IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 600 OF 2018

AMAR SUBHA NAIK AND ORS., ... Petitioners.

Versus

DEVU KESHAV NAIK AND 43 ORS. ... Respondents.

Shri S. D. Lotlikar, Senior Advocate with Shri Terence Sequeira, Advocate for the petitioner.
Shri A. D. Bhobe and Ms. A. Fernandes, Advocates for the respondents.

Coram:- DAMA SESHADRI NAIDU, J.
Reserved on:- 16th January 2020.
Pronounced on:-15th March, 2021.

ORAL ORDER

Facts:

This Writ Petition has ten petitioners and 44 respondents. Respondent nos. 1 to 36 were the original plaintiffs; they filed Regular Civil Suit No.56/2014/A before the Civil Judge, Senior Division, Ponda, seeking various reliefs. Of the 18 defendants, defendant nos. 6 and 18 filed one written statement. Besides, they raised a counterclaim; they wanted a declaration that the plaintiffs are strangers to the Trust. They have also sought a permanent injunction, besides other incidental reliefs.

2. Similarly, defendant nos.2, 9 and 13 filed a separate written statement. In fact, they too have acknowledged the counterclaim and sought the Court's leave to adopt and maintain that counterclaim. Defendant no.5 filed a separate written statement; he also wanted to be a part of the counterclaim. Then comes the written statement of defendant nos.10,11, and 16. It, too, proceeds on the same lines.

3. At one stage in June 2016, the plaintiffs applied for amending the pleadings, but the trial Court, through its Order, dated 23.2.2016, rejected it. It has reckoned that the plaintiffs are trying to withdraw an admission. Then, five days later, the trial Court dismissed the defendants' application for a temporary injunction. It was on the grounds that the Trust was a necessary party to the suit, but it was not made a party and that they sought no leave under section 92 CPC.

4. Aggrieved, the defendants filed Misc. Civil Application No. 86/2016 before the District Judge-II, Panaji, sitting at Ponda. Through its judgment, dated 12.3.2018, the learned District Judge confirmed the trial Court's findings and refused to interfere. Eventually, the defendants have filed this Writ Petition.

Petitioners:

5. Shri S. D. Lotlikar, the learned Senior Counsel, instructed by Shri Terence Sequiera, has contended that it is entirely untenable for the Courts' below to dismiss the interlocutory application on the premise that the defendants in their counterclaim have not added the necessary party. According to him, it is not a dispute among the Trust members; it is, on the contrary, a dispute involving the members and a third party. So, he stresses that Trust is not a necessary party. In that context, the learned Senior Counsel has drawn my attention to section 37 of the Trust Act, besides Section 92 of the C.P.C. He has also referred to the Deed of Trust, with a specific reference to clause 19. According to him, viewed from another perspective, the Courts below could have exercised their discretion and injuncted the plaintiffs as the defendants had sought.

Respondents:

6. In response, Shri Bhobe, the learned counsel for the respondents-plaintiffs, has submitted that Trust is a juristic person. In

its absence, as rightly held by the Courts below, the defendants could have sought no relief in the counterclaim. He has also pointed out that the Trust Act prohibits delegation, but the application was signed only by the defendants nos.6 and 18. According to him, it violates section 47. In this context, Shri Bhobe reiterates that the Trust is a legal entity, and its absence is fatal not only to the suit but also to the interlocutory application. Eventually, Shri Bhobe has taken me through section 92 (9) of CPC and wanted me to read that provision with section 50 of the Trust Act. To conclude, the learned counsel has urged that the impugned judgment suffers from no legal infirmity and requires no interference.

7. Heard Shri S. D. Lotlikar, the learned Senior Counsel, instructed by Shri T. Sequeira, for the petitioners; Shri A. D. Bhobe, the learned counsel for the respondents.

Discussion:

8. This is a writ petition under "Article 226 read with Article 227" of the Constitution of India. Respondents 1 to 36 are the plaintiffs; the petitioners and respondents 37 to 44 are the defendants in RCS No.56/2014/A, before the Civil Judge, Senior Division, Ponda. The dispute concerns the trusteeship to Shree Sai Baba Seva Mandal Trust: Who are the trustees? Are the plaintiffs the deemed trustees?

9. The plaintiffs sought these reliefs: (a) to declare that the plaintiffs are the trustees; (b) to declare that deed of rectification, dated 27.2.2002, is void; (c) to direct the sub-registrar of Ponda to cancel the deed of rectification, dated 27.2.2002; (d) to direct the defendants to execute a Deed of Rectification to the Deed of Trust, dated 28.4.1999, for including the Plaintiffs as the trustees; (e) to direct the defendants to hand over the charge of the temple and other activities to the managing committee for the term 2014-2017 with immediate effect.

