

Court No. - 1

Neutral Citation No. - 2023:AHC:118588

Reserved

AFR

Case :- TRANSFER APPLICATION (CIVIL) No. - 88 of 2023

Applicant :- Bhagwan Shrikrishna Virajman And 7 Others

Opposite Party :- U.P. Sunni Central Waqf Board And 3 Others

Counsel for Applicant :- Prabhash Pandey, Pradeep Kumar Sharma

Counsel for Opposite Party :- Punit Kumar Gupta, Birendra Prasad Maurya, Devid Kumar Singh, Kamlesh Narayan Pandey, Nasiruzzaman, Prateek Rai, Radheshyam Yadav, Varun Singh

Hon'ble Arvind Kumar Mishra-I,J.

1. Heard Sri Hari Shankar Jain, learned senior counsel for the applicants through virtual mode, Sri Vishnu Shankar Jain, Sri Prabhash Pandey and Sri Pradeep Kumar Sharma, learned counsel for the applicants, Sri Punit Kumar Gupta, learned counsel for the respondent no.1, Sri Wajahat Hussain Khan, learned senior counsel assisted by Sri Nasiruzzaman and Sri J.H. Khan, learned counsel for the respondent no.2, Sri Prateek Rai, learned counsel for the respondent no.3, Sri Birendra Prasad Maurya, Sri Kamlesh Narayan Pandey, learned counsel for the respondent no.4 and Sri Radhey Shyam Yadav, learned counsel for the proposed respondent no.5, Sri Manish Goyal, learned Additional Advocate General for the State appointed as Amicus Curiae by the Court, who is assisted by Ms. Anjali Goklani, Advocate.

2. Noticeable that in this case, an impleadment application was moved on behalf of Mahendra Pratap Singh, Advocate who also wanted hearing on point of transfer, thus praying that he be impleaded as proposed respondent no.5. The impleadment application was supported by affidavit sworn by deponent Vivek Kumar Mishra whereby averments were made in the accompanying

affidavit and it was claimed, inter-alia, that the description of civil suit as described in paragraph no.7 of this transfer application, describes the suit of the proposed respondent at serial no.1 of the list being civil suit no.950 of 2020 (Thakur Keshav Dev Ji Maharaj Virajman Mandir and others Vs. Intezamia Committee and others) has been instituted by the applicants and others on 22.12.2020. Therefore, he should be heard in this case before passing any order. Consequently, he was given opportunity to extend arguments and state his case before this Court along with other counsels of both sides and the case of the proposed respondent no.5 was argued before this Court by his counsel, Sri R.S. Yadav and due consideration was given.

3. By way of this transfer application under Section 24 of the Civil Procedure Code 1908, the following prayer has been made:-

"(a) Withdraw Civil Suit No.353 of 2022 from the Court of Civil Judge (Senior Division), Mathura to this Hon'ble Court for Trial in exercise of the powers under Section 24(1)(b) of Code of Civil Procedure, 1908;

(b) Direct to withdraw all suits of similar nature to this Hon'ble Court on the basis of list of cases which may be supplied by Ld. District Judge, Mathura to this Hon'ble Court;

(c) Pass such other order(s) as this Hon'ble Court may deem fit and proper under the facts and circumstances of the case."

4. The application is supported by affidavit with details of facts of the suit (original suit no.353 of 2022) and for sake of convenience, it would be relevant that a brief sketch of chronological development up to this stage may be narrated.

5. Bare perusal of the record of this transfer application reflects and proceeds on line that the applicants filed civil suit for declaration, injunction and right to worship at the site of Shri

Krishna Janmasthan and also removal of the present structure alleged to be Shahi Eidgah Mosque. The suit was registered as misc. case no.176 of 2020 in the court of the Civil Judge (Senior Division), Mathura.

6. It is worth mentioning that the filing of the aforesaid suit was under circumstances wherein by way of the suit some compromise decree passed earlier between parties, to that particular suit was challenged on ground of collusion between the parties of the suit by the present applicants and the alleged compromise dated 12.10.1968 and based upon that the decree passed was stated to be sham and fraud, thus the decree passed by way of aforesaid compromise was claimed to be null and void. It being so, the aforesaid suit was registered by the Civil Judge (Senior Division), Mathura as civil misc. case no.176 of 2020 on 25.09.2020. However, the aforesaid misc. proceeding / suit was dismissed by the learned Civil Judge (Senior Division), Mathura vide order dated 30.09.2020, holding that the worshipers had no right to file the suit, their number were in lakhs as worshipers of Lord Krishna and in case suit is entertained, a large number of cases may be filed / instituted, copy of the plaint has been brought on record (annexure no.1).

7. The applicant aggrieved by the aforesaid order dated 30.09.2020 of the Civil Judge (Senior Division), Mathura, preferred civil appeal no.17 of 2020 before the learned District Judge, Mathura, which was admitted by it vide order of the District Marthura, dated 16.10.2020. Later on this appeal was converted into civil revision no.2 of 2021. The parties were heard in the civil revision and vide judgment and order dated 19.05.2022, the revision was allowed and the matter was remanded to the trial court with direction to proceed in accordance with law. Consequently, the proceeding started afresh by the Civil Judge

(Senior Division), Mathura, and the suit was numbered as civil suit no.353 of 2022.

