

KERALA HIGH COURT

P.V. Mathew

Vs

K.V. Thomas

C.M.A. Nos. 301 of 1981 and 22 of 1982

(V. Khalid and G. Balagangadharan Nair, JJ.)

09.06.1982

JUDGEMENT

Balagangadharan Nair, J.

1. C.M.A. No. 301 of 1981 is by defendants 1 to 3 and 7 to 14 from an order appointing a receiver and C.M.A. No. 22 of 1982 is by defendant 1 from another order allowing attachment of his properties before judgment. In view of the common questions involved we propose to deal with the two appeals in a single judgment.

2. O.S. No. 4 of 1981 before the 2nd Additional District Judge, Ernakulam, out of which the appeals arise concerns the affairs of the St. John's Orthodox Syrian Church. Paravur Kara, Manakkunnam. The two plaintiffs and defendants 1 and 3 to 15 are Parishioners of the Church and the 2nd defendant is its Vicar. For the administration of the Church an Executive Committee of which defendant 1 to 15 are the members was elected by the General Body of the Parishioners in 1974 for a term of one year. The 1st defendant is the Kaikaran of the Church then elected. As Vicar the second defendant is the Secretary of the Committee. Defendants 1 and 2 as Kaikaran and Vicar are the custodians of the properties of the Church. Although the term of the Committee expired in 1975 there has been no election and the same Committee has been in office since then. The Church is admittedly a public trust of a religious and charitable nature within Section 92, Civil Procedure Code. The two plaintiffs brought the suit on April 8, 1981, to remove the first defendant from management of the Church and defendants 1 to 15 from office and to convene a meeting of the General Body for electing new trustees. They also claimed other reliefs appropriate to Section 92(1). On the same day as the institution of the suit the plaintiffs filed I.A. No. 469 of 1981, seeking the Court's leave to institute the suit as required by the amended Section 92(1). On this application the Court passed an order "Interim leave and notice" on April 9, 1981. The plaintiff filed two other applications. I.A. 626 of 1981 for appointing a receiver to administer the properties of the Church and to convene a meeting of the General Body for electing a new Committee and I.A. 1010 of 1981 for attaching the properties of the 1st defendant. The former application was resisted by defendants 1 to 3 and 7 to 14 and the latter by defendant 1. At the hearing of these two applications, apart from challenging them on the merits the defendants objected that no interim relief could be allowed before leave to institute the suit was

granted and that as there was only an order of interim leave for which there was no warrant the applications were unsustainable. On this the Court noted that I.A. No. 469 of 1981 was heard and granted on December 7, 1981. The same day by two separate orders which are the subject of these appeals the Court allowed I.A. Nos. 627 and 1010.

3. Besides attacking the orders on the merits counsel for the appellants raised a threshold argument that the proceedings were incompetent and lacking in jurisdiction for non-compliance with the mandatory requirements of Section 92(1). The argument was built on the basis of even contemporaneous with the institution of the suit; leave as required by Section 92(1) had not been obtained by the plaintiffs and that the interim leave granted on April 9, 1981 could not cure this infraction and save the proceedings. Counsel urged that Section 92(1) contemplates no provisional or interim leave and that the order of April 9, 1981 by which the Court purported to grant interim leave was totally ineffective. Before considering the merits of the appeals, we shall deal with this basic objection raised by the appellants.

4. That the Church is a public trust of a religious and charitable nature and that the reliefs claimed are those specified in Section 92(1) are undisputed. Indeed the plaint itself proceeds on trial basis. It is also undisputed that leave of the Court has to be obtained by the plaintiffs for instituting a suit of this nature save where the Advocate-General happens to be the plaintiff. Before the enactment of the Civil Procedure Code (Amendment) Act, 1976 (104 of 1976) Section 92(1) provided, so far as material, that "two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General "may institute suit as contemplated therein. The Amendment Act deleted the words "the consent in writing of the Advocate-General" and substituted in their place the words "leave of the Court". The Amendment was made on the basis of the 54th Report of the Law Commission which observed : "Obtaining the leave of the Advocate-general takes time, and the consideration which he takes into account can be taken into account by the Court as well. Since jurisdiction under the section is vested in the principal Civil Court of original jurisdiction, it can be expected that the discretion to grant leave under the amended section will be exercised in a responsible manner." We may also point out that by the Amendment Act Section 104 has been amended by providing for appeals from orders under Section 91 or 92 refusing leave to institute suits of the nature mentioned in either of these sections.

