

Bombay High Court

Harischandra Khanderao Kothare vs A.S. Craig on 11 November, 1941

Equivalent citations: (1942) 44 BOMLR 251

Author: Chagla

Bench: Chagla

JUDGMENT Chagla, J.

1. This is a chamber summons taken out by the defendants for setting aside an ex parte order made by Mr. Justice Kania on July 28, 1941,. and for setting aside the service of the writ of summons effected pursuant to the said Judge's order upon the defendants as representing all other members of the Great Indian Peninsula Railway Employees' Mutual Benefit Society.

2. The suit is filed by the plaintiff, who is an attorney of this Court, for damages for wrongful termination of his services by the Great Indian Peninsula Railway Employees' Mutual Benefit Society. The object of this society, as apparent from the rules which have been put in, is to provide any member of the society with legal assistance for his defence in the event of his being prosecuted for an offence or offences, under the Indian Railways Act or the Indian Penal Code, alleged to have been committed by him and arising out of and in the discharge of his duties, or of actions believed to be within the scope of his duties as an employee of the railway.

3. The defendant society wanted a legal adviser. They advertised for the post. The plaintiff, who was one of the applicants, was selected, and he took up his duties with effect from July 1, 1940. His services were terminated on May 30, 1941, and he claims, as I have already stated, damages for wrongful termination in the sum of Rs. 90,000. Defendant No. 1 is the president and defendant No. 2 is the trustee of the society. Rule 22(a) provides for the appointment of a trustee, and at the time the suit was filed defendant No. 2 happened to be the trustee. Defendants Nos. 1 and 2 are sued as representing themselves and all other members of the Great Indian Peninsula Railway Employees' Mutual Benefit Society. An ex parte order was obtained from Mr. Justice Kania on July 28, 1941, for leave to sue defendant No. 1 and defendant No. 2 in their representative capacity under O. I., Rule 8, of the Civil Procedure Code, 1908, and this chamber summons has been taken out to set aside that order.

4. The grounds on which it is urged that this order should be set aside are that this particular society is a fluctuating body with varying members, and it is urged that pursuant to the order made by Mr. Justice Kania every person who happens to be a member of the society at the time of the passing of the decree, even though he became such a member after the accrual of the cause of action or during the pendency of the suit, would be personally liable to satisfy any decree passed in favour of the plaintiff. Also a person who became a member of the society after the accrual of the cause of action and the making of the order but ceased to be such during the pendency of the suit would also be held personally liable in the event of the suit being decreed in the plaintiff's favour. It is pointed out that such members have no common interest whatever with defendant No. 1 and defendant No. 2 in this suit.

