

(1993) 08 MAD CK 0054
In the Madras High Court

M. Anandan

APPELLANT

Vs

Ayyanna Gounder Memorial Trust and Others

RESPONDENT

Date of Decision : 06-08-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92

Citation : (1993) 2 LW 308 : (1993) 2 MLJ 533

Hon'ble Judges : K.A. Swami, C.J

Bench : Division Bench

Judgement

K.A. Swami, C.J.—This appeal is preferred against the Judgment dated 21.4.1993 passed by a learned single Judge in C.M.A. No. 497 of 1993. That appeal was preferred against the order dated 21st April, 1993 passed in I.A. No. 1513 of 1990 filed in O.S. No. 1217 of 1989.

2. Facts that give rise to the present appeal are as follows: There is a Trust known as Ayyanna Gowder Memorial Trust at Coimbatore. O.S. No. 1217 of 1989 has been filed on 29th March 1989 in the Sub Court, Coimbatore for the following reliefs:

(a) Setting a scheme for the administration of the 1st plaintiff Trust, viz. Ayyanna Gowder Memorial Trust providing for the formation of an administration Committee in accordance with the objects of the Trust as reflected under the Trust Deed dated 6.3.1948 and also providing for various safeguards with regard to collection of the rents and monies and also with regard to the expenditure etc.

(b) Directing the defendants to render true and proper accounts with regard to the collection made on behalf of the Trust for the last three years and surcharging the defendant for the amount if any payable to the Trust with suitable directions to pay the said amount to the Trust.

(c) Removing the defendant from his self appointed position as Managing Trustees of the 1st plaintiff Trust on account of the irregularities committed by him with regard to the affairs of the Trust and appointing a new trustee in his

place:

(d) Granting a permanent injunction restraining the defendant from collecting any amount on behalf of the Trust or making any bookings of the marriage hall unless the Committee sanctions it; and directing the defendant to pay plaintiffs the costs.

The suit is filed u/s 92, Code of Civil Procedure. Along with the plaint, an application u/s 92, CPC is also filed seeking leave of the court to institute the suit. That application has been numbered as I.A. No. 604 of 1989. The learned trial Judge directed issue of notice on that application on 29.3.1989. The defendants/respondents in that application were also served and represented. The learned Trial Judge went on postponing the application I.A. No. 604 of 1989 for inquiry. The records of the trial court disclose that the said application is still pending at the stage of inquiry only. In the meanwhile, certain party to the suit died. Therefore, the cause title came to be amended by bringing the legal representatives on record, pursuant to the order dated 9.11.1991 passed in I.A. No. 2356 of 1990. Accordingly, the cause title of the plaint and the application I.A. No. 604 of 1989 were amended. Pending grant of leave, there were 3 applications filed by the plaintiff, i.e., I.A. No. 1511 of 1990 for grant of temporary injunction, I.A. No. 1513 of 1990 for appointment of receiver and another application for appointment of Commissioner. On the orders passed on these 3 applications, the matter came up to this Court in C.R.P. No. 1672 of 1992 against the order appointing a Commissioner, and in AAO. No. 514 of 1992 against the orders passed in I.A. Nos. 1511 and 1513 of 1990. AAO. Nos. 514 and 515 of 1992 were allowed by the judgment dated 6th August, 1992 in the following terms:

The lower court has passed non speaking orders in I.A. No. 1511 of 1990 which is the subject matter in C.M.A. No. 514 of 1992 and I.A. No. 1513 of 1990, which is the subject matter in C.M.A. No. 515 of 1992. The orders are therefore set aside and the lower court is directed to take both the interlocutory applications on its file and dispose of them on merits by passing a reasoned order.

