
(1987) 08 OHC CK 0026

In the Orissa High Court

Case No : Civil Revision No. 264 of 1981

Kintali China Jaganadham and Others

APPELLANT

Vs

K. Laxmi Naidu and Others

RESPONDENT

Date of Decision : 03-08-1987

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92

Citation : AIR 1988 Ori 100 : (1987) 64 CLT 493

Hon'ble Judges : R.C. Patnaik, J

Bench : Single Bench

Advocate : R.C. Misra, for the Appellant; B. Raghava Rao, B.L.N. Swamy and N.K. Das, for the Respondent

Judgement

R.C. Patnaik, J.—Grant of leave to the opposite parties 1 to 3, the plaintiffs, by the Court u/s 92 of the CPC during the pendency of a suit has given rise to this Civil Revision.

2. The facts briefly stated are : Title Suit No. 13 of 1980 was filed by opposite parties 1 to 3 in the Court of Subordinate Judge, Rayagada. The petitioners filed Civil Revision No. 549 of 1980 Challenging the maintainability of the suit This Court granted anrdrer of stay. During the pendency of the revision, an application was filed for withdrawal of the suit with permission to file a fresh one, or in the alternative, for return of the plaint on the ground that the learned Subordinate Judge had no jurisdiction to try the suit. No order was passed thereon inasmuch as the further proceedings of the suit had been stayed by this Court. Then a motion was made to this Court for grant of leave to the Subordinate Judge to dispose of the said application and this Court allowed the prayer. By order dt. 15-11-1980, the learned Subordinate Judge directed return of the plaint and the application seeking leave u/s 92. On 25-11-1980, the plaintiffs presented the plaint in the Court of the learned District Judge and the plaint was registered as Title Suit No. 4 of 1980: On 1-12-1980, the plaintiff-opposite parties 1 to 3 filed an application under Order 43, Rule 1 of the Civil P.

C. and the same was registered as M.J.C. No. 20 of 1980. On 1-12-1980, the petitioners entered appearance and moved an application for rejection of the plaint. On 3-12-1980, Civil Revision No. 549 of 1980 was disposed of as infructuous. The suit was being adjourned from date to date. On 13-3-1981, Opposite parties 1 to 3 -plaintiffs filed an application seeking leave u/s 92 to prosecute the suit.

3. Opposite parties 1 to 3 have alleged that in 1930's the public of Rayagada desired to have a choultry at the site over which stood Umashankar Lodge, shop rooms of Nataraj Electricals and Bata Shoe Company. The construction of choultry building was entrusted to defendant No. 1. The choultry was a public trust and charitable in nature. In course of time, defendant No. 1 misused the trust property and committed breach of trust in violation of the character of the trust property. He constructed a massive building, got the same recorded in his name and in the name of his children. In a family partition, the property was said to have been allotted to defendants 2 and 3, who were enjoying the income derived from the lodging house and the shop rooms. The plaintiffs have further averred that the defendants 2 and 3 are liable to render accounts of the income received by them. The plaintiffs and the members of the public of Rayagada are interested for proper management of the trust property and for restoration of the trust to its original purpose and character as choultry. They have asked for the following reliefs :

"(a) To declare the suit property as public trust of a charitable nature used as Choultry (Dharmasala) at Rayagada.

(b) To direct the defendants or his sons Defendants 2 and 3 or legal representatives be removed from trusteeship and management of the suit properties.

(c) To direct Defendants 1 to 3 to furnish the accounts of income and management of the suit property.

(d) To direct Defendants 4 and 5 to furnish their accounts of rent paid and security deposit given to Defendants Nos. 1 to 3 for taking shop rooms and to direct them to deposit the future rents in the Court or to pay to the persons appointed by the Court.

(e) To settle claims for proper administration of the suit property by appointing a new Board of Trustees.

(f) To take immediate possession of the suit property till the new scheme is settled through a receiver appointed by the Court.

(g) To take such other steps and give such reliefs as the Court deems proper in the facts and circumstances of the case."

The petitioner-defendants 1 to 3 have controverted the allegations and have specifically denied that there was any trust. The petitioners have alleged that

they were not allowed to file objection to the application filed by the opposite parties 1 to 3 -- plaintiffs for grant of leave u/s 92 and by the impugned order, the learned District Judge illegally granted leave to the opposite parties 1 to 3 to institute a suit u/s 92.

