CIVIL RULE.

Before D. N. Mitter and Rau JJ.

1935

April 18.

FAIZUNNESSA

v.

GOLAM RABBANI.*

Religious Endowment—Consent of Advocate-General or Collector given to a certain set of persons to file suit or appeal—Consent to each fresh addition of party, if necessary—Code of Civil Procedure (Act V of 1908), ss. 92, 93.

In a suit or appeal instituted by a certain set of plaintiffs or appellants with the consent of the Advocate-General or the Collector under sections 92 and 93 of the Code of Civil Procedure, the consent of the Advocate-General or the Collector to each fresh addition of a party is not necessary.

Chhabile Ram v. *Durga Prasad* (1) dissented from.

Ponniatha Kathoot Parameswaran Munpee v. *Moothedath Mallisseri Illath Narayanan Nambodri* (2), *Gopi Das* v. *Lal Das* (3) and *C. E. Dooply* v. *M. E. Moolla* (4) followed.

A suit under sections 92 and 93 of the Code of Civil Procedure is not prosecuted by individuals for their own interests, but as representatives of the general public interested in the endowment.

Anand Rao v. *Ramdas Daduram* (5) referred to.

CIVIL RULE obtained by the petitioner.

The facts of the case and the arguments in the Rule are sufficiently stated in the judgment.

Nripendrachandra Das and *Bhupendranath Ray Chaudhuri* for the petitioners.

A. K. Fazlul Huq, *Atiqullah* and *Abul Hossain* for the opposite party.

MITTER J. This Rule raises a question of some importance. It appears that one Daroga Amiruddin,

*Civil Rule No. 167 F. of 1935, in Appeal from Original Decree, No. 269 of 1933.

(1) (1915) I. L. R. 37 All. 296.
(2) (1916) I. L. R. 40 Mad. 110.
(3) (1918) 47 Ind. Cas. 983.
(4) (1927) I. L. R. 5 Ran. 263.
(5) (1920) L. L. R. 48 Cal. 493; L. R. 48 I. A. 12.

a rich merchant and *zemindâr* of Dacca, built a mosque, which is popularly known as "Badamtali "Mosque", situate at 1, Akmal Khan Road, Dacca, and dedicated the property attached thereto for its upkeep and maintenance and acted as the *mutâwâlli* thereof till his death. After the death of the said *mutâwâlli*, one Nurunnessa Bibi became a *mutâwâlli* of the said *wâkf* properties and the mosque; and, while so acting, she executed a *touliatnâmâ* on the 16th *Pous*, 1330 B.S., by which she appointed the opposite party No. 3, Dewan Abul Khair Ahmad Ali, the *mutâwâlli*. By this *touliatnâmâ*, certain rules of succession to the *touliat* were laid down and by virtue of those rules, opposite party No. 3 became the *mutâwâlli* after the death of Nurunnessa Bibi, which happened in 1332 B.S. It is alleged that opposite party No. 3, after assuming the management of the office of *mutâwâlli*, misappropriated the income of the *wâkf* properties and ultimately leased out the *wâkf* properties for 15 years to opposite party No. 4. Opposite parties Nos. 1 and 2, having obtained sanction from the Local Government, instituted suit No. 36 of 1932 in the court of the District Judge under section 92 of the Code of Civil Procedure, and the learned District Judge, by his order dated the 25th February, 1933, removed opposite party No. 3 from the office of the *mutâwâlli* and appointed in his place opposite party No. 5, namely Moulvi Asad Bukht, who is a stranger to the family of the *wâkif* and also to the family of the last deceased *mutâwâlli*, as a *mutâwâlli*. Against this decision an appeal has been brought and it is contended that, without calling for nominations from the public, the learned District Judge should not have appointed opposite party No. 5, who is a stranger to the family of *wâkif* and also to the family of the deceased *mutâwâlli* Nurunnessa Bibi, as the *mutâwâlli* to the mosque. It is also complained that the learned judge was wrong in absolving opposite party No. 3 from the liability to render proper accounts. This appeal, it may be

