(2017) 02 KL CK 0061

In the High Court Of Kerala

Case No : F.A.O. No. 7 of 2017

Prof. Meeran Maluk Mohammed S. APPELLANT

Vs

The Muslim Association Thiruvananthapuram RESPONDENT

Date of Decision : 14-02-2017

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, Section 92(1), Section 92(1)

Citation : (2017) AIRCC 1466 : (2017) 1 KerLJ 840

Hon'ble Judges : P.N. Ravindran and A.M. Babu, JJ.

Bench : Division Bench

Advocate : Sri. P.B. Krishnan, Sri. P.M. Neelakandan, Sri. P.B. Subramanyan, Sri. Sabu George and Sri. S. Nithin, Advocates, for the Appellant; Sri. Liju V. Stephen (Caveator), Advocate, for the Respondent No. 1; Sri. T. Krishnanunni, Senior Advocate, for the Respondent Nos. 1 and 3

Final Decision : Allowed

Judgement

A.M. Babu, J—Appellants are the petitioners in O.P.(Trust)308 of 2016. That was an original petition on the file of the District Court, Thiruvananthapuram. It was filed to seek leave of the court under section 92(1) of the Code of Civil Procedure (CPC for short). Respondents opposed the petition. Learned Second Additional District Judge refused to grant leave and dismissed the petition. The appeal is preferred against the said order dated 12.1.2017.

2. We, in this judgment, refer to the parties as they are shown in the memorandum of appeal.

3. A few facts are admitted. Admitted facts are stated below : The 1st respondent is an association registered under the Travancore-Cochin Literary, Scientific and Charitable Societies Registration Act, 1955 (Act XII of 1955 for short). Respondents 2 to 4 are respectively the secretary, president and treasurer of the 1st respondent. Appellants are life members of the association. They are at present members of the executive committee.

4. Appellants sought leave to sue to seek the following reliefs: To remove respondents 2 to 4 from the respective offices they hold. To appoint new trustees to the executive committee. To direct respondents 2 and 3 to render accounts. To settle a scheme for the 1st respondent.

5. The allegations in the petition are briefly stated below : Respondents 2 to 4 are acting against the provisions of the byelaws of the 1st respondent. There is no provision to nominate members to the executive committee. But respondents 2 to 4 have nominated 14 persons who are their men. Various sub-committees are to be formed for the proper functioning of the 1st respondent and the institutions run by it. No sub-committee shall consist of less than five members and more than seven members including the chairman. But jumbo sub-committees have been constituted to include the supporters of the 3rd respondent. There shall be a managing council for the administration of the engineering college run by the 1st respondent. Members to the managing council shall be elected by the executive committee. But two persons have been nominated to the council. The manging council shall hold at least one meeting every month. But only two meetings were held during the last 14 months. This has affected the day-to-day management and functioning of the engineering college. The general body meeting held on 30.6.2007 resolved not to induct new members. But respondents 2 to 4 took hasty steps to induct new members to hijack the general body. An internal audit committee shall be appointed by the general body to audit the accounts of the 1st respondent and the engineering college. Such an audit committee was appointed by the general body. The committee audited the accounts. The audit report shows a loss of 148 lakhs rupees to the 1st respondent. The audit disclosed manipulation of accounts and misappropriation of huge amounts by respondents 2 to 4 in connivance with their supporters in the executive committee. The audit report was rejected by respondents 2 to 4 on flimsy grounds. The budget placed before the general body at its meeting held on 24.9.2016 shows a huge loss of 275 lakhs rupees to the 1st respondent. The loss was occasioned owing to the mismanagement of the funds of the association.

6. Respondents 1, 2 and 4 jointly and the 3rd respondent separately filed statements of objections. The contentions are identical and go as under : The 1st respondent is a society registered under Act XII of 1955. It is not a trust. Therefore the petition for leave filed under section 92(1) CPC is not maintainable. All the allegations in the petition are false. The ban imposed against the induction of new members ceased to have force with effect from 9.6.2011. The report of the internal audit committee was in violation of the provisions of the byelaws. The report was not signed by all the three members. The executive committee at its meeting held on 13.11.2016 rejected the report. The accounts of the association are properly maintained and are audited by a chartered accountant. There has been no irregularity, misconduct or mismanagement on the part of the respondents. The intention of the appellants is only to malign the 3rd respondent in order to force him to resign. The appellants are indulging in

activities which are hostile to the society. New members are admitted as per the provisions of the byelaws. The byelaws is proposed to be amended at the next general body meeting. The appellants oppose all progressive steps taken by the respondents.

