
Shri Hamid Ahmed Vs Shri Asad Mueed and Others

IA No. 11871 of 2008 in CS (OS) No. 326 of 2005

Court: Delhi High Court

Date of Decision: Sept. 4, 2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) " Order 7 Rule 11, Order 7 Rule 13, 92, 92(1), 92(2)#Trusts Act, 1882 " Section 34

Citation: (2009) 162 DLT 520 : (2010) 7 RCR(Civil) 1218

Hon'ble Judges: Anil Kumar, J

Bench: Single Bench

Advocate: Chetan Sharma and Bobby Lau, for the Appellant; Satinder Singh Bawa, for the defendant No. 1, Prag Tripathi and Simran Mehta, for the defendant No. 3, for the Respondent

Final Decision: Allowed

Judgement

Anil Kumar, J.

This is an application by the defendant No. 1 under Order 7 Rule 11(d) of the CPC for rejection of the plaint on the

ground that the suit should have been filed u/s 92 of the CPC and the suit for declaration and injunction is not maintainable and therefore, the plaint

is liable to be rejected. The applicant has contended that the suit has been filed by the plaintiff Sh. Hamid Ahmed, one of the mutawalli of defendant

No. 6, Hamdard Dawakhana Wakf alleging inter-alia that Chief Mutawalli has been running the Dawakhana in a wholly arbitrary and autocratic

manner only with a view to benefit himself and his sons and has not constituted Majlis-e-Ayan and he has been handing over the entire working of

the Dawakhana to his sons contrary to the wishes of Wakif Mutawalli and against the hierarchy as set by the Wakf Deed.

2. The applicant has contended that solely on the basis of the averments made by the plaintiff and without in any way admitting, accepting,

conceding the same and without prejudice to any defence, rights, contentions that the defendant No. 1/applicant may have, the suit for removal of

defendant No. 1 from the position of Mutawalli of defendant No. 6 as framed by the plaintiff is not maintainable as the same has been filed in clear

contravention of the provisions of Section 92 of the CPC. The applicant contended that according to the pleas and contentions of the plaintiff, the

appointment of defendant No. 1 as mutawalli of defendant No. 6 is an attempt on the part of the defendants to thwart the charitable object of

defendant No. 6 and thus the plaintiff is seeking removal of defendant No. 1 from the position of mutawalli. According to the plaintiff Section 92(2)

of the CPC clearly provides that a suit filed in respect of affairs of an alleged public charity seeking any one of the reliefs enumerated in Section

92(1) of CPC can only be filed in conformity with the provisions of said section. The relief sought by the plaintiff thus falls within the ambit of

Section 92(1)(a) and thus the suit does not fulfill the fundamental requirements as contemplated u/s 92 nor the plaintiff has sought leave u/s 92 of

the CPC which is not a procedural formality but is in fact mandatory and goes to the very root of the jurisdiction and, therefore, the suit filed by the

plaintiff without obtaining the prior leave of the Court and without being filed on behalf of two persons is barred and the plaint is liable to be

rejected. The applicant also contended that a special remedy u/s 92 of the CPC bars the general remedy of an ordinary civil suit and Section 92 is

an exhaustive provision in respect of a suit seeking any of the reliefs enumerated in Section 92(1). In the circumstances, the rejection of the plaint is

sought under Order 7 Rule 11(d) of the Code of Civil Procedure.

3. The application is contested by the plaintiff contending inter-alia that the application is not maintainable and has been filed with a view to delay

the proceedings. According to the plaintiff the suit seeks to question the very right of defendant No. 1 to hold and assume office who is a mutawalli

de son tort. According to the plaintiff none of the matters assailed in the suit are in the realm of public trust of religious charitable character or

otherwise breach of trust or for administration of trust. It is also contended that that the present legal proceeding is not for the benefit of the general

public but is a private action against a wholly illegal act by defendants No. 1 & 2. It is also contended by the plaintiff that the defendant No.

1/applicant has failed to show as to how suit appears from the statement in the plaint to be barred by any law. It is pleaded that the suit is

maintainable and is not barred u/s 92 of the Code of Civil Procedure. The reliefs sought by the plaintiff do not fall within the purview of Section 92

of the CPC which is also apparent from the fact that the suit has been filed by a single person.

4. The application of the contested by the non-applicant contending inter-alia that the application is not maintainable and apart from the belated

nature of the application and its mala fide intention to delay the proceedings. It is further contended that the suit seeks to declare the appointment of

the applicant end his assumption of office illegal, wrong and void which itself is vitiated at the root. It is pleaded that defendant No. 1 is mutawalli

de son tort. The non-applicant also contended that the suit is instituted by a single individual and the matter assailed in the suit are not within the

realm of public trust of religious charitable character or otherwise of breach of trust or for administration of trust. It has also been contended that

the suit is not for the benefit of general public but is a private action against a wholly illegal act perpetrated by applicant and defendant No. 2. In the

circumstances it is prayed that the application be dismissed.

