

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment reserved on: 28.04.2023

Judgment pronounced on: 15.05.2023

+ RFA 279/2019 and CM APP.45728/2021 & CM APP.8257/2023

SH. ANIL KUMAR JAIN & ANR. Appellant

versus

BHAGWAN MAHAVIR MEMORIAL SAMITI & ORS.

.... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. S.S. Jain, Advocate.

For the Respondent : Mr. Navaniti Prasad Singh, Sr.
Advocate with Mr. Sumit Sharma and
Mr. Shantanu Chauhan, Advocates for
R-1 & 18.
Mr. Abhishek Baid and Mr. Praneet
Das, Advocates for R-4 & 17.
Mr. Mohit Kumar Bafna, Advocate for
R-6, 13, 15, 16, 20, 22 & 23.
Mr. Anuj Jain, Advocate for R-8.

CORAM:

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

TUSHAR RAO GEDELA, J.

[The proceeding has been conducted through Hybrid mode]

1. The appellants challenge the order and judgment dated 15.12.2018 passed in CS No. 58528/2016 whereby the learned Trial Court had dismissed both, the application under Order I Rule 8 of the Code of Civil Procedure, 1908 (hereinafter as "CPC") and the suit of the

appellants/plaintiffs simultaneously, by holding that the suit of the plaintiffs in which the respondent no. 1/defendant no. 1 society has been sued in a representative capacity is filed without seeking permission/leave of the court under Order I Rule 8, CPC and hence, not maintainable.

2. The following facts, shorn of all unnecessary details and germane to decide the dispute are as under:-

2.1 The appellants/plaintiffs filed a suit for Declaration, Permanent and Mandatory Injunction, besides being members of respondent no.1/defendant no.1 society, in their representative capacity of the Jain community as a whole so as to reinstate public character and to establish a complete democratic setup in the respondent society and to maintain its all India stature on the basis of its only valid, legal constitution i.e. original Memorandum of Association and Rules & Regulation registered alongwith registration of society in the year of 1974.

2.2 As the suit of the plaintiffs would have affected 165 members of the defendant no.1 society and non-members and as it was not practically possible to serve each of them to represent their interest, therefore, the suit was filed in a representative capacity in such a manner that the defendant no.1 society will represent the interest of all the members. Therefore, the plaintiffs also filed an application under Order I Rule 8 CPC to allow the defendant no.1 society to be sued in representative capacity of members of the society or the Jain Community as a whole.

2.3 Such application filed by the plaintiffs under Order I Rule 8, CPC sought exemption from impleading all the 165 members as defendants

in the proceedings and permission for, if required, publishing a public notice in any of the leading national newspapers to the effect of pendency of the proceedings with further necessary directions as per law.

2.4 The learned Trial Court heard the arguments of the parties on the application of the plaintiffs under Order I Rule 8, CPC as none of the defendants chose to file a reply to the said application and passed the impugned order and judgment dated 15.12.2018, thereby dismissing the application of the plaintiffs on the basis that the plaintiffs have not sought any prayer, either in the said application or in the suit, thereby seeking permission of the Court to sue defendants in the representative capacity on behalf of the members of the respondent society or institute the suit representing the Jain community as a whole. Further, the learned Trial Court also dismissed the suit of the appellants/plaintiffs on the ground that the suit was filed in a representative capacity without seeking permission of the court under Order I Rule 8, CPC is not maintainable.

CONTENTIONS OF THE APPELLANTS

3. Mr. Jain, learned Counsel for the appellants submits that the said impugned order and judgment has been passed even before framing of issues and without trial.

4. The learned counsel for the appellants submits that the application under Order I Rule 8, CPC was filed along with the plaint and that it was incumbent on the court to decide the application, firstly by issuing notice and then, by granting exemption from impleadment of all the

members of the respondent society as also permission for making such necessary publication of notice in the newspaper as required by the provisions under Order I Rule 8, CPC.

5. He further submits that instead of deciding the application at the first instance, the learned Trial Court proceeded with the suit and issued summons whereafter, all the interested respondents filed their Written Statements.

