

(2003) 02 AHC CK 0110
In the Allahabad High Court
Case No : C.M.W.P. No. 19388 of 1999

Jagannath Singh

APPELLANT

Vs

District Judge and Others

RESPONDENT

Date of Decision : 28-02-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11, 151, 92

Citation : AIR 2003 All 226 : (2003) 5 AWC 3743

Hon'ble Judges : D.P. Singh, J

Bench : Single Bench

Advocate : N.D. Kesari and Ram Naresh Singh, for the Appellant; C.K. Rai and Arun Kumar Pandey and Atul Kumar Pandey, S.C., for the Respondent

Final Decision : Dismissed

Judgement

D.P. Singh, J.—Heard Sri. N.D. Keshari learned counsel for the petitioner and Sri Arun Kumar Pandey, learned counsel for the contesting respondents.

2. Learned counsel for the parties agree that the pleadings have been exchanged between the parties and they request that this writ petition may be disposed of finally under the Rules of the Court.

3. The dispute relate to a trust known as "Kalimath" situated at Lakshmi Kund, Varanasi and Lakshmanpura Math situated in Lakshmanpura, Varanasi. A suit No. 21 of 1962 was filed u/s 92 of the Code of Civil Procedure. The main relief claimed in the suit was for removing the trustees and appointing new ones in their place. Another relief was sought for framing a scheme for administration of the trust. This suit was decreed. In pursuance of the decree Kamta Tiwari, Pheka Tiwari were removed from Mahantship of the said trust and Bhalchand Sharma, Chandra Nath Yogeshwar, Jagannath Singh (petitioner herein), Paripurna Nand and Batuknath Shastri were appointed trustees. Subsequently, it appears, that Bhalchand Sharma and the petitioner were made managing trustees. Out of the aforesaid five trustees, all excluding the petitioner, either died or resigned and in

their place no one was appointed by the Court.

4. The petitioner alleges that he continued to manage the trust single handedly. An application for permission to file a suit u/s 151, CPC along with a copy of the plaint was filed on 25-1-1996 by the contesting respondents. Serious allegations of misconduct and dissipation of assets of the trust were made. It appears that learning about the aforesaid application the petitioner moved an application u/s 151, CPC on 12-3-1996. This application was moved solely by the petitioner and was titled as Misc Case No. 9 of 1996. In this application it was averred that since all trustees, except the petitioner have either died or had resigned, therefore, for managing the trust new trustees be appointed. It was also asserted that vide a resolution dated 26-1-1995 it was resolved to appoint certain named persons as trustees. It would be interesting to note that no members of the sect for which the trust was established or any person interested therein was impleaded by the petitioner. This application came to be heard by the 1st Additional District Judge. who allowed the same by his order dated 31-5-1996. Thus approving the appointment of Ram Naresh Singh, Prem Shanker Dixit, Dr. Sohan Singh and Ganesh Bhatt as trustees. The said order dated 31-5-1996 is Annexure-2 to the writ petition. The application dated 25-1-1996 filed by the contesting respondents seeking permission to file suit u/s 92, C.P.C. was heard by the District Judge. When the contesting respondents came to know about the order dated 31-5-1996 passed by the 1st Additional District Judge, they moved an application dated 1-8-1996 for recalling the said order. The District Judge consolidated the application dated 25-1-1996 and 1-8-1996 and after hearing all concerned, including the petitioner, allowed both the applications vide his order dated 17th March, 1999. The present writ petition is directed against the order dated 17th March, 1999.

5. Learned counsel for the petitioner has raised only four submissions before me.

(a) Once an order u/s 92, CPC has reached finality in 1968, the District Judge was not competent to grant permission for filing a suit u/s 92, CPC in 1996.

(b) the learned District Judge was wrong in holding that application of the petitioner dated 12-3-1996 u/s 151, CPC was not maintainable.

(c) Since the respondents were not party to the earlier suit of 1968, therefore, they could not make an application u/s 151, CPC in the suit, and lastly.

(d) That the persons appointed by the petitioner as trustees in view of the order dated 31st May, 1996, having not been made parties by the contesting respondents, the impugned order is vitiated.

