

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION NO.4250 OF 2025

M/s. Shree Durga Trading Company
through its Partner Mr. Salim N. Shamsi ...Petitioner

Versus

Mr. Ateeq Anwar Agboatwala & Ors. ...Respondents

Mr. Saeed S. Shaikh, for the Petitioner.

Mr. Kevic Setalvad, Senior Advocate a/w Mr. Jehan Lalkaka a/w Ms. Reshaya Malhotra a/w Mr. Nimish Kothare a/w Ms. Hilla Boatwalla a/w Mr. Nikhil Mutha i/b Nanu Hormasjee & Co., for the Respondent Nos. 1 to 6.

CORAM: MADHAV J. JAMDAR, J.

DATED: 12th JUNE 2025

JUDGMENT.:

1. Heard Mr. Shaikh, learned Counsel appearing for the Petitioner and Mr. Setalvad, learned Senior Counsel appearing for the Respondent Nos.1 to 6.

2. By the present Writ Petition filed under Article 227 of the Constitution of India, the challenge is to the legality and validity of the order dated 13th December, 2024 passed by the learned Judge, Small Causes Court, Mumbai below Exhibit-23 in Execution Application No.59 of 2018 in RAE Suit No.1043/1806 of 2001. The said Exhibit-23 Application has been filed by the Respondents -Decree Holders to allow them to proceed with the Execution Application and to issue possession warrant. The Petitioner has also sought relief in this Writ Petition, by amending the prayer in the Writ Petition, that a declaration be granted

that the possession taken from the Petitioner on 8th April, 2025, was in pursuance to the decree passed by the learned Trial Court not having jurisdiction and therefore, the Respondent Nos.1 to 9 be directed to handover the possession of the suit premises to the Petitioner, forthwith.

3. By the said impugned order dated 13th December, 2024 the Application bearing Exhibit-23 filed in said Execution Application has been allowed directing issuance of warrant of possession of the suit premises more particularly mentioned in the Execution Application and further directing that the bailiff of the Small Causes Court, Mumbai to execute the warrant of possession.

4. At the outset, it is required to be noted that the present Petitioner has filed undertaking pursuant to the order passed by the Supreme Court, that the possession of the suit premises would be handed over to the Respondent Nos.1 to 6 on or before 6th April, 2025 and in compliance with the said undertaking the Petitioner has handed over the possession of the suit premises to the Respondent Nos. 1 to 6 on 7th April, 2025.

5. Mr. Shaikh, learned Counsel, appearing for the Petitioner submitted that the suit premises belongs to a trust which is registered with the Waqf Board of Maharashtra under the Waqf Act, 1995 (“**the said Act**”). He submitted that the said Act has been amended with effect from 1st November, 2013. In view of the said amendment particularly

amendment to Section 83 of the said Act, Waqf Tribunal has jurisdiction to decide the dispute regarding eviction of tenant and the Small Causes Court has no jurisdiction to decide the same. Therefore, it is his submission that the eviction decree which has been passed by the learned Small Causes Court, Mumbai, although confirmed up to the Supreme Court is passed by the Court having no jurisdiction and therefore, the said decree could not have been executed. It is his submission that as per the amendment Act 27 of 2013, by which the said Act has been amended, there is a change of forum and jurisdiction to decide the dispute between the Waqf and tenant regarding eviction and as the amendment is concerning forum and jurisdiction the amendment will apply retrospectively. Mr. Shaikh, learned Counsel to substantiate said contention relied on the judgment of Supreme Court in the case of *Mumtaz Yarud Dowla Waqf v. Badam Balakrishna Hotel Pvt. Ltd.*¹

6. Learned Counsel submitted that although the Petitioner had handed over possession in view of the undertaking given pursuant to the order of the Supreme Court on 7th April, 2025, but as the possession was handed over in view of the decree passed by the Court not having jurisdiction, the same is totally illegal and therefore relief sought in the present Petition is required to be granted. He relied on Judgment of the

1 2023 SCC OnLine SC 1378

Supreme Court in the case of ***Sarwan Kumar v. Madan Lal Aggarwal***² to substantiate his contention that a decree passed a Court by having no jurisdiction over the subject matter would be a nullity and the Judgment-Debtor can object to the execution of such decree being nullity and non est., at any stage, including at the stage of execution of the decree or any other collateral proceedings. He therefore submitted that the reliefs sought in the Writ Petition are required to be granted.