6. The learned counsel submits that by way of the application under Order I Rule 8, CPC, he sought exemption from impleading all the members of the respondent no.1 society other than the 25 members who were already made parties to the suit, as also, liberty to make a public notice by issuing a publication in the newspaper.

7. Learned counsel for the appellants emphasized on the fact that since it is not practically possible to serve each of the 165 members of the respondent no.1 society to represent their interests, they have not been impleaded individually as parties. The respondent no.1 society represents all its members and as such, the 165 members are being represented through the society in their representative capacity and that the appellants would have no objection for impleadment of any particular person out of existing members, if so intended and apply in the suit, which was filed in larger interest of Bhagwan Mahavir Memorial Samiti (BMMS), its members and the Jain community at large.

8. The learned counsel for the appellants submits that the learned Trial Court not only dismissed the application, but also the whole suit

without dealing with the merits of the case, that too, at the stage of completion of the pleadings.

9. To buttress his arguments, the learned counsel relied upon ***Kapoor Group & Another Vs. Supreme Court of India Bar Association*** reported in **2002 III AD (DELHI) 490**, especially Para 14, to submit that permission to sue in a representative capacity can be granted at any stage during the pendency of the suit and the suit cannot be dismissed only on the ground that the requisite leave has not been obtained under Order I Rule 8 at the commencement of the proceedings.

10. The learned counsel for the appellants submits that the impugned order records that the appellants have not sought any permission of the Court to sue the defendants in the representative capacity of the members of Bhagwan Mahavir Memorial Samiti or the Jain community as a whole and the only prayer made in the application was to seek exemption to implead all 165 members as defendants and serve them through public notice in any of the leading National newspaper, which is not true as the appellants have repeatedly averred in their plaint that all the 165 members are represented by the respondent no.1 society.

11. Learned counsel further submits that those 25 members who were in fact impleaded in the suit had no grudge/objection against the application under Order I Rule 8, CPC of the appellants/plaintiffs, many of whom are also stated to have filed their written statements.

12. The learned counsel for the appellants submits that the idea behind Order I Rule 8, CPC is that all the interested parties not before the court must get an opportunity to take a stand and protect their

interests. In the present case, the interested parties had already filed their Written Statements. He further submits that it is the duty of the court to look at how the interests of the parties not before it are to be protected.

13. The learned counsel for the appellants submits that if the learned Trial Court was not inclined towards allowing the application under Order I Rule 8, CPC, it ought to have given an opportunity to the appellants to implead and serve notices on all the members as per law. Rather, the learned Trial Court dismissed the suit in its entirety. On that basis, he further submits that the learned Trial Court, even if it deemed fit to reject the application of the appellants, ought to have proceeded with the suit in accordance with law.

14. The learned counsel submits that the impugned order records that the prayer made in the application is only to deem service of the 165 members of the society through respondent no.1 society, which is a perverse finding. On the contrary, the appellants were seeking service by publication in the newspaper. The learned counsel further submits that if once the notice were published in a public newspaper, the entire Jain community would have been invited to join the proceedings and protect their interests. The purpose of publication was to subserve the interests of all the interested parties.

15. The learned counsel of the appellants draws attention of this Court to the impugned order to submit that the order is specifically worded in a way that the application has not been considered on its merits, but is rejected on the ground that no permission was ever sought by the appellants to file it in a representative capacity. Thus, the impugned order doesn't indicate that the appellants did not have a valid

or legal reasoning to file the suit in a representative capacity.

16. The learned counsel for the appellants concludes by submitting that the permission under Order I Rule 8, CPC ought to have been granted by the learned Trial Court. Additionally, he submits that even the rejection of the application under Order I Rule 8 does not entail dismissal of the suit in its entirety. Once their application was rejected, the appellants should have been given an opportunity to file a better-worded application to comply with the requirement of Order I Rule 8, CPC or in the alternative, given the appellants an opportunity to implead and serve all the members of the respondent no. 1 society individually and the suit should have proceeded on merits.

CONTENTIONS OF THE RESPONDENT NO. 1

17. *Per contra*, Mr. Navaniti Prasad Singh, learned senior counsel for the respondent no.1 submits that the suit was filed by the appellants in a representative capacity without obtaining the leave of the court which is a condition precedent under Order I Rule 8, CPC for the suit to proceed further in accordance with law.

