

H. Abdul Rasheed Vs. Madrasa-e-arabia by Its Secretary

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Court : Karnataka

Decided On : Oct-16-2008

Reported in : 2009(6)KarLJ43:2009(3)AIRKarR140:AIR2009N0C2181.

Judge : A.N. Venugopala Gowda, J.

Acts : Karnataka Rent Control Act, 1961 - Sections 21(1); Karnataka Public Premises (Eviction of Unauthorized Occupants) Act, 1974 - Sections 2, 7(1), 7(2), 10(5), 13(1), 16 and 21(2); Karnataka Public Premises (Eviction of Unauthorized Occupants) (Amendment) Act, 1999; [Wakf Act, 1995](#); Karnataka Public Premises (Eviction of Unauthorized Occupants) (Amendment) Act, 1981; General Clauses Act, 1987 - Sections 6; [West Bengal Premises Tenancy Act, 1956](#); Code of Civil Procedure (CPC) - Sections 100 - Order 6, Rule 17 - Order 41, Rules 27 and 33

Appeal No. : Regular Second Appeal No. 678/2003

Appellant : H. Abdul Rasheed

Respondent : Madrasa-e-arabia by Its Secretary

Advocate for Def. : T.N. Raghupathy, Adv.

Advocate for Pet/Ap. : B. Pramod, Adv.

Disposition : Appeal allowed

Judgement :

A.N. Venugopala Gowda, J.

1. This appeal is by defendant, questioning the decree passed by the Trial Court and affirmed by the First Appellate Court, directing to vacate and hand over possession of suit schedule premises and to pay damages to the plaintiff.

2. Facts which have given rise to this appeal, in a nutshell are:

Respondent/plaintiff is a registered wakf. It owns a building complex at Ashoka Road, Mysore, consisting of shops, office accommodation, etc. It has leased shop Nos. 1 and 2 therein, on monthly rent of Rs. 75/- each, to appellant/defendant. Plaintiff had filed an eviction petition under Section 21(1)(a) & (h) of Karnataka Rent Control Act, 1961, against the defendant, which was disposed by holding that, the provisions of the said Act are not applicable to the petition schedule premises. Thereafter, terminating the tenancy of defendant, suit was filed in the Court of the Civil Judge (Jr.Dn.), at Mysore, to direct the defendant to deliver vacant possession of the schedule premises and pay damages of Rs. 3,000/- per month for the wrongful use and occupation of the premises from 1.4.96, till the delivery of actual possession. Suit was contested by the defendant. Based on pleadings of the parties, Issues were framed. PW-1 was examined and Ex.P1 to P10 were marked on behalf of plaintiff. DWs 1 and 2 were examined and Exs.D1 to D5 were marked on behalf of defendant. Trial Court decreed the suit in part, directing the defendant to vacate and handover vacant possession and pay damages at the rate of Rs. 2,000/- per month from 1.4.96.

3. Said decree was questioned by the appellant, in the Court of Principal Civil Judge (Sr. Dn.), at Mysore, wherein, he filed two applications, to amend the written statement and to permit the production of additional evidence. Without considering the said applications, appeal was dismissed. Challenging the said decrees, this second appeal has been filed.

4. After hearing learned Counsel on both sides, this appeal was allowed in part, by setting aside the decree for damages and maintaining the decree for possession by judgment dated 6.8.04 (reported in : ILR 2004 KAR4717 .

5. Both parties questioned the said Judgment In the Hon'ble Supreme Court. Noticing the fact that, without framing a substantial question of law, as enjoined by Section 100 of CPC, appeal had been disposed of at the admission stage itself, civil appeals were accepted, aforesaid judgment was set aside and the appeal was remitted back for disposal afresh, by first framing question of law if any and then, proceed with the matter and decide the appeal, in accordance with law.

6. Appeal was taken on board and was admitted on 7.1.08, to examine the following substantial questions of law:

1. Whether a suit for eviction of a lessee filed by the lessor, a wakf institution in the year 1996 was maintainable before a Civil Court in the light of the provisions of Clause (v) of Sub-section (e) of Section 2 of the Karnataka Public Premises (Eviction of Unauthorized Occupants) Act, 1974 as introduced to the Premises Act by Act No. 28 of 1981 with effect from 30.9.1980?