5. Mr. Engineer for the plaintiff urges that in a representative suit filed under O. I, Rule 8, no personal decree can be passed except against the defendants who are on the record of the suit eo nomine. He points out that there are funds of the society, that there is a trustee of the society, and that if the ? decree goes in favour of the plaintiff, the decree would be against the defendants on the record personally, and as regards the other members who are represented by defendants Nos. 1 and 2, it would be confined to their interest in the funds of the society. He further urges that there can be no question that the interests of all the members are common because the employment was by the society and the dismissal also was by the society. It is not the case here that certain members of the society employed the plaintiff and some others terminated his services so that different defences might be available to different members of the society. Mr. Coltman, on the other hand, on the strength of the decisions in England, to which I shall presently refer, contends that in a representative suit if a personal decree is asked for, that decree is capable of being executed not only against the defendants on the record eo nomine but also against all the persons whom the defendants represent. If that were so, then if a decree were to be passed in this suit, members of the society who were not members at the time the plaintiff was employed and also persons who ceased to be members when the plaintiffs services were terminated would be liable to pay the decretal amount. The question, therefore, that arises for determination is what is the nature of the decree in a representative suit ? Sir Dinshah Mulla in his commentary on the Civil Procedure Code states that the general rule of law is that in suits where one person is allowed to represent others as defendant in a representative capacity, any decree passed binds those others only with respect to the property of those others which he can in law represent, and although the party on record eo nomine may be made personally liable, no personal decree can be passed against the others. I am afraid that this proposition of law is not borne out by authorities both in this country and in England. The decision on which Sir Dinshah Mulla relies for this proposition of law is the decision in *Sahib Thambi v. Hamid* (1911) I.L.R. 36 Mad. 414, and it is true that that particular decision does lay down the rule of law enunciated by Sir Dinshah Mulla. But the Court in that case was not called upon to construe O. I, Rule 8, at all, and its observations on the effect of a decree passed under the provisions of that rule are purely obiter. In the Madras case the plaintiff obtained a decree against the firm of *M. L. v. Sahib Malim & Co.* in the Supreme Court of Singapore. The only partner who was served and who defended the suit -was defendant No. 3. The plaintiff then filed a suit, based on the judgment of the Singapore Court against defendant No. 3, against defendants Nos. 1 and 2 as representatives of a deceased partner and against defendant No. 4, another partner of the firm. The relief asked against them was personal and not restricted to partnership property in their hands. The Court held that the partners who were not served in the Singapore suit were not personally liable but only the partnership property, if any, in their hands was liable for the decree of the Singapore Court.

6. The view taken by the Madras High Court of the effect of a decree in a representative suit is contrary to the whole stream of authorities in England and to a decision of our own Court, to which I shall presently refer. In *Walker v. Sur* [1914] 2 K.B. 930 the plaintiff sued in an action of debt for professional services rendered four named defendants on their own behalf and on behalf of all other members of an unincorporated religious society. Bucknill J. made an order authorizing the four defendants to defend on behalf of themselves and the unincorporated religious society. From this order of Bucknill J. there was an appeal, and Lord Justice Buckley's judgment points out that the plaintiff was only suing for money, for which he wanted judgment against certain persons, and he

wanted by this order to be in a position to say that he was pursuing his remedy against persons who were not parties in the sense of being parties on the record. In the case *Mr. Lowenthal*, counsel for the plaintiff, expressly disclaimed that if he got judgment in that action he could have enforced it against a person who was not a party, but Lord Justice Buckley refused to accept that disclaimer and observed that what the Court of Appeal had to determine was whether, if that action went on, execution could be maintained against all the persons represented. In his opinion execution could be maintained, and, therefore, it was impossible to permit the defendants to be sued as representing not only themselves but all the members of the society.

7. The decision in *Walker v. Sur* had been referred to with approval in a subsequent decision of the English Court on the same question : *Hmdie & Lane, Ltd. v. Chiltern* [1928] 1 K.B. 663, and in this case it was clearly assumed that a personal judgment against the defendants on the record of the suit would be capable of execution against the persons whom they were representing under the representation order.

8. In *Barker v. Allmson* [1937] 1 K.B. 463 the defendants were sued as representing the branch of the Durham Miners' Association. Greer L. J. explained the effect of the representation order as making the members of the association at the date of the writ defendants to the action to the same extent and with the same consequences as if they had been named defendants in the writ. Scott L. J. said (p. 475): " The vital thing to remember is that judgment against representative defendants means judgment against each individual person covered by the representation.

9. In *Bhicoobai v. Hariba Raghuji* (1917) I.L.R. 42 Bom. 556, s.c. 19 Bom. L.R. 650 the plaintiffs sued certain defendants as representing themselves and other members of the Dakshini Fulmali caste under Section 70 of the Indian Contract Act, 1872, they having paid a sum of Rs. 7,234 to save the properties of the caste being sold in execution of the decree against the defendants. It is significant to note the form of the decree which was passed by Mr. Justice Marten, as he then was, in that case. Although a personal decree was asked for in the plaint, Mr. Justice Marten took an undertaking from the counsel for plaintiff No. 2 that he would not levy execution under the decree except against the immoveable property of the caste or the shares of the members of the caste, and on that undertaking being given, a decree was passed for payment of the sum of Rs. 7,234. This undertaking would have been meaningless if all the members of the caste represented by the defendants had not been personally liable under the decree, Further Marten J. sounded a note of warning against making orders under O. I, Section 8, in chambers without careful consideration, as the Court might thereby make persons liable for large sums who were not parties to the suit and who had not personally authorised the litigation.

