
(1993) 06 MAD CK 0016
In the Madras High Court
Case No : A.A.O. No"s. 496 and 497 of 1993

N. Anandan

APPELLANT

Vs

Ayyanna Gounder and others

RESPONDENT

Date of Decision : 30-06-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 26 Rule 1, Order 39 Rule 1, Order 40 Rule 1, 92

Citation : AIR 1994 Mad 43 : (1993) 2 LW 308 : (1993) 2 MLJ 493

Hon'ble Judges : Abdul Hadi, J

Bench : Single Bench

Advocate : V. Nicholas, for the Appellant; G. Subramaniam, for M.B. Ramamoorthy, for the Respondent

Judgement

1. The 1st defendant in O.S. No. 1217 of 1990 on the file of Sub Court, Coimbatore is the appellant in both these Civil Miscellaneous Appeals.

The said suit is one u/s 92, C.P.C. for settling a scheme for the administration of the 1st plaintiff-Trust, the 1st respondent in both the appeals. The

2nd and 3rd respondents herein who are also plaintiffs in the suit, claim to be trustees of the abovesaid trust. These two C.M.As. are against the

common order dated 21-4-1993 in three I.As. in the said suit including I.A. Nos. 1511 and 1513 of 1990. C.M.A. 495 of 1993 is against the

temporary injunction order in the abovesaid I.A. No. 1511 of 1990 in the said suit restraining the appellant from leasing out the trust properties or

collecting the income thereof, as Managing Trustee of the said Trust. C.M.A. No. 497 of 1993 is against the order in the abovesaid I.A. No. 1513

of 1990 appointing a Receiver to take possession of the suit trust properties and manage them.

2. Respondents-1 to 3 in the C.M.As. appeared even as caveators and since only a point of law is involved in these two appeals as is indicated

below, the appeals themselves have been taken up for disposal.

3. The only submission by the learned Counsel for the appellant in both the Appeals is that I.A. No. 604 of 1989 filed in the suit seeking leave of

the Court u/s 92, C.P.C. for instituting the abovesaid suit is still pending and no order has been passed thereon so far, granting the said leave and

that therefore, the suit itself cannot be deemed to have been already instituted (even though it has been wrongly numbered) and that hence no

interim order could have been passed in the said I.A. Nos. 151 and 1513 of 1990. Even though the said I.A. No. 604 of 1989 was filed as early

as 29-3-1989 and after the appellant herein filed counter therein as early as 13-6-1989 the Court below has adjourned the hearing of the said I.A.

for enquiry" very many times, admittedly so far no order has been passed therein granting or refusing the said leave.

3A. But, what the learned Counsel for the respondents-1 to 3 urges is that it should be inferred from certain features of the case that the said leave

has been granted by the Court below by implication and that there is no necessity for any formal or express order granting the said leave.

According to him, one of the abovesaid features is that the Court itself thought fit to number the suit in 1990. Another feature pointed out is that in

the abovesaid I.As., no specific objection was taken stating that the said I.As. could not be ordered before leave is expressly granted pursuant to

the abovesaid I.A. 604 of 1989. Yet another feature pointed out is that there was also amendment petition in the suit pursuant to the death of some

of the parties of the suit and that the said petitions were also ordered. While so, all that he contends is that it should be inferred that the Court

below has impliedly granted the abovesaid leave. Further, the said counsel points out that at this late stage, in the interest of the trust, the appellant

should not be allowed to set at naught the just interim orders that have been passed in the abovesaid I.As. to protect the interests of the trust. He

also submits that Section 92 -- suit is similar to a suit under Order 1, Rule 8, C.P.C. wherein it has been held that interim orders could be passed

pending disposal of the petition under the abovesaid Order 1, Rule 8, C.P.C. seeking permission of the Court to sue in a representative capacity

on behalf of numerous persons having the same interest. In this connection, he drew my attention to the following passage in R. Venugopala Naidu

and Others Vs. Venkatarayulu Naidu Charities and Others, .

He has also argued that a suit u/s 92 of CPC is different from a suit filed under Order 1, Rule-8 of Civil Procedure Code. We do not agree with

the learned Counsel.

