
(1978) 11 MP CK 0016
In the Madhya Pradesh High Court
Case No : L.P.A. No. 26 of 1976

Swaroopanand Saraswati	Vs	APPELLANT
Shri Ramji Tripathi and others		RESPONDENT

Date of Decision : 13-11-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 12, 22, 23, 24

Citation : (1979) J LJ 67

Hon'ble Judges : C.P. Sen, J; B.C. Verma, J

Bench : Division Bench

Advocate : Y.S. Dharmadhikari and Ku. Kanti Rao, for the Appellant; Tripathi and L.S. Baghel, for the Respondent

Final Decision : Dismissed

Judgement

C.P. Sen, J.—This is an appeal under clause 10 of the letters Patent by the plaintiff against the order of the learned Single Judge transferring the suit from the Court of District Judge, Seoni, to the Court of District Judge, Allahabad under sections 22 and 23 of the Code of Civil Procedure.

2. Several centuries ago the late Jagatguru, Adishankaracharya propounded the theory of absolute Monism based on the authority of Upanishad, and his philosophy succeeded in combating Buddhism and reestablishing the religion of Vedas. For the purpose of strengthening and maintaining the Doctrine of Non-dualistic philosophy, which he preached, he established four Mathas as monasteries in the four extremities of India namely the Jyotishpeeth near Badrinath, now Chamoli Garhwal, in the North, Shardamath in the West in Gujrat, Shringeri Math in the South in Mysore and Gowardhan Matha in the East at Puri and placed each one of them under the charge of one of his principle ascetic-disciples. He also prescribed the territorial jurisdiction of Maths. The present proceeding concerns the Matha near Badrinath. Swami Brahmanand Saraswati was the Shankaracharya of this Matha and he died on 20-5-53. It appears that thereafter dispute arose regarding his successor. The respondent

No. 1 Swami Shantanand Saraswati claimed himself to be his successor under a registered will dated 18-12-52 executed by Swami Brahmanand Saraswati. The interim committee of which the appellant was the President decided to install the respondent No. 1 as Shankaracharya of the Matha on 8-6-53. Accordingly, the respondent No. 1 was so instated as Shankaracharya. But immediately thereafter dispute arose and Swami Krishna Bodhashram was installed as Shankaracharya by persons opposed to the respondent No. 1. On 11-7-58 the respondent No. 1 applied for a succession certificate and the same was granted to him by the District Judge, Allahabad, in Misc. Case No. 44/53 on 12-12-55. Thereafter the respondent No. 1 was placed in charge of all the properties of the Maths. An appeal was preferred against that order by the appellant which was dismissed.

3. After obtaining sanction of the Advocate General of U.P. on 29-4-54, Civil suit No. 3/54 was filed against the respondent No. 1 that Swami Krishan Badoashram has been selected by the Pandits and followers of the Jyotishpeeth as the Shankaracharya and it was prayed that he be so declared. The said civil suit was dismissed by the Additional District Judge, Varanasi on 20-10-62. An appeal to the High Court was also dismissed on 11-9-73 in F. A. No. 355/62 by Allahabad High Court. A further appeal was preferred to the Supreme Court which was also dismissed on 21-8-74 and it is reported in Swami Paramatmanand Saraswati and Another Vs. Ramji Tripathi and Another, As by that time Swami Krishna Bodhashram had expired, the appellant was permitted to intervene in the Supreme Court The suit was held not maintainable u/s 92 of the Code when the allegations of mal-administration or breach of trust were neither stated nor proved. After the dismissal of the suit by the Additional District Judge, Swami Krishna Bodhashram filed civil suit No. 3/63 in the Court of Civil Judge, Tehri, U. P. Subsequently transferred to Allahabad for a declaration that he is the successor to the Gaddi of Shankaracharya of Jyotishpeeth and he is the trustee of all the properties. It was further prayed that the will dated 18-12-52 in favour of the respondent No. 1 be declared null and void and not validly executed. A further prayer was made for possession over all the properties detailed in the schedule A statement has been made at the bar by the learned counsel for the respondent No. 1 that permission was granted to Swami Krishna Bodhashram to sue in forma pauperis...A revision was preferred to the Allahabad High Court against the order of the trial Court holding that the present suit is not barred by res-judicata in view of the earlier civil suit u/s 92 of the Code In the meanwhile, Swami Krishna Bodhashram died ON 10-9-73 and the appellant was installed in his place at Varanasi on 7-12-73. Since no action was taken for substitution in the revision pending before the Allahabad High Court, it was ordered to have abated on 17-12-73 by that Court. A further statement has been made at the bar by the learned counsel for the respondent No. I that thereafter the said civil suit has been consigned to the record room as no steps were taken for bringing on record the legal representatives of the deceased plaintiff. Instead, the present appellant filed Civil suit No. 1-A/74 in the Court of District judge, Seoni, for a relief of declaration that be is the duly installed Shankaracharya of Jyotishpeeth.