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mentioned, was brought by two relators, Golam Rabbani *alias* Lal Miyâ and another, who had obtained sanction of the Collector of the district in accordance with the provisions of section 92 read with section 93 of the Code of Civil Procedure. The appeal was filed by these two relators and a requisition was made from the office for payment of the costs necessary for the carrying out of the appeal. The original relator defaulted and it is stated in this petition by the petitioner Faizunnessa, wife of Moulvi Abdul Khaleque of 17, Syed Husan Ali Lane, Dacca, that she is a *pardânashin* lady and as there was no publication of the call for nomination from the public for the appointment of the new *mutâwâlli* to the mosque, she had no opportunity to put forward her claim and her claim was not considered by the District Judge, with the result that she has been deprived of a right, to which she is entitled under the *touliatnâmâ*, to which reference has already been made. She, accordingly, moved an application to this Court for being added as a party appellant on the ground that she is vitally interested in the results of the appeal, but her application was summarily rejected on the 30th January, 1934, as the appeal was then being prosecuted diligently by opposite parties Nos. 1 and 2. It is alleged in paragraph No. 9 of the petition that the petitioner has now come to learn that the said opposite parties Nos. 1 and 2 have entered into a secret arrangement with the present *mutâwâlli*, opposite party No. 5, and are not willing to prosecute the appeal any further. With that object in view, although time has been granted to them for payment of paper-book costs, they have defaulted in the payment of the same. In paragraph 10 of the petition it is stated that if the appeal to this Court be dismissed for non-prosecution on account of the secret arrangement between opposite party No. 5 on the one hand and opposite parties Nos. 1 and 2 on the other the interest of the petitioner will be seriously affected and her legitimate claim will be lost on account of

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the collusion between the opposite parties Nos. 1 and 2 on the one hand and No. 5 on the other, and this will cause an irreparable loss to the petitioner. She has, accordingly, prayed in this Rule that if the original appellants do not wish to prosecute the appeal and allow the appeal to be dismissed for default for non-payment of paper-book costs the present petitioner may be allowed to be added as a party appellant on the record, so that she may proceed with the appeal.

A Rule was issued in terms of the petition. Mr. Fazlul Huq has appeared to show cause and he contends that this petition is not maintainable unless the petitioner obtains the sanction of the Collector of the district; and he has relied on a decision of the Allahabad High Court in the case of *Chhabile Ram* v. *Durga Prasad* (1). This decision no doubt supports the contention of the learned advocate for the opposite party. On the other hand, the High Court of Madras has held that the suit brought under section 92 of the Code of Civil Procedure being a representative suit, no question of abatement can arise if one of the relators die during the pendency of the appeal and the court has power under Order I, rule 10, clause (*2*) of the Code to add other persons interested in the trust as parties, because they had become parties to the representative suit by the very fact of its having been instituted on behalf of all persons interested in the trust and not because they are the legal representatives of the deceased party. In such cases the consent of the Advocate-General to each fresh addition of a party is not necessary. See the case of *Ponniatha Kathoot Parameswaran Munpee* v. *Moothedath Mallisseri Illath Narayanan Nambodri* (2). In this connection, with regard to abatement on the death of a party, reference may be made to the decision of their Lordships of the Judicial Committee of the Privy

(1) (1915) I. L. R. 37 All 296. (2) (1916) I. L. R. 40 Mad. 110.

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Council in the case of *Anand Rao* v. *Ramdas Daduram* (1). Their Lordships dealt with the question thus :—

> There was also a point that on the persons who originally raised the suit and got the sanction having died the suit could not go on, but there does not seem any force in that point either, it being a suit which is not prosecuted by individuals for their own interests but as representatives of the general public.

It seems to us that the petitioner, being a member of the Mahomedan community, was interested in the trust and, as such, the suit having been properly laid and the necessary sanction of the Collector of the district having been obtained it is not necessary for any member of the public to obtain a fresh sanction to carry on the appeal. An appeal is after all a continuation of the suit. It is not necessary therefore that she should obtain sanction either of the Collector or the Advocate-General as the case may be. The decision of the Madras High Court seems to us to be based on good sense. The Allahabad decision disregards the fact of the representative character of the suit. The Madras decision has been followed in Lahore. See the case of *Gopi Das* v. *Lal Das* (2). It has also been followed in the Rangoon High Court. See the case of *C. E. Dooply* v. *M. E. Moolla* (3). The Allahabad decision does not seem, in our opinion, to lay down the correct legal position.

Following the Madras, Lahore and Rangoon decisions, we think that this Rule should be made absolute and the petitioner should be permitted to be made a party appellant to the appeal and to carry on the appeal, either in conjunction with the original appellants or, if they do not proceed with the appeal, separately, on her own behalf.

There will be no order as to costs.

RAU J. I agree.

Rule absolute.

A.A.

(1) (1920) I. L. R. 48 Cal. 493 (497) ; L. R. 48 I. A. 12 (16).

(2) (1918) 47 Ind. Cas. 983.

(3) (1927) I. L. R. 5 Ran. 263.