

Singhai Lal Chand Jain (dead)

Vs

Rashtriya Swayam Sewak Sangh, Panna and others

Civil Appeal No. 3796 of 1996

(K. Ramaswamy, G. B. Pattanaik JJ)

15.02.1996

JUDGMENT

1. Leave granted.

2. Heard learned counsel on both sides.

3. This appeal by special leave arises from the judgment and order dated July 16, 1991 made in C. R. No. 476/88 of the Madhya Pradesh High Court, Jabalpur Bench. The Division Bench held that the objection to the maintainability of representative suit without leave of the Court under Order 1, Rule 8 of the Code of Civil Procedure, 1908 (Code) is sustainable. The decree of the Court is a nullity and non est. Therefore, Explanation VI to Section 11 is not attracted to the facts in this case. Accordingly, the execution is not maintainable. Calling in question the finding and decision of the High Court, this appeal by special leave has been filed.

4. The facts are fairly not in dispute. The appellant laid Civil Suit No. 1A/87 in the Court of District Judge, Panna in Madhya Pradesh for eviction of Rashtriya Swayam Sewak Sangh through its Manager, Shri Gorelal Soni, its President, Shri Shiv Behari Srivastava, Advocate and the Head Master of Saraswati Shishu Mandir, Panna by name Ram Kripal Chaubey, as a member of the Sangh. The claim was based on the title and for eviction of the Sangh and its office bearers on the premises that it had no authority to stay in the suit premises. It was the appellant's plea that they had requested for temporary occupation of the premises till alternative site was secured. He had permitted the Sangh to occupy the premises for office purposes. But later the respondents had not vacated the premises. Then defence taken by the Sangh through its Manager, the President and the Member in joint written statement was that the property belonged to the Raja of Panna who at a meeting had declared that the Sangh was entitled to occupy the premises and remain in possession for all times. Pursuant to that, they had come into the premises and, therefore, they are entitled to remain in possession. Appropriate issues were framed and after adduction of evidence and consideration thereof, the trial Court upheld the plea of the respondents and dismissed suit. In F. A. No. 70/81, the High Court by an order and judgment dated October 31, 1986 allowed the appeal and decreed the suit for ejection. All the three filed S. L. P. (C) No. 2751/87 in this Court and by order dated July 15, 1987 a Bench of three Judges of this Court refused leave and dismissed the petition. The appeal was argued by no less than Shri U. R. Lalit, one of the eminent senior counsel of this Bar. After the execution was laid, Gorelal Soni and the respondents had filed objections contending that Sangh was not a registered body but composed of several members. The appellant had not followed Order 1, Rule 8, procedure. Therefore, the decree was a nullity and Section 11 is not a bar. The executing Court had upheld the objection and dismissed the petition. On revision, the High Court confirmed the same.

5. Shri Shiv Dayal Srivastava, learned senior counsel appearing for the appellant has contended that in view of the stand taken by the Manager, the President of the Sangh and the Member and having diligently prosecuted the proceedings, by no stretch of imagination it could be construed to be a collusive suit. Unless there is a finding that the decree is obtained by collusion or negligence, every member of the Sangh is bound by the decree. Though formal permission of the Court under Order 1, Rule 8 was not sought for in the suit, in substance it is a representative suit and the defendants so understood it. Every member of the Sangh is bound by the decree. The view of the High Court is not correct in law.

6. Shri Adarsh Kumar Goel, the learned counsel appearing for the respondents contended that permission for a representative suit under Order 1, Rule 8 is mandatory in law. No permission having been obtained by the appellant, the decree passed by the High Court on appeal is a nullity. That plea can be raised at any stage including in the execution. The High Court, therefore, was right in its conclusion that the decree is a nullity.

7. The question, therefore, is : whether the view taken by the High Court is correct in law. Relevant part of Order 1, Rule 8 provides thus :-

"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."