8. However, in the meanwhile it so happened that the respondent nos.1 and 2 – U.P. Sunni Central Waqf Board and Trust Shahi Masjid Eidgah, challenged the aforesaid order of the District Judge, dated 19.05.2022 (passed in civil revision no.2 of 2021) filing the petition under Article 227 of the Constitution of India, Numbered 5967 of 2022 and 5348 of 2022, both the sides were heard by the coordinate Bench of this Court and the petition was disposed of vide order dated 01.05.2023, the last paragraph of which is extracted hereinbelow:-

"In the light of above, both the petitions are disposed by remanding the matter back to the Trial Court with directions to adjudicate the Civil Suit No.353 of 2022 after following due procedure as per law without being influenced by any observation or findings of the District Judge vide impugned order dated 19.05.2022. All the parties are free to raise all their contentions before the trial Court."

9. In the light of above order, it is apparent that the order dated 19.05.2022 passed by the District Judge, Mathura, in civil revision no.2 of 2021 was sustained. However, the various findings recorded by the District Judge, Mathura touching upon the merit of the suit itself was set aside, for specific reason that any finding on merit can be recorded only after the written statement is filed, issues framed thereon, evidence adduced and after discussion of facts and law applicable, finding to be recorded by the trial court thereon.

10. While coming back to the averments elaborated in this transfer application, it proceeds with the import that the matter involved here has historical background and it involves interest and sentiments of public at large, requires interpretation of various statutes, laws, Acts and ARTICLES of the Constitution of India. The matter is highly sensitive and inter-alia relates to belief and faith of

crores of devotees of Lord Krishna. The matter is of national importance and substantial questions of law involved in the suit. In fact, the complicated questions of law concerning a large section of society having its impact on the entire nation are required to be decided by the highest court of the State.

11. The aforesaid suit also involves, explicitly and by implication determination of questions relating to history, scriptures, interpretation of Hindu and Muslim law and it being so, the present suit (no.353 of 2022) is standing entirely on different footing unlike the normal civil suit as such of exceptional nature.

12. The averments contained in the transfer application proceed on to claim that the suit no.353 of 2022 was filed on 25.09.2020, thereafter, a number of suits have been filed and are pending in the court of the Civil Judge (Senior Division), Mathura. The applicant has furnished details of such suits in paragraph no.7 of this transfer application which comprises list of as many as nine cases, a brief reference of the same becomes relevant;

(i) Civil Suit 950 of 2020 Thakur Keshavji Maharaj Vs. Intizamiya Committee

(ii) Civil Suit 107 of 2021 Thakur Keshavji Maharaj Vs. Intizamiya Committee

(iii) Civil Suit 151 of 2021 Bhagwan Shri Krishna Virajmaan Vs. Sunni Central Waqf Board

(iv) Civil Suit 152 of 2021 Bhagwan Shri Krishna Virajmaan Vs. U.P. Sunni Central Waqf Board

(v) Civil Suit 252 of 2021 Thakur Keshavji Maharaj Vs. U.P. Sunni Central Waqf Board

(vi) Civil Suit 174 of 2021 Keshav Dev Ji Maharaj Vs. U.P. Sunni Central Waqf Board

(vii) Civil Suit 620 of 2021 Bhagwan Bal Shri Krishna Keshav Dev Virajmaan Vs. U.P. Sunni Central Waqf Board

(viii) Civil Suit 683 of 2021 Gopal Giri Maharaj Vs. U.P. Sunni Central Waqf Board,

All the aforesaid eight cases are stated to be pending in the court of the Additional Civil Judge (Senior Division), Mathura. However, the last case being ninth case described in the list of suits given in the transfer application is stated to have been pending in the court of the 3rd Additional Civil Judge (Senior Division) Mathura, with relevant detail:-

(ix) Civil Suit 839 of 2022 Bhagwan Bal Shri Krishna Virajman Vs. Intezamia Masjid Shahi Masjid.

13. However, the gravity of the issue involved and the large and wide background of the case has been tried to be equated with the case of the Ram Janam Bhoomi pertaining to Ayodhya and specific plea has been raised that this Court vide order dated 10.07.1989 was pleased to transfer all suits pertaining to Ayodhya dispute consequent upon which, the suits (alike in nature) were tried by this Court (High Court) and decided vide judgment and order dated 30.09.2010. It proceeds further with claim that an appeal was preferred against the aforesaid order and the matter was finally adjudicated upon by the five Judges Bench of the Hon'ble Apex Court vide judgment and order dated 09.11.2019 [2020 (1) SCC 1].

14. Based upon aforesaid averments, specific plea is raised that in case the suit is decided by the trial court itself, it will take long time. However, the matter needs be decided expeditiously to save the time of the litigant parties and to serve the interest of justice.

15. In support of his claim, learned counsel for the applicants proceeds on to say that under prevailing facts and circumstances of this peculiar suit, the same may be conveniently withdrawn by

virtue of provision under Section 24 of the Civil Procedure Code, 1908 which empowers the higher Courts to try the suit after withdrawing it from the lower court concerned. The suit requires consideration by higher court which admittedly has vision broad and wide.

16. The point in issue involved in the suit for adjudication relates to Shri Krishna Janmbhoomi and the plaintiffs are claiming right to worship and removal of the present Shahi Eidgah Masjid.

