

(1992) 08 KL CK 0007
In the High Court Of Kerala
Case No : C.R.P. 761/92 B

Kathirukunju Thangal Kunju

APPELLANT

Vs

Muhammed Kunju Abdul Azees and Another

RESPONDENT

Date of Decision : 11-08-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92
Waqf Act, 1954 — Section 55, 55(2)

Citation : (1992) 2 KLJ 424

Hon'ble Judges : T.V. Ramakrishnan, J

Bench : Single Bench

Advocate : P.G. Parameswara Panicker, for the Appellant; N. Haridas, for the Respondent

Final Decision : Allowed

Judgement

T.V. Ramakrishnan, J.—Revision is against an order appointing an Advocate-Commissioner in the suit O.S. No. 154 of 1991 on the file of the Sub Court, Kottarakkara. Revision Petitioner is the third Defendant in the suit and the third counter Petitioner in I.A. No. 14 of 1992 filed by the Respondents-Plaintiffs in the suit.

2. The suit is one for a declaration that Defendants 1 to 19 are not entitled to function as members of the executive committee of the Kunnicode Muslim Jama Ath and that Defendants 1 to 3 are not entitled to function as President, Vice-President and Secretary of the Jama Ath and for their removal from the office. There were two more main prayers in the plaint: one for appointment of a Commissioner for conducting election of a General Committee, Executive Committee and new office bearers and another for directing Defendants to render accounts and for realisation of amounts found due from them to the Jama Ath. There were some other incidental reliefs also in the plaint

3. Along with the plaint, Plaintiffs filed I.A. No. 14 of 1992 on 6th January 1992 praying for appointment of an Advocate-Commissioner for inspecting the account

books, minutes books, registers and other records like counterfoils of receipts etc. maintained by the Jama Ath and preparing a mahazar regarding their present stage and condition after putting the Commissioner's initials on each page of the account books. The revision Petitioner filed objection to the said application for himself and on behalf of other Defendants also. It was contended inter alia that the suit is not maintainable and as such I.A. No. 14 of 1992 also is not maintainable and liable to be dismissed without going into the merits.

4. The revision Petitioner for himself and on behalf of other Defendants, filed a separate petition praying that the question of maintainability and jurisdiction may be heard and decided preliminarily before passing any orders in I.A. No. 14 of 1992. In the affidavit filed in support of the said application, the Petitioner stated inter alia that since suit properties admittedly constitute a public wakf, there is a clear bar for the institution of the suit as framed without obtaining sanction as required under the Wakf Act, 1954 (for short "the Act"). It was also contended that treating the suit as one coming under the purview of Section 92 Code of Civil Procedure, the suit as filed is not maintainable for want of leave as contemplated in that section. In the light of the above contentions, it was submitted that the two questions raised may be decided preliminarily before passing orders in I.A. No. 14 of 1992.

5. Learned Sub Judge as per the impugned order allowed I.A. No. 14 of 1992 and appointed a Commissioner observing that the question whether the suit is maintainable can be decided after framing the issues subsequent to the filing of the written statement in the suit and the maintainability of the suit cannot be decided while deciding the question involved in this I.A. After observing so, the learned Judge went into the merits of the application and found that in the circumstances of the case, it is necessary to issue a commission as prayed for by the Plaintiffs-Respondents.

6. Learned Counsel for the Petitioner Sri P.G. Parameswara Panicker has contended that while allowing the application and appointing the Commissioner without finally taking a decision on the question whether the suit is one properly instituted, the Court below has acted irregularly and illegally in the exercise of its jurisdiction and the order thus passed is unsustainable in law. Learned Counsel submitted that I.A. No. 14 of 1992 could have been considered on merits only after taking a final decision on the objections raised by the Petitioner. It is only in a suit properly instituted, the Courts get jurisdiction to entertain and pass orders in I.As. In this case, in the light of the admitted fact that the suit properties constitute a public wakf, there is a specific bar u/s 55 of the Act for filing a suit of the nature as contemplated by Section 92 CPC without obtaining sanction from the Wakf Board (hereinafter referred to as "the Board"). The allegations and the reliefs contained in the plaint would clearly show that the suit is of a nature as contemplated by Section 92 CPC Obviously, the Plaintiffs have not produced along with the plaint the order of sanction from the Board. There is also no allegation in the plaint that the Plaintiffs have obtained an order of sanction from

the Board as contemplated u/s 55(2) of the Act. The learned Counsel would also contend that being a public wakf, Section 92 CPC may also have application in the case and the Plaintiffs should also have obtained leave from the Court for filing the suit. Plaintiffs have not even prayed for any leave from Court for filing the suit. These objections raised by the Petitioner on his behalf and on behalf of other Defendants in the suit should have been finally decided before passing any orders in I.A. No. 14 of 1992. In the circumstances, the learned Counsel submitted that the impugned order is irregular, illegal and liable to be set aside. The learned Counsel has further submitted that in the light of the express bar contained u/s 55 of the Act, the plaint itself is liable to be rejected and as such I.A. No. 14 of 1992 is also to be rejected even without going into the sustainability of the prayers contained therein.

7. In answer to the above contentions, the learned Counsel for the Respondents Sri N. Haridas has submitted that in the counter filed by the Petitioner, there is no contention raised by the Petitioner that the suit is barred u/s 55 of the Act for want of sanction thereunder. The objection regarding the maintainability and jurisdiction taken by the revision Petitioner before the Court below was too vague and general. In the circumstances, the learned Judge was perfectly justified in relegating the two questions for decision after the written statement is filed and issues are settled. The learned Counsel has further submitted that even though it is stated in the plaint that plaint schedule properties constitute a public wakf, there is no admission in the plaint that it is a wakf registered under the Act. It is only with respect to wakfs registered under the Act, the provisions of the Act including Section 55 would apply. In the circumstances, there is no substance in the contention of the Petitioner that there is a bar for the institution of the suit without obtaining sanction as contemplated u/s 55 of the Act. Learned Counsel has further submitted that if Section 55 has no application, Section 92 CPC may not also have any application in so far as the wakf in question is concerned.

