

D. Gopalan Vs. Raghava Naicker and Others

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Court : Chennai

Decided On : Jun-15-1989

Reported in : AIR1990Mad314

Judge : Ratnam and; Bakthavatsalam, JJ.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 1, Rules 1, 7, 8, 9 and 12 ; Rules of High Court Madras (Original Side), 1956 - Order 3, Rule 2 - Order 14, Rule 10(14)

Appeal No. : Original Side Appeal No. 15 of 1989

Appellant : D. Gopalan

Respondent : Raghava Naicker and Others

Advocate for Def. : S. Manikumar, Subramaniam, ;R. Arunagirinathan, ;R.T. Doraisami, Govt. Advocate and ;Krishnamurthy, Adv.

Advocate for Pet/Ap. : S.K. Sundaram, Adv.

Judgement :

ORDER

Ratnam, J.

1. This appeal is directed against the order parsed in application No. 2957 of 1988 dismissing the application filed by the appellant herein under O. 3. R. 2 of the Original Side Rules for leave to institute a suit in a representative capacity under O. 1, R. 8, C.P.C. In the affidavit filed in support of that application, in paragraph 3, the deponent to the affidavit stated that he is the General Secretary of the Madras District Social Welfare Association comprising of namely 6,000 members residing in and around the area and near the Adhi Chenna Kesava-perumal Devasthanam and the deponent and the majority of the members of the Association are devotees and the proceedings are initiated in a representative capacity on behalf of the member of the Association. It has been further stated in the affidavit that if notice is to be sent to the members of the Association, it would be an expensive process and it would, therefore, suffice to give notice by beat of tom tom. In the counter-affidavit filed on behalf of the contesting respondents, they disputed the very existence of the Association as well as the interest of the Association in the suit property and also the identity of the interest of the members of the Association in the suit property. Several other grounds had also been raised by them in opposition to the application filed by the appellant for the grant of leave to institute the suit in a representative capacity. Certain other application praying for interlocutory relief had also been filed by the appellant and they had also been contested and those applications came to be considered along with Application No. 2957 of 1988 and disposed of by a common order. In so far as Application No. 2957 of 1988 is concerned, the learned Judge on the original side examined the deponent to the affidavit in order to satisfy himself about the bona fides of the claim and on a consideration of the evidence, found that the Association had not in any manner authorised the institution of the suit on behalf of its members by Mr. D. Gopalan with reference to the suit property and that the very existence of the Association on whose behalf the suit was stated to have been instituted was doubtful and no elections had also been conducted in the Association between 1977 and 1988 and, therefore, he was not entitled to seek leave before Court to institute the suit in a representative capacity and in that view, dismissed the application. It is the correctness of this that is questioned in this appeal.

2. Learned Counsel for the appellant first contended that an application under O.III, R. 2 of the Original Side Rules read with O. 1, R. 8, C. P.C. should have been

dealt with and disposed of only by the Master sitting on the Original Side under O. XIV. R. 10(xiv) of the Original Side Rules and the enquiry by the Judge sitting on the Original Side had deprived the appellant of a further right of appeal under O. XIV. R. 12 of the Original Side Rules. Learned Counsel for the appellant even went to the extent of characterising the order of the learned Judge as non est. On the other hand, learned counsel for the contesting respondents, invited attention to O. 1, R. 4(3) and (8), O. 1, R. 8, O. III, Rr. 1 and 2, O. IV, O. XVI. Rr. 1, 8, 9, 10, 11 and 13 of the Original Side Rules, contended that there is absolutely no substance in the contention of the learned Counsel for the appellant and no objection whatever was raised in the course of the proceedings and in the absence of any prejudice having been caused to the appellant, he cannot be permitted to complain of unavailability of a right of appeal.

3. Under O. 1, R. 4(3) of the Original Side Rules, the expression 'Court' includes a Judge, or Master, or the First Assistant Registrar, Original Side. 'Master' is defined under O. 1, R. 4(8) of the Original Side Rules as the Master of the High Court at Madras. O. III, R. 2 of the Original Side Rules provides that an application under O. 1, R. 8 of the Code of Civil Procedure, shall be supported by an affidavit stating the number or approximate number of the parties, and the places where they respectively reside; that they have all the same interest in the subject-matter of the suit as well as the nature of the said interest and also set out the best means of giving notice of the institution of the suit to the said parties as well as the probable cost thereof. The further provision is to the effect that if the application is made before suit, it shall be entitled as mentioned in O. III, R. 1 and shall be accompanied by the plaint or a copy thereof. O. XIV of the Original Side Rules provides for interlocutory applications. Under R. 7 of O. XIV, the Judge, in case of urgency, may hear any application with respect to any matter. R. 8 of O. XIV provides that all applications other than those mentioned under R. 10 of O. XIV, shall be disposed of by the Judge and R. 10(xiv) of O. XIV of the Original Side Rules takes in an application under O. 1, R. 8 of the Code of Civil Procedure for leave to sue and defend on behalf of or for the benefit of all, in the same interest. Under R. 11 of O. XIV of the Original Side Rules, the Master may refer to the Judge any matter which he considers to be a proper one to be so referred, and the Judge may either dispose of the matter or refer the same back to the Master with

such directions as he may think fit. O. XIV, R. 13 of the Original Side Rules provides that all applications except appeals filed under R. 12 of O. XIV, shall be posted before the Master in the first instance and if the application is one which, either by the Rules or by a direction of the Judge is required to be dealt with by a Judge, the Master shall adjourn the matter to the Judge as soon as the matter is ready for hearing. It would also be necessary to bear in mind O. 1, R. 8 of the Original Side Rules to the effect that non-compliance with any of these rules shall not render the proceedings in any suit or matter void, unless the Court so directs, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with, in such manner and upon such terms as the Court thinks fit. It is in the background of the aforesaid provisions of the Original Side Rules that the contention of the learned Counsel for the applicant has to be considered.

