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Rameshwar Shaw v. *District Magistrate, Burdwan & Anr.*

Gajendragadkar J.

The result is, the petition succeeds and the order of detention passed against the petitioner by the District Magistrate, Burdwan, on the 9th February, 1963, is set aside. We direct that the petitioner should be released forthwith.

Petition allowed.

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MAKHAN SINGH TARSIKKA

v.

THE STATE OF PUNJAB

(P. B. GAJENDRAGADKAR, K. SUBBA RAO, K. N. WANCHOO, J. C. SHAH AND RAGHUBAR DAYAL JJ.)

Defence of India Rules 1962, *rr.* 30(1), 30(1)(b)—Person in *jail custody—Detention order, if can be served—Validity.*

On the 20th November, 1962, an order of detention was passed against the appellant under Rule 30(1)(b) of the Defence of India Rules, 1962. This order was served on the appellant on the 21st November, 1962, while he was in jail custody as an under-trial prisoner in connection with a criminal case pending against him. He was arrested on the 25th October, 1962 in connection with the said criminal case and since then he was in jail custody. On the 26th October, 1962, Emergency was declared by the President. Whilst the appellant was in jail custody, he was allowed to interview his friends and about nine persons interviewed him between 3rd November to the 19th November, 1962. It was alleged by the respondent that during these interviews, the appellant instigated the persons who saw him, to commit prejudicial activities. The appellant moved a writ petition in the High Court against the said detention order. The High Court dismissed the writ petition on the ground that the appellant had failed to make out a case that his detention was illegal.

Held : (i) The decision in *Rameshwar Shaw's case* would be applicable to the present appeal, because the scheme of Rule 30(1) is not radically different from the scheme of s. 3(1)(a) of the preventive Detention Act and does not affect the construction of Rule 30(1)(b) of the Rules.

Rameshwar Shaw v. *District Magistrate, Burdhwan,* [1964] 4 S.C.R. 921 relied on.

(ii) It is true that the nature and scope of the orders which can be validly passed under Rule 30(1) of the Defence of India Rules is very much wider than the order of detention which alone can be made under s. 3(1) of the Preventive Detention Act. But the operative portion of Rule 30(1) is substantially similar to s. 3(1) of the Act.

(iii) Rule 30(1)(b), like s. 3(1)(a), of the Act clearly postulates that an order can be made under it only where it is shown that but for the imposition of the said detention, the person concerned would be able to carry out a prejudicial activity of the character specified in Rule 30(1). On a plain construction of Rule 30(1)(b) it must be held that the order permitted by it can be served on a person who would be free otherwise to carry out his prejudicial activity. Such freedom cannot be predicated of the appellant in the present case because he was in jail at the relevant time.

(iv) The service of a detention order on a person who is already in jail custody virtually seeks to effectuate what may be called 'a double detention' and such double detention is not intended either by s. 3(1)(a) or by Rule 30(1)(b); it is plainly unnecessary and outside the purview of both the provisions.

(v) If the appropriate authority wants to detain a person under Rule 30(1)(b), it must be shown that when the order of detention is served on him, he was free to carry out his prejudicial activities and his prejudicial activities could be prevented only by his detention. Therefore, the service of the order of detention on the appellant whilst he was in jail custody was invalid.

Emperor v. *Mool Chand,* A.I.R. 1948 All 288, inapplicable.

Dayanand Modi v. *State of Bihar,* I.L.R. 30 Pat. 630 and *Meledath Bharathan Malyali* v. *Commissioner of Police,* I.L.R. 1950 Bom. 438, referred to.

(vi) On principle, it would be difficult to state as a general proposition that an order of detention cannot be validly made against a person who is in jail custody for the reason that investigation is proceeding in regard to an offence alleged to have been committed by him. This Court has held in *Rameshwar Shaw* that as an abstract proposition of law an order of detention can be validly made against a person in jail custody. Whether or not the said making of the order is valid in a particular case may have to be determined in the light of the relevant and material facts. In the present case, the making of the order of detention was not invalid. In *Rameshwar Shaw* the petitioner was ordered to be released on the ground that he was served with the order of detention whilst he was in jail and not on the ground that the making of the order was invalid.