2. Whether the suit filed in the year 1996 and as decreed by the trial Court in the year 1998 nevertheless became not tenable during the pendency of the appeal of the lessee before the lower appellate court in the wake of the further amendment to the Karnataka Public Premises (Eviction of Unauthorized Occupants) Act, 1974 by Act No. 22 of 1999 with effect from 4.8.1999 giving the following definition to a public premises which is as under;

a wakf registered with the Karnataka State Board of Wakfs.

3. Whether the lower appellate court was justified in law In holding that the amendment to the definition of public premises under the Karnataka Public Premises (Eviction of Unauthorized Occupants) Act in terms of the amending Act No. 22 of 1999 with effect from 4.8.1999 brought about during the pendency of the regular appeal before the lower appellate court, was only prospective and therefore did not affect the tenability of the suit as originally filed before the trial Court?

4. Whether the lower Appellate Court was justified in not giving a finding in regard to question No. 3 above though applications for such purpose had been filed under

Order 6 Rule 17 of CPC and Order 41 Rule 27 of CPC?

7. I have heard Sri. B. Pramod, learned Counsel A, for appellant and Sri. T.N. Raghupathy, learned Counsel for respondent and perused the records of lower Courts. For the sake of convenience, the parties will be referred in this judgment, with reference to their status in the suit.

8. Sft Sri. B. Pramod, learned Counsel for defendant contended that, suit is not maintainable in the Civil Court, in view of bar of jurisdiction under the Karnataka Public Premises (Eviction of Unauthorised Occupants), Act, 1974 (Act, for short). He contended that, premises belonging to a registered Wakf, is a public premises, falling within the purview of the Act and in view of the bar contained in Section 16 of the Act, no Court shall have jurisdiction to entertain suit or proceeding in respect of eviction or any other matters stated therein. He referred to the provision of the [Wakf Act, 1995](#) and also the provision of the Act and contended that, First Appellate Court has seriously erred in not considering the application filed for amendment of written statement, wherein, plea of maintainability of the suit, which is a pure question of law and which goes to the root of the matter was specifically raised. He contended that, the Court below, in the facts and circumstances of the case, has acted beyond its jurisdiction and hence, impugned decrees are liable to be set aside.

9. Per contra, Sri. T.N. Raghupathy, learned Counsel for plaintiff contended that, suit was filed in Trial Court on 1.4.96, on which date, provisions of the Act were not applicable to plaintiff institution, in as much as, the provisions of the Act applied only to a wakf under the management of Kamataka State Board of Wakfs and amendment under Karnataka Act 22 of 1999 to Section 2(e)(v) was made on 4.8.99 and that the amendment is prospective in its operation. He contended that, suit having been decreed on 24.2.98 and amendment to the Act being later, cannot be construed with retrospective effect to hold that, bar under Section 16 of the Act would operate for maintainability of the suit In the Civil Court. He contended that, right of appeal, is not a procedural right, but, is a substantive right and the same has to be pursued in accordance with law, which was existing at the time of filing suit and not with reference to the law amended subsequently and

subsequent amendment which has not been expressly given retrospective effect by the Legislature, cannot be applied to pending proceedings. In short, the contention is that, amendment made to Section 2(e)(v) of the Act applies to a registered wakf, only with effect from 4.8.99 and suit by a registered wakf, for eviction and damages in the Civil Court, cannot lie in law after 4.8.99 and amendment made to the Act on 4.8.99, is not retrospective and is also not applicable to proceedings pending in appeal.

10. Plaintiff is a registered wakf, with effect from 8.11.91. For recovery of possession and for awarding damages, O.S. No. 384/96 was filed on 7.6.96, against defendant, which was decreed in part on 24.2.1998. Defendant filed R.A. No. 155/98 in the First Appellate Court on 8.6.98. During the pendency of the appeal, Section 2 of the Act was amended in terms of Karnataka Act No. 22 of 1999. By that amendment, in Clause (v) of Sub-Section (e), a substitution was made, namely:

(v) A wakf registered with the Karnataka State Board of Wakfs

11. An application was filed to amend written statement, to insert the following:

The provisions of the Karnataka Public Premises (Eviction of Unauthorised Occupants) Act, 1974, apply to the Kolar Bara Imam Shadi Mahal comes under Public Premises as defined under Section 2e(v) of the K.P.P. (Eviction of Unauthorised Occupants) Act, 1974 and as such the suit is not maintainable.

