* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Order reserved on: 22 December 2022**
Order pronounced on: 04 January 2023

\+ CS(OS) 182/2019 & I.A. 22105/2022 (Interim Direction)

SH. RAM SARUP LUGANI & ANR. ..... Plaintiffs

Through: Mr. Darpan Wadhwa, Sr. Adv. with Ms. Ruchira Gupta, Ms. Harshita Sharma, Ms. Neelakshi Bhaduria, Advs. for P-2.

versus

NIRMAL LUGANI & ORS. ..... Defendants

Through: Mr. Faisal Sherwani, Mr. Aditya Vikram, Mr. Shikher Deep Aggarwal, Ms. Sanjukta Kaushik, Ms. Spandana, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

O R D E R

I.A. No. 8273/2021 (Appropriate Direction)

1. This application has been preferred for the impleadment of Major Atul Dev and Dr. Neerja Lugani Sethi as co-plaintiffs or to be impleaded as parties in light of subsequent developments which are set forth in the said application. A further prayer is made for leave being granted to the proposed co-plaintiffs to institute the

accompanying suit under Section 92 of the **Code of Civil Procedure, 1908**[1].

2. It becomes pertinent to note that the present matter is still to be registered, in *stricto sensu,* as a suit under Section 92 of the Code since leave to institute is yet to be granted. The prayer made in the instant application in essence appears to be to permit the individuals noted above to join as applicants in I.A No. 4760/2019 which is pending consideration.

3. The suit proposed to be instituted under Section 92 of the Code relates to the affairs of a public charitable trust named **Raghuvanshi Charitable Trust.**[2] The application for leave was originally preferred by Shri Ram Sarup Lugani and Shri Bahushrut Lugani. On 04 April 2019, this Court while noticing the issues which arise in some detail, proceeded to pass an order restraining the defendants from withdrawing any money directly or indirectly for themselves from the funds of the defendant No.7 or the schools falling under the management and control of the Trust.

4. The Trust itself is stated to have been constituted as a not-for-profit entity dedicated to the objective of establishing schools, colleges and other social institutions. The allegation in the proposed suit was that the defendant Nos. 1 to 6 are jointly and severely misconducting themselves and acting contrary to the aims and

[1] CPC
[2] Trust

objectives of the Trust. While this Court proceeded to pass the interlocutory order of restraint on 01 April 2019, the record would reflect that the application for leave to institute the suit remains pending on the board of the Court.

5. The applicants disclose that during the pendency of the instant proceedings, the applicant no. 1, the erstwhile Managing Trustee of the Trust succumbed to Covid-19 on 22 May 2021. It is in that backdrop that it is proposed that the two individuals named above be permitted to join the pending application for grant of leave. Major Atul Dev is stated to have retired from the Armed Forces and is one who is engaged in philanthropic activities. He is also reported to be a part of a society to which the defendant no.7 provides benefits. Dr. Neerja Lugani Sethi is stated to be an educationist, a PhD, and currently holding the office of Dean of Architecture at Indraprastha College, Dwarka, Delhi. It is further asserted that she has been closely involved in the administration of schools running under the aegis of defendant No.7 and is also a member of the School Management Committee[3] of Gurugram Public School at Sector 62. The present application apart from being supported by an affidavit of Shri Bahushrut Lugani, the original applicant no.2, also encloses affidavits of Dr. Neerja Lugani Sethi and Major Atul Dev in support of the prayers that are made.

6. The prayers made in the instant application are opposed by the opposite parties who contend that upon the demise of original

[3] SMC

applicant no.1, the number of applicants surviving upon the application seeking leave stands reduced to less than two. In view of the above, it is contended that the application fails to meet the fundamental prerequisites of Section 92 and thus must be rejected. It was further urged that since the application seeking leave is not a suit as contemplated under the Code, neither the provisions of Order I Rule 10 nor Order XXII Rule 4 of the Code would apply. Learned counsel appearing for the opposite parties further contended that the issue which arises stands duly concluded against the applicants in light of the judgment rendered by a learned Judge of this Court in **Rahul Jain & Anr. vs. Pradeep Kumar & Ors.**[4].