10. The proper form of pleadings in a representative suit was discussed in a decision in *Ideal Films, Ltd. v. Richards* [1927] 1 K.B. 374. That was a suit by the plaintiffs for hire of certain, films supplied by them to an unregistered society for exhibition. There were seventeen defendants in all, eleven defendants being members of the society and six defendants as trustees in whom the funds of the society were vested. The statement of claim, as originally drafted, asked for a simple money decree and an order against the trustees for payment of the same and costs of the suit. Mr. Justice Horridge made a representation order directing that the first eleven defendants should defend the action on

behalf of the members of the society, but dismissed the last six defendants as trustees from the action on the ground that the statement of claim, so far as it concerned them, disclosed no reasonable cause of action, and was frivolous' and vexatious. There was an appeal from this order of Horridge J., and the Court of Appeal allowed the pleading to be amended by inserting first in the statement of claim a declaration that the sum claimed by the plaintiffs was due and owing from the members of the society, and it allowed the trustees to remain on the record altering the statement of claim as against them to this extent that whereas as originally drawn it made the trustees personally liable for the costs of the action, but now it only asked for payment out of the assets of the association in their hands. Lord Justice Bankes observed in his judgment that (p. 377) :

As it was originally framed the relief asked was judgment for the amount due as against the eleven defendants personally, instead of a declaration of right as between the plaintiffs and the class whom the named defendants represent. That was not the proper form in which to ask for judgment in a representative action,.

11. This decision clearly establishes that in a suit where the defendants are sued in a representative capacity all that the plaintiff is entitled to against them is a declaration of his right as against the class whom the named defendants represent. He is not entitled to a personal decree against them, but is only entitled to be paid out of the funds or the property and assets belonging to the class and in which all members of the class are interested. Now, looking to the plaint in this suit, I think it offends against the principles laid down by Lord Justice Bankes in *Ideal Films, Ltd, v. Richards*. It does not seek for any declaration of liability on the part of the members of the society for the amount claimed. It merely asks for a personal decree against the defendants, nor is there any suggestion in the plaint that the decree which the plaintiff might obtain would be restricted to the funds of the society in the hands of the trustee or any other body in whom the funds are vested under the rules of the society.

12. Mr. Engineer has stated in the course of his arguments on the chamber summons that he is prepared to give an undertaking on behalf of his client that he would not execute the decree even if he obtained a personal decree against defendant No. 1 or against defendant No. 1 and defendant No. 2, but would restrict the operations to the funds of the society. He has also offered, if necessary, to amend the plaint to bring it in conformity with the principles laid down in *Ideal Films, Ltd. v. Richards*. As I have pointed out, a similar disclaimer was made by another counsel in *Walker v. Sur*. As regards the question of the amendment of the plaint, till leave is given by the Court it is not possible for me to say what form the plaint would take. The question that I have to decide is, on the plaint as it stands today, whether the order made by Kania J. giving the plaintiff leave to sue the defendants in a representative capacity was justified. As, in my opinion, if a decree was passed against the defendants on the plaint as it stands, it would be open to the plaintiff to execute it against persons other than those who are on the record of the suit, some of whom were in no way privy to the contract between the society and the plaintiff, I think that the order made by Kania J. cannot be justified and should not be allowed to stand.

13. I, therefore, make the summons absolute in terms of prayers (a) and (b) of the summons and direct that the plaintiff should pay the costs of the summons. I certify counsel.