

IN THE HIGH COURT OF BOMBAY AT GOA

(LD-VC-CW-133/2020)

Vijayanand Kankonkar and anr. Petitioners

Vs

Demu Shirodkar and ors. Respondents

Shri S. D. Lotlikar, Senior Advocate with Shri M. D'Souza, Advocate for the petitioners.

Shri A. Bhobe, Advocate for the respondent nos.2 and 3.

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 18th August 2020.

P.C.

The petitioners filed Regular Civil Suit No.18/2020/C against two named-defendants; they are said to represent the interest of all the villagers. That is, the plaintiffs have arrayed the defendants in the representative capacity. The suit is for perpetual injunction—against all the villagers.

2. The plaintiffs have claimed that they are the lessees of the property and have been in possession for generations. It is a communal or Government property in which the villagers are interested. In fact, the petitioners want the Court to restrain the villagers from immersing Ganesh idols in the suit property. According to them, such practice will affect their lease and possessory right as well.

3. Pending the suit, respondent nos.2 and 3 applied under Rule 8(3) of Order I, CPC (but mentioned wrongly as Rule 10 of Order I) to come on record. They claim twin rights: they are the villagers and, thus, are

interested in the suit; they are also, more importantly, the original lessees of the property. According to them, they are in actual physical possession of the property. Despite the petitioners' opposition, the trial Court allowed the impleadment application.

4. Aggrieved, the petitioners have filed this Writ Petition.

5. Shri Lotlikar, the learned Senior Counsel for the petitioners, has strenuously contended that the respondent nos. 2 and 3 have been trying to enlarge the scope of the suit. According to him, the petitioners being the *dominus litus*, the suit must proceed based on the case of action they pleaded and the relief they sought. The learned Senior Counsel stresses that the defendants already on record have been defending the interest of the rest of the villagers, including the respondent nos.2 and 3.

6. In this context, the learned Senior Counsel submits that there is no whisper in the application filed by the respondent nos.2 and 3 that the villagers already on record have not been representing their interest properly. Even otherwise, the respondent nos.2 and 3 coming on record will amount to abuse of process because they wanted the suit converted into a title dispute. But Shri Lotlikar has, in the end, fairly submitted that the respondent nos. 2 and 3 may as well come on record but they should not set up an independent right which will alter the very nature of the suit and even embarrass the trial.

7. On the other hand, Shri Bhobe, the learned counsel for the respondent nos. 2 and 3, has submitted that order 1 Rule 8(3) of CPC is a

straight forward provision. It does not require the impleading parties to establish before the Court that the defendants already on record in the representative capacity are acting adverse to those they represent. That requirement is under Rule 8(5) of Order 1 CPC, which deals with the substitution of the parties.

8. In the end, Shri Bhobe has submitted that the respondent nos. 2 and 3 fail to understand why the petitioners feel shy of facing these respondents as adversaries in the proceedings. Besides, he has also submitted that under the cover of this representative suit, the petitioners want to secure a judicial finding on their alleged tenancy, and that will affect the impleading respondents' interest. They also want an injunction against those that have been in possession without ever facing them as adversaries. According to shri Bhobe, it is an abuse of process.

9. Heard Shri S. D. Lotlikar, the learned Senior Counsel for the petitioners, and Shri A. D. Bhobe, the learned counsel for the respondent nos.2 and 3.

10. As I understand, the petitioners apprehend that the entry of respondent nos.2 and 3 will either alter the nature of the suit or enlarge the adjudicatory scope.

11. That said, I must note that any defendant can take all pleas legally available for him to defeat the plaintiff's claim. It does not mean in a suit instituted by the plaintiffs, the defendants will have a decree affirmatively establishing his right. It is only his defence in multiple forms

to defeat the plaintiffs' case. Therefore, to that extent the petitioners' fear that either the nature of the suit changes or its scope expands stands allayed.

12. Let us see how the provision fares. It reads:

8. One person may sue or defend on behalf of all in same interest.—

(1) Where there are numerous persons having the same interest in one suit,—

(a) one or more of such persons may, with the permission of the Court, sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested;

(b) the Court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested.

(2) The Court shall, in every case where a permission or direction is given under sub-rule (1), at the plaintiff's expense, give notice of the institution of the suit to all persons so interested, either by personal service, or, where, by reason of the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(3) Any person on whose behalf, or for whose benefit, a suit is instituted, or defended, under sub-rule (1), may apply to the Court to be made a party to such suit.

(4) No part of the claim in any such suit shall be abandoned under sub-rule (1), and no such suit shall be withdrawn under sub-rule (3), of rule 1 of Order XXIII, and no agreement, compromise or satisfaction shall be recorded in any such suit under rule 3 of that Order, unless the Court has given, at the plaintiff's expense, notice to all persons so interested in the manner specified in sub-rule (2).

(5) Where any person suing or defending in any such suit does not proceed with due diligence in the suit or defence, the Court may substitute in his place any other person having the same interest in the suit.

(6) A decree passed in a suit under this rule shall be binding on all persons on whose behalf, or for whose benefit, the suit is instituted, or defended, as the case may be.

Explanation.—For the purpose of determining whether the persons who sue or are sued, or defend, have the same interest in one suit, *it is not necessary to establish that such persons have the same cause of action*

as the persons on whose behalf, or for whose benefit, they sue or are sued, or defend the suit, as the case may be.

(Italics supplied)

13. The legislative mandate under sub-rule (3) of Rule 8 is unmistakable. Any person who is represented may apply to the Court to come on record himself. He need not allege that the people representing him have been acting adverse to his interest. The decree ultimately binds them; they can dispense with their representative and may desire to prosecute the case themselves. For this reason, Rule 8(3) imposes no conditions.

14. On the other hand, sub-rule (5) of Rule 8 deals with substitution. A plaintiff may be suing as a representative of a larger group; similarly, a defendant may have been defending the suit for many others, besides himself. But he is the one among many chosen by the plaintiff to represent a larger group of persons who are likely to be affected by the suit outcome. In either event, the plaintiff or the defendant, in the representative capacity, may be found wanting in prosecuting the case. In that event, any party with a similar interest can apply for substitution. As the person already on record gets displaced, the person who wants to replace him must establish to the Court's satisfaction that the person on record is not acting *bona fide*. This substitution needs a specific plea and a finding about the lack of diligence on the part of the persons already on record. If it is not substitution but addition of parties, this requirement, I reckon, is absent.

15. Before concluding, I may note that the petitioners have a grievance that the trial Court in the order of impleadment has observed on the merits that may prejudice their case. To allay that fear, out of abundant caution, I observe that the observations in the impugned order should not affect either party's claims and contentions in the suit. The order confines itself to allowing the respondents 2 and 3 to come on record. Nothing more.

16. Thus, the respondent nos.2 and 3 having already been brought on record, they are free to take all pleas legally permissible to them, as the explanation to Rule 8 of Order I CPC permits.

With these observations, I dispose of Writ Petition.

DAMA SESHADRI NAIDU, J.

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