7. Heard the learned counsel for the appellants and the learned senior counsel for the respondents.

8. The 1st respondent is an association of persons. It is registered under Act XII of 1955. The appellants call it a trust. The respondents assert that it is not a trust. The learned Additional District Judge dismissed the petition holding that the appellants failed to establish the 1st respondent to be a public trust.

9. Should leave be granted under section 92(1) of the CPC, there must be an express or constructive trust created for public purposes of a charitable or religious nature. If the 1st respondent is such a trust, some of the ingredients of section 92(1) CPC are readily satisfied. The reliefs claimed come within the purview of section 92(1). The minimum number of persons to seek leave is two. There are 17 applicants seeking it. The persons seeking the leave should have an interest in the trust. The appellants are life members and at present members of the executive committee of the 1st respondent. Therefore, they have an interest in the trust if the 1st respondent is really a trust.

10. The Supreme Court holds that the main purpose of section 92(1) CPC is to give protection to public trusts of a charitable or religious nature from being subjected to harassment by suits being filed against them. The decision is Chairman Madappa v. M.N. Mahanthadevaru (AIR 1966 SC 878). Therefore leave is not something which should be granted on a mere asking. There should be a prima facie case for the appellants. They should have a cause of action.

11. Mismanagement and misconduct and also misappropriation of funds are the allegations levelled against respondents 2 to 4 by the appellants. They allege that respondents 2 to 4 have acted against the provisions of the byelaws of the 1st respondent to induct their men in the association, its executive committee and the managing council of its engineering college. According to appellants, respondents 2 to 4 are attempting to hijack the association by inducting their men in order to cover up their misdeeds. It should be considered whether the appellants have a prima facie case. Do they have a cause of action, prima facie ?

12. The original petition contains serious allegations against respondents 2 to 4. Those serious allegations are not seriously denied in the statements of objections filed by the respondents. Only two of the allegations in the petition are specifically met in the statements of objections. Those allegations and the version of the respondents on those allegations are considered in the next two paragraphs of this judgment.

13. Admittedly the general body held on 30.6.2007 imposed a ban on admitting new members to the 1st respondent association. Appellants allege that

respondents 2 to 4 are taking hasty steps to admit their men to hijack the general body. According to the respondents, the ban imposed on 30.6.2007 ceased to have force with effect from 9.6.2011. The respondents do not say what happened on 9.6.2011. Their statements of objections do not state why or how the ban ceased to have effect with effect from 9.6.2011. All that is stated is that the executive committee met on 13.11.2016 and after verification minuted that the ban ceased. This is a very vague contention. The allegation of the appellants that new members are attempted to be admitted despite the ban cannot be brushed aside.

14. Admittedly the general body appointed an internal audit committee to audit the accounts of the 1st respondent and its engineering college. Appellants allege that the audit disclosed manipulation of accounts and misappropriation of huge amounts. It is also alleged that the audit report shows a huge loss of 148 lakhs rupees to the 1st respondent. The respondents in their statements of objections do not say that the audit committee did not record any such finding. According to them, the audit report was found to be in violation of the provisions of the byelaws. The statements of objections are silent as to which provision of the byelaws was violated by the internal audit committee. The respondents contend that the executive committee at its meeting held on 13.11.2016 rejected the audit report. But one cannot say that there is no cause of action against him since he has rejected an adverse audit report. The appellants do have a prima facie case to obtain leave under section 92(1) of the CPC, provided the 1st respondent is a trust of the nature mentioned in the section.

15. There are a few allegations in the petition which are not specifically denied in the statements of objections. Those allegations are these, namely, (i) there is no provision for nominating members to the executive committee, but respondents 2 to 4 nominated 14 persons who are their men, (ii) jumbo sub-committees have been constituted as against the provisions of the byelaws that the total strength of each committee shall not exceed seven persons including the chairman, (iii) the managing council to administer the engineering college shall have only members elected by the executive committee, but two persons have been nominated to the council, (iv) the managing council which should hold at least one meeting every month met only twice within a period of 14 months, (v) the failure to hold such periodical meetings has affected the day-to-day management and functioning of the engineering college, (vi) the annual budget placed before the general body at its meeting on 24.9.2016 showed a loss of 275 lakhs rupees to the 1st respondent and (vii) such a huge loss was the result of mismanagement of the funds of the association. The above allegations, if true, suggest mismanagement and misconduct and also misappropriation of funds.