4. Shri R. C. Misra, the learned counsel for the petitioner-defendants 1 to 3, has raised the contention that leave u/s 92 being condition precedent, the suit was not competent and the learned District Judge illegally exercised jurisdiction by granting leave in pending suit and secondly, leave should not have been granted against defendants 2 and 3, who are strangers. He has also further urged that having regard to the reliefs claimed, leave u/s 92 should not have been granted.

5. Shri B.L.N. Swamy, the learned counsel for the opposite parties 1 to 3 -- plaintiffs, has repelled the contentions urging that having regard to the main reliefs sought, the suit came within the purview of Section 92 and leave could be granted during the pendency of the suit.

6. Section 92 so far as is relevant 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 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."

7. A suit u/s 92 is a suit of special nature which presupposes the existence of a public trust of a religious or charitable character. In order to apply that section, the following conditions must be satisfied :

- (a) There must exist a trust for public purposes of charitable or of a religious nature,
- (b) The plaintiff must allege that there is a breach of such trust or that the direction of the Court is necessary for the administration of the trust,
- (c) The suit must be a representative one on behalf of the public and not an individual for the own interest,
- (d) The relief claimed in the suit must be one of the reliefs mentioned in the section.

The necessity for obtaining the leave of the Court has been imposed with a view to prevent an indefinite number of reckless and harassing suits being brought against the trustees by different persons interested in the trust. The real test for the applicability of this section is to see whether the suit is fundamentally on behalf of the public for vindication of a public right. In *Mahant Pragdasji Guru Bhagwandasji Vs. Patel Ishwarlalbhai Narsibhai and Others*, , *Mukherjea, J.* (as he then was) pointed out :

"A suit u/s 92, Civil P. C is a suit of a special nature which presupposes the existence of a public trust of a religious or charitable character. Such suit can proceed only on the allegation that there is a breach of such trust or that directions from the Court are necessary for the administration thereof, and it must pray for one or other of the reliefs that are specifically mentioned in the section. It is only when these conditions are fulfilled that the suit has got to be brought in conformity with the provision of Section 92, Civil P. C....."

As has been observed by the privy Council in 55 Ind App 96 : (AIR 1928 PC 16) (*Abdur Rahim v. Mahomed Barkat Ali*), a suit for declaration that certain property appertains to a religious trust may lie under the general law but is outside the scope of Section 92 of Civil P. C. Similar view has been taken in *Swami Paramatmanand Saraswati and Another Vs. Ramji Tripathi and Another*, and *Charan Singh and Another Vs. Darshan Singh and Others*, . In *Chairman Madappa Vs. M.N. Mahanthadevaru and Others*, , the Supreme Court has observed :

".....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."

Therefore, it has been held that grant of leave by the Court is a condition precedent to the institution of the suit. (See. *Prithipal Singh Vs. Magh Singh and Others*, and *P.V. Mathew and Others Vs. K.V. Thomas and Others*, . The language of the provision;

"Two or more persons having interest in the trust and having obtained the leave of the Court may institute a suit."

(Underlining supplied.)

is clear. Having regard to the intent and purpose of the provision, I hold that grant of leave by Court is a condition precedent and it is mandatory. In Mahant Pragdasji Guru Bhagwandasji Vs. Patel Ishwarlalbhai Narsibhai and Others, , it was observed :

".....in a suit framed u/s 92, Civil P. C, the only reliefs which the plaintiff can claim and the court can grant are those enumerated specifically in the different clauses of the section. A relief praying for a declaration that the properties in the suit are trust properties does not come under any of these clauses. When the defendant denies the existence of a trust, a declaration that the trust does exist might be made as ancillary to the main relief claimed under the section if the plaintiff is held entitled to it; but when the case of the plaintiff fails for want of a cause of action, there is no warrant for giving him a declaratory relief under the provision of Section 92, Civil P. C. The finding as to the existence of a public trust in such circumstances would be no more than an obiter dictum and cannot constitute the final decision in the suit....."

The decision of the Supreme Court is an answer to the arguments of the learned counsel for the petitioners that the reliefs claimed were outside the purview of Section 92. True it is that some of the reliefs do not come strictly within the reliefs available u/s 92 but the second relief seeking removal of the trustees, the third relief seeking accounts and the fifth relief seeking settlement of a scheme, come within the purview of Section 92. The first relief to declare that the suit property is a public trust charitable in nature, if traversed by the defendants and as it has been done in this case, can be and should be gone into as ancillary to the main relief claimed under this section, if the plaintiffs are found entitled to the other reliefs coming within the purview of Section 92, where reliefs outside the purview of Section 92 are claimed, two courses are open to the Court -- either to call upon the plaintiffs to amend the plaint so as to bring it in conformity with the requirements of Section 92, or to dispose of the question in the final decision by disallowing reliefs which are not available u/s 92. The contention of the learned counsel for the petitioners, therefore, has no I force.