7. On the other hand, it is the submission of Mr. Setalvad, learned Senior Counsel appearing for the Respondent Nos. 1 to 6, that although the Petitioner to substantiate said contentions that the learned Small Causes Court, Mumbai has no jurisdiction to decide the dispute between a landlord and tenant when the property is of the Waqf relied on judgment of the Supreme Court in the case of ***Mumtaz Yarud Dowla Waqf*** (supra), however, he submitted that the said reliance is totally misplaced as in the SLP which has been filed by the Petitioner-tenant, the said judgment has been annexed to the affidavit-in-reply. He submitted that therefore no reliance can be placed on the said judgment.

8. He submitted that in any case as far as the present Petitioner is concerned, the issue whether the jurisdiction is with the Waqf Tribunal or with the Small Causes Court is no longer *Res integra* and is already decided and therefore, between parties to the present proceeding the

² (2003) 4 SCC 147

same will be barred by the principle of *Res judicata*. He submitted that contentions which are now sought to be raised are already raised upto the Supreme Court and therefore, the Petitioner cannot raise the said contentions.

9. He submitted that in any case although, the Petitioner is relying on the judgment of the Supreme Court in the case of *Mumtaz Yarud Dowla Waqf* (supra), however, paragraph 33 of the said judgment clarifies that the legal position as held in the said decision will not apply to cases where there is already a decree where a party has not raised the issue of jurisdiction at any time.

10. Mr. Setalvad, learned Senior Counsel submits that in fact the Respondents stands on a better footing as the issue of jurisdiction was expressly raised by the Petitioner and rejected by the Small Causes Court as well as this Court and by the Supreme Court. He submitted that in any case an unconditional undertaking is given by the Petitioner to the Supreme Court and pursuant to the same, the Petitioner has vacated the suit premises. Learned Senior Counsel submits that what is sought to be done by the present Petitioner is to seek review of all the orders which have been passed and which have been confirmed by the Supreme Court and attained finality.

11. Before considering the rival contentions, it is necessary to set out certain factual aspects:-

- (i) The Petitioner-firm was a monthly tenant of “Noor Hospital Trust” in respect of Shop No.1 and 2 situated on the ground floor of “Noor Hospital Building” at Mohammed Ali Road, Mumbai.
- (ii) The Respondent Nos 1 to 6 are the trustees of the Said “Noor Hospital Trust”. The trustees of Said “Noor Hospital Trust” filed RAE Suit No.1043/1806 of 2001 in the Small Causes Court, Mumbai seeking eviction of the Petitioner.
- (iii) Learned Judge of the Small Causes Court by Judgment and Decree dated 30th September, 2014 decreed the suit.
- (iv) The present Petitioner challenged the said Judgment and Decree by filing Civil Revision Application No.546 of 2019 and a learned Single Judge of this Court remanded the matter to the Small Causes Court, Mumbai, by order dated 4th April, 2018 for recording findings on the issue of *bonafide* requirement and comparative hardship.
- (v) During the pendency of the said proceedings on remand, the Petitioner i.e. tenant filed an Application dated 24th January, 2019 before the learned Small Causes Court, Mumbai bearing Exhibit-264 in RAE Suit No.1043/1806 of 2001 to refer the dispute to the Waqf Tribunal under Section 85 of the said Act, pursuant to the 2013 amendment to Section 83 of the said Act.
- (vi) Learned Judge of the Small Causes Court, Mumbai rejected the said Application bearing Exhibit-264 in RAE Suit No.1043/1806 of 2001

by order dated 6th February, 2019 and held that Waqf Tribunal did not have jurisdiction to entertain the dispute.

(vii) The said order has been challenged by filing Civil Writ Petition No.12320 of 2019 and this Court by order dated 5th January, 2023 dismissed the said Writ Petition and held that the Waqf Tribunal did not have jurisdiction to entertain the eviction dispute between the parties.

(viii) The said order of this Court dated 5th January, 2023 was challenged by the present Petitioner before the Supreme Court by filing SLP (C) No.43859 of 2023 which was dismissed by order dated 10th July, 2024.

