

(2008) 10 MAD CK 0112

In the Madras High Court

Case No : Civil Revision Petition (NPD) No. 1287 of 2007 and M.P. No. 1 of 2007

V.L. Ramanathan

APPELLANT

Vs

Salem Nagarathar Sangam

RESPONDENT

Date of Decision : 21-10-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 2(2)
Constitution of India, 1950 — Article 227

Citation : (2008) 5 CTC 792 : (2009) 1 MLJ 1174

Hon'ble Judges : S. Tamilvanan, J

Bench : Single Bench

Advocate : V. Lakshmi Narayanan, for the Appellant; D. Ravichander, for T.R. Rajaraman, for the Respondent

Final Decision : Allowed

Judgement

S. Tamilvanan, J.—This Civil Revision Petition has been preferred against the Order and Decretal order, dated 05.04.2007 passed in O.S. No. 816 of 2005 on the file of the Principal District Munsif Court, Salem.

2. The revision petitioner is the plaintiff and respondents herein are the defendants 1 to 4 in the suit. The suit was filed seeking a decree, directing the respondents 2 to 4 to render true and proper accounts of the first respondent Sangam, to appoint a Commissioner to carryout the direction to be given by the court below in rendition of accounts and for permanent injunction restraining the respondents 2 to 4 herein from transferring the properties of the first respondent Sangam to any trust and for other consequential relief.

3. It is seen that the suit was taken on file by the court below, then, the respondents herein, as defendants filed their written statement and subsequently, the following issues were framed for the disposal of the suit:

1. Whether the first defendant is a Public Charitable Trust ?
2. Whether the suit filed without permission as requires u/s 92 of CPC is

maintainable ?

3. Whether this Court has jurisdiction to try the suit ?

4. Whether D2 to D4 has to render the account of D1 Sangam for the period from April 2001 to till date ?

5. Whether Commissioner can be appointed for rendition of accounts ?

6. Whether plaintiff is entitled injunction against D2 to D4 from getting term loans from I.O.B, Salem ?

7. Whether permanent injunction can be granted against D2 to D4 from transferring the properties of D2 Sangam to Trust ?

8. Whether court fee paid on the plaint is correct ?

9. What relief ?

4. After framing of issues, the case was posted for trial. Though no witness was examined on either side, Exs.A1 to A7 were marked on the side of the petitioner/plaintiff, however, no document was marked on the side of the respondents/defendants and after hearing the arguments advanced by both sides, the trial court passed the impugned order, whereby the trial court has decided only the issues 1 to 3 as preliminary issues against the plaintiff and ordered for return of the plaint to the plaintiff to be presented before the proper court, on the ground that the trial court has no jurisdiction to try the suit. Aggrieved by which, this Civil Revision Petition has been preferred by the plaintiff, the revision petitioner herein.

5. It is not in dispute that the first respondent is a society, registered under the Tamil Nadu Society Registration Act. However, the trial court has given a finding that it is a public trust, which has been formed for public purpose. The court below has held that the first respondent is a public trust and hence, the plaintiff could have obtained prior permission u/s 92 of the CPC before filing the suit against the first respondent herein and issues 1 and 2 were answered against the plaintiff and for issue number 3, the trial court held that it has got no jurisdiction to try the suit and as per the impugned order, the plaint was returned with a direction to present the same before the proper court.

6. Mr. V. Lakshmi Narayanan, learned Counsel appearing for the petitioner submitted that the relief sought for in the suit among other grounds could establish that the suit is not one fall u/s 92 CPC and hence, no leave is required u/s 92 of the CPC to maintain the suit. According to the learned Counsel appearing for the petitioner, the plaintiff is only a society registered under Tamil Nadu Society Registration Act and none of the relief claimed by the plaintiff would show that it is a public Trust. The revision petitioner/plaintiff has also not sought any relief to frame any scheme for the first defendant's Sangam and further, according to the petitioner, the allegation made in the affidavit in I.A. No. 436 of 2007 is incorrect and instead of rejecting the application filed by the

respondents, the plaint has been returned by the court below, after deciding some of the issues, which according to him is a gross abuse of process of court. The contention of the learned Counsel appearing for the petitioner is that the court below has no jurisdiction to return the plaint on the reasons set forth in the order. In support of his contention, he relied on the following decisions:

1. Rajamanickam, K (died) v. Periyar Self-respect Propaganda Institution, Tiruchirapalli 2006 (2) M.L.J. 528

2. The Judgment passed in Civil Revision No. 788 of 1979.

7. Per contra, Mr. D. Ravichander, learned Counsel appearing for the respondents submitted that the revision preferred under Article 227 of the Constitution of India is not maintainable. According to the learned Counsel appearing for the respondents, the petitioner could have preferred only an appeal against the order passed in the suit and not the Civil Revision Petition. In support of his contention, he relied on the following decisions:

1. Manoharan, S. v. T. Mayakkannan 2008 (2) CTC 650

2. Nesammal and another Vs. Edward and another,

3. Ajay Bansal v. Anup Mehta and Ors. 2007 (1) Supreme 667

4. Mohd. Yunus Vs. Mohd. Mustaqim and Others,

5. D. Ganesan and others Vs. M.S. Chandra Bose and another,

6. Kesavan, A v. Madurai Kamaraj University 2001 1L.W 100

8. In the decision, Ajay Bansal v. Anup Mehta and Ors. reported in 2007 (1) Sup 667, the Hon"ble Apex Court has held that ordinarily an application under Article 227 of the Constitution of India would not be maintainable where an appeal lies. An appeal lay from the decree u/s 96 of the Code. When an appeal could be filed, ordinarily, a revision petition, under Article 227 of the Constitution of India would not be entertained. According to the learned Counsel for the petitioner, there is no appeal provision against the impugned order, similarly, there is no alternative remedy available for the petitioner. Hence, this revision preferred under Article 227 of the Constitution is maintainable.

9. In the decision, Mohd. Yunus Vs. Mohd. Mustaqim and Others, , it has been held that a mere wrong decision without anything more is not enough to attract the jurisdiction of the High Court under Article 227. The supervisory power conferred on the High Courts under Article 227 of the Constitution is limited "to seeing that an inferior Court or Tribunal functions within the limits of its authority" and not to correct an error apparent on the face of the record, much less an error of law. In exercising the supervisory power under Article 227, the High Court does not act as an Appellate Court or Tribunal.

10. It is a well settled proposition of law that where there is an appeal provision, revision will not lie before this Court. Similarly, an error apparent on the fact of

the record, much less an error of law cannot be corrected, invoking Article 227 of the Constitution, by way of review or re-weigh the evidence upon which the determination of the inferior court or tribunal purports to be based or to correct errors of law in the decision, is not permissible by way of revision, under Article 227 of the Constitution.

11. This Court in the decision, Manoharan, S. v. T. Mayakkannan reported in 2008 (2) CTC 650, has held that an order rejecting a plaint, as per Order 7, Rule 11 is a decree in terms of Section 2(2) CPC and hence, revision under Article 227 is not maintainable.

12. In the decision, Nesammal and another Vs. Edward and another, this Court has held that an order rejecting the plaint is a decree, against which Appeal lies u/s 96 of the CPC and hence, revision is not maintainable under Article 227 of the Constitution. Mr. D. Ravichander, learned Counsel appearing for the respondents relying on the decision submitted that the revision is not maintainable.

13. Mr. V. Lakshmi Narayanan, learned Counsel appearing for the petitioner submitted that the aforesaid decisions are not applicable to the facts and circumstances of this case. According to him, there is no appeal provision against the impugned order passed by the court below and that there was no order, rejecting the plaint by the court below, but the court below, after deciding some of the issues, has only returned the plaint with a direction to be presented in the proper court.

14. It is not in dispute that the suit was filed on 24.08.2005 and the impugned order was passed on 05.04.2007. After the case was taken on file, it is seen that the defendants have filed their written statement, considering the pleadings of both the parties, the court below has framed nine issues and subsequently, the suit was also posted for trial. In the plaint averments, the petitioner/plaintiff has stated that the first respondent's Sangam consists of people of a particular community, namely the Nagarathar community of Salem and the petitioner herein is admittedly an Executive Member in the Sangam (Association). The first respondent Sangam is only a registered association under the Society Registration Act. In support of his contention, he has also produced the copy of the bye-laws, which was marked as Ex.A.1 before the trial court.

15. In the written statement, it has been admitted that the first respondent is a society, registered under the Tamil Nadu Society Registration Act, 1975 and the petitioner/plaintiff is a member in the Executive Committee of the respondent society and that the respondents 2 to 4 are also belong to Nagarathar community of Salem. It has been admitted that the first respondent has not been registered as a Trust under Indian Trust Act, 1882. In the accompanying affidavit filed in I.A. No. 436 of 2007 by the second respondent herein, the respondent has averred that the suit falls within the purview of Section 92 of CPC. According to the learned Counsel appearing for the petitioner, as per the plaint averments,

the first respondent is not a public trust and admittedly, it is a society registered under the Tamil Nadu Society Registration Act and therefore, the finding of the trial court is contrary to law. Further, after filing written statement by the defendants and nine issues having been framed, respondents filed the Interlocutory Application in I.A. No. 436 of 2007, seeking an order to try the issues 1 to 3 relating to the suit as preliminary issues.

