

(2013) 07 MAD CK 0244

In the Madras High Court

Case No : Original Side Appeal No's. 427 to 437 of 2012

B. Ramachandra Adityan and Kannan Adityan

APPELLANT

Vs

B. Sivanthi Adityan (Deceased) and Others

RESPONDENT

Date of Decision : 08-07-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 21, Order 11 Rule 21(1), Order 11 Rule 21(2), Order 7 Rule 11, Order 7 Rule 13

Citation : (2013) 4 CTC 614 : (2013) 4 LW 8 : (2013) 6 MLJ 55

Hon'ble Judges : M.M. Sundresh, J;M. Jaichandren, J

Bench : Division Bench

Advocate : H. Karthik Seshadri, for the Appellant; Abhishek Manusinghvi, S.C. for Mr. V. Shanmugham for R1 to R3, Mr. R. Thiagarajan, S.C. for Mr. V.G. Suresh Kumar for R7 and R9 to R11, Mr. R. Murari, S.C. for Mr. Badri Natarajan for R4 to R6, Mr. P.R. Raman for R8 and Mr. V. Sanjeevi for R12, for the Respondent

Judgement

M.M. Sundresh, J.—These Original Side Appeals have been filed challenging the Order dated 27.08.2012 passed in A. No. 1163 of 2011 in C.S.D. No. 7665 of 2011, A. Nos. 2032 of 2011, 2038 of 2011 to 2040 of 2011 and 2188 to 2193 of 2011 in C.S.D. No. 7665 of 2011. The appellants started their legal journey thirty years ago. At times they succeeded in small battles but the war did not even begin as the suit is yet to be opened up. The eventful journey has come a full circle. At present, the appellants stand once again at the very starting point of their tiring journey. However, unrelented and undaunted, they once again seek to take a fresh guard to start the voyage through this Court.

2. Background Facts:-

2.1. The background facts covering the case requires a proper narration as it involves a chequered history. The appellants are the father and the son deo. The father of the first appellant was the founder-Trustee. The entire disputes revolves around the proper administration of the Trust, which is a public Trust, having its own object to serve the public in general. The respondents are Trustees and

concerns said to be owned by some of them, which according to the appellants are created and being run through the diversion of the Trust funds meant for public purpose.

2.2. The first appellant started the legal proceedings in the year 1978. Thereafter, an application was filed by the second appellant in Application No. 165/81 on the ground that he along with his younger brother were very much interested in the Trust and its administration. The proceeding initiated by the second appellant along with his brother was terminated for the non compliance of Order XI Rule 21(1) of CPC (hereinafter referred to as "C.P.C."). Thereafter an application was filed by the first appellant along with others seeking leave to file a suit u/s 92 of the CPC. A Division Bench of this Court granted leave which was duly confirmed by the Apex Court. Two lawyers sought themselves to be impleaded before the Honourable Division Bench which was acceded to. They dropped out and consequently an application was filed by some of the respondents herein under Order VII Rule 11 of CPC to reject the plaint as the sanction granted by way of consent will have to necessarily encompass all such persons to whom it was given. The Division Bench upheld the contentions on the part of the respondents herein/Trustees, who filed the application under Order VII Rule 11 of CPC and accordingly, rejected the plaint. When a challenge was made before the Apex Court, the SLP was dismissed as withdrawn with liberty to avail such remedy as may be available in law.

2.3. The second appellant joined his father in instituting a fresh suit u/s 92 of CPC by seeking leave. It was opposed by some of the respondents. They also filed applications to dismiss the leave to sue application and the proposed plaint. Applications have been filed by others to strike out their names in the proposed plaint and the leave application on the ground that they being strangers, the suit is not maintainable in law and facts as against them u/s 92 of the Code of Civil Procedure. The learned single Judge dismissed the application filed for leave and consequently, allowed the applications filed by respondents. Challenge is made by the appellants against these proceedings before us. During the course of hearing, the second respondent died and necessary amendments have been made by the appellants by way of substitution.

3. Heard Mr. H. Karthik Seshadri, learned counsel appearing for the appellants, Dr. Abhishek Manusinghvi, learned Senior counsel for Mr. V. Shanmugam, learned counsel appearing for respondents 2 and 3, Mr. R. Thiagarajan, learned Senior Counsel for Mr. V.G. Sureshkumar, learned counsel appearing for respondents 7, 9 to 11, perused the records and the written submissions filed by the parties.

4. Findings of the learned Single Judge:-

4.1. The learned single Judge dismissed the application filed by the appellants and consequently, allowed the applications filed by the respondents on quite a few grounds. After narrating the case exposed by rival parties and extracting the decisions produced at the bar, a finding has been given that there are averments

available in the plaint against all the respondents and the issues raised based upon the factual allegations will have to be gone into only at the time of trial. However the learned single Judge was pleased to hold that the principal of "issue estoppel" would govern the case. The learned single judge non suited the second appellant by placing reliance upon Order XI Rule 21(2) CPC., as an express bar to initiate a fresh suit on the same cause of action. Therefore, according to the learned single Judge, the suit is not maintainable in law. In so far as respondents 7 to 12 are concerned, as they are companies incorporated under the Companies Act, the appellants cannot maintain the suit. According to the learned single Judge, a suit filed u/s 92 of CPC is not maintainable against respondents 7 to 12 being third parties. Consequently, the applications filed by respondents 7 to 12 were allowed by the learned single judge to strike their names from the proposed plaint. The applications filed by the respondents 1 to 6 to reject the plaint and leave application in turn were also ordered as prayed for.