He also prayed that properties of the Matha be delivered to him. The respondent No. 1 entered appearance in that Suit on 9-9-74 Immediately on the new date, he tiled application for transfer under sections 22 and 23 of the Code in the Court.

4. In this application for transfer the respondent No. 1 claimed that he is the duly installed Shankaracharya of Jyotishpeeth by virtue of the will dated 18-12-52 executed by late Swami Brahmanand Saraswati. The appellant was the President of the committee which so installed him and he had signed the minute book of the meeting. The main seat of the Matha is located in D strict Chamoli of U. P. and the upa-peeth of Matha is located at Allahabad, most of the properties of the Matha are located there and only negligible properties of the Matha are in M. P. All the defendants are residents of U. P.. The respondent No. 1 in the earlier proceedings under the Succession Act had given his address at Varanasi. He now resides at Delhi and he had given his address at Delhi in the case before the Supreme Court. In the suit u/s 92 of the Code, all the witnesses from Allahabad and Varanasi alone were examined and none from M. P. The subject matter cause of action and the relief's claimed in the present suit and Civil Suit No. 3/63 are almost the same. The properties mentioned in both the suits are also the same. In both the suits the will dated 18-12-52 has been challenged and also the claim of the respondent No. 1 as successor to Swami Brahmanand Saraswati. Seoni is beyond ecclesiastical jurisdiction of the Jyotishpeeth. Seoni is not easily approachable and there are no proper facilities of legal aid the counsel for the appellant and the respondent No. 1 are from Allahabad. The respondent No 1 will have to incur huge expenses in defending the suit at Seoni as all the witnesses and records will have to be brought from U. P.. It will not be possible to realize the huge costs because in the earlier proceeding also the decree for costs could not be executed. The conduct of the plaintiff in other litigations shows that the present suit is frivolous and vexatious and has been filed only to harass the respondent No. 1 so that there may not be a fair trial. Therefore, the balance of convenience lies in transferring the suit from the Court of District Judge, Seoni to a competent Court at Allahabad,

5. In his reply the appellant opposed the transfer of the suit to the Court at Allahabad. The appellant claimed that he resides at Nar imhpur District of M.P. and substantial properties of the Matha are also situated within this State. The application for transfer has been filed only to gain time so that the respondent No. 1 may be able to withdraw the large amounts belonging to the Matha. The suit could not be transferred from Seoni to Allahabad only to suit the convenience of the respondent No. 1. In this suit the witnesses would be coming from all over India and M.P. being the central place, it will be convenient to attend the Court at Seoni. The appellant apprehends that due to the influence of the respondent No. 1 at Allahabad, the atmosphere there is much vitiated and the trial could not be held there in a fair and proper atmosphere. The appellant did not dispute that he was first installed as Shankaracharya in Varanasi and subsequently at Delhi.

The respondent No. 1 is trying to deprive the Matha of his properties by trying to plead that some of the properties are his personal properties. The appellant was a party to the installation of the respondent No 1 s Shankaracharya as he wanted to respect to so-called will of late Swami Brahmanand Saraswati but subsequently the will was found to be fictitious and the Pandit and Vidyat Parishad found that the respondent No. 1 was not qualified to succeed as Shankaracharya. Shankaracharya has to be nominated by these 2 bodies and could not have been appointed under a Will. Civil Suit No. 3/63 has nothing to do with the present suit as the cause of action to this suit arose on 10-9-73 after the death of Swami Krishna Bodhasharam. The respondent No. 1 visits Seoni quite often. The part of cause of action arose at Seoni because the respondent No. 1 has declared there that he is the successor or Shankaracharya and he has filed objection regarding mutation of the name of the appellant in revenue records in respect of the lands of the Matha located there. Both the parties have also engaged lawyers at Seoni and it is a convenient place for the trial. Accordingly, the application is liable to be dismissed with costs.

