
AIR 1958 MP 189 : (1959) ILR (MP) 884 : (1958) 3 MPLJ 842

Madhya Pradesh High Court (Gwalior Bench)

Case No: Second Appeal No's. 145 and 160 of 1956

Manrakhan Baldeo
Prasad and Others

APPELLANT

Vs

Amir Khan Azam Khan

RESPONDENT

Date of Decision: Feb. 17, 1958

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 8

Citation: AIR 1958 MP 189 : (1959) ILR (MP) 884 : (1958) 3 MPLJ 842

Hon'ble Judges: H.R. Krishnan, J

Bench: Single Bench

Advocate: Shiv Dayal Shrivastava, for the Appellant; Abdul Hamid Siddiqui, for the Respondent

Judgement

H.R. Krishnan, J.

These two second appeals arise from the two decrees in two appeals before the Additional District Judge, Bhind from the judgment of the Civil Judge, Second Class of Bhind allowing in part the suit of Amir Khan, who is the appellant in Civil Second Appeal No. 160 of 1956 for certain declarations and the removal of encroachment. In view of the order that is being passed, it is unnecessary to go into the basis of the concurrent findings of facts.

But it is necessary to set out the general nature of the dispute that seems to have been going on mostly in Courts for some years, and is not without dangerous possibilities. In Bhind there is a mosque and adjoining it an Idgah, a piece of land used by the Muslims of the locality, for assembly on certain occasions.

To the north of Idgah is the house of Bal-deo Prasad, whose sons were the defendants in the suit and are the appellants in Second Appeal No. 145 of 1956. To the east of Baldeo's house is a lane or passage which goes to the Idgah, but how far beyond it is not

clear. For the thirty or forty years some sort of petty differences have been existing between Baldeo Frasad, some Muslims of the locality, who use Idgah and the Municipality or some such local body in whom the land is vested.

It appears that some-time in the twenties Baldeo Prasad opened a door or window on the side of the lane. But there was some byelaw in the Municipality under which no such opening on a public lane could be made without its permission that permission not having been granted, there was some difference between Baldeo Prasad and the local body-. Sometime in the year 1920 Baldeo Prasad brought a suit against certain Muslims in the locality that they had forcibly closed his door on the lane. The defence was that it was not they, but the Municipality which had got it closed as it had been opened without its permission.

Sometime before the filing of the present suit two things happened: First, the opening of a door on the eastern side of their house by Baldeo Prasad's sons, on that very lane, about which there was trouble 25 years before; but this time they presumably obtained permission of the Municipality. Second, the repair and reinforcement of the wall on the south, which had fallen down; now there was a buttress on that side of some width.

Aggrieved by both these, Amir Khan, describing himself as the Vice President of an Anjuman Islam of this locality and as the manager of the Idgah filed a suit. No prayer was made for the permission of the Court and there was no notice as required by Order 1 Rule 8. But the prayer was for relief on behalf of the Muslims who worshipped at the Idgah, Amir Khan averred that the Idgah extended right up to the edge of the wall of Baldeo Prasad's house as it stood before the repairs, and that while repairing it the defendants had encroached upon the Idgah land to the extent indicated in the map attached to the plaint; he prayed for the declaration of title and for the removal of the encroachment.

In regard to the door on the lane Amir Khan's averment is materially different from the position taken by the defendants in the suit in the twenties. Here it is that the land was not a public lane; it was a special lane used exclusively by those who were to go to Idgah for the purpose of religious worship; this is to say, only the Muslims of the locality. So the defendants' opening the door and using the land was illegal; and it should be stopped. From this view point it was immaterial whether or not the Municipality has permitted the door.

The defence was that there was no encroachment on the Idgah as the Idgah land does not extend right up to the bottom of the wall as it was before; the defendant's land extended to some distance beyond, and was left open so that there could be no dispute. The defendants averred that the lane was one used by the public in general; therefore, they were entitled to use it, and, subject to the byelaws of the Municipality, use it like every member of the public.

The defence was also that the suit was incompetent though no specific pleadings was made in this regard. Section 92 of the CPC was mentioned, which is obviously a mistake. We can take that there was 110 express averment that the suit by Amir Khan was a bad one unless it was converted into a representative suit and Order 1 Rule 8 was availed of. Even in the First Appellate Court this aspect of the case was not touched upon or was touched but very vaguely.

Thus there is no definite findings on the point. The findings were concurrent; firstly that the additional area on which new supporting wall or buttress has now been constructed was an encroachment on the land which was part of the Idgah. Secondly, that the Idgah was not one usable exclusively by the Muslims going to the Idgah but one which was open to entire public, therefore, the defendants had a right to open the door subject to the compliance with the municipal byelaws, with which the suit was not concerned. Thus it happens, that Amir Khan has filed the Second Appeal against the adverse finding in regard to the door on the lane and Manrakhanlal and others have filed another Second Appeal from the adverse decision in regard to the supporting wall.

In a dispute of this nature it is finality rather than the hair-breadth assessment of conflicting rights that is desirable; and nothing would have been more in the interest of the parties and the public than the disposal of those appeals in accordance with the concurrent findings of facts of the lower courts. Unfortunately there is material defect in the framing of the suit and it has to be remedied.

