

Vinod and Others Vs. Pandurang and Others

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Court : Karnataka

Decided On : Dec-11-1996

Reported in : AIR1997Kant144; ILR1997KAR1383; 1997(2)KarLJ511

Judge : P. Vishwanatha Shetty, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 115 - Order 1, Rule 8 - Order 7, Rule 4(2)

Appeal No. : Civil Revision Petition No. 2405 of 1996

Appellant : Vinod and Others

Respondent : Pandurang and Others

Advocate for Def. : Subash B. Adi and ;Basava Prabhu S. Patil, Adv.

Advocate for Pet/Ap. : Chaitanya Hegade, Adv.

Judgement :

ORDER

1. The petitioners in this petition are defendants-1 and 2 on the file of the Court of II Additional Munsiff at Hubli (hereinafter referred to as 'the Munsiff') and this revision petition is presented by them aggrieved by the order dated 11th July, 1996, passed on I.A.II in O.S.No. 309/1996, filed by the 1st respondent seeking permission to file the suit in a representative capacity under O. 1, R. 8 of the Code

of Civil Procedure (hereinafter referred to as 'the Code').

2. Sri Chaitanya Hegade, learned counsel appearing for the petitioners, submitted that the order passed by the Munsiff is illegal and liable to be set aside by this Court as the said order came to be passed in disregard of the provisions of O. 1, R. 8 read with O. 7, sub-rule (2) of R. 4 of the Code. According to Sri Hegade, the provisions of O. 1, R. 8 and O. 7, sub-rule (2) of R. 4 of the Code are mandatory in nature and the order passed in disregard of the said provisions seriously affect the jurisdiction of the Court to entertain the suit filed by the plaintiff-1st respondent in a representative capacity. He further submitted that the learned Munsiff has committed serious material irregularity and illegalities in exercising the jurisdiction conferred on him, inasmuch as the learned Munsiff has failed to consider that the allegations in the plaint do not satisfy the requirement of O. 1, R. 8, read with O. 7, sub-rule (2) of R. 4 of the Code. In support of his submissions, Sri Hegade relied upon the decision of the Kerala High Court in the case of Narayani Kamalakshi v. Kunchiyan Bahulayan reported in : AIR1972 Ker269 , and drew my attention to paragraphs-3 of the judgment, which reads as hereunder (at p. 270) :

'3. In suits where there are numerous parties it is open to any party to seek representation by resort to O. 1, R. 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 O. 1, R. 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 O. 1, R. 8 is one of debarring them from raising the question over again, courts have necessarily to consider the requirements under O. 1, R. 8 not as mere formalities or matters of form. I am mentioning this here because in my experience, motions made under O. 1, R. 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 judicata. 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 prejudiced. In considering any application that may come up before Court seeking permission to represent parties under O. 1, R. 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 the 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.'

3. However, Sri Subhash B. Adi, learned counsel appearing for the 1st respondent submitted that the order impugned does not suffer from any error muchless an error which calls for interference by this Court in exercise of its jurisdiction under S. 115 of the Code. According to the learned counsel, the learned Munsiff after applying his mind to the allegations made in the plaint and the affidavit filed in support of the application filed seeking permission to file the suit in a representative capacity has passed the order impugned.

4. I am unable to accept the submissions made by Sri Hegade on behalf of the petitioners. This petition is liable to be dismissed on two grounds. Firstly, on the ground that there is no error in the order impugned. Secondly, on the ground that even if there is any error, such an error does not entitle this Court to exercise its power under S. 115 of the Code.

5. Before 1 consider the submissions made on behalf of the learned counsel appearing for the parties, it is useful to extract O. 1, R. 8 and O. 7, sub-rule (2) of R. 4 of the Code, as amended by the Karnataka Act, which read thus :

'O. 1, R. 8. (1) 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, any such suit, on behalf of or for the benefit of all persons so interested.

(2) The Court may, if it deems fit or desirable to do so on a reading of the pleadings in the case, direct that one or more of such persons shall sue or be sued or defend any such suit on behalf of or for the benefit of all persons having the same interest as the first mentioned person or persons and for the said purpose call upon such person or persons to file affidavits furnishing the particulars required by sub-rule (2) of R. 4 of O. 7 or R. 7-A of O. 8 of this Code as the case may be.

