IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Civil Revision No.2753 of 2014
Date of Decision: 24.12.2015

Jan Kalyan Trust and others ......Petitioners

Vs

Jai Kumar Gupta and others .....Respondents

CORAM: ***HON'BLE MR. JUSTICE RAJ MOHAN SINGH***

Present: Mr. Akshay Bhan, Senior Advocate with
Mr. Santosh Sharma, Advocate
for the petitioners.

Ms. Suman Jain, Advocate
for the respondents.

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1. Whether Reporters of local papers may be allowed to see the judgment ?
2. To be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest?

RAJ MOHAN SINGH, J.

[1]. Petitioners/defendants have challenged order dated 10.12.2013 passed by Civil Judge (Jr. Divn.) Bhiwani vide which application for revocation of permission granted under Section 92 CPC by order dated 02.11.2013, was dismissed.

[2]. Plaintiffs filed suit for prohibitory permanent injunction restraining the petitioners/defendants not to alienate, lease, execute any power of attorney or any other instrument of transfer and dismantle the school property in contravention of

rules and regulations of charitable bodies namely Jan Kalyan Trust, Halwasia Vidya Vihar Sr. School Management Committee Society (for short 'Halwasia Trust').

[3]. Plaintiffs further prayed for issuance of prohibitory permanent injunction restraining the defendants to use the property for any other purposes than the education. The plaintiffs projected themselves to be guardian of the students of the school and filed suit under Section 92 CPC.

[4]. Plaintiffs alleged that the defendant No.1 is a Public Charitable Trust. The aim and object of the Trust was to serve public at large in the field of education. Halwasia Bal Mandir and High School Society was constituted by Jan Kalyan itself for administration of the school. The school has been established and is being run by the donations and grants. Earlier the school was affiliated to Haryana School Education Board and thereafter got affiliated with CBSE Delhi. The plaintiffs further alleged that the defendants intended to alienate the property of the school and, therefore, the suit in question came to be filed.

[5]. On 02.11.2013, trial Court granted permission to the plaintiffs/respondents to contest the suit without issuing notice to the defendants/petitioners. Defendants/petitioners appeared before the trial Court and filed an application for revocation of permission granted under Section 92 CPC, claiming that the

defendant No.1 was a private Trust under whose supervision, defendant No.2-Society was working.

[6]. The property of the school was never dedicated to public. The Trust was being managed by the founder and their legal representatives, no person from the public could become a trustee, nor had any right to interfere in the management of the Trust. The founder of the Trust had no intention to create public Trust or to dedicate or part with ownership of the property in any manner.

[7]. In written statement, allegations of the plaint have been denied. It was specifically pleaded that defendant No.1 was a private Trust and no property of it was ever dedicated to public, nor had any right to intervene in the management. The properties were being managed by founder and their legal heirs. Plaintiffs being private persons had no interest in the Jan Kalyan Trust in any manner, nor they had impleaded the trustees of the Trust. The suit was not maintainable being against the provisions of Section 92 CPC.

[8]. The application for revocation of permission was contested by the plaintiffs. Trial Court vide the impugned order dismissed the same.

[9]. For ready reference Section 92 CPC is reproduced as under:-

"***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 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 inquiries;

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

(f) authorizing 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.

(2) Save as provided by the Religious

Endowments Act, 1863 (20 of 1863), or by any responding law in force in the territories which, immediately before the 1st November, 1956, were comprised in Part B States, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.

(3) The Court may alter the original purposes of an express or constructive trust created for purposes of a charitable or religious nature and allow the property or income of such trust or any portion thereof to be applied cypress in one or more of the following circumstances, namely:—

(a) where the original; purposes of the trust, in whole or in part,—

(i) have been, as far as may be, fulfilled; or

(ii) cannot be carried out at all, or cannot be carried out according to the directions given in the instrument creating the trust or, where there is no such instrument, according to the spirit of the trust; or

(b) where the original purposes of the trust provide a use for a part only of the property available by virtue of the trust; or

(c) where the property available by virtue of the trust & other property applicable for similar purposes can be more effectively used in conjunction with, and to that end can suitably be made applicable to any other purpose, regard being had to the spire of the

trust and its applicability to common purposes; or

(d) where the original purposes, in whole or in part, were laid down by reference to an area which then was, but has since ceased to be, a unit for such purposes; or

(e) where the original purposes, in whole or in part, have, since, they were laid down,—

(i) been adequately provided for by other means, or

(ii) ceased, as being useless or harmful to the community, or

(iii) ceased to be, in law, charitable, or

(iv) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the trust, regard being had to the spirit of the trust."

[10]. Three conditions were required to be satisfied to invoke the aforesaid provisions. Firstly that the Trust was created for public purpose of a charitable or religious nature. Secondly that there was breach of trust and a direction of the Court is necessary for administration of such Trust and thirdly that the relief claimed is one of the relief enumerated in the Section.

