

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

SECOND APPEAL No.750 of 2007

JUDGMENT:

The second appeal is maintained by the unsuccessful plaintiff against the defendant club impugning the lower appellate Court's dismissal appeal decree confirming the trial Court's dismissal decree to say against the concurrent findings of the courts below. The second appeal was though admitted on 22.04.2010 by mentioning Para 8 of the grounds of the appeal raised involve substantial questions of law without formulating as contemplated by Section 100 CPC, this Court on 23.04.2018 from perusal of the material on record and from hearing and from involvement of substantial questions of law formulated the following:

1) Whether the defendant-society is justified in rejecting the application of the plaintiff by ignoring the seniority from the date of application and the respective bye-laws of the society and in admitting subsequently any other even with a say of as a special category and if not the concurrent findings of the courts below are outcome of ill-appreciation of evidence and with perversity and are unsustainable and requires interference by this Court.

2) To what result?

Heard both sides at length and perused the material on record.

The suit was filed for the relief of declaration against the action of the defendant club in rejecting the application of the plaintiff for membership and refunding the deposit amount as illegal and for a consequential direction to accord membership to

plaintiff. The factual background is that the plaintiff applied for membership in the defendant club by deposit of Rs.1,000/- vide Ex.A1-receipt issued by the club on 31.08.1985. The defendant club informed on 12.04.1986 under Ex.A3 to the plaintiff of there is no likelihood of considering his application for membership in the near future and if he desires the amount deposited will be refunded. The word if he desires the membership amount can be refunded used in Ex.A3 is crucial to say further of plaintiff did not desire to take back the amount and sought to keep his application pending to get membership whenever it came for consideration while so, the application of the plaintiff and similarly situated appears kept pending and there was an Extraordinary General Body meeting of the defendant club on 10.08.1998 where it was resolved to refund deposit amount of candidates who applied during 1981-1993 and consequently by letter dated 04.02.1999 (Ex.A4) of defendant addressed to the plaintiff it was as decided in said Extraordinary General Body meeting dated 10.08.1998 they are refunding the deposit amount of candidates applied during 1981-1993. The plaintiff issued Ex.A5 legal notice dated 17.02.1999 to said letter dated 04.02.1999 for consideration of his application for membership and not for refund of the membership amount. Plaintiff issued another notice later under Ex.A6 dated 06.09.1999 and defendant issued reply to it under Ex.A7. There is no dispute of these facts, but for on the contents of the notice and reply supra what the plaintiff claims in the plaint pursuant to the above was that in the Extraordinary General Body meeting dated 26.04.1995 defendant club raised the strength of membership from 2300 to 2500 under Rule 21(d) of the Club Rules (Ex.A2

amended rules of the club) and out of the increased strength of 200 supra only 93 members from 1981 list joined and 108 applications are pending and as per the rules membership is open to all and thereby the Extraordinary General Body meeting dated 10.08.1998 to refund the membership amount of those applicants pending from 1981-1993 as illegal and as stated in the notices supra to reconsider his application by also saying club accorded membership to Jitender in 1996 and Chandra Mohan in 1998 vide membership Nos.375 & 3036 and rejection of the plaintiff's application and refund of the deposit amount despite send back as unjust.

What the defendant contested is that the meeting held on 26.04.1995 though it was decided to increase the strength of members from 2300 to 2500 to consider the application made prior to 11.01.1981 and as the application of the plaintiff covered by Ex.A1 is subsequent to 11.01.1981, it is not in the zone of consideration. What were the members admitted of 93 out of 200 increased are not during, all applicants after 11.01.1981. The defendant even contested of no provision in the rules of membership open only to children of club members and not for others though as per bye laws all children of members are entitled if they fulfilled to step in the conditions of bye-laws and it is stated so far as the members admitted viz., Jitender and Chandramohan it was under special membership category by receiving Rs.80,000/- each as admission fee as per the revised rules and plaintiff's application is not under that special category to consider for which the defendant club cannot be blamed. The other

contention that the plaintiff has no cause of action and the suit is not maintainable and plaintiff not entitled to the relief.

It is thereby also 2 persons admitted whose applications are subsequent to that of plaintiff though it is the defendant saying theirs was under special membership category and it is not even the case of the defendant of any such special membership category provision by revised bye-laws made and intimated to the applicants whose applications are pending since 1981 if at all chooses to apply thereunder and it is not even the case of 200 strength increased from 2300 to 2500 includes by any specific result by such special membership category and of what percentage and any such bye-law not even filed though DW.1-Finance Manager of the club came to witness box on behalf of the defendant club and deposed orally against the evidence of plaintiff as PW.1 with reference to Exs.A1 to A7 supra from the issues framed by the trial Court of whether plaintiff entitled to relief of declaration and there is cause of action to the suit and to what relief.