5. Submissions of the Appellants:-

Mr. Karthik Seshadri, learned counsel appearing for the appellants would submit that here is a case where the appellants have been knocking the doors of the Court seeking for framing a scheme for the administration of the Trust and nothing more. They are interested parties being the family members of the founder. Their interest is to see that the object of the Trust is achieved and not misused. There is absolutely no malafides in the action of the appellants. The appellants do not seek to enforce their private rights. There are sufficient averments about the misuse of the funds of the Trust contrary to its object. There is a systematic diversion of the funds, which flowed into respondents 7 to 12, which are controlled and managed by some of the Trustees/respondents. The appellants have produced voluminous documents in support of their contentions. The learned single Judge has committed an error in dismissing the application on the ground of "issue estoppel", which does not arise on the facts of the case. The decision rendered by the Honourable Division Bench in O.S.A. Nos. 54 of 1996 etc., dated 16.07.1996, has become final between the parties. The submissions regarding the "person interested" mala fides, factual allegations and cause of action have been concluded inter se parties in the said judgment. The judgment of the Division Bench has been approved by the Honourable Apex Court in B.S. Adityan and Others Vs. B. Ramachandran Adityan and Others, In so far as the second appellant is concerned, the order passed under Order XI Rule 21 of CPC would not act as a bar for a suit based upon a subsequent cause of action.

The question of leave has not been decided against the second appellant and therefore, there is no application of "issue estoppel" as held by the learned single Judge. When it is the specific case of the appellants supported by averments in the plaint with the aid of documents, respondents 7 to 12 cannot be termed as strangers. It is the respondents/Trustees, who are acting in different capacities wearing different masks in the name and style of respondents/Trustees.

The allegations against respondents 7 to 12 will have to be fixed on respondents/

Trustees. The learned single Judge committed an error in rejecting the plaint instead of relegating all these issues to be tried in the suit. The learned single Judge has exceeded his jurisdiction without appreciating the fact that even a frivolous suit can be filed and it cannot be thrown out at the threshold. While deciding a suit u/s 92 of CPC., the overall public interest will have to be seen. It cannot be said that the second appellant is barred from joining with first appellant, when it is an admitted fact that the proposed plaint discloses several cause of action, there is no bar for him to institute a subsequent suit based upon it. The judgment of the Division Bench rendered in OSA. No. 191 of 2007, dated 08.01.2010, cannot act as a bar for the first appellant to maintain a subsequent suit as it was passed on a technical ground without deciding any issues on merits. Therefore, the appeals will have to be allowed and consequently the leave has to be granted. To buttress his arguments reliance was made on the decision rendered in O.S.A. No. 54 of 1996 etc., dated 16.07.1996 and the other decisions, which are as follows.

- (i) B.S. Adityan V. B. Ramachandra Adityan @ B.R. Adityan (1996 (2) LW 364)
- (ii) B.S. Adityan and Others Vs. B. Ramachandran Adityan and Others,
- (iii) Narain Lal and Others Vs. Sunder Lal (Dead) and Others,
- (iv) Bishwanath and Another Vs. Shri Thakur Radhaballabhji and Others,
- (v) Sugra Bibi Vs. Hazi Kummua Mia,
- (vi) Parmatmanand Saraswathi V. R. Tripathi (AIR 1974 SC 214);
- (vii) Charan Singh and Another Vs. Darshan Singh and Others,
- (viii) Davular Pitchayya and Another Vs. Divi Venkatakrishnamacharlu and Others, and
- (ix) Abdul Razack Sahib and Others Vs. A. Abdul Hamid Said and Others,

6. Submissions of respondents 2 and 3:-

6.1. Dr. Abhishek Manusinghvi, learned Senior counsel for Mr. V. Shanmugam, learned counsel appearing for respondents 2 and 3 submitted that re-litigation in any form cannot be permitted in law. There is no bona fides in the application filed. While deciding an application for leave to sue, the objects and reasons behind Section 92 of CPC will have to be looked into. The main object of Section 92 is to protect the Trust from undesirable elements. The appellants are seeking to canvass their private interest. In so far as the second appellant is concerned, the provisions of Order 11 Rule 21 CPC will have to be pressed into service. Therefore, when he is barred from filing a suit, consequently, it is also liable to be dismissed as Section 92 of CPC requires a minimum of two persons. The appellants are not the "persons interested". The second appellant having lost the suit on the earlier occasion, cannot maintain a subsequent suit. The appellants having lost in the earlier attempts cannot be permitted to re-agitate, which

would amount to abuse of process of law. The records would show that the respondents/Trustees have been running the Trust efficiently. When there is a conflict between equity and law, the law has to prevail Order VII Rule 13 of CPC cannot apply to the case on hand as the second appellant was not a party to the earlier round of litigation. In support of the above said submissions, reliance has been made on the following judgments.

- (i) Bloom Dekor Limited Vs. Subhash Himatlal Desai and Others,
- (ii) Rajasthan High Court Advocates Association Vs. Union of India and Others,
- (iii) Y. Abraham Ajith and Others Vs. Inspector of Police, Chennai and Another,
- (iv) Om Prakash Srivastava Vs. Union of India (UOI) and Another,
- (v) Swamy Atmananda and Others Vs. Sri Ramakrishna Tapovanam and Others,
- (vi) Alchemist Limited and Another Vs. State Bank of Sikkim and Others,
- (vii) The Church of Christ Charitable Trust and Educational Charitable Society, represented by its Chairman Vs. Ponniamman Educational Trust represented by its Chairperson/Managing Trustee,
- (viii) Rajendra Gupta, Asoka Gupta and Picnic Hotels Private Limited Vs. The Corporation of Chennai and Victoria Public Hall Trust
- (ix) Raghunath Rai Bareja and Another Vs. Punjab National Bank and Others, and
- (x) Sopan Sukhdeo Sable and Others Vs. Assistant Charity Commissioner and Others,

6.2. Mr. R. Thiagarajan, learned Senior Counsel appearing for Respondents 7 to 12 has submitted that the appellants seek to enlarge the scope of the suit proposed to be instituted u/s 92 of the Civil Procedure Code. Respondents 7 to 12 are strangers to such a suit. What the appellants seek is beyond the scope of Section 92 of CPC. Such a relief cannot be asked by mixing up with other reliefs. When that is the position, the entire suit as filed will have to be dismissed as not maintainable. Respondents 7 to 12 are companies incorporated under the Companies Act. Therefore, no interference is required from the order passed by the learned single Judge. In support his contentions, the learned Senior Counsel has made reliance on the following judgments.

