

(2014) 09 KL CK 0089

In the High Court Of Kerala

Case No : Regular First Appeal Nos. 524, 596, 604 of 2013 and R.P. No. 664 of 2013

John K.P.

APPELLANT

Vs

Mani Varkey

RESPONDENT

Date of Decision : 03-09-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 4 Rule 1, Order 7 Rule 11, 92, 92(1)

Citation : (2014) 4 KHC 36 : (2014) 4 KLJ 255

Hon'ble Judges : B. Kemal Pasha, J

Bench : Single Bench

Advocate : S. Sreekumar, Senior Advocate and P.K. Ravisankar, Advocate for the Appellant; R.D. Shenoy, K. Ramakumar, Senior Advocates, G. Subramanian, Caveator, K.J. Kuriachan, Alias M. Cherian, S.M. Prasanth, Smitha George, Saji Varghese Kakkattumattathil, S. Vinod Bhat, K. Paul Kuriakose, K.A. Anish, N. Subramaniam and Jolly John, Advocate for the Respondent

Judgement

B. Kemal Pasha, J.—(i) Can the leave under Section 92 of the Code of Civil Procedure, 1908 (hereinafter referred to as the Code) be dispensed with on the inaction of the defendant in challenging it?

(ii) Whether acquiescence can be pleaded for sustaining a suit under Section 92 of the Code when leave under Section 92 of the Code was not obtained through an express order?

(iii) Whether leave had to be obtained under Section 92 of the Code for the institution of OS No. 6/1985 as a condition precedent.

These are the questions that come up for consideration at present in these appeals and RP No. 664/2013.

Originally, the plaint in the suit in question was presented on 27/01/1984 before the Subordinate Judge's Court, Ernakulam. After curing some defects, the suit

was received in file and the same was instituted as OS No. 41/1984 on 06/02/1984. Later, the suit was transferred to the Additional District Court, Ernakulam being the special Court for dealing with church cases, where the suit was renumbered as OS No. 6/1985.

2. Later, the plaint was amended. Prior to the amendment, the following reliefs were sought for:--

"A. To declare that the Piravom St. Mary's Orthodox Syrian Church, also known as Piravom Valiapally and its assets described in the plaint schedule are to be administered under the Constitution of the Malankara Orthodox Syrian Church originally passed on 26/12/1934 and was amended subsequently under the Metropolitans, Priests and other religious dignitaries and office bearers appointed and functioning under the said Constitution.

B. To declare that defendants 29 and 30 have the right and authority to see that the plaint church and its assets are managed by proper persons, the funds and other assets of the church are properly utilised and accounted by persons in management.

C. To declare that defendants 31 and 32 cannot exercise any Episcopal authority or function or any sort of right over the plaint church and its assets or in any manner interfere in the administration of the affairs of the plaint church.

D. Restraining defendants 1 to 18 and 26 to 28 and 31 and 32, their supporters and partisans by a permanent injunction from obstructing in any manner whatsoever defendants 29, 30 and defendants 19 to 21 or other dignitaries or persons appointed under the Malankara Church Constitution from conducting religious services or from exercising their ecclesiastical and other functions, in the said church or to appoint a Receiver.

E. To declare the rights of the plaintiffs calling upon the interim Court administrators, defendants 1 to 15 or whomsoever may succeed them in their office to hand over their management or the plaint church and its assets to those whomsoever be appointed under the said Constitution of the Malankara Orthodox Syrian Church in order to administer the same.

F. Directing the contesting defendants to pay the plaintiffs the cost of this suit.

G. Granting such other reliefs as may be necessary to preserve the plaint Piravom Valiapally as a constituent Parish church of the Malankara Orthodox Syrian Church."

Admittedly, no leave under Section 92 of the Code was sought for or any leave was granted expressly by the Subordinate Judge's Court or the I Additional District Court, Ernakulam in the matter.