The civil revision petition was allowed on 20th October, 1992. The order passed by the trial court appointing a Commissioner was set aside and the trial court was directed to consider the same afresh in accordance with law. The said order reads thus:

This civil revision petition is directed against the order of the learned Principal Subordinate Judge of Coimbatore, made in I. A. No. 1512 of 1990 in O.S. No. 1217 of 1989, dated 1.7.1992. The learned Subordinate Judge has made the impugned order in the following manner: "Counter not filed. Petition is allowed. Miss. Shanthi, Advocate is appointed as an Advocate-Commissioner to make local inspection of the suit property and take inventory as book accounts and other records maintained by the Trust and initial all the books and submit report in this Court on 20.7.1992...." The learned Judge has not given any reasons for passing

the said order. According to the learned Counsel for the petitioner, the said order is a non-speaking one and that even a counter not having been filed, such an order had been passed by the learned Judge without going into the merits of the application. In these circumstances, the impugned order is set aside. I.A. No. 1512 of 1990 in O.S. No. 1217 of 1989 is remanded to the Lower Court for consideration on merits and disposal in accordance with law. The lower Court will take up the LA. on the file and dispose it of within a period of two months along with other applications, viz., I.A. Nos. 1511 and 1513 of 1990, pending in the same suit and report the result of the same to this Court. This civil revision petition is allowed. No costs.

After these applications were remitted by this Court, it is very relevant to notice that the defendants have filed the written statement on 10.11.1992. Even thereafter, the learned trial Judge has gone on adjourning the application filed for grant of leave for filing the suit. After the applications, I.A. Nos. 1511 and 1513 of 1990 were remitted, the trial Judge considered those applications and allowed the applications filed for grant of injunction as well as appointment of Receiver by the common order dated 21.4.1993. Aggrieved by the order, the 1st defendant in the suit filed C.M.A. Nos. 496 and 497 of 1993. Learned Single Judge dismissed C.M.A. No. 497 of 1993 and allowed C.M. A. No. 496 of 1993. As already Stated, this L.P.A. is directed against the order of the learned single Judge dismissing C.M.A. No. 497 of 1993.

3. The main contentions that were urged before the learned single Judge as well as before us are that the trial court acted without jurisdiction in passing the order of temporary injunction as well as appointing the receiver, because the suit was one filed u/s 92, CPC and the suit could not be considered to have been instituted, unless the leave for instituting the suit is granted as per Section 92, Code of Civil Procedure. Therefore, the orders passed on the applications, I.A. Nos. 1511 and 1513 of 1980 were non est and have had no efficacy in the eye of law. Alternatively, it is submitted that even if, in the facts and circumstances of the case, it is construed that the leave must be deemed to have been granted or this Court grants the leave on considering the records of the case in exercise of its suo moto power u/s 115, Code of Civil Procedure, the suit must be deemed to have been validly filed only from the date this Court grants the leave or this Court records a finding that on and from the particular date the leave must be deemed to have been granted. Therefore, the orders passed prior to such date/s are non est and in such event also, the orders passed in I.A. Nos. 1511 and 1513 of 1990 must be held to be a nullity. In support of this contention, several authorities have been relied upon, to which we will advert at the relevant stage.

4. On the contrary, it is contended by the respondents/plaintiffs that as far as appointment of Receiver is concerned, the provisions contained in Order 40, Rule 1, CPC do not contemplate pendency of a suit, inasmuch as a Receiver can be appointed in any proceeding. Therefore, even if it is held that the suit cannot be deemed to have been validly filed as no leave has been granted by the trial court