- (i) Kalyana Venkataramana Aiyangar and Another Vs. Kasturi Ranga Aiyangar,
- (ii) AIR 1928 16 (Privy Council)
- (iii) Johnson D.P.O. Min and Another V. U. Ogh and Others (AIR 1932 Rangoon 132);
- (iv) Janaki Bai Ammal Vs. Sri Tiruchitrumbala Vinayakar of the temple,
- (v) Gobinda Chandra Ghosh alias G. Ghosh and Another Vs. Abdul Majid Ostagar

and Others,

(vi) AIR 1947 233 (Nagpur)

(vii) Mahant Pragdasji Guru Bhagwandasji Vs. Patel Ishwarlalbhai Narsibhai and Others,

(viii) Ranchhoddas Kalidas and Others Vs. Goswami Shree Mahalaxmi Vahuji and Others,

(ix) Bishwanath and Another Vs. Shri Thakur Radhaballabhji and Others,

(x) Harendra Nath Bhattacharya and Others Vs. Kaliram Das (Dead) by his Heirs and Lrs. and Others,

(xi) Swami Paramatmanand Saraswati and Another Vs. Ramji Tripathi and Another,

(xii) L.M. Menezes, Joseph C. Kuriacose and Harold D'Silva Vs. Rt. Rev. Dr. Lawrence Pius and Others

6.3. The other learned counsels adopted the arguments of Dr. Abishek Manusinghvi and Mr. R. Thiagarajan, learned Senior Counsels.

7. Analysis:-

7.1. Before going into the issues raised before us, let us have a re-look at the relief sought for in the proposed plaint filed by the appellants u/s 92 of the CPC. The extraction is here under.

a. For framing a scheme for the administration of the third defendant Trust making provision for the number of Trustees, the method of accounting, action to be taken for misconduct of Trustees, and such other matters as may be necessary for the proper administration of the Trust, and doing so to consider whether or not the first defendant should continue as Trustee of the third defendant Trust or not.

b. Call upon the First defendant to render true and proper account of his administration of the Trust from the date of his assumption of charge as Trustee and direct him to make good such amounts as may be found unauthorisedly spent or taken away by him and make good the Trust the loss occasioned by the first defendant or any other defendant;

c. Direct a thorough investigation into the affairs of the third defendant Trust and to trace the funds siphoned off from the third defendant Trust into the hands of any third party including without limitation the defendants Nos. 4 to 12 and to take necessary steps to recovery them from them;

d. Directing such further or other enquires as may be necessary to render justice into the conduct of the first and second defendants as Trustees of the third defendant;

e. The plaintiffs are entitled to a declaration that the first to third defendants have no right what so ever to appoint any additional Trustees and a consequent permanent injunction restraining any person claiming to have been appointed by the first to third defendants as an additional Trustee from claiming or acting as such in any manner as Trustees of the third defendant Trust;

f. Directing the defendants to pay the costs of the suit and

g. For such other reliefs as this Hon'ble Court may deem fit in the circumstances.

Therefore, there is no dispute that indeed reliefs have been sought for in consonance with Section 92 of CPC by the appellants. The incidental question as to whether the relief sought for against respondents 7 to 12 is maintainable or not, we would like to deal with it later. Suffice is to say that the appellant has sought for the reliefs u/s 92 of CPC.

7.2. Ratio laid by the Division Bench:-

We do not like to reiterate the facts once again. Admittedly, the first appellant is the son of the late Founder and the second appellant is the grandson. Now coming to the question of "persons interested", mala fides or lack of bona fides, the extent up to which the allegations and counter allegations can be gone into at the stage of pre-suit applications and the definition of cause of action, we are of the considered view that they have been substantially argued by the parties and thereafter, decided by the Honourable Division Bench in O.S.A. No. 54 of 1996 etc., dated 16.07.1996 reported in 1996 (2) Law Weekly 364. The judgment rendered by the Honourable Division Bench of this Court between the parties therein is binding on them. This, we hold so, by taking note of the further fact the said judgment has become final with the strength of approval given by the Honourable Apex Court in B.S. Adityan and Others Vs. B. Ramachandran Adityan and Others, Therefore instead of answering the learned counsel appearing for both sides on these issues, we can fruitfully recapitulate the paragraphs, which are apposite, from the judgment of the Honourable Division Bench.