(3) The Court shall in all such cases give, at the expense of such party as it may decide, notice of the institution of the suit to all such persons so interested either by personal service, or where from the number of persons or any other cause such personal service is not reasonably practicable, by public advertisement, as the Court may in each case direct.

(4) Any person on whose behalf or for whose benefit a suit is instituted or defended under the provisions of this rule may apply to the Court to be made a party to such suit.

O. 7, R. 4(2). When the permission of the Court under R. 8 of O. 1 of this Code is sought, before or at the time of the institution of the suit, the plaint shall be accompanied by an application supported by an affidavit stating the number of approximate number of parties interested, the places where they respectively reside, that they have all the same interest in the subject matter of the suit and the nature of the said interest, and the best means of giving notice of the institution of the suit to the said parties. If the permission sought is granted, the plaint shall state or be amended so as to state that the plaintiff sues on behalf of himself and all other persons interested in the subject-matter of the suit and that he has been

permitted by the Court to do so by an order of Court made on a particular date, in the application mentioned above.'

Sub-rule

(1) of R. 8 of O. 1 of the Code enables a person who has filed a suit seeking relief where numerous persons have the same interest in the suit to seek leave of the Court to file the suit on behalf of or for the benefit of all persons so interested. It is the right given to the plaintiff in the suit to secure permission of the Court and to file the suit in a representative capacity. Such a right is also made available to one or more number of defendants in the suit to seek permission of the Court and defend the suit for the benefit of all the persons so interested in the suit. However, sub-rule

(2) of R. 8 of O. 1 of the Code confers power on the Court on the basis of the pleadings in the case to direct the parties either to prosecute or to defend the suit in a representative capacity. Therefore, while sub-rule(1) of R. 8 of O. 1 of the Code confers power on the parties to the suit either to prosecute or to defend the suit in a representative capacity, sub-rule

(2) of R. 8 of O. 1 of the Code confers wide powers on the Court to direct the parties to the suit either to prosecute or to defend the suit in a representative capacity, on the basis of the pleadings in the case. It is only in cases where the Court directs the parties to prosecute the suit in a representative capacity is required to call upon person/s, referred to in sub-rule

(1) of R. 8 of O. 1 of the Code, to file an affidavit furnishing the particulars required by sub-rule

(2) of R. 4 of O. 7 of the Code. Therefore, I am of the view in cases where the permission is sought for by the plaintiff/s in a suit to prosecute the suit on behalf of or for the benefit of all persons with the same interest in the suit is concerned, there is no scope for the Court to direct such persons to file an affidavit furnishing the particulars required by sub-rule

(2) of R. 4 of O. 7 of the Code. The provisions of sub-rule

(2) of R. 4 of O. 7 of the Code has no application where the leave of the Court is sought by the parties as provided under sub-rule

(1) of R. 8 of O. 1 of the Code. Therefore, I do not find any merit in the submission of Sri Hegade that the order impugned is liable to be set aside on the ground that the same came to be passed without complying with the provisions of R. 8 of O. 1 read with sub-rule

(2) of R. 4 of O. 7 of the Code.

6. Further, in the instant case, admittedly, an application under O. 1, R. 8 of the Code has been filed by the plaintiff seeking permission to file the suit in a representative capacity. The allegations made in the affidavit clearly show that the nature of injury sought to be inflicted by the petitioners by putting up a hospital/nursing home on the property in question would have serious health hazard on the citizens at large, and more particularly, the people who reside in the locality including the plaintiff. In this connection, it is relevant to refer to paragraphs-2 and 3 of the affidavit filed in support of the application, which read thus :

'2. The illegal and unauthorised would-be construction of a structure for the purpose of housing a nursing home or a hospital in the residential locality wherein suit properties are situated, would be destructive development for peaceful atmosphere and clear and healthy environment. Further, there will be constant and continuous private and public nuisance and annoyance to one and all and there will be varieties of mental torture, botheration, psychological development and so also timidity under one pretext or the other. Beauty and elegance of the entire road abutting Circuit House and Girls' High School will be tarnished on account of lot of developments due to commencement of the nursing home or hospital and so also maternity home.