(ix) In the meantime, learned Judge of the Small Causes Court, Mumbai vide order dated 22nd February, 2019 decided the issue of *bonafide* requirement and comparative hardship in favour of the Respondents-landlord.

(x) By order dated 23rd September, 2024 passed by a learned Single Judge in Civil Revision Application No.564 of 2019 the said eviction decree has been confirmed. It is the submission of Mr. Setalvad, learned Senior Counsel appearing for the Respondent Nos. 1 to 6, that the contention that the Small Causes Court had no jurisdiction to entertain the dispute was raised before the learned Single Judge, however, the said Civil Revision Application was dismissed.

(xi) Thereafter, the Petitioner has challenged the said order dated 23rd

September, 2024 passed by a learned Single Judge before the Supreme Court by filing SLP (C) D. No.53698 of 2024. In the said SLP, question of law A and grounds G to J and (6C) raised are concerning the jurisdiction of the Small Causes Court. The said SLP was dismissed by the Supreme Court by order dated 6th January, 2025 and Supreme Court granted three months time to vacate the suit premises to the Petitioners on the condition of filing undertaking before the Trial Court.

(xii) Pursuant to the said order of the Supreme Court undertaking dated 18th January, 2025 has been filed by the Petitioner before the Trial Court undertaking that the Petitioner would vacate the suit premises on or before 6th April 2025.

(xiii) An Application bearing Exhibit-23 has been filed in Execution Application No.59 of 2018 seeking execution of the said decree and a learned Judge of the Small Causes Court has issued possession warrant by order dated 13th December, 2024.

(xiv) The said order dated 13th December, 2024 has been challenged by filing the present Writ petition.

12. It is required to be noted that after noticing that the undertaking has been given to the Supreme Court to vacate the suit premises on or before, 6th April 2025 when this Writ Petition was placed before this Court, a statement was made on the instructions of the Petitioner, that in compliance with the undertaking given pursuant to the order of the

Supreme Court the possession of the suit premises would be handed over to the Respondents, on or before 6th April, 2025. Accordingly, the Petitioner has vacated the suit premises on 7th April, 2025.

13. In view of the above factual position it is necessary to consider the main contention of Mr. Shaikh, learned Counsel appearing for the Petitioner that the Small Causes Court, Mumbai has no jurisdiction to decide a dispute where the suit property is a Waqf Property. As noted hereinabove, the said point was raised by the Petitioner by filing Application bearing Exhibit-264 in RAE Suit No.1043/1806 of 2001 and by order dated 6th February, 2019 passed by the learned Judge, Small Causes Court, Mumbai, it has been held that the jurisdiction of the Small Causes Court is not barred by the provisions of Section 83 of the said Act to entertain and try the said suit and resultantly, it has been held that issue of *bonafide* requirement and hardship need not be required to be referred to the Tribunal established under the said Act. It is further significant to note that the said order is challenged before this Court by filing Writ Petition No.12320 of 2019 and by order dated 5th January, 2023 passed by this Court, the order passed by the learned Judge, Small Causes Court, Mumbai holding that in this particular case Waqf Tribunal has no jurisdiction is upheld. It is required to note the conclusions as recorded by this Court in said order dated 5th January, 2023 passed in Writ Petition No.12320 of 2019. The said conclusions

reads as under:-

“9. Conclusions :-

9.1. Position before 2013 amendment of the Waqf Act :-

*In the light of law laid down by the Supreme Court in **Ramesh Gobindram** (supra) and by a learned Single Judge of this Court in **Abdul Kadar @ Babbu Tailor S/o Ismail & Ors.** (supra) it is clear that, bar created under Section 85 of the Waqf Act is not applicable to the dispute between landlord and tenant. The questions which are required to be determined by the Tribunal are specifically set out in Sections 6 and 7 and certain other Sections of the Waqf Act, however, the same do not contemplate dispute concerning eviction of Tenant of the waqf property.*

9.2. Whether 2013 amendment of the Waqf Act is prospective or retrospective :-

*A) In the light of the law laid down by the Supreme Court in **Hitendra Vishnu Thakur & Ors.** (supra), the 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. The Rent Act provides for a right of Appeal under Section 33 whereas an order of Tribunal is final and binding in view of Section 83(7) of the Waqf Act.*

B) The 2013 amendment has come into force w.e.f. 1st November 2013.