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(vii) The plea of *malafides* cannot be permitted to be raised for the first time in the petition for special leave for the reason that a plea of *malafides* must always be made by proper pleadings at the trial stage, so that the respondent has an opportunity to meet the said proceedings.

(viii) The order of detention passed against the appellant is set aside on the ground that the service of the order is invalid and is outside the scope of the Rules.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 80 of 1963.

Appeal by special leave from the judgment and order dated March 26, 1963, of the Punjab High Court in Criminal Misc. No. 186 of 1963.

R. K. Garg, S. C. Agarwal, M. K. Ramamurthi and *D. P. Singh,* for the appellant.

L. K. Kaushal, Senior Deputy Advocate-General for the *State of Punjab* and *B. R. G. K. Achar,* for the respondent.

October 11, 1963. The Judgment of the Court was delivered by

Gajendragadkar J.

GAJENDRAGADKAR, J.—The detenu Makhan Singh Tarsikka whose *Habeas Corpus* petition has been dismissed by the Punjab High Court, has brought this appeal before us by special leave. It appears that on the 22nd October, 1962, F.I.R., was filed at the Police Station, Jandiala, alleging that offences under sections 307, 324, 364 and 367 I.P.C. had been committed by certain persons including the appellant. In pursuance of the investigation which commenced on receipt of the said F.I.R., the appellant was arrested on the 25th October, 1962. On the 26th October, 1962, Emergency was declared by the President. On the 1st November, 1962, the appellant was transferred to judicial custody of the Sub-Divisional Magistrate, Amritsar. Whilst the appellant was in jail custody, he was allowed to interview his friends and about nine persons interviewed him between 3rd November to the 19th November, 1962. On the 20th November, 1962, an order of detention was passed against the appellant under Rule 30(1)(b) of the Defence of India Rules, 1962 (hereinafter called the 'Rules'). This

order was served on the appellant on the 21st November, 1962 and it appears he was removed to the jail at Hissar. On the 30th January, 1963, he was brought back to Amritsar, and on the 9th February 1963 he filed the present writ petition.

In his petition which was filed by the appellant, the main allegation which he made in challenging the validity of his detention was that the grounds set up in the order of detention were "very vague, concocted and totally false". The detention order had stated that the appellant was detained because he was found to be "indulging in activities prejudicial to the Defence of India and Civil Defence by making propaganda against joining the armed and civil defence forces and by urging people not to contribute to the National Defence Fund." The order added that having regard to his activities, it was thought necessary to detain him in order to prevent him from carrying on the said prejudicial activities.

On the 4th March, 1963, the appellant made an additional affidavit in which he urged that the fact that the deponent was in confinement before the declaration of emergency on the 26th October, 1962 and the Chinese invasion, clearly showed that the allegations against the deponent were false and concocted. By this supplementary affidavit, the appellant furnished an additional ground in support of his original plea that the grounds on which his detention had been ordered were false and concocted.

On the 6th March, 1963, the appellant filed a third affidavit in which he stated that his political activities as a member of the Legislative Assembly were disliked "by the High-ups". He referred to several Starred Questions of which he had given notice in the Punjab Legislative Assembly to show that the ruling high-ups were angry with him. These Questions, the appellant alleged, "revealed the naked corruption of the ruling high-ups". The appellant further alleged that the Jandiala Police were enraged by the fact that at his instance the Punjab High Court had appointed the Sessions Judge at Amritsar to hold an inquiry in village Ramana Chak affairs. According to him, the S.S.P., Amritsar who was a near relative of the ruling Chief, was also hostile to him. It is on these additional grounds also that the appellant purported to

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challenge the validity of his detention before the Punjab High Court.

These three affidavits were duly challenged by counter-affidavits made on behalf of the respondent, State of Punjab. It was in one of these affidavits that the respondent brought out the fact that the appellant had nine interviews in jail between the 3rd November to 19th November, 1962 and the information received by the respondent was that during these interviews, the appellant instigated the persons who saw him, to commit prejudicial activities. The affidavits filed by the respondent also disputed the other allegations made by the appellant in the three affidavits to which we have already referred.