3. On 08/01/2002, the plaint was amended by deleting reliefs B, C and D contained in the original plaint and by substituting reliefs B, C, D and D1 as noted in the amended plaint. The said reliefs are:

"B. To declare that the defendants 54 & 55 are having the right and authority to see that the plaint church and its assets are managed by a proper Managing Committee elected under the Presidentship of the 55th defendant under the provisions of the 1934 Constitution.

C. To declare that the defendants 31 & 32 or any person claiming under them especially the 53rd defendant cannot exercise any Episcopal or spiritual authority or function or any sort of right over the plaint church and its assets or in any manner interfere in the religious services and administration of the affairs of the plaint church.

D. Restraining defendants 1 to 18 and 26 to 28 and 31, 32 & 53 and their supporters and partisans by a permanent injunction from obstructing in any manner whatever, defendants 54 and 55 and defendants 19 to 22 or other dignitaries or persons appointed under the Malankara Church Constitution from conducting religious services or from exercising their ecclesiastical and other functions in the said church.

D1. To declare that all the elections conducted in a manner not provided under the 1934 Constitution, to the Managing Committee of the church are invalid."

4. Over and above it, extensive amendments were carried in paragraph 12 of the original plaint. In paragraph 12 of the original plaint, the following pleadings were taken:

"Defendants 1 to 18 and defendants 26 to 28 and others are causing obstructions to the present Catholicos Cum Malankara Metropolitan Moran Mar Baselios Mar Thoma Mathew I, His Grace Joseph Mar Pachomios, the Diocesan Metropolitan, and defendants 19 to 21 the priests of the church, all lawfully appointed under the said Malankara Church Constitution in exercising their rights, in the Piravom Valiapally."

The said pleadings were struck off by incorporating some other averments. It was on that basis, the original reliefs B, C and D were also struck off by substituting the aforesaid reliefs B, C, D and D1.

5. Among other contentions, one of the defendants has contended that the leave under Section 92 of the Code ought to have been obtained by the plaintiffs for filing the suit and on account of want of leave, the suit is not maintainable. Subsequently, it seems that I.A. No. 2061/2004 was filed by the 47th defendant as petitioner, challenging the maintainability of the suit for want of sanction under Section 92 of the Code. It seems that the Court below had dismissed the IA vide order dated 06/10/2004. The Court below has entered a specific finding in the said order that "from the pleadings, it is very clear that sanction under Section 92 CPC is necessary for prosecuting the present suit". Therefore, it is evident that at least by 06/10/2004, the Court below was very much sure that leave under Section 92 of the Code was required in the said suit. After making such a specific observation, it seems that the Court below went on to reject the

said contention resorted to by the 47th defendant, by observing that notice under Order I Rule 8 of the Code was already there in the said suit.

6. It seems that the Court below was of the view that a notice under Order I Rule 8 of the Code could be a substitute for leave under Section 92 of the Code. Towards the operative portion of order dated 06/10/2004 in IA No. 2061/2004 the Court below held that:

"The Division Bench of our Hon"ble High Court held in AIR 1983 Kerala 238 that "Where the suit filed in relation to a trust culminated in framing of a scheme for the management of the trust, the judgment and decree and the further proceedings taken in pursuance thereto would all be valid and binding on the parties thereto when the Court entertaining the suit had jurisdiction to try it. It would be so binding even assuming that the trust was a public trust to which the provisions of Section 92 applied and the provisions of S. 92 were not complied with. "I have already stated that even if the petitioner has any right to put forward a claim that the suit is bad for want of sanction under Section 92 CPC. Hence find that the present suit might have been prosecuted by the plaintiff on the basis of an implied sanction under Section 92 of the CPC and hence the suit is maintainable. The petition is without any merits."

The said order was taken up in revision before this Court. It seems that a Single Bench of this Court has dealt with the matter and passed an order on 17/05/2005, which is almost corresponding to the aforesaid order passed by the Court below. This Court held that:

The suit was filed in the year 1985 and the petitioner was sleeping over his right till this time. In the facts and circumstances of the case, this Court finds that the Court below has considered the larger interest of the public and found that the suit was prosecuted by the plaintiff on the basis of an implied sanction under Section 92 of the CPC. Hence, the impugned order is perfectly justifiable and requires no interference by this Court.

