

(1978) 08 MAD CK 0027
In the Madras High Court

The New College and Others

APPELLANT

Vs

Basheer Mohammed and Others
Basheer Mohamed
and Others Vs The Muslim Educational Association of
Southern India and Others

RESPONDENT

Date of Decision : 19-08-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92
Constitution of India, 1950 — Article 226
Waqf Act, 1954 — Section 63

Citation : (1979) 1 MLJ 145

Hon'ble Judges : P.R. Gokulakrishnan, J

Bench : Division Bench

Judgement

P.R. Gokulakrishnan, J.—The second defendant in un-numbered suit of 1978 who was the second respondent in Application No. 2231 of 1978 is the appellant in O.S.A. No. 82 of 1978. The third defendant in the said suit who was the third respondent in the said application is the appellant in O.S.A. No. 86 of 1978. The first defendant in the said suit who was the first respondent in the said application is the appellant in O.S.A. No. 87 of 1978. These three appeals arise from the order passed by Padmanabhan, J., in Application No. 2231 of 1978 on 26th July, 1978.

2. Application No. 2231 of 1978 was filed by plaintiffs 1 to 5 in un-numbered Civil Suit of 1978 on the file of the High Court (Ordinary Original Civil Jurisdiction) praying for the grant of leave to them for instituting the suit u/s 92 of the Code of Civil Procedure. Padmanabhan, J., by his order in the said application, after observing that the question whether the first respondent has been notified to be a wakf by the Wakf Board and whether consequently the suit is not maintainable for want of prior sanction of the Wakf Board is a matter which has to be decided at the time of the trial and not at the stage of considering question whether leave should be granted for the institution of the suit u/s 92, CPC and that prima facie respondents 1 and 2 do constitute public trusts, granted leave to the

applicants to institute the suit u/s 92, Civil Procedure Code.

Aggrieved by the said order, the aforesaid defendants have preferred the respective appeals.

3. Mr. Govind Swaminathan, the learned Counsel appearing for the appellant in O.S.A. No. 82 of 1978 also argued for the appellants in O.S.A. Nos. 86 and 87 of 1978. The learned Counsel submitted that Sections 2, 4, 5 and 6 of Wakf Act, 1954 (XXIX of 1954) deal with the procedure in respect of declaring certain properties as Wakf properties, Section 6(4) of the said Act states that the list of wakfs published under Sub-section (2) of Section 5 shall, unless it is modified in pursuance of a decision of the civil Court under Sub-section (1) be final and conclusive. Section 55(1) of the Act states:

A suit to obtain any of the reliefs mentioned in Section 92 of the Code of Civil Procedure, 1908, relating to any wakf may, notwithstanding anything to the contrary contained in that section, be instituted by the Board without obtaining the consent referred to therein.

Section 55(2) states

No suit to obtain any of the reliefs referred to in Section 92 of the Code of Civil Procedure, 1908, relating to any wakf shall be instituted by any person or authority other than the Board without the consent in writing of the Board and for the institution of any such suit, it shall not be necessary to obtain the consent referred to in that section, notwithstanding anything contained therein.

Provided that nothing in this sub-section, shall apply in relation to any such suit against the Board.

Referring to the abovesaid provisions, Mr. Govind Swaminathan submitted that when the suit itself cannot be filed as per the provisions contained in Section 55(2) without the consent in writing of the Wakf Board, inasmuch as the Muslims Educational Association of Southern India, situate at No. 49, Peters Road, Royapettah, Madras, has been notified as a wakf property as early as 20th May, 1959, the Court has no power to grant the sanction u/s 92, Civil Procedure Code. The learned Counsel further submitted that in view of Section 4 of the CPC the special provisions contained in the Wakf Act only will apply to the present case and hence the grant of sanction u/s 92, Civil Procedure Code, cannot be sustained. The learned Counsel, after referring to the observations of Padmanabhan, J., to the effect that the conclusion of the learned Judge was fortified by the fact that the Government have issued G.O. 3408, Revenue, dated 17th November, 1959 under which they have exercised their powers u/s 63 of the Wakf Act and have directed that notices issued if any by the Wakf Board to the institutions registered under the Societies Registration Act be withdrawn forth, submitted that Section 63 does not give power to the Government to de-notify a Wakf already notified. Section 63 of the Wakf Act states-

Subject to any directions on questions of policy issued u/s 62, the State

Government may, from time to time, give to the Board such general or special directions as the State Government thinks fit and in the performance of its functions, the Board shall comply with any such directions.

