

10 SCOB [2018] AD

APPELLATE DIVISION

PRESENT:

Mr. Justice Surendra Kumar Sinha,
Chief Justice

Mr. Justice Syed Mahmud Hossain

Mr. Justice Hasan Foez Siddique

Mr. Justice Mirza Hussain Haider

CIVIL APPEAL NO. 473 OF 2009

(From the judgment and order dated 30.01.2008 passed by the High Court Division in Civil Revision No.1088 of 2004)

Alhaj Dr. Chowdhury Mosaddequl Isdani Appellant

Versus

Abdullah Al Munsur Chowdhury and others Respondents

For the Appellant : Mr. Mahbubey Alam, Senior Advocate,
instructed by Chowdhury Md. Zahangir,
Advocate-on-Record.

For the Respondent : Mr. A.J. Mohammad Ali, Senior Advocate,
instructed by Mr. Zainal Abedin, Advocate-on-
Record

Date of hearing : The 26th July, 2016

Persona Designata:

In legal parlance the expression “persona designa” means a person who has been described in a statute or a legal instrument by his official designation, and his function may be judicial or may not be so. But if the function of the designated person is judicial in character then he is nothing but a “court” even though he is not described as a court but by official designation. The test is the power and function he has to discharge.

... (Para 12)

On this score since the revisional application lies against the final order of the District Judge under a special law, the respondents herein correctly invoked revisional jurisdiction of the High Court Division against the order of the District Judge passed in appeal preferred against an order of eviction by the Deputy Commissioner pursuant to the prayer of the Waqf Administrator. Hence on the question as to whether revision is maintainable we hold the same in the affirmative.

... (Para 17)

The jurisdiction under section 115 of the Code of Civil Procedure is very limited. It has not empowered the revisional court to sit on appeal and take into consideration new facts placed before it through affidavit. It has the power to interfere with the judgment only when there appears error of law apparent on the face of the record occasioning failure of justice.

... (Para 21)

J U D G M E N T

MIRZA HUSSAIN HAIDER, J:

1. This civil appeal, by leave, is directed against the judgment and order dated 30.01.2008 passed by a single Bench of the High Court Division in Civil Revision No.1088 of 2004 making the Rule absolute, and setting aside the judgment and order dated 29.02.2004 passed by the learned District Judge, Dinajpur in Miscellaneous Appeal No.74 of 2003 dismissing the appeal and affirming the judgment and order dated 13.09.2003 passed by the Deputy Commissioner, Dinajpur, in eviction Miscellaneous Case No.XXIV/Eviction/47/2003 initiated pursuant to the request of the Waqf Administrator under section 64(1) of the Waqf Ordinance, 1962.

2. Facts leading to this civil appeal in short are that:

The present appellant (Mutwalli of Moinuddin Ahmed Chowdhury Waqf estate), alleging illegal occupation of 23 decimals of land of the said waqf estate by the present respondents No. 1 to 3, filed an application on 15.6.2003 to the Waqf Administrator for taking necessary steps for eviction of the said illegal occupants from the said waqf property. The Waqf Administrator, initially, being satisfied, about such illegal occupation of the waqf property by the said respondents, issued show cause notice upon them and the reply of the said respondents to the said show cause notice being not satisfactory, the Waqf Administrator applied to the Deputy Commissioner, Dinajpur, under section 64(1) of the Waqf Ordinance, to take necessary steps for eviction of those illegal occupants from the said waqf property and restore possession of the same to the Mohiuddin Ahmed Chowdhury Waqf Estate. Thereafter the Deputy Commissioner upon holding necessary survey through the Surveyor, Kanungo, regarding the property and the area which have been forcibly occupied by the respondents No. 1 to 3 passed an order on 13.9.2003 in Eviction Miscellaneous Case No.XXIV/Eviction/47/2003, and thereby evicted the said illegal occupants from the said Waqf property on 17.9.2009.