7. Learned counsel placing reliance upon the aforesaid decision submitted that the requirements placed by Section 92 are mandatory and consequently since the application seeking leave to institute the suit is left with only one individual on the record, it must be rejected. Learned counsel submitted that in **Rahul Jain,** the Court had clearly held that a fundamental prerequisite as envisaged in Section 92 can neither be rectified nor salvaged by additional persons being permitted to join the application seeking leave. Since the objection which is raised on behalf of the respondents principally rests on the judgment rendered by the Court in **Rahul Jain**, the said decision would merit a closer examination.

[4] 2007 (94) DRJ 89

8. The principal question which arose for consideration before the Court in **Rahul Jain** was summed up in paragraph 1 of the report to be whether two individuals who may have submitted an application for leave to sue would have to be alive on the date when the petition is filed or whether it would be the date on which the application is actually taken up for consideration which would be relevant and determinative. As would be evident from the recordal of facts in **Rahul Jain,** the application under Section 92 along with the proposed plaint came to be filed on or about 15 September 1999. The proposed plaintiff No.2 passed away on 16 September 2002 and before the application for leave to sue could be decided. The application for leave appears to have been granted on 20 February 2004 and thus at a time when only one of the applicants was surviving and remained on the record. The Court while considering the said application, however, proceeded to pass a conditional order providing that the grant would be subject to any objection that the proposed defendants may raise with respect to the maintainability of the suit.

9. The proposed defendants thereafter filed a petition for review of the aforesaid order. While dealing with the said petition, the learned Judge observed as follows: -

> **"9.** Undoubtedly and admittedly the present suit is a suit wherein it has been alleged that the defendants are deliberately violating the conditions of the trust which was created for public purpose and is of charitable nature and a direction has been sought for administration of such trust. Therefore, the suit clearly falls within the purview of Section 92 of the CPC. The statute has provided the conditions required to be fulfilled for the purpose of institution of the suit. Rule 1 of Order 4 of the CPC mandates that every suit

shall be instituted by presenting a plaint in duplicate to the court or such officer as is appointed in this behalf. Under rule 2 of Order 4, the particulars of every suit are required to be entered in a book to be kept for the purpose which is called the register of civil suits.

10. Section 92 of the Code of Civil Procedure, 1908 contains a prohibition that in order to maintain a suit against the public charity, no suit can be instituted without leave of the court. Therefore, merely filing a proposed plaint accompanied by an application under Section 92 seeking leave to institute a suit would not amount to institution of the suit within the meaning of the expression as laid under Rule 1 of Order 4.

11. In **110 (2004) DLT 649 (SC) : 2004 (75) DRJ 113 Shipping Corporation of India Ltd. v. Machado Brothers & Ors.,** the Apex Court held that the courts have all necessary powers under Section 151 of the Code of Civil Procedure, 1908 to make orders to prevent the abuse of the process of the court. In this matter, the court was considering an order whereby a suit was dismissed on the ground that it had been rendered infructuous by disappearance of the cause of action. The court held that continuance of the suit which had become infructuous by disappearance of the cause of action would amount to abuse of process of court and interest of justice required that the suit should be disposed of as having becoming infructuous. For this purpose, it was held that the court would exercise inherent powers under Section 151 of the Code of Civil Procedure, 1908 to make such an order to prevent the abuse of the the process of the court. The principles noticed above were laid down by the Apex Court in a factual situation which was clearly distinct from the issue which has been raised before this court and consequently would have no application to the matter which is being considered herein.

