

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 27.01.2020

Date of Verdict : 27.02.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No.1862 of 1998

1.Balasubramanian, S/o.Kalyana Padayachi
2.Pichaiyan, S/o.Thambusamy Padayachi
(for themselves and as representatives
for Anaimelagaram Village Grama
Samudayadarars, Mayiladuthurai Tk) ...Appellants

Vs.

1.Panneerselvam, S/o.Muthu
2.Chinnasamy(died), S/o.Kandayyan
3.Vaidyanathan, S/o.Rajangam
4.Sayeed, W/o.Chinnaswami(R4 died)
5.Thaiyammal, W/o.Chinnaswami(R5 died)
6.Anjammal, W/o.Chinnaswami
7.Indira, D/o.Chinnaswami(R4 died)
8.Sumathi, S/o. Chinnaswami
9.Subramanian,S/o.Chinnaswami
10.Ramesh, S/o. Chinnaswami
(RR4 to 10 brought on record as LR's of
the deceased R2 viz., Chinnasamy vide
order of court dated 16.12.2019 made
in CMP.No.260 of 2009 in SA.No.
1862 of 1998) ...Respondents

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 11.09.1998, in A.S.No.57 of 1998 on the file of the Principal Subordinate Judge, Mayiladuthurai reversing the decree and judgment dated 05.12.1997 in O.S.No.618 of 1994 on the file of the Principal District Munsif, Mayiladuthurai.

For Appellants : Mr.A.Muthukumar

For Respondents

For R1 : Mr.S.Sounthar

R2 to R4 : died

R5 to R10 : No Appearance

JUDGMENT

This second appeal is directed as against the judgment and decree dated 11.09.1998, in A.S.No.57 of 1998 on the file of the Principal Subordinate Judge, Mayiladuthurai

reversing the decree and judgment dated 05.12.1997 in O.S.No.618 of 1994 on the file of the Principal District Munsif, Mayiladuthurai.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

3. The case of the plaintiff in brief is as follows :-

3.1. The suit properties belong to Village Samudayadarars and there are nearly seventy seven village Samudayadarars. It is situated at Anaimelagaram village, Mayiladuthurai Taluk. All of them are having common interest and are entitled to enjoy the properties in common. The plaintiffs are the representatives of the village Samudayadarars. Since all of them could not able to join in the single suit as such the plaintiffs are representing the Samudayadarars and they are instituting suit for themselves and they are representatives of the other village Samudayadarars. They also filed application under Order 1 Rule 8 of CPC to file the suit on representative capacity. They are in peaceful possession and enjoyment of the property. The property belongs to the Samudayadarars are set apart towards Vettiyan, Maniyal (thalaiyari), Barbur and Washerman. Likewise, the suit properties were set apart towards maniyam of the above artisans. They will render service in the village and till their service they will enjoy the property which was allotted respectively. If the said artisans are not rendering any service in the village, they automatically ceased to enjoy the lands. Further they cannot claim any permanent occupancy right or any tenancy rights. While being so, now in the modern period, the artisans are not willing to serve in the village and they want to receive remuneration for their service. Since the artisans are not rendering any service, they have ceased to enjoy the properties. Therefore, the village Samudayadarars have taken possession of the lands and they are enjoying the properties. The entire village Samudayadarars have nominated the present plaintiffs as Nattamaidars to enjoy the properties and realise the produce and spend the same for public purpose.

3.2 The defendants are not the Samudayadarars and they have no right or interest over the property. They approached the plaintiffs to lease out the property, for which the plaintiffs refused to do so. Therefore, the defendants have nursed some grievances and began to give all sorts of trouble in the village. They also attempted to take peaceful possession and cultivate the suit lands. Therefore, the plaintiffs made an arrangement to do agricultural operation in the suit property. As such, the defendants colluded and conspired together with the aim to grab the suit schedule property. Therefore, the plaintiffs filed the suit for permanent injunction as against the defendants.