He also drew my attention to my own Judgment reported in (1990) I LW 638 (Executive Officer, Vadakku Valliyur Town Panchayat v. M.

Mattar Mohideen), which was also a case under Order 1, Rule 8 of Civil Procedure Code, holding that where the Court has ordered publication

of the notice of the application under Order 1, Rule 8, C.P.C., it can be presumed, in view of the rulings in 1980 TNLJ 86 (DB) (Sannkiah v.

Vadakasi) and Sri Ram Krishna Mission and Another Vs. Paramanand and Others, that a conditional permission contemplated under the said rule)

has been given by implication. He also points out that in R.M. Narayana Chettiar and another Vs. N. Lakshmanan Chettiar and others, , it has

been even held that in deciding the application for leave u/s 92, C.P.C., even notice of the application to the respondent is not necessary. While

50, the Court below has ordered the said notice in the present case after hearing the petitioners in the I.A. and according to the said counsel, from

this also it could be inferred that the Court had granted leave by implication.

4. I have considered the rival submissions. First of all, it must be stated that in R.M. Narayana Chettiar and another Vs. N. Lakshmanan Chettiar

and others, , the Supreme Court has held, taking into consideration the language used in Sec. 92 of the Civil Procedure Code, that leave of the

Court is a condition precedent for the institution of a suit against a public trust for the reliefs set out in the said Section (Para 17 therein). Section

92(1), C.P.C. says ""..... having obtained leave of the Court, may institute a suit"". So, it is clear that leave is a condition precedent for the

institution of such a suit. The language used in Order I, Rule 8(1)(a) is as follows :

One or more of such persons may, with the permission of the Court, sue".

It must also be noted that the permission spoken to in Order 1, Rule 8, C.P.C. is not and has also not been held to be condition precedent as in

the case of leave under Sec. 92, C.P.C. Permission under Order 1, Rule 8, C.P.C.

may be granted even after the institution of the suit and even at the appellate stage by allowing an amendment, if such amendment does not materially change the nature of the suit (AIR 1947 Mad 205, Mookka

Pillai v. Valavanda Pillai and Muthukaruppa Ethandar and Others Vs. Appavoo Nadar and Others, .

4A. The above referred to observation of the Supreme Court in R. Venugopala Naidu and Others Vs. Venkatarayulu Naidu Charities and Others,

does not mean that the suit or procedure with reference to it u/s 92, C.P.C. and that with reference to a suit under Order 1, Rule 8, C.P.C. are

same in all respects. It only means the said suits are common insofar as they both are representative suits. That is why, the Supreme Court also

observes immediately after the above-quoted passage cited by the learned Counsel for the respondent as follows :--

A suit whether u/s 92 of CPC or under Order 1, Rule 8 of CPC is by the representatives of large number of persons who have a common

interest. The very nature of a representative suit makes all those who have common interest in the suit as parties. We, therefore, conclude that all

persons who are interested in Venkatarayulu Naidu Charities which is admittedly a public trust are parties to the original suit and as such can

exercise their rights under clauses 13 and 14 of Scheme decree dated September 9, 1910.

In the said Supreme Court case relating to a suit u/s 92, C.P.C. some persons who were not parties to the said suit filed objection to the

permission granted by the Court earlier to sell the suit trust properties and sought to set aside the said permission. In that context only, the Supreme

Court held that even though they were not really eo nomine parties they were held to be parties to the suit just as in the case of a suit under Order

1, Rule 8, C.P.C. Only in that context, the Supreme Court observed the similarity between Section 92 suit and suit under Order 1, Rule 8, C.P.C.

both being representative suits. The abovesaid observation by the Supreme Court in the said decision cannot at all lead to the inference that in all

respects, the suit u/s 92, C.P.C. and the suit under Order 1, Rule 8, C.P.C. are the same.