12. To the same effect are the principles laid down by the Apex Court in **(2006) 1 SCC 75 Uday Shankar Triyar v. Ram Kalewar Prasad Singh & Anr.** In this judicial pronouncement, the court held that the requirements relating to a pleading, memorandum of appeal or application or petition for relief were procedural and non-compliance thereof should not entail automatic dismissal or rejection unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure which is hand maiden to justice, should never be made a tool to deny justice or perpetuate injustice by any oppressive or punitive use.

The Apex Court in this judicial pronouncement also laid down the well recognised exceptions to this principle which were enumerated thus:—

> "(i) where the statute prescribing the procedure, also prescribes specifically the consequence of non-compliance;
>
> (ii) where the procedural defect is not rectified, even after it is pointed out and due opportunity is given for rectifying it;
>
> (iii) where the non-compliance of violation is proved to the deliberate or mischievous;
>
> (iv) where the rectification of defect would affect the case on merits or will affect the jurisdiction of the court; and
>
> (v) in case of memorandum of appeal, there is complete absence of authority and the appeal is presented without the knowledge, consent and authority of the appellant."

13. So far as the requirement of the suit under Section 92 being instituted by two or more persons is concerned, the prohibition is to be found in the statute itself. The object and reason for stipulating that a suit against the public trust would lie at the instance of the Advocate General or two persons or more who must seek leave of the court is to be found in public policy that a trust should not be unnecessarily dragged into litigation at the instance of any disgruntled trustee or person. The proposed suit must be at the instance of at least two persons and therefore application to seek leave has to be filed by two such persons. The two persons who are desirous of instituting the suit must therefore exist on the date when the application under Section 92 seeking leave to sue is to be heard.

14. This statutory mandate finds consideration in several authoritative and binding judicial precedents. It has been conclusively and repeatedly held that the suit under Section 92 must be brought by all the persons to whom the sanction of the Advocate General has been given and a suit instituted by some of them only is not maintainable. In these circumstances, in **Narain Lal & Ors. v. Sunder Lal (Dead) & Ors., 1967 3 SCR 916**, the court had occasion to consider a case where four persons obtained the consent of the Advocate General of Rajasthan to institute a suit against the respondents under Section 92 of the Code of Civil Procedure, 1908. Shortly thereafter, one of the said four persons died and the suit was instituted by three survivors. A preliminary issue was taken by the defendants as to whether the suit filed by

three persons, while permission to sue has been given to four, is maintainable? It was held by the Supreme Court that an authority to sue given to several persons is joint authority and must be exercised by all jointly. A suit by some of them is not competent. When sanction in the present case was given to four persons arid one of them died before the institution of the suit, a suit by the remaining three was incompetent. Therefore sanction must be obtained afresh by the survivors for the institution of the suit.

16. Therefore, in the light of the principles laid down in these judgments, it is apparent that defect in the application for leave to sue in the nature of the number of persons or parties cannot be permitted to be cured or changed in the proposed suit by way of an application seeking impleadment of the applicant as a proposed plaintiff or by adding defendants. Such a defect goes to the root of the matter.

20. Therefore, so far an an application seeking leave to institute the suit under Section 92 is concerned, the applicant have to satisfy the court at the time of consideration that they have substantial interest in the management of the trust and this satisfaction has to be recorded by the court at the time of adjudicating upon the application seeking the leave to institute the suit. In the event that one of the two applicant has expired before the application is considered, it is evident that the court has occasion only to consider the interest of the one surviving applicant before it in the affairs of the trust. Therefore, the basic condition precedent in order to institute the suit against the trust is not satisfied. Such a single person cannot be given leave to sue and the same is contrary to the specific mandate of the statute. The effect in the permission, if granted to the sole applicant cannot be cured by way of an application under Order 1 Rule 10 of the Code of Civil Procedure, 1908 which comes into play, only after institution of the suit. This is also for the reason that there has been no consideration of the interest of the proposed plaintiff who seeks to be added as a plaintiff in the suit which stands registered."