12. Without considering the application and passing any order thereon, appeal was dismissed by judgment and decree dated 7.6.03. This appeal was filed on 28.7.03.

13. In terms of the amendment made to the Act, vide Karnataka Act No. 28 of 1981, a wakf under the management of the Karnataka State Board of Wakfs, was inserted and in view of the said amendment, effective from 30.9.1980, premises belonging to a wakf which was under the management of the Karnataka State Board of Wakfs, became a public premises and the provisions of the Act became applicable to such premises. The Act was again amended, as per Karnataka Act

No. 22 of 1999, on 4.8.99, by way of substitution to Section 2(e)(v), as noticed supra. By the said amending Act, substitution was made to the existing provision, making it applicable to a wakf 'registered with' the Karnataka State Board of Wakfs, in place of a wakf, 'under the management of' the Karnataka State Board of Wakfs. The point for consideration is:

whether the amendment made by substitution under the Karnataka Act No. 22 of 1999 is prospective or retrospective or retroactive and whether it will apply to proceedings pending in appeal?

14. The bone of contention as already noticed is that, defendant claims that, amendment made on 4.8.99 is applicable with effect from 30.09.1980, whereas, plaintiff contends that, it is applicable only on and after 4.8.99 and at any rate, will not apply to a premises in respect of which, an order or a decree had already been passed and due to mere pendency of the appeal, the amended Act cannot be made applicable. If it is held that, the said amendment is retrospective or retroactive i.e., with effect from 30.9.1980, in view of bar of jurisdiction contained in Section 16 of the Act, consequence would be that, Civil Court had no jurisdiction to try the suit in respect of eviction and for awarding damages and the relief claimed by plaintiff can be the subject matter of consideration by the Competent Authority under the provisions of the Act.

15. Effect of an Amendment by Substitution:

When an amendment is made to a statute and if it is by way of substitution, the construction to be placed on the effect of such amendment, has been settled by the Hon'ble Supreme Court In the case of Shamrao V. Parulekar and Ors. v. District Magistrate, Thana, Bombay and Ors. reported in : 1952 CriLJ1503 , wherein, it has been held as follows:

7. The construction of an Act which has been amended is now governed by technical rules and we must first be clear regarding the proper canons of construction. The rule is that when a subsequent Act amends an earlier one in such a way as to incorporate itself, or a part of itself, Into the earlier, then the earlier Act must thereafter be read and construed (except where that would lead to

a repugnancy, inconsistency or absurdity) as if the altered words had been written into the earlier Act with pen and ink and the old words scored out so that thereafter there is no need to refer to the amending Act at all.

16. In the case of Venkatappa K.T. and Ors. v. K.N. Krishnappa and Ors. reported in 1988(1) KLJ 578, a Division Bench of this Court has held that, when the amending Act has stated that the old sub-section, has been substituted by the new sub-section, the inference is that, the Legislature intended that the substituted provision should be deemed to have been part of the Act from the very inception.

17. In the case of Emp., MGMT of Ramkanali Colliery of BCCL v. Workmen by Secy. Rasht. Colliery Mazdoor Sangh reported in : (2001)ILLJ 1407 SC , Hon'ble Supreme Court has held that. It is a matter of legislative practice to provide while enacting an amending law, that an existing provision shall be deleted and a new provision substituted. If there is both repeal and introduction of another provision in place thereof by a single exercise, the expression 'substituted' is used. Such deletion has the effect of the repeal of the existing provision and also provide for introduction of new provision.

18. This Court, in the case of Sha Chunnilal Sohanraj v. T. Gurushantappa reported In 1972 (1) MLJ 327, has observed as follows:

The matter pertains to rules of construction of statutes and the effect of amendments made to an Act. In the Instant case, Sub-section (2) of Section 21 provides for the circumstances under which relief against eviction can be granted in proceedings under the Act. The said Sub-section was amended by substitution of a new provision set out in the earlier part of this order. Where a section of a statute is amended, the original ceases to exist and the new section supersedes It and becomes part of the law Just as if the amendment has always been there, (Vide Crawford, Statutory Construction-Interpretation of Laws pages 110-111).