17. One of the grounds urged for exercise powers under Section 24 of the C.P.C. revolves around the axis to the ambit that the Civil Judge has not worked properly while the suit was initially preferred / instituted while exercising powers under Order 7 Rule 11 C.P.C. touching upon those issues which might not have been touched at this stage. While the applicants were pursuing remedy against outcome of order of the trial court dated 30.09.2020 as many as nine suits were filed and duly registered by the Civil Judge (Senior Division), Mathura and due to that, for the past three years the suit has not progressed any further.

18. Learned counsel for the applicants has explained the historical and religious nature of the suit and claimed that the history of 'Karagar' (jail) of Kans wherein Lord Krishna incarnated in human form, is sacred and divine for the Hindu devotees. It is a deity worshiped by the Hindu devotees. The 'Karagar' of 'Kans' at present is located beneath the alleged Shahi Eidgah Masjid and by explaining these aspects to some length, the learned counsel for the applicant has endeavoured to bring to the notice of this Court the various complicated questions which are involved and call for adjudication of the same in the present suit. Some of these complicated questions were stated to be interpretation, validity and applicability of places of worship Act 1991, interpretation /

applicability of Waqf Act 1995, rights of Hindu deity under Hindu Law and under Article 25 of the Constitution of India and interpretation of Article 25, 26 and 300 A of the Constitution of India. Moreover, it involves adjudication on point of birth place – 'Asthan', as deity, the rights and duty of Shebait under Hindu Law and rights of Hindu devotees where Shebait has been negligent and the property of the deity has been alienated/transferred against the law, decree obtained by fraud and challenged by Hindu devotees, adjudication upon distinction between Waqf and Trust, and apart from all above point of applicability and interpretation of law of adverse possession.

19. Learned counsel has asserted that the aforesaid substantial questions would arise before the trial court. Therefore, the original trial may be conducted by this Court. After describing the factual background, the learned counsel claimed that sensitive / sentimental issues of national and public importance between and among people are involved which need be properly scrutinized and adjudicated upon.

20. At this juncture, it would be relevant to take note of objection raised by the respondents, however, before proceeding further, it would be desirable to state that respondent no.3 has no objection to the forum of litigation, he is interested only in expeditious disposal of the case / suit. Therefore, no special objection has been raised by the respondent no.3.

21. Noticeable that respondent no.1 while rebutting the plea of the applicant is specific to the point that the only reason assigned for ground of transfer of the trial has been enumerated in paragraph no.8 of the transfer application. Thereafter, the respondent no.1 proceeds on the line that claim has been raised by the applicants that the matter is expanding to the length and breadth of India and

concerns crores of devotees of Lord Krishna would not serve the purpose of the applicants. Apart from aforesaid specific objection, there are ancillary objections of the nature that no prejudice is caused to the applicants and the relief sought to its core by way of the suit basically pertains to cancellation of the decree dated 20.07.1973 and 07.11.1974 passed in original suit no.43 of 1967. Thereafter, learned counsel proceeds further and has explained about the import and application of the Section 24 C.P.C. in the present context. Learned counsel continued that in case the transfer appellation is allowed it would be opening pandora box and in every case pertaining to religious places would be the voice of the concerned. Learned counsel in concluding rebuttal vehemently contended that in the matter of Kashi Vishwanath Temple dispute, the Hon'ble Apex Court vide its order dated 20.05.2022 transferred the proceeding of the original suit to the District Judge, Varanasi, he being an experienced judicial officer.

22. The respondent no.2 has virtually adopted the contention as raised by respondent no.1 with fresh addition that none of the applicant is resident of Mathura where the dispute property is situate. The plaintiffs are rich persons, whereas, the opposite party no.2 has no sufficient means and financial position is very week. Convenience of the parties would be suitably adjusted if the suit is tried by the Civil Judge, Mathura. It would cause inconvenient to witnesses of both the sides to come over to Allahahad / Prayagraj from Mathura. Further claim has been raised that insofar as the nine cases enumerated in paragraph no.7 of the transfer application to be cases of similar nature are concerned, none of the parties to the suit so described has been made to this transfer application.

23. Similarly placed is the line of argument of the respondent no.4 more or less touching and urging upon the same issue as endeavoured by the respondent nos.1 and 2 while objecting to the

prayer made in the transfer application, therefore, there is no need of repeating the same argument to the same import.

24. The intervenor-the proposed respondent no.5 Mahendra Pratap Singh, Advocate was allowed to state his case as he claimed himself to be one of the plaintiffs of the suit at the top of the list furnished by the applicants in paragraph no.7 of the transfer application. The learned counsel for the respondent no.5 has not brought any new theme rather his claim is based that the relief sought by the proposed respondent in his suit (950 of 2020) has got nothing to do with the relief sought in the suit instituted by the applicants. Therefore, the transfer application is claimed to be misconceived and misguided one. The court below is competent to decide the issue raised and can be properly adjudicated upon. However, the cases of the similar nature may be consolidated and brought together, may be decided by the court below and basing the leading suit to be suit no.950 of 2020.

