HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

Case: C. Rev. No. 162/2009 & CMP No. 179/2009.

Date of order : 22.02.2011

Nek Ram and ors vs. Bharat Bhushan & ors.

Coram:

Hon'ble Mr. Justice Virender Singh, Judge

Appearing counsel:

For petitioner(s) : Mr. P.N.Goja Advocate.

For respondent(s): Mr. O.P.Thakur, Advocate.

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i) Whether approved for reporting in Press/Journal/Media No

ii) Whether to be reported in Digest/Journal Yes

Petitioners are the contesting defendants and the respondents are the plaintiffs in the original civil suit (For short to be referred to as 'plaintiffs' and 'defendants'). A civil suit for permanent prohibitory injunction was filed by the plaintiffs before learned Munsiff Billawar stating therein that they were owners in cultivating possession of some chunk of land (twenty-four kanals & two marlas) situated in Halqa Dher Tehsil Billawar. Since Ram Chand one of the co-sharers in the suit land had died hence some of the plaintiffs being successors were also in possession of the said suit land alongwith their co-sharers. The case further set up by the plaintiffs was that the defendants were forcibly encroaching upon the land and therefore, they should be restrained. A preliminary objection was raised by the defendants that the suit was not maintainable in the present form as the matter comes within

the jurisdiction of J&K Agrarian Reforms Act (Validation) Act, 1997 (For short the 'Act') and therefore the jurisdiction of the Civil Court was ousted to take cognizance under the provisions of section 19 (3)(e) of the said Act. Based on the pleadings of the parties, five issues were taken for settlement, out of which, issue No. 1 with regard to the jurisdiction was treated as preliminary issue which was decided by the learned Trial Court in the start, holding that the dispute between the parties in the suit was to be decided by the authority appointed under the Act only and therefore, referred the matter to SDM (Collector) Basohli. Aggrieved of the said order, the plaintiffs filed a revision petition bearing C. Rev. No. 37/2001 in this Court which was allowed on 25th of November 2004 setting aside the order of the learned Trial Court and directed the trial court to proceed with the case in accordance with law.

During the proceedings before the learned Trial Court, defendants, in year 2009 moved an application for recasting issue No. 1 on the ground that in the light of certain judgments rendered after the decision of aforesaid civil revision are in their favour on the point of jurisdiction, as such the issue already decided was required to be reconsidered. The said application was opposed by the plaintiffs and ultimately the learned Trial Court dismissed the same vide impugned order dated 06-11-09 observing that it was hit by principle of res judicata as the issue involved already stood decided by this Court in the Civil revision petition (37/2001) which had attained finality. Aggrieved of the said order, defendants are before this Court through the instant revision petition praying for setting aside

the order of learned Trial court or in the alternative seeking review of the order dated 25-11-2004 passed by this Court in the aforesaid revision petition (No. 37/2001) on the strength of the decisions of this Court. Further prayer is that the instant petition be treated as petition under Article 227 of Constitution of India read with section 103 of Constitution of Jammu and Kashmir seeking direction to the Trial Court to transfer the main suit for adjudication before appropriate authority under the Act.

I have heard learned counsel for both the sides and perused the available record.

Mr. Goja submits that it is not the origin of the land but the nature of the land which attracts the said Act and in the present case, defendants are shown to be in possession of the disputed property and the dispute, essentially being a dispute with regard to the possession, the Civil Court had no jurisdiction to try and hear the case. He further submits that in the written statement, the defendants have taken a categorical plea in this regard and had also relied upon the revenue records and that the learned Trial Court after going through all these aspects had returned finding on the preliminary issue that the Civil Court had no jurisdiction. He then submits that the finding returned by the learned Revisional Court is not sustainable in the light of Full Bench judgement of this Court handed down in case Jagtu vs. Badri and others, reported in 1979 KLJ 172 and also on the basis of subsequent judgments rendered by this Court later in point of time on jurisdictional aspect only. Therefore, there is no legal bar created by the

