

IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO. 339 OF 2018.

HANUMANT VISHWANATH
TUYEKAR,

... Petitioner

Versus

RAGHUVIR YGANAND
BICHOLKAR AND 13 ORS.,

... Respondents.

Shri Pavithran A. V., Advocate for the petitioner.

Shri A. D. Bhobe, Advocate for respondent nos.1, 2, 3 & 4.

Shri V. P. Thali, Advocate for respondent nos.5(a) to 5(c), 5(e) to 5(k),
6,7,10.

Ms. P. Kamat, Addl. Govt. Advocate for respondent nos.12,13 and 14.

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 9th December 2019.

P.C.

Facts:

Respondent nos.1 to 4 are the plaintiffs in Civil Suit No.18/2009.

The respondents 5(a) to 5(c), 5(e) to 5(k), 6,7,8,10, 11 are the respondents. As some of the parties to the suit died, their legal heirs were brought on record. Those details are unnecessary, though. The other respondents, that is the official machinery, are represented by the Addl. Govt. Counsel.

2. The dispute involves a temple and a trust connected with the

temple. The Defendants claim to be the trustees. The plaintiff asserts that the trustees have been acting collusively or fraudulently. The suit is still being tried. Both the parties led evidence. Finally, they submitted their written arguments. The defendants in their written argument took a plea: The plaintiff filed the suit in a representative capacity. There are others who are interested in the outcome of the litigation. Without recourse to Order I, Rule 8 of CPC, the plaintiff cannot represent the interest of all others at large.

3. In the face of the plea the defendants have taken, the plaintiffs applied under Order I, Rule 8 of CPC for the trial Court's leave to publish a notice inviting other persons interested in the litigation to come on record. All this happened, as both the counsel agree, when the matter had already been argued and ripe for judgment.

4. Responding to the notice the plaintiffs' published under Order I, Rule 8 of CPC, the writ petitioner applied to the trial Court to come on record as the 11th defendant. None objected to it. The trial Court allowed that application. Later, the petitioner, as the 11th defendant, filed the written statement. In fact, in his application to come on record, he has pleaded that both the parties—that is, the plaintiff and the defendants—have colluded and, therefore, he should come on record. In other words, his coming on record is to protect the temple's interest.

5. But in the written statement, the petitioner has entirely supported the plaintiffs' cause, save a solitary sentence repeating his earlier allegation: the plaintiff and the defendants are collusive.

6. At this juncture, the defendants stressed before the trial Court that the petitioner brought himself on record to support the plaintiff's cause. Now, at this very belated stage, he would be leading evidence to cure the defects or shortcomings the plaintiff may have suffered in his evidence. Therefore, they had applied to the trial Court to strike out the petitioner's defence. The trial Court, by order dated 11.12.2017, allowed that application; it struck off the petitioner's defence, but allowed him to continue as the defendant.

7. Aggrieved, the petitioner has filed this Writ Petition under Article 227 of the Constitution of India.

Submissions:

Petitioner:

8. Shri Pavithran, the learned Counsel for the petitioner, has submitted that the trial Court has taken an unusual course of action; it has kept the petitioner's intact as the defendant but struck off his defence. He vehemently denied that the petitioner has been colluding with the plaintiff or sailing with him. On the contrary, he stresses, the plaintiff and the defendants have been colluding to defeat the public interest or temple's interest. So he urges the Court to restore the

petitioner's defence to allow him to lead evidence.

Respondents:

9. Shri Bhobe, learned counsel for the respondents/plaintiffs 1 to 4 has submitted that it is the defendants that raised initial objection about the alleged representative character of the suit. And that compelled the plaintiffs, just before the case could end, to take recourse to Order I, Rule 8 of CPC, so that their case should not suffer from any technical lapses. When the petitioner came on record as the 11th defendant, the plaintiffs never objected, nor did they oppose his defence in the suit.

10. Shri V. P. Thali, the learned counsel for the respondent nos.5(a) to 5(c), 5(e) to 5(k), 6, 7, 10 has submitted that Order I, Rule 8, especially subrule (3) is unequivocal in its legislative mandate that any person who has an interest in the outcome of the suit may apply to the Court to be made a party. But the petitioner has not demonstrated how he is interested. According to Shri Thali, the petitioner's entry under Order I, Rule 8 of CPC is only a part of the plaintiff's camouflaged efforts to introduce another person, virtually a co-plaintiff, as the defendant and to lead further evidence through that person. He urges to this Court not to interfere with the impugned order, especially, under Article 227 of the Constitution of India.

