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such requisition, the Commissioner shall state and refer the case accordingly."

We think that the circumstances of the present case satisfy the requirements of this clause. It is true that the learned Commissioner in the present case does not say in so many words that the question of law does not arise, but his view that the question arising in the case is a settled question of law amounts to saying the same although in other words. We, therefore, allow these two applications and require the learned Commissioner of Income-tax to state the case and to refer it to this Court.

The applicant will get the costs of these two applications in this Court from the Income-tax Department.

REVISIONAL CIVIL

Before Mr. Justice Ziaul Hasan and Mr. Justice Radha Krishna Srivastava

April 30

M. FAIYAZ ALI KHAN AND OTHERS (APPLICANTS) *v.* MIAN SAIFULLAH SHAH AND OTHERS (OPPOSITE-PARTY)*

Civil Procedure Code (Act V of 1908), *sections* 92 *and* 151—*Scheme framed under section* 92—*Modifications in the scheme, if can be made by application under section* 151, *Civil Procedure Code.*

A scheme, particularly one relating to a Muslim waqf, can be modified by an application under section 151, Civil Procedure Code.

Case law discussed.

Messrs. *Ghulam Hasan* and *Mohammad Hafiz,* for the applicants.

Messrs. *H. S. Gupta, Government Advocate,* and *M. H. Kidwai,* for the opposite-party.

ZIAUL HASAN and RADHA KRISHNA, JJ.:—These appeals have been brought against an order of the learned 1st Civil Judge of Bahraich amending a scheme prepared in a suit under section 92 of the Code of Civil

*Section 115 Application Nos. 46 and 47 of 1940, for revision of the order of B. K. Topa, Esq., First Civil Judge, of Bahraich, dated the 7th June, 1939.

Procedure. Appeal No. 126 of 1938, has been brought by M. Faiyaz Ali Khan, President of the Dargah Committee of Bahraich and Appeal No. 63 of 1939 has been brought by him and four others.

In a village called Singha Parasi, which is at a distance of about a mile and a half from the town of Bahraich, there is a shrine known as the Dargah of Syed Salar Masud about which we find the following in the *District Gazetteer*:

> "The chief point of interest in Bahraich is the Dargah of Syed Salar Masud. He was the son of Salar Sahu and the nephew of Mahmud of Ghazni. It was here that he met his death in 424 Hijri at the hands of the Hindus under Raja Suhal Deo. His shrine stands in the village of Singha Parasi at a distance of a mile and a half from the town. . . . The place has long been an object of pilgrimage and a large fair takes place there yearly in Jeth attended by about 100,000 persons many of whom are Hindus. . . . The management of the shrine and the fair was formerly in the hands of *khadims,* the reputed descendants of servants of the saints. Owing however to the frequent abuses that occurred, a committee was formed in 1876 to administer the shrine under the supervision of the Deputy Commissioner. The *dargah* is now financially well off and supports a school and a dispensary."

Connected with this *dargah* is another institution known as Takia Inayat Shah or Takia Mansur Shah, or Takia Kalan, which is situated in the village of Jagdishpur Sookha. With regard to this *takia* we find the following in the wajib-ul-arz of Jagdishpur Sookha:

> "About two hundred and forty-seven years ago, Mia Inayat Shah, a faqir of Azad Soharvardia clan, came from the city of Multan to Bahraich to see Hazrat Syed Salar and took up his domicile by building a *takia* or a house in a jungle close to the *abadi* of the city of Bahraich . . . After his death Ghulam Ali Shah became his successor and in his time some fallow land was granted by the Lucknow Court for expenses of the *takia.* Mian Ghulam Ali Shah remained in possession of this land and founded mohalla Ghulam Ali Purwa on it. In 1146 Hijri Nawab Saadat Khan also granted a new sanad for the muafi . . . Himmat Ali Shah succeeded Mansur Shah and the village of

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Jagdishpur Sookha was granted by the Lucknow Court to Himmat Ali Shah for expenses of the *takia*. . . . From the time of the grant up to 1263 Fasli the village continued in the possession of the successors of the said Inayat Shah and at the settlement of 1264 to 1266 Fasli it continued as muafi in the name of Mashooq Shah and at the time of the last settlement after the death of Mashooq Shah, Azimullah Shah came into possession."

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It appears that in 1926 a suit under section 92 of the Code of Civil Procedure was filed by the Legal Remembrancer against Hamiduddin Ali Shah, the then *sajjadanashin*. The *sajjadanashin* died during the pendency of the suit on the 11th February, 1928. The suit abated and two claimants to the *gaddi* of the *sajjadanashin* appeared on the scene, one was Sharfuddin Ali Shah and the other Saifullah Shah, respondent No. 1, in these appeals. The Muslim public of Bahraich elected Saifullah Shah as the *sajjadanashin* and on the 20th July, 1938, Saifullah Shah and about a dozen leading citizens of Bahraich entered into an agreement by which a scheme for the management of the *takia* was drawn up and both the agreement and the scheme were registered. On the 7th March, 1929, a second suit under section 92, Civil Procedure Code was filed by the Legal Remembrancer and on the 15th March, a decree in the suit was drawn up adopting the scheme just referred to.