Admittedly the dispute between the parties with regard to the administration of the churches coming under the different dioceses of the Malankara Church and the entire questions relating to the administration of the churches are before different Courts and at this stage this Court is not expected to allow any party to re-agitate the matters which are already brought to the notice of the High Court as well as the Apex Court."

7. Based on the said observation, the learned Single Judge of this Court dismissed the CRP by confirming the aforesaid order passed by the Court below. By overruling the objection regarding want of leave under Section 92 of the Code, the suit was proceeded with, evidence was recorded, and the matter was finally heard. The Court below through the judgment impugned in RFA Nos. 524/2013, 596/2013 and 604/2013 has partly decreed the suit by finding that reliefs B and C in the plaint were not pressed by the learned counsel for the plaintiffs at the final stage, and by declaring that St. Mary's Orthodox Syrian

Church, Piravom has to be administered under 1934 Constitution of Malankara Church as amended subsequently.

8. Dissatisfied with the said judgment and decree dated 25/01/2013, plaintiffs 2 and 3 have come up in appeal through RFA No. 524/2013, defendants 1, 12 and 47 as appellants have come up in appeal through RFA No. 596/2013, and defendants 7 and 41 as appellants have come up in appeal through RFA. No. 604/2013. Highlighting errors apparent on the face of the aforesaid order dated 17/05/2005 passed by the Single Bench of this Court in CRP No. 1280/2004 as aforesaid, the 47th defendant has filed RP No. 664/2013 along with CM. Application No. 495/2013 for getting the delay of 2975 days caused in filing the review petition condoned.

9. CM. Application No. 495/2013 has been seriously challenged through a counter-affidavit contending inter alia as follows:--The CM. Application is not maintainable and is devoid of bona fides. There is an exorbitant delay which remains unexplained. The RP has been filed after the lapse of eight months from the date of the impugned judgment and decree. The same has been filed only after the filing of these appeals. Even the RP itself is devoid of merits and, therefore, no purpose would be served in condoning the delay. When the delay has not been explained in any manner, the same is not liable to be condoned.

10. Heard the learned Senior Counsel Sri. S. Sreekumar and the learned counsel for the plaintiffs and learned Senior Counsel Sri. R.D. Shenoy, learned Senior Counsel Sri. K. Ramakumar, learned counsel Sri. K.J. Kuriachan, Sri. Saji Varghese Kakkattumattathil, Sri. S. Vinod Bhatand Sri. K. Paul Kuriakose for the defendants. Those defendants for whom the learned counsel Sri. Paul Kuriakose appears, are also travelling along with the plaintiffs.

11. In fact, the matter has been extensively heard on all the questions involved in the suit. One of the main limbs of argument forwarded by the learned Senior Counsel Sri. R.D. Shenoy is confined to the question relating to the maintainability of the suit itself for want of leave under Section 92 of the Code. The learned Senior Counsel has argued that even in a case where no review has been filed on the order impugned in RP No. 664/2013, the validity of the said order is at stake in a matter like this, in view of the subsequent decision rendered by a Division Bench of this Court in St. Peters Orthodox Syrian Church and Others Vs. Fr. Abraham Mathews and Others, . The learned Senior Counsel has fairly conceded that as the order impugned in RP No. 664/2013 is passed by a Bench of coequal jurisdiction, this Court is bound by the said order passed by the learned Single Judge at an early stage of the very same proceedings. At the same time, the learned Senior Counsel has pointed out that the decision in St. Peter's Orthodox Syrian Church (supra) has clearly overruled in a way the order impugned in RP No. 664/2013 and, therefore, this Court can consider the question regarding the maintainability of the suit by relying on St. Peter's Orthodox Syrian Church (supra).