*C) In the light of the law laid down by the Supreme Court in **Rashid Wali Beg** (supra) and for the reasons set out in paragraph 8 hereinabove, it is clear that the 2013 amendment is prospective in nature.*

10. In view of above discussion, the 2013 amendment will not apply to the suit in the present case i.e. R.A.E. Suit No.1043/1806 of 2001 and further proceedings in the said suit.”

14. It is further significant to note that the said order dated 5th January 2023 of this Court has been challenged before the Supreme Court and the said SLP has been dismissed.

15. As noted hereinabove, in the meanwhile, the learned Judge of the Small Causes Court decided the said issue of *bonafide* requirement and hardship in favour of the Respondent Nos. 1 to 6 - Landlords and the said eviction decree passed by the learned Judge of the Small Causes Court, Mumbai has been confirmed by a learned Single Judge by order dated 23rd September, 2024 passed in Civil Revision Application No.564 of 2019. It is also significant to note that the contention that the Small Causes Court has no jurisdiction to entertain the dispute was once again raised by the Petitioner in the said Civil Revision Application, however, the said Civil Revision Application was dismissed.

16. Thereafter, the SLP has been filed challenging the said order dated 23rd September, 2024 and the said SLP as noted hereinabove has been dismissed by order dated 6th January, 2025. In the said SLP also point regarding jurisdiction has been specifically raised by the Petitioner.

17. Thus, it is clear that the contention, that the Small Causes Court has no jurisdiction and it is a Waqf Tribunal which has jurisdiction, has been raised and decided by the learned Small Causes Court and which order is upheld by this Court and the said order has been confirmed by the Supreme Court.

18. In the above background, it is relevant to note the decision of the Supreme Court in the Case of *Neelima Srivastava v. State of Uttar*

Pradesh,³ on which reliance is placed on behalf of the Respondent Nos. 1 to 6, more particularly on Paragraph No.29 of the same, which reads as under:-

“29. It becomes absolutely clear from the above clarification that earlier decisions running counter to the principles settled in the decision of Umadevi (3) will not be treated as precedents. It cannot mean that the judgment of a competent court delivered prior to the decision in Umadevi (3) and which has attained finality and is binding inter se between the parties need not be implemented. Mere overruling of the principles, on which the earlier judgment was passed, by a subsequent judgment of higher forum will not have the effect of uprooting the final adjudication between the parties and set it at naught. There is a distinction between overruling a principle and reversal of the judgment. The judgment in question itself has to be assailed and got rid of in a manner known to or recognised by law. Mere overruling of the principles by a subsequent judgment will not dilute the binding effect of the decision inter partes.”

(Emphasis added)

Thus, what the Supreme Court has held that although in the **State of Karnataka v. Umadevi**⁴ earlier decisions running counter to the principles settled in the said decision of **Umadevi** (3) will not be treated as precedent, however, the judgment of Competent Court delivered prior to the said decisions in **Umadevi** (3) and which has attained finality is binding inter se between the parties.

19. It is also required to note the judgment of Supreme Court in the case of **Government of NCT of Delhi Through Its Secretary, Land and Building Department v. K. L. Rath Steel Limited**.⁵ and more

3 (2021) 17 SCC 693

4 (2006) 4 SCC 1

5 (2024) 7 SCC 315

particularly Paragraph No.110 of the same which reads as under:-

“110. We, thus, hold that no review is available upon a change or reversal of a proposition of law by a superior court or by a larger Bench of this Court overruling its earlier exposition of law whereon the judgment/order under review was based. We also hold that notwithstanding the fact that Pune Municipal Corpn.² has since been wiped out of existence, the said decision being the law of the land when the civil appeals/special leave petitions were finally decided, the subsequent overruling of such decision and even its recall, for that matter, would not afford a ground for review within the parameters of Order 47 CPC.”

(Emphasis added)

Thus, what the Supreme Court has held that no review is available upon a change or reversal of a proposition of law by a superior Court or by a larger bench of the Court overruling its earlier exposition of law whereon the judgment /order under review was based.