11. Heard Shri Pavithran A. V., the learned counsel for the

petitioner, Shri A. D. Bhobe, the learned counsel for respondent nos.1, 2, 3 & 4; Shri V. P. Thali, the learned counsel for respondent nos.5(a) to 5(c),5(e) to 5(k), 6, 7, 10; and Ms. P. Kamat, the learned Addl. Govt. Advocate for respondent nos.12,13 and 14.

Discussion:

12. Indeed, this case presents a piquant legal position. If we plainly read Order I, Rule 8 of CPC, it does not, on the face of it, does not specify whether a person a notice under that provision should be brought on record as a plaintiff or as a defendant. But prudence demands that the new person should stand arrayed as a defendant. Let us assume a person files a suit. There may be numerous other persons having the same interest in the cause he has raised. Then, the plaintiff may seek the court's leave to sue "for the benefit of all persons so interested." On the converse, it applies to the defendant also.

13. But before permitting the plaintiff to sue or the defendant to defendant in a representative capacity, the Court shall, at the plaintiff's expense, give notice of the institution of the suit to all persons so interested, either by personal service or by public advertisement if personal service is impracticable. At any rate, "any person on whose behalf, or for whose benefit, a suit is instituted, or defended, under sub-rule (1), may apply to the Court to be made a party to such suit.

The Scope of Order I, Rule 8:

14. The general rule is that all persons interested in a suit ought to be joined as parties to it, so that the matters raised in that suit may be finally adjudicated upon, and fresh litigations over the same matters may be avoided. But Rule 8 is an exception to this general principle. It provides that when there are several persons similarly interested in a suit, one or more of them may, with the permission of the Court or upon a direction from the Court, sue or be sued on behalf of themselves and others. Thus, after underlining the efficacy of Rule 8, C. K. Thakker's Code of Civil Procedure¹, analyses the provision.

15. Sub-rule (1) of Rule 8 provides that where several persons are interested in a suit, one or more of them may, either with the permission of the Court or on a direction by the Court, sue or be sued for themselves and for others. Sub-rule (2) compels the Court to notify all persons interested in the suit. This notifying may be either by personal service or, if it is impracticable, by public advertisement. Sub-rule (3) enacts that any person on whose behalf or for whose benefit a suit is instituted or defended may apply to the Court to be added as a party to the suit. Further, Sub-rule (4) expressly states that before a representative suit is withdrawn, compromised or the claim is abandoned, notice must be given to all persons interested in the suit.

¹ C. K. Thakker, *Code of Civil Procedure*, Vol. 3, (First Ed., with Supplement, EBC Reader, 2014), 307/1578

And if the person suing or defending does not act with due diligence, Sub-rule (5) enables the Court to substitute another person having a similar interest in the suit. Finally, Sub-rule (6) declares that a decree passed in a representative suit shall bind the parties on whose behalf the suit was instituted or defended. About the legal concept of “the same interest”, the explanation clarifies that this expression does not mean the same cause of action².

16. In *Chairman, Tamil Nadu Housing Board v. T.N. Ganapathy*³, the Supreme Court observed that the provisions of Order 1, Rule 8 have been included in the Code in the public interest so as to avoid multiplicity of litigation. The condition necessary for application of the provisions is that the persons on whose behalf the suit is being brought must have the same interest. In other words, either the interest must be common or they must have a common grievance which they seek to get redressed. The provision must, therefore, receive an interpretation which will subserve the object of its enactment.

17. The provision, no doubt, is an enabling one as a rule of procedural convenience. If a person can sue on his own, this Rule does not compel him to represent a body of persons merely because they, too, have the same interest. It is “regulative, not constitutive.” As it is procedural, it creates no substantive rights. That said, if a person has

² Ibid., 307, 308/1578

³ (1990) 1 SCC 608

no right to sue on his own, this provision does not enable him to represent others who may, in fact, have a cause of action. Such prosecution is *pro bono publico* and that is impermissible under Order I, Rule 8 CPC.

18. We may further note that once the trial Court allows a case to be prosecuted or defended as a representative suit, it is essential for the Court to observe the procedural safeguards for the *principle of res judicata* bars those persons who have not been parties to the proceedings. All persons interested in the suit and notified accordingly are deemed to have been represented in the suit.