An amending Act Is not regarded as an independent statute. The statute in its old form is superseded by the statute in its amended form, the amended section of the statute taking the place of the original section, for all intents and purposes as if the amendment had always been there. The amendment should be considered as if

embodied in the whole statute of which it has become a part. Unless a contrary Intent is clearly indicated, the amended statute is regarded as if the original statute had been repeated and the whole statute re-enacted with the amendment.

19. Thus, it is dear that, when a Statute is amended by way of substitution, certain words existing in the old Statute are substituted with the provision of the new Statute, Section 6 of the General Clauses Act, 1987, does not apply and that the Legislature intended that, the substituted words should be deemed to have been part of the Act from the very inception. Where a Section of a statute is amended, by way of substitution, the original ceases to exist and the new Section supercedes it and becomes a part of the law as If the amendment has always been there in the statute. 'Substituted' is used, if there is both repeal and introduction of another provision in place thereof by a single exercise. Such deletion has the effect of repeal of the existing provision and also provides for Introduction of new provision.

20. It is an admitted fact that, an application under Order VI Rule 17 of the Code, for amendment of the written statement to raise an additional ground was filed in the First Appellate Court. The application was not considered while dismissing of the appeal. It was not correct on the part of the lower Appellate Court in disposing of the main appeal, without disposing of pending I.As. Pending I.As. are required to be considered and disposed of either earlier to the disposal of the main matter or along with the main matter depending upon the nature of prayer. In not doing so, lower Appellate Court has committed a material error.

21. It is well settled position of law by catena of decisions of the Hon'ble Supreme Court that, amendment of pleading can be allowed when two conditions are satisfied, i.e., (i) of not working injustice to the other side and (ii) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendment should be refused where the other party can not be placed in the same position as if the pleading has been originally correct, but the amendment would cause him an injury which could not be compensated in costs.

22. I have considered the LA. for amendment filed by defendant in the lower Appellate Court. The cause of action to seek the amendment as proposed, has arisen during the pendency of appeal with the said amendment of Section 2(e)(v) of the Act. The proposed amendment to the written statement is a question of law regarding maintainability of suit. The proposed amendment did not involve any new facts requiring recording of additional evidence and adjudication by the Court on facts. Being a question of law and being essential for decision making, amendment ought to have been allowed. Since the proposed amendment goes to the root of the matter i.e., regarding maintainability of suit and bar of jurisdiction on the Civil Court and will not also cause injustice to plaintiff, I deem it proper to allow the application. Without even the proposed pleading, Court can take note of the statutory provisions and decide the question of jurisdiction and maintainability of suit. Hence, application stands allowed.

23. The First Appellate Court ought to have exercised the jurisdiction conferred on it under Rule 33 of Order XLI CPC. In view of the amendment made by Karnataka Act 22 of 1999 to Section 2(e)(v) of the Act and read with Section 16 of the Act, there being a Legislative command depriving the Civil Court of its unqualified jurisdiction to pass any orders concerning the matters stated under Section 16 of the Act, the First Appellate Court ought to have regulated the matter. It is true that, when suit was instituted, Civil Court possessed the jurisdiction to entertain the suit, to pass a decree for possession and damages. But it was divested of that jurisdiction, when the Act was amended as per Karnataka Act 22 of 1999 and came into force. The language of Section 16 of the Act abundantly makes it clear and regard must also be had to its object. It is settled possession of law that, an appeal is a continuation of the suit and that the appeal would be governed by the amendment made to the Act, even though, the Trial Court decree had been passed earlier. That a change in the law during the pendency of the appeal has to be taken into consideration and will govern the rights of the parties, was the law laid down by the Hon'ble Supreme Court in the case of Ram Sarup v. Munshi reported in : [1963]3SCR858 .

24. In the case of Mayawati v. Inderjit reported In : [1966]3SCR275 , it was held as follows:

If the new law speaks in language, which expressly or by clear intendment, takes in even pending matters, the Court of trial as well as the Court of appeal must have regard to an intention so expressed, and the Court of appeal may give effect to such a law even after the judgment of the Court of first instance.