so far u/s 92, Code of Civil Procedure, an application filed by the plaintiffs seeking leave u/s 92, CPC is a proceeding by itself and in that proceeding, it is open to the court to appoint a receiver. Alternatively, it is also contended on behalf of the plaintiff/respondents that this is a case in which the plaint as well as the application for grant of leave to institute the suit are filed on the same date as per the provisions of Section 92, Code of Civil Procedure. The trial court before granting the leave, is required to look into the averments made in the plaint and to satisfy as to whether the suit filed against the public trust or the trustees raises triable issues and is not frivolous or reckless, and is not devoid of merits in order to ensure that the trustees and the Trust are not unnecessarily harassed and put to expenses. It is also further submitted that in the facts and circumstances of the case, at least, on the date when this Court remitted I.A. Nos. 1511 and 1513 of 1990 and the application filed for appointment of Commissioner with a direction that those applications must be decided afresh on merits and in accordance with law, the leave must be deemed to have been granted by this Court, as otherwise in the absence of properly instituted suit on grant of leave those applications would not have been directed to be considered and decided on merits and in accordance with law, that the parties also understood that the leave must be deemed to have been granted and it was because of this, the defendants filed the written statement on 10.11.1992, as otherwise it was not at all necessary for them to file the written statement. Learned Counsel for the plaintiffs also contended that the suit filed u/s 92, CPC stands on the same footing as the representative suit in which on the ordering of notice on the application filed under Order 1, Rule 8, CPC as held by this Court, the permission must be deemed to have been granted under Order 1, Rule 8, that the same principle should be extended to the suit filed u/s 92, CPC that as notice has been ordered in this case and the defendants have put in their appearance and the interlocutory applications have been considered, the leave must be deemed to have been granted.

5. In the light of these contentions, the following points arise for consideration:

1. Whether in the facts and circumstances of the case leave to institute the suit required u/s 92, Code of Civil Procedure, shall be deemed to have been granted?
2. Whether the proceedings taken subsequent to the date on which the leave is deemed to have been granted, can be held to be invalid?

Point (i):

It is as settled position of law that leave must be obtained for instituting a suit u/s 92, Code of Civil Procedure. This proposition does not require to be elaborated having regard to a decision of the Supreme Court in R.M. Narayana Chettiar and another Vs. N. Lakshmanan Chettiar and others, . In that case, the question that arose for consideration was as to whether it was obligatory on the Court before granting leave institute a suit as required u/s 92, Code of Civil Procedure, to give an opportunity to the respondents to show cause against the grant of such leave

and whether leave granted without such opportunity having been given was right. While considering the aforesaid question, it has been held as follows:

A plain reading of Section 92 of the Code indicates that leave of the court is a pre-condition or a condition precedent for the institution of a suit against a public trust for the reliefs set out in the said section, unless all the beneficiaries join in instituting the suit, if such a suit is instituted without leave, it would not be maintainable at all. Having in mind, the objectives underlying Section 92 and the language thereof, it appears to us that, as a rule of caution, the court should normally, unless it is impracticable or inconvenient to do so, give a notice to the proposed defendants before granting leave u/s 92 to institute a suit. The defendants could bring to the notice of the Court for instance that the allegations made in the plaint are frivolous or reckless. Apart from this, they could, in a given case point out that the persons who are applying for leave u/s 92 are doing so merely with a view to harass the Trust or have such antecedents that it would be undesirable to grant leave to such persons. The desirability of such notice being given to the defendants, however, cannot be regarded as a statutory requirement to be complied with before leave u/s 92 can be granted as that would lead to unnecessary delay and in a given case, cause considerable loss to the public trust. Such a construction of the provisions of Section 92 of the Code would render it difficult for the beneficiaries of a public trust to obtain urgent interim orders from the court even though the circumstances might warrant such relief being granted. Keeping in mind these considerations, in our opinion, although, as a rule of caution, court should normally give a notice to the defendants before granting leave under the said section to institute a suit, the court is not bound to do so, If a suit is instituted on the basis of such leave, granted without notice to the defendants, the suit would not thereby be rendered bad in law or non-maintainable. The grant of leave cannot be regarded as defeating or even seriously prejudicing any right of the proposed defendants because it is always open to them to file an application for revocation of the leave which can be considered on merits and according to law.