5. As the amendment only substituted the leave of the Court for the consent of the Advocate-General in Section 92(1) as the condition precedent to the institution of the suit, the principles laid down by judicial precedents on which the Advocate-General was to exercise his power should guide the Court in exercising the power of granting leave. This view finds support in the passage from the Report of the Law Commission quoted above, as also in the statement in Mulla's Civil Procedure Code Volume 1, 14th Edition page 533, that "These principles would, it is submitted, apply to the Court while it is called upon to grant leave". The principles on which the Advocate-General was to act in this regard have been the subject of several decisions but we propose to refer only to *Mayer Simon v. Advocate-General*¹ a Full Bench decision of the Court and *Madappa v. Mahanthadevaru*²

¹1975 Ker LT 78 (FB)

² AIR 1966 SC 878

6. In AIR 1966 Supreme Court 878 the Supreme Court observed (Para 10) :

"The main purpose of Section 92(1) is to give protection to public trusts of a charitable or

religious nature from being subjected to harassment by suits being filed against them. That is why it provides that suits under the section can only be filed either by the Advocate-General or two or more persons having an interest in the trust with the consent in writing of the Advocate-General. The object is that before the Advocate-General files a suit or gives his consent for filing a suit, he would satisfy himself that there is a *prima facie* case either of breach of trust or of the necessity for obtaining directions of the Court."

7. Although the main point that arose in Mayer Simon's case 1975 Ker LT 78 (FB) was whether the refusal of consent by the Advocate General under Section 92 was liable to challenge under Article 226, the Full Bench examined the scope of Section 92(1) at length. The learned Chief justice who wrote the main judgment emphasised that the Advocate-General must be satisfied that there is a *prima facie* case either of breach of trust, or of the necessity for obtaining the direction of the court that the applicants for leave are solvent, that they are really and substantially interested in the trust and are not actuated by impure motives and that their interests are in the interests, of the public and not in the vindication of their individual or personal rights. It was laid down that although the Advocate-General was to act objectively he was not exercising any judicial or quasi-judicial powers.

8. Mulla's Civil Procedure Code summaries the position thus at page 534 Volume 1 (14th edition).

"Further it has also been held that the function of the Advocate-General not being a judicial one, notice by him to the trust of its trustees was not obligatory and that the absence of such notice did not invalidate the consent given by him. All that was required of him at that stage was to satisfy himself that it was worthwhile to institute the suit. The mere fact that the amended section now requires leave of the Court in place of consent by the Advocate-General does not seem to change the nature of the order of leave made by the Court. In making such an order the Court, like the Advocate-General earlier, would no doubt have to apply its mind but that is only to satisfy itself whether the persons asking leave have interest in the trust, whether the trust is a public trust specified in the section and whether there are *prima facie* grounds for thinking that there has been a breach of the trust. At that stage the Court would not have before it all the parties to the proposed suit nor the evidence from which it would be called upon to adjudicate any issue. All that it would have to see is whether it is in the interest of the trust to file suit for which leave is sought."

9. With this background we might thus formulate the procedure for the grant of leave by the Court;

(i) While exercising its power under Section 92(1) the Court will be guided by the principles laid down by judicial decisions to regulate the power of the Advocate-General under the Sub-section.

(ii) 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 Section 92(1). This does not preclude the Court from requiring the production of any other record necessary for a proper decision.

(iii) The Court can, if it is so satisfied, grant the leave without issuing notice to the respondents-defendants or hearing them *S.S. Bhagat v. N.S. Ahluwalia*³, and *Shavax v. Masood Hosain*⁴,

(iv) Section 92(1) does not provide for the grant of interim leave to the plaintiffs. What it contemplates is only the grant of leave and as a corollary the refusal of leave.

(v) On the terms of Section 92(1) the leave is to precede the institution of the suit as the relevant words are "two or more persons.....having obtained the leave of the Court may institute a suit." This means that prior to the grant of leave there could not be any valid suit with the further consequence that the Court cannot pass interim orders in "the suit" before granting the leave. We find ourselves in 'agreement with the decision in CRP No. 1286 of 1979 by Viswanatha Iyer J., 1979 Ker LT (Notes) 116.

10. Applying the above principles to the instant case the court below was not right in granting interim leave on I.A. 469 of 1981. However that flaw does not in the circumstances vitiate either of the orders as they were made only subsequent to the order of "final leave although passed on same day, as disclosed by the order on I.A. 626 of 1981.

11. On the merits also we find no reason to upset the orders, Although the first defendant was the Kaikaran of the Church from 1974 he has not on the evidence and on his admission maintained any accounts from the beginning thus betraying utter irresponsibility in his duties as a trustee. His explanation is far from satisfactory and was rightly rejected by the court below. The consequence of the default is that the state of accounts of the Church for over 7 years is not even known. He had also failed to execute a decree obtained by the Church; whether he was justified in this inaction remains to be investigated but until he justifies himself it has to be viewed as serious negligence. The court has charged the receiver with the duty of convening a meeting of the parishioners to elect a new Committee; indeed it has limited the appointment till the election of the new Committee. No satisfactory explanation has been put forward either by the 1st or 2nd defendant for not convening a meeting all these years to elect the office bearers. The Court below was right in granting the application and appointing a receiver. We find absolutely no reason to overturn the order.

12. Considering the conduct of the 1st defendant and the charges against him and his liability to account for which *prima facie* material exists the Court below cannot be said to have gone wrong in directing attachment of the properties before judgment.

³ AIR 1978 Del 14

⁴ AIR 1965 And Pra 143

13. The orders are confirmed and the appeals are dismissed but without costs.
Appeal dismissed.

