
(2011) 07 AHC CK 0359
In the Allahabad High Court
Case No : Writ Petition No. 3869 of 2011

Chetram and others

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 06-07-2011

Acts Referred:

Allahabad High Court Rules, 1952 — Rule 4
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(2), Order 27 Rule 1, Order 27 Rule 3, Order 7 Rule 1, 79
Constitution of India, 1950 — Article 154, 162, 164(2), 226, 300
Uttar Pradesh Municipal Corporation Act, 1959 — Section 4(1), 6
Uttar Pradesh Urban Planning and Development Act, 1973 — Section 17, 17(1), 17(4), 2, 3

Citation : (2011) 114 RD 536

Hon'ble Judges : Ritu Raj Awasthi, J; Pradeep Kant, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Pradeep Kant, J.—This writ petition regarding the Ujariayon Housing Scheme, Part IV challenges sections 2, 3(aa), 17, 17(1) and 17(4) of the U.P. Urban Planning and Development Act, 1973 of being ultra vires the Constitution. The petitioner also prays for the following reliefs:

(b) a suitable writ, order or direction commanding opposite party No. 2 to repeal or deem repealed the U.P. Urban Planning and Development Act, 1973 in full or in part to bring it in conformity with the Constitution 74th Amendment Act by reviving the suspended provisions of the U.P. Municipal Corporation Act, 1959.

(c) a suitable writ, order or direction quashing gazette notification issued u/s 4(1) of the Act dated 19.4.2010 and declaration u/s 6 of the Act dated 4.1.2011 contained in Annexure Nos. 3 and 4 respectively.

(d) a suitable writ, order or direction quashing the allotments made by opp. party No. 5 even before completion of acquisition proceedings for "the scheme"

after summoning the original from opposite parties Nos. 2 to 5.

(e) a suitable writ, order or direction commanding the opposite parties Nos. 2 to 5 not to take any further action on the basis of impugned Annexure Nos. 3 & 4.

(f) a suitable writ, order or direction commanding the opposite parties Nos. 2 to 5 not to interfere with the possession of the petitioner in respect of the land in dispute.

2. On the hearing of the writ petition, preliminary objection was raised by the Additional Chief Standing Counsel for the State of U.P. Sri Krishna Chandra with regard to the maintainability of the present petition on the ground that the petitioners have not impleaded the Government through the Secretary of the Department/Ministry concerned of the appropriate Governments, and therefore, the petition is liable to be dismissed unless the petitioners make necessary amendment in the petition and implead opposite party Nos. 1 and 2, namely, the Union of India and the State of U.P. through the concerned Secretaries.

3. The petitioners, in the course of arguments moved an application for amendment, by means of which they impleaded the Principal Secretary, Avas Evam Shahri Niyojan, Anubhag-3, Civil Secretariat, Lucknow as opposite party No. 9 and Special Secretary, Avas Evam Shahri Niyojan, Anubhag-3 Civil Secretariat, Lucknow as opposite party No. 10, which stands allowed. However, with the consent of the parties' Counsel, we proceed to decide the preliminary question of maintainability of the petition on the ground of nonjoinder/misjoinder of parties by not impleading the appropriate Government through its limb.

4. The arguments of learned Counsel of the petitioners Sri Qamar Ahmed in response to the aforesaid objection in nutshell is that there is no requirement under law, much less the Constitution to implead Union of India or the State through the Secretary of the Ministry/Department concerned. He submitted that the opposite party Nos. 1 and 2 have been impleaded in accordance with the constitutional provision, precisely Article 300(1) which specifically provides for the manner in which the Government may sue or be sued in any suit or proceedings brought by or against the Government. Consequently, his further submission remained that this Court cannot issue any direction for impleading the opposite party Nos. 1 and 2 through the Secretary of the concerned Ministry/Department of the appropriate Government. In the alternative, he also submitted that the executive powers of the State are concentrated in the Council of Ministers by virtue of Article 75(3) read with Article 74 in the case of the Central Government and also correspondingly Article 164(2) read with Article 162 in the case of State Government and therefore, there lies no infirmity in suing the appropriate Government by its name. To buttress his alternative argument, he placed reliance on the decisions of the Supreme Court in *Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others*, *Bejoy Lakshmi Cotton Mills Ltd. Vs. State of West Bengal and Others*, *U.N.A. Rao Vs. Smt. Indira Gandhi*, and *Haridwar Singh Vs. Bagun Sumbrui and Others*,