6. The learned Single Judge came to the conclusion that the subject matter of Civil Suit No. 3/63 pending in the Allahabad Court is the same as the subject matter of the present suit. The cause of action is also based on identically similar facts, The appellant who claims to be the successor of Swami Krishna Bodhashram, who was plaintiff in that suit, ought to have continued that suit by getting him elf substituted after the death of Swami Krishna Bodhashram. As per plaint allegations of the appellant, the property of the Jyotishpeeth situated in U. P. is worth Rs. 7, 12,000 while the property situated in M. P. is worth Rs. 61,000 only. In the earlier suit, the property in M. P. was shown to be worth Rs. 13, 500 only while the property in U. P, was shown to be worth more than 7 lacs. All the defendants are residents of U. P.. The plaintiff has also been living at Benaras and Delhi. The main seat of the Jyotishpeeth is in U.P. As such, Jyotishpeeth will be governed by the laws prevailing in U. P. in regard to religious trusts Therefore he came to the conclusion that the balance of convenience lay in trying the suit at Allahabad. The present suit at Seoni has been filed with mala-fide intention. According, the case has been transferred to the Court of District Judge, Allahabad. A direction has also been given to the District Judge that he may allot the suit for disposal to the Court trying the panper suit No. 3 of 63.

7. Shri Y. S. Dharmadhikaree learned counsel for the appellant assailed the order of the learned Single Judge interalia contending that the impugned order has been passed on wrong premises, It has been wrongly held that the appellant is the legal representative of Swami Krishna Bodhashram and that he could have continued the pauper suit, It was a personal right of Swami Krishna Bodhashram to continue the pauper suit and there is no question of any substitution and the appellant is not prevented from filing a separate suit. It has also wrongly been held that the said suit is still pending. It has further been wrongly held that the Jyotishpeeth is governed by the laws in U.P. Became of these misapprehensions, the impugned order has been passed. Shri V.K. Choudhary learned counsel for

the respondent No. 1 submitted that the impugned order of the learned Single Judge is unassailable and is in accordance with the law. He raised a preliminary objection that this appeal is not competent because the impugned order is not a Judgment within the meaning of Clause 10 of the Letters Patent. In reply, Shri Dharmadhikari contended that since the right to pursue the suit at Seoni has been finally determined, it is a judgment.

Since the preliminary objection goes to the root of the matter; it is taken up first. Clause 10 of the Letters Patent provided that an appeal lies from a judgment of Single Judge of the High Court to the Division Bench of the same Court. Clause 110 of the Letters Patent of Nagpur High Court is akin to Clause 15 of the Bombay, Calcutta and Madras High Courts. The leading case on the point is the pronouncement of Sir Richard Couch, C.J., in *Justices of the Peace v. Oriental Gas Company* 8 Bengal LR 433. which is as follows:

We think that "Judgment" in Clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final or preliminary, or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined.

And other oft quoted and equally well-known judgment is the pronouncement of Sir Arnold White, C.J., in *Tuliram, v. Allagappa* 35 Madras (FB). which is as follows:

The test seems to me thus observed the learned Chief Justice, to be not what is the form of the adjudication, but what is its effect on the suit or proceeding in which it is made. If its effect, whatever its form may be. and whatever may be the nature of the application ON which it is made, it is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, of if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause.

An adjudication on an application, which is nothing more than a step to wards obtaining a final adjudication in the suit, is not a Judgment within the meaning of Letters Patent.

