

**HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR**

CR No. 04/2020
CM No. 222/2020

**Pronounced on:- 20th .05.2020
(through video conferencing)**

Gh. Mustafa Bhat

...Petitioner(s)

Through: Mr. Sheikh Mustaq, Advocate

vs.

State of J&K and others

...Respondent(s)

Through: Mr. Mir Muzaffar Hussain, Advocate
with Mr. Yaqoob Hussain, Advocate

CORAM: HON'BLE MRS. JUSTICE SINDHU SHARMA, JUDGE

JUDGMENT

1. This revision is directed against the order dated 19.12.2019 passed by Principal District Judge, Budgam rejecting the application filed by the petitioner for transfer of the Civil suit titled, 'Fayaz Ahmad Sofi v. Ghulam Mustafa Bhat pending in the court of Munsiff, Magam. In urgency memo title of the suit was in respect to a transfer application which was filed in the court of Principal District Judge titled, 'Fayaz Ahmad Sofi v. Ghulam Mustafa Bhat' annexure-II to the Revision Petition. Copy to the transfer application filed in the court of Principal District and Sessions Judge, Budgam para 1 of which reads as under:

“Application seeking withdrawal and transfer of case titled Fayaz Ahmad Sofi V/S Ghulam Mustafa Bhat from the records of Munsiff court Magam and the same be transferred to some other court within the jurisdiction of the district.”

2. The Pr. District Judge has also considered the case 'Fayaz Ahmad Sofi v. Ghulam Mustafa Bhat for transfer as is reflected in the order moreover Civil Suit titled, 'Fayaz Ahmad Sofi v. Ghulam Mustafa Bhat' was instituted on 19.07.2018 but the petitioner is filing civil revision against the order dated 19.12.2019 in which reference is made to the case No. Withdrawal/593/2019 Reg. No. 01/2019 titled, 'Ghulam Mustafa Bhat v. Fayaz Ahmad Sofi' in the matter referred in para 1 of the petition. It is only in the prayer part of the application that the applicant seeks withdrawal of both the cases from the court of Munsiff, Magam and the transfer to any other court under the jurisdiction of Principal District Court, Budgam.

3. But for the mistake noticed above Revision Petition against the order dated 19.12.2019 has been entertained and decided on its merits. But regarding the case No. Withdrawal/593/ 2019 Reg. No. 01/2019 titled, 'Ghulam Mustafa Bhat v. Fayaz Ahmad Sofi' could be treated as transfer application because under section 24 of CPC transfer application can be filed in the High Court also. Section 24 of the CPC reads as under:

“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.”

So this court can entertain the transfer application directly while deciding the Revision.

4. The main objection to the maintainability of the petitioner is that, ‘if the order had been made in favor of the party applying for the revision would have finally disposed of the suit or proceedings,’ as envisaged by the proviso to section 115.’ This objection is without any merit because it is not a revision against the order passed in the suit, as it arises out of the transfer application. Even otherwise such transfer application can be entertained directly. There is no reason why the order of District Judge rejecting or accepting such application is not maintainable because it is not a order passed in the suit, it is an order passed on transfer application which is ‘other proceedings.’
5. But the main ground of transfer is judicial bias as alleged the presiding officer is said to have passed various orders without hearing the petition. The first grievance of the applicant is regarding order dated 22.03.2019 which has been based on the application of the plaintiff-Fayaz Ahmad Sofi filed on 21.07.2018, the prayer made in the application is reproduced below:

“In the premises, it is therefore prayed that contempt proceedings be initiated against the contemnor/non-applicant the contemnor may be personally called to explain their conduct before this Hon’ble Court in order to up keep the majesty of law and shall be punished and sent to civil imprisonment for violation of the court orders”.

6. Whether the allegation was tenable being the moot question, the court ought to have considered the averments made in para 8 and 9 of the plaint filed by the respondent-Fayaz Ahmad Sofi on 19.07.2018. Para 8 and 9 of the plaint are reproduced below:

“8. That the defendant is now changing the nature of the said shop by decreasing the size of the said shop and is now adamant to disposes the plaintiff from the said shop.

9. That the defendants some days before surfaced on spot and tried to construct the wall in the middle of the said shop forcibly and without any reasonable cause and justification.”

