
(1993) 08 OHC CK 0024
In the Orissa High Court
Case No : Civil Revision No. 89 of 1990

Balaram Palai and Others

APPELLANT

Vs

Collector, Puri and Others

RESPONDENT

Date of Decision : 04-08-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 1(2), Order 8 Rule 1(3), Order 8 Rule 1(5)

Citation : AIR 1994 Ori 21

Hon'ble Judges : B.L. Hansaria, C.J.; R.K. Patra, J

Bench : Division Bench

Advocate : P.K. Misra, N.C. Pati, A.K. Nanda, B.K. Nayak and B. Sahoo, for the Appellant; A.K. Mohapatra and P.K. Mohapatra, for the Respondent

Judgement

Hansaria, C.J.—When this revision came up for hearing before a learned single Judge, he desired for the reasons incorporated in his order dated 28-4-1993 that the point involved should be authoritatively settled by a larger Bench. It is because of this order that the matter has been placed before this Bench.

2. The point involved is whether, while dealing with an application falling within the purview of Sub-rule (3) of Rule 8 of Order 1 of the Civil P. C., 1908, the party concerned must satisfy the court before his prayer for impleading him as a party in the suit is allowed that the same is necessary because the person who has filed the representative suit would act prejudicially to his interest. This was the view taken earlier by a learned single Judge in Chantamani v. Kasinath 47 (1979) CLT 365 : AIR 1979 NOC 93 (Ori). The learned Judge before whom this revision came, however, thought differently because, according to him, that would be the relevant consideration when an application is made under Sub-rule (5), and not Sub-rule (3) for which the discretion conferred should be exercised in favour of the concerned person if his application is not mala fide and does not tend to abuse the process of law.

3. To answer the reference, let us note Rule 8 in its entirety :--

"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 plaintiffs 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 plaintiffs 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."

4. It may be pointed out that the above is the position of Rule 8 after its amendment by the Court of Civil Procedure (Amendment) Act, 1976. To answer the reference, we should note the unamended Rule 8 also which was as below :--

"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, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so

interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from 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.

(2) 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."

It deserves notice that the language of new Sub-rule (3) is identical to that of old Sub-rule (2).

5. Shri Misrasubmits that though in Sub-rules (3) and (5) of amended Rule 8 different language finds place, the same has made no difference in law as it was accepted to be before R- 8 was amended in 1976. According to the learned counsel, Sub-rule (5) is merely declaratory of the law as it had stood earlier, and nothing follows from the difference in the language in these two sub-rules, which is the main reason given by the learned Judge for his not agreeing with the view taken in Chinta-mani's case. According to Shri Mohapatra, however, the requirement which has to be satisfied while invoking the power of the Court conferred by Sub-rule (5) cannot be read if an application be under Sub-rule (3).

6. In Chintamani's case, the learned single Judge examined the matter after Rule 8 had been amended. But Shri Misra brings to our notice two decisions of two other High Courts of the country (which have been noted in the order of reference) which dealt with this aspect under the unamended provision -- the same being Sub-rule (2). First of these was rendered by a learned single Judge of the Bombay High Court in Vassonji Tricumji v. Esmailbhai Shivji ILR 1910 Bom 420 (though the learned single Judge in his order of reference has mentioned about the decision in Haji Umar Abdul Rahiman v. Gustadji Muncherji Cooper ILR 1910 Bom 411, in this connection, that decision is on a different point and the real case is that of Vassonji). What was opined in Vassonji's case was that when a suit has been filed on behalf of a body of persons and an individual member of that body applies to be made a party, he must show that his interest would be prejudicially affected if he is not allowed to come in. To put it differently, he must show that the conduct of the suit is not in proper hands or that action prejudicial to his interest is being taken by those who purport to represent him. It may be pointed out that Vassonji was a case in which an application to be impleaded as a party had been filed, not after the suit had proceeded (which would bring the case within the fold of amended Sub-rule (5)) but at the threshold of the filing of the suit.

7. A Division Bench of Calcutta High Court adopted the same view in T. G. Jog v. Muir Mills Ltd., ILR 1953 Cal 171, in which reference was made to the decision in Vassonji. While agreeing with the view taken in Vassonji, the Bench stated after a suit has been properly instituted following grant of necessary leave as

contemplated by Sub-rule (1), if a person wants to come in and join as a plaintiff, though the court is not powerless in the matter, the power could be exercised only on the court being satisfied that the suit is not being properly conducted and the interest of the person who wants to be impleaded is not being properly safeguarded by the plaintiff on record. This view was taken because if the law were to be that all persons interested in the result of the suit would be entitled as of right to come in and join as co-plaintiffs, the very object underlying the rule, namely, allowing one or more persons to sue in representative capacity would be frustrated. As to the object of a representative suit, it was stated that it is a rule of convenience inasmuch as a large number of persons who have the same interest in the subject-matter are allowed to be represented by some. It may be pointed out that the case before the Calcutta High Court was also in which the prayer for impletion was made not after the suit had progressed but at the beginning of the trial itself.