On the 20th September, 1938, the respondents to appeal No. 126 of 1938, who are members of the *takia* committee, filed an application purporting to be under section 151, Civil Procedure Code, in the Court of the 1st Civil Judge of Bahraich for amendment of the scheme laid down by the decree of the 15th March, 1929. Nobody was impleaded in this application as opposite-party. Appellant No. 2, Khwaja Khalil Ahmad Shah, who is *sajjadanashin* of the *dargah*, and *ex officio* member of the *takia* committee, came to know of this application and on the 26th September, 1938, he filed an application objecting to the respondents' application for amendment of the scheme and raising the plea that all

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the members of the *takia* committee and the Advocate General were necessary parties. On this the Court ordered that the Legal Remembrancer, Mr. Mohammad Wasim, M.L.A., member of the *takia* committee and Mr. Faiyaz Ali Khan (present appellant No. 1) President of the *takia* committee be made parties. They were accordingly impleaded and though the Legal Remembrancer and Mr. Mohammad Wasim put in no objection to the amendment of the scheme, the appellant No. 1 filed a written statement containing various objections to the respondents' application for amendment. On the pleas raised by the appellants Nos. 1 and 2 the following issues were framed by the learned Judge of the trial court:

(1) Is the application barred by the principle of *res judicata* as alleged by the opposite parties?

(2) Are the proceedings under order 1, rule 8. Civil Procedure Code, necessary in this case?

(3) Is the present application barred by section 92, Civil Procedure Code?

(4) Are the applicants competent to apply for the amendment of the *takia* scheme?

(5) Is the amendment of the scheme necessary and legally permissible?

(6) Will the amendment of the scheme sought contravene religious rights or customs as alleged in paragraph 12 of the written statement of opposite party No. 4?

(7) Are the questions raised in this case proper for summary inquiry?

All the issues were decided by the learned Judge in favour of the applicants and thereupon he amended the scheme according to the prayer contained in the application for amendment with some modifications. These appeals have been brought against this order by the President of the *takia* committee and some others. We have already noted that while appeal No. 126 has been filed only by the President of the *dargah* and *takia* committees

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in appeal No. 63 of 1939 the President and four others are the appellants. Appellant No. 2, is Khwaja Khalil Ahmad Shah, *sajjadanashin* of the *dargah*, appellant No. 3, Mr. Hamidullah Khan is a member of the *takia* committee, nominated by the Municipal Board of Bahraich while Ahmad Ali and Chaudhri Shah Mohammad are members of the public.

Ziaul Hasan and Radha Krishna, JJ.

A preliminary objection has been taken on behalf of the respondents-applicants that no appeal lies. The learned counsel for the appellants also conceded that the appeal was incompetent but he contended that a revision does lie and asked us to treat the appeals as applications in revision. We are of opinion that as laid down in the case of *Abul Hasan Khan* v. *Jafar Husain* (1), the present appeals can be treated as applications in revision because the appellants challenge the jurisdiction of the court below in making an amendment in the scheme laid down in the decree in the suit under section 92, Civil Procedure Code. We have therefore heard arguments of the learned counsel for parties after treating the appeals as applications for revision.

The main, in fact almost the sole, ground urged by the learned counsel for the applicants before us was that the application of the opposite parties for amendment of the scheme was barred by section 92, Civil Procedure Code and that the scheme could not be altered without a fresh suit under that section. In support of this argument, the learned counsel relied on the following cases:

Pichai Pillai v. *Lingam Iyer* (2), in which it was held that where a scheme is settled under section 92, Civil Procedure Code direction for applying to court for modification of terms thereof is *ultra vires;* but the question before us is not whether or not a direction can be included in a scheme for modification of its terms.

Chinnan Chettiar v. *Sundaresa Ayyar* (3), in which it was held that any provision in any scheme

(1) (1937) I.L.R., 13 Luck., 523. (2) (1928) A.I.R., Mad., 268.
(3) (1929) A.I.R., Mad., 322.

framed by the court to the effect that on an application to the court under the scheme framed a trustee can be removed is *ultra vires* under section 92, Civil Procedure Code.

Ambalavana Thambiran v. *Vageesam Pillai* (1)—In this case it was held that when liberty to apply is confined by a rule under the scheme decree to particular persons, no others have *locus standi* to apply and to permit others to apply is in effect to modify the scheme which is not permissible in law except by a suit under section 92.

