R. M. Narayana Chettiar and another

Vs

N. Lakshmanan Chettiar and others

C. A. Nos. 4890-91 of 1990

(M.H. Kania, R.M. Sahai JJ)

11.10.1990

JUDGMENT

KANIA J

1. Special Leave granted. Counsel heard.

2. These two appeals are filed by Special leave against the judgment of the High Court of Madras in Revision Petitions Nos. 517 and 518 of 1989. * These appeals raise an interesting question as to whether it is obligatory on the Court, before granting leave to institute a suit as required under S. 92 of the Code of Civil Procedure, 1908, to give an opportunity to the respondents to show cause against the grant of such leave, and whether leave granted without such opportunity having been given is void.

* Reported in (1990) 1 Mad LJ 113.

3. The appellants instituted Suit No. O.S. 55 of 1987 in the court of the learned subordinate Judge of Sivaganga in Tamil Nadu against the respondents as a representative suit inter alia praying for framing a scheme for a public charitable trust. It is common ground that the reliefs prayed for in the suit were such that leave under S. 92 of the Civil Procedure Code was required for instituting the suit. On the same day on which the suit was filed by lodging the plaint in court an application was made praying for leave to institute the suit under S. 92 of the Code. Without issuing any notice to the respondents, the said court granted leave by passing an order reading "permitted" and issued summons to the respondents. In March 1988 the respondents filed an interim application before the learned Subordinate Judge for revoking the leave granted inter alia on the ground that the respondents had not been given any opportunity to be heard before leave was granted. The learned Subordinate Judge dismissed the said application on the ground that the grant of leave was an administrative act of the court and no notice to the respondents was required before such leave was granted. The respondents then preferred a Civil Revision Petition in the Madras High Court which has been allowed by a judgment delivered by learned single Judge. He took the view that an analysis of the provisions of S. 92 of the Code shows that in order to institute a representative suit as contemplated in the said Section two or more persons must have an interest in the trust and they should have obtained the leave of the court before they institute the suit. The learned single Judge held that while the said section enables persons interested in a public trust to file a suit to secure the proper administration and management of the trust and its properties by its trustees, it also imposes a check on the institution of such suits by the imposition of certain conditions, one of which is the,

obtaining of leave from the court. It was held that it is the grant of leave which confers on the person concerned a right to institute a suit under S. 92 of the Code. If there were any facts which might, disentitle the applicants for leave from obtaining the leave of the court, these could be best brought to the notice of the court by the party arrayed on the opposite side. The learned Judge also referred to the provisions of S. 104(1) (ffa) of the Code whereby an order under S. 91 or S. 92 refusing leave to institute a suit of the nature referred to in S. 91 is made appealable. The learned Judge followed the decision of the High Court of Madras in T. M. Shanmugam v. The Periyar Self Respect Propaganda Institution (1984) 2 Mad LJ 440: AIR 1985 Madras 93,and held that as the leave had been granted without any notice to the respondents, it was void and liable to be set aside. The learned Judge allowed the revision petitions, set aside the leave and held that the suit could not be entertained and was liable to be dismissed. It is against this decision that these appeals have been preferred.

4. Learned counsel for the appellants submitted that if the court were required to give opportunity to the defendants to be heard before granting leave under S. 92, the grant of leave would entail a great deal of delay and might defeat the ends of justice where some urgent relief was required. He pointed out that, if a defendant had a grievance against the grant of leave, he could always make an application to revoke the leave and no serious prejudice would be caused to the defendant by the grant of leave.

5. Learned counsel for the respondents contended that leave under S. 92 of the Code to institute a suit was a material requirement for maintenance of a suit. Before granting leave the court was called upon to consider various aspects of the matter, namely, whether the suit was such as contemplated under S. 92, whether the persons applying for such leave were fit persons to institute a representative suit and so on. It was submitted by him that the court could not decide whether leave should be granted without giving an opportunity to the defendants to show cause against the grant of leave. It was submitted by him that the grant of leave was a precondition for instituting a suit under S. 92. Leave granted without giving any opportunity to the defendant to show cause was void and a suit instituted on the basis of such void leave was not maintainable at all. It was submitted by him that at the stage of grant of leave what the court is called upon to consider is the plaint and whether, prima facie, the suit proposed to be instituted was of the kind contemplated under S. 92 of the Code, that is, whether the reliefs prayed for were such as were set out in S. 92 and whether the suit was against a public trust. It was also necessary for the court to consider whether, the proposed plaintiffs had an interest in the public trust and were fit persons for leave being granted to them. The Court could also consider whether, prima facie, the allegations in the plaint were baseless or frivolous. At that stage, it was necessary to give any notice to the defendant because he could point out the reasons why leave should not be granted.

