

A

B.S. ADITYAN AND ORS.

v.

B. RAMACHANDRAN ADITYAN AND ORS.

APRIL 16, 2004

B

[S. RAJENDRA BABU AND DORAISWAMY RAJU, JJ.]

*Code of Civil Procedure, 1908 :*

C

*Section 92—Suit under—Leave to institute—Grant of—Notice to defendants—Necessity of—Held: As a rule of caution Court should normally give notice to the defendants before granting leave but it is not bound to do so.*

D

*Section 104(1)(ffa)—Leave to institute suit—Refusal of—Appeal against—Held: Court competent to consider appeal filed against order refusing to grant leave to file a suit under S. 92 CPC.*

*Constitution of India, 1950:*

E

*Article 136—Leave to file suit under S. 92 CPC granted—Interference with—Held: Not warranted because the order made under S. 92 CPC would not determine the rights of the parties, but only enable a party to initiate a proceeding.*

F

**The respondents filed an application before the High Court for leave to file a suit under Section 92 of the Code of Civil Procedure, 1908 for framing a scheme, for removal of appellants Nos. 1 and 2 as trustees and for rendition of accounts. Single Judge dismissed the application. But the Division Bench reversed this judgment and further held that a notice to the defendants before grant of leave was not necessary as a rule of law but as a rule of caution the Court should normally give notice to the defendants. Hence the appeal.**

G

**Dismissing the appeal, the Court**

H

**HELD: 1. In the normal course if an appeal is filed against an order granting permission to a party to file a suit as falling under Section 92 of the Code of Civil Procedure, 1908, this Court does not normally interfere**

with an order made by the High Court nor does it think of entertaining a proceeding of this nature under Article 136 of the Constitution because the order made under Section 92 CPC will not determine the rights of the parties, but only enable a party to initiate a proceeding. A

[220-H; 221-A]

2. When a specific provision has been made in the Code of Civil Procedure in Section 104(1) (ffa) allowing an appeal to be filed against an order refusing to grant leave to file a suit, the appeal filed by the respondents before the Division Bench was certainly competent to be considered by that Bench. [223-B-C] B

3. Although as a rule of caution, court should normally give notice to the defendants before granting leave under Section 92 CPC 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 should not thereby be rendered bad in law or non-maintainable. 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 or even in the course of suit which may be established that the suit does not fall within the scope of Section 92 CPC. The provision under Section 104(1)(ffa) CPC for appeal against refusal of grant of leave does not lead to a different conclusion. [224-B-C; 222-C] C D E

*R.M. Narayana Chettiar v. N.Lakshmanan Chettiar*, [1991] 1 SCC 48, relied on.

*Pitchayya v. Venkatakrishnamacharlu*, AIR (1930) Mad 129, *National Sewing Thread Co. Ltd. v. James Chadwick*, [1953] SCR 1028, *R.M.A.R.A. Adaikappa Chettiar v. R. Chandrasekhara Thever*, AIR 35 (1948) PC 12, *Shankarlal Aggarwal v. Shankarlal Poddar* [1984] 1 SCR 717, *Institute of Chartered Accountants v. L.K.Ratna* [1986] 3 SCR 1049, *Charan Singh v. Darshan Singh*, [1975] 3 SCR 48 and *T. Arivanandam v. T.V. Satyapal*, [1978] 1 SCR 742 and *John v. Rees*, (1969) 2 All ER 274, referred to. F G

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 12915-12920 of 1996.

From the Judgment and Order dated 16.7.96 of the Madras High Court in O.S.A. Nos. 62-64, 128, 129 and 54 of 1996. H

**A** K. Parasaran, K.S. Cooper, Vinod Bobde, V. Shanmugham, Vineet Kumar, Ms. Jayanti Natarajan, Tushad Cooper and Tripurari Ray for the Appellants.