8. The next question is : In the face of the settled legal position that grant of leave is condition precedent to the institution of the suit, what is the effect of grant of leave during the pendency of the suit after its institution? An application u/s 92 was filed before the Court. The Court was prima facie satisfied that having regard to the allegations leave ought to be granted and did grant leave. The proper course should have been for the plaintiffs to seek leave u/s 92 and append to their application a draft copy of the plaint of the proposed suit to satisfy the Court that the proposed suit came within the purview of Section 92. The consensus of opinion amongst the High Courts is that the jurisdiction of the

Court u/s 92(1) while granting leave is administrative in nature and notice on the other side need not be issued. But, the Court must give reasons for its decision either granting or refusing leave. In this case, the plaintiffs have reversed the process. They instituted the suit and months thereafter filed the application for leave which has been granted. What is the answer to the problem? In my opinion, the institution of the suit prior to the grant of leave was without jurisdiction and, therefore, non est. Inasmuch as the plaintiffs can institute the suit immediately after the grant of leave, there is nothing wrong in treating the suit to have been instituted on the date on which leave was obtained. I get support from the reasonings of the Supreme Court in *Bansidhar Shankarlal Vs. Mohd. Ibrahim and Another*, where it was contended that institution of a proceeding in execution of a decree against a Company without obtaining the leave was incompetent. Their Lordships observed :

".....The suit or proceeding instituted without leave of the Court may, in our judgment, be regarded as ineffective until leave is obtained, but once leave is obtained the proceeding will be deemed to be instituted on the date granting leave."

and approved the decision of the Calcutta High Court in (1950) 54 CalWN 832 (*Suresh Chandra Khannabish v. Bank of Calcutta*) (FB) holding as follows :

".....The proceedings may at best be regarded as instituted on the date on which the leave was obtained from the High Court."

The reason can be applied to the suit u/s 92 also. In *Prithipal Singh Vs. Magh Singh and Others*, leave which is a condition precedent, had not been obtained. Therein, *Tewatia, J.* observed :

".....While deciding the two issues it observed that the plaintiffs have its permission to file the suit and it is from that stage that the trial of the suit would proceed....."

I, therefore, hold that leave u/s 92 is a mandatory condition precedent. The proper procedure is for the plaintiff-petitioners to file an application for leave and to append thereto a copy of the draft plaint of the suit proposed to be filed by them in order to enable the Court to grant leave, since leave is to be strictly construed. The suit instituted should be substantially in accordance with the leave granted. Since grant of leave is condition precedent, there cannot be a validly instituted suit prior to the grant of leave. Generally, a plaint seeking relief or reliefs coming within the purview of Section 92 without grant of leave should be refused. But, where a suit has been registered or interim orders have been passed prior to the grant of leave, the same shall be held to be incompetent, invalid and non est. Where leave is granted in a pending suit, the plaintiff may either ask for return of the plaint for representation of the same in conformity with the leave granted, or may ask the Court to treat the plaint as instituted on and from the date leave is granted, if the plaint is substantially in conformity with the leave. Where reliefs sought do not come within the purview of Section

92, the Court may either require the plaintiffs to amend the plaint or reserve its holding until the final decision.

9. Judged against the aforesaid holding, I see no infirmity in the order of the learned Subordinate Judge granting leave, though I find that some of the reliefs are outside the purview of Section 92. Therefore, no exception can be taken to the grant of leave. The suit shall be deemed to be instituted on the date the leave was granted and not on any earlier date. Proceeding prior to the grant of leave in the suit and any interlocutory order passed prior to the grant of leave shall be held as invalid and non est. The learned District Judge has held that the defendants 4 and 5 were strangers and has given direction for deletion of their names. The direction is unexceptionable. No relief can be granted against a third party. (See Uma Shanker and Others Vs. Salig Ram and Others,). The plaintiffs should carry out the same.

10. With the aforesaid directions, this Civil Revision is. disposed of. But, in the circumstances, there would be no order as to costs.