Referring to the above provision, Mr. Govind Swaminathan also referred to G.O.Ms. No. 3408, Revenue, dated 17th November, 1959, which states:

In exercise of the powers vested in them u/s 63 of the Wakf Act, the Government accordingly direct that notices, if any issued by the Wakf Board to institutions aforesaid be withdrawn by them forthwith,

and submitted that such a power cannot be exercised under the provisions of Section 63 of the Wakf Act and further there is absolutely nothing on record to show that the Wakf Board has withdrawn the notification issued by them relating to the Muslim Education Association of Southern India as early as 20th May, 1959.

4. Mr. K.N. Balasubramanian, learned Counsel appearing for the plaintiffs, in the appeals themselves are not maintainable either under Clause 15 of the Letters Patent or u/s 104 of the Code of Civil Procedure. According to the learned Counsel, the order of Padmanabhan, J., cannot be construed as a "judgment", and as per the provisions in Section 104, Civil Procedure Code, an appeal will lie only if leave is refused u/s 92, Civil Procedure Code. The learned Counsel also submitted that u/s 63 of the Wakf Act, the Government have power to direct the Wakf Board to denotify certain properties from the purview of the Wakf Act. According to the learned Counsel, Section 6 of the Wakf Act does not preclude a civil Court from deciding whether a particular property is or is not a wakf. Mr. K.N. Balasubramanian also referred to the decision of the Supremo Court in Charan Singh and Another Vs. Darshan Singh and Others, and submitted that the Court has to look into the plaint only for the purpose of deciding as to whether leave can be granted u/s 92, Civil Procedure Code, or not. Finally, the learned Counsel submitted that the question whether or not the Wakf Act is applicable to the trusts referred to in the plaint can be decided as a preliminary issue in the main suit itself and this cannot in any way come in the way of according sanction u/s 92, Civil Procedure Code.

5. In reply, Mr. Govind Swaminathan, the learned Counsel appearing and arguing for the appellants, submitted that the question of maintainability of the suit can be only-raised at the stage of grant of leave and not subsequently. As per Section 55(2) of the Wakf Act, no suit to obtain any of the reliefs referred to in Section 92, Civil Procedure Code, relating to any wakf shall be instituted by any person or authority other than the Board without the consent in writing of the Board. Hence Mr. Govind Swaminathan submitted that the appellants have to question the right to file the suit only at the time of grant of leave u/s 92, CPC and if not a statutory right granted to them will be very much affected. Various decisions were cited on the question of maintainability of the appeals against the order granting sanction u/s 92, Civil Procedure Code.

6. Counsel for the appellants on record have made an endorsement to the effect that O.S.A. No. 82 of 1978 is not being pressed as against respondents 6 to 9 therein, and O.S.A. Nos. 86 and 87 of 1978 are not being pressed as against respondents 8 to 11 therein. Respondents 1 to 5 in all the appeals, who are the plaintiffs, are represented by Mr. K.N. Balasubramanian, Respondent No. 10 in O.S.A. No. 82 of 1978 is represented by Mr. Abdul Razack, while respondent 11 therein is represented by Mr. V.T. Arasu. Respondent 6 in O.S.A. Nos. 86 and 87 of 1978 is represented by Mr. Abdul Razack, while respondent 7 in both the appeal is represented by Mr. Sivam.

7. We have been taken through the order of Padmanabhan, J., and also through the records filed before the Court below.

8. The main suit, in respect of which sanction has been accorded u/s 92, CPC by the impugned order, is basically for framing a scheme for the proper administration and management of the first defendant Association and also for framing rules for the management of the second defendant College. Various other incidental reliefs, such as removing the third defendant from the Honorary Secretaryship of the first defendant Association and from the post of Secretary cum Correspondent of the second defendant College, and also taking of accounts are prayed for in the plaint. The plaintiffs' case, in a nutshell, is that they are Muslims and are interested in the proper administration and efficient management of the Muslim Educational Association of Southern India (first defendant) which in turn is managing and administering the New College, Madras (second defendant). The first defendant, according to the plaint, is a public religious and charitable trust and was established in the year 1902. It was registered under the Societies Registration Act in 1906. The aims and objects of the first defendant Association, as laid down in its Memorandum, are to devise means for disseminating higher education among Muslims and to promote the study of Urdu, Persian and Arabic; to arrange for imparting religious instruction side by side with secular education; to help the poor but intelligent and deserving, with scholarships, books, school fees, etc; to impress upon the minds of the Muslim public by means of lectures, and social gatherings, and to safeguard and promote the rights and interests of the Muslim community in all spheres of life, especially religious, educational, cultural, social and economic. The first defendant is a trust created for the Muslim community which forms a Section of the general public and is of a charitable and religious nature.

