

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**C.R. No. 79 of 2018****Reserved on 28.08.2020****Pronounced on 15.09.2020**

1. M/s. I Square Infrastructure And Developers (Wrongly Mentioned In Impugned Order As Mr. I Skyers Infrastructure And Developers) 1st Floor, CIA House Contractors Colony, G.E. Road, Supela, Bhilai, District Durg Chhattisgarh. Through Its Partner.
 - a. Shri C.K. Vijayan, Son Of Shri Kumaran, Aged About 64 Years, R/o 44 C Market Sector - 1, Bhilai, District Durg Chhattisgarh.
 - b. Smt. Thankam, Wife Of Shri Kumaran, Age About 80 Years, R/o 44 C Market Sector - 1, Bhilai, District Durg Chhattisgarh.

Note - Shri M.G. Hariharan, Shri Ramesh Babu, Partners Of Applicant No. 1 Firm Applicant No. 1 Firm Is Being Represented In This Case By Two Partners Mentioned In Cause Title Therefore Other Partners Were Not Mentioned In Cause Title As They Are Not Required. For The Same Reason Shri N.L. Tushar And Smt. Tushar Girish Are Not Required In Cause Title. (Defendant No. 5),

---- Applicant**Versus**

1. State Of Chhattisgarh Through The Principal Secretary, Department Of Housing And Environment, Mahanadi Bhawan, Mantralaya, Naya Raipur Chhattisgarh.
2. Director, Directorate Of Town And Country Planning Raipur Chhattisgarh.
3. Joint Director, Town And Country Planning, Regional Officer, Durg Chhattisgarh.
4. Bhilai Municipal Corporation, Through The Commissioner, Bhilai, District Durg Chhattisgarh.
5. Ashish Paryavaran Sanrakshan Samiti, Bhilai (Regn No. 24649) Through The Secretary, Shri Vijendra Kumar Choudhary, S/o Shri Jagnarayan Choudhary, Aged About 65 Years, R/o Plot No. 4B, Street - 15, Ashish Nagar (W), Risali, Bhilai, Tahsil And District Durg Chhattisgarh. (Respondent No. 5 Plaintiff No. 1)
6. Shri Vijay Kumar Uplopwar, S/o Late Gopal Rao Uplopwar, Aged About 64 Years R/o A-4, Street - 15, Ashish Nagar (W), Risali, Bhilai, District Durg Chhattisgarh. (Respondent No. 6 Plaintiff No.2),
7. Smt. Laxmi W/o T. Balkrishan, R/o Plot No. 95, Pragati Nagar, Bhilai, Police Newai, Tahsil And District Durg Chhattisgarh. (Respondent No. 7 Defendant No. 6).

---- Non-applicants

For Applicant:	Shri Sunil Pillai, Advocate.
For State/Non-applicants No.1 to 3:	Shri Gagan Tiwari, Dy. G.A.
For Non-applicant No.4:	Shri H. B. Agrawal, learned senior Advocate along with Shri Amit Tirkey, Advocate.
For Non-applicants No.5 to 7:	None, though served.

Single Bench: Hon'ble Shri Sanjay S. Agrawal, J

CAV Order/Judgment

1. This Revision Petition has been preferred by Defendant No.5 M/s I. Square Infrastructure & Developers questioning the legality and propriety of the order dated 31.03.2018 passed by the trial Court in Civil Suit No.118-A/2014, whereby the suit as framed has been held to be instituted from the date when the leave for its institution has been accorded, while entertaining the issue No.8, under Section 91 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC'). The parties to this petition shall be referred hereinafter as per their description in the Court below

2. Briefly stated the facts of the case are that the Plaintiff, a registered society, instituted a suit claiming declaration of civil rights and also for protection from public nuisance by way of injunction in a mandatory form with regard to the property in question admeasuring 0.42 acres of land forming part of Khasra No. 406 total admeasuring 5 acres situated at village Risali, Tehsil and District Durg. According to the Plaintiff, the owners of the said property, had applied for a development plan before the Director, Town and Country Planning, Durg and it was sanctioned by the Assistant Director, Town and Country Planning, Durg vide order dated 13.12.1990 under certain terms and conditions stipulated therein. In the said sanctioned order, an open space admeasuring 0.42 acres the suit

land, was left for the purpose of garden/children Park and for its development, the Municipal Corporation, Bhilai has sanctioned a sum of Rs.5,04,651/- vide its order dated 14.05.2008.