3. Being aggrieved by and dissatisfied with the order dated 13.09.2003 passed in the aforesaid Eviction Miscellaneous Case by the Deputy Commissioner, Dinajpur, and eviction dated 17.9.2003, the evicted-respondents No. 1 to 3, preferred Miscellaneous Appeal No.74 of 2003 before the learned District Judge, Dinajpur, under section 64(2) of the Waqf Ordinance, who after hearing the parties, dismissed the said appeal by judgment and order dated 29.02.2004.

4. Being aggrieved by and dissatisfied with the aforesaid judgment and order of the learned District Judge, Dinajpur the evicted persons (respondents No. 1-3) filed Civil Revision No.1088 of 2004 under section 115(1) of the Code of Civil Procedure and a Division Bench of the High Court Division upon hearing the parties made the Rule absolute by the impugned judgment and order dated 30.01.2008 and directed the Deputy Commissioner “to restore the status-quo ante”.

5. Hence, the Mutwalli of the Mohiuddin Ahmed Chowdhury Waqf Estate as appellant filed Civil Petition for Leave to Appeal No.921 of 2008 before this Division and obtained leave giving rise to the instant Civil Appeal.

6. Mr. Mahbubey Alam, the learned Senior Counsel appearing on behalf of the appellant, submits that the Deputy Commissioner having taken action following section 64(1) of the Waqf Ordinance and there being no illegality in taking such action and the learned District Judge having affirmed the order of the Deputy Commissioner by dismissing the appeal holding the same as lawful, the High Court Division committed error in setting aside the same and as such the impugned judgment and order passed by the High Court Division, is liable to be set aside. He further submits that the High Court Division failed to consider that an order passed under section 64(2) of the Waqf Ordinance being a final order revisional application under section 115 of the Code is not maintainable. Hence, the impugned judgment and order passed by the High Court Division is liable to be set aside.

7. Mr. A. J. Mohammad Ali, the learned Senior Counsel appearing on behalf of the respondents, supporting the impugned judgment and order of the High Court Division submits that relying upon the vague and unspecified quantum of 23 decimals of land they have been evicted from their own waqf property which they were enjoying as beneficiary of their waqf estate. According to him the disputed waqf property being Waqf-ul-Awlad, the administrator of Waqf is not empowered to make any decision of his own and rather he is required to hear the desire of the waqif which is created for the benefit of the heirs and successors of the waqiff. The High Court Division having considered all these aspects rightly passed the impugned judgment.

8. Upon hearing the learned Advocates for both the sides, and on perusal of the leave granting order it reveals that two questions are to be decided in this appeal, one is whether the High Court Division failed to consider that an order passed under Section 64(2) of the Waqf Ordinance being a final order civil revisional application is maintainable, and the other one is if so whether the High Court Division erred in law in reversing the decision of the learned District Judge passed under section 64(2) of the Waqf Ordinance.

9. To meet the first point, it is required to see Section 64 of the Waqf Ordinance 1962 as a whole.

10. Section 64 reads as follows:

“64(1). If a co-sharer in a waqf property or an individual beneficiary or any other person interested in a waqf, or a stranger, creates disturbances, or obstruction in the peaceful management of the waqf or any institution attached thereto in any way, or disturbs the possession of a waqf property by the Mutawalli or any person or a managing committee appointed by the Administrator for managing the said property, or commits trespass on any such property, the Administrator shall apply to the Deputy Commissioner, who shall evict the trespasser, or take such steps for preventing such disturbance or obstruction as he deems fit.

64(2). Any person evicted by the Deputy Commissioner under sub-section (1) may, within three months from the date of his eviction, appeal to the District Judge against such order of eviction; and the decision of the District Judge on such appeal shall be final.”

11. In the instant case the order of eviction passed by the Deputy Commissioner under section 64(1) is under challenge in appeal preferred before the learned District Judge, under section 64(2) of the said Ordinance wherein no decree is required to be passed. As such the appeal has been registered as Miscellaneous Appeal. Under such circumstances when the

District Judge's order has been given finality by the statute itself, the question arises whether revision would lie before the High Court Division under section 115(1) of the Code of Civil Procedure.