A Full Bench of the Rangoon High Court in *Dayabhai v. Murugappa Chetiyar* AIR 1935 Rangoon 267 held that "Judgment" means and is a decree in a suit by which the rights of the parties at issue in the suit are determined. A Full Bench of the Nagpur High Court in AIR 1952 357 (Nagpur) differed with the Rangoon view and opined that a Judgment in Clause 10 of the Letters Patent means a decision in an action whether final, preliminary or interlocutory which decides either wholly or partially, but conclusively in so far as the Court is concerned, the controversy which is the subject of the action, it does not include a decision which is on a matter of procedure, nor one which is ancillary to the action even

though it may either imperil the ultimate decision or tend make it effective. However, the minority view concurred with the view of the Rangoon High Court. The Supreme Court in *Asrumati Debi Vs. Kumar Rupendra Deb Raikot and Others*, noticed the divergent view of the different High Courts but it went to construe the Pronouncements of Sir Richard Couch, C.J., and Sir Arnold white C.J. in the aforesaid decisions as under : The judgment within the meaning of Clause 10 of the Letters Patent would have to satisfy two tests. First, the judgment must be the final pronouncement which puts an end to the proceeding as far as the Court dealing with it is concerned. Second, the judgment must involve the determination of some right or liability though it may not be necessary that there must be a decision on the merits. But the adjudication of an application, which is nothing more than a step towards obtaining a final adjudication in the suit, is not a judgment within the meaning of the Letters Patent. Therefore, the Supreme Court in that case came to the conclusion as under:

An order for transfer of a suit made under CI. 13, Letters Patents, is not a judgment within the meaning of CI. 15 and therefore is not appeasable The order neither affects the merits of the controversy between the parties in the suit itself, nor does it terminate or dispose of the suit on any ground. An order for transfer cannot be placed in the same category as an order rejecting a plaint or one dismissing a suit on a preliminary ground.

9. The Supreme Court while considering *Asrumati Deb's* case (Supra) in *Radhey Shyam v. Shyam Behari* AIR 1971 SC 2337 . Observed that transfer application in the suit was a step towards determination of the controversy between the parties in the suit. In a recent case of *Shanti Kumar R. Canji Vs. The Home Insurance Co. of New York*, it quoted with approval the views in *Asrumati Devi's* case. In this case it approved the views of Sir Richard Couch and Sir Arnold white in preference to the views of Rangoon and Nagpur High Courts which were overruled. It may be mentioned that in that judgment the Supreme Court has quoted the minority view of the Nagpur Full Bench in *Manohar v. Baliram* (Supra) In fact, the majority judgment of Hidaytullah, J. (as he then was) was in accord with the view of Richard Couch and partly with the view of Sir Arnold white. Hidaytullah, J. in his elaborate judgment had considered all the case laws on this question, while accepting the view of Sir Arnold white that an adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not a Judgment, he differed from his definition that even orders in ancillary proceedings are included, because the professional meaning of judgment is that it is a decision obtained in an action, every other decision being an order. He, therefore, did not agree with the opinion that the word "judgment" means any final order decree or judgment. So the decision ma> not be good to the extent that orders in ancillary, proceedings are not judgment. Whatever that be, we are bound by the decision of the Supreme Court and the present case is fully governed by *Asrumati Debits* case (Supra) that the order transferring a suit is not judgment as it neither affects the merits of the

controversy between the parties in the suit-itself, nor does it terminate or dispose of the suit on any ground. It is also an application in a suit as a step towards determination of the controversy between the parties in the suit. Therefore, the present appeal is not competent. The contention of the learned counsel for the appellant that by the impugned order rights of the parties are affected inasmuch as it has been held that the appellant is the legal representative of Swami Krishna Bodhashram and he ought to have continued C. S. No, 3/63. This contention is without any merit. The question whether the appellant is legal representative of Swami Krishna Bodhashram or whether he ought to have continued the suit in that capacity were not matters in issue in the transfer application. The observations made by the learned Single Judge were only for the purpose of coming to the conclusion that the suit has been filed mala-fide at Seoni instead of continuing the previous suit at Allahabad. The motive may be because of convenience. The observations could not be binding in the trial of the suit.