19..... E. At the stage of granting of leave, the Court has to look into the allegations in the proposed plaint and the documents produced by the plaintiff only. (See; Swami Paramatmanand Saraswati and Another Vs. Ramji Tripathi and Another, and Charan Singh and Another Vs. Darshan Singh and Others,

(i) The main purpose of the provision u/s 92, Civil Procedure Code, is to give protection to public trust of a charitable or religious nature, from being subjected to harassment by suits being filed against them. That is why it provides that suits under that Section can only be filed by the Advocate-General or two or more persons having an interest in the Trust and having obtained leave of the Court. The object is that before the Advocate-General files the suit, he would satisfy himself that there is a prima facie case, either of breach of trust or of the necessity for obtaining directions of the Court on the basis of the allegations

made in the proposed plaint and the documents produced along with the plaint. So also, the Court is expected to satisfy itself that there is a prima facie case either of breach of trust or of necessity for obtaining directions of Court on the basis of allegations made in the plaint and the documents played before it along with the plaint. Vide: Davular Pitchayya and Another Vs. Divi Venkatakrishnamacharlu and Others, and Chairman Madappa Vs. M.N. Mahanthadevaru and Others,

(ii) It is in that view, the Section provides that the plaintiffs in a suit u/s 92, Code of Civil Procedure, must be persons having an interest in the Trust. Before 1887 the corresponding provision of law prevailing at that time required a direct interest in the Trust. The word "direct" was dropped in 1887 and thereafter the requirement was to have an interest. The words "having an interest" have been subject matter of judicial consideration in several judgments. In T.R. Ramachandra Iyer and Another Vs. Ponniath Akathuthu Parameswaram Munbu and Others, a Full Bench of this Court held that "interest" in Section 92, C.P.C. denotes an interest which is present and substantial and not sentimental or remote or fictitious or purely illusory interest. In that case, a Hindu residing in Madras and another residing in Tellicherry instituted a suit in the District Court of North Malabar u/s 92, Civil Procedure Code, in respect of a Hindu temple situated in Tellicherry. It was found that the former had gone to worship in the temple on one or two occasions in the past and might go there to worship in the future if business took him to Tellicherry and he relied on his right as a Hindu to worship in the temple as entitling him to institute the suit. The majority held that though as a Hindu he might have the right to worship in the temple, he had not on that ground alone the "interest" required by Section 92 of the Code to maintain the suit.

(iii). In Vaithinatha Aiyar and Another Vs. S. Tyagaraja Aiyar and Another, a Division Bench of this Court held that where the two plaintiffs instituting a suit u/s 92 of the CPC are the descendants of the founder of the charity, they have an interest within the meaning of the said Section. The Bench observed that the fact that the plaintiffs belong to the family of the founder would naturally give them an interest in the family charity so as to enable them to bring a suit u/s 92 of the Civil Procedure Code. The Bench distinguished the judgment of the Full Bench in T.R. Ramachandra Iyer and Another Vs. Ponniath Akathuthu Parameswaram Munbu and Others, The judgment of this Court was affirmed on appeal by the Privy Council in 29 CWN 154 (Privy Council) The Judicial Committee held that the descendants in the female line from the founder of the charity have an "interest" therein within the meaning of Section 92; Civil Procedure Code, although they may not directly obtain any benefit from it.

....20. Keeping the above principles in mind, we shall now advert to the facts of the case. There are four plaintiff in the suit. The first plaintiff is admittedly a son of the founder. It cannot by any stretch of imagination be said that he is not a person having interest in the trust. The argument that is advanced against him is

that he voluntarily resigned his trusteeship in 1959 and did not evince any interest till 1978. It is also argued that even after initiating an action, he withdrew the same, thus giving up his claim to trusteeship. He has not done anything to show his interest in the trust, till he filed the present proceeding in 1994. None of the above arguments can hold good to defeat the claim of the first plaintiff that he is a person having an interest in the Trust. Just because he had resigned in 1959 and kept quiet till 1978, it does not preclude him from initiating proceeding to protect the interests of the Trust as and when he finds that they are in jeopardy and the Trust is not managed properly. When a person who is a descendant in the female line has been held by the Privy Council to be one having an interest (vide *Vaidyanatha Ayyar v. Swaminatha Ayyar* (AIR 1924 P.C. 221(2))), there can be no doubt that the son of the founder is a person having an interest and for that matter, a direct interest in the Trust. In the deed of Trust, clause (d) provides that if and when additional trustees are appointed and if and when a Court has to appoint trustees or additional trustees, the heirs of descendants of the Founder may be preferred to others. That itself is sufficient to make him a person having an interest in the Trust.

21. The second plaintiff is a regular reader of Daily Thanthi and a person interested in education. The third plaintiff is a seller of newspapers and magazines and in that process has also sold Daily Thanthi. He is also a reader of Daily Thanthi from his boyhood and concerned about education. The fourth plaintiff is employed as a reporter and has been a reader of Daily Thanthi for a very long time. He is also interested in education. The first object of the Trust is to establish "Dhina Thanthi" or Daily Thanthi as an organ of educated public opinion for the Tamil reading public. Thus, it is clear that the beneficiary of the trust is the Tamil reading public. Naturally, plaintiffs 2 to 4 are beneficiaries and thus, they have an interest in the trust. They do not belong to the family and they have no axe to grind against the first defendant. We are unable to accept the contention of learned counsel for the respondents that the plaintiffs have no substantial or subsisting interest in the trust.

