

(2011) 03 AP CK 0044

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 3458 of 2007

Mohd. Mustafa Shareef

APPELLANT

Vs

Masoom Ali Mohalla Committee, M.A. Azeem and The A.P.
State Wakf Board

RESPONDENT

Date of Decision : 25-03-2011

Acts Referred:

Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 — Section 8, 8(2), 8(8)
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 10, Order 7 Rule 10A, Order 7 Rule 10A(1), Order 7 Rule 10A(2), Order 7 Rule 10A(3)
Waqf Act, 1995 — Section 83, 85

Citation : (2011) 03 AP CK 0044

Hon'ble Judges : Vilas V. Afzulpurkar, J

Bench : Single Bench

Advocate : G. Ramachandra Reddy, for Respondent Nos. 1 and 2, for the appearing parties; None, for the Respondent

Final Decision : Allowed

Judgement

Vilas V. Afzulpurkar, J.—The first Defendant in O.S. No. 102 of 2005 before the Andhra Pradesh Wakf Tribunal (for short "Tribunal"), Hyderabad, is the Petitioner. The judgment and decree dated 05.04.2007 in the aforesaid suit decreed by the tribunal is questioned on various grounds including competency of the first and second Respondents/Plaintiffs and on merits on the ground that the suit schedule property is not a wakf property as projected by the Respondents/Plaintiffs.

2. The learned Counsel for the Petitioner asserts that the gazette notification dated 01.02.1990 issued by the Government, marked as Ex. A2, does not relate to the suit schedule property. Learned Counsel for the Respondents on the other hand supports the impugned judgment by relying upon Ex. A2 aforesaid and the findings reached by the tribunal in its judgment.

3. Paragraph 3 of the impugned judgment shows that the Respondents/Plaintiffs initially filed O.S. No. 875 of 2000 before the Principal District Judge, Warangal

and later it was made over to II Additional Junior Civil Judge, Warangal, where the issues were framed and the oral and documentary evidence on behalf of both sides was recorded. The said Court also took note of the fact that during the pendency of the suit, the law relating to jurisdiction of the court has undergone a change and the Plaintiff himself contended before the trial Court as recorded in para 6 of the judgment that if the Court comes to the conclusion that it has no jurisdiction to entertain the suit, the plaint may be returned. The Learned Counsel for the Respondent/Plaintiff also contended that in case the Court comes to the conclusion that it has no jurisdiction due to change in law, the plaint may be either rejected or dismissed.

4. The said Court, thereafter, delivered judgment in the suit O.S. No. 875 of 2000 and held under issue No. 1 that in view of the decision of this Court in Mahboob Khan Vs. Mohd. Khaja and Others, that the wakf tribunal is the only forum for determination of any disputed question or other matter relating to wakf or wakf property including the suit for permanent injunction. Accordingly, it had under Order 7 Rule 10 of the Code of Civil Procedure, 1908 returned the plaint for presentation before proper forum on the ground that it does not have jurisdiction. The said judgment and decree of the trial Court is dated 16.08.2005 and thereafter, on 12.09.2005 the plaint was presented before the tribunal. It appears that the suit was numbered as O.S. No. 102 of 1995 and posted to 14.11.2005 for Plaintiffs' evidence. The tribunal records in para 3 as under:

...Issues were already framed by the learned II Additional District Judge, Warangal. The parties led their evidence in the old suit when the suit was pending before II Additional District Judge, Warangal and did not chose to lead evidence before this tribunal. The tribunal was pleased to hear arguments of both sides.

Thereafter, the tribunal considered the issues 1 and 2 and proceeded to decree the suit.

5. During the hearing of this revision petition, the legality of the procedure adopted by the tribunal was doubted by this Court and both the learned Counsel were asked to address on that aspect.

6. While the learned Counsel for the Petitioner states that in several suits, which are now presented before the wakf tribunal, this question is repeatedly arising and the procedure as followed in this case is being followed, the learned Counsel for the Respondents submits that both parties consented that the evidence already led in the suit while it was before the Court of II Additional Junior Civil Judge, Warangal, be treated as evidence in this suit and therefore, justifies the procedure adopted by the tribunal. Learned Counsel for the Respondents also points out that after constitution of the tribunal, some suits, pending before various Courts, falling within the jurisdiction of the tribunal are transferred to the tribunal and in some suits, the plaints were returned by the Courts for presentation before proper Court and thereafter, they were entertained by the

tribunal.