20. The above principles of law are applicable in the present case in view of the submissions raised by the learned Counsel appearing for the Petitioner.

21. Learned Counse of the Petitioner to substantiate his contention that the Small Causes Court has no jurisdiction to decide the dispute between a landlord and tenant where the property is a Waqf property heavily relied on judgment of the Supreme Court in the case of **Mumtaz Yarud Dowla Waqf** (supra). In the said decision of the Supreme Court after considering Section 83 of the Waqf Act as amended by 2013 amendment, it has been held that Waqf Tribunal has sufficient jurisdiction to try every suit pertaining to either a Waqf or a Waqf

property, notwithstanding the nature of relief concerned, except as mandated under the statutes. However, it is very significant to note the clarification given by the Supreme Court in the said case of ***Mumtaz Yarud Dowla Waqf*** (supra) in Paragraph No.33 which reads as under:-

*“33. We would like to consider one more issue by drawing a distinction between institution and adjudication. Institution of a suit before a forum where an adjudication process is the same as the other, insofar as the rights and liabilities are concerned, has got no relevancy when subsequently either an act or amendment has been brought forth conferring the jurisdiction to some other forum. In other words, the issue for consideration is the forum to adjudicate. **This principle is subject to the rider that it may not have an application when there is already a decree where a party has not raised the issue of jurisdiction at any point before.**”*

(Emphasis added)

Thus, what has been held by the Supreme Court is that the said decision in ***Mumtaz Yarud Dowla Waqf*** (supra) will have no application when there is already a decree where a party has not raised the issue of jurisdiction at any point before.

22. In fact it is required to be noted that in the present case the said issue of jurisdiction has been specifically raised before the learned Judge of the Small Causes Court. The learned Judge of the Small Causes Court has held that the Waqf Board has no jurisdiction to decide the said dispute. The said decision of the learned Judge of the Small Causes Court is challenged by filing Writ Petition in this Court. This Court as noted hereinabove, confirmed the said decision and the said decision has been further challenged before the Supreme Court and the

Supreme Court has also confirmed the said decision. Thus, it is very clear that in view of the explanation given by the Supreme Court in the case of *Mumtaz Yarud Dowla Wakf* (supra) in Paragraph No.33 and in view of the law laid down by the Supreme Court in the case of *Government of NCT of Delhi Through Its Secretary, Land and Building Department* (supra) and *Neelima Srivastava* (supra) no review is available upon a change or reversal proposition of law by a superior or by larger bench of the same Court overruling its earlier exposition of law whereon the judgment/order under review was based. It has been held by the Supreme Court that mere overruling of the principles, on which the earlier judgment was passed, by a subsequent judgment of higher forum will not have the effect of uprooting the final adjudication between the parties and set it at naught. There is a distinction between overruling a principle and reversal of the judgment. Mere overruling of the principles by a subsequent judgment will not dilute the binding effect of the decision inter partes.

23. The learned Counsel for the Petitioner has also relied on the judgment of the Supreme Court in the case of *Sarwanan Kumar v. Madan Lal Aggarwal* (supra) wherein it has been held that when the Court decides that interpretation of a particular provision as given earlier was not legal, it declares that the law as it stood right from the beginning as per its decision. There can not be any two views about the said

proposition. However, as already noted hereinabove, the legal position held in the *Government of NCT of Delhi Through Its Secretary, Land and Building Department* (supra) and also *Neelima Srivastava* (supra) is applicable to the present case. It is correct that once the Court interprets a provision, it declares the law as it stood right from the beginning as per its decision. However, the same is subject to the clarification as given in the case of *Mumtaz Yarud Dowla Waqf* (supra) in paragraph No.33 as noted hereinabove and also in the case of *Government of NCT of Delhi Through Its Secretary, Land and Building Department* (supra) and *Neelima Srivastava* (supra) that the judgment of a competent court delivered prior to the decision and which has attained finality and is binding inter se between the parties and remains unaffected in spite of change in the legal position.

24. Accordingly, there is no substance in the Writ Petition. The Writ Petition is dismissed, however, with no order as to costs.

[MADHAV J. JAMDAR, J.]