5. The learned Counsel for the parties have been heard at length. The matter was heard on the interim application for injunction, however, the

order could not be pronounced as some of the documents were in Urdu whose translation was stated to have been filed but which were not filed

and other reasons. The matter was, therefore, listed for rehearing. Even during the arguments for interim orders the plea of suit being barred u/s 92

was raised. The matter was, therefore, relisted for hearing whereafter the present application under Order 7 Rule 11(d) of the CPC was filed by

the defendant No. 1/applicant. It is also relevant to note on perusal of the record that an earlier application under Order 7 Rule 11 being IA No.

6980/2005 is on record on which notice was not issued. The pendency of the earlier application had not been pointed out either by the defendant

no1. / applicant nor by the plaintiff, nor while arguing the present application being IA No. 11871/2008 also filed by the defendant No. 1/applicant

under Order 7 Rule 11(d) of the Code of Civil Procedure, the pendency of earlier application was pointed out.

6. Perusal of the plaint reveals that the plaintiff who himself is a mutawalli seeks appointment of defendant No. 1, another mutawalli as wrong,

illegal, arbitrary, void and against the provision of Wakf Deed and also seeks permanent injunction against him to act as a mutawalli or taking part

in the affairs of the wakf. Paras 1 to 21 merely refers how the wakf was created by Wakif Mutawalli, Hakim Abdul Hameed who was also the

chairman.

7. The plea of the plaintiff is that his grandfather Mr. Hakim Abdul Hameed (Wakif Mutawalli) and father of the defendant Nos. 2 & 3 expired and

after his demise, Majlis-e-Ayan a body for general superintendence of the wakf was to be formed for supervision and functioning of the

dawakhana. It is asserted that defendant No. 2 who is the Chief mutawalli has been running a dawakhana in a wholly arbitrary and autocratic

manner with a view to benefit himself and his sons and he has not constituted Majlis-e-Ayan even six years after the demise of Wakif mutawalli till

the time of filing of the suit in March, 2005 or till filing of the present application. The plaintiff has pleaded that defendant No. 2 Chief mutawalli has

been acting autocratically with a view to benefit his sons including defendant No. 1 whose removal is sought and he is handing over the entire

working of the dawakhana to his sons contrary to the wishes of late Wakif Mutawalli and is acting against the hierarchy as set by the wakf deed.

8. The plaintiff has categorically asserted in the plaint that defendants No. 1, 2 & 4 are taking decisions contrary to the interest of the dawakhana

as they are carrying on work of massive renovation without any consultation and they are also buying and selling the properties without consultation

with the mutawallis which cannot be permitted. The grievance is also made about Rs. 154 crores lying in the bank accounts which are not spent in

accordance with the wakf deed. It is pleaded that non utilizing the funds in accordance with the deeds and declaration is against the interest of the

wakf. In continuation of the misdeeds, the chief mutawalli defendant No. 2 is alleged to have appointed his son defendant No. 1 in contravention

and against the provisions of the wakf deed as 5th mutawalli which appointment is wholly, illegal and fraudulent. The allegation is also made

regarding running of dawakhana by defendant No. 1 & 4 contrary to the provisions of wakf deed. The relevant paragraphs of the plaint raising

these pleas from paras 22 to 29 are reproduced for the sake of reference:

22. That unfortunately in 1999 the father of the defendants No. 2 and 3, the grand-father of the plaintiff, i.e. Wakif Mutawalli expired. As per the

wishes of the late Wakif Mutawalli a Mujlis-e-Ayan which is a body for general superintendence of the Wakf was to be formed for supervision

and functioning of the Dawakhana. However the defendant No. 2 who was the Chief Mutawalli and who has been running the Dawakhana in a

wholly arbitrary and autocratic manner, only with a view to benefit himself and his sons has not yet constituted the Mujlis-e-Ayan which was

required to be constituted although a period of about 6 years has passed since the death of the Wakif Mutawalli and defendant No. 2. Chief

Mutawalli has been since then acting autocratically with a view to benefit his sons. He has been handing over the entire working of the Dawakhana

to his sons contrary to the wishes of the late Wakif Mutawalli and against the hierarchy as set by the Wakf Deed.

23. That similarly the defendants 1, 2 and 4 are taking decisions contrary to the interest of the Dawakhana inasmuch as they are carrying on the

work of massive renovation without any consultation as also buying and selling of properties without consultation with the Muttawallis which cannot

be permitted.

