
(1988) 09 KL CK 0013
In the High Court Of Kerala
Case No : C.M.A. No. 1 of 1987

Mrs. B.K.N. Pillai @ Rajalakshmi

APPELLANT

Vs

George Mendez and another

RESPONDENT

Date of Decision : 12-09-1988

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 26, 27, 91, 91(1), 92

Citation : (1988) 2 KLJ 482

Hon'ble Judges : K. T. Thomas, J

Bench : Single Bench

Advocate : S. Subramoni and M. Balagovindan, for the Appellant; P. Gopalakrishnan Nair and D. Somasundaram, for the Respondent

Judgement

K. T. Thomas, J.—Two persons filed a suit for restraining the appellant (defendant) from conducting retreading business in a place situated close to the residence of the plaintiffs, as the conduct of the business amounts to public nuisance. The suit was resisted, among other contentions, on the ground that it is bad for want of valid leave under S. 91 of the CPC (for short "the Code,"). The trial court upheld the aforesaid contention and dismissed the suit. The District Court, in appeal, reversed the finding and held that the plaintiffs had obtained leave, though exparte, on the date of filing of the suit which is valid under law. Accordingly the trial court was directed to restore the suit and proceed to dispose it of in accordance with law. The said judgment of the District Court is assailed in this appeal filed by the defendant. Facts necessary for this appeal are the following: The suit is for declaration that the retreading business carried on by the defendant causes public nuisance and for restraining the defendant by a perpetual injunction from carrying on the said business in the present premises. The suit was filed on 24-10-1984. Along with the plaint, two interlocutory applications were also filed, one for leave under Sec. 91 of the Code and other for a temporary injunction. Leave was granted on 21-10-1984 itself, but it was done without notice to the defendant. On the next day defendant entered appearance and filed counter in which the point regarding validity of leave was

raised. The lower court upheld" the contention of the defendant and the suit was dismissed as not maintainable. The District Court in appeal found that the leave granted by the court is in accordance with law and hence the suit is not liable to be dismissed for want of leave.

2. Learned counsel for the appellant contended that inasmuch as the institution of the suit was completed by presentation of the plaint in the trial court, the suit remains defective and leave obtained subsequently, though on the same day, will not cure the defect. He also contended that leave granted without affording an opportunity to the defendant is not binding on him and is hence invalid. In support thereof, reference was made to the decision of a single Judge of the Madras High Court in T.M. Shanmugam and Others Vs. The Periyar Self Respect Propaganda Institution and Others, . The decision relates to a suit filed under Sec. 92 of the Code for removal of a party from the secretaryship of a public Trust. Leave was obtained to institute the suit without taking notice to the defendants. It was held that such a leave granted to the plaintiffs to institute the suit under Sec. 92, CPC, without notice to the defendants is void in law. The aforesaid view of the single Judge of the Madras High Court does not help the appellant in view the legal principle laid down by a Division Bench of this Court in Mathew v. Thomas 1982 K. L. T. 493. In paragraph nine of the decision, procedure for the grant of leave under S.92 (1) of the Code, has been formulated thus; "The Court can, if it is so satisfied grant the leave without issuing notice to the respondents defendants or hearing them. S.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.

3. In view of the said decision of this Court it is unnecessary to consider the correctness of the stand adopted by the learned single Judge of the Madras High Court. Thus the position is that leave obtained by the plaintiffs does not lose its validity merely because the defendant was not heard before granting leave. That apart, there appears to be some difference between the incidence of want of leave under Secs.91 (1) and 92 (1) of the Code. The relevant words in S.92 (1) of the Code are these?.....two or more persons having an interest in the trust and having obtained the leave of the court may institute a suit..... Sub-section (2) says that "no suit claiming any of the reliefs specified in subsection (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". S. 91 of the Code which is the relevant provision here is extracted below:

S.91. Public nuisances and other wrongful acts affecting the Public..... (1) In the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted,....

(a) by the Advocate General, or

(b) with the leave of the Court, by two or more persons, even though no special

damages has been caused to such persons by reason of such public nuisance or other wrongful act.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

The following words "having obtained the leave of the court may institute a suit" appearing in S. 92 of the Code make it clear that obtaining leave is sine qua non for institution of the suit. Sub-section (2) of S. 92 makes the position further clear as institution of suit without obtaining leave is not permitted. But Sec. 91 does not contain such restrictions. On the other hand there is indication in sub-section (2) of Sec 91 to show that the right to institute a suit independent of the said provision is not in any manner limited by Sec.91. However, if two or more persons opt to file a suit involving public nuisance, the institution of the suit shall be with the leave of the court. If it is instituted without leave of the court, it is open to the court to dismiss the suit or to treat that the suit has not been validly instituted. If plaintiffs succeed in obtaining leave, the suit, though filed earlier, will be treated as instituted only when leave is obtained, if there is any application for grant of leave, it is not proper to dismiss the suit until disposal of such application.

4. S.26 of the Code is not a rule to recognise that presentation of a plaint will amount to due institution of the suit. True, S.26 deals with the procedure for institution of suit. The procedure involves presentation of plaint. The words is S. 26 of the Code that "every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed" do not stretch its scope to the extent of treating all plaints presented in the court as validly instituted suits. Without presentation of the plaint there cannot be institution of the suit concerned. But the converse is not the invariable legal position that once a plaint is presented the suit shall be deemed to have been instituted validly. S. 27 of the Code uses the expression "where a suit has been duly instituted". It is indicative of the position that mere presentation of the plaint is not the test for the due institution of the suit. If the conditions precedent in instituting a suit have been complied with before presentation of the plaint. The suit may stand duly instituted with such presentation. Therefore when leave is granted by the court under Sec. 91 of the Code after presentation of the plaint the suit must be treated as instituted only after obtaining such leave. In this view also the present suit cannot be said to have been instituted without leave. The grievance of the appellant that he was not heard before leave was granted was redressed when opportunity was given to the learned counsel for the appellant to argue on any ground which he may advance against granting leave in this case. I am not satisfied that there is any valid ground to disallow the leave prayed for by the plaintiffs. For the aforesaid reasons, I dismiss this appeal.