APPELLATE CIVIL.

Before N. R. Chatterjea and Richardson JJ.

1916

May 9.

AHMED ALI

v.

ABDUL MAJID.*

Mosque Property, suit for—Leave of Court—Civil Procedure Code (Act V of 1908) O. I., r. 8—Failure to obtain permission before institution of the suit—Its effect—Objection for want of such permission, if fatal to the suit.

There is no doubt that the proper course is to obtain permission under Order I, rule 8 before the suit is instituted, but there is nothing in the rule to show that if it is not so done, it cannot be granted afterwards. The mere fact that the leave of the Court was not obtained before the institution of the suit should not result in the dismissal of the suit.

Permission under Order I, rule 8 can be granted subsequent to the filing of the suit.

The objection under s. 30 of the old Civil Procedure Code which corresponds with Order 1, rule 8 of the present Code, is not one affecting the jurisdiction of the Court.

Fernandez v. *Rodrigues* (1), *Chennu Menon* v *Krishnan* (2), *Srinivasa Chariar* v. *Raghava Chariar* (3), *Baldeo Bharthi* v. *Bir Gir* (4) followed.

Jan Ali v. *Ram Nath Mundul* (5), *Lutifunnissa Bibi* v. *Nazirun Bibi* (6) referred to.

Oriental Bank Corporation v. *Gobind Lall* (7) dissented from.

Dhunput Singh v. *Paresh Nath Singh* (8) distinguished.

Appeal from Appellate Decree, No. 2975 of 1914, against the decree of R. E. Jack, Additional District Judge of Chittagong, dated June 6, 1914, reversing the decree of Rash Behari Barman, Munsif of Chittagong, dated June 23, 1913.

(1) (1897) I. L. R. 21 Bom. 784.
(2) (1901) I. L. R. 25 Mad. 399.
(3) (1897) I. L. R. 23 Mad. 28.
(4) (1900) I. L. R. 22 All. 269.
(5) (1881) I. L. R. 8 Calc. 32.
(6) (1884) I. L. R. 11 Calc. 33.
(7) (1883) I. L. R. 9 Calc. 604.
(8) (1893) I. L. R. 21 Calc 180.

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THIS appeal arises out of a suit brought by the plaintiff for a declaration that the land described in schedule 2 to the plaint is a mosque property and as such is inalienable, and that the alienation is void and for possession of the land on behalf of the mosque. It was alleged in the plaint that a mosque was established a century ago for the use of the Mahomedans at mauza Sola Shahar and was still in existence; that the Mahomedan public used to offer prayers in the mosque which was known as *Khairati Masjid*; that there was endowed property for the maintenance of the mosque and that the property was managed by the plaintiff's predecessor; that the Government wanted to resume the property which was rent-free and attempted to assess rent and there was litigation which resulted in the release of the property on the 18th of February 1868; that the profits of the property were so long used for the maintenance of the mosque; that the property belonged to the mosque and no one had any personal interest therein; that the defendants 2, 3, 4 and 5 recently sold the lands to defendant No. I; that the defendants had no individual right in the property and had no power to do so; and that the defendant No. I has acquired no right by his purchase.

On the 19th August 1912, the plaintiff made a petition for amendment of the plaint and the amendment was allowed, making the application a part of the plaint. The defendant No. I traversed almost all the allegations made in the plaint and submitted that the suit was not maintainable without the sanction from the District Judge or some such officer authorised to grant such sanction, that the plaintiff was thus estopped from bringing the suit; that the plaintiff was a mere benamidar; that the suit was not within that Court.

After the amendment of the plaint was allowed, the defendant filed an additional written statement

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urging, *inter alia*, that the suit was not maintainable as previous to the institution of the suit the plaintiff did not take permission under Order I, rule 8 of Civil Procedure; that the suit was not maintainable without permission of the Advocate-General and that the suit was not a *bonâ fide* one.

The learned Munsif decreed the suit in part overruling the objection of defendant No. I that the suit was not maintainable. On appeal, the District Judge dismissed the suit on the ground that permission under Order I. rule 8 of the Civil Procedure Code had not been obtained before the institution of the suit.