9. The plaint alleges that the office-bearers of the first defendant Association are the President, six Vice-Presidents, Honorary Secretary, Treasurer, three Assistant Secretaries and an Honorary Assistant Treasurer, all elected from among individual members of the Association; 42 other members elected by the General Body of the Association at the annual general body meeting, a legal adviser, the immediate past President and the immediate past secretary. The management of the Association and all its movable and immovable properties are vested in the Executive Committee by virtue of the Rules of the Association. Under Clause 16

of the Rules, the Executive Committee should maintain and manage the New College, Madras (second defendant) in accordance with the terms contained in the Deed of Trust relating to it; manage the scholarships and other endowments and institutions that have been or hereafter may be entrusted to the first defendant Association; administer the scholarship donations or other funds that may be paid to the Association; arrange for election of representatives to the Senate of the Madras and Annamalai Universities and undertake any other work calculated to advance Muslim education in Southern India. Under the Rules, it is the Secretary of the first defendant Association who is in complete charge and management of the affairs of the first defendant Association and also the second defendant College. Under the Rules, the affairs of the second defendant College shall be managed and controlled by the Managing Committee consisting of 9 members, of whom three would be ex-officio members, viz., the President and the Secretary of the first defendant Association and the Principal of the College, one member nominated to it by the Syndicate of the Madras University and five members elected by the Executive Committee of the first defendant Association. The Rules further provide that the President and the Secretary of the first defendant Association shall be the Chairman and the Secretary cum Corresponent of the second defendant College. The management of the second defendant College is thus vested with the Managing Committee consisting of the 9 members as stated supra.

10. It is further stated in the plaint that by the terms of the Registered Deed of Declaration of Trust dated 7th April, 1953, the Executive Committee of the first defendant Association transferred the premises consisting of land and building of an extent of about 210 grounds and 1990 sq. ft. bearing old Door No. 41-B and new Door No. 49, Peters Road, Royapettah, Madras-14 and another property bearing Door No. 11, Singanna Naicken Street, George Town, Madras-1, of an extent of 2 grounds and 767 sq. ft, in favour of the Managing Committee of the second defendant College, in trust for the second defendant, for the proper conduct, maintenance and financial stability of the second defendant College. A copy of the Memorandum of Rules of the first defendant has been produced as Document No. 1; a copy of the Rules of the second defendant College has been produced as Document 2 and a copy of the Deed of Declaration of Trust has been produced as Document 3 along with the plaint.

11. The plaintiffs would allege that the third defendant, A.A. Rasheed, was first elected as the Honorary Secretary of the first defendant Association for one year from 1965 in the general body meeting of the first defendant. He was again re-elected for two more terms. In 1969 the Rules were amended, in and by which the terms of office of any office-bearer or Committee Member of the Association was extended to three years, providing for re-election of the retiring office-bearer or committee member for yet another term of three years for the same office. Pursuant to the amended Rules, the third defendant was re-elected to the post of Honorary Secretary of the first defendant Association for a term of three years and again after the expiry of the said period, for a further term of three

years. The third defendant was in charge of the collection of all donations made to the Association and College by patrons, educationalists, other members of the public and philanthropists. He has been collecting donations ever since he was elected to the post of Honorary Secretary in 1965 till to date.

12. The plaintiffs have specifically alleged in the plaint that the third defendant, with a view to perpetuate his term of office as Honorary Secretary of the first defendant Association, started enrolling ordinary and life members from his relations, friends and employees so as to strengthen his position and get a majority in the first defendant Association. The third defendant, out of the donations made to the College and the Association, instead of crediting the amounts in the accounts of the College and Association as such donations in the names of the respective donors, entered the names of his own henchmen and psychopants as ordinary and life members of the Association fraudulently making it appear as though the amounts were paid by the persons whose names he entered in the registers as members. Thus the third defendant misused and misappropriated the funds of the first defendant Association and second defendant College, and is liable to account for the same. The third defendant has been in charge of the day to day affairs of the second defendant College ever since 1965. He is responsible for the collection of tuition and other fees from the students of the second defendant College.

