

A SHRI V.J. THOMAS
v.
SHRI PATHROSE ABRAHAM & ORS.
(Civil Appeal No. 989 of 2008)
B FEBRUARY 5, 2008
(S.B. SINHA AND HARJIT SINGH BEDI, JJ.)

Code of Civil Procedure, 1908: Order 1 rr 8 & 10:

C *Execution of decree – Impleadment of defendants/
respondent nos.1 and 2 – Allowed by Executing Court –
Correctness of – Held: A decree obtained by suppression of
fact or collusively would not be executable against those who
were not parties to the Suit – Executing Court allowed the
application for impleadment of respondent Nos. 1 & 3 to enable
D them to press their application for setting aside ex-parte decree
upon condonation of delay – Under the circumstances,
Supreme Court in exercise of discretionary jurisdiction under
Article-136 of the Constitution found no reason to interfere with
the impugned order – Constitution of India, 1950 – Article 136
E – Discretionary jurisdiction – Exercise of.*

**Appellant filed a Suit for declaration of his title, for
possession of the suit property and for restraining the
respondents 3 to 5 from interfering with his right to enjoy
the property by entering upon it or using it as a pathway
as if it was a public pathway. A publication was also made
in a newspaper purported to be in terms of Order 1 Rule
10 of the Code of Civil Procedure. Since respondent Nos.
3 to 5 did not appear in the suit, an ex-parte decree was
passed by the trial court. Appellant filed application for
execution of the decree. Respondent Nos.1 and 2 filed
G application for setting aside the decree, to implead them
to contest the suit, to condone the delay in filing
application. I.As were allowed by the Executing Court
impleading respondent Nos.1 & 2 to contest the suit.**

Revision application filed by the appellant was dismissed by the Single Judge of the High Court. Hence, the present appeal.

Appellant contended that a suit, wherein notice under Order I Rule 8 of Code of Civil Procedure has been issued, could not have been reopened at the instance of the respondent Nos.1 and 2 without allowing their application for condonation of delay and for setting aside the ex parte decree.

Dismissing the appeal, the Court

HELD: 1.1 A suit filed in terms of Order I Rule 8 of C.P.C. should ordinarily be premised on the ground that the defendants represent the parties interested in the suit. Defendants in such a suit, although must be able to represent the public in general, but no personal decree can be passed against them. To what extent the original defendants were interested in the suit property at least in respect of the portion thereof is not known [Para 13] [383-D, E]

1.2 A litigant may execute a decree which was obtained for the benefit of the people of the locality but if he intends to execute a decree which was obtained for his own benefit, those who would be affected thereby should ordinarily be made parties to the suit. If a village pathway is the subject matter of the suit on the premise that it is the personal property of the plaintiff, those who use the said pathway or at least have lands adjacent thereto should ordinarily be impleaded as parties. In the latter case, like the present one, applying the legal principles, this Court is of the opinion that a decree which has been obtained by suppression of fact or collusively would not be executable against those who were not parties to the suit. [Para 14] [383-F, G; 384-A]

1.3 This Court has no idea as to what was the nature of interest was claimed by the Original Defendant Nos.1

A to 3(Respondent Nos. 3 to 5) in the suit land. In any event, whether the service of notice was proper would also be the subject matter of an enquiry by the trial court. It has also to be seen as to whether the notice in terms of Order I Rule 10 of the Code was published in a newspaper
B having a wide circulation in the locality. [Para 16] [384-E, F, G]

Chairman, Tamil Nadu Housing Board, Madras vs. T.N. Ganapathy, (1990) 1 SCC 608 – referred to.

C 2. If for the purpose of examination of the question, amongst others, the Executing Court has allowed the applications for impleadment of the respondent Nos.1 and 3 so as to enable them to press their applications for setting aside the ex-parte decree upon condonation of delay. No reason is found to interfere therewith in exercise
D of discretionary jurisdiction under Article 136 of the Constitution of India. [Para 18] [385-G; 386-A]

Union of India & Ors. vs. Dinanath Shantaram Karekar & Ors. (1998) 4 SCALE 659 and Church of North India vs. Lavajibhai Ratanjibhai & Ors. (2005) 10 SCC 760 – referred to.

CIVILAPPELLATE JURISDICTION : Civil Appeal No. 989 of 2008.

F From the final Judgment / Order dated 30.6.2005 of the High Court of Kerala at Ernakulam in C.R.P. No. 272 of 2004.