8. Shri Misra submits that despite "ransacking" of his office, he could not lay his hands on any other decision which he would like to bring to our notice, except *Conybeares v. Lowis*, 48 LT 527, which is a decision of 1883 by an English Court dealing with the question as to when representative action should be allowed. The view expressed was that it was not usual in such an action to allow a person fairly represented to attend subsequent proceedings, unless such person was joined as a party to the action which may not be allowed as a matter of right.

9. Shri Mohapatra in his turn brings to our notice what was observed by the Supreme Court in *The Chairman, Tamil Nadu Housing Board, Madras Vs. T.N. Ganapathy*, about the Explanation to Rule 8 which deals with the question of test to be applied for determining whether the persons who sue have the same interest, by stating that it would not be necessary to establish that such persons have the same cause of action as the person on whose behalf they sue. Relying on this Explanation it is submitted by Shri Mohapatra that for the petition of impletion filed in the present case to be allowed, it was not necessary to establish that they had the same cause of action as those of the persons who had filed the suit. This aspect has no relevance for the determination of the point under reference, because, whether in the present case the application was rightly allowed or not is not the point for our determination. It would be for the learned single Judge to decide the merits of the petition. In doing so, it is apparent that facts of the case would be borne in mind. We are really at the legal question whether for invocation of Sub-rule (3) it has to be established that the persons who had filed the representative suit were acting prejudicially to the interest of the applicant.

10. No doubt what the learned single Judge has stated in the order of reference regarding the difference in the language between Sub-rules (3) and (5) is a fact, we are of the view that despite this, a person invoking the power under Sub-rule (3) shall have to establish to the satisfaction of the court that the persons already on record are acting prejudicially to his interest. We have said so,

because this follows from the very concept of the representative suit which aspect has been, highlighted in the aforesaid Bench decision of the Calcutta High Court. Any other view would rob the representative suit of its utility and significance. Shri Mohapatra submits that the purpose of public advertisement mentioned in Sub-rule (2) is to solicit the views of others likely to be affected and if in pursuance of such an advertisement a person comes forward to say that he should be impleaded as a co-plaintiff, his prayer ought to be allowed without any condition being imposed as otherwise, according to the learned counsel, the purpose behind public advertisement would get frustrated. We have not felt persuaded to agree with this submission, as, if in pursuance of the public advertisement a very large number of persons come forward to get themselves impleaded, say as defendants, and their prayers shall have to be allowed just because the same had been made, it would cause great hindrance to the progress of the suit. That applies to im-pleading as co-defendant has to apply to join as co-plaintiff.

11. The object of representative suit was stated in *The Chairman, Tamil Nadu Housing Board, Madras Vs. T.N. Ganapathy*, as avoidance of multiplicity of litigation, which subserves public interest. A provision like Rule 8 had to be incorporated in the Code to facilitate the decision of questions in which a large number of persons are interested without recourse to the ordinary procedure. The provision must, therefore, receive an interpretation which will subserve the object of its enactment. Now, if a person praying for impleading himself in a representative suit has to be allowed to be before the court almost as a matter of right, the object of the provision would be adversely affected because the special procedure would then lose its significance and the ordinary procedure would start operating.

12. As in the order of reference the learned Judge has expressed his reservation about the view taken in *Chintamani's* case because of what has been provided in Sub-rule (5), may we state that the field of operation of Sub-rule (5) is different inasmuch as that deals with substitution of a person, which is different from addition of a person as a party along with the one already on record dealt by Sub-rule (3). It is because of this that Sub-rule (5) states that if the person already on record is not proceeding with the suit with "due diligence", the prayer would be allowed. This situation would apparently arise only after the suit has proceeded. The role and requirement of Sub-rule (5) are, therefore, different from those of Sub-rule (3).

13. Having given our considered thought to the point under reference, we are of the view that what was opined by the learned single Judge in *Chintamani's* case merits acceptance, because of which a person seeking to invoke the power of the court under Sub-rule (3), which power has been accepted by the learned Judge making the present reference also as discretionary, has to satisfy the court that the person on record is acting prejudicially to the applicant because of which he ought to be brought on record to protect his interest. As the power under Sub-

rule (3) is discretionary, we would however like to observe that the circumstance under which the discretionary power can be exercised cannot be put in a strait-jacket, and so, if in a given case the court were to be satisfied that even without proving that the person on record is acting prejudicially to the applicant his prayer to be impleaded deserves to be allowed, it would be open for it to do so, but the court shall have to be satisfied that a reason akin to prejudicial acting by the person on record exists. To put it differently, the prayer would not be allowed merely on asking. We further state that merely because the application is not mala fide or does not tend to abuse the process of law, the same would not be required to be allowed unless the aforesaid requirement exists.

14. The reference is answered accordingly. The record may be put up before the learned single Judge for disposal of the revision.

R.K. Patra, J.

15. I agree.