22. He next argued that the suit is being instituted for a personal vendetta and not with bona fide motives. We are unable to appreciate this argument. It is not known how the Court will be in a position to decide before taking evidence that the plaintiffs have come to this Court only so achieve some personal gains or with mala fide motives. It was repeatedly argued that the history of the litigation would automatically prove the same. Reference is made again and again to the resignation of trusteeship in 1959 and withdrawal of the proceeding instituted in 1978 without leave Court as well as the institution of proceedings by the sons of the first plaintiff. We are unable to draw any inference from those circumstances that the plaintiffs are actuated by malice. The case set out in the plaint is cogent and it is possible for the plaintiffs to prove the same by adducing evidence. It is only if the plaintiffs fail to adduce acceptable evidence, the Court can hold that the plaintiffs have come forward with a frivolous and vexatious litigation with ulterior motives. While the respondents harp upon the conduct of the first

plaintiff in having initiated similar proceedings earlier and not taking decisions from the Court, the plaintiffs are equally vehement in pointing out the conduct of the first respondent in making every attempt at his command to stifle the proceedings at the threshold not having the courage to face the same in the Court. It is necessary for the Court to bear in mind the fact that the first defendant did not on the earlier occasions allow the complaints to be registered as suits. We have already narrated the sequence of events. It was the first defendant who started the first round of litigation questioning the power of the founder to appoint additional trustees in spite of the fact that there is an express provision in the trust deed empowering the founder to appoint additional trustees. When the Court passed a conditional order of injunction in that proceeding, the first defendant did not comply with the condition, Thus, he is also prima facie guilty of disobeying the order of the Court.

.... 25. We are not convinced that the antecedents of the first plaintiff or the other plaintiff are such that leave should not be granted to them to institute the proposed suit. Nor do we agree with the contention of learned counsel for the respondent that the only object of the suit is to cause harassment to the first defendant and others.

....27. The proposed complaint contains several serious allegations against the management of the trust. They are matters to be established by evidence. If they are proved, there will be no doubt whatever that the first defendant is guilty of breach of trust. The prayer in the proposed complaint is to frame a scheme for the administration of the Trust, making provision for the number of trustees, the method of accounting, action to be taken for misconduct of trustees and such other matters as may be necessary for the proper administration of the Trust and also to consider whether or not the first defendant should continue as a trustee of the trust. Besides the above prayer, there is a prayer for directing the first defendant to render a true and proper account of the administration of the trust. The relief's prayed for will fall within the scope of Section 92, Code of Civil Procedure.

28. Learned counsel for the respondents has contended that the plaintiffs are only trying to re-agitate the same matter again and again in order to harass the first defendant. The facts narrated earlier prove that on no prior occasion the Court considered the truth of the allegations....

...38. It is well settled that mere identity of some of the issues do not bring about identity of subject-matter. The entire cause of action and the reliefs claimed must be the same to make the subject-matter identical. (See: Vallabh Das Vs. Madan Lal and Others,

39. It is equally well settled that if a suit is maintainable for part of the reliefs claimed, the suit cannot be thrown out in limine as not maintainable. (See: Ishar Singh Vs. National Fertilizers and another, Hence, the contention of the learned counsel for the respondents that addition of new allegations based on new facts

will not help the plaintiffs to maintain the suit is not tenable. On the other hand, there is considerable force in the contention of learned counsel for the appellants that even with regard to the old allegations which are repeated now, it is a case of containing cause of action and the suit is maintainable.)

7.3. In view of the same, we are of the view that the submissions made on "persons interested" mala fides or lack of bona fides, whether it is necessary to decide the allegations made between the parties at the stage of seeking leave and the definition of cause of action are to be held in favour of the appellants.

In so far as the object and scope of 92 of CPC is concerned, we are of the view that the arguments pertaining to same are not required to be gone into in detail. This is for the reason that the first appellant was already permitted in the earlier round of litigation to institute the suit u/s 92 of CPC. Further more, the suit u/s 92 of CPC is yet to be instituted after obtaining the leave. In other words, it is not as if there was already an adjudication on merits. We would like to reiterate the fact that the scope of 92 of CPC was argued extensively before the Honourable Division Bench in O.S.A. No. 54 of 1996 etc., and thereafter only, the leave was granted in favour of the first appellant. Even though the second appellant was not a party to the said judgment, we are of the view that the ratio laid down therein would also apply to him as he is a grandson of the founder Trustee and the contentions regarding the earlier proceedings initiated by him were also taken note of in the above said proceedings by the Honourable Division Bench. A faint attempt was also made before the Apex Court in this regard. Hence, even though submissions have been raised on the conduct of the appellants, we are not willing to accept the said submissions made on behalf of the respondents. In so far as the first appellant is concerned, this was raised and considered by the Honourable Division Bench and had been approved by the Honourable Apex Court. Further more, even the learned single Judge did not dwell upon the same. We are also of the view that these are the matters for evidence and not to be decided at this stage.

7.4. Scope of Order XI Rule 21 of CPC.

The learned single Judge has dismissed the application by making reliance upon Order XI Rule 21 of CPC. The said provision is very clear that as the consequence on the exercise of power provided to the Court thereunder, the plaintiff is barred by law to institute another suit on the very same cause of action. A cause of action constitutes a bundle of facts as held by the Division Bench inter se parties earlier. The learned single Judge has himself observed that there are averments pertaining to the subsequent events than that was available earlier. The earlier leave application was filed in the year 1981.

In a suit instituted u/s 92 of CPC, it cannot be said that when there is a subsequent cause of action requiring interference of a Court, a party is non suited to institute the same based upon an order passed three decades ago while dealing with a different cause of action. In this connection it is to be noted that in

the present case, the second appellant has placed sufficient materials supported by documentary evidence, which were said to have arisen subsequently paving way for a new cause of action. Therefore, we are not able to approve the findings of the learned single Judge on the applicability of Order XI Rule 21 CPC to the case of the second appellant.