Hence the plaintiff's appeal to this Court.

Maulvi Fazlul Huq, for the appellant, contended that sanction of the Advocate-General was not necessary in the present case as the suit did not fall under section 92 of the Code of Civil Procedure. This was a case under section 99 of the Code of Civil Procedure. This was a suit brought under section 30 of the old and Order I, rule 8 of the Present Code. I applied for leave and also for amendment after the institution of the suit.

The view held by the Calcutta High Court in *Oriental Bank Corporation* v. *Gobind Lall Seal* (1), is apparently against me, but the cases in the other High Courts are all in my favour: *Fernandez* v. *Rodrigues* (2), *Baldeo Bharthi* v. *Bir Gir* (3), *Chemmu Menon* v. *Krishnan* (4) and *Srinivasa Chariar* v. *Raghava Chariar* (5).

Babu Dhirendra Lal Kastgir (with him *Babu Tarakeswa Nath Mitra*), for the respondent, submitted that leave of the Court under s. 30 (O. I, rule 8)

(1) (1883) I. L. R. 9 Calc. 604.
(2) (1897) I. L. R. 21 Bom 784.
(3) (1900) I. L. R 22 All. 269.
(4) (1901) I. L. R. 25 Mad. 399.
(5) (1897) I. L. R. 23 Mad. 28.

must be obtained before the institution of the suit. The Calcutta High Court has always taken that view. *Oriental Bank Corporation* v. *Gobind Lall Seal* (1), *Geereeballa Dabee* v. *Chunder Kant Mookerjee* (2), *Dhunput Singh* v. *Paresh Nath Singh* (3), *Lutifunnissa* v. *Nazirun* (4), *Jan Ali* v. *Ram Nath Mundul* (5). *Oriental Bank Corporation* v. *Gobind Lall Seal* (1) lays down that such leave cannot be granted at the hearing. Opposite view has been taken by the other High Courts, but the Bombay Full Bench Case [*Fernandez* v. *Rodrigues* (6)] says that section 30 implies that permission should be given before the institution of the suit. But it adds that as it is a question analogous to that of adding parties, the defect can be remedied subsequently. The other cases are based on his case. This is not a case of adding parties. Here is a question of jurisdiction and this view has been taken by the Calcutta High Court. The other High Courts have looked upon this question as one of mere irregularity which could be cured by subsequent permission. But it is really a question of jurisdiction and therefore leave cannot be given subsequent to the institution of the suit.

In the case of endowed properties, suits can be brought either under Act XX of 1863 or under the Civil Procedure, sections 30 and 539. Previous sanction of the Court is necessary if the suit is brought under Act XX or section 30.

Section 42 of the Specific Relief Act is also a bar to the present suit. The plaintiff does not pray for the appointment of a mutawalli. The decree of the 1st Court is incapable of execution as the *musjid* is not a juridical person. The lower Appellate Court has

(1) (1883) I. L. R. 9 Calc. 604.
(2) (1885) I. L. R. 11 Calc. 213.
(3) (1893) I. L. R. 21 Calc. 180
(4) (1884) I. L. R. 11 Calc. 33.
(5) (1881) I. L. R. 8 Calc. 32.
(6) (1897) I. L. R. 21 Bom. 784.

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dismissed the suit on the preliminary ground that the suit is not maintainable under section 30. There are other questions involved in the suit which have not been decided by the lower Appellate Court. If this Court holds that leave under section 30 can be subsequently granted the case should go back for decision on other questions.

N. R. CHATTERJEA AND RICHARDSON JJ. This appeal arises out of a suit for a declaration that the property described in Schedule II of the plaint is mosque property and is inalienable, that the alienation of the same by the defendants Nos. 2 to 5 in favour of the defendant No. 1 is invalid and for a decree, that possession of the said property be restored to the mosque. The suit was instituted on the 31st May 1912 and, after the written statement had been filed by the defendant No. 1 on the 26th July 1912, the plaintiff made an application for amendment of the plaint on the 19th August 1912. In that application it was stated that the plaintiff was an heir of one of the original *sarbarakars* and was along with other persons interested in the maintenance of the mosque, and permission of the Court to sue on behalf of all the persons interested was prayed for under Order I, rule 8 of the Civil Procedure Code. The defendant No. 1 in his additional written statement pleaded that the plaint ought to be rejected as no permission had been obtained and no steps had been taken for service of notice previous to the filing of the suit. The Court of first instance overruled the said objection of the defendant No. 1 and, on the merits found in favour of the plaintiff and partly decreed the suit on the 23rd June 1913. On appeal, the learned District Judge dismissed the suit on the ground that the permission under Order I, rule 8 of the Civil Procedure Code,

had not been obtained before the institution of the suit. The plaintiff has appealed to this Court.