12. The statute empowered the "District Judge" to hear the appeal against the order of eviction passed by the Deputy Commissioner. Under section 2 of the Code of Civil Procedure "District Judge" means the limits of the jurisdiction of a principal Civil Court of original jurisdiction and "Judge" means the presiding officer of a Civil Court. In the General Clauses Act "District Judge" is defined to mean the judge of a principal Civil Court of original jurisdiction. Now question may arise when power is entrusted upon the District Judge then whether he is to act as a Court or as a person. A person is considered as an individual rather than as a member of a class. It may be a person specifically named or identified in law as opposed to the one belonging to an identified category or group. This allows a judge to be appointed to discharge some non-judicial functions. Such entrustment can be termed as "persona designata". The term "persona designata" thus means a person designated individually or by name rather than as a member of a class to do some specific work. In the case of **AK M Ruhul Amin Vs. District Judge and Appellate Election Tribunal, Bhola and others along with other disposed of civil appeals and civil petitions (38 DLR (AD) 173)** this Division held "When one is designated not by name but by official designation it is a 'Persona Designata'". It has further been held considering the definition given by law Lexicon of British India that "The test to find out whether the person who is named as an individual or is designated by his office is the person who is selected to exercise the power by excluding others from the exercise of such power. If the answer is in the affirmative then such person becomes a 'persona designata'." It has further been held "District Judge means the Court of District Judge and not an individual carrying the designation, he is obviously subordinate to the High Court Division." It is to be seen whether the legislature by using the term "District Judge" in Section 64(2) of the Waqf Ordinance intended that the District Judge in disposing of a proceeding should act judicially meaning as a "Court" or as a "persona designata". Under such circumstances the nature of the function of the District Judge is required to be looked into to determine whether he is a persona designata or a Court. If such functions reveal attributes of a Court, he exercises judicial power. When an authority exercises judicial power he is not a persona designata but a Court. In legal parlance the expression "persona designata" means a person who has been described in a statute or a legal instrument by his official designation, and his function may be judicial or may not be so. But if the function of the designated person is judicial in character then he is nothing but a "court" even though he is not described as a court but by official designation. The test is the power and function he has to discharge. In the case of **IDBP(Bangladesh) Vs. M/s. Master Industries (26 DLR 157)** it was held "as the District Judge was required to exercise judicial power, while acting under the aforesaid section, he was not a 'persona designata' but a Court."

13. The Waqf Ordinance 1962 in several other provisions provided appeal to the "District Judge"; one of those is section 43 of the said Ordinance. Therein the law also provides "..... and the decision of the District Judge shall be final" which is similar to what has been contemplated in Section 64(2) of the said Ordinance.

14. This Division in several decisions concluded saying the expressions "District Judge under section 43 of the said Ordinance means a 'Court' not a 'persona designata'". In the case of **Amir Sultana Ali Hyder Vs. Md. K. Alam alias S Alam and others reported in 29 DLR(SC) 295**, this Division held "*though his decision has been made final which precludes*

any further appeal from his decision, such finality as attaches thereto does not oust the revisional power of the High Court. The use of the word 'final' in section 43 does not, therefore, mean that the order of the District Judge is not amenable to the jurisdiction of the High Court.” Again in the case of **Aminul Haque Shah Chowdhury Vs. Abdul Wahab Shah Chowdhury and others, reported in 4 MLR(AD) 367**, it has been held “as the District Judge, as contemplated under Section 43 of the the Waqf Ordinance, is not a persona designata but a Court and as it is Court of civil nature, the provision of the Code of Civil Procedure is very much attracted in the present case and thus the provision of Order LXI Rule 19, CPC for admission of appeal dismissed for default is available to the respondents”. The expression “District Judge” also occurs in Section 32 of the said Ordinance. Therein also it has been held “District Judge” under such provision means “Court” and not a “persona designata”.