5. Since thus it is clear that the leave u/s 92, C.P.C. is a condition precedent to the institution of the suit itself, now it is to be seen whether it could

be inferred in the present case that the said leave has been granted by the court below by implication in view of the abovereferred to features

pointed out by the learned Counsel for the respondent. The learned Counsel for the appellant points out that despite the abovesaid features there is

absolutely no scope at all for any such inference. According to him, the reason is that not only the abovesaid I. A. 604 of 1989 is still pending the

Court below thought fit to order notice to the respondents (despite the fact that it is not incumbent on the Court to issue notice to the respondents

in the said I. A.) and after the counter has been filed by the respondents herein the Court as stated above, had been adjourning the case for

enquiry"" several times, right from 13-6-1989 till 20-4-1993, as found in the copy of the said I.A. Petition and orders thereon, shown to me. I

concur with this argument since it is clear that the court below has yet to apply its mind as to whether it should grant or not, the leave u/s 92,

C.P.C. The fact that the Court is posting the said I.A. for ""enquiry"" number of times, shows that it has yet to apply its mind on the question at issue.

Therefore, I agree with the contention of the learned Counsel for the appellant that despite the abovereferred to features pointed out by the learned

Counsel for the respondents, there is no possibility at all for any inference being drawn to hold that the abovesaid leave had been already given by

implication.

6. In this connection, no doubt the learned Counsel for the appellant draws my attention to the abovereferred to my own decision and points out

that in the abovesaid decision also, it has been held as stated above that despite the fact that the I.A. seeking permission under Order 1, Rule 8,

C.P.C. Had been only posted for enquiry on several days and was only pending at the relevant time without order having been passed finally in the

said I.A. In this connection, he drew my attention to the following passage in para 4 of the said judgment.

I.A. No. 257 of 1989 was filed along with the suit seeking permission under Order 1, Rule 8, C.P.C., the said I.A. is dated 24-5-1989. Notice

was ordered in the said petition on the same day. Publication in one issue of Dinathandhi was also ordered. On 26-6-1989 it was recorded that

papar publication was made. Thereafter the said I.A. was posted for enquiry subsequently on several days and so far no order has been passed

finally in the said I.A.

Despite the above fact that the I.A. was only posted for enquiry on several occasions, I have held in the said decision that it should be presumed

that a conditional permission under Order 1, Rule 8, C.P.C. had been given by implication, even though no express order granting such permission

had been passed in the said I.A. under Order 1, Rule 8, C.P.C.

6A. For coming to the said conclusion I relied on Sri Ram Krishna Mission and Another Vs. Paramanand and Others, and 1980 TNLJ 86 (DB) of

this Court. The passage relied on in Sri Ram Krishna Mission and Another Vs. Paramanand and Others, is as follows (at page 424) :

Unlike Order 33, Rule 8, C.P.C. which provides that where the application for permission to sue as a pauper has been granted it shall be

numbered and registered and shall be deemed the plaint in the suit. Order 1, Rule 8, C.P.C. contemplates a suit from the very inception. It is true

that a representative character is imparted to the suit only after the requisite procedure has been complied with; but it would be erroneous to hold

that no suit has been instituted until permission has been granted by the Court.

..... "I think that when a Court issues notice on an application for leave under Order 1, Rule 8 made after the presentation of the suit, it should be

inferred that the Court has by implication granted a conditional permission.

Similarly the relevant passage in 1980 TLNJ 86 (Sankiah v. Vadakasi) is as follows :

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 on the other hand, when the plaintiffs have filed the necessary application and the

Court has ordered the necessary notice to be published in dailies, it is for the other residents of Chellam North and South Streets, if they were so

inclined to have come and opposed the plaintiffs.

6B. But, neither the above referred to my own decision nor the other two decisions Sri Ram Krishna Mission and Another Vs. Paramanand and

Others, and 1980 TLNJ 86 (DB) all under Order 1, Rule 8, C.P.C. can be applied to the present suit u/s 92, C.P.C. This is so particularly

because of what is contained in Clause (2) of Order I, Rule 8, C.P.C. which runs as follows :

The Court shall, in every case where a permission or direction is given under sub-rule (1), at the plaintiff's expense, give notice of the institution of the suit to all persons so interested.....

The permission referred to in the said clause 2 is the permission of the Court under clause 1 of the said Rule which may be sought for by a plaintiff.

