

(2009) 05 KL CK 0126
In the High Court Of Kerala
Case No : FAO. No. 282 of 2004 ()

Muraleedharan, Jojo, Rajsingh and Nirmala	APPELLANT
Vs	
Kurakkavu Devaswom Trust Bharana Samithi, Rishikesh, Santhosh and Vavachan	RESPONDENT

Date of Decision : 22-05-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92, 92(1)

Citation : (2009) 05 KL CK 0126

Hon'ble Judges : P.R. Raman, J;P. Bhavadasan, J

Bench : Division Bench

Advocate : R. Rajasekharan Pillai, for the Appellant; K. Harilal, for the Respondent

Judgement

P.R. Raman, J.—Appellants sought to institute a suit after seeking leave u/s 92 of the Code of Civil Procedure. The defendants on notice entered appearance and filed their counter affidavit. The court below held that in the light of the counter affidavit, which is not attempted to be challenged by the plaintiffs and on a perusal of the documents produced by defendants 1 to 4, the plaintiffs have no prima facie case and hence the petition was dismissed and leave refused. Appellants are aggrieved by the said order.

2. Sri. R. Rajasekharan Pillai, learned Counsel appearing on behalf of the appellants would contend that the court below ought not have looked into the counter affidavit or the documents produced by the defendants at this stage of the proceedings. All that the court is to see at this stage is whether the appellants have made out a case in the sense that whether necessary allegations are made out for granting leave and whether the reliefs sought would fall within Clauses (a) to (h) of Section 92 of Code of Civil Procedure.

3. Per contra, learned Counsel appearing for the respondents would submit that though a notice may not be mandatory, it is desirable, and when a notice is issued, it is open to the defendants to show that the plaintiffs have not made out

a prima facie case and the attempt is only to harass the trust.

4. Both sides placed reliance on the reported case laws and it is not necessary to refer to all such decisions, except one we found is relevant for the purpose of disposal of this case, which we may do in the course of our discussion below.

5. As per Section 92 of the CPC, when there is an 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, 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 having jurisdiction. It is invoking the said provision that the plaintiffs filed the petition u/s 92 seeking leave. The relief to be prayed for could only be as enumerated under clauses (a) to (h). In the present case, on a perusal of the plaint averment and relief sought for, a copy of the plaint was made available to us by counsel for the appellants, we find that there is a prayer for removal of the trustees. There is also a prayer for accounting. There is also a prayer for amending the byelaw. Besides, there is a further prayer not to create obstruction to fourth respondent and other public from worshipping and offering vazhipadus. It is pointed out by the counsel appearing for the respondents that the persons who were the trustees at the appointed time were re-elected successively based on election conducted and therefore the question of granting the prayer to remove the trustees at this distance of time may not arise. At any rate, if at all there are allegations against the trustees, nothing stops the appellants from filing a fresh petition based on new averments. It is his further case that the relief against the fourth petitioner and others is purely personal and not governed by any of the reliefs enumerated in clauses (a) to (h). Regarding the prayer made for accounting, it is pointed out that no sufficient allegations are made out in the petition for granting leave as sought for. Further prayer seeking to amend the byelaw is not supported by any reasons.

6. Before we go into the merits of the contentions raised, we may refer to the decision of the Apex Court regarding as to what should be done when a petition is filed u/s 92 and what exactly the court is invited to do at this stage. In R.M. Narayana Chettiar and another Vs. N. Lakshmanan Chettiar and others, the Apex Court held that u/s 92 the leave of the court is a pre-condition or a condition precedent for institution of the suit against a public trust. Having in mind the objectives underlined in Section 92 and the language thereof, as a rule of caution, the court should normally notice it is impracticable or inconvenient to do so, give notice to the proposed defendant 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, they should also 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 for such antecedents that it would be undesirable to grant leave to such persons. The desirability of a notice

being given to the defendant however cannot be regarded as a statutory requirement to be complied with before leave u/s 92 could be granted, that would lead to unnecessary delay and cause inconvenience to the public trust.

In the light of the above, it can be seen that if leave is granted or refused before issuing notice by a court while disposing of a petition u/s 92, all that would have required by the court to do is to look into the petition and the averments made therein to satisfy the court as to whether the petitioners have made out a case by making necessary averments in the petition and whether the relief sought for will fall within the enumerated Clauses (a) to (h) of Section 92(1). But once the court issues a notice and the defendant appears, it has been held that it is open to the defendant to point out and bring to the notice of the court that the allegations made in the plaint are frivolous or reckless or that the petitioners who apply for leave are doing so merely to harass the trust or to have such antecedents that would be undesirable to grant leave to such persons. Therefore this is an information provided by the defendants on notice being issued to them. Therefore, it has to be said that when the defendants enter appearance and file their counter affidavits, the court could certainly go into as to whether the allegations made in the petition are frivolous or reckless as contended by the defendants in their counter affidavit supported by any of the documents that might be produced along with the same. Even if no notice is issued, it is still open to the defendant to raise such a contention at a later stage of the proceeding whereupon the court will be raising an issue on the same and deciding it on merits in accordance with law. It is also open to the court to suo motu take into consideration and pass appropriate orders as contemplated u/s 92. Therefore one will have to see whether what are the allegations made in the petition, what are the reliefs sought for and whether the contentions of the defendant that the petition u/s 92 is totally frivolous or reckless can be decided. But the court below did not express in so many words as to what part of the contention raised in the written statement or the documents produced by them would show that the petition is totally frivolous or reckless. It is an one line order. When ultimately the court enters a finding, it must be supported by reasons stated so that the correctness or otherwise of the reasons would be gone into. Therefore, it is not necessary at this stage to go into the rival contentions made by the parties regarding as to whether the petition filed u/s 92 is totally reckless or frivolous or whether the petitioner has filed this petition just to harass the trust. Therefore, for the limited purpose of enabling the court to consider such contentions as raised in the written statement and the documents produced and to pass appropriate orders, we set aside the order and sent back the matter to the court below for fresh consideration in accordance with law.