18. He further submits that not only were the appellants/plaintiffs suing the respondents in a representative capacity, but they were also simultaneously instituting and suing in a representative capacity by claiming to represent the interests of the whole Jain Community.

19. The only permission being sought by the appellants by filing an application under Order I Rule 8, CPC was for substituting 165 members of the Society, and not for representing the Jain community by way of the suit or for suing the respondent in a representative capacity.

The learned Trial Court took note of the same and passed the impugned order, which is sustainable in the eyes of law and requires no interference by this Court.

20. There was no alternate prayer made by the appellants in the application and now it is too late in the day to make a grievance of the same when they themselves never prayed for grant of leave of the court as mandated by the provisions of Order I Rule 8, CPC.

21. The learned senior counsel for the respondent submits that Bhagwan Mahavir Memorial Samiti (BMMS) Society is registered under The Societies Registration Act, 1860. It is a closed door society with a limited number of members with limited objects managed in a manner stated by the Society and is not representing the interests of the Jain community as a whole.

22. Learned senior counsel submits that the fact that the membership of the plaintiff no. 2 was rejected 2 years before filing of the suit was not disclosed before the Court nor has he challenged the cancellation of his membership by the Governing Council.

23. He further submits that by way of the suit, the appellants had sought to challenge the 1992 Rules whereby it was decided that no elections will be held and a Governing Council was formed to take care of the interests of the society. The appellants are challenging the same rules which got them their membership in the Society. Learned senior counsel vehemently argued that the appellants cannot be permitted to approbate and reprobate. The learned senior counsel further submits that though the appellant/plaintiff no. 1 claims to have become a member of

the respondent no. 1 society in 2002, but has sought to challenge the Rules of 1992 in 2016 and the same is, on the face of it, barred by law.

24. The learned senior counsel submits that the learned Trial Court had also noticed that the appellants are seeking to sue in a representative character without obtaining the leave of the court and hence, passed a well reasoned order upholding the mandate of the provisions of Order I Rule 8, CPC and dismissing the suit as being non-maintainable.

25. He submits that in a suit filed in a representative character or where the defendants are sued in a representative character, it is a *sine qua non* to take the leave of the Court. Without such permission being granted, the suit cannot proceed and thus, the question of obtaining such leave of court at a belated stage does not arise. He further submits that both, seeking leave of the Court and the same being granted, is a *sine qua non* under the provisions of Order I Rule 8, CPC. The twin conditions not being met, the suit ought to fail.

26. The learned senior counsel draws attention of this Court to the prayer clause of the application of the appellants under Order I Rule 8, CPC. The same is extracted hereunder:

“...the present application may be allowed and exemption may be granted to the plaintiffs to implead all 165 members as defendants in the present proceedings and if required a public notice in any of the leading national newspaper may be ordered to be published to the effect of pendency of the present proceedings with further necessary directions as per law.”

There is not even a mention of the suit being filed or the

respondent society being sued in a representative character. The mandate of Order I Rule 8, CPC not being fulfilled, the suit was rightly dismissed by the learned Trial Court.

27. The learned senior counsel submits that mere bald statements in the plaint that the appellants are suing in a representative character do not satisfy the mandate of Order I Rule 8, CPC and a formal application is required to be filed with a prayer seeking leave of the court for the same. The same not being done in the present case, the question of the suit proceeding on merits does not arise.

28. Learned senior counsel further submits that in addition to abovesaid proposition, the appellants were at liberty to even make an alternate prayer to the effect that if the Trial Court was not inclined to allow the application under Order I Rule 8, CPC to sue in a representative character, the appellants may be allowed to proceed with the suit in their individual capacity as dismissal of the application under Order I Rule 8, CPC in itself is deemed as dismissal of the suit being non-maintainable.

29. The learned senior counsel submits that the appellants always have an option of reinstituting the suit afresh giving up the representative character of the suit.