4. The defendants resisted the plaintiffs' case by filing written statement stating that the plaintiffs are not the representatives of Gram Samudayadarars and there are totally 75 village Samudayadarars. The plaintiffs were never elected as their representatives. The first item of the suit property admeasuring 200 kuzhis were given as maniyam to Asari. Initially, it was given to one, Samikannu Asari and thereafter his son is in possession and enjoyment of the suit property. Since, he was not able to cultivate the property, he sub-leased the same to the first defendant for the consideration of Rs.1,000/-. The first defendant also entered into an agreement dated 07.06.1983 with the son of the Samikannu Asari, namely Selvaraj. As per the lease, within a period of two years, he has to return a sum of Rs.1,000/- and on receipt of the same, the first defendant has to hand over the possession of the first item of the suit schedule property. In fact, his tenancy was also entered in the register and he is continuously cultivating the land.

4.1 Further stated that insofar as the second item of the property is concerned, admeasuring 44 cents, the second defendant is cultivating the same and his tenancy was also entered in the register. Therefore, already the defendants 1 and 2 are in possession and enjoyment of the suit properties and the plaintiffs never have been in possession of the suit property. Likewise, the third defendant also is in possession and enjoyment of the property admeasuring 280 kuzhis and cultivate the same. Therefore, the plaintiffs are not entitled to seek any relief as prayed for and sought for dismissal of the suit.

5. In support of the plaintiff's case, P.W.1 to P.W.3 were examined and five documents were marked as Ex.A.1 to Ex.A.5. On the side of the defendants, D.W.1 to D.W.6 were examined and Ex.B.1 to Ex.B.14 were marked. On considering the oral and documentary evidences adduced by the respective parties and the submission made by the learned counsel, the trial Court decreed the suit in favour of the plaintiffs. Aggrieved over the judgment and decree of the trial Court, the defendants 1 and 2 preferred an appeal suit in A.S.No.57 of 1998 before the Principal Subordinate Judge, Mayiladuthurai. The first appellate Court on appreciating the materials placed on records, allowed the appeal by reversing the judgment and decree passed by the trial Court and dismissed the suit. Challenging the same, the plaintiffs have come forward with the present second appeal.

6. At the time of admission of the second appeal, the following substantial questions of law were framed :-

- a) Whether the lower appellate court erred in holding that the suit has not been properly instituted under Order 1 Rule 8 of CPC, when the defendants failed to raise any objection in IA.No.1675 of 1994,

application for permission to the plaintiffs to sue in representative capacity?

b) Whether the lower appellate court erred in allowing the appeal and dismissed the suit on the ground that the mandatory procedures under Order 1 Rule 8 CPC were not followed by the trial court without remanding the matter for fresh consideration?

c) Whether the defendants are estopped from raising any objection for non compliance of the mandatory procedure under Order 1 Rule 8 when they did not choose to raise any objection to the application for granting leave to sue in representative capacity?

d) Whether the lower appellate erred in holding that the plaintiffs were not in possession of the suit property on the date of the suit without properly analysing the evidence on record particularly Ex.A.1 and Ex.A.2?

7. The learned counsel appearing for the plaintiffs submitted that the plaintiffs filed an application under Order 1 Rule 8 of CPC seeking permission to file a suit by the plaintiffs on behalf of other Samudayadarars. The said application was allowed and thereafter the trial court proceeded with the trial. In fact, any objection was raised by the defendants and the trial court had given enough opportunity to the defendants and thereafter allowed the application. There are totally six items in the suit property. Even according to the defendants, they are nowhere connected with the possession and enjoyment of the suit item Nos.3 to 6 properties. The first defendant is concerned about the first item of the suit schedule property. The second defendant is concerned about the second item of the suit schedule property. The first item of the suit schedule property is claimed as if it was given possession to one, Samikannu Asari and after his demise, his son, Selvaraj was in possession and enjoyment of the suit property. Since he was not able to cultivate the said land, he sub-leased to the first defendant for a sum of Rs.1,000/- for a period of two years. Insofar as the second item of the suit schedule property, it was given to the second defendant as he is a 'poosari'.