6. Before considering the merits of the aforesaid contentions, it would not be out of place to refer to the relevant provisions of the Code of Civil Procedure. The relevant part of sub-sec. (1) of S. 92 runs as follows:

> "92. Public Charities
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> (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 -

(a) removing any trustee;

(b) appointing a new trustee;

(c) vesting any property in a trustee;

(cc) directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possession to the person entitled to the possession of such property;

(d) directing accounts and enquiries;

(e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;

(f) authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged;

(g) settling a scheme; or

(h) granting such further or other relief as the nature of the case may require."

7. S.104 provides for appeals against certain orders unless otherwise provided in he body of the Code or by any other law in force. Clause (ffa) of that section runs as follows:

"(ffa) an order under S. 91 or S. 92 refusing leave to institute a suit of the nature referred to in S. 91 or S. 92, as the case may be."

8. We may mention that prior to its amendment in 1976, S. 92 of the Code provided that leave of the Advocate-General had to be obtained for the institution of a suit of the kind described in that section and not the leave of the court.

9. We may now discuss the main cases relied on by the learned counsel for the respective parties. Coming first to the cases relied upon by learned counsel for the appellants, we find that the first decision cited by him was the decision of this Court in Swami Parmatmanand Saraswati v. Ramji Tripathi (1975) 1 SCR 790 at p. 796 : (AIR 1974 SC 2141 at p. 2145). In that case it was field that to see whether the suit falls within the ambit of S. 92, only the allegations in the plaint should be looked into in the first instance. But, if, after the evidence is taken, it is found that the breach of trust alleged has not been made out and that the prayer for direction of the court is vague and is not based on any solid foundation of fact or reason but is made only with a view to bring the suit under the section then such a suit must be dismissed. Learned Counsel next drew our attention to the decision of this Court in Charan Singh v. Darshan Singh (1975) 3 SCR 48: (AIR 1975 SC 37 1). S. 92 of the Code before its amendment in 1976 was applicable to the case. The court cited with approval the observations of Mukherje, J., (as he then was), in Mahant Pragdasji Guru Bhagwandasji v. Patel Ishwarlalbhai Narsibhai (reported in 1952 SCR 513 : (AIR 1952 SC 143).) which runs as follows (at pp. 374-75 of AIR):

> "A suit under Section 92, Civil Procedure Code, is a suit of a special nature which presupposes the existence of a public trust of a religious or charitable character. Such suit can proceed only on the allegation that there is a breach of such trust or that directions of the court are necessary. It is only when these conditions are fulfilled that the suit has got to be brought in conformity with the provisions of Section 92, Civil Procedure Code........."

10. Neither of the aforesaid decisions of this Court deal with the question as to whether before granting leave to institute a suit under S. 92, Advocate-General, or later the Court, was required to give an opportunity to the proposed defendants to show cause why leave should not be granted. What learned counsel for the appellants urged, however, was that these decisions show that at the time when the Advocate-General or the Court is required to consider whether to grant leave to institute a suit as contemplated under S. 92, it is only the averments in the plaint which have to be examined and hence, the presence of the defendant is not necessary. We may now consider the High Court decisions relied on by the learned counsel for the appellants.

11. In Prithipal Singh v Magh Singh, AIR 1982 Punj and Har 137 a learned single Judge of the Punjab and Haryana High Court held that the grant of leave to file a suit is not a mere irregularity which can be cured but is a condition precedent. The provisions of S. 92 are mandatory in nature in that respect. He further held that in granting leave under S. 92 of the Code, the court does not have to write a reasoned order. It does not even have to give a notice to the defendant of an application for leave to file a suit as the order granting leave is of an administrative nature. The same view was taken by a Division Bench of the Punjab and Haryana High Court in Lachhman Dass Udasi (deceased by L.R.s) v. Ranjit Singh, AIR 1987 Punj & Har 108 wherein it was held that no notice is necessary to be issued to the defendants prior to the granting or refusing of leave under S. 92 of the Code as at that stage it is, only the subjective satisfaction of the court that is required and, thus, the order is an order of administrative nature.

12. A Division Bench of the Kerala High Court also took the same view in P. V. Mathew v. K. V. Thomas, AIR 1983 Kerala 5. In that case it was held that along with the petition for leave the plaintiffs-petitioners should produce in court the plaint for the court's perusal to enable it to pass a proper order under S. 92(1). This does not preclude the court from requiring the production of any other record necessary for a proper decision. The court, if it is so satisfied, may grant the leave without issuing notice to the respondents-defendants or hearing them. In coming to this conclusion, the Division Bench relied upon the earlier decision of the Full Bench of the Kerala High Court in Mayer Simon, Perur v. Advocate-General of Kerala, AIR 1975 Kerala 57 which was rendered before the amendment of S. 92 of the Code in 1976.

13. Learned Counsel referred to the judgment of a learned single Judge of Allahabad High Court in Ambrish Kumar Singh v. Raja Abhushan Bran Bramhshan AIR 1989 All 194. In that case the learned Judge held that while granting leave the court does not decide the rights of the parties. No right is adjudicated at this stage. The court has merely to see whether there is a prima facie case for granting leave to file a suit. This order does not in any way affect the final decision which will be given on merits after the parties have, led evidence in the suit. Section 92 of the Code does not contemplate giving of any notice to the proposed defendants before granting leave.