There is no doubt that in this case permission of the Court was obtained by the plaintiff and the notice required by rule 8 of Order I was served upon the interested persons. The only question is whether the lower Appellate Court was justified in dismissing the suit on the ground that no permission was obtained at the time the suit was originally instituted. Order I, rule 8 of the Civil Procedure Code lays down that where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued or may defend, in such suit, on behalf of or for the benefit of all persons so interested, but the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons. There is no doubt that the proper course is to obtain the permission before the suit is instituted; but there is nothing in the rule to show that, if it is not so done at that time, the permission cannot be granted afterwards. The question is not one of jurisdiction and there are no imperative or prohibitory words in the rule indicating that the suit must be dismissed if the leave of the Court is not obtained before the plaint is filed. The provisions of the rule making it necessary to obtain the permission of the Court and to serve notice upon the persons interested must be complied with before the suit can proceed; but, where this is done, the mere fact that the leave of the Court was not obtained *before* the institution of the suit should not, we think, result in the dismissal of the suit. The view we take is supported by the Full Bench decision of the Bombay High Court in the case of *Fernandez* v. *Rodrigues* (1). There it was held that

(1) (1897) I. L. R. 21 Bom. 784.

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the permission might, according to the old Chancery practice in England, be given at any time; that the matter involved no question of jurisdiction and was analogous to that of adding parties. The Madras High Court also has held that the leave to sue under section 30 of the old Code of Civil Procedure may be given after the commencement of the suit: see *Chennu Menon* v. *Krishnan* (1) and *Srinivasa Chariar* v. *Raghava Chariar* (2). The same view has been taken by the Allahabad High Court in the case of *Baldeo Bharthi* v. *Bir Gir* (3). The cases in our Court on the point are *Jan Ali* v. *Ram Nath Mundul* (4), *The Oriental Bank Corporation* v. *Gobind Lall Seal* (5) and *Lutifunnissa Bibi* v. *Nazirun Bibi* (6) In these cases it has been held that the plaintiff is not entitled to institute a suit without obtaining leave under section 30 of the old Code of Civil Procedure. But in none of these cases except the case of the *Oriental Bank Corporation* v. *Gobind Lal Seal* (7), was leave applied for or obtained at all. The question therefore whether leave can be granted subsequent to the institution of the suit did not arise nor was decided in those cases. As already stated there can be no doubt that leave of the Court must be obtained and the requirements of section 30 of the old Code corresponding to Order I rule 8 of the new Code must be complied with before a suit of this nature can be proceeded with, and unless that is done, the suit must be dismissed. In the case of the *Oriental Bank Corporation* v. *Gobind Lall Seal* (7), however, leave was applied for subsequent to the institution of the suit and was refused; and that is the only case in this Court in

(1) (1901) I. L. R. 25 Mad. 399.
(2) (1897) I. L. R. 23 Mad. 28.
(3) (1900) I. L. R. 22 All. 269.
(4) (1881) I. L. R. 8 Calc. 32.
(5) (1883) I. L. R. 9 Calc. 604.
(6) (1884) I. L. R. 11 Calc. 33.
(7) (1883) I. L. R. 9 Calc. 604.