16. This Court in the decision, *Rajamanickam, K (died) v. Periyar Self-respect Propaganda Institution, Tiruchirapalli* reported in 2006 2 M.L.J. 528, has held as follows:

9. In order to maintain the suit u/s 92 C.P.C, the petitioners/plaintiffs should show the existence of a Trust and the alleged breach of the terms of the Trust; besides which the interestedness of the petitioners/plaintiffs in the running of the Trust shall also be made known.

10. But as seen from the Memorandum of Articles of Association of the Periyar Self-Respect Propoganda Institution (first defendant), Tiruchirapalli, it is found that it was incorporated and found to have been registered under the Societies Registration Act 21 of 1860. That certificate number is 13 of 1952 with a Memorandum of Articles of Association containing 13 life members and 30 Rules; according to Clause 22, the life members of the Executive Committee along shall be the Trustees of the properties already purchased. According to Clause 23, the properties of the Institution shall be in the names of the President and the Secretary and they shall have power to purchase and sell the properties on behalf of the Institution. If it is a Trust property, there will not be a clause empowering the President to sell the properties. That itself indicates that it is not a Trust. The fact that it was registered under the Societies Act may also lend support to the above view.

17. The case on hand is also similar in nature, since the first respondent has been registered as a society under the Tamil Nadu Society Registration Act. As contended by the learned Counsel appearing for the petitioner, there is no prayer in the suit for framing any scheme. It is not in dispute that the association has been registered for the welfare of a particular community, namely, Nagarathar community in Salem and therefore, the decision of this Court referred to above is applicable to the facts and circumstances of this case.

18. As held by this Court in the decision, 2008 2 CTC 650 and *Nesammal and another Vs. Edward and another*, , a decree u/s 2(2) of the CPC is appealable and an order rejecting the plaint is a decree u/s 2(2) CPC and hence against the order, appeal lies u/s 96 of the CPC and therefore, revision is not maintainable, if it is an order rejecting the plaint. Here in the instant case, admittedly, the court below has not rejected the plaint, instead returned the plaint, after deciding the issues 1 to 3 holding that the first respondent is a public trust and filing a suit without getting permission u/s 92 CPC is not maintainable and held that the trial court has got no jurisdiction, after deciding the first three issues, without

deciding the other issues, the court below has returned the plaint with the direction to present the same in the proper court.

19. As per the plaint averments, the plaintiff is not a public trust and the defendants have also admitted the fact that the first respondent is a society, registered under the Tamil Nadu Society Registration Act and the petitioner/plaintiff is a member in the Executive Committee of the Society. Further, the first respondent, Sangam (Association) was formed for the welfare of Nagarathar Community of Salem. Therefore, deciding the issue whether the first respondent/D1 is a Public Trust or not is a mixed question of law and fact.

20. The Delhi High Court in Civil Revn. No. 788 of 1979, as downloaded and submitted from AIR High Courts on CD-ROM 1975-2007, at page Del 121, has held that the issue, which has been decided as preliminary issue noticed in the order, does not fall in the category of the preliminary issues which are permissible to be tried as such under the provisions of Order XIV CPC and hence, the jurisdiction vested in the trial court has not been properly exercised while deciding the said issue. The order, deciding that issue, if allowed, would occasion a failure of justice and in any case, cause irreparable injury to the petitioners.

21. In the instant case, issues 1 to 3 as discussed above, in this revision are not merely question of law, but mixed question of law and fact. In such circumstances, to meet the ends of justice, the court below, after deciding the first three issues, without appreciating the evidence properly and deciding the other issues, should not have returned the plaint, on the ground of want of jurisdiction, with a direction that the same has to be presented before the proper forum. The court below has returned the plaint one year and 8 months after filing of this suit and that too after framing of issues and the suit having been posted for trial, when there are disputed question of law and facts involved.