30. The Learned senior counsel for the respondent relies upon the following judgments in support of his submissions:-

(a) ***Govind Ram v. Gokul***, reported in **1929 SCC OnLine All 480**:

“3. It was, in our opinion, his plain duty to require the plaintiffs to obtain permission as a condition precedent to his entering on the

case and then his duty of notification would follow. In the same way the lower appellate Court entertained and heard the appeal and so did the single Judge of this Court. We are of opinion that none of the Courts should have gone into the merits of the case once it was satisfied that this was a representative action, and the imperative provisions of O. 1, R. 8, had not been complied with.

* * *

4. ...It has been said that although there was a failure to obtain permission, nevertheless the learned Munsif should have amended the plaint and out all the portion that related to a representative action and have allowed the plaintiffs to continue a personal action. But all sorts of difficulties would at once have arisen. The defendants were brought on the record not because all of them had personally obstructed each and every one of the plaintiffs but because they were representatives of the two opposing communities. In our opinion, no amendment could possibly have turned this point into an effective one. Again the other answer is that nobody asked for any amendment.

... The only order the Munsif should have made would have been to have rejected the plaint on the ground of the failure to obtain permission. We therefore set aside the decree of the learned single Judge of this Court, and repeating that this was a suit which should never have been entertained by the Munsif, we dismiss the suit ordering the plaintiffs to pay the costs throughout in all Courts.”

(b) Assistant Commissioner, Hindu Religious and Charitable Endowments v. Nattamai K.S. Ellappa Mudaliar, reported in 1987 SCC OnLine Mad 30

“As pointed out earlier R.8 of O.1, Code of Civil Procedure constitutes a glaring exception to the general rule and if it is not strictly complied with, it may result in a flagrant departure from the salutary practice of not proceeding with an adjudication in the absence of the parties affected thereby; The foundation of O.1, R.8, Code of Civil Procedure lies in a principle which transcends the personal or parochial nature of the combatants who are arrayed as parties to the suit. It affects the rights of the persons not present before the Court. Hence, a duty is cast on the Court itself to follow meticulously the procedure prescribed by O.1, R.1, Code of Civil

Procedure and it is immaterial whether the defendants raised the objection in the written statement or not.”

- (c) **Anant Shri Sukhramji Trust v. Union of India**, reported in **1996 SCC OnLine Raj 50** wherein it was held that a suit suffers from defect due to the non-compliance of mandatory provisions under Order I Rule 8.

REBUTTAL OF THE APPELLANTS

31. The learned counsel for the appellants submits that there was no requirement of a formal application as the leave can be obtained by way of the pleadings. In fact, the application filed under Order I Rule 8, CPC specifically mentioned that the contents of the suit be read as part and parcel to the application.

32. The learned counsel draws attention of this court to Page 45 of the appeal whereby the plaint has been annexed, to submit that the pleadings were always clear about the intention of the appellants to file the suit in a representative character and the same reflects that the appellants sought permission of the Court by way of pleadings.

33. Learned counsel further submits that the prayer made in the application seeking exemption from impleading all the 165 members and publishing a notice in newspaper in itself fulfills the mandatory requirement of Order I Rule 8, CPC as the permission to sue in a representative character is useless without publication. Publication is necessary in a suit filed or sued in a representative character for invoking the interests of the parties by informing them about the pendency of the *lis*. By way of publication, the appellants sought to sue all the 165 members through the respondent no. 1 Society. Publication is

an invitation to a limited extent for the members who may want to get impleaded in such suit.

34. He submits that the leave under Order I Rule 8, CPC can also be granted at an appellate stage by curing the defect and urges this Court to allow the same. He further submits that had the suit not been dismissed, he would have re-applied for the permission of the Court.

CONTENTIONS OF RESPONDENT No. 8

35. Mr. Anuj Jain appears on behalf of the Respondent No. 8, who is one of the members of the respondent no.1 society and submits that he supports the case of the appellants.

36. The learned counsel submits that this Court has to consider both the aspects of how the permission is to be sought under Order I Rule 8, CPC and what is the fate of the suit if there is a technical defect in the application filed under Order I Rule 8, CPC.

37. The learned counsel draws attention of the court to the impugned order to submit that the learned Trial Court did not decide the application on merits, rather dismissed the same on a technical ground that the language of the prayer of the application doesn't specify that the suit is being sought to be filed in a representative character.