24. That similarly there are huge amounts to the extent of Rs. 154 crores which are lying in the bank accounts of the organization. The said

amounts are not being spent in accordance with the Wakf Deed and the Declaration. The non utilization of the funds in accordance with the Deeds

and Declaration and keeping the same in the bank accounts is against the interests of the organization.

25. That with a view to involve and hand over the work of the Dawakhana to his sons, he in contravention and against the provisions of the Wakf

Deed appointed his sons Mr. Asad Mueed as a Fifth Mutawalli. The said appointment is wholly illegal, fraudulent and not as per the provisions of

Wakf Deed.

26. That Mr. Asad Mueed could not have been appointed as a Fifth Mutawalli as no further Mutawalli or Mutawallis could have been added or

altered during the life-time of the Mutawallis so appointed by the Wakif Mutawalli.

27. That Chief Mutawalli in collusion and conspiracy with defendant No. 1 and 4 against defendant No. 3 and plaintiff has been taking steps and

running the Dawakhana contrary to the provisions of the Wakf Deed.

28. The defendant No. 2 has been without the consent and approval of the plaintiff setting up factories which are not in the interest of the

Dawakhana and public at large, the defendant No. 2 is also selling and buying the property without consulting or taking approval of any kind

whatsoever from the plaintiff and/or other Mutawallis.

29. That the defendant No. 2 is carrying out the function of buying/selling property in the name of the Dawakhana through his son and is only

encouraging and promoting his sons which is not in the interest of the Dawakhana and is contrary to the Wakf Deed.

9. Similarly averments have also been made by the plaintiff in his replication to the written statement filed on behalf of defendant No. 1. It has been

pleaded that defendant No. 1 & defendant No. 2 with a view to usurp the properties of the wakf and so as to deny other mutawallis of any

information of any kind whatsoever in regard to the functioning of the wakf has not convened to Majlis-e-Ayan inspite of several written and oral

requests made by the plaintiff and defendant No. 3 in this regard. It is also contended that the properties have been sold in a clandestine manner.

The plea of the plaintiff is that according to the wakf deed the income and amounts were to be utilized for the purpose of charity, however, instead

of utilizing the money for charity about 154 crores are lying in fixed deposit. Other incidents of charity work not being carried out by defendant No.

2 is also alleged and it is asserted that defendant Nos. 2 & 4 are bent upon circumventing the wakf by keeping the money legitimately meant for

charity.

10. The learned Counsel for the parties has argued the matter on various dates whether the plaint is liable to be rejected or not under Order 7 Rule

11 (d) of the Code of Civil Procedure. The counsel for the applicant has relied on Ramdas Bhagat Vs. Krishna Prasad Tewari and Others, ;

Saleem Bhai and Others Vs. State of Maharashtra and Others, .; Harl Bhagwan Sharma and Others Vs. Badri Bhagat Jhandewalan Temple

Society and Others, ; 2121 (1982) DLT 404 (DB) Shanti Devi v. State (Delhi Administration); AIR 1966 J&K 31 Arjun Nath and Anr v. Kailash

and Ors.; Association of Radhaswami Dera Baba Bagga Singh and Another Vs. Gurnam Singh and Others, .; Sarat K. Mitra Vs. Hem Ch. Dey

and Others, . to contend that the suit is for removal of a trustee as contemplated u/s 92(1)(a) of the CPC and, therefore, the same being not in

accordance with the provisions of said section is barred and the plaint is liable to be rejected.

11. Per contra the learned Counsel for the plaintiff/non applicant per contra has relied on Anil Nanda and Another Vs. Escorts Ltd. and Others, .;

Vidyodaya Trust Vs. Mohan Prasad R. and Others, ." Anil Nanda and Another Vs. Escorts Limited and Others, .; Syed Mohd. Salie Labbai

(Dead) by L.Rs. and Others Vs. Mohd. Hanifa (Dead) by L. Rs. and Others, ; Kabul Singh and Another Vs. Ram Singh and Others, ; Duttgir

Mahant Vs. Rishi Ram etc., ; Sundralingam Chettiar v. S. Nagalingam and Ors. AIR 1958 Mad; Janaki Bai Ammal Vs. Sri Tiruchitrumbala

Vinayakar of the temple, ; Sanat Kumar Mitra Vs. Hem Chandra Dey and Others, ; Sugra Bibi Vs. Hazi Kummua Mia, and Abdur Rahim and Ors.

v. Syed Abu Mohomed Barkat Ali Shah and Ors. AIR 1928 PC 16 to contend that the suit simpliciter for removal of defendant No. 1 who is now

alleged to be a trustee de son tort is maintainable as it is filed only by one person and the relief claimed are not for appointment of another trustee in

place of defendant No. 1 nor it is for administration and running of the wakf, defendant No. 6.

