Salem Advocate Bar Association, Tamil ... vs Union Of India on 25 October, 2002

Equivalent citations: AIR 2003 SUPREME COURT 189, 2003 (1) SCC 49, 2002 AIR SCW 4627, (2007) 3 RAJ LW 2531, 2003 (1) ALL CJ 572, 2003 ALL CJ 1 572, 2002 (6) SLT 519, (2003) 1 ALLMR 391 (SC), (2003) 1 JCR 75 (SC), 2002 (8) SCALE 146.2, 2002 (6) ANDHLT 1, 2003 HRR 17, (2002) 9 JT 175 (SC), 2003 (1) ALL MR 391, 2003 (1) COM LJ 54 SC, 2002 (10) SRJ 482, (2003) 2 ALLINDCAS 451 (SC), 2002 (9) JT 175, (2002) ILR(KER) 3 SC 545, 2003 (1) UJ (SC) 1, (2003) ILR (KANT) (4) 3315, (2002) 3 KER LT 920, (2002) 4 ICC 668, (2002) 100 DLT 691, (2002) 3 GUJ LH 665, (2002) 4 MAD LW 512, (2003) 1 DMC 73, (2003) 1 CIVILCOURTC 198, (2003) 1 GUJ LR 148, (2003) 1 JAB LJ 171, (2003) 1 LANDLR 379, (2003) 1 ORISSA LR 650, (2003) 1 PUN LR 336, (2002) 4 SCJ 584, (2002) 8 SUPREME 55, (2002) 4 RECCIVR 786, (2002) 8 SCALE 146(2), (2003) 1 WLC(SC)CVL 384, (2003) 1 UC 143, (2003) 1 MPHT 96, (2003) 1 ALL RENTCAS 1, (2003) 3 ALL WC 2238, (2003) 1 CIVLJ 514, (2002) 4 CURCC 184, (2003) 95 CUT LT 12, (2003) 3 BOM CR 327

CASE NO.:
Writ Petition (civil) 496 of 2002

PETITIONER:
SALEM ADVOCATE BAR ASSOCIATION, TAMIL NADU

RESPONDENT:
UNION OF INDIA

DATE OF JUDGMENT: 25/10/2002

BENCH:
B.N. KIRPAL CJ & Y.K. SABHARWAL & ARIJIT PASSAYAT

JUDGMENT:

JUDGMENT 2002 Supp(3) SCR 353 (With W.P. (C) No. 570 of 2002) The Judgment was delivered by KIRPAL, CJI.

Rule.

2. These writ petitions have been filed seeking to challenge amendments made to the Code of Civil Procedure by the Amendment Act 46 of 1999 and Amendment Act 22 of 2002.

3. Writ Petition @ No. 496 of 2002 was filed by the Salem Advocate Bar Association and after notice was issued the petitioner sought leave of this Court to withdraw the writ petition. By order dated 16th September, 2002, the prayer to withdraw the writ petition was declined, as the petition had been filed in public interest. At the request of the Court, Shri C.S. Vaidyanathan, Sr. Adv. assisted by Shri K.V. Vishwanathan, Advocate agreed to assist the Court as Amicus Curiae and they have rendered assistance to the Court for dealing with the case. The Court records its appreciation for the assistance given.

4. In the petitions, the amendments which were sought to be made by the aforesaid Amendment Acts, have been challenged, but we do not find that the said provisions are in any way ultra vires the Constitution. Neither Mr. Vaidyanathan nor any other learned counsel made any submissions to the effect that any of the amendments made were without legislative competence or violative of any of the provisions of the Constitution. We have also gone through the provisions by which amendments have been made and do not find any constitutional infirmity in the same.

5. Mr. Vaidyanathan, however, drew our attention to some of the amendments which have been made with a view to show that there may be some practical difficulties in implementing the same. He also contended that some clarifications may be necessary. We shall deal with the said provisions presently.