38. He further submits that all through the plaint, the appellants/plaintiffs have averred that they are seeking to file the suit against the 165 members through respondent no.1 society in a representative character. Infact, the prayer of the application clearly shows that the exemption and publication sought for was for the purpose of proceeding with the suit in a representative character and same

suffices the mandate of the provisions of Order I Rule 8, CPC.

39. Learned counsel submits that rejection of not only the application but the whole suit merely on the basis of defect in the language of the prayer of the application is not within the legal parameters by shrinking the ambit of Order I Rule 8, CPC.

40. He concludes by saying that the prayer in the application for exemption and publication coupled with the language of the plaint fulfills the mandate of provisions under Order I Rule 8, CPC and thus, the impugned order is liable to set aside being unsustainable in law.

41. The learned senior counsel for respondent no.1 society argues that respondent no.8 has no *locus standi* to argue at all being a member of the society, and as per his own submissions, he is being represented by the respondent no.1 society and cannot take a contrary stand.

ANALYSIS AND FINDINGS

42. This Court has considered the aforesaid submissions of the learned counsel appearing for the parties and closely scrutinized the impugned order as also the documents placed on record.

43. At the outset, it may be apposite to extract provisions of Order I Rule 8, CPC, which is extracted as hereunder:-

“8. One person may sue or defend on behalf of all in same interest. –

(1) Where there are numerous persons having the same interest in one suit,-

(a) 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;

(b) 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.

(2) The Court shall, in every case where a permission or direction is given under sub-rule (1), at the plaintiff's expense, give notice of the institution of the suit to all persons so interested either by personal service, or, where, by reason of the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(3) 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.

(4) No part of the claim in any such suit shall be abandoned under sub-rule (1), and no such suit shall be withdrawn under sub-rule (3), of rule 1 of Order XXIII, and no agreement, compromise or satisfaction shall be recorded in any such suit under rule 3 of that Order, unless the Court has given, at the plaintiff's expense, notice to all persons so interested in the manner specified in sub-rule (2).

(5) Where any person suing or defending in any such suit does not proceed with due diligence in the suit or defence, the Court may substitute in his place any other person having the same interest in the suit.

(6) A decree passed in a suit under this rule shall be binding on all persons on whose behalf, or for whose benefit, the suit is instituted, or defended, as the case may be.

Explanation.- For the purpose of determining whether the persons who sue or are sued, or defend, have the same interest in one suit, it is not necessary to establish that such persons have the same cause of action as the persons on whose behalf, or for whose benefit, they sue or are sued, or defend the suit, as the case may be."

44. By virtue of the application under Order I Rule 8, CPC, the appellants/plaintiffs sought permission of the learned Trial Court to sue the respondent society as also the 165 members that comprised the society in a representative capacity i.e. through the 25 members of the

Governing Council who represented the 165 members of the society. The learned Trial Court by the impugned order dated 15.12.2018 dismissed the application on the basis that the appellants did not seek any prayer either in the said application or in the suit to sue the defendants in a representative capacity on behalf of the members of the society or the Jain community as a whole. Thus, there being no submission or an application on that point, the learned Trial Court dismissed not only the application but also the suit itself.

45. The submission of Mr. Jain, learned counsel for the appellants that once an application under Order I Rule 8 has been filed, the Court is under an obligation to either permit the appellant to sue the defendants in their representative capacity or permit the appellant to make a publication through which the respondents members would be apprised of the pendency of the suit and as a result, would join the suit either as a plaintiff or as a defendant, if so required and as the case may be, did not find favour with the learned Trial Court. The reasons mentioned in the impugned order, though are complete, however, there are aspects which need deeper consideration.

46. As per para 4 of the plaint, the appellants/plaintiffs have categorically asserted not only that they are suing the respondent no.1/society in their individual capacity as members of the respondent society but also suing the respondent society as a representative of whole of the Jain community. The averments also projected that it may not be possible for the appellants to serve each of the 165 members comprising the respondent no.1 society individually and it may not even be practical to do so. On that basis, the appellant sought exemption

from individual impleadment. The application of the appellants also asserted that the 165 members are being represented through the respondent no.1/society in their representative capacity.

