

(1971) 08 KL CK 0002

In the High Court Of Kerala

Case No : Second Appeal No's. 1152 and 1229 of 1966

Narayani Kamalakshi and Others

APPELLANT

Vs

Kunchiyan Bahulayan and Others

RESPONDENT

Date of Decision : 31-08-1971

Acts Referred:

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

Citation : AIR 1972 Ker 269

Hon'ble Judges : P. Subramonian Potti, J

Bench : Single Bench

Advocate : C.K. Sivasankara Panicker, D.N. Potti, P.G.P. Panicker and T.A. Narayanan Nair, for the Appellant; K.N. Narayanan Nair and N. Sudhakaran, for the Respondent

Final Decision : Dismissed

Judgement

P. Subramonian Potti, J.—Both these second appeals arise from the same suit. The suit is one for declaration that the Ollal Devaswom. the properties of which are scheduled to the plaintiff, is a Private trust of the joint family of plaintiffs and defendants 1 to 11 for removal of the first defendant from the management of the Devaswom. for recovery of the assets and properties of the Devasworn in his hands and for settling a scheme with regard to the management of the Devaswom. A preliminary decree was passed declaring that the plaintiff Devaswom was a private family trust, removing the first defendant from management and directing recovery of possession of properties said funds in the possession of the first defendant, vesting the management in the second defendant and directing the Preparation of a scheme for the effective administration of the plaintiff Devaswom. Pursuant to this preliminary decree, the Court posted the matter for settling the scheme. When the plaintiffs put in a draft scheme, and none else did so the scheme proposed by the plaintiffs was accepted on the ground that there was no objection filed by any party to the scheme though it was posted for such objection. S. A. No. 1229 of 1966 is by defendants 4 to 7 and 9 to 11 challenging

both the preliminary decree as well as the final decree. S. A. No. 1152 of 1966 is the appeal by defendants 20 and 21 challenging the preliminary decree.

2. In the main appeal. S. A. No. 1229 of 1966 the challenge to the preliminary decree is on the ground that the suit which is apparently instituted as one on behalf of the family of the plaintiffs is bad for non-joinder of necessary parties. It is contended that though some members of the tarwad are impleaded as plaintiffs and some as defendants, the parties so impleaded do not exhaust the entire membership of the tarwad. That, of course, is seen to be true as admitted by P. W. 1 himself when he was cross-examined. A number of members have been left out from, the suit. It would appear that considerations of expediency and convenience have alone been the guiding factor in impleading parties in the suit. The members whose addresses were not available and who were not residing locally, have apparently been left out. In answer to the plea of non-joinder of those parties, the plaintiffs would point out that there has been a motion for treating the suit as a representative one and, therefore, though all the members are not on the party array, they must be deemed to have been represented in the suit. Along with the replication filed in answer to the written statement, a petition was filed seeking permission under Order 1. Rule 8 of the CPC and requesting orders for publication of notice to the respondents and on that, court directed publication. Counsel attacks these proceedings on the ground that no order has been passed granting permission under Order 1, Rule 8 and therefore, the decree passed in this case is bad. Consequently, therefore, according to counsel- those who are not actually parties, shall not be deemed to be represented in the suit. It is therefore, urged that for that reason the suit must be found to be bad and must be dismissed.

3. In suits where there are numerous parties it is open to any party to seek representation by resort to Order 1. Rule 8 of the Code of Civil Procedure. The term "numerous" has received judicial interpretation and it has been said that this is not a term of art. It is not to be read either as innumerable or as limitless or even as unascertainable. The determination of the question whether the parties are "numerous" must necessarily depend upon the allegations in the plaint and the nature of the suit. These are matters for consideration by the Court at the time of granting permission. Who are sought, to be represented and whether they are persons whose addresses are ascertainable is a matter which the Court must be told. The party who seeks such representation under Order 1. Rule 8 must necessarily furnish addresses of such persons. That is because notice to such persons by publication is to be resorted to only when personal service on them is found to be not reasonably practicable. The Court will be in a position to decide whether such notice by personal service could be taken only when all these facts are before Court When the Court decides to grant permission, and issues notice to the parties, the proceedings in the suit will be binding on the parties who are sought to be represented. Since the consequence of a decision reached with parties represented under Order 1, Rule 8 is one of debarring them from raising the question over again, courts have necessarily to