10. In that suit, the defendants entered appearance and filed their written statements. Besides that, some of the defendants filed a counterclaim. Among the defendants who actually filed the counterclaim is a disputed fact, but we need not visit that controversy. The fact remains that two of the defendants in RCS No.56/2014/A filed an interlocutory application for an injunction in their counterclaim. Thy are defendant no.6 (since deceased) and defendant no.18 (the petitioner no.10 in this writ petition).

11. In the counterclaim, the reliefs are these: (a) to declare that the plaintiffs are strangers to the trust; (b) to injunct the plaintiffs their agents, and so on from interfering with the activities of the Managing Committee or Board of Trustees; (c) to injunct the plaintiffs and others from acting as trustees; (D) to injunct the plaintiffs from collecting any donations or sponsorships; (E) to injunct the plaintiffs from selling any items in the temple.

12. Let us examine the application for the temporary injunction "the defendants" filed. It carries the cause title as was given in RCS No. 56/2014. The pleadings simply narrate that "the defendants have filed a counterclaim against the plaintiffs…". And throughout the pleadings, it has not been specified who among the many defendants have filed, first, the counterclaim and, second, the interlocutory application. *Prima facie*, the application reads as if all the defendants had filed that application for a temporary injunction. The defendants have sought the temporary injunction on all counts on which they sought a perpetual injunction.

13. But the interim injunction application bears the signatures of only defendants 6 and 18. Then, the "affidavit" reads: "I, Shri Nanda Sonu Raikar, … The defendant 6 herein and the President of… Trust above named do hereby…". The Trust is not a party, though.

14. The trial court dismissed the application for an interim

injunction through its order, dated 28/06/2016. Aggrieved, the defendants 2, 5, 6, 9, 10 to 14 and 18 filed the Miscellaneous Civil Appeal. The appellate court, too, refused to interfere. So, the appellants in that MCA have filed this writ petition.

15. Let us see on what grounds both the courts below have refused to grant the interim relief to the petitioners: (1) the application for temporary injunction filed by only two trustees, that is defendants 6 and 18, is not maintainable in law without the co-trustees or trust being a party to the counterclaim or suit. (2) the trust is a necessary party; in its absence, the proceedings suffer. (3) the counterclaim filed by appellants 9 and 10 shows that appellant 9 signed the counterclaim as the President of the Trust but did not mention any co-trustee's consent. (4) the application for a temporary injunction was signed neither by the Managing Committee nor Board of the Trust. (5) the counterclaim and the interim application for an injunction are hit by section 92 of CPC.

16. We need to examine the correctness of the concurrent findings of the courts below. But that examination is on the touchstone of this Court's supervisory jurisdiction under Article 227 of the Constitution. We must, indeed, remember that a proceeding under Article 227 is no appeal in disguise. Mere error, if any, in the trial Court's exercising its discretion will provide no ground for interference. The order impugned must have suffered from a graver element of injustice or illegality, such as perversity or abuse of discretion. That said, both the courts below have rejected the injunction application on technicalities—rather, on the grounds of maintainability—thus answering what seem to be questions of law. So, this Writ Petition needs adjudication.

Is the interlocutory application—and, for that matter, the very counterclaim—bad for non-joinder of necessary parties such as the other co-trustees and the very Trust?

17. We will, however, confine our discussion only to the application for the interim injunction. Let us check the statutory position. Section 47 of the Indian Trusts Act mandates that "a trustee cannot delegate". A trustee cannot delegate his office or his duties. But he may delegate to a co-trustee or even a stranger (a) if the instrument of the trust so provides, or (b) if the delegation is in the regular course of business, or (c) if the delegation is necessary, or (d) if the beneficiary, competent to contract, consents to the delegation. As the explanation clarifies, a trustee can delegate to an attorney or proxy any ministerial acts or acts with no independent discretion. Section 47 reads:

> 47. Trustee cannot delegate.—A trustee cannot delegate his office or any of his duties either to a co-trustee or to a stranger, unless
> (a) the instrument of trust so provides, or
> (b) the delegation is in the regular course of business, or
> (c) the delegation is necessary, or
> (d) the beneficiary, being competent to contract, consents to the delegation.
> Explanation.—The appointment of an attorney or proxy to do an act merely ministerial and involving no independent discretion is not a delegation within the meaning of this section.

18. Besides, section 48 unambiguously declares thus: Co-trustees cannot act singly. When there are more trustees than one, all must join in the execution of the trust unless the instrument of trust otherwise provides.