[11]. Plaintiffs have relied upon Trust Deed to show that trustees shall have the right to nominate two trustees in place of first named trustees in case of his death, retirement or refusal. As long as Trust is in force, there will be at least two trustees from amongst family members of the founders, whenever the

number of trustees exceeds two, otherwise there will be one trustee from the members of the family of the founders. Thus, it is mandatory for the Trust to have trustees from the family of the founders, otherwise it would cease to exist.

[12]. Apparently, no person from public can become trustee of Jan Kalyan. The trustees were empowered to invest and keep invested the Trust fund whether representing the corpus or income in such investments as they shall think fit in their absolute discretion. The primary concern before the trial Court was to find out whether Trust in dispute is a public Trust or private Trust. Permission/leave of the Court under Section 92 CPC is solely dependent upon the Trust being a public Trust.

[13]. A suit under Section 92 CPC is a suit of special nature and it pre-supposes the existence of public Trust of religious or charitable nature. Suit can only proceed if allegations of breach of such trust exists and for that administration of Trust is required under the direction of the Court. Grant of leave is *sine qua non* for filing such a suit for which Trust being public Trust is also a condition precedent.

[14]. In order to establish that the Trust is a public Trust, complete dedication of the property is required to be established. The burden is always on the plaintiffs or the person who claims the property to be public Trust. There must be clear

and unequivocal manifestation of intention to create a Trust and vesting thereof in the donor and another as trustee. Complete dedication creates a Trust whereas partial dedication creates only a charity.

[15]. In order to maintain the suit, plaintiffs have to show that there has been a complete dedication of the property in favour of general public. A suit under Section 92 CPC would be maintainable only if, it is proved beyond pale of doubt that Trust is a public Trust and not otherwise. Though no instruction in writing is required to dedicate the property for religious or charitable purposes, only a clear and unequivocal manifestation of intention to create a Trust and vesting thereof in the donor and another as a trustee is required. Complete dedication of the property is also required for creating a public Trust.

[16]. Dedication for public purpose would involve complete cessation of ownership on the part of the founder and vesting of the same for religious object. A right of easement in favour of community or a part of the community would not constitute such dedication where owner retains the property for himself. It may be that right of the owner of the property, is qualified by public right of user, such right is not wholly unrestricted. The public in general did not have any right of participation in the management of the property, nor have any maintenance.

[17]. The dedication would mean complete relinquishment of his right of ownership and proprietorship. Benevolent act of the founder in the benefit of the general public may or may not amount to dedication for charitable purpose when a complete control is retained by the owner and management is also controlled by him, dedication cannot be presumed.

[18]. In ***Kuldip Chand & Anr. vs. Advocate General to Government of Himachal Pradesh and Ors, 2003(1) RCR (Civil) 824***, the Hon'ble Apex Court laid down the certain tests as guidelines on the facts of each case, whether an endorsement is of a public or private in nature. The same are given as under:-

> *"(1) Where the origin of the endowment cannot be ascertained, the question whether the user of the temple by members of the public is as of right;*
>
> *(2) The fact that the control and management vests either in a large body of persons or in the members of the public and the founder does not retain any control over the management. Allied to this may be a circumstance where the evidence shows that there is provision for a scheme to be framed by associating the members of the public at large;*
>
> *(3) Where, however, a document is available to*

prove the nature and origin of the endowment and the recitals of the document show that the control and management of the temple is retained with the founder or his descendants, and that extensive properties are dedicated for the purpose of the maintenance of the temple belonging to the founder himself, this will be a conclusive proof to show that the endowment was of a private nature;

(4) Where the evidence shows that the founder of the endowment did not make any stipulation for offerings or contributions to be made by members of the public to the temple, this would be an important intrinsic circumstance to indicate the private nature of the endowment."

[19]. Learned Senior counsel for the petitioners also submitted that leave of the Court is a pre-condition for filing the suit under Section 92 CPC. A suit against the general public for the relief set out in the said Section would not be maintainable unless all the beneficiaries joined in instituting the suit. If such a suit is instituted without leave of the Court, the same would not be maintainable at all. The language used in Section 92 CPC appears to be a rule of caution that the Court should normally give notice to the defendants unless it is impracticable to do so.

[20]. In ***Vidyodaya Trust vs. Mohan Prasad R & Ors., 2008(2) RCR (Civil) 229***, the Hon'ble Apex Court held in the

following manner:-

> *"18. Prior to legislative change made by the Code of Civil Procedure (Amendment) Act, 104 of 1976 the expression used was "consent in writing of the Advocate-General". This expression has been substituted by the words "leave of the Court". Sub-Section (3) has also been inserted by the Amendment Act. The object of Section 92 CPC is to protect the public trust of a charitable and religious nature from being subjected to harassment by suits filed against them. Public trusts for charitable and religious purpose are run for the benefit of the public. No individual should take benefit from them. If the persons in management of the trusts are subjected to multiplicity of legal proceedings, funds which are to be used for charitable or religious purposes would be wasted on litigation. The harassment might dissuade respectable and honest people from becoming trustees of pubic trusts. Thus, there is need for scrutiny. In the suit against public trusts, if on analysis of the averments contained in the plaint it transpires that the primary object behind the suit was the vindication of individual or personal rights of some persons an action under the provision does not lie. As noted in Swami Parmatmanand's case (supra) a suit under Section 92 CPC is a suit of special nature, which pre- supposes the existence of a public trust of religious or charitable character. When the plaintiffs do not sue to vindicate the right of the public but seek a declaration of their individual or personal rights or the individual or*

personal rights of any other persons or persons in whom they are interested, Section 92 has no application.

