

(1984) 07 MAD CK 0035

In the Madras High Court

Case No : C.S. No. 170 and 1978 and Application No's. 2208 of 1978 and 378 of 1984

T.M. Shanmugham and Others

APPELLANT

Vs

The Periyar Self-respect Propaganda Institution and Others

RESPONDENT

Date of Decision : 10-07-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92
Original Side Rules — Order 14 Rule 8, Order 4 Rule 2

Citation : AIR 1985 Mad 93

Hon'ble Judges : Venkataswami, J

Bench : Single Bench

Advocate : G. Ramaswami, for the Appellant; N.C. Raghavachari, for the Respondent

Judgement

1. Application No. 2208 of 1978 is filed by the defendants 1 and 2 in C. S. 170 of 1978, for revoking the leave granted to the plaintiffs in

Application No. 1427 of 1978, without notice to the defendants by an order dated 3-4-1978 under S. 92 of the Civil P.C. Appln. No.376 of

1984 is again filed by the defendants 1 and 2 to dismiss the suit C.S. 170 of 1978 as not maintainable.

2. C. S. No. 170 of 1978 was filed under O. IV, R. 2 of Original Side Rules read with Order VII, Rule 1 of the Civil P.C., after obtaining leave of

the Court under S. 92, Civil P.C. for removal of the second defendant from the Secretary ship of Periyar Self Respect Propaganda Institution (first

defendant) and for other consequential relief, including appointment of a receiver for taking over charge of the first defendant institution. It is seen

from the papers that Appln No. 1427 of 1978 was filed under S. 92, Civil P.C. read with O. XIV, R. 8 of the Original Side Rules by the

applicants plaintiffs for the leave to institute the suit for the purpose of settling the respect scheme in respect of first defendant institution on 31-3-

1978. That application was ordered by S. Natarajan on 1978 without ordering notice to the defendants/respondents 1 and 2. After obtaining the

leave, the suit was filed on 341978 and numbered on 6-4-1978. After the suit was taken on file, it appears that Appln No. 1549 of 1978 was

taken out to restrain the defendants 1and 2 from alienating all or any of the properties movable 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 1and 2, and took notice. At that time Appln. No.2268 of 1978 was filed for revoking the leave granted ex party as stated above on 3-

4-1978. However, that application was not disposed of earlier and when the suit was ready for hearing, the defendants 1and 2 have taken out

another application No. 376 of 1984, to dismiss the suit as not maintainable.

3. 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 under S. 92, Civil P.C. is a judgment coming

within the meaning of Cl. 15 of the Letters Patent and as such appealable. On the basis of this judgment, it is contended that the leave of Court

under 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 the

appeal would lie against an order of a single Judge of this Court granting leave to the plaintiffs to institute a suit under S. 92 of the Civil P.C. After

reviewing the various authorities, the Bench held that the order granting leave to sue under S. 92 isajudgment coming within the meaning of cl. 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 a judicial manner after hearing both the parties. The leave granted to the plaintiffs

to institute the suit under S. 92 of the Civil P.C., 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 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 Appln No. 1427 of 1978 will go and the application will have to be heard afresh after giving notice to the counsel for the defendant. 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 party. Appln 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 under S. 92 of the Code depends upon the allegations in the plaint and does not fail, 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 under S. 92, and, therefore, the application can be ordered after issuing notice and hearing the defendants.

5. G. Ramaswami the learned counsel for the applicants, invited my attention to the language employed in S. 92, Civil P.C. S. 92 Civil 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 G. Ramaswami on the underlined portion in the above extract. The contention of 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 ranting 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:

Whether leave under Cl.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 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 Cl. 12,

He also placed reliance on the language employed in S. 92 Civil P.C. as stated above. S. 92 Civil 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 C. S. 394 of 1974, after holding that leave granted ex party, is void in law and 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 S. 92 Civil 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 under S. 92, the learned Judge has also held that the suit was not maintainable under the

Charitable and Religious Trusts Act, 1920. In this case, as noticed above, there are two applications-by the defendants I and 2, one for revoking

the leave granted to the plaintiffs under S. 92, Civil 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 under S. 92, Civil 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 voidness 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 N.

C. Raghavachari on the latter portion of the judgment of Kader J. in C. S. 394 of 1978.

6. I hold that the leave granted to the plaintiffs to institute the suit under S. 92 Civil 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 under S. 92 Civil P. C.

7. In the result, Application No. 376 of 1984 is allowed and the suit is dismissed. In view of the order passed in Appln No. 376 of 1984, no order

is necessary in Appln No. 2208 of 1978. However, there will be no order as to costs.

8. Order accordingly.