8. Procedure is the handmaid to the substantive justice. The suit was laid against the Sangh represented by the Manager, Mr. Gorelal Soni, the President, Shiv Behari Srivastava, a practising advocate also a member who is no other than a Head Master of a school, three of them had jointly filed the written statement with the defence available to them. The trial Court had proceeded on that basis. After framing the appropriate issues, the trial Court had accepted the plea of the defendants and dismissed the suit. On appeal, when the correctness thereof was canvassed, the respondents defended the action. The High Court on consideration of the evidence, did not accept the plea of the Sangh and accordingly, granted a decree. The matter did not rest there, they came in Appeal by way of special leave which was argued by one of the most eminent members of the Bar on behalf of the Sangh. The leave was refused by this Court. Thus it can be concluded that the Sangh was properly represented by the President, the Manager who was at the relevant time in office on behalf of the Sangh and also member of the Sangh who was no other than a Head Master and a practising advocate as President. The High Court, after hearing counsel on either side, considered the case and decreed the suit. With dismissal of the special leave petition by this Court, the decree became final. Therefore, it cannot be said to be a collusive suit nor a shadow of negligence is traceable so as to treat the decree a nullity. It is true that no permission of the Court was taken to be sued in a representative capacity by or on behalf of the Sangh. But Clause (b) of Order 1, Rule 8 indicates that it may sue or be sued, or may defend such suit, on behalf of, or for the benefit of all persons so interested. Clause (b) clearly applies to the facts in this case. The President of the Sangh, the Manager of the Sangh and a Member have duly represented the Sangh and defended the suit for the

benefit of all the persons so interested in the Sangh.

9. Having been thus defended, the question arises : whether the decree operates as a res judicata. Section 11, Code envisages principle of re judicta, i. e., no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them, claim, litigating under the same title, in a suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. Explanation VI to Section 11 is relevant in this behalf had reads thus :

"Where persons litigate bona fide in respect of a public right or a private right claimed for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating".

10. Therefore, the respondents now claim under the same title in the previous suit and thereby they are bound by the decree. The doctrine of res judicata evolved the public policy to prevent trial of an issue twice over. It clearly applies to the facts of the case. Accordingly, they are precluded to raise objections on behalf of the Sangh by filing the objections.

11. In *Surayya Begum (Mst.) v. Mohd. Usman*, (1991) 3 SCC 114, this Court has considered the effect of Explanation VI of Section 11 and held thus :

"The principle of representation of the interest of a person, not impleaded by name in a judicial proceeding, through a named party is not unknown. A karta of a Joint Hindu Family has always been recognised as a representative of the other members of the Joint Hindu Family, and so has been a trustee. In cases where the provisions of Order 1, Rule 8 of the Civil Procedure Code are attracted a named party in a suit represents the other persons interested in the litigation, and likewise a receiver appointed in one case represents the interest of the litigating parties in another case against a stranger. Similarly the real owner is entitled to the benefits under a decree obtained by his benamidar against a stranger and at the same time is also bound by the decision. Examples can be multiplied. It is for this reason that we find Explanation VI in the following words in Section 11 of the Code of Civil Procedure :

"Explanation VI. - Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating".

This, of course, is subject to the essential condition that the interest of a person concerned has really been represented by the others; in other words, his interest has been looked after in a bona fide manner. If there be any clash of interests between the person concerned and his assumed representative or if the latter due to collusion or for any other reason mala fide neglects to defend the case, he cannot be considered to be a representative. The issue, when it becomes relevant, has, therefore, to be answered with reference to the facts and circumstances of the individual case. There may be instances in which the position is absolutely clear beyond any reasonable doubt one way or the other and the question can be settled without any difficulty; but in other cases the issue may have to be decided with reference to relevant evidence to

be led by the parties. Surayya Begum's case is of this class while Renu Sharma's appeal belongs to the first category."

12. The Privy Council in Talluri Venkata Seshayya v. Thadikonda Kotiswara Rao, AIR 1937 PC 1, had held thus :

"The provisions of Section 11 of the Code are mandatory and the ordinary litigant, who claims under one of the parties to the former suit, can only avoid its provisions by taking advantage of Section 44, Evidence Act, which defines with precision the grounds of such avoidance as fraud or collusion. It is not for the Court to treat negligence or gross negligence, as fraud or collusion, unless fraud or collusion is the proper inference from facts. Other factors in Exception 6 to Section 11 being present, the section lays down a condition that the persons must be litigating bona fide and the fulfilment of this condition is necessary for the applicability of the section."

13. Thus it could be held that the Sangh having been duly represented in the previous proceedings and conducted the litigation on behalf of the Sangh bona fide and were unsuccessful in the suit, no one on behalf of the Sangh can lay any objection in the execution nor plead nullity of the decree. The doctrine of res judicata prohibited the members of the Sangh to obstruct the execution of the decree. The decree of ejection binds every member of the Sangh and, therefore, the appellant is entitled to have the decree executed and possession taken.

14. The appeal is accordingly allowed and the respondents are directed to deliver the vacant possession of the premises within six months from today. In default, the appellant is entitled to have the decree executed through the assistance of the police. No costs. Appeal allowed.