7. Respondent/plaintiff filed an application which was disposed of vide order dated 16.08.2018. Para 1 of which is reproduced as under:

“By way of this order I shall dispose of an ad-interim application filed in support of the suit for Permanent and Mandatory injunction on the grounds that further for the sake of gravity the pleas taken in the main suit are adopted as grounds for the present application. The plaintiff-applicant has a strong prima facie case and he is sure to succeed or in the same. Balance of convenience lies in favour of the applicant. Finally the applicant has prayed that till final disposal of the main suit, the non-applicant may be restrained from changing the nature of

the suit shop i.e 24X11 situated at Magam Jamia Lane by decreasing its size.

The petitioner challenged the order in appeal which was dismissed by Principal District Judge, Budgam by order dated 01.11.2018.

8. Be that as it may the question involved is of judicial bias which has been defined by their lordships of the Supreme Court in **AIR 1998 SC 2050** in paras 25, 26 and 29 has held that:

“25. Bias may be defined as a pre-conceived opinion or a pre-disposition or pre-determination to decide a case or an issue in a particular manner, so much so that such pre-disposition does not leave the mind open to conviction. It is, in fact, a condition of mind, which sways judgments and renders the judge unable to exercise impartiality in a particular case.

26. Bias has many forms. It may be pecuniary bias, personal bias, bias as to subject matter in dispute, or policy bias etc. In the instant case, we are not concerned with any of these forms of bias. We have to deal, as we shall presently see, a new form of bias, namely, bias on account of judicial obstinacy.”

9. The trial court refused to rely on the agreement dated 04.07.2018 but proceeded to protect whatever was agreed between the petitioner and the respondent by holding at page 28 of the order dated 16.08.2018 which extracted below :

“Keeping in view the aforesaid discussion, the application for grant of interim relief is disposed off with the following directions:

1. That the defendant landlord may undertake repairs if he chooses to in the subject shop without changing the dimensions of the subject shop i.e. 24X11 feet or nature thereof. Further allowing the non-applicant to effect repairs in any manner shall not be construed in any manner delivery of possession to the defendant and is for the sole purpose of effecting repairs in furtherance of agreement dated 04.07.2018 only.
 2. That the said repairs if effected, shall be conducted under the supervision of SHO P/S Magam who shall ensure that while making repairs, defendant landlord shall not violate the terms of point no. 1.
 3. For all other aspects, the parties to the suit shall maintain status quo with respect to possession, ownership and nature of the suit shop measuring 24X11 feet situated at Jamia Lane, Magam.”
10. There could be no better proof of his bias as reflected in its order which reads as under:
- “ I am of the considered opinion, that the continuous closure of the suit shop would result in continuous loss of business to the plaintiff which cannot be compensated by any means while as continuous closure of suit shop is resulting in undue hardship to the plaintiff. The instant facts and circumstances project a situation which projects a case of peculiar nature where the denial of relief and continuance of the situation will cause hardship to the applicant/plaintiff alone while as it will not help the non-applicant also if this shop remains closed till the final disposal of the main suit.”
11. It appears that no effective order was passed on the application and an identical application was filed on 21.07.2019 but no order was passed

on the application. Para 4 of the application is reproduced below:

“04. That during the night hours on 19,20th day of July 2017 the contemnors have demolished the wall of the shop and have started the construction and have thrown out the goods from the shop and have locked the shutters of the shop and have started the construction of the complex which directly have changed the nature of the shop, it is germane to mention here that the non-applicant have started the construction of the other shops of the complex which have all over changed the shape of the shop suit.”

12. But these applications remained pending as no effective order was passed. It appears that the plaintiff filed another application on 29.11.2018 which was decided by the Munsiff on 22.03.2019 by directing as under:

“Keeping in view of the above, application filed by the plaintiff is allowed and the plaintiff is allowed to carry out his business operation from the suit shop subject to following conditions:-

- (i) That in the event, case of the plaintiff is found to be untrue, in such a situation, the plaintiff will pay an amount of Rs. 50,000/- as annual rent to the defendant without any resistance or claim;
- (ii) The plaintiff shall vacate the suit premises as and when directed by the court.
- (iii) That the use and occupation of the subject shop in no manner will be construed as delivery of possession, if otherwise proved at the conclusion of trial.

Application is, accordingly, disposed off and shall form

part of the main file”

13. Since the above order dated 22.03.2019 has been stayed by this Court in OWP No. 367/2019, IA No. 01/2019 vide order dated 03.04.2019 filed by the petitioner a reference is made to only indicate certain admission made by the plaintiff to find out if there was a judicial bias on the part of Munsiff, Magam.