14. Learned counsel for the respondents, on the other hand drew our attention to the aforementioned decision of the Madras High Court in T. M. Shanmugham v. The Periyar Self Respect Propaganda Institution AIR 1985 Mad 93 which has been relied upon in the impugned judgment. In that case a

learned Judge of the said High Court held that leave granted to the plaintiffs to institute a suit under S. 92 of the Code without notice to the defendants is void in law and the logical consequence will be that the institution and the numbering of the suit cannot be validly sustained in law and, therefore, the suit was liable to be dismissed on that technical ground. However, this will not stand in the way of the plaintiffs, if so desired, to institute fresh proceedings in accordance with law under S. 92 of the Code.

15. In the case of Gurdwara Prabandhak Committee, Delhi Cantonment v. Amarjit Singh Sabharwlal, AIR 1974 Delhi 39 a learned single Judge of the Delhi High Court has taken the view that an order of District Judge granting or refusing leave must be a reasoned. order. The public trust concerned has right to be heard before the grant or refusal of leave. It was held by him that if the trust is not given an opportunity of being heard, it would be a material irregularity. To pass a non-speaking order in a judicial proceeding is also a material irregularity and revision would lie against such an irregularity. The granting or refusing leave is a judicial order subject to revision or appeal and it must be supported by reasons. Before such an order is passed both sides must have had an opportunity of being heard.

16. As far as the decisions of this Court which have been pointed out to us are concerned, the question as to whether before granting leave to institute a suit under S. 92 of the Code, the Court is required to give an opportunity of being heard to the proposed defendants did not arise for determination at all in those cases. As far as the High Courts are concerned, they have taken different views on this question. The legislative history of S. 92 of the Code indicates that one of the objects which led to the enactment of the said section was to enable two or more persons interested in any trust created for a public purpose of a charitable or religious nature should be enabled to file a suit for the reliefs set out in the said section without having to join all the beneficiaries since it would be highly inconvenient and impracticable for all the beneficiaries to join in the suit; hence any two or more of them were given the right to institute a suit for the reliefs mentioned in the said S. 92 of the Code. However, it was considered desirable to prevent a public trust from being harassed or put to legal expenses by reckless or frivolous suits being brought against the trustees and hence, a provision was made for leave of the court having to be obtained before the suit is instituted.

17. A plain reading of S. 92 of the Code indicates that leave of the court is a precondition or a condition precedent for the institution of a suit against a public trust for the reliefs set out in the said section; unless all the beneficiaries join in instituting the suit, if such a suit is instituted without leave, it would not be maintainable at all. Having in mind, the objectives underlying S. 92 and the language thereof, it appears to us that, as a rule of caution, the court should normally, unless it is impracticable or inconvenient to do so, give a notice to the proposed defendants before granting leave under S. 92 to institute a suit. The defendants could bring to the notice of the court for instance that the allegations made in the plaint are frivolous or reckless. Apart from this, they could, in a given case, point out that the persons who are applying for leave under S. 92 are doing so merely with a view to harass the trust or have such antecedents that it would be undesirable to grant leave to such persons. The desirability of such notice being given to the defendants, however, cannot be regarded as a statutory requirement to be complied with before leave under S. 92 can be granted as that would lead to unnecessary delay and, in a given case, cause considerable loss to the public trust. Such a construction of the provisions of S. 92 of the Code would render-it difficult for the beneficiaries of a public trust to obtain urgent interim orders from the court even though the circumstances might warrant such relief being granted. Keeping in mind these considerations, in our opinion, although, as a rule of caution, Court should normally give notice to the defendants before granting leave under the said section to institute a suit, the Court is not bound to do so. If a suit is

instituted on the basis of such leave, granted without notice to the defendants, the suit would not thereby be rendered bad in law or non-maintainable. The grant of leave cannot be regarded as defeating or even seriously prejudicing any right of the proposed defendants because it is always open to them to file an application for revocation of the leave which can be considered on merits and according to law.

18. We may mention that although clause (ffa) of S. 104(1) of the Code provides that an appeal shall lie against the refusal of grant of leave, that cannot lead to the conclusion that it is obligatory on the part of the Court to give notice to the proposed defendants before granting leave because an appeal lies only against the refusal of leave and not against, the grant of leave. Before refusing leave the proposed plaintiffs are bound to be heard and it is the plaintiffs and not the defendants who could be prejudiced by refusal to grant such leave.

19. In the result, the appeals are allowed as aforestated. The impugned judgment of the High Court is set aside. The trial Court is directed to dispose of the application for revocation of leave on merits and in accordance with law.

20. On the facts and circumstances of the case, there will be no order as to costs incurred so far.

Appeal allowed.

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