10. Assuming that an appeal lies to the Division Bench under Clause 10 of the Letters patent, let us examine whether the transfer of the case from Seoni Court to Allahabad Court was competent and was justified. Regarding the scope of a Letters Patent appeal, the Supreme Court in Smt. Asha Devi Vs. Dukhi Sao and Another, has held:

The power of a Division Bench hearing a Letters Patent appeal under Clause 10 from the judgment of a Single Judge in first appeal is not limited only to a question of law u/s 100, Civil P. C. but it has the same power which the Single Judge has as a first appellate Court in respect of both questions of fact and of law. The limitations on the power of the Court imposed by Ss. 100 & 101, Civil P. C. cannot be made applicable to an Appellate Court hearing a Letters Patent appeal for the simple reason that Single Judge of the High Court is not a Court subordinate to the High Court.

11. General power of transfer and withdrawal of suits are contained in section 24 of the Code of Civil Procedure. Sections 12 and 23 of the Code apply only to cases where the plaintiff has the option to sue in two or more Courts. u/s 22, the defendant, after notice to the other parties and at the earliest possible opportunity and at or before settlement of issues, may apply to have the suit transferred to one of the other Courts where the suits could have been filed. Though the notice to the other parties is to be given, the defect can be cured by notice on the application itself. The Court has to decide the application after hearing the objections, if any, of the other parties in the suit. Section 23 prescribes the forum where the application for transfer has to be made. In case the suit is sought to be transferred to a Court subordinate to another High Court, the application has to be made in the High Court within whose jurisdiction the suit is pending. In the present case, the respondent No. 1 entered appearance in the suit for the first time before the District Judge, Seoni, on 9-9-1974 and the application for transfer was moved in this Court on the very next date on

10-9-1974 to transfer the suit to a competent Court at Allahabad, The learned Single Judge decided the application after notice and hearing all the parties to the suit As Such, the learned Single Judge has rightly entertained and decided the transfer application, A Division Bench of this Court in *Firm Kanhaiyalal v. Zamerlal* AIR 940 Nag 145 has held that under sections 22 & 23. High Court can transfer a suit pending in a subordinate Court to a Court subordinate to another High Court. Same is the view taken by the Supreme Court in *Western U. P. Electric and Power Supply Co. Ltd. v. Hind Lamps Ltd.* (1969) 2 SCR 16. Therefore, the learned Single Judge had the jurisdiction to transfer the suit from the Court of District Judge, Seoni, to the Court of District Judge, Allahabad.

12. The plaintiff, as arbiter litis, has a right to choose his own forum and that right should not be interfered with except on very strong grounds. The search should be for justice and the Court must be satisfied that justice could more likely be done between the parties by refusing to allow plaintiff to continue his suit in the forum of his choice. The onus of establishing sufficient grounds for the transfer lies heavily on the applicant. There is unanimity of opinion that preponderance of balance of convenience is of prime consideration for transfer of suit. So the convenience of the parties is a valid ground of transfer though there is no unanimity about it being a material ground for transfer [See *Ramkumar v. Tularam* AIR 1920 Pat 138, *Thakur Singh v. Thakur Sheo Ratan* AIR 1923 Oudh 30, *Saroj Bashim v. Girja Prasad* AIR 1926 Cal 376 AIR 1940 145 (Nagpur) *Basanti Devi v. Mst. Sahodra* AIR 1923 All 979 G.M. *Rajulu Vs. Rao Bahadur M. Govindan Nair*, , *Vaman Vasudeo Chitaley Vs. Raghunath Ganesh Thakar*, *Salavandi Nadar v. Venngopala* AIR 1950 Ker 91 *Jyotsna Raje Vs. Jagpal Singh*, , *Sundardas Thackersay and Bros. Vs. The New Commercial Mills Co. Ltd.*, & *Sri Pamban Kumaragurubara Swami Temple Vs. K. Subramanya Mudaliar*, , In *Firm Kanhaiyalal v. Zumerlal* {Supra} it has been held by this Court as under:

In deciding the question whether it is expedient to order transfer of the suit the convenience of the parties is indeed a factor which enters into consideration, but it is obvious that the convenience of both parties have to be weighed and the matter must ultimately turn on the balance of convenience.