Therefore, it is clear that leave is a precondition or a condition precedent for institution of a suit against a public trust seeking reliefs set out in Section 92, Code of Civil Procedure. It is also further clear that it is open to the Court to grant leave even without notice to the defendants, if the Court considers that no such notice to the defendants cannot be held to be bad in law. Of course, in the aforesaid decision, the question as to whether in the facts and circumstances of the case, leave to institute a suit was required by Section 92, Code of Civil Procedure, must be deemed to have been granted or not, did not arise for consideration. The fact that grant of leave is a condition precedent or a pre-condition for instituting the suit, does not exclude the possibility of finding out as to whether in the facts and circumstances of the case, leave must be deemed to have been granted, as the same depends upon the proceedings taken in the suit without the objection by the parties and the orders passed thereon. We have narrated the events that have taken place pending grant of leave by the Trial

Court of instituting the suit u/s 92, Code of Civil procedure. We have specifically referred to the orders passed by this Court remitting I. A. Nos. 1511 and 1513 of 1990 and also the application filed for appointment of commissioner. If the leave had not been deemed to have been granted, this Court would not have remitted those applications for fresh consideration on merits and in accordance with law. In such a case, this Court would have only directed the trial court to decide I.A. No. 604 of 1989 first and then take I.A. Nos. 1511 and 1513 of 1990. The 1st defendant who was the petitioner in C.R.P. No. 1672 of 1992 and the appellant in A.A.O. Nos. 514 and 515 of 1992, would have raised the first objection as to the consideration of the application without grant of leave. The fact that the 1st defendant himself filed the C.R.P. No. 1672 of 1992 and as appellant in the A.A.Os. 514 and 515 of 1992 obtained the order on merits and not on the contention that leave had not been granted and therefore, the applications could not be considered, also goes to show that the parties proceeded before this Court that in the facts and circumstances of the case, leave must be deemed to have been granted. At any rate, the matter is placed beyond pale of doubt when this Court remitted the application I.A. Nos. 1511 and 1513 of 1990 for fresh consideration and thereafter, the defendants filed the written statement on 10; 11.1992. Therefore, in the facts and circumstances of the case, we are of the view that on the date (6th August, 1992) on which this Court allowed A.A.O. Nos. 514 and 515 of 1992 and remitted them for disposal on merits by passing a reasoned order, leave must be deemed to have been granted. The order passed in C.R.P. No. 1672 of 1992 is subsequent thereto, as the same was decided on 20th October, 1992 the C.R.P. was allowed the application, I.A. No. 1512 of 1990 was remitted to the trial court for fresh consideration in accordance with law.

6. We may also consider the contention urged by the learned Counsel for the appellant that as the grant of leave is condition precedent for instituting the suit, there is no scope for holding that the leave must be deemed to have been granted, as long as such a leave is not granted. Learned Counsel further submitted that what applies to a suit in a representative capacity seeking permission under Order 1, Rule 8, Code of Civil Procedure, does not apply to the suit filed u/s 92, Code of Civil Procedure, because the provisions contained in Order 1, Rule 8 and Section 92, Code of Civil Procedure, 1908 are not similarly worded. Of course, as far as the proposition that permission must be deemed to have been granted in a suit filed in a representative capacity, once the notice is issued in the suit by the Court and further actions are taken therein, is covered by a Division Bench decision of this Court in *Sankiah v. Vadakasi* 1980 T.L.N.J. 86. The Division Bench of this Court has in the aforesaid decision held,

However, it is not necessary that a formal order should be passed by the court. From the circumstances of the case and from the fact that the Court had ordered publication of the notice it can be presumed that the Court had granted the necessary permission under Order 1, Rule 8.

The Supreme Court had an occasion to consider as to whether the suit filed u/s

92, Code of Civil Procedure, 1908, could attract the principles that would attract the suit filed in a representative capacity in *R. Venugopala Naidu and Others Vs. Venkatarayulu Naidu Charities and Others*, . The question that arose for consideration in that case was as to whether "parties" mentioned in Clause 14 of the scheme decree re-produced meant only the named plaintiffs and defendants in the cause title and their successors-in-interest or the suit being filed in a representative capacity it included all those who were interested in the suit. It was held that it included all those who are interested in the suit and therefore, even though some of the were not made parties, they are bound by the earlier decision and therefore, the Explanation IV to Section 11, Code of Civil Procedure, 1908 attracted to a subsequent suit filed by them. Thus, the Supreme Court in principle recognised that the suit filed u/s 92, Code of Civil Procedure, in substance is a representative suit, though the procedure that has to be followed for filing the suit is not the same. Ofcourse, we may add here that the procedure that has to be followed in instituting both the suits is not one and the same as seen from the provisions in the, Code of Civil Procedure. One is covered by the provisions contained in Order 1, Rule 8 and another one by the provisions contained in Section 92, Code of Civil Procedure. But, in our view, it should not make any difference for the purpose of finding out as to whether the leave is deemed to have been granted. Therefore, we are of the view that in the facts and circumstances of the case, leave must be deemed to have been granted on the date when A.A.O. Nos. 514 and 515 of 1992 were decided, viz., 6th August, 1992.