12. Order 7 Rule 11(d) contemplates that where the suit appears from the averments made in the plaint to be barred by any law, then the plaint

can be rejected. The legal position is that to decide whether a plaint is liable to be rejected under Order 7 Rule 11, averments in the plaint have to

be read without looking at the defense and thereupon it has to be seen whether on the averments made in the plaint Under Order 7 Rule 11 of the

CPC gets attracted. For rejection of the plaint under Order 7 Rule 11 the averments in the plaint should be unequivocal, categorical and specific

leading to only conclusion that the plaint is barred. Rejection of plaint is a serious matter as it non suits the plaintiff and kills the cause of action and

consequently it cannot be ordered cursorily without satisfying the requirements of the said provision. The effect of dismissal of suit is altogether

different and distinct from the effect of rejection of the plaint. In case plaint is rejected under Order 7 Rule 11 of CPC, filing of a fresh plaint in

respect of the same cause of action is specifically, permitted under Order VII Rule 13 of CPC. Altogether different consequence follows in the

event of dismissal of suit, which has the effect of precluding the plaintiff from filing a fresh suit on the same cause of action. Legal proposition that to

decide the matter under order 7 Rule 11 of the Code of Civil Procedure, averments in plaint only have to be read without looking at the defense

and thereupon it has to be seen whether on the averments made in the plaint order 7 Rule 11 of the CPC gets attracted or not can be culled from

2005 (iv) AD (Delhi) 541 Kanwal Kishore Manchanda v. S.D. Technical Services Pvt. Ltd.; 2005 (II) AD (Delhi) 430 Arvinda Kumar Singh v.

Hardayal Kaur; Asha Bhatia Vs. V.L. Bhatia, ; 2003 (V) AD (Delhi) 370 Punam Laroia v. Sanjeev Laroia; Condor Power Products Pvt. Vs.

Sandeep Rohtagi, .

13. Relying on Kabul Singh and Anr. (supra), it is contended that in a suit where the primary object is vindication of individual or personal rights of

plaintiff himself, action u/s 92 of the CPC does not lie. It was further contended that if the object of the suit is to settle controversy about right to

manage trust between present trustees and some other new trustees then suit is outside the purview of Section 92. A suit u/s 92 of the CPC is a

suit of special nature which pre-supposes the existence of a public trust of religious or charitable nature and the Court is required to ascertain from

the plaint the dominant purpose of the suit. In this case, the plaintiffs residents of Tehri having faith in Sikh religion of Guru Granth Sahib claimed

that the trustees of the trust be removed and a scheme for management of the trust be framed and new trustee in accordance with such scheme be

appointed and also sought rendition of accounts. In defense it was pleaded that Maharaja Tehri Garhwal had a piece of land belonging to State

and entrusted the management thereof to the brother of defendant with right to nominate his successor and the residents of Tehri are not entitled to

intermeddle and that the mismanagement of the affairs of the Gurudwara were denied. Considering the facts that the plaint was conspicuous by

complete absence of averment charging the trustees of mal- administration or misconduct in respect of the trust, it was held that no foundation was

laid in the plaint to seek their removal and the purpose of the suit was only to settle the controversy, whether the trustees- defendants had rightful

claim to manage the affairs of the trust in preference to the trustee alleged to have been elected by residents of the town. In these circumstances, it

was held that the suit would be outside the purview of Section 92. It was held that the relief of removal of the members of the present trust was of

little consequence and the suit could not be u/s 92 of Code of Civil Procedure. The court in *Kabul Singh and Anr. (supra)* had relied on *Swami*

Paramatmanand Saraswati and Another Vs. Ramji Tripathi and Another, and Charan Singh and Another Vs. Darshan Singh and Others, holding

that a suit u/s 92 of CPC is a suit of a special nature which presupposes the existence of a public trust of religious or charitable nature. The Court is

required to ascertain from the plaint the dominant purpose of the suit. If on an analysis of the averments contained the plaint, it transpires that the

primary object behind the suit was the vindication of individual or personal rights of third persons or the plaintiffs themselves, an action under this

provisions does not lie. It was further held that even if all the other ingredients of a suit u/s 92 are made out and it is clear that the plaintiffs are 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 in whom they are interested, then the suit would be outside the scope of Section 92. A suit whose primary object or purpose to remedy the

infringement of an individual right or to vindicate a private right does not fall u/s 92 of the Code of Civil Procedure.