**B** P.P. Rao, L. Nageshwara Rao, Kovilan Poonkundram, T. Harish Kumar, V. Krishnamurthy, M.A. Krishnamoorthy and M.A. Chinnasamy for the Respondents.

The Judgment of the Court was delivered by

**C** **RAJENDRA BABU, J.** A deed of declaration was executed by S.B. Adityan consisting of himself, his elder brother S.T. Adityan and the first respondent herein, B. Ramachandran Adityan as Trustees on 1.3.1954. Under a deed of resignation dated 19.5.1959 the first respondent herein resigned as Trustee and also as Director of Daily Thanthi. By a deed of appointment of trustees executed on 22.5.1959 the first appellant B.S. Adityan son of S.P. Adityan and the second appellant were appointed as one of the new trustees and also to be the Director of Daily Thanthi. A supplementary deed was also executed on 28.6.1961. On 8.11.1961 the Founder resigned. On 2.3.1962 a decree was passed by the High Court in C.S. No. 90/1961 approving the supplementary deed dated 28.6.1961. On 27.12.1963 S.T. Adityan resigned. In the last week of June 1978 the Founder executed three deeds of appointments of trustees appointing himself, his elder brother S.T. Adityan and the first respondent as additional trustees of Thanthi Trust. The Appellants filed applications under Section 92 Civil Procedure Code (CPC) for leave to file suits challenging the said appointments and leave was granted and the said suits are numbered as C.S. Nos. 352 and 353 of 1978. On 29.8.1978 the first respondent and his uncle S.T. Adityan filed application under Section 92

**D** CPC for leave to file a suit for removing appellants Nos. 1 and 2 as trustees. On 13.9.1978 an temporary order of injunction was made by the High Court restraining the newly appointed trustees from interfering with the management of the trust on the condition that the first appellant must deposit a sum of Rs. 1 lakh per month. All the three newly appointed trustees, that is, Founder, S.T. Adityan and the first respondent executed resignation deeds and withdrew the application No. 3147/1978 filed under Section 92 CPC. Inasmuch as the newly appointed trustees resigned their trusteeship and withdrew their application under Section 92 CPC, the appellants proceeded on the basis that suits C.S. Nos. 352 and 353 of 1978 had become unnecessary and withdrew the same.

**H**

While the matter stood thus, on 20.1.1981 Kannan Adityan and Kathiresa Adityan filed an application No. 165/1981 under Section 92 CPC for leave to file a suit for appointing them as additional trustees and for rendition of accounts by the first and second appellants. The appellants filed application No. 879/1991 for permission of court to cross-examine the applicants therein, that is, Kannan Adityan and Kathiresa Adityan, to establish the fact that it was the father of the petitioners therein who was supplying all documents and materials and who was conducting the proceedings and that they were 21 and 18 years of age and were students then studying in the Engineering College. The said application filed by the appellants came to be dismissed by the learned single Judge. On appeal filed in O.S.A. No. 152/1981 the Division Bench held that it would be in the interest of justice to allow the appellants therein to cross-examine Kannan Adityan and Kathiresa Adityan. When the matter was carried to this Court, this Court dismissed the Special Leave Petition No. 6040 of 1982 by observing that the cross-examination, however, was confined to the question of sanction and principles governing the same. An application had been filed under Order XI Rule 21 CPC which having been dismissed and on appeal having been confirmed by the Division Bench, the same matter was carried to this Court by way of a special leave petition. This Court disposed of the said special leave petition and ultimately by an order made on 18.1.1993 dismissed it.