Devsi Tulsidas v. *Bawa Ramkrishendas* (2)—In this it was held that if any member of the public has any grievance against a trustee for his removal, he is to proceed under section 92 and file a regular suit and not to move the court by an application under sections 92 and 151; but the application in the present case is not for the removal of any particular trustee.

U. Po Maung v. *U. Tun Pe* (3), in which it was held that where a scheme has been framed, any modification or alteration of the scheme is in effect a new scheme and power to frame a new scheme is given only subject to the condition laid down in section 92; but in this case the very terms of the trust were sought to be changed in so far that though the trustees were appointed for life it was sought to limit their tenure to three years. It was on this account that the Rangoon Court held that the appointment of new trustees was illegal under section 92 which lays down that in order to vary the terms of an express trust the proper course is for the Advocate General or two or more persons with his permission to institute a suit to obtain such a variation. In the case before us, there is no prayer for amendment of the terms of the trust.

(1) (1930) A.I.R., Mad., 226. (2) (1935) A.I.R., Sind, 210.
(3) (1929) A.I.R., Ran., 20.

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Abdulla v. *Abdulla Haroon* (1)—In this case a single Judge of the Judicial Commissioner's Court of Sind held that the remedy of the parties interested in a trust for the modification of a scheme framed in a suit by appointing additional trustees is not by an application in that very suit but by a new suit under section 92.

Abdur Rahman v. *Mst. Kulsumbi* (2)—In this case a learned Additional Judicial Commissioner of Nagpur held that if a clause in a scheme prepared by the court provides for the removal of a trustee on an application that clause is invalid for it goes right across the provisions of section 92, and that in order to remove a trustee a suit has to be filed with the sanction of the Advocate General. This case again has no application not only because there is no prayer in the application before us for the removal of any trustee but also because no such question arises before us whether or not a clause in a scheme providing for the removal of a trustee on application is valid.

Some of the above cases no doubt support the appellants to a certain extent but after a full consideration of all the cases cited before us we have come to the conclusion that the weight and preponderance of authority is on the side of holding that a scheme, particularly one relating to a Muslim waqf, can be modified by an application under section 151, Civil Procedure Code.

In *Sadupadhya Umeshanand Oja* v. *Hon. Maharaja Sir Ravaneswar Prosad Singh Bahadur of Gidhour* (3), a Bench of the Calcutta High Court held that a court which has sanctioned a scheme for the administration of a charitable trust is competent from time to time to vary

(1) (1927) A.I.R., Sind, 1. (2) (1931) A.I.R., Nagpur, 82.
(3) (1917) 43 I.C., 772.

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the scheme as the exigencies of the case may require. At page 774 the learned Judges say:

> "The authority of the court to amend the scheme from time to time has not been and cannot possibly be questioned."

They then refer to various cases in support of their view.

The same view was expressed again in a Calcutta case in *Manadananda Jha* v. *Tarakananda Jha Panda* (1).

In the case of *Chandraprasad Ramprasad* v. *Jinabharthi Narayanabharthi* (2), it was held that even though a suit under section 92 is decided and is at an end for all practical purposes, liberty to apply for modification or alteration of the scheme can be given in order to avoid multiplicity of suits and for such purposes, consent of the Advocate General is not necessary.

Again in *Mahadev Heramb Dev.* v. *Govindrao Krishnarao Kale* (3), the Bombay High Court held that when a scheme of management of a public religious trust provides for its modifications by court on application by any person interested in the institution, any person who may from time to time have an interest in the institution whether or not he was a party to the suit in which the scheme was originally framed can apply for modification of the terms of the scheme. In this case the scheme itself provided for its modification by court on an application.

In the Allahabad case of *Sri Swami Rangacharya* v. *Ganga Ram* (4), also there was a reservation clause in the scheme and it was held that the power of the court to settle a scheme for the administration of a trust is sufficiently comprehensive to include a provision to make the scheme alterable by the court if necessary in future and that if the scheme is amended subsequently by the court within the limits laid down by the decree the court is giving effect to its own decree rather than amending it.

(1) (1924) A.I.R., Cal., 330.
(2) (1931) A.I.R., Bom., 391.
(3) (1937) A.I.R., Bom., 124.
(4) (1935) I.L.R., 58 All., 538.

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No doubt in the last three cases there was a provision in the scheme itself for its alteration by application to the court, but in the Calcutta case of *Sadupadhya Umeshanand Oja* v. *Hon. Maharaja Sir Ravaneswar Prosad Singh Bahadur of Gidhour* (1), there was originally no reservation clause in the scheme and the amendment made in the scheme was itself intended to put in such a clause in the scheme. Moreover, as was pointed out in the case of *Ambalavana Thambiran* v. *Vageesam Pillai* (2), the general Muhammadan law vests in the court the Kazi's power of appointing a trustee directly and if the Kazi could make the appointment without his having recourse to section 92 as the law allowed him to do, so also could the court.