7.1 He further submitted that even de hors the application filed under Order 1 Rule 8 of CPC, the plaintiffs can very well maintain the suit without even others' consent, since they are also Samudayadarars and they are entitled to file a suit against the defendants. Considering the facts and

circumstances, the trial court rightly decreed the suit and unfortunately, the first appellate court reversed the finding only on the ground that the procedure contemplated under Order 1 Rule 8 of CPC was not followed, and no public notice was given before allowing the application under Order 1 Rule 8 of CPC. In fact, even assuming that there are some irregularities while allowing the application under Order 1 Rule 8 of CPC, the first appellate court can very well issue public notice and settle the matter fresh or the first appellate court can very well remand the matter for fresh disposal insofar as the application under Order 1 Rule 8 of CPC.

7.2 To support of his contention, the learned counsel appearing for the plaintiffs relied upon the following judgments :-

(i) Shantilal Bardichand Mahajan Vs. Champalal Radhaji and Ors. reported in AIR 1962 MP 363.

(ii) The Victoria Edward Hall rep. by its Secretary Dr.I.Ismail Vs. M.Samraj and 5 others reported in 2001 (3) CTC 129.

8. Per contra, the learned counsel appearing for the defendants 1 and 2 submitted that the plaintiffs were never assumed charges from the previous Nattamaidarars and as such they were never recognised as Nattamaidarars of the village Samudayadarars. Therefore they have no locus to file the present suit. Further, the provision as contemplated under Order 1 Rule 8 of CPC has not been complied with. Admittedly, public notice was not issued to other members of the village Samudayadarars and as such the suit itself is not maintainable. In fact, in Ex.A.3, except the resolution permitting the plaintiffs to initiate the suit, no other endorsement was made in the said book. Therefore, Ex.A.3 was fabricated only for the purpose of suit and there is absolutely no mentioning about the earlier Nattamaidarars and also in respect of handing over the possession of any property from any artisans. He also submitted that on the date of filing the suit, the plaintiffs failed to prove their possession and enjoyment of the suit property. Therefore, they are not entitled for any relief sought for in the suit. Though the trial court decreed the suit, the first appellate court rightly reversed the same and as such prayed for dismissal of the appeal.

9. Heard Mr.A.Muthukumar, learned counsel appearing for the Plaintiffs and Mr.A.Sounthar, learned counsel appearing for the defendants.

10. The suit is filed for permanent injunction. Accordingly to the plaintiffs, they are representatives of village Samudayadarars. They are in peaceful possession and enjoyment of the suit property and in their village there are Vettiyan, Maniyal, Barbur and Washerman and the said

properties were set apart towards 'maniyam' of the said above artisans. They will render services for the villagers and they will enjoy the land. If the said artisans are not rendering any service, they automatically cease to enjoy the lands. While being so, the entire village Samudayadarars have nominated the plaintiffs as Nattamaidarars to enjoy the property and realise income from the properties to spent for public purposes. They filed suit on their behalf and on behalf of other members of the Samudayadarars. Therefore they filed application under Order 1 Rule 8 of CPC seeking permission of the Court to file a suit. The trial court ordered notice and also ordered public notice by order dated 09.08.1994. Though, the defendants appeared before the trial court, they did not file any counter and they did not raise any objection. Therefore, the said interlocutory application was allowed by the trial court and permitted the plaintiffs to proceed with the suit. Accordingly, the trial court allowed the suit as prayed for, whereas the first appellate court concluded that the plaintiffs failed to produce that they were nominated as representatives of the village Samudayadarars.