6. Learned counsel for the contesting respondents urged that the application dated 12-3-1996 u/s 151, CPC moved by the petitioner was not maintainable in view of the provisions of Section 92, CPC. Further it has been urged that there were serious allegations against the petitioner and he had moved the application dated 12-3-1996 only as "peshbandi" to the application made by the contesting

respondents for permission to file the suit. It has also been submitted that in any event the impugned order do not visit the petitioner with any civil consequences. Therefore, under Article 226 of the Constitution, this Court ought not to interfere with such an equitable order. It has also been argued that a bale perusal of the application for per-mission to file the suit and the reliefs claimed for in the plaint would clearly show that the present cause of action was entirely different from the cause of action which gave rise to suit No. 21 of 1968.

7. A decree u/s 92, CPC is only a declaratory decree and the District Judge was fully competent to grant permission for filing a suit u/s 92, CPC. The relief claimed in the present suit and the suit of 1968 are materially and substantially different, so also the cause of action is different. The scheme of administration which was framed in 1968 continued for more than two decades and lacunas were noticed in its working. There is no provision for filling up of vacancies in the scheme. The second suit has rightly been filed for filling up of vacancies and lacunas in the scheme. The finding of the District Judge questioning the veracity of the resolution of resolution dated 26-11-1995 is well founded. Once all other trustees, except the petitioner had ceased to function much prior to 1995, there was no question of any resolution being passed on 26-11-1995. A perusal of the scheme framed under the 1968 suit shows that there was no arrangement for filling up the vacancies and also there was no power with the trustees to appoint new trustees without the leave of the Court. Therefore, it cannot be said that the second suit was either barred or incompetent. The learned District Judge has dealt in detail with this argument and his conclusions are neither perverse nor against any law. In fact the impugned order is in furtherance of the spirit of Section 92 of the Code of Civil Procedure. In my view, the findings recorded by the District Judge on the first question are valid and reasonable. Thus, I find no merit in the first contention of the learned counsel for the petitioner :

8. The second and third contention of the learned counsel for the petitioner can be considered together. It is true that the courts have inherent powers u/s 151, CPC but this power is normally utilised when no other power is available under the CPC. Where specific power is available, even then power u/s 151, CPC can jointly be exercised by the, Court. But if this specific power is dependent upon certain preconditions, the power u/s 151, CPC cannot be exercised in place of the specific power without first satisfying the preconditions of the specified power. Section 92 CPC provides for certain preconditions to be specified before exercise of power therein Section 92, CPC provides certain preconditions for exercise of power therein. It would be useful to notice the provisions of Section 92, CPC.

9. Section 92, CPC reads as under :

"92. Public charities (1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General or two or more persons having an interest in the trust and having obtained the (leave of the Court) may institute a suit

whether contentious or not, in the principal civil Court of original jurisdiction or in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject matter of the trust is situate to obtain a decree -

- (a) removing any trustee;
- (b) appointing a new trustee;
- (c) vesting any property in a trustee;
- (cc) directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possession to the person entitled to the possession of such property;
- (d) directing accounts and enquiries;
- (e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;
- (f) authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged;
- (g) setting a scheme, or
- (h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act, 1863 (20 of 1863), (or by any corresponding law enforce in (the territories which, immediately before the first November, 1956, were comprised in part B States)), no such claiming any of the reliefs specified in Sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.

(3) The Court may alter the original purposes of an express or constructive trust created for public purposes of a charitable or religious nature and allow the property or income of such trust or any portion thereof to be applied cy pres in one or more of the following circumstances, namely :--

- (a) where the original purposes of the trust; in whole or in part.-
 - (i) have been, as far as may be, fulfilled; or
 - (ii) cannot be carried out at ail, or cannot be carried put according to the directions given in the instrument creating the trust or where there is no such instrument, according to the spirit of the trust; or
- (b) where the original purposes of the trust provide a use for a part only of the property available by virtue of the trust; or
- (c) where the property available by virtue of the trust and other property applicable for similar purposes can be more effectively used in conjunction with,

and to that end can suitably be made applicable to any other purpose, regard being had to the spirit of the trust and its applicability to common purposes; or

(d) where the original purposes, in whole or in part, were laid down by reference to an area which then was, but has since ceased to be, a unit for such purposes; or

(e) where the original purposes, in whole or in part, have, since they were laid down-

(i) been adequately provided for by other means, or

(ii) ceased, as being useless or harmful to the community, or

(iii) ceased to be, in law, charitable, or

(iv) used in any other way to provide a suitable and effective method of using the property available by virtue of the trust, regard being had to the spirit of the trust."

