

**(1996) 03 MAD CK 0017**

**In the Madras High Court**

**Case No :** Appeal Against Order No's. 258 and 259 of 1996

Jeyaraman

APPELLANT

Vs

Kandappa Palanivelu and another

RESPONDENT

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**Date of Decision :** 27-03-1996

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5, Order 38 Rule 5(1), Order 39 Rule 1, 92, 92(1)

**Citation :** (1996) 03 MAD CK 0017

**Hon'ble Judges :** Jagadeesan, J

**Bench :** Single Bench

**Advocate :** R.G. Narendhiran, for the Appellant; T. Susindran, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

Jagadeesan, J.—By consent of both the counsel the appeals are taken up for final disposal. The respondents herein have filed the suit against

the appellant and six others u/s 92, C.P.C with an application for leave to sue. The prayers in the suit are as follows:-

a) settling a scheme for the proper and efficient administration and management of private family religious and charitable trust founded by

Sellaperumal Pillai comprising of Sri Vazhigarai Amman Temple and Annathana Chatram in the village of Thakkalur in Thirunallur commune

providing for appointment of both the plaintiffs as trustees for their life time;

b) Directing the 1st defendant to render a true and proper account for the rents and profits derived by Seenivasa Pillai from out of 2 values of trust

lands and for the amounts to be ascertained as payable from out of the estate of Seenivasa Pillai in the hands of 1st defendant Jayaraman;

c) Granting such other and further reliefs as this Hon"ble Court may deem fit and

proper in the circumstances of this case.

Along with the application for leave to sue, they also filed I.A. 188/95 seeking for a direction, directing the appellant herein to furnish security for

Rs. 12 lakhs within the time specified by the Court to satisfy the decree that may be passed against him, on settlement of account and in case of his

failure to do so, attachment before judgement.

2. The plaintiffs filed another application I.A.189/95 seeking for a temporary injunction pending disposal of the suit restraining the appellant herein

from interfering with the respondents administration, management and possession of the suit temple.

3. The appellant herein has filed counter and opposed the said applications.

4. However, the lower court by common order dated 2.2.96 allowed both the applications, against which the appellant has preferred the present

appeals.

5. The respondents have filed caveat and on 16.2.96 the appeals were admitted and interim orders were granted. When C.M.Ps. came up for final

orders, at the request of both the counsel, the appeals are taken up for final disposals

6. The only ground urged by the counsel for the appellant is that the respondents have filed the suit u/s 92C.P.C and also filed an application

seeking leave to file the suit. Unless leave is granted, the suit will not be numbered and as such the lower court has no jurisdiction to entertain the

said two I.A. Nos. 188 and 189 of 1995 seeking for interim direction and interim injunction. The order of the lower court is contrary to law.

7. He also relied upon a judgment reported in M. Anandan Vs. Ayyanna Gounder Memorial Trust and Others, in support of his contention. In that

case, a Division Bench of this Court has held as follows:-

Learned counsel for the appellant placed reliance on the decision reported in P.V. Mathew v. K.V. Thomas (AIR 1983 Kerala 5) and Kintali

China Jaganathan v. K. Lakshmi Naidu (AIR 1988 Orissa 100) in support of the contention that any order passed without granting leave must be

deemed to be non est. In P.V. Mathew's case (AIR 1983 Kerala 5) a Division Bench of Kerala High Court has laid down the procedure to be

followed by the court in granting leave u/s 92(1) CPC as follows:

With this background we might thus formulated the procedure for the grant of leave by the court:

i) While exercising its power under S.92 in court will be guided by the principles laid down by judicial decisions to regulate the power of the

Advocate General under the Sub-Section.

ii) Along with the petition for leave the plaintiff petitioner should produce in Court the plaint for the court's perusal to enable it to pass a proper

order under S. 92(1). This does not preclude the court from requiring the production of any other record necessary for a proper decision.

iii) The court can, if it is so satisfied grant the leave without issuing notice to the respondent-defendants or hearing them S.S. Bhagat v. N.S.

Ahluwalia, (AIR 1978 Del.14) and Shevess v. Massood Hossain (AIR 1968 AP 143).

iv) Section 92(1) does not provide for the grant interim leave to the plaintiffs. What it contemplates only the grant of leave and as a corollary the refusal leave.

v) On the terms of S.92(1) the leave is to precede the institution of the suit as the relevant words are two or more persons... having obtained the leave of the court may institute a suit.

This means that prior to the grant of leave there could not be any valid suit with the further consequences that the court cannot pass interim order in

"the suit" before granting the leave. We find ourselves in agreement with the decision in C.R.P. No. 1286 of 1979 by Viswanatha Iyer, J. 1979Ker

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Thus, it held that prior to grant of leave there could not be any validly instituted suit with the further consequence that the court cannot pass interim

orders in the suit before granting the leave Similar view was expressed in Kintali China Jaganathan's case (AIR 1988 Orissa 100), There is no

dispute that once we hold that grant of leave is necessary for instituting the suit under S.92. Code of Civil Procedure, the court cannot without

granting leave proceed to pass any interim order for the passing of which there must be a validly instituted suit. Therefore, there is no question of

disagreeing with the view expressed in the aforesaid decisions.

8. The learned counsel for the respondents fairly represented that in view of the abovesaid Division Bench judgement, the common order of the

lower court in both the applications cannot be sustained and is liable to be set aside.

9. In fact before the lower court an objection was raised by the appellant stating that until the suit filed u/s 92 CPC is numbered, the court has no power to entertain the application for interim relief. But the lower court has rejected that objection as follows :-

In the first place, I would like to point out that Order 38, Rule 5 and Order 39, Rule 1, C.P.C. enjoins on the Court that if the court is satisfied by affidavit or otherwise, the reliefs of grant of attachment before judgement and injunction can be passed. I am satisfied after careful consideration of the affidavit of the petitioner No. 2 and No. 1 and the documents filed along with the petitions and the counters that there is satisfactory and prima facie case in favour of the petitioner No. 2 in respect of both reliefs.

Order 38, Rule 5(1), C.P.C. makes it clear that at any stage of the suit where the court is satisfied by affidavit or otherwise, that the defendant,

with intent to obstruct or delay the execution of any decree that may be passed against him, the court is empowered to direct him to furnish

security. Likewise Order 39, Rule 1, C.P.C also makes it clear that where in any suit it is proved by affidavit or otherwise that any property in

dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or that the

defendant threatens, or intends to remove or dispose of his property with a view to defrauding his creditors and that the defendant threatens to

dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, then the court is empowered to

grant interim injunction. The words occurring in Order 38, Rule 5 "at any stage of a suit" and the words occurring in Order 39, Rule 1 "where in

any suit" mean only a pending suit. Till a suit is numbered, it cannot be called as a suit and it would be only the presentation of the plaint. Hence the

lower court has totally misconstrued the provisions and exercised its power. The Court's satisfaction is required only in the pending suit and not

otherwise. Merely because the court is satisfied with the averments made in the application, it cannot exercise power to grant interim relief when

the suit is not numbered i.e., when the suit is not before court. If only the suit is before court, then only the court is empowered to exercise its

power. Hence the order of the lower court is totally without jurisdiction and the court below has exercised its discretionary power by giving some false excuse.

For the reasons stated above, the appeals are allowed. However, there will be no orders to costs.