It appears that before the High Court it was urged by the appellant that the order of his detention had been passed *malafide* and his contention was sought to be supported on the ground that he had been arrested on the 25th October, 1962, and so, it would not be rationally possible to allege against him that he had indulged in the prejudicial activities mentioned in the said order. It was also argued before the High Court on his behalf that since a criminal case under s. 307 I.P.C. was pending against him at the relevant time, it was not open to the detaining authority to detain him under Rule 30(1)(b) of the Rules. The learned Judge who heard the *habeas corpus* petition filed by the appellant, rejected both these contentions. In the result, he held that the appellant had failed to make out a case that his detention was illegal, and so, the writ petition was dismissed.

On behalf of the appellant, Mr. Garg has urged that the service of the order of detention which was effected on the 21st November, 1962 is illegal and in support of his argument he has relied on a recent decision of this Court in *Rameshwar Shaw* v. *The District Magistrate, Burdwan & Another*(1). Mr. Garg points out that the material words used in section 3(1) of the Preventive Detention Act, 1960 (No. 4 of 1960) (hereinafter called 'the Act') which were construed by this Court in the case of *Rameshwar Shaw*(1) are substantially the same as in Rule 30(1) of the rules with which the present appeal is concerned, and he contends that the said decision fully justifies his argument

(1) [1964] 4 S.C.R. 918.

that the service of the impugned order of detention on the appellant when he was already in jail custody is outside the purview of Rule 30(1). In our opinion, this argument is well-founded and must be accepted.

In the case of *Rameshwar Shaw*(1) this Court construed s. 3(1) of the Act and held that the said provision necessarily postulates that a person sought to be detained would be free to act in a prejudicial manner if he is not detained. In other words, the freedom of action to the person sought to be detained at the relevant time must be shown before an order of detention can be validly served on him under the said section. If a person is already in jail custody, it was observed in the said judgment, how can it rationally be postulated that if he is not detained he would act in a prejudicial manner?, and so, the effect of the said decision is that an order of detention cannot be validly served on person who is already in jail custody and in respect of whom it is rationally not possible to predicate that if the said order is not served on him, he would be able to indulge in any prejudicial activity.

In the case of *Rameshwar Shaw*(1) this Court also considered the question as to whether an order of detention can be made against a person who is in jail custody, and it was held that as an abstract proposition of law, there may not be any doubt that s. 3(1)(a) of the Act does not preclude the authority from passing an order of detention against a person whilst he is in detention or in jail. But this Court also added that the relevant facts in connection with the making of the order may differ and that may make a difference in the application of the principle that a detention order can be passed against a person in jail. Dealing with this aspect of the matter, this Court emphasised the relevance of the considerations of proximity of time and concluded that whether an order of detention can be passed against a person who is in detention or in jail, will always have to be determined in the circumstances of each case. It would thus be seen that in the case of *Rameshwar Shaw* (1), his application was allowed and he was ordered to be set at liberty on the ground that the service of the order detaining him was

(1) [1964] 4 S.C.R. 918.

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effected when he was in jail. Mr. Garg naturally relies on this authority in support of his first contention that the service of the detention order against the appellant whilst he was in jail is similarly invalid.

The learned Dy. Advocate-General who appears for the respondent attempted to argue that the decision in *Rameshwar Shaw's case* (1) would not be applicable to the present appeal, because the scheme of Rule 30(1) is radically different from the scheme of s. 3(1) of the Act. He concedes that the operative portion of Rule 30(1) is substantially similar to section 3(1). Rule 30(1) provides :—

> "The Central Government or the State Government, if it is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the defence of India and civil defence, the public safety, the maintenance of public order, India's relations with foreign powers, the maintenance of peaceful conditions in any part of India, the efficient conduct of military operations or the maintenance of supplies and services essential to the life of the community, it is necessary so to do, may make an order. . ."

