

(1984) 07 MAD CK 0056
In the Madras High Court

T.M. Shanmugam and Others

APPELLANT

Vs

The Periyar Self Respect Propaganda Institution and Others

RESPONDENT

Date of Decision : 10-07-1984

Acts Referred:

Citation : (1984) 97 LW 480 : (1984) 2 MLJ 440

Hon'ble Judges : K. Venkataswami, J

Bench : Division Bench

Judgement

K. Venkataswami, J.—Application No. 2208/78 is filed by the defendants 1 and 2 in C.S. No. 170/78 for revoking the leave granted to the plaintiffs in Application No. 1427/78 without notice to the defendants by an order dated 3-4-78 u/s 92 of the Code of Civil Procedure. Application No. 376/84 is again filed by the defendants 1 and 2 to dismiss the suit C.S. No. 170 of 1978 as not maintainable.

2. C.S. No. 170 of 1978 was filed under Order IV Rules 2 of Original Side Rules read with Order VII Rule 1 of the CPC after obtaining leave of the Court u/s 92 C.P.C., for removal of the second defendant from the Secretaryship of Periyar Self respect Propaganda Institution (first defendant) and for other consequential reliefs, including appointment of a receiver for taking over charge of the first defendant institution. It is seen from the papers that application No. 1427 of 1978 was filed u/s 92 C.P.C., read with Order XIV, Rule 8 of the Original Side Rules by the Applicants/Plaintiffs for leave to institute the suit for the purpose of settling the scheme in respect of first defendant institution on 31-3-1978. That application was ordered by S. Natarajan, J., on 3-4-1978 without ordering notice to the defendants/respondents 1 and 2. After obtaining the leave, the suit was filed on 3-4-1978 and numbered on 6-4-1978. After the suit was taken on file, it appears that Application No. 1549/ 78 was taken out to restrain the defendants 1 and 2 from alienating all or any of the properties moveable or Immovable belonging to the first defendant institution in any way whatsoever pending disposal of the application for appointment of receiver. In that application counsel appeared for defendants 1 and 2 and took notice. At that time, Application No.

2208/78 was filed for revoking the leave granted ex parte as stated above on 3-4-78. However, that application was not disposed of earlier and when the suit was ready for hearing, the defendants 1 and 2 have taken out another application No. 376 of 1984 to dismiss the suit as not maintainable.

3. Mr. G. Ramaswami, learned Counsel appearing, for the applicants/defendants 1 and 2 submitted that a Division Bench of this Court in *The New College and Others Vs. Basheer Mohammed and Others*, , has held that the order granting leave u/s 92 C.P.C., is a judgment coming within the meaning of Clause 15 of the Letters Patent and as such appealable. On the basis of this judgment, it is contended that the leave of Court u/s 92 must be given only after notice to the defendants. In this connection, the learned Counsel relied on a judgment of Kader, J., in C.S. No. 394 of 1978 dated 9-8-1983. Under similar circumstances, the learned Judge has held as follows:

In *The New College and Others Vs. Basheer Mohammed and Others*, , the question that came up before the Division Bench was whether an appeal would lie against an order of a single Judge of this Court granting leave to the Plaintiffs to institute a suit u/s 92 of the Code of Civil Procedure. After reviewing the various authorities, the Bench held that the order granting leave to sue u/s 92 is a judgment coming within the meaning of Clause 15 of the Letters Patent and the appeal there against is maintainable. It follows that the order granting permission is not administrative but judicial in character. Judgment means and involves the deciding of a dispute in a judicial manner after hearing both the parties. The leave granted to the plaintiffs to institute this suit u/s 92 of the CPC without notice to the defendants is therefore void in law.

In the light of these pronouncements, it is the contention of the learned Counsel for the applicants that the leave already granted is void in law, which means non est in law and entertaining and numbering of the suit pursuant to an order which is non est in law will have to be removed from the file.

4. Mr. N.C. Raghavachari, learned Counsel for the plaintiffs in view of the Judgment of Kader, J., conceded to a limited extent that the order passed in application No. 1427 of 78 will go and the application will have to be heard afresh after giving notice to the counsel for the defendants. In support of that, he also relied on the following passage in the judgment of Kader, J.

It cannot however be contended that the suit is not maintainable because of the leave granted ex parte. Application No.3082 of 1978 has to be reopened and orders have to be passed after hearing the defendants.