10. The learned Judge in **Rahul Jain** sought to buttress the conclusions which ultimately came to be recorded drawing an analogy from Section 69(2) of the **Indian Partnership Act, 1932**[5]. This would

[5] The 1932 Act

be evident from the following observations as appearing in paragraphs 22 and 23 of the report and which are extracted hereinbelow: -

> "**22**. In **(1994) 1 ArbLR 385 Kelson Construction v. Versha Spinning Mills Ltd. & Anr.,** the court held thus:—
>
> > "6. In **Loonkaran Sethia etc. v. Mr. Ivan E. John and others etc., AIR 1977 SC 336** the Hon'ble Supreme Court has held that the provisions of Section 69 are mandatory in character and its effect is to tender suit by a plaintiff in respect of a right vested in him or acquired by him under a contract which he entered into as a partner of an unregistered firm, whether existing or dissolved, void. What is material is that on the date of institution of the suit the partnership should have been registered failing that the suit would fail. In **Shankar Housing Corporation v. Smt. Mohan Devi and Others, AIR 1978 Delhi 255**, a Division Bench of this Court had also taken the following view:
> >
> > > "The point of time contemplated in Section 69(2) is at the time of the institution of the suit. That is to today, the firm must be a registered firm by the date of the institution of the suit and the person suing (i.e., all the partners) must have been shown in the Register of Firms as partners of the firm by the date of the institution of the suit.
> > >
> > > Sub-section (1) and (2) of Section 69 are substantives provisions intended to discourage the non-registration of firms. The provision in Section 69(2) is mandatory and makes the registration of a firm a condition p;precedent to the institution of a suit of the nature mentioned in it."
> >
> > Similarly another single Bench of this Court in the case of **Kavita Trehan and others v. Balsara Hygienic Products Ltd., AIR 1992 Delhi 92,** had held that a suit filed by a partner of a firm which is not registered on the date of the filing of the suit would be hit by the provisions of Section 69(2) of the Indian Partnership Act and as such it is not maintainable and is liable to be dismissed. In the case of **M/s. Shreeram Finance Corporation v. Yasin Khan and others, AIR 1989 SC 1769**, the Hon'ble Supreme Court had gone to the extent of laying down that even if the suit is instituted by a registered firm, but change in the constitution

> of the firm had taken place whereby one new partner had been added and two had retired and a minor being admitted to the benefits of the firm, the suit was filed by the firm after such change in the constitution but the change was not notified to the Registrar of Firms, the suit was not maintainable as the current partners were not shown in the Register of Firms."
>
> **23**. In the pronouncement of this court in **1994 1 ArbLR 385 Kelson Construction v. Versha Spinning Mills Ltd. & Anr.,** the court held that if a suit on the date of its institution is not maintainable, there was nothing in the language of the section which by any implication has the effect of validating the same plaint with effect from the date of the registration of the partnership. It was further laid down that while it is the duty of the court to administer justice according to the principles of equity and good conscience, the courts are not supposed to circumvent or overlook the mandatory provisions of statute. When a statute does not permit any suit to be brought, contrary to its specific provisions, the courts cannot by the device of interpretation overcome such legal bar."

11. The Court ultimately came to record and arrive at the following conclusions: -

> "**24**. In the instant case, a requirement under Section 92 of the Code of Civil Procedure cannot be held to be a merely technical bar, non-compliance whereof is only an irregularity. In my view, the prohibition goes to the root of the jurisdiction of the court and finds its basis in the spirit, intendment and purpose for which Section 92 was enacted. Failure to bring the application by two persons who have an interest in the affairs of the trust on the date the application is taken up for consideration is a sine qua non for the maintainability of the application and the institution of the suit. The requirement of Section 92 of the Code of Civil Procedure, 1908 cannot be compared to the omission to sign or verify the plaint which is considered irregularity and technical defect inasmuch as the same entails satisfaction of the court on factual matters. In the instant case, the applicants have to satisfy the court that they have a valid and substantial interest in the affairs of the trust when the application under Section 92 is taken up for consideration or is allowed.

