
(1992) 05 OHC CK 0016
In the Orissa High Court
Case No : Misc. Appeal No. 23 of 1989

Purna Chandra Panigrahi

APPELLANT

Vs

Baidya Jani and Others

RESPONDENT

Date of Decision : 14-05-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8
Orissa Hindu Religious Endowments Act, 1951 — Section 27, 41

Citation : (1992) 74 CLT 309 : (1992) 2 OLR 78

Hon'ble Judges : G.B. Pattnaik, J;A. Pasayat, J

Bench : Division Bench

Advocate : S. Misra 2, B. Das, K. Kar, A.K. Misra and B.K. Panigrahi, for the Appellant; P.N. Mohapatra and S.K. Patnaik (for respondents 1 to 6), for the Respondent

Final Decision : Allowed

Judgement

A. Pasayat, J.—Differing from the view expressed in some decisions of this Court relating to the scope and ambit of Order 1, Rule-8 of the Code of Civil Procedure, 1908 (in short, the "CPC"), this reference has been made by a learned Single Judge.

2. Background facts necessary for disposal of the reference are delineated as follows:

The dispute relates to the deity Dhabaleswar Mahadev installed in village Sapseiate in the district of Kalahandi. According to Puma Chandra Panigrahi, the appellant, he is the hereditary trustee of the deity, which is a temple. Since the Commissioner had directed constitution of non-hereditary Trust Board u/s {[0-9]} 7 of the Orissa Hindu Religious Endowments Act, 1951 (in short, the "Act"), the appellant had sought for relief u/s 41 of the Act. Respondents 1 to 6 filed an application u/s 41 of the Act claiming that the temple was without hereditary trustee. Appellant's application was registered as O. A. No. 19 of 1986, whereas respondents 1 to 6's application was registered as O. A. No. ?. of 1986 before

the Addl. Asst. Commissioner of Endowments, Berhampur. The said authority decided that the institution Dhabaleswar Mahadev alias Pataleswar Mahadev is a public religious institution having no hereditary trustee. The appellant filed an appeal before the Deputy Commissioner of Endowments who upheld the view. Thereafter, the present Misc. Appeal was filed.

3. During course of hearing of the appeal, it was urged before the learned Single Judge that mandatory provisions of Order 1, Rule 8 CPC having not been complied with, the matter ought to be remanded to the original forum. It was urged that notice under Order 1, Rule 8 CPC, issued did not indicate as to who represented the Hindu public, and the provisions being mandatory, the entire proceeding was vitiated from the stage of issuance of notice. Reliance was placed on various decisions of this Court. Stand of respondents 1 to 6 however, was that the notice is in accordance with law, and even if there was defect in the notice, no prejudice has been caused to the appellant, and he having himself filed the defective notice, the matter should not be remanded to the trial Court to fill up the lacuna. Since the respondents 1 to 6 were appointed as non-hereditary trustees u/s 21 of the Act, they substantially represented the Hindu public and once they were parties there was no necessity for the general public to be noticed. Learned Single Judge noticed that an application was filed by the appellant no. 27-3-1987 to take out notice under Order 1, Rule 8 CPC making the averment therein that he had sued the respondents 1 to 6 in the representative capacity. This application was allowed by the Addl. Asst. Commissioner on 27-3-1987 who permitted issuance of notice. Learned Single Judge was of the view that permission granted was defective, because the appellant had sued the respondents 1 to 5 in the personal capacity, and not in their representative capacity. Therefore, permission to issue notice under Order 1, Rule 8 CPC was illegal exercise of jurisdiction. However, it was accepted that the notice was defective. Learned Single Judge was of the view that though the notice was defective, yet in view of the fact that the appellant had not sued the respondents 1 to 6 in their representative capacity, permission should not have been granted, and in any event the applicant could not have bettered his case even if the notice would have been proper and legal. Learned Single Judge differed from the view taken by this Court in *Udayanath Das v. Lingaraj Maharana and 5 others etc.* 1975 (1) CWR 11 and *Bauri Sahu and Ors. v. Hanu Behera and Ors.*, S. A. No. 37 of 1968 disposed of on 20-9-1971, where it was held that whether the plaintiff has a good case on merit or not is not a relevant consideration while deciding the question of validity of a notice under Order 1, Rule 8 CPC. In *Udayanath Das's case (supra)*, an earlier decision of this Court in *Brundabati Thakurani and Ors. v. Hari Biswal and Ors.* 1997 (1) CWR 699 was relied on. Learned Single Judge felt that the aforesaid decisions of this Court did not expose the correct position in law and therefore, needed a fresh look. Stands urged before learned Single Judge were reiterated before us by learned counsel for parties.