10. Section 92 mandates that where any direction is sought from the Court for administration of any trust, two or more persons having an interest in the trust may institute a suit with the leave of the Court. Even for appointing a new trustee, the preconditions mentioned in Section 92 have to be complied. The application of the petitioner dated 12-3-1996 was made solely by the petitioner and it was not moved by "two or more persons" and neither was the application made by leave of the Court". The power in the aforesaid application was for appointing a new trustee. Thus, in my opinion the application of the petitioner dated 12-3-1996 u/s 151, CPC was referable to Section 92 of the CPC and since the preconditions of Section 92, CPC had not been complied with the application was not maintainable. The application of the contesting respondents for recall of the said void order was maintainable in view of the aforesaid reasons. The contesting respondents have made specific averments in the application that they are interested parties and belong to the sect for which the "math" was established and were vitally interested in the smooth functioning of the trust, therefore, even if they were not party in their individual capacity, but since they were members of the trust they could approach the Court.

11. There is yet another angle to this contention. An application seeking leave of the Court to institute the suit u/s 92 CPC was filed on 25th January, 1996, Serious allegations against the petitioner were made therein and the matter was under active consideration of the District Judge. It appears that to pre-empt those proceedings the petitioner filed the application u/s 151 CPC on 12-3-1996 and had it adjudicated by the 1st Additional District Judge. The facts speak for themselves. Therefore, the second and third contention of the learned counsel for the petitioner has no force and is thus rejected.

12. The last contention of the learned counsel for the petitioner is also bereft of any force. The trust was a party and it was not necessary to implied all the newly

appointed trustees as parties. The petitioner was heard in person. Further, these persons have not come before this Court complaining that they were not given any opportunity. There is nothing on record to show that those persons made any effort before the District Judge to be heard. Even otherwise, the Court is not bound to give notice u/s 92 CPC. Thus, in my opinion, the last contention also fails.

13. Learned counsel for the petitioner in order to justify the resolution dated 26-11-1995 has relied upon the decision of the Apex Court rendered in *Raje Anandrao Vs. Shamrao and Others*, . The ratio laid down in the aforesaid decision of the Apex Court is that in a scheme settled u/s 92, CPC insertion of a clause for modification of the scheme could not be invalid. The ratio laid down does not at all apply to the facts of the present case.

14. Learned counsel for the petitioner in support of his contention that the permission was granted to the contesting respondents to institute the suit u/s 92, CPC was only an abuse of process of Court, has cited the ratio laid down by this Court in the case of *Narain Das v. Khunni Lal*, AIR 1917 Allahabad 319. In that case this Court countenanced an entirely different set of facts. In that case the Court had found that individual persons in the garb of being interested in a trust were abusing the powers of the Court u/s 92, CPC. This case is also of no help to the petitioner as in the present case neither any finding has been recorded by the Court nor there is any pleading to that effect. Further, to support his contention that the application on behalf of the contesting respondents to set aside the decree passed in 1968 suit was not maintainable as the contesting respondents were not party to that suit, has relied on the decision of this Court rendered in *Mahfooz Ali Khan v. Additional District Judge, Rampur* 1985 All WC 269 : 1985 A LJ 281 The ratio laid down in the aforesaid decision does not apply to the facts of the present case. Therein third parties sought to intervene in the execution proceedings and this Court held that the executing Court could not go behind the decree at the instance of third party. In the case at hand, the contesting respondents are members of the trust and vitally interested therein and also they had not claimed for setting aside the decree passed in 1968 suit, therefore, the ratio does not help the petitioner.

15. For the foregoing discussions, the writ petition is dismissed with costs and the District Judge, Varanasi is directed to proceed to decide the suit on merits expeditiously preferably within a period of twelve months from the date of presentation of a certified copy of this order before the Court. Petition dismissed.