7. Certain provisions of the Wakf Act, 1995 may be noticed. u/s 83 of the Wakf Act the tribunals known as Wakf tribunals are constituted. However, it is to be remembered that Wakf Act came into force on 01.01.1996 but the tribunal was constituted by the State Government only with effect from 01.07.1997. There is no provision under the Wakf Act for simultaneous transfer of all suits pending before any Court but triable by the wakf tribunal to the tribunal itself and bar of jurisdiction of civil Court u/s 85 of, the Wakf Act reads as follows:

85. Bar of jurisdiction of Civil Courts: - No suit or other legal proceeding 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.

8. The position with respect to suits pending before various Courts but relating to wakf property and triable by wakf tribunal was considered by the Division Bench of this Court in P. Rama Rao v. High Court of AP 2000 (1) ALD 298 (DB) : 2000 (1) ALT 210 (DB) and it was held that bar of jurisdiction of civil Court contemplated u/s 85 of the Wakf Act would be effective only with effect from the constitution of wakf tribunal and till such time civil Court would continue as a rightful forum for adjudication of disputes in such suits.

9. Before going into the merits of the respective contentions, it would be appropriate to notice the provisions under CPC dealing with the transfer of the suit and return of the suit, as both the said situations have different implications. Section 24; Order 7 Rule 10 and Order 7 Rule 10(A) CPC are extracted for convenience:

24. General power of transfer and withdrawal - (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage:

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under Sub-

section (1), the Court which [is thereafter to try or dispose of such suit or proceeding] may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

[(3) For the purposes of this section,:

(a) Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court;

(b) "proceeding" includes a proceeding for the execution of a decree or order.]

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes,

[(5) A suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it.]

ORDER VII PLAINT

10. Return of plaint. - (1) Subject to the provisions of Rule 10A, the plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted

[Explanation.- For the removal of doubts, it is hereby declared that a Court of appeal or revision may direct, after setting aside the decree passed in a suit, the return of the plaint under this sub-rule.]

(2) Procedure on returning plaint.- On returning a plaint, the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.

10A. Power of Court to fix a date of appearance in the Court where plaint is to be filed after its return.- (1) Where, in any suit, after the Defendant has appeared, the Court is of the opinion that the plaint should be returned, it shall, before doing so, intimate its decision to the Plaintiff.

(2) Where an intimation is given to the Plaintiff under Sub-rule (1), the Plaintiff may make an application to the Court:

(a) specifying the Court in which he proposes to present the plaint after its return,

(b) praying that the Court" may fix a date for the appearance of the parties in the said Court, and

(c) requesting that the notice of the date so fixed may be given to him and to the Defendant.

(3) Where an application is made by the Plaintiff under Sub-rule (2), the Court shall, before returning the plaint and notwithstanding that the order for return of

plaint was made by it on the ground that it has no jurisdiction to try the suit,:

(a) fix a date for the appearance of the parties in the Court in which the plaint is proposed to be presented, and

(b) give to the Plaintiff and to the Defendant notice of such for appearance.

(4) Where the notice of the date for appearance is given under Sub-rule (3),:

(a) it shall not be necessary for the Court in which the plaint is presented after its return, to serve the Defendant with a summons for appearance in the suit, unless that Court, for reasons to be recorded, otherwise directs, and

(b) the said notice shall be deemed to be a summons for the appearance of the Defendant in the Court in which the plaint is presented on the date so fixed by the Court by which the plaint was returned.

(5) Where the application made by the Plaintiff under Sub-rule (2) is allowed by the Court, the Plaintiff shall not be entitled to appeal against the order returning the plaint.