7. Before answering point No. (1), we would like to lay down the procedure that has to be followed by the trial court in a suit filed u/s 92, Code of Civil Procedure. The object of the provisions contained in Section 92, CPC as noticed by the Supreme Court in *R.M. Narayana Chettiar and another Vs. N. Lakshmanan Chettiar and others*, , on referring to the several decisions of the various High Courts, is to ensure that the allegations in the plaint are not prima facie baseless or frivolous or reckless with a view to safeguard the interests of the public trust and the trustees. Therefore, necessarily, the court in which the application seeking leave is filed, has to look into the plaint. Consequently, the plaint has to be filed along with the application seeking leave. Therefore, filing of the plaint along with the application seeking leave cannot be considered to be irregular. The Court has to prima facie see and satisfy itself as to whether the allegations made in the plaint are not frivolous or reckless and they raise a triable issue that the persons who have applied for leave having regard to their antecedents only intend to harass the trust. For this purpose, it is not always necessary for the Court to issue notice to the defendants. Leave to institute the suit can be granted without notice to the defendant. As observed by the Supreme Court, granting of leave without notice is not invalid. Many times, it may be necessary to grant leave without notice in order to safeguard the interest of the Trust and to enable the court to pass such interim orders as are necessary to safeguard the Trust properties. Therefore, the trial court shall, whenever such a suit is filed along

with the application seeking leave, first go through the plaint and applications and the documents if any produced with the application or the plaint decide whether the leave should or should not be granted. Normally, the trial court should give notice to the defendant before granting leave to file to suit u/s 92, Code of Civil Procedure. However, in appropriate and urgent cases, where the circumstances of the case warrant the issue of interim orders for the grant of which the pendency of a suit is a condition precedent, as in the case of grant of order of ad-interim injunction under Order 39, Rule 1, C.P.C., the court can grant leave to file the suit u/s 82, C.P.C. even without notice to the defendant, provided the court is satisfied prima facie that the suit is not frivolous and it is not intended to harass the Trust, that it raises triable issues.

8. In such cases leave is granted to file the suit without notice to defendant, liberty must be reserved to the defendant to file an application for revocation of the leave already granted. It has become necessary to state the aforesaid procedure because in the instant case, and we are informed that invariably, in all such suits, the enquiry into the application seeking leave to institute the suit is continued for number of years. In the instant case, the plaint along with the application seeking leave was filed on 29.3.1989. Even to this day, the Trial Court has not passed any order on the application-I.A. No. 604 of 1989 filed for grant of leave. It is under these circumstances, it became necessary for us to go into the question as to whether in the facts and circumstances of the case, the leave must be deemed to have been granted. The trial courts shall follow the Procedure laid down herein, to avoid such a situation. Accordingly, point No. (1) is answered in the affirmative.

9. Learned Counsel for the appellant placed reliance on the decision reported in P.V. Mathew v. on the decision reported in P.V. Mathew and Others Vs. K.V. Thomas and Others, in support of the contention that any order passed without granting leave must be deemed to be non est. In P.V. Mathew and Others Vs. K.V. Thomas and Others, , 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 formulate the procedure for the grant of leave by the court: (i) While exercising its power u/s 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 plaintiff-petitioner should produce in court the plaint for the court's perusal the enable it to pass a proper order u/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 respondents-defendants or hearing them S.S. Bhagat v. N. S. Ahluwalia AIR 1978 Del. 14 and She vex v. Masood Hosain AIR 1968 A.P. 143.