3. Further claim of the Plaintiff is that the Joint Director, Town and Country Planning, Durg on the basis of an application made by Defendant No.5, namely, M/s I. Square Infrastructures and Developers, a partnership firm, has initiated the proceeding wherein the park area has been reduced to the extent of 50% vide its order dated 14.10.2010 and that by taking undue advantage of it, the said Defendant has started interfering with the said park area with an intention to convert the same into the plots for residential purposes, giving rise to the institution of the revision by the Plaintiff under Section 32 read with Section 72/74 of the Chhattisgarh Nagar tatha Gram Nivesh Adhiniya, 1973 before Defendant No.1, who, in turn, has dismissed the same vide its order dated 26.03.2012 which led to the filing of the petition being WP(PIL) No.42/13. The said petition was disposed of by the Division Bench of this Court vide order dated 11.11.2014 while granting permission to the Plaintiff for filing a civil suit and accordingly the suit in the instant nature for the protection of the children park as granted earlier by the competent authority vide order dated 13.12.1990, which has attained its finality, has been instituted on 24.12.2014 while taking recourse to the provision prescribed under Section 94 of the CPC.

4. The defendants have contested the claim and the trial Court vide order dated 17.02.2016 has framed the issues and one of the issues, namely, issue No.8 was framed as under:-

“Whether the mandatory provision prescribed under Section

91(1) of CPC has been complied with?”

5. After considering the submissions of the parties with regard to the aforesaid issue, it was observed by the trial Court vide order impugned dated 31.03.2018 that although a formal application seeking leave to institute the suit has not been filed from its inception but as the matter was pending for a long upon its registration and also the interim orders were made therein and in view of the said background observed that the suit shall be deemed to be instituted with the date the leave is granted while allowing the application filed by the Plaintiff during its pendency under Section 151 of the CPC to this effect. The said issue has, thus, been decided accordingly which has been impugned by way of preferring this revision petition by Defendant No.5.

6. According to Shri Sunil Pillai, learned counsel appearing for the Applicant, the suit as instituted under Section 91 of CPC could have been instituted only with the leave of the Court and admittedly neither the application seeking leave to institute the suit was accompanied with the plaint nor any order to the said effect was passed. In such an eventuality, the suit as framed should have been held to be not maintainable for the non-compliance of the said mandatory provision. Having failed to do so, the trial Court has committed a serious illegality in proceeding ahead with the matter while allowing the application filed by the Plaintiff under Section 151 of the CPC by treating the suit to be instituted from the date the leave is granted. In support, he placed his reliance upon the decisions rendered by the Supreme Court in the matter of **A. C. Muthiah vs. Board of Control for Cricket in India and another** reported in (2011) 6 SCC 617 and Civil Appeal No(s).6067/2010 decided on 18.09.2019 (2019) SCC

online 1296 respectively.

7. No one appears on behalf of the contesting Non-applicants 5 to 7/Plaintiffs despite service of notice of this petition.

8. I have heard learned counsel for the Applicant and perused the entire papers annexed with this petition carefully.

9. Before advertng to the aforesaid contention, it is necessary to examine the provision prescribed under Section 91 of the CPC, which reads as under:-

91. Public nuisances and other wrongful act affecting the public.- [(1) In the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted,-

(a) by the Advocate-General, or

(b) with the leave of the Court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.]

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

10. By virtue of the aforesaid provision, a suit for declaration and injunction or for such other relief as may be appropriate in the circumstances of the case with regard to the public nuisance or other wrongful act affecting or likely to affect the public may be instituted with the leave of the Court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act. The provision, thus, deals with public nuisance or other wrongful act which affects a considerable number of people. Under the said provision, the Advocate General or two or more

persons with the leave of the Court may bring a suit either for a declaration or injunction or for any other relief irrespective of any special damage. It, thus, appears from a bare perusal of the aforesaid provision that for the institution of a valid suit, leave of the Court is a condition precedent and there would be no properly instituted suit under the aforesaid provision before the leave is granted.