25. In the case of *Lahmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri* reported in , it has been held that, once a decree passed by a Court had been appealed against, the matter became sub judice again and thereafter the Appellate Court acquired seisin of the whole case, except that for certain purposes, for example, execution, the decree was regarded as final and the Court below retained jurisdiction.

26. In the case of *H. Shiva Rao and Anr. v. CECILIA Pereira and Ors.* reported in : AIR 1987 SC248 , It has been held as follows:

5. It has to be borne in mind that Rent Control legislations are beneficial to the tenant and restrictive of the rights of the landlords these legislations were passed to meet the problem of shortage of accommodation in cities and towns. Whether that is the best way to meet the problem of finding habitats for growing number of people is another issue. Whether or not the problem could not be met by another way is also another question. Courts must find out the literal meaning of the expression in the task of construction. In doing so if the expressions are ambiguous then the construction that fulfils the object of the legislation must provide the key to the meaning. Courts must not make a mockery of legislation and should take a constructive approach to fulfil the purpose and for that purpose, if necessary, iron out the creases.

27. In the case of *Lakshmi Narayan Guin and Ors. v. Niranjana Modak* reported in : [1985]2SCR202 , the facts were that, appellants had filed a suit for ejectment and arrears of rent, which was resisted by respondent. Suit was decreed by Trial Court. Appeal by tenant was dismissed and second appeal was allowed by the High Court by holding that, by virtue of West Bengal Premises Tenancy Act 1956 being extended to the area wherein the premises was situated during the pendency of first appeal, the first appellate Court was bound to take into account the change of law and to extend its benefit to the tenant and consequently set

aside the decree of Trial Court and dismissed the suit. In the appeal by landlord/plaintiff, the Hon'ble Supreme Court has held as follows:

7. ...It is well settled that when a Trial Court decrees a suit and the decree is challenged by a >competent appeal, the appeal is considered as a continuation of the suit, and when the appellate decree affirms, modifies or reverses the decree on the merits, the Trial Court decree is said in law to merge in the appellant decree, and it is the appellant decree which rules. The object of Sub-section (1) of Section 13 is to protect the possession of the tenant, subject to the exceptions specified in the sub-section, and that protection is ensured if we construe the Sub-section to mean that, subject to those exceptions, no effective or operative order or decree can be made by the Court in a landlord's suit for possession against a tenant. To our mind, therefore, Sub-section (1) of Section 13 of the Act can be invoked by a tenant during the pendency of an appeal against a Trial Court decree.

8. The next point is whether Sub-section (1) of Section 13 can be invoked where the suit was instituted before the Act came into force. In the instant case, the suit was instituted long before the Act was extended to Memari. Sub-section (1) of Section 13 directs the Court not to make any order or decree for possession subject, of course, to the statutory exceptions. The legislative command in effect deprives the Court of its unqualified jurisdiction to make such order or decree. It is true that when the suit was instituted the Court possessed such jurisdiction and could pass a decree for possession. But it was divested of that jurisdiction when the Act was brought into force.

28. Though a decree for eviction and damages had been passed in the suit by the Trial Court, the decree was under challenge in a proceeding arising out of the suit in appeal and was pending in the lower Appellate Court. Since, in theory an appeal is a continuation of the suit and re-hearing of the suit, the change in law brought by way of amendment by way of substitution, became applicable to the pending proceeding. The amended provision has retro-active effect.

29. Section 16 of the Act bars jurisdiction of Civil Court even to entertain a suit or a proceeding in respect of eviction of any person who is in unauthorised occupation

of any public premises or the recovery of the arrears of rent payable under Sub-section (1) of Section 7 or damages payable under Sub-section (5) of Section 10, or any portion of rent, damages or cost. The Section refers to 'suit or proceeding in respect of the eviction'.