15. Another important question is also to be looked into i.e. what the statute meant by using the word “final” in the last portion of section 64(2) of the said Ordinance. The work “final” in relation to the orders of the court occurring in several statutes has been construed to mean that they are not appealable; nevertheless they are open to revision or review. This view has been taken by this Division in 38 DLR’s case mentioned earlier. The legislature having empowered the Waqf Administrator ‘to apply to the Deputy Commissioner to evict the trespasser from a particular waqf property or for taking steps for preventing such disturbance or obstruction as he deems fit’ and accordingly when the trespassers are evicted by the Deputy Commissioner upon holding survey and inquiry, as has been done in the present case, remedy has been given in the statute itself under section 64(2) to prefer an appeal before the District Judge so that the eviction/action of the Deputy Commissioner is tested/judged by the Court of law, as to its legality. Such remedy has been provided for “the person who has been aggrieved’ by such actions of the Deputy Commissioner pursuant to the waqf Administrator’s prayer and when such appeal is preferred and decided by the learned District Judge as per law, his decision is termed as “final” by the statute. Thus when the District Judge constitutes a Court, which he does under the aforesaid provision of law, he is always subordinate to the High Court Division and is amenable to its jurisdiction.

16. From the above it is clear that under all circumstances this Division in several cases categorically held that the decision of the District Judge in appeal either under section 32 or 43 or 64(2) is given by a ‘Court’ not by a ‘persona designata’. Hence revisional application always lies.

17. On this score since the revisional application lies against the final order of the District Judge under a special law, the respondents herein correctly invoked revisional jurisdiction of the High Court Division against the order of the District Judge passed in appeal preferred against an order of eviction by the Deputy Commissioner pursuant to the prayer of the Waqf Administrator. Hence on the question as to whether revision is maintainable we hold the same in the affirmative.

18. In the present case, another important aspect is necessary to be discussed which relates to dispute between Mutwalli of Mohiuddin Ahmed Chowdhury Waqf Estate, registered under EC No. 14038 (the present appellant) and the respondents herein (claimed to be the beneficiaries of Emajuddin Ahmed Waqf Estate registered under EC No. 14653). It is claimed by the present appellant that 23 decimals of land of his Waqf Estate have been occupied by the present respondents No. 1 to 3. On the other hand, the respondents No. 1 to 3 claimed that 23 decimals of land along with other lands belong to their Emajuddin Ahmed

Chowdhury Waqf Estate not to the appellant's Mohiuddin Ahmed Chowdhury Waqf Estate and as such they being the beneficiaries of the said Emajuddin Ahmed Chowdhury Waqf Estate are legally occupying the said 23 decimals of land. Thus, the said respondents claim that they have been illegally evicted from the lawful possession of their property without serving any notice by the Waqf Arbitrator or directing them to explain anything in respect of the allegations made in the application of the present appellant dated 15.6.2003. They also claim that the District Judge without considering the documents filed by the present respondents affirmed the eviction order committing error of law inasmuch as whenever such complicated matter arises the court must not hesitate to dispose of the same without calling for any evidence or witnesses from both the sides and inviting production of documents and scrutinizing of the said documents. It is also contended that the said 23 decimals of land, which is claimed to be the land of the present appellant is unspecified. As such the order of eviction and affirmance of the same by the District Judge is illegal.