(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 consequences that the court cannot pass interim orders 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. 1979 K.L.T. 176.

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 Jaganadhan v. K. Lakmi Naidu* AIR 1953 Ori. 100. There is no dispute that once we hold that grant of leave is necessary for instituting the suit u/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. But, in the light of the finding recorded by us on point No. (1), the proceedings that have taken place subsequent to the order dated 6th August, 1992, cannot be held to be non-est, because we have held that the leave must be deemed to have been granted from that date having regard to the various orders passed in the suit by the trial court as well as by this Court and the conduct of the defendants in filing the written statement subsequent to the order dated 6th August, 1992 passed by this Court in A.A.O. Nos. 514 and 515 of 1992. That being so, it is not possible to hold that the orders passed subsequent to 6th August, 1992 are non est. No other point has been urged before the learned single Judge on the merits of the question as to appointment of receiver. The trial court on consideration of the relevant materials has appointed the Receiver. Learned single Judge has approved it. The appointment of Receiver is a matter of discretion. It is not pointed out to us that the discretion has been exercised on irrelevant considerations or it is arbitrarily exercised. Therefore, we are of the view that there is no ground to interfere with the order appointing the Receiver.

10. We may also point out here that one of the grounds on which the learned single Judge has affirmed the order appointing the Receiver is that Receiver can even be appointed in any proceeding, not necessarily in a suit, therefore, the fact that the leave has not been granted u/s 92, CPC and the suit cannot be held to have been validly instituted, does not come in the way of appointing a Receiver. Order 40, Rule 1, Code of Civil Procedure, 1908, provides that,

1. Appointment of Receivers: (1) where it appears to the court to be just and convenient, the court may by order:

- (a) appoint a Receiver of any property, whether before or after decree;
- (b) receive any person from the possession or custody of the property;
- (c) commit the same to the possession, custody or management of the Receiver, and
- (d) confer upon the receiver all such powers, as to bringing and defending suits and for the realisation, Management, protection, preservation and improvement of the property, the collections, of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers, as the Court thinks fit.

Therefore, the Rule does not make it condition precedent that there should be a suit pending for appointment of a receiver. Learned single Judge has considered this aspect of the matter in paragraph 7A of the judgment and has followed the decisions in Sulaiman v. Sm Jama Ath 1982 K.L.T. 790, Mohammad Ali Khan Vs. Ahmad Ali Khan and Others, and Bai Sakri v. Bai Dhani AIR 1948 Bom. 139 and has ultimately held as follows:

According to the learned Counsel, if interim orders could be passed to safeguard the interest of the Trust pending disposal of the application for leave u/s 92, C.P.C., the Supreme Court would not have made such an observation. But, in my view, from this observation alone, without any further discussion in the matter, it cannot be concluded that the Supreme Court is of the view that to interim order at all could be passed pending disposal of the abovesaid application for leave u/s 92 C.P.C. In view of my reasoning based on the above refereed to decisions of Kerala, Allahabad and Bombay High Courts, I hold that an order for appointment of Receiver to protect and preserve the suit Trust properties, could be made by a court even pending disposal of the application for leave u/s 92, C.P.C.

We are in entire agreement with the view expressed by the learned single Judge. Therefore, on this ground also, the appointment of receiver can be held to be valid. For the reasons stated above, point No. (ii) is answered in the negative.

11. Accordingly, the appeal fails and the same is dismissed. In the facts and circumstances of the case, there will be no order as to costs. In the light of the view we have taken, now the learned Trial Judge of the view we have taken, now the learned Trial Judge is not required to proceed with I.A. No. 604 of 1990. He shall now proceed to frame the issues in the, suit, try and decide the same in accordance with law, within six months from 1.9.1993. To avoid further delay in the service of notice in the suit, the parties are directed to appear before the trial court on 1.9.1993.