Then follow eight clauses which authorise the specified categories of orders which may be passed under Rule 30(1). Clause (b) relates to detention and it is with this clause that we are concerned in the present appeal. The argument is that the eight clauses indicate that it is not only the detention which can be ordered by the appropriate authority, but there are several other kinds of orders which can be passed ; under clause (a), for instance, the person can be directed to remove himself from India in such manner, by such time and by such route as may be specified in the order, and be prohibited from returning to India. Clause (c) authorises the appropriate authority to impose limitations against a person prohibiting him from going into any such area or place as may be specified in the order. Clause (d) contemplates a kind of internment of the person within the area specified in the order. Under clause (e) the movements of the person can be regulated by asking him to report himself or to notify his movements or both in the manner indicated in that clause. Clause (f)

(1) [1964] 4 S.C.R. 918.

permits imposition of restrictions in respect of the employment or business carried on by the person, while under clause (g), restrictions may be imposed on the possession or use by the person of any articles mentioned in the order. Clause (h) is general in terms and it provides that the appropriate authority may make an order otherwise regulating the conduct of the person in any such particular as may be specified in the order.

It is thus clear that the nature and the scope of the orders which can be validly passed under Rule 30(1) is very much wider than the order of detention which alone can be made under s. 3(1) of the Act. But the question which we have to consider is : does this fact make any difference to the interpretation of the operative provisions of Rule 30(1) in relation to detention? In our opinion, the answer to this question must be in the negative. Rule 30(1)(b), like s. 3(1)(a), clearly postulates that an order can be made under it only where it is shown that but for the imposition of the said detention, the person concerned would be able to carry out a prejudicial activity of the character specified in Rule 30(1). In other words, one of the conditions precedent to the service of the order permitted under Rule 30(1)(b) is that if the said order is not served on the person, he would be free and able to carry out his prejudicial activity in question. The fact that other kinds of orders can be passed against a person under Rule 30(1) does not alter the essential condition of a valid service of the order contemplated by Rule 30(1)(b) that if the said order is not served, the prejudicial activity may follow. Therefore, we are satisfied that on a plain construction of Rule 30(1)(b) it must be held that the order permitted by it can be served on a person who would be free otherwise to carry out his prejudicial activity. Such a freedom cannot be predicated of the appellant in the present case because he was in jail at the relevant time. Therefore, we do not think that the distinction which the Dy. Advocate-General seeks to make between the provisions of Rule 30(1)(b) and section 3(1)(a) makes any difference to the construction of the Rule. The service of a detention order on a person who is already in jail custody virtually seeks to effectuate what may be called 'a double detention' and such double detention is not

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intended either by s. 3(1)(a) or by Rule 30(1)(b); it is plainly unnecessary and outside the purview of both the provisions.

It was also argued by the learned Dy. Advocate-General that in the case of an under-trial prisoner who is entitled to interview his friends or relatives under rules framed in that behalf, it would be possible for him to send out messages and thereby carry on his prejudicial activities in an indirect way, and that could be stopped only if he is detained under Rule 30(1)(b). We are not impressed by this argument. It appears that Rule 13 of the Punjab Detenus Rules, 1950, allows a detenu to interview a near relative in accordance with these rules and Rule 19 requires that all interviews shall take place unless otherwise directed by the Dy. Inspector-General, Criminal Investigation Department, in the presence of an officer deputed for the purpose by the Superintendent of Police of the district, and it provides that such officer may stop the interview if the conversation turns on any undesirable subject. The contention is that whereas an ordinary under-trial prisoner is not required to interview his friends and relatives in the presence of the Police Officer, that is a condition imposed by Rule 19, and so, in order to prevent the appellant from carrying out his prejudicial activities by means of interviews even whilst he is in jail custody it was necessary to make the order of detention and serve it on him though he was in jail. That, it is suggested, is a distinctive feature of the scheme contemplated by Rule 30(1) of the Rules. The obvious answer to this argument, however, is that if the restriction contemplated by Rule 19 of the Punjab Detenus Rules was intended to be imposed against the appellant, under Rule 30(1) it could easily have been done by regulating his conduct whilst he was an under-trial prisoner in jail. We have already seen that Rule 30(1)(h) authorises the appropriate authority to regulate the conduct of a person in any such particular as may be specified in the order, and there can be no difficulty in holding that if the respondent took the view that from jail, the appellant was carrying out prejudicial activities, an appropriate order could have been passed against him under R. 30(1)(h). That being so, we do not think that the argument that the scheme of R. 30(1) is radically different from the scheme

of s. 3(1)(a) of the Act and affects the construction of the operative portion of Rule 30(1)(b), can be sustained. If the appropriate authority wants to detain a person under Rule 30(1)(b), it must be shown that when the order of detention is served on him, he was free to carry out his prejudicial activities and his prejudicial activities could be prevented only by his detention. Therefore, we must hold that the service of the order of detention on the appellant whilst he was in jail custody is invalid.