16. We are satisfied that the appellants have a prima facie case. They have a cause of action. They are entitled to get the leave of the court if the 1st respondent is a trust, express or constructive, created for public purposes of a charitable or religious nature. We hold so. Had there been no prima facie case

and cause of action for the appellants, we would have stopped this judgment here and dismissed the appeal.

17. The appellants have to clear a big hurdle next. They should satisfy prima facie that the 1st respondent is an express or constructive trust created for public purposes of a charitable or religious nature. The respondents have contended that the 1st respondent is not a trust and was never a trust. The appellants met defeat at the hands of the learned Additional District Judge for their failure to establish the 1st respondent to be a public trust, charitable or religious.

18. The original petition almost everywhere refers to the 1st respondent a trust. But the pleadings are quite insufficient to contend for a trust of the nature stated in section 92(1) CPC. The appellants themselves are aware of the insufficiency of their pleadings, which was why they filed I.A. No. 23 of 2017 seeking an amendment of the original petition. They are also aware that the documents produced by them are not sufficient to bring home their case on the point. That was why they filed I.A. No. 22 of 2017 to direct the respondents to produce two documents. The court below directed to keep I.A.No.23 of 2017 in abeyance till the disposal of the original petition. I.A.No.22 of 2017 was filed on 4.1.2017, but not touched till 12.1.2017. It was on 12.1.2017 the original petition was dismissed. It is endorsed on I.A.No.22 of 2017 that the same was heard and decided along with the original petition. The learned Judge said that no interlocutory application could be considered before granting the leave.

19. The learned counsel for the appellants has relied on several decisions and commentaries to tell us what is a trust. But the appellants have no foundation in the original petition to contend for a trust of the nature stated in section 92(1) of the CPC. According to the learned counsel for the appellants, (i) the 1st respondent association was formed in 1957, (ii) it was registered under Act XII of 1955 in 1966, (iii) there was another association called the Muslim Club which was formed in 1948, (iv) the Muslim Club got amalgamated with the 1st respondent in 1968, (v) a constructive trust was created after such amalgamation at the meeting of the governing body held on 23.4.1968 and (vi) the creation of a constructive trust was approved by the general body at its meeting held in 1969. But there is no factual foundation in the original petition to support the aforesaid arguments of the learned counsel. I.A.No.23 of 2017 was filed to amend the original petition to raise contentions in the line of the above noted arguments of the learned counsel. It was also sought to be incorporated in the original petition by an amendment that the minutes of the general body would clarify and establish the creation of a public trust of a charitable nature. I.A.No.22 of 2017 was filed requesting to direct the respondents to produce two documents. One of those documents is the original minutes of the meeting of the working committee held on 23.4.1968. The other document is the original of the annual report and minutes of the 1st respondent of the year 1968-69. The arguments of the learned counsel cannot be considered unless the original

petition is amended as proposed or even better. We shall consider whether I.A.No.22 of 2017 and I.A.No.23 of 2017 can be considered and decided at any time before the grant of leave.

20. There are several provisions in the CPC which indicate that applications under those provisions could be filed only in suits. To give a few examples are (i) an application under Order 11, Rule 12 for discovery of documents or under rule 14 for directing production of documents, (ii) an application under Order 26, Rule 1 for issuance of commission for examination of witnesses or under rule 9 for local investigation, (iii) an application under Order 38, Rule 1 or rule 5 for arrest or attachment before judgment and (iv) an application under Order 39, Rule 1 for temporary injunction. No application under any of the aforementioned provisions and several other provisions of the CPC can be considered at the stage of considering an original petition seeking leave under section 92(1) of the CPC. It is so because at that stage there is no suit. There is only a proposed suit. But an application for amendment of pleadings stands on a different footing.

21. Order 6, Rule 17 CPC provides that the court may at any stage of the proceedings allow either party to alter or amend his pleadings. The word used in rule 17 is ''proceedings'' and not ''suit''. This is very important. Rule 1 Order 6 defines ''pleading'' to mean plaint or written statement. Plaint and written statement are referable to suits and suits only. But still rule 6 permits amendment of pleadings at any stage of the proceedings. The ''proceedings'' referred to in Order 6, Rule 17 should mean a pre-suit proceedings also. Therefore an application thereunder can be considered and decided in a proceedings for leave under section 92(1) CPC.