14. In *Duttgir Mahant (supra)*, a single Judge of Punjab and Haryana High Court had held that Section 92 of the CPC has no application unless

three conditions are fulfilled, i.e., the suit relates to public, charitable or religious trust; it is founded on an allegation of breach of trust or the

direction of the court is required for administration of the trust and the reliefs claimed are those which are mentioned in the said Section. It was held

that such a suit is one of a special nature and therefore the allegation of breach of trust is not substantial or if the plaintiffs fails to make out a case

for a direction for proper administration, the very foundation of the suit would fail. In this case, a suit was filed u/s 92 for removal of defendants

from the trusteeship of the Dera and for appointment of new trustees for the administration of the property of the Dera which is a religious

institution where persons belonging to various communities come for worship.

15. On the facts and circumstances of the case, it was held that the real test for the applicability of the Section 92 is to see whether suit is

fundamentally on behalf of public for vindication of a public right and in order to apply the test the court must look to the substance and not the

form of the suit and in these circumstances it was held that the trustee whose removal was sought was validly appointed and his removal was not

sought on any of the ground enumerated in Section 92 and in the circumstances it was beyond the purview of Section 92 to embark upon an

enquiry if the trustee was validly appointed.

16. Learned Counsel for the plaintiff in order to substantiate his pleas that the suit does not lie u/s 92 of the CPC and therefore the plaint is not

liable to be rejected under Order VII Rule 11 of CPC has also placed reliance on Sundaralingam Chettiar and Ors. (supra). In a suit filed u/s 92,

one of the reliefs asked for in the plaint was for the removal of defendants 1 to 5 from the trusteeship and the appointment of fresh trustee in their

place and for the amendment of the plaint. The plaintiff in substance sought for declaration that an election of defendants No. 2 and 3 as trustees

and the election of first defendant as managing trustee was invalid, such an amendment was held to be not permissible as it would have resulted in

introducing an entirely new cause of action and setting up a case inconsistent with the case now pleaded and was declined.

17. In Janaki Bai Ammal (supra), a suit was filed by an idol represented by its Manager or Kariyasthar whereas the defendant was the widow of

late Zamindar of Melmandai who was sued as trustee of a fund established for meeting the expenses of public worship and other duties. The short

question in the suit was whether Section 92 of the CPC would be applicable. On analysis of the facts, it was held that the cause of action was that

there was accumulated balance of the collections in the hands of the defendant which the defendant had refused to pay to the plaintiff. It was

apparent that the reliefs sought were for taking the action and direction to the defendant to pay to the plaintiff such payment as may thereby be

found due. In these circumstances, it was held that whether a suit falls within Section 92 depends not upon the character in which the plaintiff sued,

but upon the nature of the reliefs sought. In the circumstances, it was held that the suit was u/s 92 of the CPC and could not be instituted without

obtaining the sanction from the Advocate-General and dismissal of the suit by the District Munsif was upheld.

18. To attract Section 92, the suit must be founded on the breach of trust as was held in Sanat Kumar Mitra (supra) a single Judge of the Calcutta

High court had held that in order to attract provisions of Section 92, the suit must be founded on a breach of trust and when the material allegation

in the plaint on which the cause of action is based, is that the appointment of trustee is invalid, suit for removal of the trustee is outside the Section

92. The Supreme Court in a suit for removal of mutawalli and appointment of new trustee in case of a wakf in favor of family members or founder

and in favor of public, had held that the provisions of Section 92 will be attracted and the suit filed without the consent of Advocate-General was

not maintainable in Sugra Bibi (supra). In this case, a wakf deed had been executed by Hazi Elahi Bux who had appointed his son and his son-in-

law as joint mutawallis, and on the death of a joint mutawallis the survivor was to be sole mutawallis had the power to nominate his successor

from the family line of the settler. The mutawalli had died without nominating the successor and a suit was filed for a declaration against the

surviving mutawalli that he was unfit to continue to manage the wakf estate and he should be removed from the office of mutawalli and the son of

the plaintiff be declared fit and be appointed as mutawalli of the wakf estate. An objection was taken that the suit is not maintainable u/s 92 of

CPC without the sanction of Advocate-General. Relying on the principle laid down in Janaki Bai Ammal Vs. Sri Tiruchitrambala Vinayakar of the

temple, , it was held that the suit brought must be treated as a suit brought in a representative capacity on behalf of all the beneficiaries of the wakf

which was created for public purpose of charitable and religious natures and reliefs claims were not for enforcement of any private right but reliefs

for removal of the trustee and for appointment of a new trustee in his place which fall within Clauses (a) and (b) of Section 92(1) of CPC and thus

the suit was not in individual capacity but in representing all the beneficiaries of the wakf and in absence of consent in writing of the Advocate-

General, the suit was not maintainable.