4. It is not in dispute and indeed learned Single Judge has accepted the position

that notice under Order 1, Rule 8 CPC is of mandatory character. The provisions of Order 1, Rule 8 CPC are mandatory and not directory in nature and notice under Order 1, Rule 8 (2) CPC is an essential pre-condition for trial of the suit, This view was succinctly expressed in Harihar Jena and Others Vs. Bhagabat Jena and Others, and Lakhana Nayak and Another Vs. Basudev Swamy and Others, . The notice under the provision must disclose the nature of the suit as well as reliefs claimed therein in order to enable the persons interested to get themselves impleaded as parties to the suit either to support the cause or oppose it. The notice must state about why the suit has been filed and what is the relief claimed therein, and it must also state who are the persons selected to represent the cause. The object for which Order 1, Rule 8, CPC has been enacted is really to facilitate the decision of question in which a large body of persons are interested without recourse to ordinary procedure where each individual has to sustain an action by a separate suit. Where there is community of interest amongst numerous persons to avoid expenses" trouble and multiplicity of proceedings, few of them are allowed to represent the whole. In a proceeding for a declaration that a particular institution does not have a hereditary trustee or has one, if the members of Hindu public are neither impleaded, nor the suit framed under Order 1, Rule 8 CPC, there can be no adjudication of the question whether the institution is a hereditary or not. It will be futile to declare that the public have no right in the institution without impleading the members of the public under Order 1, Rule 3 CPC. A similar view was expressed by the Patna High Court in Bihari Pd. Sinha and Others Vs. Mahanth Ramswarath Dass and Another, relating to a public charitable trust.

5. It is not disputed that proceeding u/s 41 of the Act cannot be maintained without public being represented, because question of hereditary trusteeship and non-hereditary trusteeship has close link and nexus with the public. Learned Single Judge was of the view that if the applicant could not succeed on the basis of the pleadings made, non-impletion of Hindu public was of very little consequence. The object of Order 1, Rule 8 CPC apparently being to avoid multiplicity of proceedings and a determination which can effectively take care of the Us involved, it would not be proper to throw out applicant's case, merely on the ground that on merits applicant was not able to substantiate his plea. Had the public appeared, they, may have thrown some light which the applicant in the case had not done. Whether they would have supported the case of applicant is not known. Therefore, it is appropriate that the applicant must have a determination of his / s on merits which would bind all the parties. Whatever conclusion the Court may come to in the case can be binding only as between parties to the suit. Other members of the public not being represented will not be affected one way or the other, institutions can be categorised into two general categories i.e. Private and Public. The former can be sub- classified into absolute and nominal. The public category can be further classified as hereditary and non-hereditary. Obviously therefore, there can be no determination unless Public are impleaded in a proceeding u/s 41 of the Act.

6. Conclusion of learned Single Judge that original forum could not have permitted the applicant to take out notice under Order 1, Rule 8 (2) CPC does not appeal to us. From the order sheet of the original forum, we find that the applicant had filed an application under Order 1, Rule 8 CPC with a draft notice clearly indicating that he had impleaded the opposite parties in the application in their representative capacity. Had that not been the intention, question of making any application for representative impletion would not have arisen. We may refer at this stage to the application itself and the background for the same. As indicated above, the genesis of the dispute was a proceeding u/s 27 of the Act relating to appointment of Trust Board of non- hereditary trustees. From the pleadings, we find that there is reference to the public in paragraph-2 of the application. In the counter affidavit filed by the opposite parties 1to6, it is stated in paragraph-3 that the Raja constructed the said temple and donated the properties in favour of the deity for its Seba puja and other ceremonies and the villagers continued to be in management. The pleadings of the parties clearly indicate that they were aware that the public had to be represented in the proceeding and that a community of interest was involved.

7. The view of learned Referring Judge is that, it is not necessary to remand to the lower forum for regularising the proceeding by issuance of a valid notice, if the applicant is not prejudiced by such irregularities/ illegalities in the matter of issuance of notice. If on merits, applicant could not establish his case, absence of the Hindu public was of no consequence. In view of the analysis made by us above, we do not subscribe to the view.

8. The further conclusion of learned Single Judge is that where an applicant is successful in establishing his case u/s 41 of the Act, and the application has been filed in the representative capacity, the illegality in notice would vitiate the proceeding and the ultimate judgment and decree would not be binding in the general public. To make it binding, the case has to be remanded to the trial Court for issuance of valid notice and to proceed in accordance with law. The last conclusion does not appear to be correct. Once there is a remand, the judgment and decree are assailed in an appeal where it is found that there is illegality in notice are rendered inconsequential. In case of remand there can be no judgment and decree on merits. Question of it being binding does not arise because the case has to be decided afresh after proper parties are brought before the Court.

9. We may notice at this stage the contention of learned counsel for respondents 1 to 6 to the effect that public have been substantially represented because of the constitution of non-hereditary Trust Board. That cannot be held to be a sufficient compliance with the requirements of Order 1, Rule 8 CPC. The accepted position being that the notice was defective it is a fit case to be remanded to the original forum to the stage of issuance of notice under Order 1, Rule 8 CPC. Since the entire case has been referred to the Division Bench instead of answering the reference we are deciding the appeal.

The Misc. Appeal is accordingly allowed. No costs.

G.B. Pattnaik, J.

I agree.