25. Before proceeding further with the analysis of the entire claim, certain aspects need be observed. This transfer application is supported by an affidavit of one Rajesh Mani Tripathi wherein the aforesaid details have been provided in paragraph no.8 of the affidavit. Counter affidavit has been filed on behalf of the respondent no.1 and there is no denial of the assertions made in paragraph no.8 of the affidavit filed in support of this transfer application. This is evident from bare perusal of the paragraph no.10 of the counter affidavit filed by respondent. Likewise, in the counter affidavit of respondent no.2, assertions made in paragraph no.8 of the affidavit has been stated to be matter of record except for the fact that original suit no.151 of 2021 and original suit no. 152 of 2021 were dismissed for want of prosecution besides these two suits, some more suits are also pending before the court concerned. For ready reference, paragraph no.6 of the counter

affidavit of respondent no.2 is extracted herein under:-

"That the contents of paragraph no.6, 7 and 8 of the affidavit are also the matter of record but two suits as CS No.151 of 2021 and CS No.152 of 2021 have been dismissed for non prosecution and some more suits are also pending besides the list in paragraph no.7.

26. Likewise counter affidavit filed by the respondent no.4 who has admitted contents of the paragraph no.8 of the affidavit filed in support of the transfer application and has given detail of one further suit being original suit no.12 of 2023 Sri Krishna Janambhoomi Mukti Nirman Trust Vs. Shahi Masjid Eidgah and others, which is stated to be pending before the court of the Civil Judge (Senior Division), Mathura.

27. From pleadings of the parties, it is more evident that at least, nine suits are pending consideration, inter-alia, involving the issue relating to the interpretation of various facets of statutes, constitutional law, elastical law, historical importance besides personal law and common law.

28. The detailed arguments were advanced by the parties and upon completion of the pleadings on several dates which is evident from the order-sheet, judgment was reserved on 03.05.2023.

Analysis

29. Section 24 of the Code of Civil Procedure (hereinafter referred as "the C.P.C.") is a general power of transfer and withdrawal. This power can be exercised either on the application of the party or power can be exercised suo motu. Section 24 C.P.C. is extracted hereinbelow:-

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.

2[(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.]

30. Bare perusal of Section 24 (1)(b) CPC shows that suit can be withdrawn which is pending in the subordinate court to the Court to which the transfer application is made i.e. High Court. The High Court is competent to try or dispose of the same. The scope of Section 24 CPC is large enough encompass to try all issues by the High Court and exercise its power on civil court. There is no bar that the High Court cannot try suit, if it is withdrawn from the civil court where it is pending and is transferred to the High Court for disposal.

31. For the purpose of exercising jurisdiction under Section 24 C.P.C., the High Court has to circumspect all the facts in issue and all the consequences that it may have upon masses. It will be apt to refer the decision of Hon'ble Apex Court in the case of ***Baselius Mar Thoma Mathews I and others Vs. Plaulose Mar Athanasius and others, (1980) 1 SCC 601***. The facts in the aforesaid case relates to the spiritual life affecting orthodox syrian

christians, as many as 250 suits manifesting litigious syndrome are remaining pending in the several courts of Kerala. Even the court of the Additional District Judge that was nominated to dispose of eight suits, two sensitive suits did not work out to possible logical end to the entire litigation. In such backdrop, Hon'ble Apex Court proceeded to make observation as follows:-

"(7) It is indubitable that after the decision by the District Court appeals will inevitably be carried to the High Court. It is predictably reasonable to expect, from all that has been presented to us and all that we have been able to gather from the records, that the case involves questions of public moment and which are likely to spiral up to the Supreme Court on final appeal. In this jurisdiction, the approach has to be pragmatic, not theoretic, without whittling down the basics of law bearing on transfer of cases.

(8) We do not for a moment countenance the suggestion that the district Judge is not equal to the legal intricacies or factual challenges of these or other cases, the procedural law having vested him with unlimited jurisdiction and the High Court having committed these cases to his seisin. Hints of bias are also out of bounds, as we have indicated. If these suits at this stage of early arguments which have yet to begun effectively, are transferred to the High Court a spell of few years in the stressful life of the litigation will be saved. Taking copies of a bunch of decrees by the District Court, followed by preliminaries and filing of appeals, service of notices and other ripening processes, may consume considerable time and money. And then the High Court would begin de novo the entire arguments and appreciation of the whole range of facts and law as in first appeal it is bound to do in a case of this type. Where lakhs of people are excitedly affected by the ultimate decision and the fate of a few hundred suits and a thousand churches is to be settled by adjudication, the elimination of some years and duplication of hearings and full arguments, at the commanding height of the High Court is a wise measure, all things considered. The social savings of abbreviation of laws' delays are important to social justice.

(9) We do not tarry to dilate on the many dimensions to this

transfer petition except to state that we feel the advancement of public justice will be promoted by the High Court itself at this stage, proceeding to hear the suits. We, therefore, direct that all the suits covered by the transfer petition be transferred to the High Court and tried from the present stage post-haste, since expeditious termination is the driving force behind this order for transfer."