which it has been decided that leave cannot be granted subsequent to the filing of the plaint. The learned Judge (Mr. Justice Norris) who decided that case refused leave on the ground that he had not the power to grant permission at that stage. It was the decision of a single Judge and, although the opinion of the Judge is entitled to respectful consideration, we are not bound by it. It must be observed that in that case permission was applied for at the hearing of the suit and not before. We have been referred by the learned vakil for the respondents to a passage in the case of *Dhunput Singh* v. *Paresh Nath Singh* (1) in which it is stated that the decisions of this Court lay down that the leave of the Court under section 30 of the old Code must be obtained before the institution of the suit and cannot be granted subsequently. This question, however, was not raised in that case, the only question raised being whether the permission under section 30 must be express or might be implied from the circumstances, and the cases of this Court, as we have seen with the exception of *The Oriental Bank Corporation* v. *Gobind Lall Seal*(2), did not decide the question whether leave could be granted subsequent to the institution of the suit as no such question was raised in those cases. In the present case, leave was applied for and obtained long before the hearing and the requirements of the rule were complied with. We may in this connection refer to the case of *Geereeballa Dabee* v. *Chunder Kant Mookerjee* (3), in which Mr. Justice Wilson in delivering judgment stated that he was of opinion that "the technical objection to the suit was a valid one, the suit being one purporting to be brought under section 30 of the Code and, as such, only permissible when leave to sue in

(1) (1893) I. L. R. 21 Calc. 180. (2) (1883) I. L. R. 9 Calc. 604.
(3) (1885) I. L. R. 11 Calc. 213.

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that way had been obtained;" and he, therefore, dismissed the suit on that ground stating, however, that "he would have been unwilling to dismiss the suit on such a ground if he had thought that there was any substance in the plaintiff's case; but as Mr. Pugh had rested his case on the pleadings and had called no evidence, there was no ground for thinking that the suit was a substantial one." That shows that, in the opinion of the learned Judge, the objection based on section 30 was not one affecting the jurisdiction of the Court. Having regard to the absence of any prohibitory or imperative words in Order I, rule 8 of the Civil Procedure Code and the weight of authorities on the point, we respectfully differ from the view taken in the case of *Oriental Bank Corporation* v. *Gobind Lall Seal* (1) and hold that leave can be granted under Order I, rule 8 of the Civil Procedure Code subsequent to the filing of the suit.

It is contended on behalf of the respondents that it is a case of a public, religious and charitable trust and the case, therefore, falls under section 92 of the Code of the Civil Procedure and that the sanction of the Advocate-General ought to have been obtained before the suit was instituted. But these questions have not been gone into nor have the facts necessary for the determination of the questions been found by the Court of appeal below

We are of opinion that the provisions of Order I, rule 8 of the Civil Procedure Code having been complied with, though subsequent to the filing of the plaint, the suit cannot be dismissed; and, as it has been dismissed by the learned District Judge only on the objection based on Order I, rule 8, we set aside the decree of the lower appellate Court and send back the case to that Court in order that that Court may decide

(1) (1883) I. L. R. 9 Calc. 604.

the other questions raised by the appellant in this case including the question of the validity of the decree of the Court of first instance and dispose of the case according to law. Costs will abide the result.

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S. K. B. *Case remanded.*

LETTERS PATENT APPEAL.

Before Woodroffe and Chaudhuri JJ.

DWARKANATH CHAUDHURI

v.

TAFAZAR RAHAMAN SARKAR.*

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May 23.

Non-occupancy Raiyat—Khamar land—Statute—Heading of Chapters—Bengal Tenancy Act (VIII of 1885), Ch. XI, s. 45 and Sch. III, C'. 1 (a).

A tenant of a *khamar* land is not a non-occupancy *raiyat.*

The heading of a chapter in a statute may be looked at for the purpose of interpreting a section in the statute.

LETTERS PATENT APPEAL by the plaintiffs, Dwarkanath Chaudhuri and others.

The appeal arose out of a suit for *khas* possession and damages brought by the plaintiffs landlords on the ground that the defendants had taken settlement of the land in suit for 5 years from the predecessor-in-interest of the plaintiffs and that the plaintiffs were entitled to re-enter on the expiration of the agreement. The defendants contended, *inter alia*, that they were occupancy *raiyats* and were not liable to ejectment and that the suit was barred by limitation. The Munsif held that the defendants were non-occupany *raiyats* and that the suit had been

* Letters Patent Appeal, No. 114 of 1915, in Appeal from Appellate Decree No. 991 of 1914.