> **25.** For this reason, the omission cannot be supplied by making an application under Order 1 Rule 10 of the Code of Civil Procedure, 1908. Undoubtedly, the two persons who make the application must have a substantial interest in the affairs of the trust when the application is filed and continue to do so when the application is taken up for consideration. This court had held that the provisions of Order 22 of the Code of Civil Procedure, 1908 were not applicable to the application under Section 92 of the Code of Civil Procedure, 1908. The proposed plaintiff on whose behalf the application being IA 6040/2004 has been filed was not before the court on 20th April, 2004 when IA 9572/1999 was taken up for hearing and was allowed. Secondly, no leave to institute the suit has been granted in favour of the proposed plaintiff and consequently it cannot be added as a party."

The review petition consequently came to be allowed and the order of 20 April 2004 recalled.

12. A consideration of the principles which came to be enunciated and recognized in **Rahul Jain** would establish that the Court fundamentally held that on the date when an application seeking leave to sue is taken up for consideration, the record must reflect that it is supported by not less than two individuals in light of the mandatory provisions of Section 92. This is evident from the plain language employed in that provision which uses the expression *"two or more persons having an interest…"*.

13. Undoubtedly, a Section 92 suit cannot be recognized as having come to be instituted unless the application for grant of leave of the Court is granted. Till that time, the suit would remain a proposed action with respect to the affairs of a public charitable trust. Evidently, in **Rahul Jain** on the date when leave was granted by the Court, there was only one individual who remained on the record of the application

seeking leave. It is in that backdrop that the Court came to conclude that the order granting leave was unsustainable.

14. In the considered opinion of this Court, **Rahul Jain** also correctly holds that a fundamental defect from which an application for leave may suffer cannot be rectified after leave has been granted. The learned Judge correctly came to record that the fact that the application seeking leave was being pursued by only one individual would not fall in the category of a procedural defect or irregularity which could be cured. Insofar as the provisions of Section 69(2) of the 1932 Act are concerned, it may be noted that a suit which is contemplated under that provision, does not follow the two-tier statutory procedure which is constructed and put in place by Section 92. In light of the express language of Section 69(2) of the 1932 Act, a registered partnership must be in existence on the date of institution of the suit itself. As distinguished from the position which would obtain in the context of Section 69(2) suits, a suit which is sought to be brought in terms of Section 92 of the Code cannot be said to have been instituted in accordance with law unless leave of the Court has been previously obtained.

15. The position which thus emerges from the aforesaid discussion would be that a suit under Section 92 of the Code would be recognized as having been instituted only after the application seeking leave of the Court has been obtained and granted. Till such time as that application is allowed and the Court grants leave, the suit remains a proposed action in respect of a trust. It is the grant of leave by the

Court on an application preferred for that purpose by two or more persons that leads to the registration of the suit. It is in that backdrop that the decision in **Rahul Jain** is liable to be appreciated and understood. Bearing in mind the express provisions of Section 92 of the Code, **Rahul Jain** correctly holds that at least two persons must be in existence on the date when the application for leave is either taken up for consideration or on the date when leave is granted. The decision clearly holds that it is either of the two aforenoted dates which would be determinate. **Rahul Jain** also rightly found that a defect which relates to the minimum number of applicants who must be present before the Court on the pivotal date cannot be cured by way of impleadment after leave has been granted.

16. To the extent of what stands recorded hereinabove, the instant application clearly does not raise an insurmountable obstacle since the applicants are neither seeking impleadment after leave has been granted nor is it one which has been instituted after the Court may have granted permission to a particular set of proposed plaintiffs. However, while learned counsel for the respondent may be correct in his submission that the provisions of Order I Rule 10 or for that matter Order XXII Rule 3 of the Code would not be applicable at this stage since, strictly speaking, a suit is yet to be registered and instituted, the Court finds no justifiable ground to refuse the prayers made in the instant application for the following reasons.

