

(1944) 12 BOM CK 0014
In the Bombay High Court
Case No : O.C.J. Suit No. 980 of 1941

Harischandra Khunderrao Kothare

APPELLANT

Vs

A.B. Craig

RESPONDENT

Date of Decision : 12-12-1944

Acts Referred:

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

Citation : AIR 1945 Bom 465 : (1945) 47 BOMLR 465

Hon'ble Judges : Kania, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Kania, J.—This suit is filed by the plaintiff, who is a solicitor, for damages for breach of an alleged contract of employment by the G.I.P. Railway Employees Mutual Benefit Fund Society. The plaintiff alleges that the society had agreed to employ him on the terms mentioned in para. 4 of the plaint. That society is not registered. Two persons are made party defendants and are sued on behalf of themselves and all other members of the said society. When the suit was filed leave was obtained under Order I, Rule 8, Civil Procedure Code, 1908. At that time the prayers were only for a decree against the defendants for a sum of Rs. 90,000 and for costs. The defendants thereafter took out a summons to revoke the leave granted ex parte. That summons came for argument before Chagla J. The judgment on that summons is reported in (1942) 44 Born. L.R. 251. The learned Judge considered that on the averments in the plaint the prayer was for a decree against all individuals of the society personally, and such relief was not permitted by law. The ex parte leave originally granted was therefore set aside. That judgment was delivered on November 11, 1941. On November 25, 1941, the plaintiff took out a summons for amendment of the plaint and for leave under Order I, Rule 8, to sue the defendants, their representative capacity, and for leave under Clause 12 of the Letters Patent. That summons was argued at length before Chagla J., who by his order dated December 2, 1941, allowed the

amendment and granted leave under Order I, Rule 8. Pursuant to that order the plaint has been amended and in para. 2 of the plaint it is stated:

the plaintiff craves leave to refer to the rules of the said society when produced. There are funds belonging to the said society in which all the members of the said society are interested as provided by the rules of the said society.

The prayers were also amended. The prayers as amended are for a declaration that the members of the said society are liable to pay and the plaintiff is entitled to receive from them the amount claimed as damages ; that it may be declared that the amount mentioned in the above prayer is payable to the plaintiff out of the funds of the society and that the defendants or defendant No. 2 as the trustee of the society may be ordered to pay to the plaintiff the aforesaid sum out of the funds of the society. In the plaint even before the amendment it was stated that defendant No. 2 was a trustee of the society.

2. The defendants have filed a written statement raising various defences. It is alleged that between June 1, 1941, and November 26, 1941, 303 new members who were in no way concerned with the alleged wrongful dismissal of the plaintiff and with this suit became members and became entitled to the funds. It is further stated that during the same period 768 members ceased to be members of the society, and were paid the sums respectively payable to them out of the funds of the society. It was, therefore, contended that the new members had no common interest with the named defendants in the plaintiff's claim and they may have separate defences which were distinct in themselves. It was contended that the order made under Order I, Rule 8, should be revoked. In my opinion it is not open to the defendants to raise that plea. This is a contention about the validity of the order and should have been argued when Chagla J. made the order after hearing both parties. If they were dissatisfied with that order, which was not *ex parte*, their remedy was to appeal. In my opinion, it is not within the province of this Court at the hearing now to set aside the order on the ground that it was wrong in law.

3. The first contention urged on behalf of the defendants is contained in issue No. 1, viz. whether the suit as framed is maintainable. The basis of this argument must be the assumption, as true, of the facts mentioned in the plaint. The contention is that a suit cannot lie against the defendants in their representative capacity when the relief asked is the payment of a sum of money. It was argued that the procedure pertaining to representative suits is inapplicable to actions on debts, or money claims, or to liability under contracts or in tort. In support of this contention Mr. Manecksha relied on several authorities which I shall presently consider. In order to appreciate the effect of the various decisions cited on behalf of the defendants it is necessary to bear in mind the material facts alleged by the plaintiff in his plaint. They are (1) that the society is unregistered ; (2) that defendant No. 2 is a trustee of the society; (3) that there are funds belonging to the society in which all the members of the society are interested as provided in the rules of the society ; (4) that in addition to the

declaration, the prayer is for an order of payment against the defendants in their representative capacity out of the funds of the society. A copy of the rules has been produced and it can be seen that the society is of non-official character and is not subject to any control by the G.I.P. Railway administration as regards the disposal of its funds except to the extent provided under the rules. Rule 22 states that there shall be a trustee of the society, who shall be a member of the society stationed in Bombay. Then follow the provision for his election, his temporary absence, and appointment of someone else under certain circumstances. There is no provision throughout the rules for vesting any property of the society in the trustee. Rule 22(b) provided that the bankers of the society shall be the National Bank of India and or the Imperial Bank of India. It then runs as follows:

All money belonging to or due to the society shall be paid into one of such banks and the account of the society with such bank or banks shall be operated upon by the manager and the trustee for the time being appointed under sub-clause (a) hereof.

4. Rule 22(d) provides as follows:

All investments shall be made and placed in the name of any banker of the society for the time being or in the name of the nominees of such bank and the securities representing such investments retained by such bank on behalf of the society. Such bank or its nominees shall in regard to the holding and disposal thereof and of the interest and income therefrom from time to time act on the joint instructions in writing of the General Manager for the time being of the G.I.P. Railway, the Manager of the Society and the trustee for the time being appointed under Sub-clause (a) hereof.

The other rules are not material for the present discussion. From these facts it is therefore clear that the fund of the society is not vested in any one else. It is vested in the society itself. The investments are held by the banks or the banks' nominees for the society and the manager and the other persons mentioned in Rule 22(d) are only given authority to issue directions to alter investments or for disposal of interest. All throughout, the investments of the society continue to be vested in the society and in no one else.

5. The argument advanced on behalf of the defendants must go to the length of contending that in respect of an unincorporated society, if a contract is made on behalf of the society and it is broken, no damages could be claimed by the plaintiff in a representative suit. The narrower argument is that no such damages could be claimed unless there was a trustee in whom the property was vested and against whom only an order for payment can be made by the Court. As regards the larger argument it is sufficient to say that it is unsound as pointed out in *Taff Vale Railway v. Amalgamated Society of Railway Servants* [1901] A.C. 426. Halsbury L.C. in his peculiar way dealt with the argument very briefly but clearly. He observed (p. 436):

If the Legislature has created a thing which¹ can own property, which can

employ servants, and which can inflict injury, it must be taken, I think, to have impliedly given the power to make it suitable in a Court of law for injuries purposely done by its authority and procurement.

This was to refute the contention that a trade union cannot be sued in its name. Lord Macnaghten in delivering judgment observed (p. 438):

How are these bodies to be sued? I have no doubt whatever that a trade union, whether registered or unregistered, may be sued in a representative action if the persons selected as defendants be persons who, from their position, may be taken clearly to represent the body.

6. Lord Lindley in the course of his judgment observed as follows (p. 443):

I have myself no doubt whatever that if the trade union could not be sued in this case in its registered name, some of its members (namely, its executive committee) could be sued on behalf of themselves and the other members of the society, and an injunction and judgment for damages could be properly obtained in a proper case in an action so framed. Further, it is in my opinion equally plain that if the trustees in whom the property of the society is legally vested were added as parties, an order could be made in the same action for the payment by them out of the funds at the society of all damages and costs for which the plaintiff might obtain judgment against the trade union.

No later decision has limited the operation of this pronouncement in any way.

7. Mr. Manecksha relied on *Walker v. Sur* [1914] 2 K.B. 930. That was an action for debt for professional services rendered by the plaintiff. He sued four named defendants on their own behalf and all other members of an unincorporated society, most of whom resided abroad. He applied for leave to sue the defendants in representative character but that was refused. I may mention at this stage that according to various English decisions, when a suit is filed in a representative capacity and a decree for payment of money is passed, it is construed as a decree not only against the named defendants but also against all persons whom the named defendants are considered to represent. On that principle a representative action can be permitted and a decree passed, against the defendants only when they are personally liable for the debt. If the prayer is not otherwise limited, that would normally be the effect of a decree passed in such a suit. In *Walker v. Sur* all the Judges found difficulty in the literal construction of Order XVI, Rule 9, of the Rules of the Supreme Court, (corresponding to Order I, Rule 8 of the Civil Procedure Code) and emphasized that it was a common law action for debt for professional services rendered by the plaintiff. Kennedy L. J. emphasized the point very clearly in these words (p. 937):

The body is continually changing, and to give a judgment against all the members for debt would be to include the case of an incoming member, who would be made liable though he was not a member at the date of the contract

and in the case of an outgoing member you would have to take the state of things at the date of the judgment.

