

Kerala High Court

T.C.Varghese vs Mar Yuhanon Ehidio Jacobite ... on 9 July, 2009

IN THE HIGH COURT OF KERALA AT ERNAKULAM

WP(C).No. 11401 of 2009(0)

1. T.C.VARGHESE, S/O.CHACKO,
... Petitioner
2. K.K.BABY, S/O.KURIAN, KOMBANAL HOUSE,
3. V.K.POULOSE, S/O.KURIAN,
4. SAJI PAUL, S/O.PAILY,

Vs

1. MAR YUHANON EHIDIO JACOBITE SYRIAN
... Respondent
2. REV. FR. MATHEW,
3. A.P.PAUL, S/O.PAILY,
4. M.K.GEORGE, S/O.KURUVILA,
5. THE RECEIVER, MAR YUHANON EHIDIO
6. P.U.KURIAKOSE KATHANAR,

For Petitioner :SRI.K.J.KURIACHAN

For Respondent :SRI.M.GOPIKRISHNAN NAMBIAR

The Hon'ble MR. Justice S.S.SATHEESACHANDRAN

Dated :09/07/2009

O R D E R

S.S.SATHEESACHANDRAN, J.

W.P.(C).No.11401 OF 2009

Dated this the 9th day of July 2009

JUDGMENT

The writ petition is filed by the plaintiff in O.S 51/2003 pending on the file of First Additional District Court, Ernakulam. The suit has been filed in a representative capacity by the plaintiffs after getting permission from the court under Order 1 Rule 8 of Code of Civil Procedure. The disputes involved in the suit pertain to a church over which rival claims are made by two factions, known as Jacobite and Orthodox. After the entire evidence was recorded in the case, the plaintiff moved for withdrawal of the suit seeking permission to file a fresh suit. Ext.P1 is the copy of that application. Taking note that the suit was instituted after getting permission under Order 1 Rule 8 of Code of Civil Procedure, as contemplated by the Rule, the court directed the plaintiff to give notice of the withdrawal by publication. Pursuant to such publication the respondents 9 and 10 in the present petition appeared and sought permission for substituting them in the place of the plaintiffs and to continue prosecution of the suit. The petitioners/plaintiffs objected to such substitution contending that the persons who are seeking substitution belong to the rival faction, of the contesting defendants. The contesting defendants also filed a counter affidavit opposing the withdrawal of the suit. Both these petitions, the application moved by the plaintiffs for withdrawal, and also the other moved by the persons who sought for substitution in the place of plaintiffs, were jointly considered by the learned District Judge and a common order was passed. Ext.P6 is the copy of that order. The petitioners who sought substitution were permitted to proceed with the case from the state on which the plaintiffs moved for its withdrawal. However the request of those petitioners for their substitution in the place of plaintiffs striking out the plaintiffs from the party array was rejected. Propriety and correctness of that order is challenged by the plaintiffs invoking the supervisory jurisdiction vested with this court under Article 227 of the Constitution of India.

2. I heard the counsel on both sides. From the facts and circumstances presented and also the submissions made by the learned counsel on both sides with reference to Ext.P6 order and the materials tendered with the writ petition, I find Ext.P6 order cannot be sustained for more than one reason. If Ext.P6 order is allowed to stand then plaintiffs would continue as such in the suit, but with two more strangers as additional plaintiffs along with them, the persons who applied for substitution as plaintiffs in the suit. The persons who sought for substitution are granted permission to prosecute the suit keeping the original plaintiffs in the party array as such, and both now continue with conflicting interests as masters of the suit. In a case where a suit is filed in a representative capacity and permission is accorded to proceed with the claim in a representative capacity, but, later the court finds that the persons who had been granted such permission do not prosecute the suit with due diligence it may substitute in their place some other having the same interest in the suit. Such substitution is covered by Clause (5) of Rule 8 Order (1) of the Code of Civil Procedure. So, the first question that emerges for consideration is when such substitution invoking the above rule is sought for by a person and a challenge is made by the plaintiffs that the party seeking such substitution is not having identical interest in the suit the court is expected and duty bound to conduct an enquiry over that matter. Plaintiffs in their counter affidavit specifically contended that the persons who sought for substitution belong to a different church and they are not the followers of their faction. Whatever be the merit of such contention, once such a challenge is raised a preliminary finding that they have an identity of interest in the cause shown by the plaintiff in the suit is imperative before passing any order of substitution. If at all any substitution is made, then

also, the plaintiffs should have been removed from the party array when some other person is allowed to represent the faction which have filed the suit for the reliefs claimed thereunder; that was also not followed in the present case. The learned counsel for the contesting defendants urged before me that the withdrawal of the petition does not satisfy the mandatory requirements covered by Order 23 Rule 1 of Code of Civil Procedure in the sense that the plaintiffs have no case that suit is bound to file on account of any formal defect or for any other sufficient cause. I do not want to express any opinion on that point since the court below has not considered that aspect at all. At the same time it has to be stated what is sufficient cause is an elastic expression which has to be considered in the totality of the facts and circumstances presented in the case. The court below without advertng to any of these aspects has mechanically allowed the impleadment of additional plaintiffs to the suit rejecting the request of the plaintiffs for its withdrawal Ext.P6 order is liable to be set aside, and I do so. The court below is directed to examine afresh and dispose the petitions moved for withdrawal and the other for substitution in the light of the observations made above, and, in accordance with law. The writ petition is disposed.

Sd/-

S.S.SATHEESACHANDRAN, JUDGE //TRUE COPY// P.A TO JUDGE vdv