19. Learned Counsel for the plaintiff has also relied on Anil Nanda and Another Vs. Escorts Ltd. and Others, , whereby the judgment of a single

Judge rejecting the plaint under Order VII Rule 11 Clause (a) and (d) of CPC was set aside. In this case, a suit was filed seeking a declaration that

the merger of Escorts Health Institute, Delhi and Chandigarh, was bad in law; a decree for declaration of conversion of Escorts Health Institute,

Chandigarh into a limited company is void; a decree for permanent injunction in favor of Anil Nanda, one of the sons of the settler, restraining the

others from transferring, alienating or otherwise creating third party interest and against the transfer of shares and a mandatory injunction for

restoration of assets and properties to the original status of a public charitable institution. The plaint was rejected by a single Judge holding that the

reliefs sought fall within the scope of Section 92 of CPC and thus rejecting the plaint which order was set aside by the Division Bench holding that

a suit of a trustee against a co-trustee is not covered by Section 92 of CPC and to attract the bar u/s 92 of Code of Civil Procedure, the relief

claimed for must either fall in Clause (a) to (g) or must be akin to Clauses (a) to (g) to fall in Clause (h). Since the Division Bench was of the

opinion that the reliefs claimed for in the suit did not fall in Clauses (a) to (g) nor were akin to any of said clauses, mandatory leave u/s 92 of the

CPC not obtaining the leave prior to institution of the suit was held to be not fatal. Before the Division Bench it was rather admitted by the counsel

for the defendants that the reliefs sought in the suit do not fall within the ambit of section (a) to (g) of Section 92(1) of the CPC in Para 27 of the

said judgment on page 713 in Anil Nanda and Another Vs. Escorts Ltd. and Others, .

20. Reliance has also been placed by the petitioner on Vidyodaya Trust Vs. Mohan Prasad R. and Others, . holding that if a suit is brought by an

individual as representative of the public for the vindication of public right, the court has to go beyond the relief and having regard to the capacity in

which the plaintiff has sued and the purpose for which the suit is brought which is to be deciphered from the averments made in the plaint. It is to

be decided whether the leave should be granted or not. The Supreme Court was dealing with the issue whether the leave u/s 92 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 had held that unless all the

beneficiaries join in institution of the suit, if such a suit is instituted without leave, it would not be maintainable at all. Relying on the object of Section

92 and the language thereof, it was held that as a rule of caution, the Court should normally, unless it is impracticable or inconvenient to do so, give

a notice to the proposed defendants before granting leave u/s 92 to institute a suit, as the defendants in such case can bring to the notice of the

court that the allegations made in the plaint are frivolous or reckless and can also point out that the persons who are applying for leave u/s 92 are

doing so merely with a view to harass the trust or have such antecedents that it would be undesirable to grant leave to such persons.

21. The learned Senior Counsel for the non-applicant/plaintiff has strongly relied on some of the observations made in the precedents relied on

behalf of the plaintiff, however it must be remembered that a decision is only an authority for what it actually decides. What is of the essence in a

decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. The ratio of any

decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it

actually decides, and not what logically follows from it. It is well settled that a little difference in facts or additional facts may make a lot of

difference in the precedential value of a decision. Considering the present facts and circumstances, it may not be necessary to deal with precedents

in detail relied on by the parties in the facts and circumstances of the present case as the present case is apparently distinguishable from the fact

situation of the most of the precedents relied on by the parties. The Supreme Court in *Bharat Petroleum Corporation Ltd and Anr. v. N.R.*

Vairamani and Anr. AIR 2004 SC 778 had also held that a decision cannot be relied on without considering the factual situation. In the same

judgment the Supreme Court also observed:

Court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which

reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of

their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be

construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy

discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words

of statutes; their words are not to be interpreted as statutes.

In *Padmasundara Rao and Others Vs. State of Tamil Nadu and Others*, , the Supreme Court had held as under:

There is always a peril in treating the words of judgment as though they are words in a legislative enactment and it is to be remembered that judicial

utterances are made in setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of

difference between conclusions in two cases.

In *Ambalal Manibhai Patel Vs. State of Gujarat*, the Supreme Court had observed:

The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an

authority for what it actually decides, and not what logically follows from it.

Similarly in *Bhavnagar University v. Palitana Sugar Mills Pvt Ltd (2003) 2 SC 111* (vide para 59), the Supreme had observed:

It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.