17. It must and at the outset be reemphasized that the proposed applicants crave liberty of the Court to join the pending application for

grant of leave. This is therefore not a case where parties are proposing to join the *lis* after leave may have been granted or seeking impleadment in proceedings post the grant of permission by the Court in terms of Section 92. Further, even if the Court were to grant the prayers as made in the instant application, it would not amount to the Court according leave to sue. That would be an issue which would survive for consideration once the Court takes up I.A No. 4760/2019.

18. The Court while arriving at the aforesaid conclusion also bears in mind that the Code, as has been repeatedly held, is not liable to be viewed as exhaustively providing for the infinite contingencies which may arise in the course of civil litigation. It is perhaps to take care of the unpredictable vagaries of litigation that the Legislature in its inherent wisdom preserved and recognised the inherent powers of the Court by insertion of Section 151. Section 151 and its scope was lucidly explained by a Full Bench of the Allahabad High Court in **Raj Narain Saxena vs. Bhim Sen and Ors.**[6] in the following terms: -

> **"4.** I may also deal at this stage with what happens in an ordinary suit. Under Sec. 6 of the Code of Civil Procedure no court has jurisdiction over a suit, the amount or value of the subject-matter of which exceeds its pecuniary limits. Sec. 15 requires every suit to be instituted in the court of the lowest grade competent to try it. Under Sec. 26, every suit must be instituted by the presentation of a plaint or as laid down in Order 33. Sec. 6 of the Court-fees Act provides that no plaint or application which must be charged with court-fees "shall be filed, exhibited or recorded in any Court ….., unless in respect of such document there be paid a fee of an amount not less than that" mentioned in the schedules attached to the Act. Sec. 3 of the Limitation Act lays down that "every suit instituted. ….. and application made, after the period of limitation

[6] 1965 SCC OnLine All 109

prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence." According to the explanation, a suit is instituted in an ordinary case when the plaint is presented to the proper officer and in the case of a pauper, when his application for permission to sue as a pauper is made. The rules regarding plaints are contained id Or. 7 of the Code of Civil Procedure. A plaint must contain, *inter alia*, the facts constituting the cause of action and when it arose, the fact showing that the court has jurisdiction, the relief and a statement of the value of the subject matter of the suit for the purposes of jurisdiction and of court-fees. If the facts show that the cause of action arose so early that the period of limitation for a suit on its basis expired before the plaint was presented it is the duty of the court itself to reject the plaint at once under Sec. 3 of the Limitation Act. If the suit is barred by time it has no jurisdiction to take any further action. Since in the case of a pauper suit it is filed when an application for permission is presented under Order 33, Rule 1 it can, and ought to, be rejected straightaway if the suit was on the date of its presentation barred by time. Under Order 7, Rule 10 a plaint "shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted." Since a pauper suit is instituted by presenting an application for permission and since that application itself is deemed to be a plaint (though only on its being granted) some High Courts have held that the application can itself be returned to be presented to the court in which it should have been instituted. If it be said that Rule 10 of Order 7 can be applied only after an application for permission has matured into a plaint under Rule 8 of Order 33 and that so long as it has not matured into a plaint it cannot be treated as a plaint and, therefore, cannot be returned for presentation to the competent court, the only consequence would be that the application will have to be rejected. The provision in Rule 10 of Order 7 is a concession to the plaintiff; instead of the plaint being rejected it is allowed to be returned to him so that he may present it to the competent court. If Rule 10 did not exist the court would be bound to reject the plaint. Every authority is bound to see that it has the power which it is asked to exercise. A statutory authority has only these powers which the statute has conferred upon it and has no jurisdiction to exercise any other power. It is not open to the parties to confer any power upon it and it does not become authorised to exercise a power merely because a party applies to it for its exercise. If it cannot exercise it, it must refuse to exercise it. So it is for it to determine before it exercises the power that it possesses it. No statutory provision is required for its doing so; it is its inherent jurisdiction. Therefore, if a court has

