

S/L 8
28.01.2021
Court. No. 19
GB

C.O. 1451 of 2020

Mir. Md. Yusuf
Vs.
Smt. Mamata Laha

(Through Video Conference)

Mr. Suman Sankar Chatterjee,
Mr. Uday Sankar Chatterjee.

...for the Petitioner.

This revisional application has been filed by the defendant no.1 in Title Suit No.108 of 2016 (CIS 1387 of 2017), by which an application under Order VII, Rule 10 read with Section 151 of the Code of Civil Procedure was rejected.

The defendant no.1 filed the application for return of the plaint on the ground that the suit property was a wakf property and the reliefs were claimed against the mutawalli. The petitioner claims to be the mutawalli of the said wakf estate.

The learned court below upon perusal of the entire plaint as a whole arrived at a conclusion that the application for return of the plaint was not maintainable, firstly because an application under order VII, Rule 10 of the Code of Civil Procedure is usually filed for return of a plaint to the court having jurisdiction on the ground that the court in which the suit had been filed either lacked territorial or pecuniary jurisdiction. The learned court below also considered whether the suit was liable to be rejected being barred by law

under the provisions of Order VII, Rule 11 of the Code of Civil Procedure and upon reading the plaint as a whole had arrived at a conclusion that the plaint could not be rejected at this stage as the pleadings reflected that the suit property has been held not to be a wakf property in several litigations and the said declaration has been upheld up to the High Court.

The learned court below also considered the fact that the defendant no.1 also filed a suit for declaration of title and injunction challenging an auction sale against the predecessor-in-interest of the plaintiff and the said suit also failed. On perusal of the pleadings in paragraphs 5 to 9 of the plaint, the learned court below held that the question whether the suit property was a wakf property or not, has been determined and finally decided up to the Hon'ble High Court and the fact that the suit property was not a wakf property could not be re-agitated.

The learned court below further held that although Mir Sajendar Rahaman challenged the auction sale of the suit property several times, all the proceedings were dismissed and the right, title and interest of the auction purchaser and the subsequent transferees in respect of the suit property had been affirmed.

The learned court below held that on perusal of the facts as pleaded in the plaint it would appear that the suit property was not a wakf property and the plaint ought not to be either returned or rejected. Moreover, the suit property

was purchased by the predecessor-in-interest of the petitioner at a court auction sale and the sale certificate was issued to the owner thereafter, after confirmation of the sale. The said purchaser got possession. The plaintiff has inherited the property from the auction purchaser.

Mr. Chatterjee, learned advocate appearing on behalf of the petitioner submits that CS and LR records are in the name of the defendant no.1 and the proceedings initiated by the plaintiff for correction of the record of rights resulted in failure of the plaintiff to get her name recorded in the said record of rights. Thus, according to Mr. Chatterjee the estate belongs to the wakf estate and the plaint ought to be returned or rejected, to be filed before the learned Wakf Tribunal. He relies on Section 85 of the Wakf Act and also on the decision of the Hon'ble Apex Court in the matter of Haryana Wakf Board Versus Mahesh Kumar reported in (2014) 16 SCC page 45.

Section 85 of the Wakf Act provides that no suit or any legal proceeding shall lie in any civil court in respect of any dispute, question or other matter relating to any wakf property. The plaint as a whole would indicate that the title of the plaintiff through her predecessor-in-interest in the property had been traced out in the plaint and it also appears that the title of the predecessor-in-interest of the plaintiff in respect of the suit property has been upheld by the High Court. The predecessor-in-interest of the petitioner acquired the property at an auction sale through court. Sale certificate

was granted by the court. The defendant no.1 claiming to be the mutawalli of the alleged wakf estate, challenged such court sale. He was unsuccessful even upto the appeal. Thus, at this stage apart from the averments in the plaint, the learned court below did not have any occasion to consider any other documents to decide whether the plaint should be rejected or returned.

I do not find any illegality or irregularity in the order impugned. While considering whether the plaint should be returned to be placed before the appropriate forum the scrutiny should be restricted to the averments in the plaint. Extraction of a line or word from here and there would not be appropriate for return of the plaint. Thus, the order impugned is not interfered with. However, it goes without saying that maintainability of the suit will be decided as the first issue at the trial of the suit.

Later, the petitioner prays that the application for injunction should be heard after the preliminary issue on the point of maintainability of the suit is heard and decided. Maintainability of the suit as indicated above would depend on evidence to be led by the parties. In this case, in view of the complicated facts and also in view of the several litigations which were initiated by the parties prior to the filing of the instant suit on the basis of which the right, title and interest of the plaintiff has been established, the issue has to be tried on evidence. Even if the learned court below proceeds with the hearing of the application for injunction

and passes an order, the findings therein will only be tentative in nature and shall not have any binding effect on the ultimate decision in the suit. This principle has been laid down by several judicial decisions. As such, I do not accept the prayer of the petitioner for directing maintainability of the suit to be decided as a preliminary issue prior to the disposal of the injunction application.

The revisional application is disposed of.

There will be, however, no order as to costs.

Urgent Photostat certified copy of this order, if applied for, be given to the parties on priority basis.

(Shampa Sarkar, J.)