32. It has been admitted to the respondents that they will be losing right of available remedy on misc. application in revision before the District Judge, Mathura and their right of filing the appeal before the High Court but all procedures are merely handmade of the justice, the ultimate aim is to provide speedy justice. One of the arguments which was advanced from both the sides was with respect to the case of Ram Janambhoomi, which was transferred to the High Court from the subordinate courts. On the one hand, the applicants have to say that seminal issue of the public importance was involved in the said case of Ram Janambhoomi and the High Court transferred the matter from the subordinate court to itself. However, on the other hand, learned counsel for the respondents has to say that the transfer was not made, for the reason of the importance in issue but was made because of fact that the suit was already pending before the subordinate court for 40 years and could not reach a logical conclusion and even after transfer to the High Court, it took 30 years for the High Court to decide the suit.

33. In order to appreciate rival contentions, it will be appropriate to refer the decision of the division Bench of this Court in the case of the ***State of U.P. and others Vs. U.P. Sunni Central Board of Waqf and others, (1989) 15 ALR 696*** by which the suit came to be transferred. In paragraph no.2 of the aforesaid decision, facts have been stated and contents of Section 24 C.P.C. and its application have been duly mentioned which are being reproduced herein under:-

".....An application was again moved by the State in the month of February, 1989 on the administrative side praying that this application under section 24, C.P.C., may be listed for orders as early as possible. It was mentioned in the said application that the suits relate with inter se dispute between the members of two communities; one claiming it to be Ram Janam Bhoomi temple and the other as Babri Masjid and though the dispute is purely civil in nature but it assumes importance, time to time in the context as it some times excites religious sentiments and generates tension between the communities. It was further stated that the State Government is concerned to preserve amity and brotherly relations between the communities, but at time it assumes sensitive issue and sometimes creates possibility of discord and tension between otherwise peaceful population and the hearing and final disposal of suits in the civil court will take long time and hence the cases may be transferred to this court. On that application it was ordered that the case may be listed on February 23, 1989 and this is how proceedings started"

34. A perusal of the same, facts disclose that it was on account of religious sentiments, general of tensions between two communities and to preserve amity brotherly relations, the application was moved and not on account of fact that the matter was not decided for 40 years. Paragraph no.9 and 10 of the aforesaid decision of the division Bench of this Court are relevant and extracted herein under:-

9. Powers of the court under Section 24 of the C.P.C. are not to be rendered negatory because right of one or two appeals is lost. In suitable cases and situations like the present are the same has rather become necessary for advancing the cause of justice and putting an end to the litigation rotating round the same controversy.

10. Taking into consideration the facts of the case and the pendency of suits for several years and the issue in question which is creating tension between the members of two communities and developing division tendency, we are of the view that the application under Section 24, C.P.C. for withdrawal of suits and its trial and disposal by this court be allowed.

35. The apprehension that was expressed by the learned counsel for the respondent nos.1 and 2 to the effect that their right of appeal will be lost if the suit is transferred to the High Court does

not merit consideration. The issue is no longer res integra and has been decided by the division Bench of this Court in the case of ***Swami Vasudevanand Saraswati Disciple of Swami Shanta Nand Saraswati Vs. Jagat Guru Shankaracharya Jyotishpeeth Peethadheshwar Shri Swami Swaroopa Nand Saraswati reported in 2016 SCC Online All 2956***, paragraph nos.27, 28, 29 and 30 are extracted herein under:-

"27. Further argument that transfer of appeal from District Judge to High Court, if allowed, then a right of second appeal will be lost, has been negated by this Court in State of U.P. v. Sunni Central Board of Waqf. It is an order passed on application under Section 24, C.P.C. whereby suits pending in Court of Civil Judge / Munsif were transferred to this Court at Lucknow. A similar argument of loss of right of appeal was negated by observing as under:

"Powers of the Court under Section 24 of the C.P.C. are not to be rendered negatory because right of one of two appeals is lost. In suitable cases and situations like the present are the same has rather become necessary for advancing the cause of justice and putting an end to the litigation rotating round the same controversy".

28. So far as circumstances when this Court would be justified in transferring a case pending in subordinate Court to High Court is concerned, in Baselius Mar Thoma Mathews I V. Paulose Mar Asthanasius, it has been held, where dispute may affect lot of people, who are excitedly affected by ultimate decision, and exercise of transfer would save some years and duplication of hearing, which is likely to take ample time, transfer of matter to High Court is a wise measure.

29. Here we do not propose to multiply this judgment by referring to catena of authorities on the question when exercise of jurisdiction under section 24, C.P.C. would be justified and suffice it to mention, where a matter is of importance of general public and parties also agree for early disposal, and more so that early disposal of matter has been found expedient even by Highest Court of law, an attempt should be made so that dispute is adjudicated at the earliest so as not to consume much more time and leave scope of dispute to prolong and take long time.

30. It cannot be doubted that office of Jagat Guru Shankaracharya at Jyotirmath Badrikashram is of high importance to majority of people and lakhs of people visit the Holy Math. Dispute of holder of office of such place, is a matter of wide importance and ought to be adjudicated at the earliest."

36. The special leave petition filed against the aforesaid judgment was dismissed as such the aforesaid decision has attained finality. The office of Jagat Guru Shankaracharya has been held to be office of high importance as lakhs of people visit the Holy Math, therefore, it was decided to give expeditious disposal to the matter.