11. According to the observations made in the matter of **A. C. Muthiah vs. Board of Control for Cricket in India and another**(supra) as relied upon by Shri Pillai, there is, however, no dispute that in order to maintain a suit under the said provision in the nature of public interest for removal of public nuisance or other wrongful act affecting or likely to affect the public at large, the Plaintiff has to obtain the leave of the Court before institution of such a suit and two or more persons must require to be joined as Plaintiffs in filing the same. But the question which falls for determination at this stage that what would be the effect where the trial Court, while entertaining the issue No.8, has accorded its permission during its pendency?

12. In order to ascertain the proper interpretation of the aforesaid provision, the principles laid down by the Supreme Court in the matter of **Bansidhar Sankarlal v. Md. Ibrahim and another** reported in **AIR 1971 SC 1292** are to be seen. In the said matter, a decree for ejectment of the company was put in execution without obtaining the leave of the Court as required to be obtained under Section 171 of the Indian Companies Act, 1913. It was observed in that factual scenario that if the proceeding for execution of a decree for ejectment is initiated without the leave of the Court, then it may be regarded as ineffective until the leave is granted, but

once the leave is granted, the proceedings will be deemed to be instituted on the date when the leave is granted. The observation so made therein at paragraph 8 is relevant for the purpose at this juncture, which reads as under:-

8.The suit or proceeding instituted without leave of the Court may, in our judgment, be regarded as ineffective until leave is obtained, but once leave is obtained the proceeding will be deemed instituted on the date granting leave.”

13. The High Court of Orissa in a similar situation in the matter of ***Kintali China Jaganadham and others v. K. Laxmi Naidu and others*** reported in **AIR 1988 Orissa 100**, as happened in the instant matter, observed at paragraph 9, while following the aforesaid principles of law that in a suit when it was instituted without the leave of the Court and its presentation was granted thereafter, as under:-

“9.The suit shall be deemed to be instituted on the date the leave was granted and not on any earlier date. Proceeding prior to the grant of leave in the suit and any interlocutory order passed prior to the grant of leave shall be held as invalid and non est.....”

14. Similar in the view taken by this Court in the matter of ***Bhupendra Singh Babara and another vs. Municipal Council Ambikapur and another*** reported in **(2001) 3 M.P.H.T. 80 (CG)**, wherein it has been observed that the suit of such a nature could be held to be duly instituted only after the leave is granted or permission is accorded.

15. Now, further reliance of Shri Pillai on a decision rendered by the Supreme Court in the matter of ***A. C. Muthiah vs. Board of Control for Cricket in India and another*** (supra) is, however, of no use and would not

come as a rescue for him. That is the case where an application for leave to institute such a kind of suit was filed. However, no order in this regard was passed by the trial Court, nor the defendant had raised any objection regarding its maintainability for want of leave and instead, both the parties had led evidence and the matter was decided on merits. In that factual scenario, though observed that in every suit of such a nature, grant of leave is necessary under the said provision, but in a peculiar circumstances when an objection was not raised by the defendant initially, therefore, while declining to consider his objection, observed ultimately that the observation made herein, shall not be treated as a precedent.

16. Upon due consideration of the observations made in both the decisions as relied upon by Shri Pillai, I am not impressed with the contention of him.

17. In the present matter, as observed herein above, although the suit in the instant nature was filed initially without seeking leave of the Court but an application to this effect as required under the law was made by the Plaintiff during its pendency and after allowing the same, the suit has been held to be instituted on the date when the same is granted. In view of the said background and in the light of the principles laid down in the above mentioned decisions, I do not find any infirmity in the approach of the Court below in deciding the issue no.8 as such.

18. In view of above, the revision petition is accordingly dismissed. No order as to costs.

Sd/-

(Sanjay S. Agrawal)
JUDGE