11. Further, Ex.A.3 was the minutes book from the village Samudayadarars showing the resolution passed by the members of village Samudayadarars nominating the plaintiffs to file the present suit. In the said book, except the resolution appointing the plaintiffs, no other entries were made in the book. Therefore, the trial court concluded that only to file the suit, the records were created by them. In respect of the application filed under Order 1 Rule 8 of CPC in I.A.No.1675 of 1994, no proper enquiry was conducted by the trial court and no public notice was taken by the plaintiffs. When the application was adjourned for taking notice, suddenly it was allowed. Further concluded that there is no proof to show that the trial court conducted enquiry on the application and allowed on merits. Therefore, the trial court without even conducting any enquiry, simply allowed the suit thereby permitting the plaintiffs to proceed with the suit. Therefore, reversed the findings of the trial court and dismissed the suit. In this regard, the learned counsel for the plaintiffs has relied upon the judgment in the case of Shantilal Bardichand Mahajan Vs. Champalal Radhaji and Ors. reported in AIR 1962 MP 363, wherein it is held as follows:

9. These questions have come up before the courts on several occasions. For example, in the case reported in Bhiya v. Mangta ILR (1955) 5 Raj 910, it was ruled that the provisions of Order 1 Rule 8 were mandatory, breach was calculated to affect the decision, and a failure on the part of the Court to perform the duty of issuing notices is not one of mere technicality curable under Section 99, C. P. C., the reason being that on the issue of notice a large number of persons may come forward and ask to be joined as parties to the suit. It was at the same time held that in the event of omission substantially

to comply with Order 1 Rule 8, the proper course was not to dismiss the suit to set aside the decree and remand the case to be proceeded with according to law. We shall consider if we should do this in the instant case, or give the permission and issue the notice in this court itself.

10. In the earlier case reported in Mookka Pillai v. Valavanda Pillai, AIR 1947 Mad 205, it was held that, in the appellate Court the persons suing in individual capacity can be permitted to sue in representative capacity even by amending the plaint if necessary, in the present case, the plaint is clear enough and the plaintiffs' position is in fact stronger. In the case reported in Mukaremdas v. Chhagan AIR 1959 Bom 491, the plaint was filed, as in the instant case, as one in the representative capacity. There was no formal permission recorded in the order but some notices were issued. So the court held that the absence of a formal order giving permission was really immaterial; but in the earlier Bombay case reported in Hubli Panjarapole v. Saraswatavva Bayappa, AIR 1953 Bom 334, there was a real omission to issue notices and it was held that during the pendency of the suit itself, permission could be sought and notices issued. Thus, authority is ample for the view that the omission can be remedied even at the appellate stage, if the nature of the suit is not changed.

12. The alternative before us is therefore to set aside the decree under appeal and send back the suit to the trial Court for according permission, which has in a sense been tacitly granted, and to issue notices at the cost of the plaintiffs, and then to rewrite the judgment in the light of the averments, ...

12. He also relied upon the judgment in the case of The Victoria Edward Hall rep. by its Secretary Dr. I. Ismail Vs. M. Samraj and 5 others reported in 2001 (3) CTC 129, wherein it is held as follows:

10. In S. Thirunavukkarasu and another v. J. Jayalalitha and another, it has been held by a Division Bench of this Court that the averments made in the plaint should be taken note of for the purpose of deciding the jurisdiction to entertain and try the suit filed before the Court.

11. A perusal of Order 1, Rule 8, C.P.C. would

reveal that where there are numerous persons having same interest in one suit, one or more of such persons may, with the permission of the Court sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested. It would also reveal that the Court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested. In the case, the 1st respondent as plaintiff had taken a stand that only 650 members were permitted to be admitted as members of the revision petitioner society as per the resolution dated 22.7.1990, that the subsequent admission of 207 members in the revision petitioner society is already in dispute and that the revision petitioner society has no right to admit 1496 members as members of the revision petitioner and allow them to vote in the election held on 30.7.2000 without the Registrar of Societies admitting such members of the revision petitioner society after filing Form VII along with the resolution passed by the General Body or the revision petitioner society. Therefore, it is evident that out of 1496 members except 650 members, membership of other members are in dispute. If the relief of declaration sought for in the suit that the voters list of the year 2000-2001 is incorrect and invalid is to be decided the presence of the members whose membership is disputed is a must for being heard, or else it will affect the right of the persons not present before the Court. It is relevant to point that a duty is cast on the Court to follow the procedure prescribed under Order 1, Rule 8 C.P.C. irrespective of the fact as to whether the defendant or defendants present before Court raises any objection or not. In view of the fact that a duty is cast on the Court to safeguard the interest of the persons who are not present before Court a petition under Order 1, Rule 8, C.P.C. for grant of leave of Court to file a suit in representative capacity has to be filed by the 1st respondent herein. The learned counsel appearing for the 1st respondent herein undertakes to file a petition under Order 1, Rule 8, C.P.C. In view, of the circumstances stated supra, the solemn undertaking given by the learned counsel appearing for the 1st respondent herein has taken note of and approved.