consider the requirements under Order 1, Rule 8 not as mere formalities or matters of form. I am mentioning this here because in my experience, motions made under Order 1, Rule 8 have been considered by the subordinate courts very lightly and as a matter of course. Judicial discretion of the courts in the matter of grant of such permission have rarely been seen exercised. Courts must remember that by granting such permission, the court is really seeking to bind those parties who are not on the party array in the suit, and any contest by them on the same question later would be barred by *res fudicata*. Therefore, the Court owes a duty to those who are not on the party array but are still considered as represented in the suit to see that they are not preiudiced. In considering any application that may come up before Court seeking permission to represent parties under Order 1, Rule 8, the courts have to keep this in view. The Court must insist upon parties furnishing the addresses of persons when their addresses are ascertainable and when the number is such that personal service would not be impracticable, the Court must necessarily direct such personal service on fine parties besides publication. I am referring to this aspect in this case for a particular reason. I have found that applications moved for such permission are being treated very lightly. Notwithstanding the failure of a Court to pass an order on a petition under Order 1, Rule 8. the Court shall assume such permission being granted to the parties where the Court has directed publication. In resorting to that course. I have satisfied myself that no iniustice was done to the parties concerned. I am satisfied that the decree is. in no way, prejudicial to those sought to be represented and therefore no necessity to reopen the decree arises at this distant date. On the other hand, to reopen the decree on the basis that there has been technically an irregular approach to the case in the matter of granting permission under Order 1, Rule 8 would be to put the clock back by more than eight years and to start the litigation afresh, a litigation which has consumed considerable time of the Court and the parties. I see no reason to adopt such a course.

4. The view that mere omission to pass a formal order granting sanction would not vitiate the decree was expressed by the Division Bench of the Lahore High Court in *Punjab Co-op. Bank v. Hari Singh* AIR 1933 Lah 749 . The learned Judges referring to various decisions on this question said: "It is well settled that the permission may be inferred from the proceedings of the trial Court". That such a formal order giving permission under Order 1, Rule 8 is not necessary is the view expressed by Justice Gokhale of the Bombay High Court in *Mukaremdas Mannudas and Others Vs. Chhagan Kisan Bhawasar and Others*, . In fact, the learned Judge took the view that the permission under Order 1, Rule 8 can be granted even at the appellate stage. Referring to the decision of the Madras High Court in *Muthukaruppa Ethandar and Others Vs. Appavoo Nadar and Others*, and that in *Chatrabhoj Keshavii v. Ghanshyamlalji Batanji* AIR 1952 Kutch 92 , Mathew, J. said in *Kuthukutty Kunhali's son Kunhalavi Musaliar and Others Vs. Pakkath Enu's son Abdulla and Others*, thus;

"..... that the Court must be deemed to have given its permission when It

ordered the publication of the notice in the paper."

Though in the cases which are relied on by the learned Judge in that case the permission sought for was granted before the disposal of the suit, my learned brother was prepared to extend the rule even to cases where no permission was specifically granted at any stage but the Court had directed publication of notice to the persons who are said to be represented deeming such order as necessarily involving prior grant of permission. I would respectfully adopt the view and hold that in this case a direction to publish notice is sufficient to infer permission being granted by the Court. Though that is the result reached in this case, I think it will be better to avoid such circumstances and consider applications judicially.

5. Counsel also contended that he has objection to the preliminary decree on the ground that his properties are directed to be recovered from him. I do not understand the statement. The decree as it appears is against the first defendant and the properties in his possession. I cannot see how about this the appellants before me in S. A. No. 1229 of 1966 can have any grievance. Counsel points out that in the appellate judgment there is a reference to a decree for recovery of all properties and that is how he feels aggrieved. I must state here that observation of the learned Judge is clearly erroneous and it is contrary to the scope of the decree.

6. It is also contended by the appellants in S. A. No. 1229 of 1966 that the final decree passed is objectionable as sufficient time was not given to file objection to the scheme. Even at the hearing I am not told of any particular objection to the scheme which has been adopted. If really parties were aggrieved by the scheme, they would be ready with their objection and would be in a position to say what their objections are. I have gone through the scheme myself and I do not see any reason why it should, on the face of it, appear to be objectionable. Of course, it is open to any party who, after the working of the scheme, feels that it operates to the prejudice of the family, to seek to alter or modify the scheme properly and, therefore, on that score there cannot be any grievance.

7. There is yet another contention and that relates to E Schedule item. It is contended that the release of a mortgage in regard to this item was taken in the names of first defendant and sixth defendant jointly and, therefore, sixth defendant has some interest in regard to the mortgage so far as that item is concerned. But it has to be remembered that first defendant came into management under a power of attorney in 1952 and the release is taken long thereafter and the consideration for the release was only Rs. 199/-. Considering the assets of the Devaswom available to the first defendant and the fact of association of the first defendant along with the sixth defendant in taking the release. I see no reason to interfere with the decision of the courts below on the question of special right claimed by defendants 1 and 6 in regard to that item.

8. The last of the arguments concerns the question raised in S. A. No. 1152 of 1966. There, the complaint is that defendants 20 and 21, who are the legal

representatives of the first defendant, have not been found to be entitled to the special right in regard to E Schedule. This is a claim similar to that set up by the 6th defendant. In meeting this contention, the Court below said that the first defendant set up this claim and, therefore, defendants 20 and 21 have no locus standi. This is not correct. On the merits, J said earlier that the appellants have no case since the mortgage right is released after the first defendant came into management. There is a similar claim for special right in regard to the building in A Schedule. It is not shown how there is any foundation for this claim. In the case, it has not been proved that the first defendant is entitled to any such right.

9. In the result, both the second appeals are dismissed. Parties are directed to suffer costs in these appeals.