So, only after permission spoken to under clause 1 is given the Court gives notice of the institution of the suit to all persons interested. So, when the

Court gives such notice we can infer that the abovesaid permission has been granted by implication. That is why, I have held in the abovesaid my

decision that it should be presumed that conditional permission has been given by implication. (The said permission is a conditional one because as

pointed out in 1980 TLNJ 86, the defendants after they get the notice, could appear and oppose the application under Order 1, Rule 8, C.P.C.

and could get the said conditional permission revoked, if they are able to convince the Court to that effect.

6C. On the other hand, there is no such provision in Sec. 92, C.P.C. Further, even without ordering notice, the Court could grant the leave under

Sec. 92, C.P.C. though giving such notice may be a desirable one as pointed out by the Supreme Court in R.M. Narayana Chettiar and another

Vs. N. Lakshmanan Chettiar and others, . Therefore, the above referred to decision under Order 1, Rule 8, C.P.C. cannot be applied to the

present case u/s 92, C.P.C. and it cannot be inferred in the present case that the leave u/s 92 has been granted by the court below by implication.

7. The next question is whether, consequent upon the abovesaid conclusion reached, should both the above referred to impugned orders in the

abovesaid two I.As. be set aside. In this regard, I am of the view that simply because of the abovesaid conclusion reached by me, the order in I.A.

1513 of 1990 appointing a Receiver as stated above, cannot be set aside, though the other order in I.A. 1511 of 1990 granting temporary

injunction as stated above has to be set aside. This is because of the difference in the language used in O. 39, R. 1, C.P.C. on the one hand and O.

40, Rule 1, C.P.C. which I shall presently point out. No doubt in AIR 1980 Ori 100 I find the following passage (at page 104) :

Where a suit has been registered or interim orders have been passed prior to the granting of leave (under Sec. 92) the same shall be held to be

incompetent, invalid and non est.

7A. But in view of the reasons I give below I think that the abovesaid ruling in Kintali China Jaganadham and Others Vs. K. Laxmi Naidu and

Others, cannot be applied to an interim order appointing a Receiver pending the suit, under Order 40, Rule 1, C.P.C. I draw support for this

proposition from the following three decisions. In 1982 Ker LT 790 (Sulaiman v. S. M. Jama Ath) the Kerala High Court has held that unlike an

application for the issue of a commission, which contemplates the existence of a suit for passing an order under Order 26, Rule 1, an application

for the appointment of a Receiver does not in terms of Order 40, Rule 1, C.P.C. contemplate an already registered suit for the exercise of the

power thereunder and even while proceedings for leave under Sec. 92 are pending and the question of leave remains undecided, it will be open to

the court to entertain an application for the appointment of a Receiver and deal with and dispose of the same in accordance with the law.

7B. For coming to this conclusion, Kerala High Court relies on two decisions Mohammad Ali Khan Vs. Ahmad Ali Khan and Others, and AIR

1948 Bom 139 (DB), Mohammad Ali Khan Vs. Ahmad Ali Khan and Others, , the question was whether while setting aside the order of the

District Judge removing the existing Mutwalli of the suit wakf, and appointing another Mutwalli thereof, on the ground that the said order of the

District Judge was without jurisdiction, the High Court could appoint a Receiver to safeguard the wakf property of which the person appointed had

taken possession pursuant to the District Judge's order. In the said decision, the following observation of Braund, J., was approved by the other

learned Judge Wali Ullah, J. though the third Judge Allsop, J disagreed in that respect.

With defence, I do not share the view that this Court, in this or any other matter involving the administration and care of assets, has no sufficient

seisin of the subject-matter of a dispute which is once before it, to enable it to make such provision as is proper for the protection of the estate.

Jurisdiction to protect property pending the ascertainment of rights is inherent in any Court which once has cognizance in any form of a dispute

involving the execution of a trust or the administration of assets; and I think the Court has not merely jurisdiction but a duty to safeguard them. Thus

the learned Advocate appearing for the respondent has asked us to do by the appointment of a Receiver pending the disposal of the matter in issue.