13. The plaintiffs would further allege in the plaint that owing to the rumours that the third defendant misappropriated large funds, a committee of three members consisting of Mr. Habibullah Badsha, Dr. Syed Khaleefathullah and Dr. J. Azeez-ur-Rahman was constituted and the said committee went through the accounts and vouchers of the College and the counterfoils of the receipts issued by the College, for only a short period of fourteen months at random in the academic years 1974-75 and 1975-76. According to the plaint, the committee was shocked to know of the startling facts, viz., that amounts for which receipts had been issued for the collection of fees from the students did not tally with the daily fee collection register, and in the said period of fourteen months a sum of about Rs. 72,000 did not find a place in the daily fee collection register for which receipts had been issued; that on the expenditure account of the College entries to the extent of Rs. 32,642.84 purported to have been paid in cash were found without any supporting vouchers and the entries for the said sum in the accounts simply mentioned as towards air-conditioning account without any particulars or supporting vouchers in the accounts, though the amount in question was a substantial one. Apart from the abovesaid findings by the committee, the plaint alleges in paragraph 15 thereof as many as 19 instances wherein the third defendant has allegedly mismanaged and mis-appropriated the College funds. According to the plaintiffs, the third defendant, with the active connivance of defendants 4 and 5, mis-appropriated all these amounts. After further narrating various other irregularities, mis-appropriations and mismanagement as having been committed by the third defendant, they aver that the Memorandum and Rules governing the management of the second defendant College do not provide

sufficient safeguards from such malpractices and/or mismanagement of the said institution by any office-bearer, that the affairs of the second defendant College are in absolute chaos, which will ultimately result in complete ruination of the first defendant Association and that if the second defendant College is left in the management of the present committee and the third defendant it will go to ruin.

14. With the abovesaid allegations the plaintiffs have come forward with the suit and would seek leave of the Court u/s 92, Civil Procedure Code, for instituting the suit by means of an Application No. 2231 of 1978 alleging acts of irregularities, mismanagement and misappropriation on the part of the third defendant in relation to these public charitable trusts.

15. The third defendant A.A. Rasheed filed a counter-affidavit denying all the allegations and reserving his detailed statement on the plaint at the appropriate time. Regarding the permission sought for u/s 92, Civil Procedure Code, he has stated that there is no case for granting permission when the entire charges are against one person and are motivated. He has also contended that the plaintiffs have not come with clean hands, that the first defendant-Association is a notified wakf and that therefore no suit u/s 92, Civil Procedure Code, can be filed without getting the consent of the Wakf Board u/s 55 of the Wakf Act. The second defendant is not a trust and hence the reliefs asked for in respect of the second defendant cannot come within the purview of Section 92, Civil Procedure Code.

The third defendant's further contentions inter alia are as follows:

Without alleging or setting out any charges in respect of the management of the first defendant, the plaintiffs cannot come forward with the plea for framing a scheme. The conditions stipulated in Section 92, Civil Procedure Code, have not been satisfied and hence the suit cannot be entertained. The first defendant is not a trust within the meaning of Section 92, Civil Procedure Code, since it has been registered under the Societies Registration Act. The purpose of a society may be charitable but that does not convert the Society into a trust. There are ample provisions available under the Rules of the first defendant Association to take action in respect of the alleged irregularities. The rules and regulations of the College amply provide for guarding against malpractices and mismanagement. The College is running smoothly under the administration of the third defendant. The chaos created was due to the efforts of a few disgruntled members to have the third defendant removed. The reliefs asked for in the plaint are outside the scope of Section 92, Civil Procedure Code.

16. As we have seen in the paragraphs supra, Padmanabhan, J., after perusing the plaint, affidavit, counter-affidavit and also the documents filed, granted leave to the plaintiffs to institute the suit u/s 92, Civil Procedure Code, on being satisfied prima facie that respondents 1 and 2 are public trusts and the proposed suit relates to the said public trusts.

17. We have already set out the arguments advanced by the respective counsel in these appeals, in the foregoing paragraphs. We will first take up the question

of maintainability of those appeals. Section 104, Civil Procedure Code, inter alia provides:

An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders....