37. Having said so on the power to try the suit after withdrawing the same under Section 24 CPC., the next apprehension expressed by the learned counsel for the respondents is with regard to the presence of the witnesses to give evidence and inconvenience caused to the witnesses to come Prayagraj from Mathura for getting their statement recorded before the court concerned. The aforesaid argument, on the face of it, is ill-founded. The Order 18 Rule 4 CPC provides for recording evidence and it is for the Court to record evidence either itself or by commissioner appointed by it. With the advancement of the technology and impetus being provided to e-judiciary, physical presence of the witnesses can be done in the manner and mode as per discretion available with this Court trying the suit and it can be recorded through audio - video link. The reference in this regard may be made in the case reported in the case of ***Twentieth Century Fox Film Vs. NRI Film Production Pvt. Ltd AIR 2003 148*** wherein following points have been observed by Karnataka High Court. This can be done by providing link officer in the local court where witnesses can physically present, provide video link and cross examination can be done through audio - video mode. The relevant extract from paragraph no.7 is reproduced herein under:-

"7. Coming to the merits of the matter, let me see as to whether the Audio-Video Link in the matter of evidence is permissible in law or not ?

Order 18 of CPC provides for hearing of the suit and examination of

witnesses. Order 18 Rule 3 provides for evidence where other issues are involved. Recording of evidence is provided under Order 18, Rule 4. The CPC is amended from time to time in the Interest of speedy disposal and to avoid cumbersome procedure in the matter of conducting civil trials. It is a matter of fact that civil proceedings in this country take a few years as experience reveals. To get over this normal procedural delay, the Government has thought it fit to amend the Act in the larger interest of speedy disposal. The statement of objects and reasons of CPC Amendment Act 1999 would show that the maximum time is consumed in recording evidence by the courts and it is proposed to reduce such delay by making provision for evidence by affidavit. The object refers to the report of the Hon'ble Mr. Justice Malimath. and the Law Commission Recommendations. The Act was amended in 1999 in terms of the Act 46/1999 it was subsequently amended in CPC amendment Act of 2002. Order 18. Rule 4 provides for examination in chief of a witness by way of an affidavit. Sub-rule (2) provides for cross-examination and re-examination of witnesses being done in attendance whose evidence by affidavit has been furnished to the Court is to be taken by the Court or the commissioner appointed by it. The Court may also take into consideration the relevant factors as it think fit in terms of the rule. The argument of Sri AYN Gupta, learned counsel is that the word "attendance" would mean physical attendance. The argument of Sri Udaya Holla, learned counsel is that the word "attendance" would not mean physical attendance. Audio-Video Link is a technology developed by electronic media to avoid the physical presence and to avoid the loss in time. It is a speedy method evolved for the purpose of speedy decision. Even in Audio-Video Link party is definitely present in person and his presence is reflected on the screen. The word 'in attendance' under Order 18, Rule 3(4)(2) is to be understood as the person being present and it need not be physical presence. The presence on the screen is as good as attendance for the purpose of Order 18, Rule 3(4) (2) of the Rules. After all law only requires the presence of the witness and It does not matter as to how he is present . Just because it is physically impossible for him to be present at Mysore, this method of Audio-Video Link is suggested by the party for speedy disposal. Insistence of personal attendance would defeat the very object of Order 18, Rule 3(4)(2) of the CPC. Moreover, the proviso also provides for taking into account such relevant factor as he think fit. Therefore, mere non-physical attendance by itself does not prohibit examination of a

witness by way of Audio-Video Link. I must also notice at this stage that Order 18, Rule 3(4)(3) which provides for recording evidence either by writing or mechanically in the presence of a Judge. Audio-Video Link is a mechanical process where the party is present on the screen and there is a mechanical divisor recording the evidence. This also supports the contention of Mr. Udaya Holla. Therefore, I am firmly of the view that there cannot be any impediment in the given set of facts to record evidence through Audio-Video Link . There is no prohibition as such in term of Order 18, Rule 3(4) of the Code. On the other hand, the amendments would support the contention of such an interpretation. After all the present amendment has been effected for speedy trial and speedy disposal and that cannot be strangled by narrow interpretation. Technology development is taking place all over the Globe and Courts cannot lag behind in this regard. If law Courts do not permit technological development in Court proceedings, it would be lagging behind compared to other sectors. Law has to develop and if law is to develop, technology has to be made as a tool. Therefore, the objections in this regard is unsustainable. Learned trial Judge has taken a very narrow view. A reading of entire order of the learned Judge would show that the learned Judge had in his mind that time factor of this Court and also certain defects in the matter of procedure of recording evidence. Any implementation of new technology will have initial hiccups and these are to be removed by proper application of law with sufficient safeguards. Therefore, the learned Judge in my view is not right in rejecting recording of evidence by Audio-Video Link in the given set of facts.”

Argument on the constitutional aspect

38. Before dealing with the said argument, the High Court has to remain conscious of the fact that being the highest Court of the State, it is guardian of the people and being 3rd pillar of the Constitution, it safeguards interest of the people as a whole, the small sub-sects, tribe then bigger sub-sect community and full circle of the people, all fall within the protection of the Constitution. The people as a whole constitutes fraternity, unity and integrity of the nation coupled with dignity of the individual are the essential aim to be achieved as enshrined in the Preamble of the Constitution

of India. To adjudge things from the said angle, this Court now appreciate as to what argument that was advanced on behalf of the applicant.