Supporting this observation, Wali Ullah, J. also observed as follows:--

It is clear from Order 40, Rule 1, CPC that a Receiver can be appointed in proceedings other than suits. Thus, it has been held that a Receiver may be appointed during the course of the proceedings for the appointment of a guardian under the Guardians and Wards Act, vide AIR 1925

Lahore 489 and AIR 1929 119 (Nagpur)

7C. In AIR 1948 Bom 139, Bai Sakri v. Bai Dhani, the question was whether in proceedings in forma pauperis, the Court was competent to

appoint a Receiver, and the Division Bench of the Bombay High Court held that a Receiver could be appointed in such a case pending the decision

in the application for leave to sue as pauper. There, it has been pointed out that the present form of Order 40, Rule 1 differs from the older Section

503 (of the preceding Code of Civil Procedure), in that the words ""where it appears to the Court to be just and convenient"" have been substituted

for the words ""Where it appears to the Court to be necessary for the realisation, preservation or better custody, or management of property,

move-able or immovable, the subject of a suit or attachment"". The said Division Bench points out further thus :--

The omission of the words ""the subject of a suit or attachment"" leaves the rule in extremely general terms, and so far as sub-rule (1) is concerned,

there is nothing whatever in the rule to suggest that a Receiver could not be appointed in any proceeding that was before the Court. It is of course

necessary that there should be some proceeding before the Court and a person who has no other business in the Court at all cannot come to the

Court and ask the Court to appoint a receiver and then go away. But so far as sub-rule (1) is concerned, there is nothing to suggest that an

application to sue as a pauper is not the sort of proceeding in which a receiver could be appointed. It is true that sub-rule (2) refers to parties to

the suit, but we do not think that these words in sub-rule (2) can be allowed to control the general terms of sub-rule (1) in view of the fact that

there has been a deliberate amendment of the old rule and the principal part of the amendment was to omit the only words which would limit the

proceedings before the Court to suits or attachments"".

8. No doubt the learned counsel for the respondents draws my attention to the following passage in R.M. Narayana Chettiar and another Vs. N.

Lakshmanan Chettiar and others, , to contend that even the Supreme Court does not contemplate that an interim order could be passed pending

disposal of the petition under S. 92, C.P.C. for instituting the suit thereunder.

The desirability of such notice (of the petition for leave under S. 92, C.P.C.) being given to the defendants, however, cannot be regarded as a

statutory requirement to be complied with before leave under 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 S. 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"".

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 under 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 no interim order at all could be passed pending

disposal of the abovesaid application for leave under S. 92, C.P.C. In view of my reasoning based on the above referred to the 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 under S. 92, C.P.C.

8(a). No doubt, in contract, it may also be noted that the language of O. 39, R. 1, C.P.C. indicates that the temporary injunction thereof can be

granted only in a "suit", since the said rule begins by saying ""Where in any suit, it is proved...

9. Therefore, since no other argument was advanced by the learned counsel for the appellant to point out any error in the above referred to

receiver order in I.A. No. 1513 of 1990 on its merits, I, while setting aside the impugned order in the other I.A, No. 1511 of 1990 on the

abovesaid legal ground that the prescribed condition precedent has not been

fulfilled, I confirm the impugned order in I.A. No. 1513 of 1990.

Accordingly, C.M.A. No. 496 of 1993 is allowed and C.M.A. No. 497 of 1993 is dismissed. No costs.

I also want to add that it is very much regrettable that none of the learned Judges who presided over the Court below during the period from 1989

to 1993 when the above said I.A. no. 604 of 1989 was pending, appears to, have taken enough care to see that the said I.A. was disposed of at a

very early date, very soon, after the said I.A. is posted before it. each of them should have realised that where the plaintiffs deserve leave to

institute the suit u/s 92, C.P.C. but the said leave is not granted without any delay, the suit trust might suffer very much if there was mis-

management by the persons in management of the trust, but suitable interim orders could not be had from the Court. After all, if only judicial

officers apply their mind, there could be no difficulty at all in disposing of an application u/s 92, C.P.C. seeking the leave. The Court has only to

satisfy itself whether the persons asking for leave have interest in the trust, whether the trust is a public trust and whether there are prima facie

grounds for thinking that there has been a breach of trust.

10. Order accordingly.