12. An application for leave of Court under Order 1, Rule 8, C.P.C. can be allowed even at Appellate stage in a suit filed in individual capacity by means of amendment when such amendment does not materially change the nature of suit in view of the decision of this Court reported in M. Pillai v. S. Pillai, A.I.R. 1947 Mad. 205. Same principle

has been laid by this Court in Nilgiri District Janatha Party, Etc., v. A. Rahim, and 3 others, 1996 (2) LW 456. In Mukalem Das v. Chhagan Kisan, , it has been held that permission under Order 1, Rule 8, C.P.C. can be granted even at the appellate stage. In Anandan v. Ayyanna Gounder, 1993 (II) M.L.J. 493, His Lordship Abdul Hadi, J. has held that leave is a condition precedent for institution of a suit under section 92(1), C.P.C, but it is not so, if leave has to be obtained from the Court under Order 1, Rule 8, C.P.C. It has also been held that permission under Order 1, Rule 8, C.P.C. may be granted even after institution of the suit and even at the appellate stage by allowing an amendment if such amendment does not materially change the nature of the suit. In Assistant Commissioner, H.R. & C.E., Salem v. N.K.S.F. Mudaliar, , His Lordship M. Srinivasan, J. (as he then was) has held that a person cannot advance the claims of a group of persons or community without adopting the procedure under Order 1, Rule 8, C.P.C., if the relief is prayed for only on the basis of the rights of the community as such. A distinction has to be maintained between cases where individual putforward a right which he has acquired as a member of a community and cases where a right of the community is putforward in the suit. It is also held that if it is the former, the individual is not debarred from maintaining the suit in his own right in respect of a wrong done to him even though the act complained of may also be injurious to some other persons having the same right and if it is the latter, the procedure under Order 1, Rule 8, C.P.C. has to be followed and without doing so, no relief could be granted to the individual concerned. In Dhirendranath Chandra v. Apurba Krishna Chandra and others, , it has been held as follows:-

"A plain reading of Rule 2 will show that ordinarily even if the case may be disposed of on a preliminary issue, the Court is bound to pronounce judgment on all issues. This ordinary rule is subject to only one exception which has been provided in sub-rule (2) according to which if the case or any part thereof may be disposed of on issue of law only and if that issue of law relates to the jurisdiction of the Court or a bar to the suit created by any law for the time being in force, the Court may try such issue first. It is, therefore, clear that a departure from the ordinary rule provided in sub-rule (1) of Rule 2 can be made by the Court only in the circumstances mentioned in sub-rule (2) and even in these

circumstances the Court, has only a discretion that it may try an issue of law relating to the points mentioned in Clause (a) and (b) of sub-rule (2) as a preliminary issue before framing other issues. There is, however, nothing in sub-rule (2) which makes it obligatory for the Court to try such an issue first in all cases. If, therefore, the Court is of opinion that in any particular case it will be more expedient to try all the issues together and therefore, if it refuses to try and decide any issue of law even on the points referred to in Clause (a) and (b) or sub-rule (2) as a preliminary issue before taking up other issues, it commits no error touching jurisdiction."

13. In the above judgments, the learned Single Judge of this Court and the Hon'ble Division Bench of High Court of Madhya Pradesh held that in the event of omission substantially to comply with Order 1 Rule 8, the proper course was not to dismiss the suit to set aside the decree and remand the case to be proceeded with according to law. Further held that the application for leave of court under Order 1 Rule 8 of CPC can be allowed even at the appellate stage in a suit filed in individual capacity.