statute which would operate as res-judicata, as the Court cannot be allowed to try a case when it lacks jurisdiction. The grievance of Mr. Goja is that the learned Trial Court without returning any finding with regard to the jurisdiction vested in it, dismissed the application of the defendants observing that it was hit by Principle of res-judicata and that the view taken is contrary to the views expressed by this Court in three judgements rendered after the decision of the revision petition. To strengthen his arguments, Mr. Goja relies upon the judgments of this court rendered in cases **Zulfkar Ali Shah vs. Alam Shah and others, reported in 2006 (1)JKJ 582 (HC), Puran Chand and others vs. Ram Krishan, reported in 2008(3) JKJ 528 (HC)** and **Randhir Singh vs. Gian Chand and another, reported in 2008(3)JKJ 512(HC).**

In the same breath the other argument advanced by Mr. Goja is that, if at all, this Court is of the view that the order of the learned Trial Court is not liable to be set aside for any good reason, at least the order of the Revisional Court can be reviewed by this Court itself to avoid miscarriage of justice or in the alternative this Court can exercise its supervisory powers prohibiting the Subordinate Court not to exercise its jurisdiction not vested in it so as to meet ends of justice. In this regard he relies upon a judgment of Hon'ble Supreme Court rendered in case **M.M.Thomas vs. State of Kerala, reported in (2000)1 Supreme Court Cases 666.**

Per contra, Mr. Thakur submits none of the grounds is legally available to the defendants as there appears to be no error in the impugned order showing indulgence of this Court

and that the learned Trial Court has rightly rejected the application observing that it is hit by the principle of res-judicata. Mr. Thakur then submits that an attempt seeking review of the earlier order passed by this Court in the revision petition is again not permissible as the review has a limited scope and the present case does not fall within the legal parameters of same, that too when the order has attained finality way back in year 2004. At the same time, it is not a case which calls for invoking its jurisdiction under Article 227 of Constitution of India.

In support of his arguments, Mr. Thakur has relied upon cases **C.V.Rajendran vs. N.M. Muhammed Kunhi, reported in AIR 2003 Supreme Court 649** and **Abdul Salam vs. State of Jammu and Kashmir and others, reported in AIR 1981 Jammu and Kashmir 21 (Full Bench).**

On facts also, Mr. Thakur states that the revenue records on which Mr. Goja is relying heavily and annexed herewith also were obtained subsequently, whereas there is no reference of this all in the original pleadings, on the basis of which, all issues including the preliminary issue on the point of jurisdiction were framed by the Trial Court. Therefore, the defendants cannot derive any benefit from this aspect as well and they have no case at all on any count. Rather it calls for imposing exemplary costs.

May be Mr. Goja has made an attempt to launch multiple attacks taking one or the other plea, but in my considered view, the short point that arises for consideration in the instant revision petition is: whether an issue in a civil suit already

attained finality can once again be re-agitated afresh in the same suit taking the plea that in certain judgments of High Court delivered later in point of time with regard to the same controversy, another view from the one taken earlier has been taken.

Admittedly the preliminary issue of jurisdiction which was initially decided in favour of the defendants by the learned Trial Court vide order dated 24-02-2001 was set aside by this Court in a civil revision petition (37/2001) way back on 25th of Nov. 2004. This order has attained finality being not challenged by the defendants. They went on waiting for five long years and ultimately on basis of certain judgments referred to above and rendered subsequently, an application was moved for recasting of the settled issue which stands dismissed. In my view, the complete answer to the point for consideration is traceable from the Full Bench judgment of this Court delivered in Abdul Salam's case and relied upon by Mr. Thakur. For reference, the facts of the said case, in brief, need to be reproduced.

The appellant Abdul Salam was a contractor for carriage of food grains. A complaint was made against him that he had supplied food grains short of consignment. The matter was enquired into and ultimately an amount of about Rupees one lac was slapped upon him on account of shortage. Consequently a notice was issued to him by the concerned department which constrained him to file a writ petition questioning the recovery taking certain pleas including that he was not heard. The said writ petition was decided against him.