V.J. Francis, P.I. Jose and Anupam Mishra for the Appellant.

M.T. George for the Respondents.

G The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

H 2. A question of some importance as to whether a third party can be impleaded in a suit filed under Order I Rule 8 of the Code of Civil Procedure is involved in this appeal which arises

out of the judgment and order dated 30th June, 2005 passed by a Learned Single Judge of the Kerala High Court in CRP No. 272 of 2004 dismissing the revision application filed by the appellant herein challenging the order dated 17.10.2003 passed by Additional sub Court, Kottayam. A

3. The basic fact of the matter is not in dispute. B

4. Appellant herein filed Original Suit No. 364 of 1997 in the Court of Additional Sub Court, Kottayam, for declaration of his title and for possession of the suit property. A prayer therein was made for restraining the defendants who were three in number (Respondent Nos. 3 to 5 herein) from interfering with his right to enjoy the property by entering upon it or using it as a pathway as if it was a public pathway. A purported publication was also made in a newspaper purported to be in terms of Order I Rule 10 of the Code of Civil Procedure. C

5. Respondent Nos. 3 to 5 herein did not appear in the suit as a result whereof, an ex-parte decree was passed on 26.3.1998. An application for execution of the said decree was filed. Respondent Nos. 1 and 2 herein in the said execution case filed five applications, the details whereof are as under: D

I.A.No.965/2002- Under Order 9 Rule 13, for setting aside the exparte decree. E

I.A.No.966/2002- For Condonation of Delay

I.A.No.967/2002- Application for Stay of all the proceedings in the execution. F

I.A.No.968/2002- Application filed by the respondent no.1 for permission to contest the suit and to add himself in the array of parties as additional defendant No.1. G

I.A.No.969/2002- Application filed by respondent No.2 for permission to contest the suit and for making her as additional defendant No.5. H

A 6. The Executing Court allowed I.A No. 968 of 2002 and 969 of 2002 impleading respondent Nos. 1 and 2 as defendant No. 5 and 7 in the suit. The Revision Application filed thereagainst has been dismissed by a Single Judge of the High Court by reason of the impugned judgment.

B 7. Mr. V.J. Francis, learned counsel appearing on behalf of the appellant, submitted that a suit, wherein notice under Order I Rule 8 of Code of Civil Procedure has been issued, could not have been reopened at the instance of the respondent Nos. 1 and 2 herein without allowing their application for
C condonation of delay and for setting aside the ex parte decree. It was urged that no case has been made out for condonation of delay as the applications for setting aside the ex parte decree was filed after more than four years from the passing thereof.

D Respondent Nos. 1 and 2, in any event, it was contended, could not have represented the panchayat and, thus, the impugned order is unsustainable.

E 8. Mr. M.T. George, learned counsel appearing on behalf of the respondent, however, would support the impugned judgment.

9. The suit land measuring 450 ft. x 4 ft. starts from Vattachalpady junction of Manarcadu-Thengana PWD road and ends at Kuttiiypadyperumpanachi Panchayat road on the east.

F Respondent Nos. 1 and 2 were not parties to the suit. They, in their applications, inter alia, contended that the appellant and the respondent Nos. 3 to 5 herein are neighbours and close associates. The suit was a collusive one. Leave of the Court under Order 1 Rule 8 was obtained on a misrepresentation.

G 10. A specific contention was also raised that plaintiff-petitioner deliberately and intentionally had not impleaded the users of the pathway in the said suit. It was stated that publication of the notice purported to be under Order 1 Rule 8 CPC was made in the newspapers which did not have wide circulation in
H the locality.

11. The High Court has, inter alia, relying upon the decision of the Madras High Court in *Swaminatha Mudaliar vs. Kumaraswami Chettiar and others* [(1923) 44 MLJ 282] accepted the said contentions of the respondent, holding :

"It may be unusual to bring fresh plaintiffs on the record after a decree has been passed; but there is authority for doing so under Order I Rule 10.

Order 1 Rule 8 expressly permits any person on whose behalf a representative suit is instituted to apply to the Court to be brought on the record, and the words of this rule are not limited, as they are by Order 1 Rule 10 by the purpose being expressed as that of adjudication on the questions arising in the suit. "

12. The plaint is not before us. The application purported to have been filed by the applicant under Order 1 Rule 8 is also not before us. On what basis, the respondent Nos. 3 to 5 were impleaded in the suit and in which capacity, thus, is not known.