This Court in AIR 1927 219 (Nagpur) has held "where in a partition suit greater part of the property is situated, it is to be tried in that district." In *K.L. Daftary v. K.L. Dube* AIR 1955 Nag 45 this Court has held as under:

Where the trial of a suit at place A is likely to cause delay and put the defendants to considerable expenses, out of thirteen defendants, twelve defendants reside at places outside. A and ten defendants support the application for the transfer of the case at place B, it is in the interests of justice that the trial should be held in a Court at place B. In AIR 1932 49 (Nagpur) it has been held by this Court:

Since both the suits relate to the same transaction and involve common questions of fact it is desirable that they should be tried by the same judge.

The Kerala High Court in *David Vs. James Arthur Edwards and Another*, , has

observed that if in choosing a particular Court, the plaintiff has acted mala fide to harass the defendants, the case ought to be transferred.

13. Another factor that has to be taken into consideration is the interest of justice. A case has to be transferred if there is reasonable apprehension of a party to a suit that he might not get justice in the Court where the suit is pending. This may be because the trial Judge is prejudicial or because there in the surcharged atmosphere no fair trial is possible at that place. This Court In *Raghuandan v. G.M. Chawla* 1963 MPLJ SN 117 has held as under:

The learned District Judge lost sight of the well recognised position that the question whether the apprehension entertained by an applicant that he might not get justice at the hands of a particular Judge, was a reasonable apprehension or not had to be determined on such material as was on record & on the explanation of the Judge, concerned. The onus of establishing sufficient grounds for transfer lay very heavily on the applicant. No amount of imaginary suspicion or capricious belief could be permitted to be raised as a ground for transfer. The view, in the circumstances on record, taken by the learned District Judge was as capricious as the feeling of the applicant seeking transfer.

14. On merits, we are in full agreement with the learned Single Judge that the preponderance of probabilities are in favour of trying the suit at Allahabad. All the defendants in the suit are residents of U. P, In the earlier proceedings the plaintiff had also shown his residence at Benaras, U. P. Most of the properties of the Jyotishpeeth are located in U.P. According to the plaintiff's own showing, the properties at U.P, are worth Rs, 7,12,000/-while the properties at M. P. are worth Rs. 61,000/- only. In earlier suit valuation was only Rs. 13,500/-. The respondent No. 1 has challenged the valuation and asserts that the value of the immovable properties alone at U. P. cannot be less than 8 lacs. By amendment the plaintiff has increased the valuation of the properties in M P. by five lacs by increasing the value of the property at Jabalpur from 5,00 to 5 lacs. Whatever that be the property at Seoni is valued at Rs. 25,000 only. There is no valid reason except convenience to the plaintiff or choosing the forum for filing this suit at Seoni when the previous litigations were in Allahabad and Banaras Courts. The cause of action and the subject matter of the present suit are similar to those in C.S No. 3/63. The schedule of properties in this suit is lifted from the schedule of properties in the earlier suit. The plaintiff in his pleading has emitted that the earlier suit is pending. We are here not concerned as to whether the plaintiff could or could not have continued that suit as legal representative of Swami Krishna Bodhashram and whether the present suit is competent or not. In the earlier suit u/s 92 of the Code all the witnesses examined belonged to U.P. In the present case the main cause of action shown to be installation of the plaintiff as Shankaracharya on 7-12-73. Obviously, this was at Varanasi. The plaintiff has also challenged the will dated 18-12-52 in favour of the respondent No. 1. There can be no doubt that for proving the will and also for proving installation of the plaintiff as Shankaracharya, most, of the witnesses must be of the places where

these events purported to have taken place. It will not be, therefore, convenient for the parties to have the suit tried at Seoni. The standing counsel of both the parties belong to Allahabad and they have been appearing in this proceeding. It would suit them better if the case is tried at Allahabad. The plaintiff has shown in the plaint that part of the cause of action arose at Seoni because of the location of part of properties of Jyotishpeeth there but this cannot out way the other overwhelming factors which require that the suit should be tried at Allahabad. In case, the plaintiff succeeds, the execution of the decree has to be given effect at U. P. Appellant has not substantiated as to why he would not got fair trial at Allahabad. Looking to the overall considerations and circumstances of the case the case has been rightly transferred to the Court of District Judge, Allahabad.

15. The appeal accordingly fails and it is dismissed with costs. Counsel's fee Rs. 500/-, if certified.