5. At the outset, the learned Additional Advocate General Sri J.N. Mathur very fairly submitted that considering the constitutional provisions and particularly Article 300 of the Constitution strictly, the writ petition ought not to be dismissed on the ground that the petitioners have not impleaded opposite party Nos. 1 and 2 through the Department/Ministry concerned, although he placed his concern stating that in the absence of proper description of the Government, it becomes difficult for the Government to identify the department/ministry to which the matter relates to and provide speedy and due assistance to the Court. It is even difficult for the Standing Counsel or the Government Advocate to track the Department/Ministry concerned to seek instructions in the matter, where notice is accepted by them under Rule 4 of Chapter XXII, of Allahabad High Court Rules, 1952, that prescribes minimum a day's time before the motion is moved in the Court. Thus, it saves the Government from zigzag procedure in identifying the department/ministry. He therefore submitted that purposive and meaningful interpretation should be meted out of the constitutional provisions to hold that the litigants should mandatorily sue the Government through the Secretary of the Department/Ministry concerned, which is the prevailing conventional practice. To buttress his submissions, he placed reliance on the cases of *State of Punjab Vs. Tripta Rani and another*, and *State of U.P. through Competent Authority and another v. Hari Ram and another*. 2005 (60) ALR 6525

6. Thus, following questions arise for consideration before us:

1. Whether the omission to sue the Government through the Secretary of the Ministry/Department concerned, constitutes non-joinder of necessary party within the meaning of Article 300 of the Constitution?

2. In the event, the above-mentioned question is answered in the negative, can this Court issue any direction to the petitioners to implead opposite party Nos. 1 and 2 through the Secretary of the Ministry/Department concerned?

Article 300(1) of the Constitution, as interpreted by the Apex Court in *The State of Rajasthan Vs. Mst. Vidhyawati and Another*, is in three parts. (1) The first part provides for the form and cause-title in a suit and say that the Government of India or the Government of a State, as the case may be, may sue or be sued by the name of the Union of India or that of the State respectively; (2) that a State may sue or be sued in relation to its affairs in like cases as the corresponding provinces or the corresponding Indian States might have sued or been sued if the Constitution had not been enacted; and (3) that the second part is subject to any provisions which may be made by an Act of the legislature of the State concerned, in due exercise of its legislative functions, in pursuance of powers conferred by the Constitution. Thus, the first part deals only with the nomenclature of parties. Thus, we are concerned only with the first part in the present matter viz. the nomenclature of the parties in cause-title in suits and proceedings by or against the Government.

7. On a bare reading of the first part of Article 300(1), it emerges that it only

requires that Government of India may sue or be sued as Union of India and that the Government of the State by the name of the State. It requires nothing more.

8. In the case of Tripta Rani (*supra*) the learned Single Judge was called on to set aside an *ex parte* decree against the State of the trial Court. Admittedly therein the matter related to the Health Department and the Department was not furnished any details by the plaintiff. While setting aside the *ex-parte* decree the learned single judge did not appreciate the approach of the trial Court on the ground that the State was sued through the Chief Secretary and not the Secretary of the Health Department. The learned single judge observed that when the matter related to Health Department of the State, the State should have been served through the Secretary, Health Department and not the Chief Secretary as contemplated in section 79 of the Code of Civil Procedure.

9. At another instance in State of U.P. Through Competent Authority (*supra*) wherein the State of U.P. was described as :

1. State of U.P through Competent Authority U.L.C. Varanasi
2. Competent Authority, Urban Land Ceiling, Varanasi.

10. This Court expressed concern over the manner in which the petition had been filed. After considering the provisions of Chapter XIII of the L.R. Manual and sections 79 and 80 alongwith Order XXVII Rule 1 of the Code of the Civil Procedure and also Article 154 of the Constitution of India observed that "it is a matter of common knowledge that the State of U.P., for the purposes of filing writ petition under Article 226 of the Constitution should sue or be sued through the Secretary of the Concerned Department." The Court held that the impleadment of State of U.P. through competent authority Urban Land Ceiling was questionable about the maintainability of the writ petition and observed that the State should take due care in future that the petitions are filed in accordance with law.

11. Sri Qamar Ahmad questioned the dictum of the aforesaid judgment on the ground that it is *per incuriam* as the Court did not consider Article 300(1) and also the law as propounded in *Chief Conservator of Forests, Govt. of A.P. v. Collector*, 2003 (51) ALR 124 (SC) : 2003 (5) AIC 513 (SC) at page 129 that:

In a *lis* dealing with the property of a State, there can be no dispute that the State is the necessary party and should be impleaded as provided in Article 300 of the Constitution and section 79 CPC viz. in the name of the State/Union of India, as the case may be, lest the suit will be bad for nonjoinder of the necessary party.