no power to entertain a suit it must refuse to entertain it and reject the plaint (in the absence of a provision authorising it to return it for presentation to the competent court). If Rule 10 of Order 7, does not apply to an application for permission the application must be rejected if the court to which it is presented has no jurisdiction over the suit. Rule 11, requires a plaint to be rejected when it does not disclose a cause of action, when the relief claimed is undervalued and the plaintiff has failed to correct it within the time fixed by the court, when it is properly valued and the plaint is not sufficiently stamped with the court-fee or when the suit appears from the statements in the plaint itself to be barred by any law. Because of the provision in Sec. 3 of the Limitation Act and the provision in rule 10 there is no provision about a plaint being rejected on the ground that the suit is barred by time or that the plaint is presented in a court having no jurisdiction. Only a plaint is to be rejected when the suit appears from the statement in itself to be barred by any law but the fact that this Court has added an explanation to Rule 5 of Order 33, which deals with rejection of an application for permission, does not mean that in its view an application for permission is a plaint. The object behind the explanation appears to make it clear that being barred by any law does not amount to absence of a cause action within the meaning of Cl. (d) of Rule 5. There is no mention in Rule 5 that an application for permission can be rejected on the ground that the court has no jurisdiction because every plaint, appeal or application is liable to be rejected on the ground of want of jurisdiction as already explained. No statutory provision is required at all for an authority's refusing to exercise jurisdiction not vested in it; a statutory provision would be required only if it had not to reject a plaint, appeal, application etc. on the ground of want of jurisdiction but to return it. Rule 5 does not contain an authority for rejecting an application for permission on the ground that it is barred by time because Sec. 3 of the Limitation Act contains the required provision. Moreover, there is Sec. 151 in the Code preserving the inherent power of the court "to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court." This expressly authorises a court to make such orders as it considers necessary for the ends of justice or prevention of abuse of the process of the court. A court can make any order even though not provided in the Code, the only condition being that it is necessary for the ends of justice or prevention of abuse of the process of the court. The provisions of the Code are generally meant to serve the ends of justice but in their very nature they cannot reach all possible circumstances that can exist and there are bound to be no provisions dealing with some of the

circumstances. Also some of the provisions may result in abuse of the process of the court. Consequently every court has the inherent power, recognised by Sec. 151, to make any orders that it considers necessary for the ends of justice or preventing abuse of the process of the court. The Code cannot and does not even purport to, be exhaustive and hence the residuary power has been conferred upon the court through recognition of its inherent power. With this residuary power the Code is now exhaustive; for circumstances which are likely to exist frequently or can be contemplated there are express provisions; for others there is the inherent power of the court. The existence of the inherent power pre-supposes that any order that is not prohibited is within the competence of the court. Any order not prohibited by the Code can be made by a court; if it is expressly provided for it is made by virtue of that authority and if it is not expressly provided for it is made because of its being necessary for the ends of justice or prevention of abuse of the process of the court. I respectfully adopt the statement of Mahmood, J. in *Narsingh Das* v. *Mangal Dubey* [I.L.R. 5 Alld. 163.] that "Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law" subject to only this condition that the procedure that is not provided for expressly by the Code must be justified on the ground of the ends of justice or of prevention of abuse of the process of the court. In *Gupteshwar Missir* v. *Chaturanand Missir* [A.I.R. 1950 Patna 309.] Sinha, J., with whom Rai, J. concurred, said at page 310 that "it is true the Code is not exhaustive, but certainly it is exhaustive in matters specifically provided for." What is not exhaustive is the Code minus Sec. 151; since Sec. 151 contains the residuary power it necessarily follows that the power conferred by the remaining provisions is not exhaustive. It is also not correct to say that the Code is exhaustive in matters specifically provided for because even in respect of such matters the court is left free to make a different order if it is necessary for the ends of justice or prevention of abuse of the process of the court. Consequently, rule 5, cannot be said to be exhaustive of the circumstances in which an application for permission can be rejected; it can be rejected in other circumstances to secure the ends of justice or prevent abuse of the process of the court and rejecting an application on the ground that the court has no jurisdiction over it is rejecting it for the ends of justice and preventing abuse of the process of the court. If the court has no jurisdiction it would be abuse of its process if it is made to proceed on it. The only just order that can be passed on