6. Amendment has been made to Section 27 dealing with summons to the defendant which, after the amendment, reads as follows:

> "Summons to Defendants - Where a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim and may be served in the manner prescribed on such day not beyond thirty days from the date of the institution of the suit."

7. It was submitted by Mr. Vaidyanathan that the words" on such day not beyond thirty days from the date of the institution of the suit"

> seem to indicate that the summons must be served within thirty days of the date of the institution of the suit. In our opinion, the said provisions read as a whole will not be susceptible to that meaning. The words added by amendment, it appears, fix outer time frame, by providing that steps must be taken within thirty days from the date of the institution of the suit, to issue summons. In other words, of the suit is instituted, for example, on 1st January, 2002, then the correct addresses of the defendants and the process fee must be filed in the court within thirty days so that summons be issued by the court not beyond thirty days from the date of the institution of the suit. The object is to avoid long delay in issue of summons for want of steps by the plaintiff. It is quite evident that if all that is required to be done by a party, has been performed within the period of thirty days, then no fault can be attributed to the party. If for any reason, the court is not in a position or is unable to or does not issue summons within thirty days, there will, in our opinion, compliance with the

provisions of Section 27 once within thirty days of the issue of the summons the party concerned has taken steps to file the process fee along with completing the other formalities which are required to enable the court to issue the summons.

8. Our attention was then drawn to a new Section 89 which has been introduced in the Code of Civil Procedure. This provides for settlement of disputes, etc., and reads as under:

"89. Settlement of disputes outside the Court.- (1) Where it appears to the Court that there exist elements which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the Court may reformulate the terms of a possible settlement and refer the same for -(a) arbitration;

(b) conciliation;

(c) judicial settlement including settlement through Lok Adalat; or

(d) mediation.

(2) Where a dispute has been referred-

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."

9. It is quite obvious that the reason why Section 89 has been inserted is to try to see that cases, which are filed in court need not necessarily be decided by the court itself. Keeping in mind the laws delays and the limited number of Judges which are available, it has now become imperative that resort should be had to Alternative Dispute Resolution Mechanism with a view to bring to an end litigation between the parties at an early date. The Alternative Dispute Resolution (ADR) Mechanism as contemplated by Section 89 is arbitration or conciliation or judicial settlement

including settlement through Lok Adalat or mediation. Sub-section (2) of Section 89 refers to different Acts in relation to arbitration, conciliation or settlement through Lok Adalat, but with regard to mediation Section 89(2)

(d) provides that the parties shall follow the procedure as may be prescribed. Section 89(2)(d), therefore, contemplates appropriate rules being framed with regard to mediation.

10. In certain countries of the world where ADR has been successful to the extent that over 90 per cent of the cases are settled out of court, there is a requirement that the parties to the suit must indicate the form of ADR which they would like to resort to during the pendency of the trial of the suit. If the parties agree to arbitration, then the provisions of the Arbitration and Conciliation Act, 1996 will apply and that case will go outside the stream of the court but resorting to conciliation or judicial settlement or mediation with a view to settle the dispute would not ipso facto take the case outside the judicial system. All that this means is that effort has to be made to bring about an amicable settlement between the parties but if conciliation or mediation or judicial settlement is not possible, despite efforts being made, the case will ultimately go to trial.

11. Section 89 is a new provision and even though arbitration or conciliation has been in place as a mode for settling the disputes, this has not really reduced the burden on the courts. It does appear to us that modalities have to be formulated for the manner in which Section 89 and, for that mater, the other provisions which have been introduced by way of amendments, may have to be in operation. All counsel are agreed that for this purpose, it will be appropriate if a Committee is constitution so as to ensure that the amendments made become effective and result in quicker dispensation of justice.