12. Per contra, the learned Senior Counsel Sri. S. Sreekumar for the plaintiffs has canvassed an argument that the order passed by the learned Single Judge, which is impugned in RP No. 664/2013, had become final as the same was not challenged by anybody. It is also argued that this Court is bound by the said order passed by the learned Single Judge at the early stage of the very same proceedings. It has also been argued that RP No. 664/2013 is hopelessly barred by limitation and the delay has not yet been condoned. The learned Senior Counsel has argued that Section 92 of the Code has no application in this case as the property of the church is in custodia legis and the properties are still in the possession of administrators appointed by the Court below in the prior suit. The learned Senior Counsel has further argued that in this case no leave at all is required as the relief granted by the Court below in the impugned judgment and decree is only confined to the application of the judgment of the Apex Court in Most. Rev. P.M.A. Metropolitan and others, etc. etc. Vs. Moran Mar Marthoma and another etc. etc., .

13. In the course of the hearing, the merit of CM. Application No. 495/2013 filed in RP No. 664/2013 has also been considered. The learned Senior Counsel Sri. R.D. Shenoy has relied on the decision in Naubat Ram Sharma Vs. Additional District Judge II, Moradabad and Others, . The said decision is considered to be an eye opener in exercising the powers of Courts in condoning delays, which has ultimately led to a pragmatic approach in the matter. It was held therein:

"1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day"s delay must be explained" does not mean that a pedantic approach should be made. Why not every hour"s delay, every second"s delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was

the "State", which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even-handed manner."

It was held therein that the Courts therefore have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause".

14. The learned Senior Counsel has also relied on the decision in *State of Nagaland Vs. Lipok AO and Others*, wherein it was held in paragraph 14 that:

"The expression "sufficient cause" is adequately elastic to enable the Court to apply the law in a meaningful manner which subserves the ends of justice-that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. This Court reiterated that the expression "every day's delay must be explained" does not mean that a pedantic approach should be made. The doctrine must be applied in a rational common sense pragmatic manner. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk. Judiciary is not respected on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so. Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal."

15. The Courts have been called upon to have a rational commonsense in a pragmatic manner when approaching the question of "sufficient cause" for condoning the delay in filing appeals. The decision in *Naubat Ram Sharma (supra)* was followed in *State of Nagaland (supra)* also. When there is such an amount of delay in the matter, this Court is of the view that the merits of the matter also is required to be considered while dealing with the question of "sufficient cause" for condoning the delay. As rightly pointed out by the learned Senior Counsel Sri. R.D. Shenoy that even without the review of such an order, if the matter requires reconsideration on the basis of subsequent judicial pronouncement of higher forums, there is nothing wrong in condoning the delay and to consider the review petition also.

16. The learned Senior Counsel Sri. R.D. Shenoy has relied on the decision in *Kiran Singh and Others Vs. Chaman Paswan and Others*, to canvas his argument that a decree passed without jurisdiction is a nullity. In that decision, it was held

in paragraph 6:

"It is a fundamental principle that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties."

17. The argument in short is that the question of leave under Section 92 of the Code is a jurisdictional question and if a decree is passed in such a suit filed without having leave under Section 92 of the Code, the said decree is one passed without jurisdiction, which necessarily renders the decree a nullity. The learned Senior Counsel Sri. S. Sreekumar has canvassed an argument that the said questions cannot be considered at present as the order impugned in RP No. 664/2013 has become final and this Court being a Court of coequal jurisdiction is bound by the said order.

18. The fact that the church in question commonly known as "Piravom Valiapally" and its properties constitute a public religious and charitable trust is not in dispute and fortunately for this Court, the said question does not arise for consideration at all. It is a fact that still there are two factions among the members of the church, and disputes persist between them. It is evident that the suit is filed by one of the factions owing allegiance to the Orthodox faction as against the other faction owing allegiance to the Patriarch. Of course, it is true that after the decision of the Apex Court in *Most. Rev. P. M.A. Metropolitan and Others* (supra), any such two factions cannot be there as the venture by the Apex Court was to avoid any factional feud or disputes. Whatever it is, it is a fact that two such factions are still there and one of the factions has come up with the suit against the other faction.