7.5. Whether the present suit is barred by law:-

At present we are dealing with the initiation of a suit by way of leave sought before us. Dr. Abhishek Manusinghvi, learned Senior Counsel appearing for respondents 2 and 3 would contend that the necessary consequences of the termination of the earlier proceedings would non suit the first appellant. We are afraid that the said contention cannot be accepted for the reason that there is no bar for instituting a fresh suit u/s 92 of CPC when the requirements therein are complied with. The earlier proceedings were terminated by the orders of this Court on the ground that a suit to be instituted inconformity with the leave granted by the Court. In other words, when a leave is granted to the named individuals, then all of them jointly will have to proceed with the suit. This ratio laid by the Division Bench has become final between the parties. In our considered view, the said ratio cannot take away the rights of one of the parties to institute a fresh suit along with another person. In fact it is the respondents/ Trustees who are non suited from raising the pleas which have been decisively concluded against them by the decision rendered in O.S.A. No. 54 of 1996 etc., dated 16.07.1996. In this case, two "public spirited" lawyers got themselves impleaded in the earlier round of litigation when a leave was sought for. It is they, who dropped out for reasons best known to them. They did not choose to take part in the proceedings any further. When once it can be said that a suit will have to conform to the leave granted to the specified persons, thereby giving each one of them a right, the same logic would also apply to a person, who is unable to pursue the leave on account of others not continuing, in thereafter filing a separate suit seeking leave along with another. This position of law has been considered by the Honourable Apex Court in *Narain Lal and Others Vs. Sunder Lal (Dead) and Others*, The reasoning of the Apex Court is placed here under:

We hold that an authority to sue given to several persons without more is a joint authority and must be acted upon by all jointly, and a suit by some of them only is not competent. As Sir George Rankin said in *Musammat Ali Begam v. Badrul-Islam Ali Khan (1)*, "where the consent in writing of the Advocate General or Collector is given to a suit by three persons as plaintiffs, the suit cannot be validly instituted by two only. The suit as instituted must conform to the consent. Once the representative suit is validly instituted, it is subject to all the incidents of such a suit; the subsequent death of a plaintiff will not render the suit incompetent, see *Raja Anand Rao v. Ramdas Daduram*(6), and an appeal by some of the plaintiffs impleading the remaining plaintiff as a respondent is not incompetent because all did not join as appellants, see *Musammat Ali Begam v.*

Badrul-Islam Ali Khan (5). In Shee Ram v. Rain Chand and others (7) the sanction of the Collector to bring a suit under S. 92 was given to twenty persons. One of them died before the suit was brought and the remaining nineteen instituted the suit. Skemp, J. held that in view of the two Privy Council rulings the suit was validly instituted. But he erroneously assumed that in Musammatt Ali Begam v. Badrul-Islam Ali Khan(5) it was held that where the sanction had been given to three persons, a suit by two of them only was validly instituted. From the report of 48, Ind. App. 12 AIR 1921 123 (Privy Council) it is not clear whether all the persons to whom the sanction was given brought the suit, and the point raised and decided was that the death of one of the plaintiffs after the institution of the suit did not render the suit incompetent. We are unable to agree with the Lahore ruling. Where sanction is given to four persons and one of them dies before the institution of the suit, a suit by the remaining three is incompetent. Fresh sanction must be obtained by the survivors for the institution of the suit. We must hold that the suit brought by the appellants was competent. The High Court rightly held that the suit was not maintainable. This judgment will not bar the institution of a fresh suit in conformity with a fresh consent obtained from the Advocate-General or Collector.

Therefore, applying the said ratio, we have no hesitation in holding that there is no bar for seeking a fresh leave in a case where the earlier suit was found to be incompetent for not including all those who have been granted such leave. Hence, we hold that notwithstanding the termination of earlier suit, the present suit is maintainable in law. In this connection, we once again would like to reiterate the fact that the Honourable Apex Court was satisfied earlier with the averments made by the first appellant while granting leave.

Accordingly, we hold that the order passed by the Honourable Division Bench on the earlier occasion in OSA. Nos. 191 and 194 of 2007 dated 08.01.2010, would not be a bar for initiation of the present one, particularly, when there are new facts involved with some more defendants giving rise to the separate and new cause of action.

7.6. Joinder of parties and its effect:-

12.1. We have already noted the arguments advanced by the learned Senior Counsel Mr. R. Thiagarajan, in support of the findings of the learned single Judge that in a suit filed u/s 92 of CPC., no claim can be made against strangers. We have perused the averments made by the appellants in their proposed plaint. The learned counsel appearing for the appellants has also produced the chart before us indicating thereby that the respondents/Trustees are in complete control of respondents 7 to 12-concerns. The averments are to the effect that the money belonging to the Trust is being diverted to these concerns. The appellants have also produced certain documents in support of their contentions. These are the matters which will have to go into at the time of trial. The learned single Judge, in our considered view, has committed an error in holding that the suit as filed is not maintainable against respondents 7 to 12. It is the specific case of the

appellants that respondents 7 to 12 are nothing but a creation of the respondents/Trustees. They are none other than the trustees in different form. Considering the said submission, we are of the view that such an issue shall have to be gone into u/s 92 of CPC while deciding the suit. It is the specific case of the appellants that the trustees have created the companies and diverting the fund belonging to the Trust. According to the appellants, there is no difference between the Trustees and the companies created by them. It is their further case that they hold substantial shares leading to an absolute control. In other words the trustees are enjoying the trust properties through different entities. There is only a difference in form and not in substance. Therefore, there is nothing wrong in tearing the mask off. We would like to draw support for the said view from a decision of this Court rendered in Abdul Razack Sahib and Others Vs. A. Abdul Hamid Said and Others, The relevant passage is produced here under: "It is well settled that to determine whether a suit falls within Rule 92, CPC we have to look at the plaint and the allegations therein and not to the written statement. The plaint clearly proceeds on the footing that the defendants are trustees though the plaintiffs allege that the defendants had committed breach of trust. Because the defendants were repudiating the obligations on their part, the plaintiffs also wanted a declaration as to the trust nature of the funds collected by the defendants and their position as trustees. But the inclusion of such a prayer would not take the suit out of the category of suits falling u/s 92, Civil Procedure Code. This is not a case in which the plaintiffs are suing to recover trust property from strangers or persons who according to the plaintiffs have no right to be in possession of the trust properties. On the other hand, the plaintiffs say that the defendants are trustees and are lawfully in possession of the funds; only they charge them with dereliction of duty. The prayers fall clearly within the scope of Clauses (d) and (h) of Section 92....