The trustees, namely, the first and the second appellants, resolved to appoint Mr. Maruthai Pillai, Mrs. Sarojini Varadappan and Mr. R. Somasundaram as additional trustees. On 3.1.1994 respondents Nos. 1 to 4 filed an application No. 33/1994 for leave to file a suit under Section 92 CPC for framing a scheme, for removal of appellants No. 1 and 2 as trustees and for accounts. An application No. 1030/1994 was filed seeking to implead Maruthai Pillai, Mrs. Sarojini Varadappan and R. Somasundaram as parties to application No. 33/1994. A number of incidental applications Nos. 214/1994, 215/1994, 1901/1994 and 153/1994 were filed for various reasons like appointment of receiver, impleadment of parties and for publication of the proceedings in newspapers. The appellants also filed an application to dismiss the said applications filed under Section 92 CPC in *limini*. C.S. No. 1509/1994 was filed by Kannan Adityan and Kathiresa Adityan for a declaration as follows :-

“The order of dismissal passed in Application No. 165/1981 filed by the plaintiffs herein under the provisions of Section 92 of the CPC for grant of leave of this Hon’ble Court and the unnumbered suit filed

A along with the said application and confirmed by the Division Bench and by Supreme Court of India by order dated 18.1.1993 made in S.L.P. No. 3362 and 3363 of 1987 are vitiated by fraud, without jurisdiction *non est* in law and void, and consequently to set aside all the orders made in Application No. 165 of 1981 and the unnumbered suit filed along with the said application including that of the order dated 18.1.1993 passed by the Supreme Court of India in S.L.P. No. 3362 and 3363 of 1987 and restore application No. 165 of 1981 along with the suit referred to above to file and to hear the same afresh.”

B

C Application filed by the appellants for dismissal of application No. 33/1994 filed under Section 92 CPC was dismissed by a learned Single Judge and several orders were made in other applications. While O.S.A. No. 62/1996 was filed against the order dismissing application No. 33/1994 filed under Section 92 CPC, O.S.A. Nos. 63 and 64 of 1996 were filed in regard to certain other incidental reliefs. The Division Bench by an order made on

D 16.7.1996 allowed the appeals and thus by allowing O.S.A. No. 62/1996 it allowed application No. 33/1994 granting leave to the appellants therein to file suit under Section 92 CPC against the appellants herein. In the said order the Division Bench also considered the scope of Section 92 CPC, impact of the amendment of the Civil Procedure Code in 1976 requiring the Court to give permission in place of the Advocate General to give consent thereto, and also noticed several decisions of the Courts on the aforesaid matters. While

E some of the decisions have taken the view that an order granting such permission is an administrative order, some other courts have taken the view that such an order is liable to be reviewed under Article 226 of the Constitution. The High Court went on to hold that a notice to defendants before leave is

F not necessary as a rule of law but as a rule of caution, the court should normally give notice to the defendants before granting permission to institute a suit under Section 92 CPC; that the defendants could bring to the notice of the court that the allegations made in the plaint are frivolous or reckless and that in a given case, they could point out that the persons who are applying for leave are doing so merely with a view to harass the trust or have such

G antecedents that it would be undesirable to grant leave to such persons; that Section 141 CPC is not applicable to a proceeding which is administrative in nature. The High Court examined the facts of the case in the light of principles adverted to by it.

H In the normal course if an appeal is filed against an order granting

permission to a party to file a suit as falling under Section 92 CPC, we do not normally interfere with an order made by the High Court nor do we think of entertaining a proceeding of this nature under Article 136 of the Constitution because the order made thereunder will not determine the rights of the parties, but only enable a party to initiate a proceeding.