30. In the case of N. Mohammad v. Mandal Panchayat reported in : ILR 1998 KAR2607 , the effect of Section 16 of the Act has been interpreted as follows:

That Section 16 bars the jurisdiction of the Civil Court even to entertain a suit or a proceeding. The material expression is 'suit or proceeding in respect of the eviction'. It is not a suit or proceeding for eviction, by 'in respect of eviction'. This term is a term of very wide connotation touching the right of eviction of the authority to evict the person residing unauthorisedly. It means that even if it is for prohibiting the eviction of unauthorised occupant, a person files any suit in Civil Court, the mandate of law is that it shall not be entertained nor any proceeding of such nature shall be entertained by Civil Court. When I so opine, I find support for my view from the decision of this Court in the case of The Divisional Controller, KSRTC, Hubli and Anr. v. Gangadhar, S/o Ramachandra Shanbag reported in AIR 1993 KAR 82. In paragraph 12 after quoting Section 16, this Court has observed as under:

Therefore, in view of the specific provisions of Section 16, it is seen that any dispute arising out of the action taken by the competent authority seeking to evict a licensee from the public premises, or to recover arrears of rent payable under Sub-section (1) of Section 7 or damages payable under Sub-section (2) of that Section or the costs awarded to the State Government or the local authority or the corporate authority under Sub-section (5) of Section 10 or any portion of such rent, damages or costs, cannot be entertained by any Civil Court.

The expression 'Unauthorized occupation' has also been defined In the Act that it includes even continuation of occupation of a person in public premises after the authority under which he was allowed to occupy the premises has expired.

31. In view of the bar contained in Section 16 of the Act, Civil Court has no jurisdiction to entertain the suit and suit in the Civil Court being not maintainable,

the decree passed against the defendant and affirmed by the appellate Court being without jurisdiction, is liable to be set aside. In view of bar of jurisdiction, no finding on the factual dispute can be recorded.

32. In view of the foregoing discussions, the substantial questions of law raised for consideration are answered as follows:

(a) Suit for eviction of lessee filed by lessor - a registered wakf with the Karnataka State Board of Wakfs is not maintainable before a Civil Court since the premises belonging to such a wakf falls within the definition of public premises under the provisions of the Act.

(b) Though the suit was filed In the year 1996 and was decreed by the Trial Court in the year 1998, nevertheless, in view of pendency of the matter in appeal and in view of bar of jurisdiction, became untenable, since during the pendency of appeal of the lessee before the Appellate Court, Act was amended by way of substitution to Section 2(e)(v) of the Act, making applicable the provisions of the Act to a wakf registered with Karnataka State Board of Wakfs.

(c) Since the amendment is retro-active, Appellate Court was not justified in law in holding that, the amendment to the definition .of public premises under the Act in terms of Karnataka Amendment Act No. 22 of 1999 with effect from 4.8.99, did not effect the tenability of the suit as originally filed before the Trial Court.

(d) The lower Appellate Court was not justified, in not giving a finding in regard to question No. 3, though applications had been filed by the appellant to amend the written statement and to produce additional evidence.

33. In the result, the appeal is liable to be allowed and I pass the following order:

i) Appeal is allowed.

ii) The Judgment and Decree passed In R.A. No. 155/98 dated 7.6.03, by the Principal Civil Judge (Sr. Dn.) at Mysore, is hereby set aside.

iii) The Judgment and Decree passed in O.S. No. 384/96 dated 24.2.98 by the II Addl. First Civil Judge (Jr. Dn.) at Mysore, is hereby set aside and the suit is

hereby dismissed due to bar of jurisdiction under Section 16 of the Karnataka Public Premises (Eviction of Unauthorized Occupants) Act, 1974.

It is made clear that, the dismissal of the suit will not come in the way of respondent/plaintiff initiating proceedings against the appellant for appropriate reliefs under the provisions of Karnataka Public Premises (Eviction of Unauthorized Occupants) Act, 1974, before the competent authority. All the contentions of both parties are left open for consideration in such proceedings.

The amount of Rs. 1,40,000/- deposited by the appellant before this Court, is directed to be deposited by the Registry in any nationalised bank for a period of one year. If the respondent/plaintiff succeeds in the proceeding before the competent authority under the provisions of the said Act, it may move this Court for release of the amount in deposit with accrued interest, in its favour. Depending upon the result of the proceedings that may be initiated by the respondent/plaintiff, the appellant/defendant is also at liberty to move this Court regarding release or otherwise of the amount in deposit and the interest thereon. This arrangement has been made with the consent of the appellant through his advocate.

In the circumstances of the case, parties are directed to bear their respective costs throughout.

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