14. In the case on hand, the plaintiffs represented on their behalf and also on behalf of other village Samudayadarars and filed the suit for bare injunction in respect of the suit properties. Their specific case is that the village Samudayadarars are in peaceful possession and enjoyment of the suit properties. Whoever render service as Vettiyan, Maniyal, Barbur, Washerman, they will enjoy the lands for their rendering service to the village, and whenever they stop the service, they automatically cease to enjoy the lands which are handed over to them. While being so, the first item of the suit property originally was handed over to one Samikannu Asari. After his demise, his son one, Selvaraj was in possession and enjoyment and he sub leased the first item of the suit schedule property in favour of the first defendant, after receipt of Rs.1,000/-. It is nothing but usufructuary mortgage. Therefore, the first item of the suit property was never handed over by the plaintiffs or their members in favour of the first defendant for rendering any service.

15. Likewise in respect of the second item of the property, the second defendant claimed under the cultivating tenancy and the same was also registered in the register. Therefore, the object of the properties completely failed and the defendants are not original allottees to the suit properties. The application under Order 1 Rule 8 of CPC for

grant of leave that duty is cast upon the court to safeguard the interest of the persons who are not present before the court. In fact, the plaintiffs filed application under Order 1 Rule 8 of CPC in I.A.No.1675 of 1994 and the same was allowed by the trial court. It is also seen that the trial court ordered public notice. Ignoring the same, without any reason and without any piece of evidence, the first appellate court concluded that the trial court did not follow the procedure as contemplated under Order 1 Rule 8 of CPC.

16. As pointed by the learned counsel for the plaintiffs, even if any error in the application filed under Order 1 Rule 8 of CPC and no application was filed under Order 1 Rule 8 of CPC, it can be curable before the appellate court. But the said circumstances do not arise here, since already the trial court allowed the application under Order 1 Rule 8 of CPC. That apart, the plaintiffs, to prove their possession and enjoyment of the suit property, the chitta and kist receipts were marked as Ex.A.1 and Ex.A.2. They clearly proved their possession and enjoyment of the suit property. The minutes book of the village Samudayadarars was marked as Ex.A.3, in which there was a resolution passed by the members nominating the plaintiffs as Nattamaidarars and also permitting them to file the suit. Even in the written statement, the first and second defendant categorically admitted that the first item of the suit property originally was handed over to one, Samikannu Asari for rendering his service. In respect of the second item of the suit property was handed over to one, Poorasamy @ Pusari. Therefore, at any point of time, the suit properties were never handed over to the defendants 1 and 2 as they are artisans. Accordingly, the trial court rightly decreed the suit in favour of the plaintiffs. Unfortunately, the first appellate court erroneously concluded against the plaintiffs. Therefore, this Court constrains to interfere with the findings of the first appellate court as perverse and against evidence on record. Accordingly, all the substantial questions of law formulated in this second appeal are answered in favour of the plaintiffs and as against the defendants.

17. In view of the above discussion, the Second Appeal is allowed and the judgment and decree dated 11.09.1998 passed in A.S.No.57 of 1998 on the file of the Principal Subordinate Judge, Mayiladuthurai, are hereby set aside and resultantly, the suit filed by the plaintiffs in O.S.No.618 of 1994 is allowed by restoring the judgment and decree dated 05.12.1997 made in O.S.No.618 of 1994 on the file of the Principal District Munsif, Mayiladuthurai. No costs.

Sd/-
Assistant Registrar

//True copy//

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To

1. The Principal Subordinate Judge,
Mayiladuthurai
2. The Principal District Munsif,
Mayiladuthurai.
3. The Section Officer,
V.R. Section,
Madras High Court,
Chennai.

+1cc to Mr.A.Muthukumar, Advocate SR.No.17107

+1cc to Mr.S.Sounthar, Advocate SR.No.17706

S.A.No.1862 of 1998

SAI (CO)
GMY (23/11/2020)



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