22. Considering the evidence, in the interest of justice, the court below should have pronounced judgment on all the issues framed by the court. In such circumstances, return of the plaint, to be presented before proper court, after one year and eight months, when the suit is ripe for trial, will not meet the ends of justice. Further, the court below could have considered that if the view of the appellate court is that the court below has got jurisdiction, for deciding the other issues, once again the suit should be remitted back to the trial court for the purpose of deciding the other issues which were not decided and it would cause much inconvenience to both the parties to the suit, however, the court below has not considered the same. As the impugned order is only of returning the plaint, with a direction to present the plaint in the proper court, after giving its finding only on three issues, I am of the view that it is not an appealable decree, as contemplated u/s 2(2) of the Code of Civil Procedure. Therefore, the impugned order passed by the court below returning the plaint after deciding three issues leaving six other issues, without any finding cannot be construed as an appealable decree, as contemplated u/s 2(2) of CPC and the impugned order for return of the plaint with the direction to be presented in the proper court at this

stage, would lead to miscarriage of justice.

23. It is a settled proposition of law that when there is no appeal provision, revision u/s 115 CPC is maintainable and in such a case, if there is no alternative remedy available, then, in the interest of justice, the supervisory jurisdiction of this Court conferred under Article 227 of the Constitution can be invoked. Here in the instant case, as per the plaint averments, the first defendant is only society, registered under the Tamil Nadu Society Registration Act. The respondents as defendants have admitted the fact that the plaintiff is an Executive Member in the said registered society. It is not in dispute that the first respondent has not been registered as a Public Trust, registered under the Indian Trust Act. As contended by the learned Counsel for the petitioner, the court below has not followed the view of this Court in a similar case that was reported in 2006 2 M.L.J. 528 (cited supra).

24. As it is a mixed question of both law and fact based on the evidence, the court below cannot differ from the view of this Court, as the decision is applicable to the facts and circumstances of this case. As per the plaint averments, the plaintiff is only a society registered under the society registration Act and not a Trust registered under the Indian Trust Act. In such circumstances, merely based on the view taken by the court below, that the court has no jurisdiction, it cannot leave the other issues, without giving any finding and return the plaint to be presented in some other court having jurisdiction.

25. It is for the trial court to decide whether a preliminary issue should be answered at the threshold or it should be tried and disposed of along with other issues. However, while deciding preliminary issues, the court should consider the pleading of both the parties in toto, failure amounts to material irregularity in exercise of its jurisdiction. As per Order XIV Rule 2 of the Code of Civil Procedure, to decide certain issues as preliminary issues, it is mandatory that the same must be pure question of law and not mixed question of law and fact. As per the decision of the Hon'ble Supreme Court in Major S.S. Khanna Vs. Brig. F.J. Dillon, , the court has no jurisdiction to try a suit on mixed question of law and fact as preliminary issues. It is a well settled proposition of law that when determination of issue requires evidence, the issue cannot be decided as preliminary issue.

26. In the instance case, as per the averments of the plaint, the first respondent/D1 is only a society, registered under the Tamil Nadu Society Registration Act and not registered under the Indian Trust Act, the aforesaid fact has been admitted by the defendants in their written statement. The copy of the bye-law, relating to the first respondent/D1 shows that it is only a registered society of Nagarathar Community of Salem, having certain objects for public cause. It is clear that the trial court has decided the preliminary issues, only based on the evidence, holding that the first respondent is a Public Trust. Therefore, the issues decided by the court below are undoubtedly of mixed questions of law and fact, which cannot be decided as preliminary issues by the court below. Since the trial court

has decided only certain issues, leaving the other issues and the parties have not let any oral evidence, even if there is any appeal provision, the appellate court cannot be justified in deciding all the issues relating to the suit.

27. The impugned order passed by the court below, partially deciding the suit and returning the plaint with the direction to present the same before some other court on the ground that the court below has no jurisdiction, based on the order passed in I.A. No. 436 of 2007 would only lead to miscarriage of justice. Therefore, the only remedy available to the petitioner/plaintiff is seeking a relief under Article 227 of the Constitution, as there is no alternative remedy available to the petitioner.

28. Considering the aforesaid fact and circumstance, this Court is of the view that the Civil Revision Petition filed under Article 227 of the Constitution of India is legally maintainable and to meet the ends of justice, the same has to be allowed.

29. In the result, this Civil Revision Petition is allowed and the impugned order passed by the court below is set aside. The court below is directed to restore the suit as per procedure known to law and dispose the same on merits and in accordance with law, independently without going into the observations of this Court, within a period of three months from the date of receipt of a copy of this order. Consequently, connected miscellaneous petition is closed. However, there is no order as to costs.