(Emphasis supplied)

12. The Gauwahati High Court in *Bulu Mazumdar v. Department of Post Offices*, (2007) 58 AIC 799 (Gau) has laid down that where a suit was instituted in the name of Department of Post Offices, it was held to have not properly been

instituted. The learned single Judge observed that the suit was not filed by the Secretary of the Department of Post, but was filed by the Department of Post Offices represented by the constituted attorney and Superintendent of Post Offices. Neither the Union of India nor the Secretary to the Government of India, Postal Department were made party to the suit. The suit was thus, hit by section 79 read with Article 300 of the Constitution, which requires filing of the suit by the Union of India. The Court held that the description of the plaintiff therefore, not mis-description of Union of India and thus, the suit in question was not maintainable.

13. Recourse may be taken to section 79 read with Order XXVII Rule 3 of the CPC to understand Article 300. It can safely be construed that section 79 and Article 300 are mutatis mutandis. Section 79 also does not go beyond the fact that the Government of India may sue or be sued as Union of India and correspondingly the State by the name of the State. However, section 79 deals with only suits. It cannot be questioned that a suit, shall in all circumstances be only instituted by the presentation of a plaint. Order VII of the CPC relates to the plaint. In Rule 1 of Order VII wherein particulars to be contained in plaint are provided, it may be seen that it is necessary that every plaint must contain the name, description and place of residence of the plaintiff and the defendant and where the plaint is not in accordance with Order VII it may be returned to bring it in conformity with Order VII or even rejected where the plaintiff fails to comply with the directions of the Court. However, one may learn from Order XXVII which deals with suits by or against the Government or Public Officers in their official capacity and particularly Rule 3 concerning plaints in suits by or against the Government which expressly provides that instead of inserting in the plaint the name and description and the place of residence of plaintiff and defendant, it shall be sufficient to insert the appropriate name as provided in section 79. One may notice that this provision expressly ousts the mandatory requirement of inserting the description of the parties in the plaint. Instead it provides that in suits by or against the Government, it would be sufficient to mention the appropriate name as provided in section 79. Now the question arises as to what is the appropriate name u/s 79.

14. Section 79 clearly provides as stated above also that in case of the Government of India, the authority to be named would be Union of India and in the case of a State the name of the State. Similar is the case with Article 300. The Constitution does not make any departure from the position settled by the provisions of the Civil Procedure Code. It is this aspect which was overlooked by this Court in State of U.P. Through Competent Authority (supra) which proceeded on the assumption that it is "common knowledge" to implead the State through the Secretary of the Ministry/Department concerned, without considering the provision of Article 300 of the Constitution. Thus, to this extent we agree with the argument of the learned Counsel for the petitioner Sri Qamar Ahmad that the aforesaid judgment of this Court is per incuriam, since, it was given without taking into consideration Article 300 of the Constitution. An order delivered

without reference to the relevant constitutional provisions is per incuriam and not binding (see *Siddharam Satlingappa Mhetre Vs. State of Maharashtra and Others*, see also *Municipal Corporation of Delhi Vs. Gurnam Kaur, N. Bhargavan Pillai (Dead) by Lrs. and Another Vs. State of Kerala*, and *Union of India (UOI) and Another Vs. Manik Lal Banerjee*,

15. The Supreme Court has also clearly stated in *Chief Conservator of Forest (supra)* that in a suit by or against the Government the authority to be named shall be the Union of India or in the name of the State as the case may be. It makes one thing absolutely clear that it is not the requirement under Article 300 of the Constitution to implead the Government through the Secretary of the Department/Ministry concerned. Thus, we have no hesitation in coming to the conclusion that there is no necessity to implead opposite party Nos. 1 and 2 through the Secretary of the Department/Ministry concerned and therefore, it cannot be construed that the present matter is a case of non-joinder of necessary parties since Union of India and State of U.P. have been impleaded by their prescribed names. The plea, thus, raised by Sri Qamar Ahmad is upheld.

16. On the second question of whether we can give any direction to the petitioners to implead the opposite party Nos. 1 and 2 through the Department/Ministry concerned and thus, whether we can give purposive construction to Article 300 to request the petitioners to make necessary amendment in the writ petition.