(ffa) ...order u/s 91 or Section 92 refusing leave to institute a suit of the nature referred to in Section 91 or Section 92, as the case may be....

Mr. K.N. Balasubramanian, the learned Counsel, contended that inasmuch as Padmanabhan, J., has granted leave u/s 92, Civil Procedure Code, the appeals are act maintainable as per the provision in Section 104 (ffa), Civil Procedure Cede. To the reference made to Clause 15 of the Letters Patent by Mr. Govind Swaminathan, the learned Counsel, in support of the submission that an appeal shall lie to the High Court from the judgment of one Judge of the High Court itself, Mr. K.N. Balasubramanian submitted that such an appeal is available only against a "judgment" and not an "order" granting leave u/s 92, Civil Procedure Code.

Ganpati v. Pilaji AIR 1956 Nag. 211 a Division Bench Judgment of the Nagpur High Court, specifically states that Section 104, Civil Procedure Code, applies to appeals to High Court from Courts subordinate to it and it does not deal with appeals from a Single Judge of the High Court to a Bench under the Letters Patent. It further states that an appeal from the judgment of a Single Judge of the High Court is provided by Clause 10 of the Letters Patent of the Nagpur High Court, which is analogous to Clause 15 of the Letters Patent of the Madras High Court, and such an appeal cannot be said to be barred u/s 104, CPC in the absence of an expres provision. On the other hand, such an appeal can be filed under Clause 15 of Letters Patent by virtue of Section 4 of the Civil Procedure Code.

18. Clause 15 of the Letters Patent clearly confers a right of appeal against the judgment of a Single Judge of the High Court to the very same High Court itself. This right is subject to Clause 44 of the Letters Patent which gives power to the Indian Legislature to restrict, amend or alter such right. Section 104, CPC does not prohibit an appeal from an order granting leave u/s 92, Civil Procedure Code. No doubt, the order of the nature of the one under appeal has not been made as one from which an appeal can be filed u/s 104, Civil Procedure Code. If the order under appeal is construed as a "judgment", the appeals are maintainable under Clause 15 of the Letters Patent. The order granting leave u/s 92, CPC in our view, is a "judgment" as contemplated under Clause 15 of the Letters Patent. One view is fortified by the decision rendered by the Supreme Court in Asrumati Debi Vs. Kumar Rupendra Deb Raikot and Others, . In that case, it has been held that an order under Clause 13 of the Letters Patent of the Calcutta High Court allowing an application for transfer of a suit to the High Court to be tried in its Extraordinary Original Civil Jurisdiction is not a "judgment" within the meaning of

Clause 15 of the Letters Patent for purposes of appeal. While dealing with the said case, the Supreme Court considered the meaning of the word "judgment" and also the conflicting decisions thereon. The Supreme Court also referred to the case of the justices of the Peace for Calcutta v. The Oriental Gas Co. (1872) 8 Beng. L.R. 433 and to the following observations of the Chief Justice of Calcutta therein:

We think that "judgment" in Clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final or preliminary, or interlocutory, the difference between them bring that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined.

Proceeding further, the Supreme Court also referred to the decision in Tuljaram v. Alagappa I.L.R.(1912) Mad. 1 : 21 M.L.J. 1 and to the observations of Sir Arnold White, C.J., therein - to find out whether an order is a "judgment" or not, in the following words--

We have to look to its effect upon the particular suit or proceeding in which it is made. If its effect is to terminate the suit or proceeding, the decision would be a "judgment" but not otherwise....

The learned Chief Justice qualifies the general proposition laid down above by stating that

an adjudication on an application, which is nothing more than a step towards obtaining a final adjudication in the suit, is not a judgment within the meaning of the Letters Patent.

The Supreme Court, after considering the above two decisions, held that an order under Clause 13 of the Letters Patent, which is for transferring a suit, does not satisfy the test of a "judgment" as formulated by the above said two decisions of the High Courts. Proceeding further, the Supreme Court observed-

On the other hand, an order of transfer under Clause 13 of the Letters Patent, is in the first place, not at all an order made by the Court in which the suit is pending. In the second place, the order does not put an end to the suit which remains perfectly alive and that very suit is to be tried by another Court, the proceedings in the latter, to be taken only from the stage at which they were left in the Court in which the suit was originally filed.