Their Lordships of the Privy Council also remarked in *Mahomed Ismail Ariff* v. *Ahmed Moolla Dawood* (3):

> "Generally speaking in case of a waqf or trust created for specific individuals or a determinate body of individuals, the Kazi whose place in the British Indian system is taken by the Civil Court has in carrying the trust into execution to give effect so far as possible to the expressed wishes of the founder. With respect however to public religious or charitable trusts of which a public mosque is a common and well-known example, the Kazi's discretion is very wide. . . . He may in his judicial discretion vary any rule of management which he may find either not practicable or not in the best interests of this institution."

In view of the above authorities we are clearly of opinion that the court below had jurisdiction to entertain an application for amendment of the scheme laid down for the management of the *takia* in 1929.

Further we are of opinion that the relief sought by the opposite parties by their application for amendment does not fall within any of the clauses (*a*) to (*h*) mentioned in sub-section 1 of section 92, Civil Procedure Code.

The learned counsel for the applicants contends that the present application falls within clauses (*a*), (*b*) or

(1) (1917) 43 I.C., 772. (2) (1930) A.I.R., Mad., 226.
(3) (1916) L.R., I.A., 127.

(*g*), that is to say, that the application is for the removal of trustees or for the appointment of new trustees or for settling a scheme. We are however unable to accept this contention. The following are the changes sought by the applicants in the constitution of the committee:

(1) Instead of clause (*a*) of rule 1 of the scheme laying down that the President of the *dargah* committee will *ex officio* be the President of the *takia* committee, the suggestion is that the President of the *takia* committee should be nominated by the Commissioner of the Fyzabad Division from one of the senior Deputy Collectors who happens to be a Hanafi Muslim.

(2) The scheme provides for the inclusion of three members of the Municipal Board, Bahraich, in the *takia* committee and the opposite parties feeling that there is no representation of the rural population on the committee desire that two members should be taken from the District Board also.

(3) The scheme was framed when there was only one Chamber of Legislature in the Province but now there is a Legislative Assembly as well as a Legislative Council. The court has amended the scheme so as to provide that a Hanafi elected M.L.A. or M.L.C. be elected by members of the *takia* committee provided that if none of them is a Hanafi Muslim, the *takia* committee shall elect another Hanafi Muslim.

(4) By the amendment of clause (*f*) of rule (1) of the scheme the opposite parties sought to do away with the inter-connection of the *takia* and *dargah* committees. This prayer has not been accepted by the learned lower court and we think very rightly.

These are all the amendments made in the scheme by the court below and none of them can in our opinion be said to fall under clause (*a*), (*b*) or (*g*) of sub-section 1 of section 92, Civil Procedure Code. We may point out that

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when the application was made, the office of the President of the *dargah* and *takia* committees was vacant owing to the resignation of Khan Sahib Maulvi Iqbal Ahmad, Deputy Collector, so that it cannot be said that the application was put in for the removal of the President of the *takia* committee.

The application does not in our view offend in any manner against section 92, Civil Procedure Code.

Ziaul Hasan and Radha Krishna, JJ.

Against the merits of the amendments sought by the opposite parties no arguments were addressed to us beyond saying that the opposite parties ought to show that the amendments were necessary or advisable and we have already shown that they are both necessary and advisable.

In the result we uphold the order of the learned Judge of the court below and dismiss these applications with costs.

Application dismissed.

REVISIONAL CRIMINAL

Before Mr. Justice G. H. Thomas, Chief Judge, and Mr. Justice Ziaul Hasan

1940 May 7

MAQBOOL HUSAIN (APPLICANT) v. KING-EMPEROR (OPPOSITE-PARTY)*

Government of India Act, 1935, *sections* 205, 270 *and* 271—*Section* 270, *applicability of—Criminal Procedure Code* (*Act V of* 1898), *section* 197—*Police Act* (*V of* 1861), (*amended by the Government of India* (*Adaptation of Indian Laws*) *Order*, 1937), *section* 7—*Sub-Inspector of Police, prosecution of—Sanction of Provincial Government for prosecution, if necessary—Rules framed under the Government of India Act*, 1919, *whether can override the provisions of Government of India Act*, 1935.—*Certificate for appeal to Federal Court, when can be granted.*

Section 270 of the Government of India Act relates to acts done prior to April, 1937, and has, therefore, no application to acts done subsequent to that date.

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*Criminal Miscellaneous Application No. 36 of 1940, in Criminal Appeal No. 510 of 1939, against the order of Raghubar Dayal, Esq., I.C.S., Sessions Judge of Hardoi, dated the 3rd November, 1939.