39. Learned counsel for the applicants has explained the historical and religious nature of the suit and claimed that the history of 'Karagar' (jail) of Kans wherein Lord Krishna incarnated in human form, is sacred and divine for the Hindu devotees. It is a deity worshiped by the Hindu devotees. The 'Karagar' of 'Kans' at present is located beneath the alleged Shahi Eidgah Masjid and by explaining these aspects to some length, the learned counsel for the applicant has endeavoured to bring to the notice of this Court the various complicated questions which are involved and call for adjudication of the same in the present suit. Some of these complicated questions were stated to be interpretation, validity and applicability of places of worship Act 1991, interpretation / applicability of Waqf Act 1995, rights of Hindu deity under Hindu Law and under Article 25 of the Constitution of India and interpretation of Article 25, 26 and 300 A of the Constitution of India. Moreover, it involves adjudication on point of birth place – 'Asthan', as deity, the rights and duty of Shebait under Hindu Law and rights of Hindu devotees where Shebait has been negligent and the property of the deity has been alienated/transferred against the law, decree obtained by fraud and challenged by Hindu devotees, adjudication upon distinction between Waqf and Trust, and apart from all above point of applicability and interpretation of law of adverse possession.

40. Learned counsel has asserted that the aforesaid substantial questions would arise before the trial court. Therefore, the original trial may be conducted by this Court. After describing the factual background, the learned counsel claimed that sensitive / sentimental issues of national and public importance between and

among people are involved which need be properly scrutinized and adjudicated upon.

41. To the aforesaid arguments, it is interesting to note that learned counsel for the respondent nos.1 and 2 have not refuted that such issues and seminal importance would not be arising for adjudication of the suit. The only argument advanced is that the suit is of simple nature which is for setting aside the compromise decree and all questions are incidental which are dependent on fate of grant of the first relief. Candidly, learned counsel for the respondent nos.1 and 2 do not dispute consideration of the matter falling within the province of the Articles 25, 26 and 300A of the Constitution of India. Under the circumstances, the Court will be failing in its duty if it does not prima facie consider the scope of Article 25 of the Constitution of India. Article 25 (1) reads as follows:-

“25. Freedom of conscience and free profession, practice and propagation of religion.-(1) Subject to public order, morality and health and to the other provisions of this Part, **all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.**”

Similarly Article 26 of the Constitution of India reads as follows:-

“**26. Freedom to manage religious affairs.**- Subject to public order, morality and health, every religious denomination or any section thereof shall have the right

- (a) to establish and maintain institutions for religious and charitable purposes;
- (b) to manage its own affairs in matters of religion;
- (c) to own and acquire movable and immovable property; and
- (d) to administer such property in accordance with law.”

42. Bare perusal of the Articles 25 and 26 of the Constitution of

India discloses that rights are subject to the public order and morality. The principle of constitutional morality, therefore, steps in and hence the rights under Articles 25 and 26 can be exercised when they are tested on the touchstone of the constitutional morality and the public order. Reference in this regard may be made to the very recent decision of the constitution Bench of Hon'ble Apex Court in the case of Central Board Dawoodi Bohra Community and another Vs. State of Maharashtra and another reported in 2023 (4) SCC page 541. The Honble Apex Court has held the Constitution to be living instrument and considered changing need of the society. Paragraph nos. 26, 28, 32.1, 32.2, 32.3 and 34 are reproduced herein under:-

"26. Nariman, J in paragraph 176.7, stressed that the term 'morality' refers to that which is considered abhorrent to civilized society, given the mores of the time, by reason of harm caused by way, inter alia, of exploitation and degradation.

28. The question is whether the exclusionary practice which prevails in the Dawoodi Bohra community of excommunicating its members will stand the test of Constitutional morality? As observed by Das Gupta, J. in the case of Sardar Syedna¹, the excommunication of a member of the community affects many of his civil rights. The Privy Council, in the case of [Hasanali & Ors. v. Mansoorali & Ors.](#)¹², in paragraph 4, has dealt with the effect of excommunication in Dawoodi Bohra community. Paragraph 4 reads thus:

"4. The appellants would limit the effect of excommunication, whatever steps might have been taken to bring it into being, to complete 12 1947 SCC OnLine PC 63 social ostracism. There is nothing, they say, to show that it excluded from rights of property or worship. Their Lordships do not find themselves able to accept this limitation. The Dai is a religious leader as well as being trustee of the property of the community, and in India exclusion from caste is well known.