47. As per the prayer of the appellants, a decree of mandatory injunction directing the general body of 165 members of respondent no.1 society to elect the Governing Council and office bearers of Bhagwan Mahavir Memorial Samiti (BMMS)/Respondent no.1 society in accordance with the Memorandum of Association and Rules and Regulation of 1974 in a time bound manner was sought. Though the appellant sought permission of the learned Trial Court to sue the 165 members of the respondent no.1 society in a representative capacity through the 25 members of the Governing Council, however, as observed by the learned Trial Court, did not seek any particular permission to institute and sue on behalf of or representing the whole of Jain community.

48. The argument that in case the learned Trial Court was not inclined to allow the application of the appellants under Order I Rule 8 CPC, it ought to have given an opportunity to the appellants to implead and serve notices on the said members individually and in the absence whereof, the rejection of the suit itself could not have been possible, appears to be a logical conclusion to dismissal of such an application. It makes sense that once the Civil Court concludes, for whatever reason, that the application under Order I Rule 8, CPC, 1908 ought not to be allowed, the same cannot result in detriment to the plaintiff. However, in the present case, the learned Trial Court proceeded to dismiss the suit itself for not obtaining leave to institute and sue in a representative

capacity.

49. It appears that the learned trial Court based its conclusion on the averments of the plaint containing references to a cause being espoused by the appellant for and on behalf of the Jain community and if that were so, then in accordance with the provisions of Order I Rule 8, CPC particularly sub-Rule (a) of Rule 1, permission of the court had to be sought in that regard. It is an admitted case that no such application under Order I Rule 8, CPC seeking permission of the Court to sue the respondent no.1 society and others in a representative capacity for and on behalf of the Jain community in general was ever sought.

50. The other argument of Mr. Jain, learned counsel for the appellant that the object behind Order I Rule 8, CPC is to ensure that all the interested parties who are not before the Court get an opportunity to take a stand and get their interests protected appears to be untenable. This is for the reason that no such application was ever filed seeking leave to sue in a representative capacity.

51. The learned counsel for the appellants relied upon ***Kamalakshi v. Bahulayan***, reported in **1971 SCC OnLine Ker 18** whereby the High Court of Kerala held that the Court must be deemed to have given its permission under Order I Rule 8, CPC when it ordered the publication of the notice in the newspaper. The same is not relevant to the facts in the present case as no such permission for publication was ever granted by the learned Trial Court to assume it being granted for leave under Order I Rule 8, CPC.

52. This Court is in agreement with the submission of the learned

senior counsel for the respondent no.1 in respect of the prayer clause of the application under Order I Rule 8, CPC in that, the said prayer clause does not even mention the suit being filed in a representative capacity. In order to appreciate the aforesaid aspect, the relevant extract of the said prayer clause is extracted hereunder:-

“It is therefore most respectfully prayed that in view of the submissions made above and in the interest of justice, the present application may be allowed and exemption may be granted to plaintiffs to implead all 165 members as defendants in the present proceedings and if required, a public notice in any of the leading national newspaper may be ordered to be published to the effect of pendency of the present proceedings with further necessary directions as per law.”

53. In other words, in accordance with the provisions of Order I Rule 8 CPC, seeking leave to sue in a representative capacity, in cases such as the present one, is a *sine qua non*. It is not merely the permission to sue the defendants in a representative capacity which is sufficient, but the appellants ought to have also simultaneously sought leave of the Court to institute and sue the society in a representative capacity, since they claimed to be espousing the cause of Jain community.

54. That having been said, in the present case, though the appellants did not file any specific application to seek permission of the Court to institute and sue in a representative capacity, yet the failure thereof would not entail dismissal of the suit itself.

55. For the aforesaid conclusion, it is relevant to peruse the averments made in the plaint wherein the appellants/plaintiffs have specifically claimed to be individually aggrieved by the acts of the Respondent Society and had thus, filed the suit on the basis of their being the

members of the said Respondent Society. The same emerges from the reading of Para 1 of the plaint which is reproduced hereunder:-

“That the Plaintiff No. 1 and 2 are Jain by religion, follower of Bhagwan Mahavir and by endorsing the aims and objects of defendant no.1 society had become its members in the year 2002 and 2016 by paying a sum of Rs.25,000/- each, duly acknowledged vide Receipt No.412, dated 02.05.2002 and Receipt No. 738, dated 09.11.2015 respectively accordingly their names are also shown in the list of its members. The membership of the Plaintiffs have also been confirmed by defendant no.1 society vide its various documents inter-alia including minutes of meetings, list of members, correspondences etc.”