3. The public at large will suffer if a nursinghome or hospital is established and commenced and the officials of the defendants-3and 4, have not at all observed the strict rulesfor granting commencement certificate andbuilding permission for establishing andfunctioning of a nursing home. The sanctityand dignity of the

citizens has been invaded in view of granting of the permission for construction of the nursing home or hospital as none has been consulted nor any written consent has been obtained from the locality. Fresh air, clean water and comfortable atmosphere and peaceful environment are the basic necessities for the citizens of the locality and if the hospital is allowed to be constructed, then there will be lot of hustle and bustle of the city and so also every possibility of spreading the diseases.'

Further, in almost similar terms the allegations have been made in the plaint and more particularly in paragraphs-12 and 13 of the plaint. Therefore, I do not find any substance in the contention of Sri Hegade that the permission sought for by the 1st respondent to file the suit in a representative capacity should have been rejected for lack of necessary particulars contemplated under O. 1, R. 8 of the Code. The averments made in the affidavit filed in support of the application and also the averments made in paragraphs-12 and 13 of the plaint, in my view, fully satisfy the requirement of O. 1, R. 8 of the Code. The power to grant permission to the parties either to sue or be sued in a representative capacity is conferred on the Court and the said power is required to be exercised after being satisfied as to whether the subject matter of the suit concerns the interest of numerous persons, or not. On this question, the Court will have to apply its mind and grant its permission. In the instant case, as stated earlier, the averments made in the affidavit filed in support of the application and the averments made in the plaint clearly show that the grievance made-out by the plaintiff against the petitioners, i.e., defendants-1 and 2 in the suit, would affect or have a bearing on the rights of numerous members of the public and more particularly the residents of the locality where defendants-1 and 2 propose to put-up the hospital/ nursing home. In view of my above conclusion, Sri Hegade cannot derive much support from the decision in Narayani Kamalakshi's case (supra) relied upon by him, merely on the ground that the details regarding the name and particulars of the persons or the members of the public have not been set-out in detail either in the plaint or in the application. Sub-rule (3) of R. 8 of O. 1 of the Code contemplates service of notice by means of paper publication of the proceedings in case the Court is of the view that the personal service to the members of the public is not reasonably practicable. Therefore, the object of granting permission to institute the proceedings in a representative capacity is only to notify the members of the

public, who have the same interest that of the plaintiff in the suit to come on record either for the purpose of prosecuting the suit or to defend the suit. This is clear from the provisions contained in sub-rule (4) of R. 8 of O. 1 of the Code.

7. Further, as rightly pointed-out by Sri Adi, in a matter like this where the permission is granted by the Court to sue in a representative capacity, this Court should be very slow to exercise its power under S. 115 of the Code, unless the decision of the Court has resulted in manifest error, illegality or irregularity in exercise of the jurisdiction conferred on it, which has resulted in failure of justice. It is well settled that mere error of law or error of fact which has no bearing on exercise of jurisdiction by the trial Court cannot be a ground for the High Court to exercise its powers under Section 115 of the Code to interfere against the order of the trial Court. In a matter like this, if the order passed by the trial Court indicates substantial compliance of the provisions of Rule 8 of Order I and sub-rule (2) of Rule 4 of Order VII of the Code, this Court will not be justified in interfering against the said order. The provisions of Order I, Rule 8 of the Code must be considered keeping in view the interest of the public at large. The defendants in the suit against whom a grievance is made by the plaintiff alleging that the action of the defendants seriously infringes not only his right, but also the rights of the members of the public should not be permitted to challenge the order passed by the Court granting permission to the parties to prosecute the suit in a representative capacity, before this Court invoking its power under Section 115 of the Code. Therefore, I am of the view that even if there is any error in the order impugned as pointed out by Sri Hegade, this is not a fit case for interference by this Court in exercise of its power under Section 115 of the Code.

8. For the reasons stated above, I am of the view that there is no merit in this revision petition, and the same is accordingly dismissed.

9. Revision dismissed.