12. In our opinion, the suggestion so made merits a favourable consideration. With the constitution of such a Committee, any creases which require to be ironed out can be identified and apprehensions which may exist in the minds of the litigating public or the lawyers clarified. As suggested, the Committee will consist of a Judge sitting or retired nominated by the Chief Justice of India and the other members of the Committee will be Mr. Kapil Sibal, Senior Advocate, Mr. Arun Jaitley, Senior Advocate, Mr. C.S. Vaidyanathan, Senior Advocate and Mr. D. V. Subba Rao, Chairman, Bar Council of India. This Committee will be at liberty to co-opt any other member and to take assistance of any member of the Bar or Association. This Committee may consider devising a model case management formula as well as rules and regulations which should be followed while taking recourse to the ADR referred to in Section 89. The Model rules, with or without modification, which are formulated may be adopted by the High Court concerned for giving effect to Section 89(2)(d).

13. Mr. Vaidyanathan drew our attention to Section 100A which deals with intra-court appeals. This Section reads as follows:

> "100A. No further appeal in certain cases. - Notwithstanding anything contained in any Letters Patent for any High Court or in any other Instrument having the force of law or in any other law for the time being in force, where any appeal from an original

> or appellate decree or order is heard and decided by a single Judge or a High Court, no further appeal shall lie from the judgment and decree of such single Judge."

14. It was submitted by Mr. Vaidyanathan that where the original decree is reversed by a Single Judge of the High Court, there should be a provision for filing a Letters Patent Appeal.

15. Section 100A deals with two types of cases which are decided by a Single Judge. One is where the Single Judge hears an appeal from an appellate decree or order. The question of there being any further appeal in such a case cannot and should not be contemplated. Where, however, an appeal is filed before the High Court against the decree of a trial court, a question may arise whether any further appeal should be permitted or not. Even at present upon the value of the case, the appeal from original decree is either heard by a Single Judge or by a Division Bench of the High Court. Where the regular first appeal so filed is heard be Division Bench, the question of there being an intra-court appeal does not arise. It is only in cases where the value is not substantial that the rules of the High Court may provided for the regular first appeal to be heard by a Single Judge. In such a case to give a further right of appeal where the amount involved is nominal to a Division Bench will really be increasing the workload unnecessarily. We do not find that any prejudice would be caused to the litigants by not providing for intra-court appeal, even where the value involved in large. In such a case, the High Court by Rules, can provide that the Division Bench will hear the regular first appeal. No fault can, thus, be found with the amended provision Section 100A.

16. Our attention has been drawn to Order 7 Rule 11 to which clauses (e) and (f) have been added which enable the court to reject the plaint where it is not filed in duplicate or where the plaintiff fails to comply with the provisions of Rule 9 of Order 7. It appears to us that the said clauses being procedural would not require the automatic rejection of the plaint at the first instance. If there is any defect as contemplated by Rule 11 (e) or non-compliance as referred to in Rule 11(f), the court should ordinarily give an opportunity for rectifying the defects and in the event of the same not being done the court will have the liberty or the right to reject the plaint.

17. In Order 18, Rule 4 has substituted and sub-rule (1) provides that in every case examination-in-chief of the witnesses shall be on affidavits and copies thereof shall be supplied to the opposite parties by the part who calls them for evidence. It was contended by Mr. Vaidyanathan that it may not be possible for the party calling the witness to compel the witness to file an affidavit. It often happens that the witness may not be under the control of the party who wants to rely upon his evidence and that witness may have to be summoned through court. Order 16 Rule 1 provides for list of witnesses being filed and summons being issued to them for being present in court for recording their evidence. Rule 1A, on the other hand, refers to production of witnesses without summons where any party to the suit may bring any witness to give any evidence or to produce documents. Reading the provisions of Order 16 and Order 18 together, it appears to us that Order 16 Rule IA, i.e. where any party to a suit, without applying for summoning under Rule 1 brings any witness to give evidence or produce any document. In such a case, examination-in-chief is not to be recorded in court but shall be in the form of an affidavit.

18. In cases where the summons have to be issued under Order 16 Rule 1, the stringent provision of Order 18 Rule 4 may not apply. When summons are issued, the court can give an option to the witness summoned either to file an affidavit by way of examination-in-chief or to be present in court for the examination. In appropriate cases, the court can direct the summoned witness to file an affidavit by way of examination-in-chief. In other words, with regard to the summoned witnesses the principle incorporated in Order 18 Rule 4 can be waived. Whether a witness shall be directed to file affidavit or be required to be present in court for recording of his evidence is a matter to be decided by the court in its discretion having regard to the facts of each case.