8. Even though the wording in the written objection filed by the Petitioner for himself and for other Defendants would suggest that their objection is regarding the maintainability and jurisdiction of the Court, really the objection raised was based upon the bar imposed by the provisions of the Act against the institution of the suit without obtaining necessary sanction under the Act and necessary leave u/s 92 Code of Civil Procedure. It is for the above reasons that the Petitioner submitted that the suit is not maintainable and the Court has no jurisdiction to entertain the suit without complying with the requirements of the Act and Section 92 Code of Civil Procedure. Section 55 of the Act is thus:

Institution of suits u/s 92 of the Code of Civil Procedure, 1908.-(1) A suit to obtain any of the reliefs mentioned in Section 92 of the Code of Civil Procedure, 1908, relating to any wakf may, notwithstanding anything to the contrary contained in that section, be instituted by the Board without obtaining the consent referred to therein.

(2) No suit to obtain any of the reliefs referred to in Section 92 of the Code of

Civil Procedure, 1908, relating to any Wakf shall be instituted by any person or authority other than the Board without the consent in writing of the Board and for the institution of any such suit, it shall not be necessary to obtain the consent referred to in that section, notwithstanding anything contained therein:

Provided that nothing in this sub-section shall apply in relation to any such suit against the Board.

Clause (1) of Section 55 of the Act relieves the Board from the need to obtain leave u/s 92 CPC while filing a suit of the nature contemplated by Section 92 relating to a wakf. In the light of Section 55(2) of the Act, it is clear beyond doubt that in a case where Section 55 has application, no suit can be filed without obtaining sanction from the Board. In that case a suit instituted without obtaining sanction cannot also be considered as properly instituted also. The sanction of the Board is made clearly a condition precedent for filing the suit in cases where Section 55(2) of the Act has application.

9. This Court in a Division Bench decision reported in Mathew v. Thomas 1982 KLT 493, has held, with reference to a suit filed u/s 92 CPC without obtaining leave from the Court, 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 a leave". In Sulaiman v. S.M. Jama Ath 1982 KLT 790, this Court has again held that before the grant of leave u/s 92 Code of Civil Procedure, there is no "suit properly instituted and as such no commission can be appointed before leave is granted u/s 92". The principles laid down in the above two decisions would clearly indicate that in a suit where an objection is taken to the effect that there is no suit properly instituted for want of leave u/s 92 Code of Civil Procedure, no order appointing a commission can be made without taking a final decision regarding the objection raised and without finding that there is a suit properly instituted. In my considered view, the principle laid down in the above two decisions would squarely apply to a case like the one on hand also, where the question raised is whether the suit in question can be considered as one properly instituted for want of sanction u/s 55 of the Act. If that be the true position, it is only on finding that there is a properly instituted suit, the learned Judge may get jurisdiction to consider the I.A. on merits. On the other hand, if the finding is in the negative, the Court may not have any jurisdiction to pass any interim orders in the I.A. filed for appointing a Commissioner in such a suit not properly instituted. In this view, the learned Sub Judge was clearly in error in relegating the said question for decision at a later stage and considering and allowing I.A. No. 14 of 1992 on merits. The learned Judge should have taken a final decision regarding the preliminary objections raised before taking up for consideration I.A. No. 14 of 1992.

10. In the circumstances, it is not necessary to examine the sustainability of the rival contentions put forward by Counsel on both sides in this revision. The impugned order is liable to be set aside on the short ground that the learned Judge has not taken a final decision regarding the preliminary objections raised

by the Petitioner which he was bound to take before I.A. No. 14 of 1992 was taken up for consideration. In the circumstances, the order passed in I.A. No. 14 of 1992 is set aside. Learned Judge is directed to decide the preliminary question whether there is a properly instituted suit in this case, in the light of the rival contentions raised by the parties and broadly indicated above. Stated differently, the Court may have to consider and decide whether the institution of the suit in the case is barred or is improper either for want of sanction u/s 55(2) of the Act or for leave u/s 92 CPC before going into the merits of I.A. No. 14 of 1992. For the purpose of deciding the above preliminary question, it may also be necessary to consider whether the suit in question is one for obtaining any of the reliefs mentioned for in Section 92 Code of Civil Procedure. Further, in the light of the contentions raised by the parties, it may also be necessary to consider whether Section 55(2) of the Act and/or Section 92 CPC are applicable to the case on hand. The Court below may proceed to consider all the above questions in accordance with law after giving both sides an opportunity to substantiate their respective contentions in the matter. If any fresh evidence is to be adduced, such evidence may be produced within two weeks from the date of receipt of a copy of this order by the Court below. If the learned Judge finds that the suit has been properly instituted, the learned Judge may proceed to consider and dispose of I.A. No. 14 of 1992 on merits in accordance with law. If the answer is in the negative, it may have to be further held that the I.A. is also not maintainable. I make it clear that I have not expressed any opinion regarding the attainability or otherwise of the preliminary objections raised by the Petitioner. As the matter relates to the management of a public wakf, I direct that the I.A. may be disposed of finally as early as possible, at any rate within a period of five weeks from the date of receipt of a copy of this order.

C.R.P. is allowed as indicated above. No costs.