The Supreme Court also distinguished in that case an order for transfer and an order rescinding or refusing to rescind leave to sue granted under Clause 12 of the Letters Patent (of the Calcutta High Court). According to the Supreme Court, the order rescinding or refusing to rescind leave to sue granted under Clause 12 of the Letters Patent is a "judgment" coming within the purview of Clause 15 of the Letters Patent.

19. In the present case, the grant of leave definitely determines some right or liability of a party. Such preliminary or interlocutory determination, according to Justices of the Peace for Calcutta v. The Oriental Gas Co. (1872) 8 Beng. L.R. 733 and Asrumati Debi v. Kumar Rupendra Deb, Rajkot (1872) 8 Beng. L.R. 733 is a "judgment". This view in Justices of the Peace for Calcutta v. The Oriental Gas Co. 1953 S.C.J. 300 : (1953) 1 M.L.J. 710 (S.C.), found favour with the Supreme Court and was followed in Tuljaram v. Alagappa I.L.R.(1912) Mad. 1 : 21 M.L.J. 1. No doubt, the Supreme Court approved the observations of the Chief Justice in Tuljaram v. Alagappa I.L.R.(1912) Mad. 1 : 1912 21 M.L.J. 1, in the following words-

an adjudication on an application, which is nothing more than a step towards obtaining a final adjudication in the suit, is not a judgment within the meaning of Letters Patent.

20. Shanti Kumar R. Canji Vs. The Home Insurance Co. of New York, , deals with the definition of "judgment" which alone enables the affected party to prefer an appeal under Letters Patent. In that decision, the Supreme Court has held that when an amendment takes away from the defendant the defence of immunity from any liability by reason of limitation, it is a "judgment" within Clause 15 of the Letters Patent; it is a decision affecting the merits of the question between the parties by determining the right or liability based on limitation, and it is the final decision as far as the trial Court is concerned. Discussing on this aspect, the Supreme Court noticed the decision rendered in Asrumati Debi v. Rupendra Deb 1953 S.C.J. 300 : (1953) 1 M.L.J. 710 wherein an argument was advanced that if an order refusing to rescind leave to sue granted under Clause 12 of the Letters Patent was a judgment under Clause 15 of the Letters Patent then there was no difference in principle between an order of that description and an order transferring the suit under Clause 15 of the Letters Patent. On this argument, the Supreme Court in Asrumati Debt's case 1953 S.C.J. 300 : (1953) 1 M.L.J. 710 held that if leave under Clause 12 of the Letters Patent was rescinded the suit would come to an end and if an order was made refusing to rescind the leave the result would be on a vital point adverse to the defendant and it would go to the root of the suit and become final and decisive against the defendant so far as the Court making the order was concerned. Quoting the decision in Asrumati Debi Vs. Kumar Rupendra Deb Raikot and Others, , the Supreme Court observed in Shanti Kumar R. Canji Vs. The Home Insurance Co. of New York, , that in finding out whether any decision is a judgment within the meaning of Clause 15 of the Letters Patent each case must be looked into in order to find out as to whether there is a decision determining the right or liability of the parties affecting the merits of the controversy between the parties". The Supreme Court also referred to Tuljaram v. Alagappa I.L.R.(1912) Mad. 1 : 1912 21 M.L.J. 1, wherein our High Court has stated thus:

If the effect is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not

complied with, is to put an end to the suit or proceeding, the adjudication is a "judgment".

After quoting these decisions and observing that

The views of the High Courts at Calcutta and Madras with regard to the meaning of "judgment" are with respect preferred to the meaning of "judgment" given by the Rangoon and Nagpur High Court,

the Supreme Court held-

The right to claim that an introduction of a cause of action by amendment is barred by limitation is founded on immunity from a liability. A right is an averment of entitlement arising out of legal rules. A legal right may be defined as an advantage or benefit conferred upon a person by a rule of law. Immunity in short is no liability. It is an immunity from the legal power of some other person. The correlative of immunity is disability. Disability means the absence of power. The appellant in the present case because of the limitation of the cause of action has no power to render the respondent liable for the alleged claim. The respondent has acquired by reason of limitation immunity from any liability.

Ultimately, the Supreme Court held-

In finding out whether the order is a judgment within the meaning of Clause 15 of the Letters Patent it has to be found out that the order affects the merits of the action between the parties by determining some right or liability. The right or liability is to be found out by the Court. The nature of the order will have to be examined in order to ascertain whether there has been a determination of any right or liability.

