
(1961) 10 GUJ CK 0019
In the Gujarat High Court

Patel Khushalbhai Ashabhai and Another	APPELLANT
Vs	
Shree Bodal Gram Vikas Sahakaki Mandal Ltd. and Others	RESPONDENT

Date of Decision : 24-10-1961

Acts Referred:

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

Citation : (1962) 3 GLR 1004

Hon'ble Judges : V.B. Raju, J

Bench : Single Bench

Judgement

V.B. Raju, J.—The facts out of which this civil revision application arises can be briefly stated as follows:

Two plaintiffs Khushalbhai and Ambalal filed a suit on behalf of themselves and on behalf of all co-sharers in the well situated in the suit land being the heirs of Harakhji Bhavji and Hiraji Rupaji the original owners of the well against the Gram Panchayat of Bodal the Sarpanch of the same village and the District Local Board contending that the defendants were wrongly claiming the well to have vested in the village Panchayat. Mr. M.C. Shah Civil Judge Junior Division Borsad gave permission under Order 1 Rule 8 CPC to bring the suit in a representative capacity. He passed the order on 30-10-57. The suit however came up for hearing before his successor who framed a preliminary issue whether the suit in a representative capacity was maintainable and he gave a finding in the negative on the ground that each of the co-sharers had a separate share in the well and therefore a distinct and different interest in the well. It is against this order that the present revision application is made.

2.It is contended that once a permission is granted under Order 1 Rule 8 C.P. Code by a Judge his successor cannot hold that a suit in a representative capacity under Order 1 Rule 8 C.P. Code is not maintainable. Reliance is placed on Gafuralli Sayad Anwar Vs. Mohiddin Shamsuddin, Order 1 Rule 8 CPC reads as under:

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 cases give at the plaintiffs 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.

Once a Judge gives a permission referred to in Order 1 Rule 8 it is not open to the successor Judge to hold that the permission was wrongly or improperly given and that the suit is not maintainable. But it is however open to the successor Judge to frame the necessary issues relating to the controversies between the parties and while giving findings on those issues he can hold that no decree can be passed in favour of the plaintiffs on behalf of all the persons for whose benefit they purport to have filed a suit because the interest of the plaintiffs is not the same as the interest of the other persons. On such ground he can refuse to pass a decree in favour of the plaintiffs and for the benefit of all the persons whom they purport to represent. For this purpose the successor Judge may go into the question whether the interest of the plaintiffs is the same as the interest of the other persons whom they seek to represent. But beyond this it is not open to a successor Judge to cancel the permission given by his predecessor under Order 1 Rule 8 C.P. Code. In *Gafuralli Sayad Anwar Vs. Mohiddin Shamsuddin*, it is held that if the predecessor Judge has given permission to the plaintiffs to sue under Order 1 Rule 8 C.P. Code the successor Judge cannot review the order in his final judgment and it is not permissible for the successor Judge to dismiss the suit under Order 1 Rule 8 C.P. Code simply on the ground that some persons objected to the plaintiffs carrying on the suit. Therefore the learned Judges of the Bombay High Court remanded the case to the lower Court. This case partially supports the counsel for the applicants The learned Counsel for the respondent No. 2 however relies on *Subramania v. Sreenivasa* AIR 1947 Mad 100 In this case the following observations of Venkatasubha Rao, J in *V. Krishna Aiyar v. Pachaiyappa Chetti* 47 M.L.J. 540 were relied on:

Order 1 Rule 8 C.P. Code presupposes the existence of a right of suit in the plaintiff who instituted the suit and the community of interest between him and others of the class is the pre-requisite necessary to enable him to represent that class. If the plaintiff turns out not to be a member of the class on whose behalf he professed to institute the suit the suit is not a representative suit and no member of the class is constructively a party to it.

3. The learned Judge of the Madras High Court observed that the Judge hearing the case can frame the issue as to whether the plaintiff was a villager when the

suit was filed in a representative capacity on behalf of all the villagers. The question can be determined by the Judge hearing the suit because when a suit is filed in a representative capacity on behalf of all the villagers by a particular person a decree can be passed in favour of the plaintiff only if he happens to be such a villager and therefore on the question whether a decree can be passed in favour of the plaintiff for the benefit of all the villagers the Judge can decide whether or not the plaintiff was a villager so as to represent the other persons for whose benefit the decree should be passed. Both the Bombay and Madras cases are consistent with the view that I have taken namely that when permission is given by a Judge under Order 1 Rule 8 C.P. Code to a plaintiff to sue in a representative capacity it is open to the Judge deciding the suit to frame an issue whether the decree could be passed in favour of the plaintiffs for the benefit of the persons on whose behalf they purport to sue and while deciding this question the Judge can decide whether the plaintiffs have the same interest as the persons on whose behalf they purport to sue but it is not open to the Judge to frame a preliminary issue as to whether the suit is not maintainable and to dismiss the suit on the finding on the preliminary issue.

4. The learned Counsel for the opponent also relies on *Balkrishna Moreshwar Kunte v. The Municipality of Mahad* ILR Bom 32 where it was observed that unless there is a special provision of the law co-owners are not permitted to sue through some or one of their members but all co-owners must join in a suit to recover their property. These observations are not applicable to the instant case because the instant case is not a suit by co-owners to recover their property in which they had different interest. But co-owners may have the same interest in another subject matter namely to resist the claim of the Panchayat that the well has vested in the Panchayat and they have the same interest in getting a declaration against the Panchayat. The learned Counsel for the opponent has also relied on *Padmakar Vinayak Joshi v. Mahadev Krishna Joshi* ILR Bom 21 which has no real bearing on the point involved in this application. The learned Counsel for the opponent has also relied on *Navheri and Ors. v. Shek jamal* 5 Bom. LR 577 where the principle laid down in 10 Bombay 32 was followed. These observations are not applicable to the facts of the Instant case because there is no suit by the co-owners to recover property in which they have different interests.

5. For the above reasons I hold that the learned Judge of the Court below exercised his jurisdiction with material irregularity in framing a preliminary issued is regarding the fact that his predecessor had already given permission under Order 1 Rule 8 C.P. Code to the plaintiffs to file a suit in a representative capacity. The finding of the learned Judge on the preliminary issue is therefore set aside and it is directed that the Judge should decide other issues. While deciding the other issues the Judge may go into the question whether the plaintiffs have the same interest as the other persons on whose behalf they purport to sue in the subject matter of the litigation and whether it is proper to pass a decree as contemplated in Order 1 Rule 8 Civil Procedure Code. In view of

the peculiar features of the case there will be no order as to costs.