22. Take a case where two persons seek the leave of the court under section 92(1) of the CPC and one or both of them die. If one or more persons apply to come on record as petitioner or petitioners, necessarily the original petition should be amended. You cannot say that in that event Order 6, Rule 17 has no application as only the cause title need be amended. As the persons seeking leave under section 92(1) shall have an interest in the trust, the body of the original petition should be amended to state that the person or persons who seek to come on record has or have such an interest. There is no bar to consider an application for amendment of pleadings before leave is granted under section 92(1) of the CPC. We do not appreciate the direction to keep I.A.No.23 of 2017 in abeyance till the disposal of the original petition.

23. I.A.No.22 of 2017 is shown to be filed under two wrong provisions, viz : section 92 and order I rule 8 of the CPC. Misquoting of the provision may not be fatal. An application for production of documents under Order 11, Rule 14 can be filed only in a suit. That does not mean that an application for production of documents cannot be filed before the proceedings become a suit. We treat I.A.No.22 of 2017 as one filed under section 151 of the CPC.

24. There is no hard and fast rule that no interlocutory application shall be

considered unless leave under section 92(1) CPC is granted. There are interlocutory applications which may have to be considered before the grant of leave. There are applications which cannot be considered at that stage. Documents which may be necessary for the disposal of the proposed suit, but not necessary for deciding the question of grant of leave, cannot be directed to be produced before granting the leave. But there may be documents which may have to be perused to decide the very question of grant of leave. Those documents may or may not be required for the disposal of the proposed suit. Such documents may be in the possession or power of the opposite party. Justice will be in peril if production of such documents cannot be directed at the stage of considering the question of grant of leave. A court may have to direct the opposite party to produce documents even before the grant of leave in order to decide whether leave should be granted. The court will have to decide the application if the documents are shown to be necessary for the disposal of the original petition seeking leave.

25. I.A.No.22 of 2017 was filed requesting to direct the respondents to produce two documents. Those documents are stated to be relevant for deciding whether the 1st respondent is a trust of the nature specified in section 92(1) of the CPC. Paragraphs 10 to 12 of the affidavit filed in support of the said application state that the application is filed since the respondents have questioned the very maintainability of the original petition by contending that the 1st respondent is not a trust. It is thus made clear in the affidavit that the appellants filed the application as the documents mentioned therein are necessary for considering a question relevant for the disposal of the original petition. The court below should have disposed of I.A.No.22 of 2017 before considering the original petition.

26. The learned Additional District Judge has relied on the decisions of this court in Mathew v. Thomas (1982 KLT 493) and Govindan v. Koovalasseri SMK Trust (2001 KHC 527) to hold that interlocutory applications cannot be considered before the grant of leave. We do not think that the aforesaid decisions stand in the way of considering every interlocutory application before the grant of leave. In Mathew''s case (supra) the trial court granted interim leave and considered an application seeking the appointment of a receiver and also an application for attachment of property. The Division Bench has said that there is no provision for granting interim leave. This Court did not interfere with the appointment of receiver and attachment of property since those applications were allowed after allowing the application seeking the leave. Mathew''s case (supra) does not hold that no interlocutory application of whatever nature shall be considered before granting leave.

27. In Govindan''s case (supra) the interlocutory application dealt with was one filed under Order 11, Rule 14 of the CPC to direct production of documents which were necessary for the disposal of the proposed suit. I.A.No.22 of 2017, as already seen, is not such an application. At the risk of repetition we say that I.A.No.22 of 2017 is an application to call for documents which are stated to be

necessary for the disposal of the original petition.

28. I.A.No.22 of 2017 and I.A.No.23 of 2017 which ought to have been disposed of before the disposal of the original petition were not disposed of by the court below. We are not in a position to consider and decide those applications in this appeal. For, the respondents did not get the opportunity to file objections to oppose those applications. They are to be afforded such an opportunity. We therefore have no option but to remand the case back to the court below.

29. We remit the case back to the court below. It is not an open remand. The question that is available for consideration after the remand is whether the 1st respondent is prima facie a trust, express or constructive, created for public purposes of a charitable or religious nature. However, if anything else is to be considered other than those matters considered and concluded by us, such matters can also be considered by the court below. The learned Additional District Judge will dispose of the original petition after the disposal of I.A.No.22 of 2017 and I.A.No.23 of 2017 and any other application which may be filed and which could be disposed of before the disposal of the original petition.

30.In the result, the appeal is allowed. The order impugned in the appeal is set aside. The original petition is remitted back to the court below for disposal anew. The parties shall appear in that court through counsel on 1.3.2017. No costs.