19. Section 92 of the Code reads:

"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 person 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 inquiries;

(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) settling 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 in force in the territories which, immediately before the 1st November, 1956, were comprised in Part B States, no suit 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 Cypres 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 all, or cannot be carried out 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 purpose 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 of 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) ceased 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."

20. The learned Senior Counsel on both sides have pointed out that in order to attract Section 92 of the Code the following conditions must be satisfied:

"(a) There is a trust created for public purposes of a charitable or generous nature;

(b) There is a breach alleged of such trust, or the direction of the Court is necessary for the administration of such trust;

(c) The suit must be a representative one on behalf of the public and is not by individuals for their own interest; and

(d) the relief claimed in the suit is the one or other reliefs mentioned in the section."

21. In the decision in Lucknow Diocessan Trust Association, Allahabad and others Vs. Sachindranand Bakshi and others, , it was held:

"That the trust was a public trust and the college was a charitable institution. Suit was not filed for vindication of a personal right of the plaintiffs or any other person but for vindicating the right of the public for preventing the breach of trust. Object of the suit was to prevent the breach of trust and to force the trustees to discharge their obligations and perform the duties of trustees in accordance with the object of the trust. No doubt the relief claimed by the plaintiffs does not fall in Clauses (a) to (g) of Section 92, CPC but in view of the averments made in the plaint and the finding recorded by the Trial Court, the relief claimed in the suit falls under Clause (h) of the said Section. Since the suit was not filed with the consent in writing of the Advocate General the same was not maintainable and hence had to be dismissed."

22. In the decision reported in Chairman Madappa Vs. M.N. Mahanthadevaru and Others, , it was held as follows:

"Let us now see if there is anything in Section 92(1). Clause (f) which prohibits the giving of such directions even if there is a provision to that effect in the scheme. Section 92(1) provides for two classes of cases, namely, (i) where there is a breach of trust in a trust created for public purposes of a charitable or religious nature, and (ii) where the direction of the Court is deemed necessary for the administration of any such trust. The main purpose of Section 92(1) is to give protection to public trusts 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 either by the Advocate

General, or two or more persons having an interest in the trust with the consent in writing of the Advocate General. The object clearly is that before the Advocate General files a suit or gives his consent for filing a suit under Section 92, 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. The reliefs to be sought in a suit under Section 92(1) are indicated in that section and include removal of any trustee, appointment of a new trustee, vesting of any property in a trustee, directing a removed trustee or person who has ceased to be a trustee to deliver possession of trust property in his possession to the person entitled to the possession of such property, directing accounts and enquiries, declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular object of the trust, authorisation of the whole or any part of the trust-property to be let, sold, mortgaged or exchanged, or settlement of a scheme. The nature of these reliefs will show that a suit under Section 92 may be filed when there is a breach of trust or when the administration of the trust generally requires improvement. One of the reliefs which can be sought in such a suit is to obtain the authority of the Court for letting, selling, mortgaging or exchanging the whole or any part of the property of the trust, as provided in Clause (f) of the reliefs."

23. In *St. Peter's Orthodox Syrian Church* (supra), it was held as follows:

"Thus, leave of the Court is not necessary if it is the Advocate General who has instituted the suit which is of the nature referred to in Section 92 CPC. Leave of the Court is insisted upon only if the suit is one falling under Section 92 CPC and is instituted by 2 or more persons having an interest in the public trust concerned. The usage of the words "having obtained the leave of the Court, may institute a suit" occurring in Section 92(1) CPC is a clear indication that leave of the Court is a condition precedent to the very institution of the suit and such leave cannot be given subsequent to the institution of the suit. If the case is one falling under Section 92 CPC and the suit is instituted for any of the reliefs enumerated under Clauses (a) to (h) of Section 92(1) CPC failure to obtain the leave of the Court before the institution of the suit, will go to the root of the matter and is a jurisdictional defect or infirmity which cannot be cured by a post-institutional leave granted by the Court.....The rigid requirement of law is that the leave petition itself should contain all the necessary facts which as the nature of the public trust concerned, the alleged breach of trust or the circumstances under which the direction of the Court is considered necessary for the administration of the trust and the main reliefs prayed for in the proposed suit. It is only after the leave of the Court is obtained can the plaintiffs institute the suit as provided under Order IV Rule 1 CPC.....Grant of leave being a jurisdictional pre-condition, any consent, waiver or acquiescence on the part of the opposite party either in the pleadings or otherwise, will not cloth the Court with the jurisdiction to entertain the suit, much less, try and dispose of such suit. Conversely, if the suit has been instituted after obtaining the leave of the Court, that by itself will not preclude the Court from revoking the leave already granted

