxim “nova constitutio futuris formam imponere debet non praeteritis”, i.e. ‘a new law ought to regulate what is to follow, not the past’, contain a principle of presumption of prospectivity of a statute.

(2) Justice G.P. Singh in “Principles of Statutory Interpretation” (14th Edition, in Chapter 6) while dealing with operation of fiscal statute elaborates the principles of statutory interpretation in the following words:

“Fiscal legislation imposing liability is generally governed by the normal presumption that it is not retrospective and it is a cardinal principle of the tax law that the law to be applied is that in force in the assessment year unless otherwise provided expressly or by necessary implication. The above rule applies to the charging section and other substantive provisions such as a provision imposing penalty and does not apply to machinery or procedural provisions of a taxing Act which are generally retrospective and apply even to pending proceedings. But a procedural provision, as far as possible, will not be so construed as to affect finality of tax assessment or to open up liability

which had become barred. Assessment creates a vested right and an assessee cannot be subjected to re-assessment unless a provision to that effect inserted by amendment is either expressly or by necessary implication retrospective. A provision which in terms is retrospective and has the effect of opening up liability which had become barred by lapse of time, will be subject to the rule of strict construction. In the absence of a clear implication such a legislation will not be given a greater retrospectivity than is expressly mentioned; nor will it be construed to authorize the Income-tax authorities to commence proceedings which, before the new Act came into force, had by the expiry of the period then provided become barred. But unambiguous language must be given effect to, even if it results in reopening of assessments which had become final after expiry of the period earlier provided for reopening them. There is no fixed formula for the expression of legislative intent to give retrospectivity to a taxation enactment.....”

(19) Their Lordships of the Supreme Court in the matter of **Govind Das and ors. v. the Income Tax Officer and another**², noticing the settled Rules of interpretation laid down the law as under:-

“11. Now it is a well settled Rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. The general Rule as stated by Halsbury in Vol. 36 of the Laws of England (3rd Edn.) and reiterated in several decisions of this Court as well as English courts is that

“all statute other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie

2 1976 (1) SCC 906

prospective” and retrospective operation should not be given to a statute so as to affect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. If we apply this principle of interpretation, it is clear that Sub-section (6) of Section 171 applies only to a situation where the assessment of a Hindu undivided family is completed Under Section 143 or Section 144 of the new Act. It can have no application where the assessment of a Hindu undivided family is completed under the corresponding provisions of the old Act. Such a case would be governed by Section 25-A of the old Act which does not impose any personal liability on the members in case of partial partition and to construe Sub-Section (6) of Section 171 as applicable in such a case with consequential effect of casting of the members personal liability which did not exist Under Section 25-A, would be to give retrospective operation to Sub-section (6) of Section 171 which is not warranted either by the express language of that provision or by necessary implication. Sub-section (6) of Section 171 can be given full effect by interpreting it as applicable only in a case where the assessment of a Hindu undivided family is made Under Section 143 or Section 144 of the new Act. We cannot, therefore, consistently with the Rule of interpretation which denies retrospective operation to a statute which has the effect of creating or imposing a new obligation or liability, construe Sub-section (6) of Section 171 as embracing a case where assessment of a Hindu undivided family is made under the provisions of the old Act. Here in the present case, the assessments of the Hindu undivided family for Assessment Years 1950-51 to 1956-57 were completed in accordance with the provisions of the old Act which included Section 25-A and the Income Tax Officer was, therefore, not entitled to avail of the provision enacted in Sub-section (6) read with Sub-Section (7) of Section 171 of the new Act for the purpose of recovering the tax

or any part thereof personally from any members of the joint family including the Petitioners.”

(20) Recently, a Constitution Bench of the Supreme Court speaking through Dr. Justice A. K. Sikri, in the matter of **The Commissioner of Income Tax (Central-1 New Delhi) v. Vatika Township Pvt. Ltd.**³ while considering as to whether Proviso inserted in Section 113 of Income Tax Act w.e.f. 01.06.2002 is prospective or clarificatory/retrospective, noticed the general principles concerning retrospectivity of a statute and observed as under:-

“28. of the various Rules guiding how legislation has to be interpreted, one establishment Rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the Rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should find that his plans have been retrospectively upset. This principle of law is known as *lex prospicit non respicit*: law looks forward not backward. As was observed in Phillips v. Eyre, a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

29. The obvious basis of the principle against retrospectivity is the principle of “fairness”, which must be the basis of every legal Rule as was observed in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be

3 (2015) 1 SCC 1

treated as prospective unless the legislative intent is clearly to give the enactment as retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later.

33. A Constitution bench of this Court in Keshavlal Jethalal Shah v. Mohanlal Bhagwandas⁴, while considering the nature of amendment to Section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act as amended by Gujarat Act 18 of 1965, observed as follows: (AIR p.1339, para 8)

8. ... The amending Clause does not seek to explain any pre-existing legislation which was ambiguous or defective. The power of the High Court to entertain a petition for exercising revisional jurisdiction was before the amendment derived from Section 115 of the Code of Civil Procedure, and the legislature has by the amending Act not attempted to explain the meaning of that provision. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act.”