14. The first question is about possession of the plaintiff, para 8 to 10 of the plaint filed on 19.07.2018 relevant are extracted below:

“8. That the defendant is now changing the nature of the said shop by decreasing the size of the said shop and is now adamant to disposes the plaintiff from the said shop.

9. That the defendants some days before surfaced on spot and tried to construct the wall in the middle of the said shop forcibly and without any reasonable cause and justification.

10. That in case the defendants succeeded in constructing and decreasing the size of the shop of the plaintiff in such eventuality the plaintiff will get dispossessed from the said shop and the plaintiff shall suffer an irreparable loss and injury.”

15. That the plaintiff-applicant filed application on 19.07.2018 under section 151 read with order 39 Rule 2 A CPC requesting for implementing of the order dated 19.07.2018 in letter and spirit through SHO, Police Station, Magam and the respondent be punished for non-compliance of the order. However he filed another application on 21.07.2018 under order 39 Rule 2-A for initiating contempt proceedings for willful disobedience of the order dated 19.07.2018 para 4 of the application being relevant is reproduced below:

“04. That during the night hours on 19,20th day of July 2017 the contemnors have demolished the wall of the shop and have started the construction and have thrown out the goods from the shop and have locked the shutters of the shop and have started the construction of the complex which directly have changed the nature of the shop, it is germane to mention here that the non-applicant have started the construction of the other shops of the complex which have all over changed the shape of the shop suit.”

16. One of the prayers in para 11 of the application dated 21.07.2018 is that:

“it is also prayed that the plaintiff be allowed to restore the possession of the suit shop which was existing on spot at the time of filing of the suit and interim order was passed.”

17. The question arises whether the plaintiff or defendant has been in possession. Reading of para 8 and 9 of the plaint filed by Fayaz Ahmad Sofi leads to inference that construction started somewhere in early July because in para 9 it is pleaded that defendants some days before surfaced on spot and tried to construct the wall in the middle of the said shop, this was on 19.07.2018 but in para 4 of the application the occurrence is of 19 and 20th July, 2018 while the application was filed on 20th July, 2018 is silent about the alleged occurrence. Further prayer of the application dated 21.07.2018 seeks restoration of possession and the Court passed no order on this application. Strangely, there is no reference in the order dated 16.08.2018 and either of the applications.

18. However in the application dated 21.07.2018, plaintiff for the first time admits that he is out of possession and demands restoration of possession but the Trial court by order dated 22.03.2019 passed as if the plaintiff was yet to vacate the premises and further stating that this will be only for the purpose of repair and shall not be deemed to be delivery of possession. It appears that trial court was all along proceedings on the basis of agreement dated 04.07.2018 as is evident from order dated 16.08.2017, but still is not sure of its authenticity as stated in order dated 16.08.2018.

19. Since the trial court was committed to uphold the possession of the plaintiff, therefore, it directed SDPO to comply its orders by forwarding the application on 02.07.2019. The trial court has completely ignored the report of local commissioner, Advocate Mr. Mohd. Fayaz Magrey dated 03.07.2019 appointed by it while passing order dated 22.03.2019. It has also not reconciled the averment made by plaintiff in para 9 of the plaint while passing order dated 22.03.2019 and completely ignored statement made in the application dated 19.07.2018 filed on 20.07.2018 where it is stated that the petitioner was raising constructions illegally. Moreover, in the order dated 16.08.2018, SHO, Magam was directed to ensure that the order is not violated by making repairs. But why the SHO, Magam was not put on notice regarding any violation.

20. In view of above, order dated 19.12.2019 passed by Pr. District Judge Budgam is set aside, suit titled, 'Ghulam Mustafa Bhat v. Fayaz Ahmad Sofi and suit titled Fayaz Ahmad Sofi vs Ghulam Mustafa Bhat pending in the Court of Munsif, Magam, are directed to

be withdrawn from the court of Munsiff, Magam and transferred to the court of Sub-Judge(Judicial Magistrate), Budgam for trial of the same. Munsiff, Magam shall ensure that the files are sent to the transferee Court immediately.

21. Copy of the order be sent to both the courts and the concerned court after receipt of record shall issue notice to the counsel as well as respondent to appear before it on such date as is fixed.

22. **Disposed of** as such alongwith connected CM.

(Sindhu Sharma)
Judge

Srinagar
20th .05.2020
SUNIL-II

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No