19. In Swamy Parmatmanand's case (supra) it was held that it is only the allegations in the plaint that should be looked into in the first instance to see whether the suit falls within the ambit of Section 92. But if after 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 in fact or reason but is made only with a view to bringing the suit under the Section then suit purporting to be brought under Section 92 must be dismissed."

[21]. While delivering the aforesaid judgment the necessity was discussed relying upon the dictum laid down by the Hon'ble Apex Court in ***R.M. Narayana Chettiar and another vs. N. Lakshmanan Chettiar and others, 1991(1) SCC 48***.

[22]. Learned counsel for the respondents however placed reliance upon ***R.M. Narayana Chettiar and another*** (supra) to contend that Court is not bound to give notice to the defendants, however it is only a caution to give notice. Learned counsel also relied upon the objects of the Trust to allege that the Trust is the public Trust in nature.

[23]. Learned Senior counsel for the petitioners by referring to para Nos. 3, 4 and 6 of the plaint as well as the Trust deed

argues that the ingredients of public Trust are not satisfied. Clause 5 of the objects of the Trust provides control and management with the trustees in respect of collection of income and other functions of the Trust. In this way, there was total control with the trustees of the Trust which makes the Trust a private Trust. There is no mention of dedication in the entire Trust deed which satisfies the ingredients of Trust being public Trust.

[24]. Therefore, according to learned Senior counsel for the petitioners relief has been wrongly granted to the plaintiffs/ respondents to pursue the suit under Section 92 CPC.

[25]. Perusal of order dated 02.11.20013 passed by the trial Court reveals that much emphasis has been laid on the Trust deed to arrive at *prima facie* conclusion that the Trust is a public Trust. The impugned order has been passed on the application for revocation of permission. It is necessary to see whether at the time of granting permission the trial Court has applied its mind or not?

[26]. The concluding part of order dated 02.11.2013 only reveals the following opinion of the Court:-

> *"After going through the case file, permission is given to the plaintiffs to pursue the present suit. Now notice to the defendants be issued for 12.11.2013. Dasti summons, if so desired, be also given."*

[27]. As already discussed in order to maintain a suit under Section 92 CPC, the plaintiff has to show the existence of public Trust. The Court should normally give notice to the defendant before granting leave under the aforesaid Section, though the Court is not bound to do so, but before granting leave to institute the suit, proceedings for granting leave have to be held in the Court.

[28]. In these proceedings, the Court has to be satisfied that Trust is a public Trust and the person who wants to file the suit is interested in the Trust. It is only on the satisfaction of the Court, permission to institute the suit can be granted by the Court.

[29]. Perusal of order dated 02.11.2013 vide which permission was granted under Section 92 CPC reveals that there is no satisfaction recorded by the Civil Judge (Sr. Divn.) Bhiwani in the context of finding whether Trust is a public Trust or private Trust and whether other ingredients are satisfied or not viz-a-viz the dedication and control of the Trust at the hands of the trustees.

[30]. The order dated 02.11.2013 appears to be totally non-speaking and does not satisfy the mandate in terms of Section 92 CPC. Even though the Court has tried to elaborate the nature of Trust with reference to Trust deed in the application for

revocation of permission, but the fact remains that the basic order dated 02.11.2013 is totally non-speaking in nature.

[31]. The order granting permission/leave to file suit under Section 92 CPC and application for revocation of such permission should be considered on different pedestal. The basic order appears to be totally non-speaking and does not conform the requirement of law. Therefore, this Court is of considered view that the Civil Judge (Jr. Divn.) Bhiwani has committed error of law while granting the permission by passing totally non-speaking order and the said order even though not assailed in the present revision petition independently has material bearing on the entire case.

[32]. Even in the impugned order dated 10.12.2013, the Civil Judge (Jr. Divn.) Bhiwani has not adverted to the factum of complete dedication of the property in order to make the Trust a public Trust.

[33]. In view of above, it would be just and expedient to remand the case back to the Civil Judge (Jr. Divn.), Bhiwani after setting aside the orders dated 02.11.2013 and 10.12.2013 passed by the Civil Judge (Jr. Divn.) Bhiwani with a direction to decide the application of the plaintiffs/respondents for permission to pursue the suit in terms of Section 92 CPC, afresh by considering the legal positions as enumerated above and

decide the application as expeditiously as possible preferably within a period of one month from the date of receipt of certified copy of the order.

[34]. Petition is disposed of with the aforesaid direction.

December 24, 2015 **(RAJ MOHAN SINGH)**
Atik **JUDGE**