The defendants who are the appellants in Civil Second Appeal No. 145 of 1956 have taken the stand vaguely in the lower Courts, but clearly here that the plaintiff is not competent either as Vice President of Anjuman Islam or as the so-called manager of the Idgah, to bring this suit on behalf of the Muslims of that locality, without permission under Order 1 Rule 8 of the Civil Procedure Code, and notice to them. He has not brought it on his behalf only; in fact it is not possible, as he seeks the relief not of something positive to be granted and enjoyed by him as an individual; from his view point the relief is something negative, the removal of an alleged encroachment on the Idgah, as measured and ascertained in this suit, and the restraining of the defendants from using a lane as approach to their house.

The first point to be considered is, whether the defendants not having done so expressly in the lower Courts can raise this plea at this stage. The answer to this depends on whether the defect is one that goes to the very root of the suit; that is to say, if this is one that makes the suit non-maintainable even, as one by the plaintiff in his individual capacity, the objection can be taken at any stage.

On the contrary, if the suit can proceed in one form or" another, say as one by the individual, notwithstanding the fact that he professed to bring it in the representative capacity, certainly the objection cannot be entertained at the present stage. From what will be set out presently, I am of the opinion that it goes to the root of the suit and

therefore, can be raised at time before final disposal.

The suit has been filed by the plaintiff ostensibly in an inherent representative capacity, not requiring permission or notice under Order 1, Rule 8 of the C. P. C. He describes himself as Vice President of the Anjuman Islam in that locality; but it is not registered and has no juristic personality; so that even on the assumption that the Muslims in general of the locality were members of the Anjuman, and had authorised the plaintiff to bring the suit he is not competent to do so, without permission. Similarly the description of the plaintiff as the manager or may be the care-taker of the Idgah does not solve the difficulty.

The Idgah is land assigned for the assemblage for the Muslims. If it cannot vest in any society, the manager appointed by the Anjuman, cannot also represent all the users. Thus the suit as representative suit, which it ostensibly is, cannot proceed without the permission of the Court in accordance with Order 1, Rule 8 of the Civil Procedure Code.

Nor can it be one by an individual. No doubt there is ample authority for the proposition that the absence of permission, cannot prevent the suit from proceeding as one by individual plaintiff on his behalf only, without binding the other members of the class. But this is possible only when the relief sought is one that can be properly taken and enjoyed by the individual.

Both parties have quoted rulings in appeal to support of their respective positions; but have tried to ignore, that suits of the type fall broadly speaking into two categories. The first is where the prayer is that something positive may be granted to the plaintiff. For example, in *Pokhar Das v. Rihhu Ram* AIR 1921 Lah 76 (A), the suit was for restraining the defendant from interfering with the rights of the people of a Mohalla to use a well.

As long as the plaintiff belonged to that Mohalla it was open to him either to pray that he as an individual should not be obstructed from going to the well; if he did not take the permission of the Court the suit could proceed, but the decision might not bind others. Similarly in [Jadu Singh and Others Vs. Sant Singh and Others](#), the question was whether a numerous class, namely, tenants of a locality were entitled to irrigate their lands through a particular plot number belonging to the defendants.

The defendant not having taken his objection at the proper time, the suit was allowed to proceed as one brought by the plaintiff as an individual; this was correct as the relief was something he could be permitted to get. When the suit is of this type, the suit can proceed as one by an individual. If one of the individuals gets the relief, the defendant should in his own interest give it to the others of that class. Otherwise they too can bring individual suits and succeed. Any way the defendant can know what to do to save himself from other suits.

There is another class of suits where; the relief sought by its very nature, can be granted only to the numerous class; it is negative in the sense that the defendant is called up to do something against his interest, and it is essential that the whole class should be bound

by the decision. [Sudhansudhar Roy and Others Vs. Sasadhar Roy](#), and [Ahmed Sayed Vs. Bashir Ahmed and Others](#), refer to cases of this type and the latter is similar to the present one.

Here one prayer is that the defendants should not have a door opening on a lane and use it as an approach to their house because that would be an invasion of the exclusive right of a numerous class. Unless the entire class is bound, no relief can properly be given. In this suit the relief has been refused; but it does not, as the suit stands bind the class and every member of it (other than the plaintiff) can bring a suit of the same nature for the same relief and thereby cause unnecessary harassment to the defendants.

They, in fact, would not know what to do. Another relief is that at the one edge of the Idgah there has been a small encroachment by the defendants and that it should be removed. It is not that either the whole or any considerable part of the Idgah had been occupied but that every member of the numerous class is entitled to use every inch of that land. Actually the Court had held that there is an encroachment of a particular length and breadth and had ordered the removal. But unless this binds the numerous class, every member other than the plaintiff can bring separate suits each alleging that there are more and wider encroachments.

Again the defendants cannot know when there will be an end to this encroachment removing litigation. A suit of the second type, for a negative relief that cannot be enjoyed by the plaintiff except as a member of the numerous class and jointly with them, can proceed only as a representative one. In that event the plaintiff has either to show an inherent capacity to represent the class or to take permission (at any stage) under Order 1, Rule 8 of the C. P. C. In the present suit the plaintiff did aver that he had a representative capacity even without permission under Order 1, Rule 8; but that cannot be accepted. In other words the plaintiff has to fall upon the provision of Order 1, Rule 8 of the Civil Procedure Code.

In the result I allow both the appeals and set aside the judgment of the trial Court; I further order that the suit should go back and be taken up at the stage at which the plaint had been filed. The plaintiff should seek permission under Order 1, Rule 8 of the CPC within two months from the date of this judgment. If he fails to do so, the suit shall stand dismissed. No costs of pleader's fee to either party up to this stage.