.... The learned Judges held that in a suit under S. 92, it was competent for the Court to decide whether the trust in respect of which the suit was brought was a public charitable trust so as to attract the application of the section. No doubt it was held that in a suit under S. 92 CPC no declaration of title or decree for possession could be obtained against total strangers to the Trust. But where the relief is claimed against even constructive trustees and trustees de son tort the suit would fall within S. 92.

In view of our said conclusion, we hold that the suit is not liable to be dismissed and the application is not liable to be rejected on the ground of misjoinder of parties. Consequently, there is no need to delete the names of respondents 7 to 12. It is no doubt true that the appellants will have to prove the averments made by them that the respondents/trustees have diverted the funds of the Trust illegally by the creation of respondents 7 to 12 concerns, which are wholly controlled by them. However, in the event of the appellants establishing the said averments before the Court, the consequence there from would follow and the Court has to grant an appropriate decree against respondents 7 to 12. To put it differently if the appellants after proving their case, do not have respondents 7 to

12 as the defendants, then, no effective decree can be passed. In that eventuality the suit itself would become not maintainable, even though the appellants could establish the diversion and syphoning of the fund of the public Trust in favour of respondents 7 to 12, which have been created deliberately for the purpose by some of the trustees. Hence looking from any angle, we do not find any reason to hold that respondents 7 to 12 are neither necessary nor proper parties. Merely because respondents 7 to 12 are companies incorporated under the Companies Act, they cannot escape from answering the Court when the plaintiffs seek to invoke Section 92 of the Civil Procedure Code. Such a defence is not open to them as the averments would show that they are not strangers and no independent right sought to be claimed against them by the appellants by treating them as third parties. The matter can be seen from a different perspective as well. It is also in the interest of the respondents 7 to 12 to be added as defendants in the proposed plaint. This we feel so on the footing that if the appellants are able to establish their case, then the Court may record a finding to that effect while answering the issue. The respondents 7 to 12 would either be directly or indirectly affected by such findings or issues decided. Therefore, when the legal rights of respondents 7 to 12 are likely to be affected and in the light of the factual scenario surrounding the case, it would be just and proper to include respondents 7 to 12 as party defendants. To put it differently, when there is likelihood of their legal rights being affected, then it is necessary to have them as parties. In this connection, we would like to quote the following passage of the Honourable Apex Court in *Ramesh Hirachand Kundanmal Vs. Municipal Corporation of Greater Bombay and Others*,

32. Considering the aforesaid provisions, this Court in *Ramesh Hirachand Kundanmal Vs. Municipal Corporation of Greater Bombay and Others*,

"14. It cannot be said that the main object of the rule is to prevent multiplicity of actions though it may incidentally have that effect. But that appears to be a desirable consequence of the rule rather than its main objective. The person to be joined must be one whose presence is necessary as a party. What makes a person a necessary party is not merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party. The line has been drawn on a wider construction of the rule between the direct interest or the legal interest and commercial interest. It is, therefore, necessary that the person must be directly or legally interested in the action in the answer, i.e., he can say that the litigation may lead to a result which will affect him legally that is by curtailing his legal rights. It is difficult to say that the rule contemplates joining as a defendant a person whose only object is to prosecute his own cause of action. Similar

provision was considered in *Amon v. Raphael Tuck & Sons Ltd.*, wherein after quoting the observations of Wynn-Parry, J. in *Dollfus Miegiet Compagnie S.A. v. Bank of England*, that their true test lies not so much in an analysis of what are the constituents of the applicants rights, but rather in what would be the result on the subject matter of the action if those rights could be established, Devlin, J. has stated: (*Amon case*, QB. 371)

...The test is: May the order for which the plaintiff is asking directly affect the intervenor in the enjoyment of his legal rights.

We also note the fact that the applications have been filed by respondents 7 to 12 only to delete their names and not to dismiss the suit. Further more, the question as to whether a party is necessary or proper will have to be decided on the materials produced at the time of deciding the suit and not otherwise. Moreover, such a procedural irregularity would not have the effect of wiping out the entire suit as contended by the learned Senior counsel appearing for respondents 7 to 12. It is useful to reproduce the following passage of Allsop, J., rendered in *Ratan Sen alias Ratan Lal Vs. Suraj Bhan and Others*,

"Even if there was a misjoinder of parties or causes of action that would not justify any interference with the decree in appeal. The question, however, remains whether there was any misjoinder. All persons may be joined as defendants against whom any right to relief arising out of the same act is alleged to exist (O. 1, R. 3). It seems to me that a relief is claimed against any person who is interested in denying the right to be relief.

Accordingly, we reject the contention of the learned Senior counsel on that score. We also reject the findings of the learned single Judge that respondents 7 to 12 being companies, no prayer can be sought for u/s 92 of CPC, in view of the observation made above and in the light of specific averments in the plaint. The judgments relied on by the learned Senior Counsel also do not lend any credence to his submissions.