In addition to this, Mr. N.C. Raghavachari, the learned Counsel for the plaintiffs also relied on a judgment of the Supreme Court in *Charan Singh and Another Vs. Darshan Singh and Others*, . In that decision, the Supreme Court has held:

It is well settled that the maintainability of the suit u/s 92 of the Code depends upon the allegations in the plaint and does not fall for decision with reference to

the averments in the written statement.

Placing reliance on the above sentence, the learned Counsel contends that in the plaint there are necessary averments warranting grant of leave to sue u/s 92 and therefore, the application can be ordered after issuing notice and hearing the defendants.

5. Mr. G. Ramaswami, the learned Counsel for the applicants invited my attention to the language employed in Section 92 C.P.C. Section 92 C.P.C. (relevant portion) reads as follows:

92. Public charities-(1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the leave of the Court, may institute a suit, whether contentious or not, in the principal civil Court of Original Jurisdiction or in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree.

Particular reliance is placed by Mr. G. Ramaswami, on the underlined portion in the above extract. The contention of Mr. G. Ramaswami, is that for instituting the suit itself, the obtaining of the leave of the Court is a condition precedent. Therefore, the suit instituted, entertained and numbered on the unsustainable order granting leave, cannot be cured by hearing the very same application once over. In this connection, he placed reliance on the Division Bench Judgment of this Court in *The Clan Line Steamers Ltd. Vs. Gordon Woodroffe and Co. (Madras) Pvt. Ltd. and Others*, . The head note reads as follows:

Where leave under Clause 12 is necessary, the granting of such leave is a condition precedent to the court having jurisdiction to entertain the suit and therefore such leave has to be obtained at the time of the institution of the suit. If, on a consideration of the evidence let in during the trial it is decided that the first defendant is not carrying on business within the jurisdiction of the High Court, and leave to sue was required, the defect of not obtaining leave at the time of the institution of the suit cannot be cured by subsequently granting leave under C1. 12.

He also placed reliance on the language employed in Section 92 C.P.C, as stated above. Section 92 C.P.C, clearly contemplates obtaining of leave as a condition precedent for the institution of the suit., As a matter of fact, as pointed out at the beginning, the suit itself was instituted and numbered subsequent to the order of the Court granting leave to sue. Therefore, if the order granting leave is void in law as held by Kader, J., the logical consequence will be, the further action taken pursuant to that order must go, namely the institution of the suit and numbering of the suit and other proceedings taken thereafter. No doubt, Kader, J., in CS. No. 394 of 1974, after holding that leave granted ex parte, is

void in law held further that the application for leave to sue can be reopened and orders can be passed after hearing the defendants. But, it does not appear from the judgment that the counsel appearing for the defendants pursued the matter further for the dismissal of the suit placing reliance on the language employed in Section 92 C.P.C, as has been done by Mr. G. Ramaswami, learned Counsel for the applicants. Further, it is seen from the judgment that apart from the defect in granting leave to sue u/s 92, the learned Judge has also held that the suit was not maintainable under the Charitable and Religious Trust Act, 1920. In this case, as noticed above, there are two applications by the defendants 1 and 2, one for revoking the leave granted to the plaintiffs u/s 92 C.P.C, and the other for dismissal of the suit as not maintainable on the ground that the leave to sue granted, was void in law. The suit is maintainable u/s 92 C.P.C Subject to leave being granted by the Court after hearing the defendants is one aspect of the matter and whether the suit originally instituted and numbered on the basis of a void order granting leave can be allowed to remain on record notwithstanding the voidity of the order granting leave, is another aspect. The latter aspect, with due respect, was not brought to the notice of the learned Judge and therefore, was not considered. I am therefore, of the view that no reliance can be placed by Mr. N.C. Raghavachari, on the latter portion of the judgment of Kader, J., in C.S. No. 394 of 1978.

6. I hold that the leave granted to the plaintiffs to institute the suit u/s 92 C.P.C., without notice to the defendants is void in law and the logical consequence of which will be that the institution and numbering of the suit cannot be validly sustained in law and therefore liable to be dismissed on the technical ground. However, this will not stand in the way of the plaintiffs, if so desired, to institute afresh proceedings in accordance with law u/s 92 C.P.C.

7. In the result, application No. 376/84 is allowed and the suit is dismissed. In view of the order passed in Application No. 376 of 1984, no order is necessary in Application No. 2208 of 1978. However, there will be no order as to costs.