22. Though in the plaint it has not been pleaded that the defendant No. 1 is a trustee de son tort, however, in reply to the application for the

rejection of plaint it is asserted that defendant No. 1 is a trustee de son tort. A trustee de son tort is one who is without any appointment, however,

who takes upon himself the management of the Trust property purporting to be the trustee. In *Sanat K. Mitra (supra)*, it was held that such a

trustee is a "trustee" within the meaning of Section 92 of the CPC and a suit for removal of such a trustee with invalid appointment or even with no

appointment comes within the ambit of Section 92. It was further held that unless the suit relates to a trust for public purpose of a charitable or

religious nature; if there is breach alleged of such Trust or the direction of the court is deemed necessary for administration of such Trust and the

relief claimed is one of the reliefs mentioned in Section 92, the suit shall be maintainable under said Section. Each of these conditions must be

specified in order that the suit may be filed in the manner provided by the Section. It was further held that one cannot evade the Section simply by

adding certain inconsequential reliefs not allowed by Section 92 when the suit is clearly within the scope of the Section.

23. To infer whether the suit lies u/s 92 of CPC or not, generally the averment in the plaint had to be considered. The substance of the plaint has to

be understood in its proper perspective, the reliefs claimed have to be kept in mind and then the question of jurisdiction is to be determined. In

Arjun Nath and Anr. (supra), it was held that the provision of Section 92 cannot be avoided by adding some inconsequential reliefs which might

not be within the scope of the Section. Relying on Ramdas Bhagat Vs. Krishna Prasad Tewari and Others, , it was further held that in considering

the applicability of Section 92, the Court must look to the substance of the claim and not merely to its wording. It was held that Section 92 is

applied to suits for removal of trustee de son tort, i.e. de facto trustee and not de jure trustee. The trustee de son tort was held to be different from

trespasser. In Association of Radhaswami Dera Baba Bagga Singh and Anr. (supra), it was held that a trespasser claims adversely to the Trust and

so cannot be admitted to be a trustee while the trustee de son tort does not claim adversely though his title to act as a trustee may be defective and

a suit against a trustee de son tort or a de facto trustee shall be covered u/s 92 of Code of Civil Procedure. It was further held that merely addition

of a prayer for declaration cannot take the suit from within the ambit of Section 92 when substantially all other conditions of the Section are

otherwise fulfilled. For a suit to be u/s 92, it was also held that the suit must be not only in the interest of plaintiff individually but in the interest of

public or the trust itself. In Hari Bhagwan Sharma and Ors. (supra), it was held that where two or more persons have interest in the trust and need

to file a suit u/s 92, they must obtain leave of the court to institute the suit and the permission of the Court is a condition precedent to the institution

of the suit. The provision of Section 92 was also held to be mandatory in nature and grant of leave to file the suit was held not merely a matter of

form but of real substance, being a condition precedent to institute the suit. In the circumstances, it was held that in case a plaint is filed which is u/s

92 of CPC without obtaining the leave of the court, the plaint is liable to be rejected.

24. In case the plaint is u/s 92 of CPC and the permission of the court which is mandatory is not obtained, plaint can be rejected at any stage of

the suit before the conclusion of the trial. The Supreme Court had held so in Saleem Bhai and Ors. (supra) laying down that the trial court can

exercise the power under Order VII Rule 11 of CPC at any stage of the suit, before registering the plaint or after issuing the summons to the

defendant at any time before the conclusion of the trial. It was further held that for the purpose of deciding an application under Clause (a) and (d)

of Rule 11 of Order VII of Code of Civil Procedure, the averments in the plaint are germane, the pleas taken by the defendant in the written

statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order

VII Rule 11 of CPC cannot be but a procedural irregularity touching the exercise of jurisdiction of the trial court.

25. If there is an evidence to show that the trustee de son tort was guilty of mismanagement, it will be a clear case for formulation of scheme u/s 92

of the Code of Civil Procedure. The Supreme Court in Syed Mohd. Saleie Labbai and Ors. (supra) had held that Section 92 applies where there

is any alleged breach of any express or constructive trust created for a public, charitable or religious purpose. It was further held that it also applies

where the direction of the court is necessary for the administration of any such public trust. Relying on Ramdas Bhagat Vs. Krishna Prasad Tewari

and Others, in Shanti Devi (supra), a Division Bench had reiterated that in a suit u/s 92, the court can remove the trustee de son tort. It was further

held that in respect of a charitable trust no one can appoint himself as trustee unless the trust deed so provides u/s 92 of CPC and the court can

settle a scheme to appoint new trustees, authorize the whole or any part of the trust property to be let, sold, mortgage or exchange. It was further

held that u/s 34 of the Trust Act the court will not give an opinion, advice and direction in the case of a charitable trust to a person who cannot be

better described then as a trustee de son tort. A trustee de son tort was held to be liable again to what he has done or what he has received while

he was acting and cannot be heard to say that he had no right to act as a trustee.