17. It is a settled principle that nonjoinder of "necessary party" may lead to dismissal of the suits, writ proceedings or any other proceedings. However, if nonjoinder is in the case of a "proper party", it would not be fatal to the case. In the present petition, both the Central Government and the State Government have been impleaded as opposite party Nos. 1 and 2 and therefore, as concluded above, it is certainly not a case of non-joinder of necessary parties. However, taking into account and considering the development of time and the dynamic phase through which the modern Government is subject to, it may be noticed that the modern State is not confined to the traditional functions of safety and security but is efficaciously striving for its development into a welfare state. Thus, there are variety of departments/ministries functioning as the limb of the Government in providing support and welfare to the citizens. In the present situation, it cannot be said that the plea of Sri Jai Deep Narain Mathur, learned Additional Advocate General, is without any force and not meaningful. For there is no reason to doubt the prevailing zig-zag situation that occurs where the State is not impleaded in a proper manner i.e. through the Secretary of the Department/Ministry concerned. It can be understood that it becomes extremely difficult for the Government Counsel and even the Government to track the particular department to which the suit or proceeding concern and take instructions expeditiously for assisting the Court.

18. The alternative argument of Sri Qamar Ahmad that the power of the executive are concentrated in the Council of Minister and therefore, there is no

infirmity in impleading the Government only by its name and not through the Secretary of the Department/Ministry concerned, is impractical and meaningless. There is no question that the Cabinet concentrates the executive power within itself but it may be understood that it is practicably not possible for the Council of Ministers to engage in day-to-day litigations concerning the Government and spend time and labour in tracing the Department/Ministry to which the matter relates to.

19. In *Anil Kumar Singh v. Shivnath Mishra*, 1995 RD 90 (SC) : 1995 (26) ALR (SC) (Sum.) the apex Court opined that by operation of Order I Rule 10(2) the Court may have the power to strike out the name of the parties improperly joined or add a party either on an application or without application of either party in its own discretion, but the condition precedent is that the Court must be satisfied that the presence of the party to be added, would be necessary, in order to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in a suit. To bring a person as party-defendant is not a substantive right but one of procedure and the Court has discretion in its proper exercise. The object of the Rule is to bring on record all the persons who are parties to the dispute relating to the subject matter so that the dispute may be determined in their presence, at the same time without any protraction, in convenience, and to avoid multiplicity of proceedings. A person may be added as a defendant to the suit though no relief may be claimed against him/her provided his/her presence is necessary for a complete and final decision on the question involved in the suit. Such a person is only a "proper party" as distinguished from a "necessary party" (see also *Kasturi v. Iyyamperumal*. 2005 (60) ALR 487 (SC) : 2005 (31) AIC 144 (SC))

20. The principle was reiterated by the Apex Court in *Mumbai International Airport (P) Ltd. v. Regency Convention Center and Hotel (P) Ltd.*, 2010 (82) ALR 229 (SC) : 2010 (93) AIC 173 (SC) : 2010 (111) RD 189 (SC) wherein in paragraph 22 the Apex Court laid down that Order I Rule 10(2) of the CPC is not about the right of a non-party to be impleaded as a party, but about the judicial discretion of the Court to strike out or add parties at any stage of a proceeding. In exercising its judicial discretion under the said Rule, the Court will of course act according to reason and fair play and not to whims and caprice.

21. Thus, it can safely be inferred from the scheme of Order 1 Rule 10(2) of the CPC and also the aforesaid decisions of the apex Court that there is no bar on this Court to issue direction for impleading proper parties, or to require the better description of the parties in the suit or other proceedings, including writ-proceedings. Applying the principle of Order I Rule 10(2) of the CPC this Court can issue directions for adding the "necessary" as well as "proper party". This, apart the multifarious reliefs which have been claimed and prayed for, in the present writ petition, require an answer from the concerned Departments of the Government and therefore, also it would be expedient to implead the Government through the Secretary of the concerned Departments for effective

and speedy adjudication.

22. We would further like to observe and find it appropriate, that in writ petitions, preferred against the Government of India or the State Government, they be impleaded through the Secretary of the concerned Departments, for the reasons aforesaid.

23. We are therefore, of the opinion, that directions be given to the petitioners to amend their writ petition and implead the opposite party Nos. 1 and 2 through the Secretary of the Ministry /Department concerned within three weeks of the receipt of the certified copy of this order. We order accordingly.

24. The preliminary objection is accordingly disposed of.