8. In another passage he said (p. 937):

It is not alleged that there are any such trustees at all, and the claim is to my mind a claim in which it is sought] to make a judgment for payment of money effective against a number of persons who belong to a named society] but who have no common fund vested in trustees who could be joined as representing the society.

Those observations emphasized the point of distinction which existed between that case and the Taff Vale Railway Co.'s case (supra).

The principle of that case is clear. If there is no common fund, and a decree is sought against members of the society personally, in respect of transactions to which they were never parties, it is clear that the Court cannot give such relief to the plaintiff. *Hardie & Lane, Ltd. v. Chiltern* [1928] 1 K.B. 9663 was a case in which an association of motor dealers were sued in their representative capacity by plaintiffs who were members of the association. They had made three members parties on their own behalf and on behalf of other members of the society. The claim was for damages alleged to have been caused to the plaintiffs by the conspiracy and fraud of the defendants, as a result of which the plaintiffs were induced to sell a motorcar at a price below that which was fixed by the association. The defendants were not the trustees of the association which had in fact no trustees. An application for an order under Order XVI, Rule 9, of the Supreme Court Rules was rejected because the defendants had no common interest as such. It was observed that the plaintiffs could not abandon their claim in tort and still pursue their claim for money had and received, which depended upon the alleged tort. It is obvious that this case does not support the contention urged by the defendants. A personal wrong arising out of the conspiracy and fraud of named defendants cannot affect the association as a body or the other members of the association. Still, however, in delivering judgment Fraser J., in considering *Taff Vale Railway Co.'s* case and *Ideal Films Ltd. v. Richards* [1927] 1 K.B. 374 noticed that there was no common fund of the association, of which there were trustees, and the relief asked for was not to pay any money out of the common fund. Sargant L.J. at p. 699 in the Court of Appeal emphasized the point very clearly. He observed:

The action here is not to enforce a right against a fund in which all members of the Motor Trade Association have a common interest, or to declare the interpretation of regulations binding them in common, a class of cases to which Order XVI, Rule 9 is at any rate primarily applicable. It is to enforce strictly a personal liability against the named defendants and the whole of the members of the association.

It was held that on those facts the named defendants could not adequately represent for the purposes of defence the individual members of the association,

because obviously they had defences which were separate from those of the named defendants.

9. In *Barker v. Allanson* [1937 1 K.B. 463] a suit was brought in 1936 by a plaintiff in respect of goods supplied by the plaintiff to different members of a lodge in 1921. The plaintiff asked for an order under Order XVI, Rule 9, against named defendants but that was refused. It was pointed out that the members of the lodge in 1921 were quite different from those who were members in August, 1936 ; that the members who had received the goods and who were personally liable to pay had nothing to do with the members who were sued and some of whom were minors in 1921. The question of limitation was also considered. In the course of judgment it was pointed out that there was no supply of goods to the lodge. The supply was to individual members who had to pay for the same. It was pointed out that the defendants had no fund of the lodge, in any event, in their possession, custody or power which could be lawfully applied in payment of the claim made by the plaintiff. It was pointed out that there was no authority under the rules for the officers of the lodge to supply goods to the members. There were different classes of members with different interests and having different defences to the claim, The affidavit of the plaintiff was relied upon to reject the application, In that affidavit he had expressly stated that he gave credit to the lodge and not to any individual member thereof. Most of the persons to whom goods were supplied were quite unknown to him and he would not have supplied the goods to them but for the order of the lodge. It was pointed out that the lodge not having the authority to pledge the credit of the other members, there can arise no question of common interest and the application must therefore fail.