26. From the pleas raised by the plaintiff what is apparent is that the plaintiff if claiming that the funds of the trust are lying unutilized and are not

spent on charity and the funds of the wakf are rather used for massive renovations and for buying and selling the properties. It is alleged that it is

done in conspiracy by Chief Mutawalli/Defendant No. 2 with defendant No. 1 and defendant No. 4. Though the removal of defendant No. 1 is

also sought on the ground that he has not been appointed in accordance with the wakf deed or that he could not be appointed under the wakf

deed, however, on reading of the entire plaint it is apparent that it is just not the vindication of personal right of the plaintiff but the plaintiff has sued

to vindicate the right of the public at large for utilization of the amounts of the wakf for charitable purposes. The dominant purpose of the suit

appears to be that the plaintiff is also a mutawalli, however, he is not allowed to function as such and use the income and the funds of wakf for

charitable purposes rather the income and funds of the wakf are used for renovation and for buying and selling the properties which was not the

intention and object of deceased Wakif Mutawalli and the purpose of the wakf. It is also contended that that the `dawakhana. is being run in an

autocratic and arbitrary manner. This is not disputed that the suit relates to public charitable wakf. The charitable purpose and object of the wakf is

to be achieved through Majlis-e-Ayan which has not been constituted. The allegations of maladministration or misconduct are categorical and

specific in the plaint. In the circumstances it will be difficult to infer that the dominant purpose of the suit is not regarding functioning of the charitable

wakf which is deviating from its object of charity and on account of conspiracy of some of the defendants, the trust rather is indulging in sale and

purchase of the properties and also indulging in massive renovations. The allegations of the plaintiff are not that the defendants are carrying on

repairs but renovations, which in the opinion of the plaintiff are superfluous and are not in consonance with the object of the wakf which is charity.

It is also averred in paragraph 28 of the plaint that setting up factories by Chief Mutawalli/defendant No. 2 without consultation with the plaintiff is

not in the interest of public at large. On a meaningful reading of the plaint what is apparent is that the grievance of the plaintiff is that the Chief

Mutawalli has deviated from the object of the wakf for the purposes of charity and for this purpose he has also appointed his son, defendant No.

1, as a mutawalli, though he cannot function as such.

27. The beneficiaries of the charity of the wakf are public at large and in the circumstances it will be a suit in representative capacity by the plaintiff

seeking a direction to defendant No. 2 to utilise the funds of the wakf for charity and not to save them for some other purpose and also desist from

selling and buying the properties for the purpose of the income of the wakf and rather to improve the functioning of `dawakhana. which is allegedly

being run in an autocratic and arbitrary manner. The plaintiff has admitted in reply to the application that defendant No. 1 is a trustee de son tort i.e.

though his appointment is not in consonance with the requirement of the deed and the intention of deceased Wakif Mutawalli, however, he has

taken upon himself the management of trust properties along with Chief Mutawalli/defendant No. 2. Then a suit u/s 92 shall be maintainable even

against such a trustee as has been held in some of the precedents considered hereinabove. In Ramdas Bhagat (supra) it was held that Section 92

applies for the removal of trustee de son tort, who is different from trespasser. If the case is of mismanagement of trust, alleged breach of express

or constructive trust created for public charitable purpose and the directions is required from the Court, it will be a case of formulation of scheme

u/s 92 of the Code of Civil Procedure. In this case what is sought is that the `dawakhana. must not be allowed in autocratic and arbitrary manner

and from the funds of the wakf, charity should be done instead of buying and selling the properties and spending money on massive renovation

which perhaps are not required.

28. Merely because the suit is filed by one plaintiff only and not by two will not lead to inference that the suit is not u/s 92 of the Code of Civil

Procedure. It will not change the nature of the suit but it rather shows the defect in the suit. Considering the entirety of the plaint it is inevitable to

infer that the reliefs which are available under sub section (1) of section (92) of the CPC have been claimed by the plaintiff.

29. Since it has been held that the relief claimed primarily by the plaintiff are which can be granted u/s 92(1) of the Code of Civil Procedure, the

plaintiff was liable to obtain leave of the Court. In the circumstances, since the suit is u/s 92 of the CPC and the leave of the Court has not been

sought and has not been granted and the plaint has been instituted by one plaintiff only, the plaint is liable to be rejected under Order VII Rule 11

of the Code of Civil Procedure.

30. Therefore, for the foregoing reasons, the application IA 11871 of 2008 under Order VII Rule 11 (d) of the CPC is allowed and the plaint is

rejected. The suit should have been filed by the plaintiff u/s 92 of the CPC and in compliance of its requirement. All the pending applications are

disposed of in the facts and circumstances, since the plaint has been rejected. The parties are, however, left to bear their own costs.