19. In *J.P. Srivastava & Sons (P) Ltd. v. Gwalior Sugar Co. Ltd.*[1], the Supreme Court has analysed section 47 and discerned two more grounds from that provision. If we continue our enumeration from section 47, those two additional grounds are these: (e) where there is express sanction or approval of the act by the co-trustees; (f) where the co-trustee merely gives effect to a decision taken by the trustees jointly.

1(2005) 1 SCC 172

One of the questions before the Full Bench of this Court in *Shyambai v. Madan Mohan Mandir Sanstha*[2] is whether sections 47 and 48 of the Indian Trusts Act apply to a Public Trust? If they do, whether all the trustees of that Public Trust should join as parties to the suit for evicting a tenant?

20. While answering the above question, the Full Bench has noted the Apex Court's decision in *Thayarammal (dead) by L.R. v. Kanakammal*[3], and this Court's two decisions: *Controller of Estate Duty v. Mangala*[4], and in *Sarda Education Trust v. Mukund Rambhau Pinjarka*[5]. Those decisions do declare that the provisions of the Indian Trusts Act, 1882, in general, and sections 47 and 48 in particular, do not apply to the public trusts.

21. So the Full Bench has noted that the judgment of this Court's Division Bench in *Sarda Education Trust* was holding the field, and it had not conflicted with any other co-equal Bench decision. So, there was no occasion for the learned Single Judge to refer the matter to a larger Bench because *Sarada Education Trust*, as a Division Bench decision, binds the learned Single Judge. In the end, the Full Bench has observed that *Sarda Education Trust* was based on the Supreme Court's judgment in *Thayarammal*. In brief, the Indian Trusts Act applies only to private trusts and not to public trusts.

22. The Trust the petitioners and the respondents here are fighting for is a private trust. And the limitations imposed by Indian Trust Act do affect it.

2AIR 2010 Bom 88 (FB)
3(2005) 1 SCC 457
41982 Mh. L. J 686
52008 (2) Mh. L. J 395

23. In *Duli Chand v. Mahabir Pershad Trilok Chand Charitable Trust*[6], a Division Bench of Delhi High Court has held that a trust is not a legal entity. In fact, a trust may be defined as an obligation imposed on the ostensible owner of the property to use it for a particular object, to benefit a named beneficiary or a charity. Thus, all trustees in law are owners of the property, but they must use it in a particular manner. If many trustees exist, they are joint owners of the property. It is not like a corporation, which has a legal existence of its own and which, therefore, can appoint an agent. A trust is not, in this sense, a legal entity. It is the trustees who are the legal entities.

24. All is said and done, we must also accept that if the trust deed itself authorises a particular trustee or an office bearer to sue and be sued for and on behalf of the trust, the position differs. So let us now examine the Trust Deed. Indeed, there is no such enabling clause in the Trust Deed. Clause 8 (xviii) serves a different purpose altogether; it collectively empowers all the trustees to frame such rules and regulations as are necessary for the management and administration of the Trust. Nothing more.

25. From the above discussion, we gather that the defendants, as the plaintiffs in the counterclaim, claim to represent the Trust; they claim to draw their powers from the Deed of Trust; they want the Trust and its properties protected. Despite that, only two of them have filed the counterclaim. The rest are said to have adopted the counter-claim. I am afraid the concept of 'adopting' a plea does not apply to seeking a positive relief—that is, filing a suit, for instance. When a plaintiff sues, no other person can 'adopt' the relief sought in that suit. He ought to be a co-plaintiff. If he is a defendant, he may support the

6(1984) 25 DLT 70 (DB)

plaintiff's cause and sail with him, but the relief the plaintiff gets cannot be treated as relief in that defendant's favour, too.

26. So, here, only the defendants 6 and 18 have filed the counterclaim; they are, in effect, the plaintiffs in a parallel suit called a counterclaim. The rest are the defendants. When they have sought an interim injunction, they alone are the petitioners. Then, I fail to understand how all others— defendants 2, 5, 9, 10 to 14—can file the Miscellaneous Appeal. They, however, joined defendants 6 and 18 (the plaintiffs in the counterclaim) and maintained the appeal.

27. Then, the irresistible conclusion is that the defendants 6 and 18 alone, as the plaintiffs in the counterclaim, could not have sought the interim relief representing all the trustees. Both sections 47 and 48, as held by the courts below, hit their action.

Does the Interim Injunction Application—and the Counterclaim as a whole—suffer for want of permission under section 92 of CPC?

28. Again, let us confine our discussion to the interim injunction application. A trust may have been created expressly or constructively for public purposes of a charitable or religious nature. If a Court's direction is necessary for the administration of any such trust, the Advocate-General, or "two or more persons having an interest in the trust" with the court's leave, may institute a suit in the principal Civil Court of original jurisdiction or in any other competent court. For that court to have jurisdiction, the whole or any part of the subject matter of the trust must have been situated within its local limits. The suitor can obtain a decree, whether the issue is contentious or not, for these purposes:

> (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) 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.