if the Court is thereafter convinced that the suit is not one falling under Section 92 CPC... In such an event, the suit will have to be filed before the proper Court having jurisdiction to try such suit. Even though the Court is not bound to give notice to the proposed defendants before granting leave under Section 92 CPC as a rule of caution, Court should normally give notice to the defendants.....It is important to remember that a suit under Section 92 CPC is a representative suit and the decision in the suit will bind not only the parties to the suit but also all persons interested in the public trust concerned."

24. The learned Senior Counsel Sri. R.D. Shenoy has relied on the decision in Fr. John Jacob and Others Vs. Fr. N.I. Paulose and Others, , wherein it was held in paragraph 8:

"A recapitulation of the principles evolved in the above cases by this Court over the applicability of Section 92 of the Code in such suits instituted by one faction of the church against the other, to gain control and administration of church, is not called for disposing the present appeal. Suffice to state that the principles enunciated in the above decisions over the applicability of Section 92 of the Code are equally applicable to the present suit filed by respondents. First plaintiff who claims to be the vicar appointed by the metropolita of the Orthodox faction with the other two plaintiffs, one of them stated to be kaikaran and the other, a member of the parish, was not vindicating his private right, but, asserting the right of his faction over the church, a public trust, against the other rival faction (Jacobite) suing defendants in their representative capacity. Declaration and injunction applied for in the sit is nothing but a camouflage, and, the real purport and object of the suit would demonstrate that the reliefs canvassed in respect of the public trust squarely come under Section 92 of the Code. That being so, the suit which was instituted without obtaining permission under Section 92 of the Code was not maintainable, and the decree passed in the suit is liable to be set aside."

25. In Charan Singh and Another Vs. Darshan Singh and Others, , it was held that the maintainability of the suit under Section 92 of the Code depends upon the allegations set out in the plaint and does not fall for decision with reference to the averments in the written statement. The learned counsel Sri. K.J. Kuriachan has invited the attention of this Court to the judgment dated 09/03/2012 in AS No. 361/1999, wherein it was held in paragraph 10 that:

"It is well settled that the application of Section 92 CPC has to be determined with reference to the averments in the plaint. It is not to be determined with reference to the ultimate relief that is to be granted in the suit. It is not in dispute that the Church in question is a public religious trust. If that be so, one of the conditions necessary to attract Section 92 CPC is satisfied."

26. A reading of the original plaint prior to the amendment clearly reveals that the suit in question was not one for vindication for any personal right, but, purely relating to the administration of the trust. On going through the reliefs in the

unamended plaint, and some other reliefs even in the amended plaint also, it is evident that the same relates to the administration of the church in question.

27. The reasons relied on by the Court below to dismiss IA No. 2061/2004 are that the suit was being treated as a suit by the Court below and that many interlocutory orders were passed therein. Strictly speaking, all such interlocutory orders passed in a suit, which ought to have been instituted with the leave under Section 92 of the Code, at a stage wherein no leave was obtained, are nullity. May be such orders might have been confirmed or upheld by the superior Courts; but, that does not mean that such orders passed in such a suit filed without leave are not nullity. Even though it has not been specifically stated by the Court below in the order by which IA No. 2061/2004 was dismissed or in the judgment passed by the learned Single Judge of this Court in dismissing the CRP on the said order that the defendants have waived their right to challenge the maintainability of the suit under Section 92, or that the suit had to be continued on account of acquiescence, it seems that the principles based on which the said orders were passed are that the defendants had waived their right to challenge the maintainability of the suit under Section 92 or that the suit had attained legality even without any leave under Section 92 of the Code through acquiescence etc.