10. It would be noticed from Section 24 CPC above, that the power of transfer is used by the Court (High Court or District Court, as the cases may be) on the ground of convenience or to meet a situation where a Court of exclusive jurisdiction is created to try certain category of suits. Creation of such exclusive Court may occur under a special act, which may provide for transfer of all pending suits, triable by the Court established under such special act i.e. A.P. Land Grabbing (Prohibition) Act and Section 8 therein. Section 8(2) and (8) may be noticed at this stage:

8. Procedure and powers of the Special Courts:

(2) Notwithstanding anything contained in the Code of Civil Procedure, 1908 the Code of Criminal Procedure, 1973 or in the Andhra Pradesh Civil Courts Act, 1972, any case in respect of an alleged act of land grabbing or the determination of questions of title and ownership to, or lawful possession of any land grabbed under this Act, shall be triable only in a Special Court constituted for the area in which the land grabbed is situated; and the decision of the Special Court shall be final.

...

...

...

(8) Any case, pending before any court or other authority immediately before the constitution of a Special court, as would have been within the jurisdiction of such Special Court, shall stand transferred to the Special court [xxx] as if the case of action on which such suit or proceedings is based had arisen after constitution of the Special Court.

As mentioned above, such provision, which is generally found in various other special statutes, is not found under the Wakf Act.

11. Section 24(2) Code of Civil Procedure, however, provides that on such transfer the transferee Court may either re-try the suit or proceed from the point at which it was transferred or withdrawn from the original Court. The incidence of such transfer u/s 24 CPC may or may not imply that the original Court where the suit was instituted had no jurisdiction to try the suit and the transfer or withdrawal of the suit from that Court may be necessitated either on account of convenience or on account of creation of Court of exclusive jurisdiction or in law, it is required to transfer all cases pending before the Courts, in the first instance, to the newly created Court of exclusive jurisdiction. In other words, the Court where the proceeding or a suit is instituted, in the first instance, was competent and had jurisdiction to try the suit until it is divested by an order of transfer or withdrawal passed u/s 24 Code of Civil Procedure. Sub-clause (5) is added to Section 24 CPC by amendment in 1976 empowering transfer of a suit or proceedings even from a Court, which has no jurisdiction to try it. In substance, therefore, various steps taken in the trial of a suit, such as framing of issues or recording of evidence etc. in the Court of first instance, does not get wiped off or obliterated on account of transfer or withdrawal and the transferee Court may proceed from the point at which the suit was transferred or withdrawn.

12. In contrast, under Order 7 Rules 10 and 10A CPC when a plaint is returned for presentation to proper Court, the proper Court to which the plaint is then presented is required to try the suit afresh/de novo by following the procedure prescribed under Code of Civil Procedure. This aspect would be clear if we look at Sub-clause (3) of Rule 10(A) Code of Civil Procedure, which provides that notwithstanding that the order of return of plaint is made on the ground that the Court had no jurisdiction to try the suit, while returning the plaint the Court would fix the date of appearance of the parties before the proper Court and give notice of appearance to the Plaintiff and Defendant and thereby, after presentation of the plaint to the proper Court, it would not be necessary to serve the Defendant with the summons once again. Except the aforesaid, the suit, for all purposes, is treated as a freshly instituted suit before the proper Court. All steps taken by the Court where the suit was instituted, in the first instance, therefore, cannot be saved and cannot be relied upon by the proper Court to which the plaint is later presented. In effect, therefore, the evidence recorded and documents marked in the Court, in the first instance, cannot be relied upon for the purpose of disposal of the suit by the proper Court to which the plaint is then presented.

13. The Supreme Court in *Sri Amar Chand Inani Vs. The Union of India (UOI)*, held as under:

...Even if the Plaintiff was entitled to get an exclusion of the time during which he was prosecuting the suit in the Karnal and Panipat, the suit would not be within time as the filing of the suit in the Karnal Court was beyond the period of

limitation. It was, however, argued by counsel for the Appellant that the suit instituted in the Trial Court by the presentation of the plaint after it was returned for presentation to the proper Court was a continuation of the suit filed in the Karnal Court and, therefore, the suit filed in Karnal Court must be deemed to have been filed in the trial Court; We think there is no substance in the argument, for, when the plaint was returned for presentation to the proper Court and was presented in that Court, the suit can be deemed to be instituted in the proper Court only when the plaint was presented in that Court. In other words, the suit instituted in the trial Court by the presentation of the plaint returned by the Panipat Court was not a continuation of the suit filed in the Karnal Court (see the decisions in *Hirachand Succaram Gandhi Vs. G.I.P. Railway Company*, , *Bimala Prosad Mukerji Vs. Lal Moni Devi and Others*, , and *Ram Kishun v. Ashirbad* ILR 29 Pat 699 : AIR 1950 Pat 478. Therefore, the presentation of the plaint in the Karnal Court on March 2, 1959, cannot be deemed to be a presentation of it on that day in the trial Court.