The trial Court dismissed the plaintiff's suit ultimately by judgment dated 21.08.2002 saying from DW.1's cross examination membership consists of four categories of permanent membership, life membership, special membership, children of permanent members to admit during lifetime of their parents as per amended rules of 1986 and any application to be considered is as per seniority and special category members also treated as general members and they can be admitted without seniority and could show no rule of such special category he admitted about 93 members as members after enhancement of the strength from 2300 to 2500. They denied the suggestion of without following the

bye-laws including in giving membership to the children of members with no provision. DW.1 deposed further of annual report of club states strength of the club is 3529 permanent members and 1178 admitted in the children of members' category of 1991 and denied the suggestion of others to deprive the plaintiff right and he has deposed falsely. In fact, the Ex.A2 rules clause 13(b) states admission of members registered after 1981 list up to 27.07.1993 on payment of Rs.50,000/- as per the Extraordinary General Body meeting in taking such decision on 26.04.1995 and of decided to admit members who are waiting in 1981 waiting list with admission fee of Rs.25,000/- additional 200 and only 193 candidates utilized the option. It is not even the case of the defendant either from the written statement or reply-Ex.A7 or from any document including from the evidence of PW.1-plaintiff was informed about any such provision and intimated for its admission on payment of Rs.25,000/- and he did not incline and even Ex.A4 letter in refunding the amount of Rs.1,000/- to the plaintiff no way mentions the same and plaintiff having received sent back and it was again refunded back to say plaintiff unwilling to receive back and cancelled his seniority of the application pending for membership, that too when he made a request under Ex.A5 to reconsider, so also under Ex.A6, to reconsider. What Ex.A7 reply to Ex.A6 notice is that the club is unable to admit the plaintiff and as referred supra it is not even offered to pay balance of Rs.24,000/- to consider under Rs.25,000/- category pursuant to the so called Extraordinary General Body meeting resolution dated 26.04.1995 deposed by DW.1 with reference to Ex.A2 if any. What the lower appellate Court observed in dismissal of the appeal also

is that even assuming vacancies peculated appellant was not ready to pay Rs.25,000/- or Rs.50,000/-. It is not even the case of the defendant that plaintiff was so informed and he expressed inability, much less by bringing to his notice any such amendment. In fact, the application fee is Rs.1,000/- and payment of any balance amount arises either for Rs.25,000/- or Rs.50,000/- or for Rs.80,000/- as the case may be on intimation to admit subject to such payment and it is not the case of the defendant club either from the written statement or from the Ex.A7 reply or Ex.A4 letter or by any intimation that was not considered by the courts below and it is not even stated if he is prepared to pay the deficit to recoup that balance they can consider for membership, it is simply refunded saying inability while others were admitted. No doubt there is no concluded contract from the application for membership on payment of advance taken to admit from vacancies arise in future and supposed to consider by maintaining seniority list to fill the vacancies out of waiting list out of seniority basis. However, once such is the case, the question of refund does not arise that too when plaintiff not willing to take back the application amount and to loss the seniority of his application. Once such is the case, the defendant club is bound to consider the application of the plaintiff by protecting its seniority and bound to intimate the plaintiff if at all to admit any others under any other slot if plaintiff is also ready to pay the balance amount and without such option they cannot refund the application advance and cancel the application unilaterally but for to consider.

Having regard to the above, the defendant society is not justified in rejecting the application of the plaintiff by ignoring the seniority from the date of the application that too in admitting others under special categories without any such intimation to avail such benefit by plaintiff and without intimation if at all to pay the balance and their refund of the amount against the willingness of the plaintiff is unsustainable and the defendant society is directed to take back the application amount of the plaintiff and restore the seniority to the date of his application Ex.A1 and intimate to the plaintiff before admitting any other members hereafter under any of the categories if at all the plaintiff is willing to pay balance amount to admit in protecting his seniority before considering any other subsequent applicants.

Accordingly and with these observations while setting aside the concurrent findings of the courts below, the second appeal is to that extent allowed.

Consequently, miscellaneous petitions, if any shall stand closed. No costs.

JUSTICE Dr. B.SIVA SANKARA RAO

Date: 05.06.2018
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