Shri K. Parasaran, learned senior counsel appearing for the appellants herein, submitted that the present case is one of the third round of litigation in respect of the some trust property; that what is to be considered in the present case is not trust in relation to an immovable property but in relation to a newspaper "Dina Thanthi" or "Daily Thanthi" at present being published as a daily newspaper in Tamil language together with the goodwill thereof, the Head Office of which being presently situated at 60, Cutchery Road, Mylapore, Madras as a going concern with all its assets and liabilities and all the printing machine, printing types, furniture and accessories of the newspaper formed part of the trust property; that it is a running newspaper business which is the property held under and impressed with Trust which required great skill to run a venture of such a nature; that immovable properties had been subsequently acquired for the Trust where offices have been located and business is carried out and there are also guest houses at one or two centres. The appellants filed an application No. 2421 of 1994 under Section 92 CPC read with Section 151 CPC to dismiss the application filed by respondents 1 to 4 for leave to file a suit under Section 92 CPC for framing a scheme, for removal of appellants Nos. 1 and 2 as trustees and for accounts. The learned Single Judge, by an order made on 21.12.1999, allowed application filed by the appellant herein in application No. 2421 of 1994 to dismiss the application filed under Section 92 read with Section 151 CPC. On appeal, as stated earlier, the Division Bench also in original side granted leave to respondents Nos. 1 to 4 to file suit under Section 92 CPC against the appellants in the present case.

The learned counsel for the appellants urged that the order that was passed under Section 92 CPC granting permission to file a suit is whether administrative in character or otherwise; that this does arise when the objections of the defendants are considered; that as to scope of the meaning of the expressions "order, judgment, decree and adjudication". He drew our attention to decision in *Pitchayya and Anr. v. Venkatakrisnamacharlu and Ors.*, AIR (1930) Madras 129, to the effect that the object of Section 92 CPC is to safeguard the rights of public and of institutions under trustees. In this regard, he specifically drew our attention to *National Sewing Thread Co. Ltd. v.*

- A *James Chadwick and Bros. Ltd.*, [1953] SCR 1028. He also adverted to decision in *R.M.A.R.A. Adaikappa Chettiar and Anr. v. R. Chandrasekhara Thevar*, AIR 35 (1948) PC 12, to contend that where a legal right is in dispute and the ordinary courts of the country are seized of such dispute the courts are governed by ordinary rules of procedure applicable thereto and an appeal lies if authorised by such rules, notwithstanding that the legal right
- B claimed arises under a special stature which does not in terms confer a right of appeal. In *R.M. Narayana Chettiar and Anr. v. N. Lakshmanan Chettiar and Ors.*, [1991] 1 SCC 48, this Court has examined in detail the scope of Section 92 CPC and explained the object underlying therein in granting permission to file a suit. In this case, this Court held that court should normally
- C give notice to the defendants before granting leave as a rule of caution but court is not bound to do so in all circumstances and non-issuance of notice would not render the suit bad or non-maintainable and defendants can at any time apply for revocation of the leave and provision under Section 104(1)(ffa) for appeal against refusal of grant of leave does not lead to a different conclusion. In the light of this decision, we do not consider it necessary to
- D advert to other decisions cited by the learned counsel. More so, the matter was considered by the Law Commission in its Report submitted in April 1992 on this aspect of the matter. After noticing various decision of different courts and the decision in *R.M. Narayana Chettiar's* case (supra), the Law Commission recommended that to expect the court to issue notice and then
- E to try the several points of detail before granting leave in the light of the objections put forth by the respective defendants, would mean that there will be a trial before trial and this would not be desirable. The recommendation of the Law Commission was, therefore, to insert an *Explanation* below Section 92 CPC to the effect that the court may grant leave under this Section without issuing notice to any other person, but this does not, of course, mean that the
- F court will grant leave as a matter of course. Particular emphasis is made and heavy reliance is placed on the decision of this Court in *Shankarlal Aggarwal and Ors. v. Shankarlal Poddar and Ors.*, [1964] 1 SCR 717, to emphasise distinction between administrative and judicial orders. It is urged that order from which the appeal was preferred was not a judgment within the meaning
- G of clause 15 of the Letters Patent and so no appeal lies to the Division Bench. Reference is made to the decision of this Court in *Institute of Chartered Accountants v. L.K. Ratna and Ors.*, [1986] 3 SCR 1049, to bring out distinction between administrative and judicial order. Scope of Section 92 CPC was examined in *Charan Singh and Anr. v. Darshan Singh and Ors.*, [1975] 3 SCR 48, where the whole case turned on the facts arising in that
- H particular case.

