
(2016) 01 KAR CK 0181

In the Karnataka High Court

Case No : Writ Petition No. 1344/2013 (GM-CPC)

Navayuga Devanahalli Tollway Private Limited

APPELLANT

Vs

Chandrashekar and Others

RESPONDENT

Date of Decision : 12-01-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 39 Rule 1, Order 39 Rule 2, Section 91, Section 91(1)(b), Section 92

Citation : (2016) 01 KAR CK 0181

Hon'ble Judges : Budihal R.B., J.

Bench : Single Bench

Advocate : Dhyan Chinnappa, Ld. Sr. Adv. for Arun Kumar, Advocate, for the Appellant; B.A. Raviraj, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Budihal R.B., J.—1. This writ petition is filed by defendant No. 1 challenging order dated 15.12.2012 passed by the trial Court on the application filed under Section 91(1)(b) of CPC. The said application was filed by the plaintiffs seeking grant of leave to institute suit against defendants and it was allowed by the trial Court. The legality and correctness of the said order is challenged by the petitioner-defendant No. 1 in this petition.

2. Heard the arguments of learned counsel for the petitioner-defendant No. 1 and also learned counsel for respondent No. 5 representing National Highway Authority of India.

3. Learned counsel for the petitioner-defendant No. 1 made submission that the suit was filed by respondents plaintiffs. As per Section 91 of CPC, to maintain the said suit, the plaintiffs have not obtained prior leave of the Court and without obtaining leave, the said suit was filed. Along with the suit, they also filed an application I.A. No. 2 under Order 39 Rules 1 and 2 of CPC seeking temporary injunction against the defendants and the said application was allowed and an order of temporary injunction was granted. The said order was challenged before

this Court in W.P. Nos. 26156/2012 and 22469/2012 and while passing the order by this Court, the learned counsel appearing for the respondents plaintiffs made submission that the plaintiffs are going to withdraw the application seeking grant of injunction and that they will file a fresh application. At that time, this Court permitted the plaintiffs to file necessary application before the concerned Court. Subsequently, an application was filed by the respondents plaintiffs before the trial Court which was objected by the petitioner-defendant No. 1 stating that the suit in question is not maintainable. In spite of such objection statement, the application was allowed by the trial Court. Being aggrieved by same, defendant No. 1 is before this Court in this petition.

4. Learned counsel for the petitioner further submitted that when the suit was filed on the ground that there is public nuisance, the plaintiffs ought to have complied with the provisions and mandatory requirements of Section 91 of CPC which was not done in the case. In spite of not seeking prior leave to present plaint before the trial Court, the suit was proceeded with and ultimately, when the injunction order was challenged before this Court, the plaintiffs filed a memo before the Court that they are going to withdraw the said application and file a fresh application for the same relief after obtaining necessary leave of the trial Court. It was placed on record and they were permitted to file said application before the trial Court. The learned counsel submitted that to the application filed under Section 91(1)(b) of CPC, objections were filed by the petitioner herein. In spite of the said objection, the application was allowed. According to the learned counsel, it is contrary to mandatory requirements of Section 91 of CPC and no such leave can be granted subsequent to the institution of the suit. Leave is to be obtained from the Court before institution of the suit. On this ground, the learned counsel submitted that the order passed by the trial Court is illegal and it is not sustainable in law. In support of his contentions, the learned counsel has relied on the judgment of the Hon'ble Supreme Court in case of A.C. MUTHIAH VS. BOARD OF CONTROL FOR CRICKET IN INDIA AND ANOTHER reported in , 2011(6) SCC 617 and drew the attention of this Court to para 42 of the said judgment. He has also relied upon the decision of the High Court of Kerala dated 11.10.2011 in AS 136/2001 and drew the attention of this Court to para 9 of the said judgment. The learned counsel made submission that so far as obtaining leave of the Court before institution of the suit when it was filed under Section 91 of CPC, he fairly submitted that he was not able to lay his hands to any decisions and submitted that leave is to be obtained before institution of the suit. The suit was filed under Order I Rule 8 read with Section 91 of CPC. In this connection, he submitted that mandate requires that leave is to be obtained before institution of the suit and the same principle is applicable even when the suit was filed on the ground that there is nuisance as per Section 91 of CPC. Hence, the order is not sustainable. The only way for the plaintiffs is to withdraw the suit and file a fresh suit seeking prior leave before institution of such suit. Though the decision of the Kerala High Court is in respect of suit filed under section 92 of CPC, learned counsel for petitioner submits that same analogy is made applicable

even when the suit is filed under Section 91 of CPC also.

5. Learned counsel for the 5th respondent submitted that the 5th respondent adopts the submissions made by learned counsel for the petitioner-defendant No. 1.

6. The other respondents though served and represented through learned advocates, the learned advocates remained absent.

7. I have perused the grounds urged in the writ petition and the impugned order passed by the trial Court dated 15.12.2012 on the application filed under Section 91(1)(b) of CPC seeking leave to institute the suit.

8. Section 91 of CPC reads as under:

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 damage 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.

9. Admittedly, in this case even according to the respondents plaintiffs, they have not obtained prior leave of the Court to institute the suit and without obtaining the leave, they have presented the plaint before the trial Court. When the order of temporary injunction granted by the trial Court was challenged before this Court, the plaintiffs made submission before this Court that they will withdraw the application and file a fresh application after obtaining leave from the Court as required under Section 91 of CPC. Therefore, this factual aspect is not in dispute and it is an admitted fact that the suit was instituted before the trial Court without such leave. In the order passed by this Court in W.P. Nos. 26156/2012 connected with W.P. No. 22469/2012 dated 30.8.2012, this Court has only given liberty to the respondents plaintiffs to file an application under Section 91(1)(b) seeking appropriate order from the trial Court and there is no direction as such by this Court that in case an application is filed, it is to be allowed and leave is to be granted automatically. Even though the plaintiffs have filed such application before the trial Court after disposal of the writ petitions, they had to satisfy the trial Court that such application at that stage was also maintainable. In this regard, I have perused the principles enunciated in the decisions relied upon by the learned counsel for the petitioner herein. Looking to the said principles laid down in the decisions, they make it clear that at the time of institution of suit itself, the parties have to file such application seeking leave of the Court to

institute the suit. Subsequent filing of such application is not maintainable and if such application is filed, no leave is to be granted. In view of this legal position in the said reported decisions and also the other orders passed by this Court in W.P. No. 21795/2014 and W.P. No. 24061/2014 dated 10.7.2014 and the order dated 7.7.2015 passed in W.P. No. 21623/2014, I am of the clear opinion that the order allowing the application seeking leave to institute suit and granting leave by the trial Court at that stage is illegal and it is not sustainable in law. Accordingly, writ petition is allowed and the order passed by the trial Court in the said application is hereby set aside.