4. Ordinarily, when an application seeking leave to institute a suit in a representative capacity is filed under O. 111, R.2 of the Original Side Rules read with O. 1, R. 8 of the Code of Civil Procedure, such an application should be dealt with under O. XIV, R. 10(xiv) of the Original Side Rules by the Master. However, in this case, what is found is that the appellant had moved Application No. 2957 of 1988 before the Judge on the Original Side on 22-6-1988 as a motion after lunch. Presumably, the appellant was obliged to do so because he wanted to secure orders in the other application filed, which could not have been dealt with by the Master of this Court. Obviously, therefore, when the appellant moved the Judge on the Original Side, it follows that the appellant had given up or waived the normal procedure prescribed in O. XIV, R. 10(xiv) of the Original Side Rules with reference to such an application, namely, a disposal of the same by the Master. It is also pertinent to point out that under O. 1, R. 8 of the Original Side Rules, non-compliance with these rules would not in any manner render the proceedings in any suit or matter void, unless so directed by Court. Now the question is, whether the proceeding should be declared to be void, though learned counsel for the appellant in the course of his argument claimed that the proceedings are non est. We do not see how the proceedings could be characterised as non est. for. the outcome of the proceedings, was only the result of the course adopted by the appellant himself and even as per O. 1, R. 8 of the Original Side Rules, non-

compliance with these rules would not render the proceedings void, unless so directed by the Court, We do not see any reason whatever to declare the proceedings void, for, the only ground urged is that the application had been dealt with by the Judge on the Original Side instead of the Master and even accepting that there was non-compliance with the rules under O. 1, R. 8 of the Original Side Rules referred to earlier, that would not by itself render the proceedings void or non est and in the absence of any other reason, particularly any serious prejudice caused to the appellant, we are also not inclined to declare the proceedings void on any ground. It is also significant that the appellant had not in the course of the proceedings before the learned Judge raised any objection that the application should have been heard by the Master of this Court and not by the learned Judge and it should, therefore, be taken that the appellant had no objection to the matter being dealt with by the learned Judge and, thereafter, the appellant cannot be heard to raise any objection with reference to the propriety of the course adopted by the learned Judge in the disposal of the application. The non-availability of a right of appeal under O. XIV, R. 12 of the Original Side Rules to the Judge from the order of the Master was brought about by the appellant himself and he cannot now be permitted to turn round and complain that the remedy of appeal had been lost to him. We, therefore, cannot accept the first contention of the learned counsel for the appellant.

5. Learned counsel for the appellant next contended that there was no proper enquiry into the application, as the application had not been posted and duly enquired into and, therefore, the order rejecting the application should be set aside. We are not persuaded to uphold this contention, for, a careful perusal of the order appealed against as well as the list on the Original Side on the relevant dates clearly shows that the applications had been listed and posted and indeed the learned Judge had also proceeded to record the evidence in the application. It is difficult to accept that all these things had been done without the matters being posted for hearing, as claimed by learned Counsel for the appellant. We, therefore, cannot accede to the contention that the matter was not posted and the application was also not heard.

6. Yet another contention raised by learned Counsel for the appellant was that service was incomplete and, therefore, the application could not have been properly dealt with by the Court. Here again, we do not find any substance, for, it has not been established to the satisfaction of the Court that the service was incomplete. In any event, such of those persons who were interested in opposing the appellant had appeared and opposed him and that would be sufficient for purposes of enabling the Court to consider the question whether leave to institute the suit in a representative capacity as prayed for by the appellant should be granted or not. Indeed, it is seen From a perusal of the counters filed by the contesting respondents that all possible objections had been raised by them and it is doubtful whether any other objection at all would have been available to the other respondents, even on the assumption that they had not been served. It is also not established that those respondents who are claimed to have been not served had any interest whatever in the suit property or even in the suit. Under those circumstances, this contention also cannot be countenanced.

7. Coming to the merits, we find that in the proposed plaint, the appellant had been described as the General Secretary of the Madras District Social Welfare Association, Madras-33. This appears to us to be merely a description of the deponent to the affidavit. This is also further strengthened by the evidence of the deponent to the affidavit recorded on 5-10-1988 in Application Nos. 4578 to 4580 and 3274 of 1988. The deponent to the affidavit had accepted that the Madras District Social Welfare Association is not a registered society and that there was no election between 1977 and 1988 and the minutes books have been removed. To a specific question whether the files and other documents relating to the Association were in the custody of the deponent to the affidavit, it was stated that they had been taken away and they were not in his possession now. From the answers given by the deponent to the affidavit as could be seen from his evidence recorded before the learned Judge on the Original Side, it is clear that the very existence of the so-called Association is doubtful. More than this, the number of members of the Association and their interest in this matter and their having authorised the deponent to the affidavit to institute the suit on behalf of the Association since all the members had the same interest in the subject-matter in suit, have all not been established. A consideration of the numerous prior

proceedings and the orders passed thereon clearly leaves this Court with the impression that it is not the interest of the so-called Association that the deponent to the affidavit is attempting to vindicate by the institution of the suit, but some other oblique and ulterior purpose. We have carefully considered the submissions of the learned Counsel for the appellant in the light of the state of record as it is and we are satisfied that the appellant had not made out a case for the grant of leave to institute the suit in a representative capacity. We, therefore, dismiss this appeal. There will be, however, no order as to costs.

8. Appeal dismissed.

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