13. A suit filed in terms of Order 1 Rule 8 should ordinarily be premised on the ground that the defendants represent the parties interested in the suit. Defendants in such a suit, although must be able to represent the public in general, but no personal decree can be passed against them. To what extent the original defendants were interested in the suit property at least in respect of the portion thereof is not known.

14. A litigant may execute a decree which was obtained for the benefit of the people of the locality but if he intends to execute a decree which was obtained for his own benefit, those who would be affected thereby should ordinarily be made parties to the suit. Similarly, if a village pathway is the subject matter of the suit on the premise that it is the personal property of the plaintiff, those who use the said pathway or at least have lands adjacent thereto should ordinarily be impleaded as parties. In the latter case, like the present one, applying the legal principles, as noticed hereinbefore, we are of the opinion that a decree

A which has been obtained by suppression of fact or collusively would not be executable against those who were not parties to the suit.

B 15. Reliance has been placed by Mr. Francis on *Chairman, Tamil Nadu Housing Board, Madras v. T.N. Ganapathy* [(1990) 1 SCC 608] wherein the question which arose for consideration centered around the maintainability of the suit at the instance of the plaintiffs who belonged to the category of low income group against Housing Board for a permanent injunction from demanding and calculating from the allottees any additional price, was answered in the following terms :

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"Coming to the relevant circumstances in the present case, it will be seen that all the allotments in Ashok Nagar were made under the same scheme and all the relevant facts are common. The basis of the impugned demand of the appellant is equally applicable to all the allottees and the plea of the plaintiff is available to all of them. The trial court was, therefore, perfectly right in permitting the plaintiff to proceed under Order I, Rule 8 of the Code of Civil Procedure. Nobody in this situation can complain of any inconvenience or injustice. On the other hand, the appellant is being saved from being involved in unnecessary repeated litigation."

F 16. As indicated hereinbefore, we have no idea as to what was the nature of interest was claimed by the Original Defendant No. 1 to 3 (Respondent Nos. 3 to 5) in the suit land. In any event, whether the service of notice was proper would also be the subject matter of an enquiry by the learned trial court. It has also to be seen as to whether the notice in terms of Order I Rule 10 of the Code was published in a newspaper having a wide circulation in the locality.

G 17. In *Union of India & Ors. v. Dinanath Shantaram Karekar & Ors.* [1998 (4) SCALE 659], this Court held :

H "So far as the service of show cause notice is concerned,

it also cannot be treated to have been served. Service of this notice was sought to be effected on the respondent by publication in a newspaper without making any earlier effort to serve him personally by tendering the show cause notice either through the office peon or by registered post. There is nothing on record to indicate that the newspaper in which the show-cause notice was published was a popular newspaper which was expected to be read by the public in general or that it had wide circulation in the area or locality where the respondent lived. The show-cause notice cannot, therefore, in these circumstances, be held to have been served on the respondent. In any case, since the very initiation of the disciplinary proceedings was bad for the reason that the charge sheet was not served, all subsequent steps and stages, including the issuance of the show-cause notice would be bad."

In *Church of North India v. Lavajibhai Ratanjibhai & Ors.* [(2005) 10 SCC 760], it was observed

"71. bars a suit to enforce a right on behalf of a public trust. C.N.I. got itself registered as a public trust in the year 1981. A suit evidently was filed by the plaintiffs in the year 1980 because C.N.I. was not then entitled to file a suit. It may be true that the suit was filed under Order 1, Rule 8 of the Code of Civil Procedure but therein the question as to whether the Appellant herein, being a registered trust became entitled to the properties of Brethren Church could not have been gone into. What is prohibited is to enforce a right on behalf of a public trust. When the plaintiffs intended to enforce a right on behalf of the Appellant, the suit was evidently not maintainable."

18. If for the purpose of examination of the said question, amongst others, the executing court has allowed the applications for impleadment of the respondent Nos. 1 and 3 herein as defendant No. 4 and 5, so as to enable them to press their applications for setting aside the ex-parte decree upon

A condonation of delay; we do not see any reason to interfere therewith in exercise of our discretionary jurisdiction under Article 136 of the Constitution of India.

19. For the reasons above mentioned, there is no merit in this appeal which is accordingly dismissed with costs.
B Counsel's fee assessed at Rs. 10,000/- (Rupees ten thousand only).

S.K.S.

Appeal dismissed.