19. If we come back to the concept of “same interest”, it is not synonymous with “identical interest” or the “same cause of action.” Not even a “joint interest” is sine qua non. All that this provision requires is “community of interest,” with shades distinct individual interests still remaining.

20. On the scope of Sub-rule (3) of Rule 8, C. K. Thakker’s CPC⁴ collates the case law and explains that if any person is dissatisfied that the suit is not properly conducted, or that he is not properly represented, or that his interests will be seriously affected unless he joins the dispute as a party, he may apply to the Court to be added as a party plaintiff or defendant, as the case may be. Such person can be

⁴ C. K. Thakker’s CPC (n 1) 342/1578

added as a co-plaintiff or co-defendant. But to be brought on record, he must show that the suit is not properly prosecuted and that the interest of justice requires that he should be joined as a party. Such application should be made without delay. A person added as a co-plaintiff must accept the plaint as it is. A person added as a co-defendant may file the written statement supporting or contesting the plaintiff's claim. Discretionary as the relief is, the Court must exercise this discretion judicially.

21. So a party who wants to come on record under Order I, Rule 8 (3) may come on record as a co-plaintiff or as a co-defendant. As a co-plaintiff, he cannot but accept the plaint averments in their entirety; but as a co-defendant he has at least four options: (a) accept the plaintiff's case and support him; (b) accept the plaintiff's case in part; (c) support the other defendants entirely; (d) support the other defendants only in certain aspects. Thus, based on the degree of identity he displays with the cause or the parties, the person added under Rule 8(3) will have his right to participate in the trial.

Back to the Case:

22. Here, to come on record, the petitioner filed an application. In that application, he has accused both the plaintiffs and the defendants of collusion. After his coming on record as a co-defendant, he has identified himself with the plaintiffs' cause, his stray sentence in the

written statement about collusion notwithstanding. Besides, supporting the plaintiffs, the petitioner has not spelt out how the plaintiffs have not been prosecuting the case well or how they have colluded, if ever, with the other defendants. A statement after a fashion serves no purpose. More particularly, any allegation of collusion or malefic methods must be supported by evidential pleas, too.

23. It is not unusual that some of the defendants may support the plaintiff's cause; there is no invariable rule that once a person is arrayed as a defendant, he must be opposing the plaintiff. Nor can we presume that such support as the plaintiff gets from the defendant betrays collusion. In that event, however, the procedural safeguard is that the defendant who supports the plaintiff must lead evidence before the defendants that oppose the plaintiffs do. It is as if he were a co-plaintiff, and it does not matter even if he were the last defendant in the array. Nothing more.

24. Here, the plaintiffs sued the defendants, the trial was completed, and the parties filed their written arguments. Then, the defendants, as the record reveals, objected that the suit attracts Order I, Rule 8 of CPC. Perhaps, not to suffer on account of any technicality, the plaintiffs invoked that provision. Thus, the petitioner came on record. Despite his initial adverse plea, he filed written statement supporting the plaintiff. No law bars him from do so, of course. In fact,

I have gone through it. It entirely supports the plaintiffs' cause. To that extent there is no occasion for the petitioner to lead further evidence.

25. That said, the petitioner has hurled somewhere in the written statement a stray, solitary sentence that the plaintiffs and the defendants have colluded. Order VI, Rule 4 of CPC mandates that if a party pleads any misrepresentation, fraud, breach of trust, willful default, or undue influence, shall spell out the details "with dates and items if necessary" about that misrepresentation and so on. A bald allegation will not suffice.

26. Here, the petitioner's pleadings in the written statement are devoid of any detail. The suit was filed in 2009, over a decade ago. Now the trial Court's reopening the matter in the name of letting the petitioner lead his evidence does not serve the interest of justice; rather, it harms the interest of justice.

Result:

27. I, therefore, hold that the petitioner should remain in the array of parties as the defendant, for he never wanted any transposition. As the law does not bar him from supporting the plaintiffs, his defence—which may have been supporting the plaintiffs—stands also stands restored. But there is no occasion for him to lead further evidence; based on material available on record, he may argue his case before the trial Court.

With the above observations, I dispose of the writ petition.

DAMA SESHADRI NAIDU, J.

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