> such an application is that of rejection. It is unusual for a legislature, when vesting a certain power in a particular authority, to enact an express provision that an authority other than it must reject an application for its exercise (on the ground of want of jurisdiction); obviously this is because the authority to which an application is made has inherent jurisdiction to refuse to exercise a power not vested in it. I respectfully agree with what was said in *Nanda Kishore Singh* v. *Ram Golam Sahu* [I.L.R. 40 Cal. 955 at p. 960.] . In *Shamu Patter* v. *Abdul Kadir Ravuthan* [L.R. 39 Indian Appeals 218 at page 223.] it was pointed out by his Lordship Amer Ali that "every court trying civil cases has inherent jurisdiction to take cognizance of questions which cut at the root of the subject matter of controversy between the parties" even in the absence of any provision in the Code."

19. The Full Bench of that Court in **Raj Narain Saxena** drew sustenance from the principle expounded by the learned Justice Mahmood who had held that courts must not proceed on the premise that every procedure is to be understood as prohibited unless expressly or particularly granted but in fact proceed on the converse principle of every procedure being sanctioned in law unless shown and established to the contrary.

20. The Court is thus of the considered opinion that the grant of the prayers as made in the instant application would not fall foul of any provision of the Code. No provision of the Code, either expressly or impliedly, prohibits persons from joining an application for leave to sue. All that Section 92 mandates is that the application seeking leave must be made by at least two persons. For the purposes of determining whether the aforesaid prescription stands satisfied, the Court must ensure that the statutorily prescribed minimum number of applicants

exist on the record on the date when the said application is taken up for consideration or permission to sue is granted.

21. Neither **Rahul Jain** nor any other decision rendered either by this Court or any other High Court was shown to hold that a Court lacks the power to permit persons joining an application which seeks leave to institute a suit against a trust. **Rahul Jain** is merely an authority for the proposition that on the date when the application seeking leave to sue is taken up for consideration or permission granted, there must be in existence before the Court two or more persons who pray for and seek that relief. **Rahul Jain** also constitutes an authority for the principle that a fundamental flaw which may be found to exist on the record on the date when leave is granted is not curable by subsequent impleadment of parties. The Court thus comes to the firm conclusion that the injuncts as propounded in **Rahul Jain** do not stand attracted in the facts and circumstances of the present case.

22. The Court further finds that the exercise of power under Section 151 of the Code clearly appears to be permissible in law in absence of an express provision in the Code prohibiting the adoption of the measure propounded by the Court in exercise of it inherent powers. More fundamentally, the facts of the present case clearly justify the invocation of inherent powers in order to ensure that the ends of justice are subserved and the asserted silence of the Code does not result in prejudice being caused. The situation which arises clearly warrants the invocation of the inherent powers of the Court in order to

ensure that the interest of the *lis* is not rendered a casualty on the altar of a technical and pedantic interpretation of a procedural statute.

23. Accordingly, the instant application is allowed. The Court consequently permits Major Atul Dev and Dr. Neerja Lugani Sethi to join as applicants in I.A No. 4760/2019. All contentions of respective parties insofar as they pertain to the merits of the aforesaid application are kept open.

CS(OS) 182/2019 & I.A. 22105/2022 (Interim Direction)

1. List again on 10.02.2023.

YASHWANT VARMA, J.

JANUARY 04, 2023
neha