It is clear from the aforesaid statement in the plaint that the appellants have laid the plaint in individual capacity too. Even the cause of action paragraph of the plaint is to the same effect. Having regard to the above, it is difficult to conclude and agree with the impugned order and judgment that the suit itself is not maintainable for the lack of permission under Order I rule 8, CPC, 1908.

56. The aforesaid reasoning gets fortified by the ratio laid down by the Supreme Court in ***Hari Ram vs. Jyoti Prasad & Another*** reported in **(2011) 2 SCC 682**, wherein it was held that where the suit is filed by an aggrieved person whose right was prejudicially affected, the same cannot be dismissed on the ground of non-compliance with the provisions of Order I Rule 8 CPC. The relevant para of the judgment is extracted hereunder:

“20. The next plea which was raised and argued

vehemently by the learned senior counsel appearing for the appellant was that the suit was bad for non-compliance of the provisions of Order I Rule 8 of the CPC. The said submission is also found to be without any merit as apart from being a representative suit, the suit was filed by an aggrieved person whose right to use public street of 10 feet width was prejudicially affected. Since affected person himself has filed a suit, therefore, the suit cannot be dismissed on the ground of alleged non-compliance of the provisions of Order I Rule 8 of the CPC.

21. In this connection, we may appropriately refer to a judgment of the Supreme in Kalyan Singh, London Trained Cutter, Johri Bazar, Jaipur Vs. Smt. Chhoti and Ors. reported in MANU/SC/0258/1989 : AIR 1990 SC 396. In paragraph 13 of the said judgment, this Court has held that suit could be instituted by representative of a particular community but that by itself was not sufficient to constitute the suit as representative suit inasmuch as for a representative suit, the permission of Court under Order I Rule 8 of the CPC is mandatory.

22. In paragraph 14 of the said judgment, it was also held that any member of a community may successfully bring a suit to assert his right in the community property or for protecting such property by seeking removal of encroachment therefrom and that in such a suit he need not comply with the requirements of Order I Rule 8 CPC. It was further held in the said case that the suit against alleged trespass even if it was not a representative suit on behalf of the community could be a suit of this category.

23. In that view of the matter and in the light of the aforesaid legal position laid down by this Court, we hold that the suit filed by the

plaintiff/respondent No. 1 was maintainable.”

Considering the aforesaid ratio, and from the holistic reading of the whole plaint, it is clear that apart from espousing the cause of the community, the appellants were claiming themselves to have been individually affected and had filed the suit in that individual capacity as members of the Respondent Society.

57. The aforesaid judgment was relied upon by the High Court of Gujarat in ***Mahulbhai Bipinbhai Tamboli and Ors. Vs. Akshaybhai Ramanbhai Thakkar and Ors.*** reported in **2019 SCC OnLine Guj 6902**, wherein it was held that though the permission of the Court under Order I Rule 8 CPC is mandatory and an application has to be moved by the party in that regard, but omission to obtain such leave cannot serve as a reason for rejecting the plaint itself. The same stand has been taken by the High Court of Patna in ***Ravindra Prasad Gupta & Ors. Vs. Bageshwari Prasada & Ors.*** reported in **2020 SCC OnLine Pat 1481**.

58. The appellants have specifically averred in Para 4 of their plaint that they have instituted the suit being the members of the Respondent no. 1 society as also on behalf of the Jain community as whole. Para 4 of the plaint is extracted hereunder:

“That the present suit has been filed by the Plaintiffs, besides being members of defendant no.1 society, in their representative capacity of the Jain community as a whole so as to reinstate public character and to establish a complete democratic setup in defendant no.1 society and to maintain its all India stature on the basis of its only valid, legal constitution i.e. original Memorandum of Association and Rule & Regulation registered alongwith registration of society, in the year of 1974 (hereinafter, respectively referred to as MOA of 1974 and R&R 1974)...”