19. Order 18 Rule (42) gives the court the power to decide as to whether evidence of a witness shall be taken either by the court or by the Commissioner. An apprehension was raised to the effect that the court has no discretion and once it decides that the evidence will be recorded by the Commissioner then evidence of other witnesses cannot be recorded in court. We do not think that is the correct interpretation of sub-rule 4(2). Under the said sub-rule, the court has the power to direct either all the evidence being recorded in court or all the evidence being recorded by the Commissioner or the evidence being recorded partly by the Commissioner and partly by the court. For example, if the plaintiff wants to examine 10 witnesses, then the court may direct that in respect of five witnesses evidence will be recorded by the Commissioner while in the case of other five witnesses evidence will be recorded in court. In this connection, we may refer to Order 18 Rule 4(3), which provides that the evidence may be recorded either in writing or mechanically in the presence of the Judge or the Commissioner. The use of the word 'mechanically' indicates that the evidence can be recorded even with the help of the electronic media, audio or audio-visual, and in fact whenever the evidence is recorded by the Commissioner it will be advisable that there should be simultaneously at least an audio recording of the statement of the witnesses so as to obviate any controversy at a later stage.

20. Mr. Vaidyanathan drew our attention to the fact that by amendment in 1976, Rule 17A had been inserted in Order 18 which gave an opportunity to a party to adduce additional evidence under the circumstances mentioned therein. He submitted that by the Amendment Act 22 of 2002, this sub-rule has been deleted which may cause hardship to the litigants.

21. We find that in the Code of Civil Procedure, 1908, a provision similar to Rule 17A did not exist. This provision, as already noted, was inserted in 1976. The effect of the deletion of this provision in 2002 is merely to restore status quo ante, that is to say, the position which existed prior to the insertion of Rule 17A in 1976. The remedy, if any, that was available to a litigant with regard to adducing additional evidence prior to 1976 would be available now and no more. It is quite evident that Rule 17A has been deleted with a view that unnecessarily applications are not filed primarily with a view to prolong the trial.

22. Lastly, Mr. Vaidyanathan drew our attention to Rule 9 which was inserted in Order 41 which reads as follows:

> "Registry of memorandum of appeal. (1) The Court from whose decree an appeal lies shall entertain the memorandum of appeal and shall endorse thereon the date of

presentation and shall register the appeal in a book of appeal kept for that purpose.

(2) Such book shall be called the register of appeal."

23. The apprehension was that this rule requires the appeal to be filed in the court from whose decree the appeal is sought to be filed. In our opinion, this is not so. The appeal is to be filed under Order 41 Rule 1 in the court in which it is maintainable. All that Order 41 Rule 9 requires is that a copy of memorandum of appeal which has been filed in the appellate court should also be presented before the court against whose decree the appeal has been filed and endorsement thereof shall be made by the decreeing court in book called the Register of Appeals. Perhaps, the intention of the Legislature was that the court against whose decree an appeal has been filed should be made aware of the factum of the filing of the appeal which may or not be relevant at a future date. Merely because a memorandum of appeal is not filed number Order 41 Rule 9 will not, to our mind, make the appeal filed in the appellate court as a defective one.

24. No other contentions were raised. As already observed, if any difficulties are felt, these can be placed before the Committee constituted hereinabove. The Committee would consider the said difficulties and make necessary suggestions in its report. It is hoped that the amendments now made in the Code of Civil Procedure would help in expeditious disposal of cases in the trial courts and the appellate courts.

25. It would be open to the Committee to seek directions. The Committee is requested to file its report within a period of four months. To consider the report, list these petitions after four months. Copies of this judgment be sent to the Registrars of all the High Courts so that necessary action can be taken by the respective High Courts and any writ petition pending in those High Courts can be formally disposed of.