(21) Similarly, the Supreme Court, speaking through Dr. Justice A.K. Sikri in the matter of Jayam and co. v. Assistant Commissioner and Ors.⁵ again reiterated the broad legal principles in this regard in paragraphs 14 and 18 which is to the following effect:-

“14. With this, let us advert to the issue on retrospectivity. No doubt, when it comes to fiscal legislation, the legislature has power to make the provision retrospectively. In R.C. Tobacco(P) Ltd. v. Union of India⁶, this Court stated broad legal principles while testing a retrospective statute, in the following manner:

(I) A law cannot be held to be unreasonable

4 AIR 1968 SC 1336

5 (2016) 15 SCC 125

6 2014 AIR SCW 5674

merely because it operates retrospectively;

(ii) The unreasonability must lie in some other additional factors;

(iii) The retrospective operation of a fiscal statute would have to be found to be unduly oppressive and confiscatory before it can be held to be unreasonable as to violate constitutional norms;

(iv) Where taxing statute is plainly discriminatory or provides no procedural machinery for assessment and levy of tax or that is confiscatory, courts will be justified in striking down the impugned statute as unconstitutional;

(v) The other factors being period of retrospectivity and degree of unforeseen or unforeseeable financial burden imposed for the part period;

(vi) Length of time is not by itself decisive to affect retrospectivity. (Jayam and Co. case, SCC Online Mad para 85)

18. The entire gamut of retrospective operation of fiscal statutes was revisited by this Court in a Constitution Bench judgment in CIT v. Vatika Township (P) Ltd.⁶ in the following manner:

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34. It would also be pertinent to mention that assessment creates a vested right and an Assessee cannot be subjected to reassessment unless a provision to that effect inserted by amendment is either expressly or by necessary implication retrospective. (See CED v.

M.A. Merchant⁷)

35. We would also like to reproduce hereunder the following observations made by this Court in Goving Das v. ITO⁸, while holding Section 171(6) of the Income Tax Act to be prospective and inapplicable for any assessment year prior to 1-4-1962, the date on which the Income Tax Act came into force:

'11. Now it is a well-settled Rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters or procedure. The general Rule as stated by Halsbury in Vol. 36 of the Laws of England (3rd Edn.) and reiterated in several decisions of this Court as well as English courts is that

“all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are *prima facie* prospective and retrospective operation should not be given to a statute so as to affect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.”

(22) Thus, it is quite settled principle of statutory construction that every statute is *prima facie* prospective unless it is expressly or by necessary implication made to have retrospective effect.

(23) Thus, there is nothing in the Waqf Amendment Act, 2015 which makes the amended provision retrospective, therefore amendment in question brought into force with effect from 1.11.2013 would be prospective in nature and amendment would not apply, as such, the instant suit which was already filed prior to

7 AIR 1989 SC 1710

8 AIR 1977 SC 552

1.11.2013, would still be governed by un-amended provision. It is held accordingly.

(24) There is one more reason for holding so. The plaintiff has filed suit for declaration of title that order of State Waqf Board already passed is null and void and permanent injunction also be granted restraining from evicting the petitioner/ plaintiff in compliance of that order.

(25) It is well settled principle of law that there is a strong presumption that Civil Courts have jurisdiction to decide all questions of civil nature. The exclusion of jurisdiction of civil Courts is therefore not to be readily inferred and such exclusion must either be “explicitly expressed or clearly implied”.

(26) It is a principle of no means to be whittled down and has been referred to as a fundamental rule. As a necessary corollary of this rule, provisions excluding jurisdiction of civil Courts and provisions conferring jurisdiction on authorities and tribunals other than civil Courts are strictly construed. The existence of jurisdiction in civil Courts to decide questions of civil nature being the general rule and exclusion being an exception, the burden of proof to show that jurisdiction is excluded in any particular case is on the party raising such a contention. The rule that the exclusion of jurisdiction of civil Courts is not to be readily inferred, is based on the theory that civil Courts are Courts of general jurisdiction and people have a right, unless expressly or impliedly debarred, to insist for free access to the Courts of general jurisdiction of the State. [See

Principles of Statutory Interpretation by Justice G.P. Singh, 10th Edition].

(27) In a recently delivered judgment in the matter of **Vimal Kishore Shah and others v. Jayesh Dinesh Shah and others**⁹, their Lordships of the Supreme Court reiterating the above principles of law have held that ouster of jurisdiction of the Civil Courts cannot be inferred readily. Their Lordships succinctly held as under: -

“31..... The provisions as to reference of disputes to arbitration is a matter that concerns the jurisdiction of courts. Ordinarily, the courts are zealous of their jurisdiction and can only allow it to be curtailed by some provision of law. The provisions of the India Arbitration Act constitute such a law, but the provision must be strictly construed.”

(28) Reverting to the facts of the present case, it is clear that present is a suit for declaration simplicitor and consequential relief of injunction for not enforcing the order passed by the Waqf Board and the relief of declaration and injunction can be granted only by civil Court and, therefore, even otherwise, jurisdiction for grant for injunction and declaration would lie with the Waqf Tribunal. It is not a bare suit for eviction of tenant from waqf property brought by the plaintiff, therefore, suit for declaration of title and injunction cannot, even otherwise, be held to be barred by Section 83 of Wakf (Amendment) Act, 2013 and, as such, both the courts below are absolutely unjustified in holding that Civil Court has no jurisdiction in the instant matter, which is contrary to the well settled law in this regard. Thus examining the matter from any of the angles, impugned order

⁹(2016) 8 SCC 788 : (AIR 2016 SC 3887)

cannot be sustained and is liable to be and is hereby set aside.

(29) Accordingly, the writ petition is allowed to the extent indicated hereinabove. The civil Court is directed to hear the suit and conclude it expeditiously preferably within a period of four months from the date of receipt of certified copy of this order as the suit was filed way back on 29.6.2011.

Sd/-
(Sanjay K. Agrawal)
Judge

D/-