28. In *St. Peter's Orthodox Syrian Church* (supra), a Division Bench of this Court has clearly held in paragraph 10 that--

"The grant of leave being a jurisdictional pre-condition, any consent, waiver or acquiescence on the part of the opposite party either in the pleadings or otherwise will not cloth the Court with the jurisdiction to enter the suit, much less, try and dispose of such suit. If the suit has been instituted after obtaining the leave of the Court, that by itself will not preclude the Court from revoking the leave under Section 92 of the Code."

It has to be noted that a suit filed under Section 92 of the Code is a representative suit and the decision in the suit will bind not only the parties to the suit but also all persons interested in the public trust concerned. In such a case, while dealing with the question of leave under Section 92 of the Code, the persons in charge of judicial administration while imparting justice, shall be careful in dealing with the matter. Even in a case wherein notice was effected under Order I Rule 8 of the Code in a matter coming under Section 92 of the Code, it cannot be said that the leave under Section 92 of the Code, can be dispensed with when there is sufficient notice under Order I Rule 8 of the Code. In all cases in which notice under Order I Rule 8 of the Code is required, such notice is not a pre-condition for the institution of the suit. At the same time, a suit contemplated under Section 92 of the Code can only be instituted after obtaining the leave under Section 92 of the Code and, therefore, it is a pre-condition for the institution of the suit.

29. The presentation of a plaint cannot be treated as an institution of the suit.

Institution of the suit is there only when the plaint is accepted by the concerned Court and is numbered after applying its mind. The question as to how a suit under Section 92 of the Code can be instituted, has been clearly answered by the Division Bench of this Court in P.V. Mathew and Others Vs. K.V. Thomas and Others, of the decision says:

"9. With this background we might thus formulate the procedure for the grant of leave by the Court:

(i) While exercising its power under Section 92(1) the 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 plaintiffs-petitioners should produce in Court the plaint for the Court's perusal to enable it to pass a proper order under Section 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 and Others Vs. N.S. Ahluwalia, and Shavax A. Lal and Others Vs. Syed Masood Hosain and Others, .

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

(v) On the terms of Section 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 consequence that the Court cannot pass interim orders in "the suit" before granting the leave. We find ourselves in agreement with the decision in CRP No. 1286 of 1979 by Viswanatha Iyer J., 1979 Ker LT (Notes) 116."

30. In fact, for instituting such a suit under Section 92 of the Code, a petition seeking leave under Section 92 of the Code shall be presented before the concerned Court. Even in that petition, all the pleadings in the plaint can be incorporated. In the alternative, a simple petition seeking leave, with which the plaint as such is appended, can also be filed. In either case, the Court has to apply its mind to note down whether the four conditions stipulated above are there in order to treat the suit as one under Section 92 of the Code. If leave has to be granted, the Court has to grant leave on the petition; then only the suit can be numbered. Till then, the suit itself cannot be numbered. If leave has not been granted, the plaint has to be rejected, as there is no cause of action within the meaning of Order VII Rule 11 of the Code.

31. When the Division Bench of this Court has held in St. Peter's Orthodox Syrian Church (supra) that leave under Section 92 being a pre-condition, even the consent of the opposite party, waiver or acquiescence of the opposite party

either in the pleadings or otherwise, will not cloth the Court with the jurisdiction to entertain such a suit. As rightly pointed out by the learned Senior Counsel Sri. R.D. Shenoy, in such circumstances, it has to be considered that the said decision of the Division Bench of this Court in St. Peter's Orthodox Syrian Church (supra) has clearly overruled the order passed by the learned Single Judge of this Court in CRP No. 1280 of 2004, as aforesaid. The said order has been passed merely by considering the fact that many orders were passed by the Court below in the suit even without any leave and such orders were upheld by this Court subsequently. All those orders vanish in the light of the decision of the Division Bench in St. Peter's Orthodox Syrian Church (supra).