*There is at least one case in which it is recorded that certain persons applied to the King to intercede with the thirtythird Dai, complaining that in consequence of excommunication they were kept from the mosques and places where true believers met; and no instance has been cited where excommunicated persons freely exercised their religious rights. Indeed, the complaint in the cases brought to their Lordships' attention as regards which relief is claimed for the appellants or those whom they are said to represent is that they were wrongly excommunicated, not that if rightly excommunicated they were wrongly deprived of their religious rights. Excommunication, in their Lordships' view, if justified, necessarily involves exclusion from the exercise of religious rights in places under the trusteeship of the head of the community in which religious exercises are performed.” (emphasis added) A person who is excommunicated by the community, will not be entitled to use the common property of the community and the burial/cremation grounds of the community. In a sense, such a person will virtually become untouchable (being banished or ostracized) within the community. In a given case, it will result in his civil death. It can be argued that the concept of Constitutional morality which overrides the freedom conferred by clause (b) of [Article 26](#), will not permit the civil rights of excommunicated persons which originate from the dignity and liberty of human beings to be taken away. The concepts of equality, liberty and fraternity are certainly part of our Constitutional morality. Basic ideas enshrined in our Constitution are part of Constitutional morality. The conscience of our Constitution is Constitutional morality. Hence, it is contended that excommunication or ostracisation is anathema to the concepts of liberty and equality. It is against the anti discriminatory ethos which forms a part of Constitutional morality. Therefore, the Constitutional Court ought not to tolerate anything which takes away the right and privilege of any person to live with dignity as the concept of Constitutional morality does not permit the Court to do so. Therefore, in our view, the protection under [Article 26\(b\)](#) granted by the decision in the case of *Sardar Syedna*¹ to the power to excommunicate a member of the Dawoodi Bohra community, needs reconsideration as the said right is subject to morality which is understood as Constitutional morality. This issue will require examination by a larger Bench.*

32. To conclude, prima facie, we find that the exercise of balancing

*the rights under [Article 26\(b\)](#) with other rights under Part III and in particular [Article 21](#) was not undertaken by the Constitution Bench in the case of *Sardar Syedna*¹. This question is substantially in issue before the Bench of nine Judges in *Sabrimala Temple Review 9JJ*. Moreover, the question whether the protection can be given by [Article 26\(b\)](#) to the practice of excommunication is to be tested on the touchstone of the concept of Constitutional morality as the said right is subject to morality. This is an important and emergent issue. These are the two main grounds on which the said decision may need reconsideration by a larger Bench decision was subjected to a review. This Court dealt with the review (*Sabrimala Temple Review – 5JJ.7*). The majority opinion contains questions formulated for referring it to a larger Bench. Question Nos. 5.1 to 5.3 are relevant which reads thus:*

"5.1.(i) Regarding the interplay between the freedom of religion under Articles 25 and 26 of the Constitution and other provisions in Part III, particularly [Article 14](#).

5.2.(ii) What is the sweep of expression "public order, morality and health" occurring in [Article 25\(1\)](#) of the Constitution.

*5.3.(iii) The expression "morality" or "constitutional morality" has not been defined in the Constitution. Is it overarching morality in reference to Preamble or limited to religious beliefs or faith. There is need to delineate the contours of that expression, lest it becomes subjective." Accordingly, the review petition was listed before a nineJudge Bench. By the order dated 10 th February 2020, the Bench of nineJudges (*Sabrimala Temple Review –9 JJ.8*) framed seven questions of law, out of which questions 3 and 4 are relevant for our purposes read thus:*

"3. Whether the rights of a religious denomination under [Article 26](#) of the Constitution of India are subject to other provisions of Part III of the Constitution of India apart from public order, morality and health?

4. What is the scope and extent of the word 'morality' under Articles 25 and 26 of the Constitution of India and whether it is meant to include Constitutional morality?"

43. Having said so and looking to the fact that as many as 10 suits are stated to be pending before the civil court and also there

should be more suits that can be said to be pending and issue can be said to be seminal public importance affected the masses beyond tribe and beyond communities having not proceeded an inch further since their institution on merits for past two to three years, provides full justification for withdrawal of all the suits touching upon the issue involved in the suit from the civil court concerned to this Court under Section 24(1)(b) CPC while the prayer made for original suit no.353 of 2022 being withdrawn and transferred to this Court made by the applicant is allowed. For rest of the suits, this Court withdraws such suits of similar nature from the lower civil court concerned are transferred (them) to this Court exercising its suo motu powers for trial.

44. The instant transfer application is allowed.

45. Let the District Judge, Mathura prepare a list of all such cases of similar nature involving the subject matter and touching upon its periphery, expressly or by implication include particulars of such cases and these suits/cases along with record, as above, shall be duly forwarded to this Court within two weeks and the same shall stand transferred to this Court in exercise of suo motu powers of this Court.

46. It is requested to the respected Chief Justice to kindly nominate an appropriate Bench for trial and disposal of such suits, so withdrawn.

47. This Court appreciates the assistance provided to it by Sri Hari Shankar Jain, Sri Vishnu Shankar Jain, Sri Prabhash Pandey and Sri Pradeep Kumar Sharma, learned counsel for the applicants, Sri Punit Kumar Gupta, learned counsel for the respondent no.1, Sri Wajahat Hussain Khan, learned senior counsel assisted by Sri Nasiruzzaman and Sri J.H. Khan, learned counsel for the respondent no.2, Sri Prateek Rai, learned counsel for the

respondent no.3, Sri Birendra Prasad Maurya, Sri Kamlesh Narayan Pandey, learned counsel for the respondent no.4 and Sri Radhey Shyam Yadav, learned counsel for the proposed respondent no.5, and more particularly to Sri Manish Goyal, the learned Additional Advocate General for the State appointed as Amicus Curiae by this Court, who is assisted by Ms. Anjali Goklani, Advocate, for rendering valuable assistance to this Court in disposal of this transfer application.

48. Let a copy of this order be transmitted to the trial Judge/District Judge, Mathura, forthwith for ensuring compliance as above.

49. Costs easy.

Order Date :- 26.5.2023

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