No doubt, the decision of a Division Bench of our High Court in Haji K.M. Abdul Kasim and Others Vs. P.M.N. Mohammed Dawood and Others, states-

...It is conceded that the Board (Wakf Board) can under the provisions of Section 55(1), even without an enquiry file a suit for any or all the reliefs u/s 92 of the Civil Procedure Code. If the Board can do that even in a case where the Advocate-General has not considered the matter, there will be less reason for an enquiry where there is his sanction. It follows that a consent given by the Wakf Board u/s 55(2) neither involves an adjudication of rights of parties, nor need it be given after an enquiry or on the basis of any judicial adjudication. The question is more or less one of expediency of permitting a suit to be filed. Such a duty on the part of the Board cannot be regarded as a quasi-judicial act to entitle this Court to interfere under Article 226 (of the Constitution of India).

Thus, in the above decision the Division Bench while considering whether a rule nisi under Article 226 of the Constitution can issue calling upon the Wakf Board to produce its records with a view to quash its order u/s 55(2) of the Wakf Act, held that the consent given by the Wakf Board u/s 55(2) cannot be considered as a quasi-judicial act. Incidentally, the Division Bench also referred to the sanction

to be given by the Advocate-General u/s 92, Civil Procedure Code.

21. Apart from the fact that power given to the Advocate-General has now come to vest with the Court concerned, the decisions rendered in *Asrumati Debi Vs. Kumar Rupendra Deb Raikot and Others*, and *Shanti Kumar v. H. Ins. Co., New York* (1975) 1 S.C.J. 187 : AIR 1974 S.C. 1919 make it clear that the nature of the order will have to be examined in order to ascertain whether there has been a determination of any right or liability. In *Asrumati Debi Vs. Kumar Rupendra Deb Raikot and Others*, it has been held that if leave under Clause 12 of the Letters Patent was rescinded the suit would come to an end and if an order was made refusing to rescind the leave the result would be on a vital point adverse to the defendant and it would go to the root of the suit and become final and decisive against the defendant so far as the Court making the order was concerned.

22. Considering the observations made by the Supreme Court and also the fact that the power has now come to vest with the Court, it is clear that if leave to institute the suit is granted, the defendants are losing the right to prohibit the plaintiffs in getting the sanction u/s 92, CPC thereby preventing them from proceeding with the suit.

23. The grant of leave, in question before us, once for all decides the right of the plaintiffs to get the leave u/s 92, CPC and negatives the contention of the appellants that leave should not be granted. This order, though preliminary or interlocutory in nature, definitely determines some right or liability of the parties to the suit.

24. In this connection we can usefully quote the decision in *L.Ct.L.P.L. Palaniappa Chettiar and Another Vs. M.R. Krishnamurthy Chetty and Others*, where, a Full Bench of our High Court while dealing with *Asrumati Debi Vs. Kumar Rupendra Deb Raikot and Others*, has observed-

From the Supreme Court decision, it appears to us that four tests can be clearly formulated, and not merely two, as was thought to be the case by the Division. Benches of this Court in *Union of India (UOI) Vs. S.S. Shanmugha Nadar*, and *Cork Industries and Others Vs. A. Govindarajulu Mudaliar*, . Three of those tests may be termed as tests of a positive character, and the last is really negative but there can be no doubt that it also has relevance and force. The tests are : (1) whether the order or judgment of the single Judge terminates the suit or proceedings? (2) Whether it affects the merits of the controversy between the parties in the suit itself? (3) A test that can be considered as a refinement of test No. 2, but which upon juristic principle should be separately stated, namely, whether it determines some right or liability as between the two parties? and (4) the negative test that has found express recognition in the dicta of White, C.J., with reference to *Vaghoji Kuverji v. Camaji Bomanji* I.L.R.(1905) 29 Bom. 249 and has not been disapproved by their Lordships of the Supreme Court in *Asrumati Devi v. Kumar Rupendra Deb Raikot* 1953 S.C.J. 265 : 77 L.W. 491 :

ILR (1964) Mad 42 but which, instead, would appear to have been impliedly approved, namely, whether, apart from actual order in the lis or proceeding, "a conceivable order", or an order to the contrary effect, would have disposed of the suit and would come within the definition of "judgment"? Very simply stated, since the order declining leave to sue in *ferma pauperis* is indisputably a "Judgment" and is appealable, an order granting leave in the same Us or proceeding, determining the same right and liability, would also be a "judgment", for the simple reason that the other possible order would have terminated the suit its elf. The difficulty with regard to the acceptance of the test in *Cork Industries v. A. Govindarajulu Mudaliar* (1964) 2 M.L.J. 265 : 77 L.W. 491 : ILR (1964) Mad. 42 is that only two tests are formulated, and there is no reference at all to the test of a "conceivable order" in the lis, which would terminate the proceeding.