(emphasis supplied)

The Supreme Court in *Hanamanthappa and another Vs. Chandrashekharappa and others*, held as under:

...In substance, it is a suit filed afresh subject to the limitation, pecuniary jurisdiction and payment of the Court fee as had rightly been pointed out by the High Court....

14. A decision of the Delhi High Court in *Vogel Media International v. Jasu Shah* 2004 AD (Del) (8) 275 : 2005 ILR DLH (13) 795 : 2005 IJHC 1119 DEL on a similar question may be noticed. In that case also the plaint was returned for presentation to proper Court and the question, as to whether interim injunction passed by the Court where the suit was instituted, in the first instance, continues to operate after presentation of the plaint to the proper court after its return, fell for consideration and it was answered in the negative holding that after presentation of the plaint before the proper Court, the same has to be tried de novo. The Delhi High Court relied upon its earlier decisions in *Rail Chand Vs. Alal Chand and Others*, and *Pushpa Kapal v. Shiv Kumar* 35 (1998) DLT 187. While referring to the latter case it has noted as under:

...In the latter case after an order of return of the plaint had been made by the Trial Court for presentation to the Court of District Judge due to enhancement in the pecuniary value of the suit which the Trial Court was not competent to try but before representing the plaint to the Court of the District Judge, an application u/s 24 read with Section 151 CPC was moved on behalf of the Plaintiff in the High Court. Before the High Court it was pleaded on behalf of the Plaintiff that if only the plaint was to be returned to the Plaintiff for presentation of the same to the Court of District Judge, de nove proceedings would have to be started by the court of the District Judge, which would put the Plaintiff to unnecessary harassment culminating into unnecessary delay in the disposal of the suit, and

that if the suit is transferred by the High Court to the Court of District Judge, the District Judge would not have to record the evidence afresh and would take up the case from the stage it had reached and would thus be left only with the task of hearing the final arguments in the matter...

15. The above analysis shows that when a plaint is returned for presentation to proper Court under Order 7 Rule 10 Code of Civil Procedure, the plaint alone is returned and as such, the Court to which the plaint is later on presented will have to commence the proceedings on such plaint afresh. The plaint so represented is not a continuation of the plaint presented in the former Court, whether for the purpose of limitation or for Court fees and in all respects, the plaint so presented in the proper Court is a fresh presentation of plaint requiring all proceedings thereafter to be taken up de novo. On the contrary, in the case of transfer of suits the entire suit up to the stage at which it was tried by the former Court is transferred to the transferee Court and it is left to the discretion of the transferee Court, as provided u/s 24(2) CPC either to re-try the suit or proceeded from the point at which it was transferred or withdrawn. It may be that in a particular case, while ordering transfer, a specific direction to continue from a particular stage may be given, as was noticed by the Supreme Court in *Joginder Tuli Vs. S.L. Bhatia and Another*, as under:

...Under these circumstances, the original order passed by the High Court directing the District Judge to proceed from the stage at which the suit stood transferred to the District Court appears to be correct in the circumstances. Normally, when the plaint is directed to be returned for presentation to the proper court perhaps it has to start from the beginning but in this case, since the evidence was already adduced by the parties, the matter was tried accordingly. The High Court had directed to proceed from that stage at which the suit stood transferred. We find no illegality in the order passed by the High Court warranting interference.

(emphasis supplied)

16. In view of the legal position, as above, the very procedure adopted by the tribunal in disposal of the suit being not in accordance with law, I am constrained to set aside the judgment and decree impugned herein. Since the said suit will have to be tried afresh, the contentions of the parties on merits are left open with liberty to both parties to agitate the same before the tribunal.

The civil revision petition is accordingly allowed and the suit O.S. No. 102 of 2005 shall stand remitted to the tribunal for fresh disposal from the stage of framing issues onwards in accordance with law. There shall be no order as to costs.