In this connection, our attention has been drawn to two decisions to which reference may be made. In *Emperor* v. *Mool Chand & Ors.*(1), the Allahabad High Court has held that the detention of persons who have already been arrested cannot be said to be mala fide merely for the reason that the order of detention was passed against them when they had already been arrested. The mere fact, says the judgment, that persons were first arrested under some provisions of the ordinary law and were later ordered to be detained under the U.P. Maintenance of Public Order (Temporary Act) is not in itself, proof of mala fides and that it is for the party setting up mala fides to prove circumstances from which mala fides could be reasonably inferred. It would thus be seen that the point argued before the Court and which has been decided by the judgment, is that a detenu cannot succeed in proving that the order of his detention has been passed mala fide solely for the reason that prior to the date of the order, he had been arrested. In other words, in order to prove mala fides in passing the detention order, adequate evidence must be led and the mere allegation that the order followed the arrest of the detenu under the Cr. Procedure Code, for an offence will not sustain his plea of mala fides. We do not see how this judgment can assist the respondent in the present appeal.

In *Dayanand Modi* v. *The State of Bihar*(2), the question raised was whether detention and prosecution of the same person can be simultaneously made. In other words, the point urged was whether a person who is being prosecuted under the ordinary criminal law can

(1) I.L.R. 1948 All 288.
(2) I.L.R. 30 Patna 630.

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be detained whilst the prosecution is still pending against him. This decision has no bearing on the question as to the construction of Rule 30(1)(b) and the effect of the service of an order of detention on a person who is already in jail custody. All that the Patna High Court did in that case was that it rejected the extreme proposition urged for the detenu that when an offence is alleged to have been committed, the State Government has no authority to detain, but must launch a prosecution and wait for the decision of the Court, or that the withdrawal of a pending prosecution will in certain cases amount to an acquittal and, therefore, deprive the State Government of any legal authority to make an order of detention on the same facts. As we will presently indicate, the problem which the Patna High Court has considered in that case was sought to be raised before us by Mr. Garg, but since we have come to the conclusion that the service of the order of detention on the appellant whilst he was in jail custody is invalid, we do not propose to deal with that question.

We may, however, indicate the nature of the point which Mr. Garg sought to raise before us. Basing himself on the decision of the Full Bench of the Bombay High Court in *Maledath Bharathan Malyali* v. *The Commissioner of Police*(1), Mr. Garg contended that it was not open to the respondent to take simultaneously two actions against the appellant—one under the ordinary Cr. Procedure Code and the other under Rule 30(1)(b). The Bombay High Court appears to have held that the State cannot pursue both the rights at the same time if on the facts of a particular case it is apparent that these two rights are inconsistent and cannot be exercised at the same time, the two rights in question being the right to investigate and prosecute a person under the ordinary criminal law and the right to detain him under the Preventive Detention Act. As we have just mentioned, we do not propose to deal with this point in the present appeal.

Mr. Garg also contended that the making of the

(1) I.L.R. 1950 Bom. 438.

order of detention itself is invalid, because at the time when the order was made the appropriate authority knew that the appellant was in jail, and so, the order passed was not justified and is, therefore, invalid under Rule 30(1). In support of this argument Mr. Garg has relied upon the observations made by this Court in the case of *Rameshwar Shaw*(1). It would be recalled that in that case also, Rameshwar Shaw was ordered to be released on the ground that he was served with the order of detention whilst he was in jail and not on the ground that the making of the order was invalid. In fact, this Court made no finding on that question and based its decision on the narrow ground that the service of the order was invalid. We propose to adopt the same course in the present appeal. In dealing with the question about the validity of the making of the order, it would be necessary to ascertain some more relevant and material facts. Even though the appellant was in jail custody, it is not unlikely that he could have applied for bail and might have obtained an order of bail, and bearing that contigency in mind, the appropriate authority would be justified in making an order of detention against the appellant, provided of course, the authority waited for the service of the order after the appellant was released on bail; so that, on principle, it would be difficult to state as a general proposition that an order of detention cannot be validly made against a person who is in jail custody for the reason that investigation is proceeding in regard to an offence alleged to have been committed by him. In fact, as we have already pointed out in the case of *Rameshwar Shaw*(1), as an abstract proposition of law, this Court has held that an order of detention can be validly made against a person in jail custody. Whether or not the said making of the order is valid in a particular case may have to be determined in the light of the relevant and material facts. In the absence of any such facts in the present case, we do not think we would be justified in dealing with Mr. Garg's argument that the making of the order was invalid. In fact, we were told that after the criminal case pending against the appellant was transferred from

(1) [1964] 4 S.C.R. 918.