32. Looking from another perspective also, even if the order passed by the learned Single Judge in the CRP is accepted, it can only be treated as something relating to matters occurred after the institution of the suit. It can never relate back to the pre-suit stage. When the leave under Section 92 is a pre-condition for filing a suit itself, the said question also has to be decided. All other orders passed by the Court below except an order granting leave under Section 92 of the Code, at a stage wherein there was no leave in the matter, are not legally sustainable for want of leave. Those orders were not passed in a suit at all, as there was no legally instituted suit.

33. When the order impugned in RP No. 664/13 is not legally sustainable in view of the decision of the Division Bench of this Court in St. Peter's Orthodox Syrian Church (supra), there is no meaning in not condoning the delay caused in filing the RP. Justice cannot be a casualty in the hands of recklessness from the part of somebody, who is entrusted with the task of administering and imparting justice. If any error has happened, with an open heart, the same has to be corrected by the judiciary itself. Otherwise, justice will become a casualty. In such a case, a broad minded and a pragmatic approach as pointed out by the Apex Court in Naubat Ram Sharma (supra) is required in condoning the delay. In such cases, the Court has to consider such review petitions as a "wake up call demanding interference by the Court for the correction of errors apparent on the face of the record.

34. The learned Senior Counsel Sri. R.D. Shenoy has pointed out that the order passed by the learned Single Judge in the CRP is perineurium of the Statute. No doubt, it is per incuriam of the provisions contained in Section 92 of the Code. It has become trite law through the various judicial pronouncements, which this Court has pointed out above, that in the matter of Malankara Church when a relief has been sought for, for the administration of parish churches between two factions, the same has to be treated as a suit within the meaning of Section 92 of the Code. The said question need not again be considered when the same has already been settled by the Division Bench of this Court in St. Peter's Orthodox Syrian Church (supra). When considering the question whether there was want of leave under Section 92 of the Code, the fact that the plaintiffs have later given up some reliefs sought for in the plaint, or subsequently the plaint was amended

for taking away some averments and allegations which tend to show that there was mal-administration, breach of trust etc., or the fact that the Court has granted only a relief which does not fall under Section 92 of the Code, are of no consequence at all.

35. Even if the Court below has not granted any reliefs within the meaning of Section 92, the same also has no significance at all, when there is no legally instituted suit. Matters being so, much discussion is not required to conclude that there is no properly instituted suit in this case. The judgment and decree impugned in RFA Nos. 524, 596 and 604 of 2013 are vitiated for want of leave. The Court below ought not have passed the impugned judgment and decree. In the light of the discussions made above., this Court is of the view that the delay caused in filing RP No. 664 of 2013 has only to be condoned for the ends of justice. Therefore, the CM Application No. 495 of 2013 stands allowed. RP No. 664 of 2013 is admitted and the order impugned therein, passed by the learned Single Judge in CRP No. 1280 of 2014 stands reviewed to the extend noted above. It is found that the suit is bad for want of leave under Section 92 of the Code. There is no properly instituted suit at all. The impugned judgment and decree are liable to be set aside and the suit is liable to be dismissed for want of leave under Section 92 of the Code.

In the result, CM. Application No. 495 of 2013 stands allowed. RP No. 664 of 2013 is allowed, and the impugned order passed by the learned Single Judge in the order in CRP No. 1280 of 2014 stands reviewed to the extend noted above. The judgment and decree impugned in RFA Nos. 524, 596 and 604 of 2013 are set aside and the suit is dismissed for want of leave under Section 92 of the Code. RFA Nos. 524, 596 and 604 of 2013 are disposed of accordingly. In the nature of these appeals, there is no order as to costs.

All the interlocutory applications in these appeals are closed.