7.7. Issue Estoppel:-

The learned single Judge has also rejected the application for leave on the legal plea of "issue estoppel". This, the learned single Judge held so, after holding that the issues covering the cause of action ought to be decided only at the time of trial. As discussed earlier, Order XI Rule 21 cannot be stretched to a cause of action that has arisen in a suit proposed to be filed after three decades from that of the earlier one with new facts. As stated earlier, the issue regarding the entitlement of leave for the second appellant was never decided on merits earlier. There are other issues raised by the appellants in the present plaint. For some of the issues, leave was granted to the first appellant by this Court as confirmed by the Honourable Apex Court. The suit is yet to be numbered and decided on merits. In all these years, no issue has been decided against the appellants on merits. Therefore, we hold that the learned single judge was not correct in dismissing the applications filed by the appellants on the ground of "issue

estoppel".

8. Observation:-

As we noted earlier, more than 30 long years have elapsed without even an adjudication on merits. Before summing up, we would only quote the following passage of a recent pronouncement of the Apex Court in Noor Mohammed Vs. Jethanand and Another, which would be very apposite.

13. It has to be kept in mind that the time of leisure has to be given a decent burial. The sooner it takes place, the better it is. It is the obligation of the present generation to march with the time and remind oneself every moment that rule of law is the centripetal concern and delay in delineation and disposal of cases injects an artificial virus and becomes a vitiating element. The unfortunate characteristics of endemic delays have to be avoided at any cost. One has to bear in mind that this is the day, this is the hour and this is the moment, when all soldiers of law fight from the path. One has to remind oneself of the great saying, "Awake, Arise, "O" Partha.

14. As advised, at present, we are disposed to refer to certain pronouncements of this Court. A three-Judge Bench in Kailash v. Nanhku, while dealing with the issue whether Order 8 Rule 1 of CPC is mandatory or directory, referred to the observations in Sushil Kumar Sen v. State of Bihar which we may profitably reproduce: (Kailash case, SCC p. 495, para 28)

"28...."5..... The mortality of justice at the hands of law troubles a judge's conscience and points an angry interrogation at the law reformer.

6. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act ex debito Justitiae where the tragic sequel otherwise would be wholly inequitable..... Justice is the goal of jurisprudence--processual, as much as substantive." (Sushil Kumar Sen cse, SCC p. 777, para 5-6)"

The Bench further referred to the pronouncement in State of Punjab v. Shamlal Murari to emphasise the approach relating to the process of adjective law. It has been stated in the said case: (Kailash case, SCC p. 495, para 29)

29...."8..... Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice....Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice (Shamlal Murari case, SCC p. 722, para 8)

28. In a democratic set up, intrinsic and embedded faith in the adjudicatory system is of seminal and pivotal concern. Delay gradually declines the citizenry faith in the system. It is the faith and faith alone that keeps the system alive. It provides oxygen constantly. Fragmentation of faith has the effect-potentiality to

bring in a state of cataclysm where justice may become a causality. A litigant expects a reasoned verdict from a temperate Judge but does not intend to and, rightly so, to guillotine much of time at the altar of reasons. Timely delivery of justice keeps the faith ingrained and establishes the sustained stability. Access to speedy justice is regarded as a human right which is deeply rooted in the foundational concept of democracy and such a right is not only the creation of law but also a natural right. This right can be fully ripened by the requisite commitment of all concerned with the system. It cannot be regarded as a facet of Utopianism because such a thought is likely to make the right a mirage losing the centrality of purpose. Therefore, whoever has a role to play in the justice dispensation system cannot be allowed to remotely conceive of a casual approach.

29. In this context, it is apt to refer to a passage from Ramdeo Chauhan Alias Raj Nath v. State of Assam:(SCC p. 739, para 22)

22.... The judicial system cannot be allowed to be taken to ransom by having resort to imaginative and concocted grounds by taking advantage of loose sentences appearing in the evidence of some of the witnesses, particularly at the stage of special leave petition. The law insists on finality of judgments and is more concerned with the strengthening of the judicial system. The courts are enjoined upon to perform their duties with the object of strengthening the confidence of the common man in the institution entrusted with the administration of justice. Any effort which weakens the system and shakes the faith of the common man in the justice dispensation system has to be discouraged.

30. In Zahira Habibulla H. Sheikh and another v. State of Gujarat and others, emphasizing on the duty of Court to maintain public confidence in the administration of justice, this Court has poignantly held as follows: (SCC p. 184, para 35)

35.... Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice--often referred to as the duty to vindicate and uphold the "majesty of the law". Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it.

31. Thus, from the aforesaid, it is clear as day that everyone involved in the system of dispensation of justice has to inspire the confidence of the common man in the effectiveness of the judicial system. Sustenance of faith has to be treated as spinal sans sympathy or indulgence. If someone considers the task to be Herculean, the same has to be performed with solemnity, for faith is the "elan vital" of our system.

Conclusion:-

Accordingly, we hold that the judgment and decree granted by the learned single Judge in Application Nos. 1163, 2032, 2038 to 2040 and 2188 to 2193 of 2011 in C.S.D. No. 7665 of 2011 are liable to be interfered with. As a result, O.S.A. No. 427 of 2012 filed by the appellants challenging the order made in Application No. 1163 of 2011 in CSD. No. 7665 of 2011 is allowed and consequently, all other O.S.A. Nos. 428 to 437 of 2012 filed challenging the order made in Application Nos. 2032, 2038 to 2040 and 2188 to 2193 of 2011 in C.S.D. No. 7665 of 2011 are also allowed. No costs. However, we make it clear that all our discussions on facts and law are meant only for the purpose of deciding these appeals and therefore, they will not have any bearing on the merits of the case. The learned single Judge is at liberty to decide any application pending suit or the main suit on its own merit and in accordance with law.