29. The trial Court and the Appellate Court have both held that section 92 of CPC applies to the petitioners' case. Here, we must note two things. The suit filed by respondents 1 to 36 as plaintiffs (RCS No.56/2014/A) is distinct from the petitioners' counterclaim. Even if we accept that only two defendants filed the counterclaim, it is a suit for all practical purposes filed by them. It has nothing to do with RCS No.56/2014/A; it survives independently whatever should happen to RCS No.56/2014/A. What affects one need not affect the other. The Appellate Court in para 15 of its Judgment, dt.12.03.2018, has listed out the circumstances under which the plaintiffs should seek the court's leave under section 92 of CPC if the suit involves a trust created for public purposes of a charitable or religious nature. But it conflated both the suit and the counterclaim and held that if RCS No.56/2014/A suffers for want of sanction under section 92 of CPC, so does the counterclaim. But it is not so. If we assume that section 92 of CPC applies to the counterclaim, none of the instances mentioned under sub-section (1) covers the reliefs the defendants, 6 and 18 sought.

30. Let us begin our discussion on this question by citing Mukherjea, J. (as HisHis Lordship then was), in *Mahant Pragdasji Guru Bhagwandasji v. Patel Ishwarlalbhai Narsibhai*[7]. In that case, the Supreme Court has held that a suit under section 92 of CPC "is a suit of a special nature which presupposes the existence of a public trust of a religious or charitable character". Such a suit can proceed only on the allegation

7AIR 1952 SC 143

that there is a breach of such trust or that the court's directions are necessary. It is only when these conditions are fulfilled that the suit has got to be brought in conformity with the provision of section 92 of CPC.

31. In *Vidyodaya Trust v. Mohan Prasad R*[8], the Supreme Court has held that "a plain reading of Section 92 of the Code indicates that leave of the court is a pre-condition 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". Besides, the Supreme Court in *Vidyodaya Trust* has quoted with approval its earlier judgment in *Swami Paramatmanand Saraswati v. Ramji Tripathi*[9]:

> A suit under Section 92 is a suite of a special nature that *pre-supposes the existence of a public Trust of a religious or charitable character.* Such a suit can proceed only on the allegation that there was a breach of such trust or that the court's direction is necessary for the administration of the trust, and the plaintiff must pray for one or more of the reliefs that are mentioned in the section. It is, therefore, clear that if the allegation of breach of trust is not substantiated or that the plaintiff had not made out a case for any direction by the court for the proper administration of the trust, the very foundation of a suit under the section would fail; and, *even if all the other ingredients of a suit under Section 92 are made out, if it is clear that the plaintiffs are not suing to vindicate the right of the public but are seeking a declaration of their individual or personal rights or the individual or personal rights of any other person or persons in whom they are interested, then the suit would be outside the scope of Section 92.*
>
> (italics supplied)

32. *Swami Paramatmanand Saraswati*, as extracted above, postulates two conditions for a suitor to seek leave under section 92

8(2008) 4 SCC 115
91974 (2) SCC 695

CPC. One is that the defendant trust must be "a public Trust of a religious or charitable character". The other is that the plaintiff must be suing "to vindicate the right of the public". If neither condition exists, the suit would be outside the scope of Section 92. Any suit for declaration of, say, a trustee's "individual or personal rights, or the individual or personal rights of any other person or persons in whom they are interested" is beyond Section 92 of CPC

33. Here, first, the Trust is not a party to the suit or the counterclaim Nor is it a public trust. Second, in neither suit—or if we confine ourselves to the counterclaim —is there any relief "to vindicate the right of the public". So, the the Courts below erred in holding that injunction application is bad for their not seeking the leave under section 92 CPC.

34. In his celebrated commentary on the Code of Civil Procedure, the legendary author Mullah quotes *Lima v. Rama*[10] and *Gursangaya v. Tamana*[11] of this Court to comment that section 92 of CPC does not bar a suit for a claim for the administration of private trusts.

35. Therefore, the Court's findings on this count—the need for permission under section 92 CPC—statutorily suffer. In other words, their finding that the petitioners—that is, whoever has filed the counterclaim—must have taken the court's leave under section 92 CPC is erroneous.

That said, the impugned judgment, dated 12.3.2018, sustains itself on the first count—that of non-joinder of necessary parties. And that goes to the root of the matter. So it calls for no interference.

DAMA SESHADRI NAIDU, J.

10(1889) ILR 13 Bom 548

11(1892) ILR 16 Bom 281