Considering the principles laid down in the abovesaid decisions, we are of opinion that the order granting leave u/s 92, CPC is a "judgment" coming within the meaning of Clause 15 of the Letters Patent and as such the appeals are maintainable.

35. Mr. Govind Swaminathan, the learned Counsel appearing for the appellants strenuously argued that Section 55 of the Wakf Act (XXIX of 1954) is a clear bar to the suit since no consent in writing of the Board has been obtained for filing a suit. According to Mr. Govind Swaminathan, this contention can be raised at the stage when leave is sought u/s 92, CPC and the same cannot be raised subsequent to the entertainment of the suit. A reading of Section 55(2) of the Wakf Act would clearly show that the reliefs referred to in Section 92, CPC cannot be claimed in respect of wakf property or such suit cannot be instituted before the consent in writing of the Board is obtained. This does not mean the question of maintainability of the suit in view of Section 55(2) of the Wakf Act, cannot be agitated in the suit itself either as a preliminary issue or along with other issues arising in the suit. The argument that Section 63 of the Wakf Act has been invoked by the Government for de-notifying the trust is countered by stating that the said Section is not available for de-notifying a wakf already notified. These contentions, in our opinion, are however, matters to be decided at the time "f the trial and not at the stage of considering the question whether leave should be granted for instituting the suit u/s 92, Civil Procedure Code. We make it clear that the observations of Padmanabhan, J., to the effect that the conclusion of the learned Judge is fortified by the fact that the Government has issued G.O.Ms. No. 3408, Revenue, dated 17th November, 1959, under which they have exercised their powers u/s 63 of the Wakf Act and have directed that notices issued if any by the Wakf Board to the institutions registered under the Societies Registration Act be withdrawn forthwith, cannot be taken as upholding the de-notification alleged in the plaint. We also make it clear that the question is at large and can be agitated at the trial of the suit. When we say trial of the suit, we mean either at the time of deciding the preliminary issue or while finally disposing of the suit.

26. The learned Judge went into the documents which were filed along with the plaint as document Nos. 1 to 3 and prima jade got satisfied that the first and second defendants do constitute public trusts and that the proposed suit relates to those trusts. We have also perused the copy of the Memorandum of Rules of the first defendant, which is document No. 1, copy of the Rules of the second defendant College which is document No. 2 and copy of the Deed of Declaration of Trust which is document No. 3. These documents read with the serious allegations levelled against the third defendant in the plaint prima Jade establish that the first and second defendants constitute public trusts and the serious allegations made in the plaint against the third defendant, if ultimately proved, will be sufficient for removing him from the office of secretaryship of the first defendant as well as of the second defendant College. It has been sucocictly stated that to accord sanction u/s 92, CPC the Court has to look into the plaint allegations only for its satisfaction to grant or to refuse to grant the leave. In Abdul Razack Sahib and Others Vs. A. Abdul Hamid Said and Others, a Bench of this Court has categorically stated-

It is well-settled that, to determine whether a suit falls within Section 92 of the Code of Civil Procedure, we have to look at the plaint and the allegations therein and not to the written statement.

This statement of law has been reiterated in Charan Singh and Another Vs. Darshan Singh and Others, , wherein the Supreme Court has observed that it is well-settled that the maintainability of the suit u/s 92, CPC depends upon the allegations in the plaint and does not fall for decision with reference to the averments in the written statement. Inasmuch as we are prima facie satisfied on the plaint allegations that the first and second defendants do constitute public trusts and that the proposed suit relates to the said public trusts, the leave granted to the plaintiffs to institute the suit u/s 92, CPC is in order.

27. In these circumstances, and with the abovesaid observations, these appeals are dismissed with costs. Counsel's fee : one set.