Our attention was also drawn to a decision of this Court in *T. Arivandandam v. T.V. Satyapal and Anr.*, [1978] 1 SCR 742, to contend that the court has a duty in vexatious suits to exercise appropriate powers under Order VII Rule 11 CPC. Our attention is also drawn to the decision in *John v. Rees and Ors.*, (1969) 2 All ER 274. He particularly emphasised that it is not appropriate to give decision against a party without affording an opportunity to him. Though reference has been made to several other decisions, we do not think it necessary to advert to the same.

In this background, when a specific provision has been made in the Code of Civil Procedure in Section 104(1)(ffa) allowing an appeal to be filed against an order refusing to grant leave to file a suit, the appeal filed by the respondents before the Division Bench was certainly competent to be considered by that Bench. In this case, on an earlier occasion, when one of the suits was filed under Section 92 CPC, when the founder had executed a deed of appointment of trustees and certain interim orders were passed in that suit, the said application was withdrawn without obtaining leave under Order XXIII Rule 1 on 19.9.1978 inasmuch as the newly appointed trustees had resigned their trusteeship and withdrew their application under Section 92 CPC, the two suits C.S. No. 352 and 353 of 1978 filed by appellants were disposed of as having become infructuous. Later on another application No. 165 of 1981 had been filed under Section 92 CPC for leave to file a suit for appointing them as additional trustees and for rendition of accounts. In that proceeding an application No. 879 of 1991 was filed for permission of court to cross-examine the applicants therein R. Kannan Adityan and R. Kathiresa Adityan in particular to prove the fact that it was the father of those petitioners therein who was supplying all documents and materials and who was conducting the proceedings. Application filed to cross-examine applicants was dismissed by the learned Single Judge. On further appeal, the Division Bench held that it would be in the interest of justice to permit the appellants to cross-examine the said parties. The matter was carried to this Court in Special Leave Petition No. 6040 of 1982. This Court dismissed the said Special Leave Petition noticing that the cross-examination "*will be confined to the question of sanction and principles governing the same*", of course, after noticing entire documents. Again, another application No. 4738 of 1982 was brought before the court to dismiss application No. 165 of 1991 under Order XI Rule 21 CPC which was, however, dismissed by the learned Single Judge and the matter was carried in appeal which was also dismissed by the Division Bench. That matter was brought before this Court. This Court asked the parties to file the appropriate affidavits in regard thereto and thereafter all



A papers were placed before the Court. However, this Court dismissed the Special Leave Petition. It is in this background the learned counsel submitted that the court ought to have examined the matter in all necessary details before granting permission under Section 92 CPC. In *R.M. Narayana Chettiar's* case (supra), this Court considered in detail the history of the legislation and whether court is required to give an opportunity of being heard to the proposed defendants before granting leave to institute a suit under Section 92 CPC and stated the law on the matter. 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. 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 or even in the course of suit which may be established that the suit does not fall within the scope of Section 92 CPC. In that view of the matter, we do not think, there is any reason for us to interfere with the order made by the High Court.

However, we may notice one or two aspects. It was not at all necessary for the High Court to have examined the applicability of Section 141 CPC or otherwise in a matter of this nature. So also observations made by the High Court in para-28 as to the performance of the learned counsel and general remarks in para-41 as to events taking place in the country are uncalled for and unwarranted in dealing with the appeal before it. Such stray excursion will take the matter in dispute out of focus. The crux of the matter was only whether in granting leave under Section 92 CPC the proposed parties have to be heard in the matter or not and whether the suit should have been dismissed *in limine* under Order VII Rule 11 CPC, particularly when the trustees who had filed the suit had seized some interest in the matter and they were not mere strangers to the suit or such persons at whose instance the matter should not have been heard such as insolvent or a party who does not have sufficient interest in the matter.

In the result, we dismiss these appeals.

V.S.S.

Appeals dismissed.