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Amritsar to a court of competent jurisdiction in U.P. the said court has allowed the appellant's application for bail, subject, of course, to his detention under the impugned order of detention; and so, the possibility that the appropriate authority might have apprehended that the appellant would move for bail and might succeed in that behalf, cannot be ruled out in dealing with the question about the validity of the making of the order. Besides, when a person is in jail custody and criminal proceedings are pending against him, the appropriate authority may, in a given case, take the view that the criminal proceedings may end very soon and may terminate in his acquittal. In such a case, it would be open to the appropriate authority to make an order of detention, if the requisite conditions of the Rule or the section are satisfied, and serve it on the person concerned if and after he is acquitted in the said criminal proceedings.

That leaves the question about mala fides to which Mr. Garg referred in the course of his arguments. We do not think Mr. Garg can be permitted to raise that point in the present appeal, because we find that adequate material has not been produced by the appellant in support of his plea in the present proceedings. In fact, the allegations of mala fides which were introduced by the appellant for the first time in the affidavit filed by him on the 6th March, 1963 are far from satisfactory. The case which Mr. Garg wanted to make under the head of mala fides is directed against the Chief Minister of Punjab, and it is plain that even the third affidavit filed by the appellant does not disclose any allegations which can justify the said plea being raised. Therefore, we do not think it would be possible to entertain the said plea in the present case. A plea of mala fides must always be made by proper pleadings at the trial stage, so that the respondent has an opportunity to meet the said pleadings. Mr. Garg no doubt attempted to refer us to certain averments made by the appellant in his petition for special leave, but we do not think we can permit Mr. Garg to make out a case of mala fides on the averments made for the first time in the application for

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special leave. That is why we propose to express no opinion on the merits of the plea of mala fides which the appellant wanted to raise before us.

The result is, the appeal is allowed and the order of detention passed against the appellant is set aside on the ground that the service of the order is invalid and is outside the scope of Rule 30(1)(b) of the Rules. We accordingly direct that the appellant should be released forthwith.

Appeal allowed.

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September 12

STATE OF ANDHRA PRADESH

v.

GUNDUGOLA VENKATA SURYANARAYANA GARU

(A. K. SARKAR, J. C. SHAH AND RAGHUBAR DAYAL, JJ.)

Civil Procedure Code, S. 80, O. 1. r. 8.—Notice under 80, Civil Procedure Code by two persons but suit filed by one—Validity of suit—Representative suit—Requirements of—Meaning of 'Estate' —Madras Estates Land Act, 1908, S. 3(2)(*d*)—*Madras Estates Rent Reduction Act,* 1947.

The Government of Madras applied the provisions of the Madras Estates Rent Reduction Act, 1947 to the lands in the village Mallinadhapuram on the ground that the grant was of the whole village and hence an estate within the meaning of S. 3(2)(d) of the Madras Estates Land Act, 1908. The respondent and another person served a notice under S. 80 of the Code of Civil Procedure upon the Government of the State of Madras in which they challenged the above mentioned notification and asked the Government not to act upon it. Out of the two persons who gave the notice, the respondent alone filed the suit. The trial court held that the original grant was not of the entire village and was not so confirmed or recognised by the Government of the Province of Madras and therefore as it was not on "estate" within the meaning of S. 3(2)(d) of the Madras Estates Land Act the Madras Rent Reduction Act, 1947 did not apply to it. But the suit was dismissed on the ground that although two persons had given the notice under S. 80 of the Code of Civil Procedure, only one person had filed the suit. The High Court agreed with the trial court that the grant was not of an entire village but it also held that the notice was not defective and the suit was maintainable as it was a representative suit and the permission of the