He subsequently filed a suit for injunction seeking to restrain the State from making recovery from him. The said suit failed in the original Court and thereafter dismissed by the Appellate Court as well. He filed second appeal in the High Court. When the matter was taken up by learned Single judge of this Court, it was argued that the order of recovery was vitiated by the fact that no hearing was granted to the contractor. It was further argued that, according to settled principles of law, an opportunity of being heard was to be afforded. In that view, the correctness of the view expressed by the Division Bench of this Court to the effect that no hearing was required to be given to the concerned (person) before an amount was certified to be due was doubted before the learned Single Judge arguing that the said judgement ran contrary to the law subsequently delivered by Hon'ble Supreme Court in certain other matters. The learned Single judge found that in the earlier writ petition filed by the appellant against the respondent, the issue of hearing before the amount was certified to be due, was specifically pleaded and decided against him. It was also argued on behalf of the State before the learned single that the earlier decision in the writ petition would operate as res-judicata and the appeal was liable to be dismissed on that ground alone. Learned counsel for the appellant met the objection urging that since the decision in the writ petition ran contrary to the law subsequently laid down by Hon'ble Supreme Court on the point of affording reasonable opportunity of being heard, the earlier decision taken by the learned Writ Court was no decision in the eye of law and as such, it could not operate as res-judicata.

Learned Single judge while hearing the appeal formulated the question of law: whether a judgement inter parties given by a competent Court in a previous suit or writ petition will operate as res-judacata in a subsequent suit or writ petition between the same parties where the decision in the earlier suit or writ petition was founded on a view contrary to that expressed by Hon'ble Supreme Court in a different case. This is how the aforesaid question came before the Full Bench of this Court for an authoritative pronouncement.

The Full Bench, while relying upon many judgments of Hon'ble Supreme Court handed down on the same proposition of law, observed in para No. 10 as under:

> **Para 10-"From a review of the aforesaid judgment it stands established that in any case in which it is found that the matter directly and substantially in issue had been directly and substantially in issue in a former suit or writ petition and has been heard and finally decided by a competent Court principles of res-judicata cannot be ignored. Even an erroneous judgment is nonetheless a binding judgment inter parties, so long as it is not reviewed or reversed by a higher court. Once a final judgement has been obtained, the same matter cannot be canvassed anew in another action. This is the core of the rule, the court is not concerned with the correctness or otherwise of the earlier judgement.**

> **The matter in issue, if it is purely one of fact decided in the earlier proceeding by a competent court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact, for the same reasons, cannot be considered anew in any subsequent proceedings. There would be no difference where the decision is on a question of law either, if the conditions for the application of section 11 CPC are satisfied, except in cases where the question decided in the previous cause is a question of law and relates to the jurisdiction of the court or the lack of it or the law has been subsequently changed by the legislature. Doctrine of res judicata and general principle emanating therefrom must be resorted to secure and freeze the issue once debated and finally decided and the principle of res judicata cannot be ignored merely on the plea that the earlier judgment was wrong or erroneous".**

While dealing with the arguments of learned counsel for the appellant that by virtue of the later judgment of the Hon'ble Supreme Court, the earlier judgment in the writ petition, which had declared the law differently, has been rendered no decision in the eye of law, this Court observed that the said argument is not sound. It was further observed that basis for the argument of the learned counsel for the appellant is Article 141 of Constitution of India and the learned counsel sought to interpret in the manner that after the law is declared by Hon'ble Supreme Court, any contrary view expressed on the point by any other court is not only over-ridden but that the judgment itself is wiped off for all intent and purposes. While dealing with

that aspect, it was held by the Full Bench in para No. 12 as under:

> **Para 12-"Undoubtedly, Article 141 of the Constitution of India enacts that the law declared by the Supreme Court shall be binding on all courts within the territory of India. But the plain implication of the article is that when the Supreme Court expresses its view on a particular point of law, that view would be binding on all courts in India, irrespective of any contrary view by any other court earlier and after the declaration by the Supreme Court, the view expressed to the contrary would no longer be treated as good law. It, however, does not mean that the effect of the decision, which had taken a contrary view and had become final between them stands automatically wiped off. The effect of a judgment, inter parties, can only be wiped off by getting that particular judgment reversed in an appeal or review. To hold otherwise would offend against the principle of finality of judgments. Moreover, Mr. Thakur is not correct in assuming that the declaration of law by the Supreme Court amounts to an 'alteration' in law so as to exclude the application of the rule of res-judicata.**
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> **Article 141 of the Constitution has a limited purpose and does not confer any legislative functions on the Supreme Court. The Supreme Court only interprets law and neither enacts nor amends the law as laid down by the legislature. Thus, the exception to application of the rule of res judicata that if there is 'alteration' of the law since the earlier judgment the rule would not apply, would not be attracted because the interpretation given**

by the Supreme Court cannot be equated with enactment of new or altered law by the legislature. It is, therefore, immaterial for the application of the principles of res judicata as to whether the Supreme Court subsequently in a different case expresses a view contrary to a decision inter parties in an earlier suit or writ petition. Indeed, the declaration by the Supreme Court would imply that the law has always what the Supreme Court interprets it to mean but this cannot be extended to take away the rights which have become final between the parties in an earlier decision which took the contrary view. The rights which have become final as a result of a judgment delivered by a competent court cannot be washed away by a subsequent interpretation in a different cause. The correctness or otherwise of the earlier decision is wholly irrelevant where the conditions for the application of the rule of res judicata are satisfied in the latter case".

Ultimately, it was held that the Civil suit filed by the appellant-Contractor was barred by principle of res- judicata for the reason that the judgment rendered inter parties of a competent Court in a previous writ petition would certainly operate as res-judicata in a subsequent suit between the same parties, where the issues directly involved in the two proceedings are the same, irrespective of the fact whether or not the decision in the earlier writ petition was founded on a view contrary to the one subsequently expressed by Hon'ble Supreme Court in different cases.

Mr. Goja has not been able to cite any judgment contrary to it.

In the case at hand, the fact situation is rather better favouring the plaintiffs as in the same proceedings after the judgment earned by the plaintiffs in Nov. 2004 in civil revision petition (37/2001) decided by this Court had attained finality, an attempt was made by the defendants after long five years for recasting the same issue which already stood decided and the basis was certain judgements passed later in point of time. Therefore, applying the ratio of aforesaid judgement handed down by Full Bench of this Court on the facts of the present case, in my considered view, the application moved by the defendants for recasting issue already decided on jurisdiction of the Court deserved to be rejected and as such, has been rightly rejected by the learned Trial Court on principle of res-judicata. Resultantly, it does not call for showing any indulgence of this Court while exercising its revisional jurisdiction.

Much stress has been laid by Mr. Goja for an alternative relief. I have gone through M.M.Thomas's case relied upon by Mr. Goja in this regard. The facts of the aforesaid case are altogether different and not applicable to the present case. The case at hand is not of any error apparent on the face of record which calls for its correction by this Court by invoking jurisdiction under Article 227 of Constitution of India. The issue as discussed hereinabove, is altogether different for consideration. Similarly, the judgment passed by this Court in Civil Revision petition (37/2001) and attained finality, does not

fall within the scope of review at this stage on the grounds projected herein.

As a sequel to the aforesaid discussion, the net result surfaces is that the instant revision petition is dismissed alongwith connected CMP(s), being devoid of any merit in it. The interim order dated 17-11-2009 vide which Trial Court proceedings were stayed shall stand vacated. The Trial Court is hereby directed to proceed ahead with the trial without any further delay. Parties are directed to appear before the court of concerned on 7th of March, 2011.

However, there shall be no order as to costs.

Registrar Judicial to send the copy of judgment to the Court concerned well in advance.

Disposed of as such alongwith connected CMP(s).

(**Virender Singh**)
Judge

Jammu.
22-02-2011.
Sanjeev