10. Mr. Manecksha further relied on *Ratnaswami v. Prince of Arcot's Endowments* [1938] Mad. 1094. In that case the plaintiff sued named defendants for a declaration of his title and for possession of certain lands and also prayed for recovery of mesne profits. In the plaint it was stated that in pursuance of a conspiracy the defendants combined in order to deny the plaintiff's title and claimed unlawful possession of the lands. The Court passed the decree for possession but refused to grant the decree for mesne profits, on the ground that each individual defendant, out of the 150 who were sought to be represented by the named defendants, was in occupation only of a very small portion of the total area sued to be recovered and there being no attempt to apportion the liability the decree for one amount for mesne profits could not be passed. The facts there also show that there was no common fund held by all the villagers against whom the representative decree was sought to be obtained. They were all charged with wrongfully taking possession of portions of the plaintiff's lands and having wrongfully, each in his own individual capacity, enjoyed the mesne profits of the land occupied by him. It is clear that in such a case there can be no representative suit in which a money decree can be passed. On the other hand in *Ideal Films Ltd. v. Richards* [1927] 1 K.B. 374 an action was brought against an unregistered association for the hire of articles supplied, and a representative

order was obtained against the committee of the association asking that they should defend the action on behalf of the members. The plaintiff claimed to join as defendants to the action certain persons in whom the property belonging to the association was vested as trustees. In their statement of claim it was made clear that the trustees were only being sued in that capacity and that no claim was being made against them personally for either money, debt or costs of the action. The Court passed the order asked for. The facts of the case clearly show that the funds were alleged to be vested in the trustees and therefore the representative order allowing the claim against the named defendants and trustees for payment of money was permitted.

11. In *Bicoobai v. Hariba Raghuji* I.L.R (1917) Bom. 556 : 19 Bom. L.R. 650 Marten J. (as he then was) had occasion to consider the question of a representative decree in respect of a caste. Certain members of a caste paid money to save the caste's Immovable property from being sold in enforcement of a decree obtained by a third party. Thereafter those members filed a suit to recover what they had been out of pocket and made named persons party defendants and obtained an order under Order I, Rule 8. The learned Judge considered several English cases including *Taff Vale Railway's* case and *Walker v. Sur* and pointed out that in the case before him he had to deal with common property, viz. the Immovable property of the caste in question. He observed that it was not clear in whom that property was actually vested, but the caste had trustees and as already held by him defendant No. 13 in that case was a trustee and the remaining defendants fairly represented the caste. On these facts he held that the action was maintainable. He however limited the decree in this way (p. 576):

?on the second plaintiff by his counsel Undertaking not to levy execution under this order except against the Immovable property mentioned in the Schedule here or the shares of the members of the caste therein, order that in pursuance of the said declaration the defendants and all other members of the. caste other than the second plaintiff do pay to the second plaintiff the sum....

Having regard to the order dated December 2, 1941, passed by Chagla J. in the present case, I have not now to determine whether the defendants are proper representatives of the society. That question was discussed and decided by Chagla J. by his order on December 2. The only question which now remains to be considered is whether, on the averments in the plaint and the rules of the society, the suit as framed can be maintained. In my opinion, there is no objection to the maintainability of the suit. The plaintiff has alleged that there is a common fund in which the members of the society are all interested under its rules. The rules further show that the society has a trustee and the person who was trustee on the date of the suit has been made a party defendant. The rules further show that the property and the fund of the society are not vested in any individual but belong to and remain vested in the members of the society. Although the power to operate on the banking account is given to named

persons, the same can be varied by the rules and such power does not make the fund vested in those individuals. The plaintiff has alleged the existence of the common fund and limited his prayers to recover the amount out of the common fund. In prayer (c) he has further prayed that the defendants (who for this purpose must be considered as members of the society) and defendant No. 2, the trustee, may be ordered to pay the plaintiff's claim. Having regard to the fact-that the fund is not vested in any particular individual, the plaintiff naturally is unable to state in what member the fund is vested. The plaintiff is also further unable to state in the hands of what particular individual the funds remain. Under the rules the funds are vested in the members, and unless anything is shown to the contrary they are deemed in law to remain in their hands. Under the rules the members may have given power to named individuals to operate to a limited extent on the investments and income, but that does not alter the location of the funds. Even in the banks the funds are in the account of the society and the investments are all held by the bank for the society and in the name of the society. It seems to me therefore that the suit as framed is maintainable and the first issue should be answered in the affirmative.