(emphasis supplied)

59. A further perusal of the plaint itself, specially paras 7 and 8, shows that the appellant/plaintiff no.1 has individual grievances as well in respect of which the suit had been instituted by him. The averments in the plaint to the effect that the plaintiff no.1 had prepared a brief note pointing out the irregularities and suggestions, whereafter a committee was also formed by the Governing Council to deal with the suggested amendments confirms that the suit was filed in the capacity of being a member of the Respondent no.1 society too and not purely in a representative capacity. Paras 7 & 8 are extracted hereunder:-

“7. That as per the requirement, based upon the MOA of 1979 and R&R of 1992, the Plaintiff No.1 prepared a brief note dated 19.07.2014 and circulated the same vide email, pointing out not only the aforesaid irregularities and protest made against the illegal, arbitrary and unconstitutional clauses of the amended MOA of 1979 and R&R of 1992, but also the manner adopted to amend the same without following the procedure prescribed in original MOA and R&R of 1974 and referred few suggestions for the improvement in the working of BMMS.

8. That thereafter a Governing Council meeting of BMMS was convened on 29.07.2014. In view of above of aforesaid brief notes dated 19.07.2014 pointing out irregularities and suggestions submitted by the Plaintiff No.1, in the said meeting a committee for “amendment in the Constitution” was constituted with Plaintiff No.1 as one of its member. The Plaintiff No.1 being member of the said committee, thereafter demanded the records of BMMS i.e. resolutions, documents related to previous amendments of MOA and R&R, list of members and their membership, payment

subscription records etc. In turn, though few records were provided to the Plaintiff No.1, however despite specific demand, the society failed to provide the original Constitution of Society of 1974, the resolutions and related records of passing amendments of MOA in 1979 and R&R in 1992 and complete membership records of BMMS etc.”

60. Though the law point is crystal clear with respect to the mandatory character of the provisions of Order I Rule 8, CPC in that, to enable a person to file a suit in a representative capacity for and on behalf of numerous persons where they have the same interest, the party must seek the leave of the Court to bring such a suit in representative capacity so as to bind the non-impleaded parties, however, the non-compliance of Order I Rule 8 CPC, does not entail dismissal of the suit itself. The suit may continue in the individual capacity against the members of the society impleaded by the appellants in the suit, provided the averments to that effect are pleaded in the plaint.

61. The judgment of the High Court of Kerala in the case of ***Entire Members of ‘Maniyani’ Community of Karivellur Village Vs. Periyadan Narayanan Nair & Others*** reported in **2021 SCC OnLine Ker 2397** is very clear on this point that even if permission or direction sought under Order I Rule 8 CPC is declined, still the suit can be proceeded with, the difference being, then the decree passed in such a suit will bind only the parties to the suit and it will not obtain a representative character.

62. Thus, as the appellants/plaintiffs themselves are affected by the

action of the respondents/defendants, the plaint could not have been rejected on the ground of alleged non-compliance of the provisions of Order 1 Rule 8 of the CPC.

63. The judgments relied upon by the learned senior counsel are those where the party has not obtained such leave, however, do not consider a situation where the plaintiffs to a suit, have instituted the same, also in their individual capacity.

64. Thus, in view of the above facts and the law as laid down by the Supreme Court and other High Courts, this Court is of the view that there is no impediment in the Appellants/plaintiffs maintaining the suit themselves without recourse to Order I Rule 8 of the Code of Civil Procedure, 1908, though the result thereof, would be binding between the parties to such suit alone.

65. Accordingly, this Court deems it fit to partly set aside the impugned judgment and decree dated 15.12.2018 of the Trial Court only to the extent of dismissal of the suit, however, not interfering with the rejection of the application under Order I Rule 8, CPC, 1908.

66. As a result, Civil Suit No. 58528/2016 is revived and restored back to its original number before the Trial Court for disposal in accordance with law.

67. This court clarifies that it has not expressed any opinion on the merits of the suit. All issues which may arise during the course of the trial shall be decided uninfluenced by any of the observations made by this Court.

68. The appeal is partly allowed as above and stands disposed of.

Pending applications also stand disposed of.

TUSHAR RAO GEDELA, J.

MAY 15, 2023/rl