19. From the aforesaid pleadings it appears that the persons evicted from the property have raised a question as to which Waqf Estate is the owner of the said 23 decimals of land. It is to be borne in mind that such question of ownership/title cannot be decided without taking evidence and without considering the documents placed by the parties before the appellate authority hearing an appeal under section 64(2) of the Ordinance. Moreover, the respondents also claimed that since the disputed 23 decimals of land have not been specified, eviction from the said unspecified land is illegal. From the above contention it appears that the ownership or title of the said 23 decimals of land is disputed. The general principle of law is any question as to title/ownership or specification of the scheduled land can only be considered/determined by a competent Court not in a proceeding under section 64 of the Waqf Ordinance, which is a summary proceeding in nature. Only question is to be decided in the said proceeding whether the evicted person was in illegal possession of a waqf property enrolled at the office of the Administrator under section 47(Chapter IV) of the Ordinance. Any person claiming any interest in any waqf property is required to make application to the District Judge under section 35(1) within certain time as provided in section 50 of the Ordinance. In the present case the respondents claim that they have been dispossessed from the property of their waqf estate in which they are beneficiaries. There arises a question whether the said 23 decimals of land belong to which waqf estate. Such dispute can only be resolved under section 50 read with section 35 of the Ordinance. But no such step has been taken by the present respondents. Since the respondents have raised such allegation they need to get the remedy in a competent forum not in a summary proceeding under section 64 of the Waqf Ordinance.

20. Moreover from the record it appears that such allegation has firstly been made in the appeal filed under section 64(2) of the Ordinance which has been squarely dealt with by the appellate Court upon considering the pleadings of the present respondents and found that the allegations as to evicting them from their property illegally is not correct. The appellate Court in its judgment observed that the Waqf Administrator after receiving the complaint from the present appellant on 15.6.2003 issued show cause notice upon the present respondents No. 1 to 3 through the Assistant Waqf Administrator and their reply to the same being unsatisfactory and the administrator was satisfied that 23 decimals of the property of the present appellant's Waqf Estate are in illegal possession of the present respondents thus the administrator invoked section 64(1) of the Ordinance and applied to the Deputy Commissioner to evict the illegal occupants. Pursuant to such prayer the Deputy Commissioner, as it appears from the record, of its own initiative, directed the Assistant Commissioner (Land) to inquire into the matter. In his turn the Assistant Commissioner after

holding necessary enquiry and holding survey through the Kanungo found that the present respondents had indeed been occupying 23 decimals of the appellant's waqf property. The Deputy Commissioner on examining the report of the Assistant Commissioner became fully satisfied about the illegal occupation of 23 decimals of land by respondents No. 1 to 3 and passed the order for eviction on 13.9.2003. Accordingly the illegal occupants have been evicted. So the contention of the respondents that they have not been served with any notice or they have not been heard, as such, is without any basis.

21. From the impugned judgment it appears that the High Court Division upon travelling beyond its revisional jurisdiction came to a finding that the waqf "is not a Waqf-E-Lila and rather it seems to be an Waqf-Ul-Awlad and the Administrator is not empowered from making decision of his own and rather he is required to adhere to the desire of the Waqf Estate in the nature of Waqf-Ul-Awlad which bears a clear and distinguished character from that of an Waqf-E-Lillah" on considering Annexure-A misconstruing the law and the fact that the revision does not arise out of a suit for declaration of title and recovery of possession or a suit under section 9 of the Specific Relief Act but is a matter arising out of section 64(2) of the Waqf Ordinance. The jurisdiction under section 115 of the Code of Civil Procedure is very limited. It has not empowered the revisional court to sit on appeal and take into consideration new facts placed before it through affidavit. It has the power to interfere with the judgment only when there appears error of law apparent on the face of the record occasioning failure of justice. It has already been discussed earlier that under a proceeding arising out of section 64 of the Waqf Ordinance there is no scope to decide title or any dispute regarding the property. Only thing is to be looked into in such proceeding is whether the property belongs to a Waqf Estate and whether the occupier of it is an illegal occupier. The Administrator as well as the Deputy Commissioner in the present case after holding separate inquiries found the allegation of illegal occupation of 23 decimals of land by the present respondents, correct/proved and hence evicted the illegal occupants (present respondents No. 1 to 3) from the said property of the Waqf Estate.

22. Under such circumstances we are of the view that the High Court Division, while making the Rule absolute, failed to consider all these aspects and rather misdirected itself and as such came to an erroneous finding and conclusion which is required to be interfered with by this Division. Accordingly we find merit in this appeal.

23. This civil appeal is thus allowed without any order as to cost. The judgment and order complained of herein is set aside.