APPELLATE CIVIL.

Before Mr. Justice Das and Mr. Justice Doyle.

1928

June 19.

U PO MAUNG AND OTHERS
v.
U TUN PE AND OTHERS.*

Civil Procedure (Act V of 1908), s. 92—Alteration or modification of scheme—Regular suit essential—Mere application, whether authorised under scheme or not, insufficient—Consent of Government Advocate essential.

A scheme settled by a District Court for the management of a pagoda gave no power to the Court to vary the scheme on mere application. Nevertheless on the application of the trustees the Court varied the scheme as to the tenure of office and mode of appointment of trustees.

Held, that where a scheme has been framed under s. 92 of the Civil Procedure Code, it cannot be altered or modified except by a regular suit filed by the Government Advocate or by interested parties with the consent of the Government Advocate in accordance with the provisions of s. 92 of the Act.

Veeraraghavachariar v. *The Advocate-General of Madras*, 51 Mad. 31—*followed.*

Ba Maw for the appellant.

Thein Maung for the respondents.

DAS and DOYLE, JJ.—In Civil Regular No. 169 of 1906 of the District Court of Thatôn a scheme was settled for the management of the affairs of the Kyaiktiyo Pagoda and seven trustees were appointed for life their tenure of office being otherwise terminable only by resignation, misconduct or prolonged absence. Rule 26 of the scheme gave the trustees power with the permission of the Thatôn District Court to frame rules for the guidance of the public provided that they were not contrary to the formulation of the scheme. Rule 26 clearly gave the trustees power only to frame bye-laws within the purview of the scheme and was not intended to give either themselves or the District

* Civil Miscellaneous Appeal No. 39 of 1928 against the order of the District Court of Thatôn, in Civil Miscellaneous No. 56 of 1927.

Court power on mere application to vary the orignal scheme.

In Civil Miscellaneous Case No. 5 of 1927, the District Court of Thatôn on the application of the existing trustees varied the scheme to the extent that the tenure of office of the trustees should be for three years, an election to be held triennially on the 1st August it being agreed that the existing trustees should cease to hold office on the 1st July 1927.

An election was held on the 7th August 1927, and the old trustees who stood for election did not secure re-election. Disputes as to handing over the trust property led to an order from the High Court that the existing old trustees should hold office until the result of the election was confirmed by the District Court.

In Civil Miscellaneous Case No. 56 of 1927, the District Court of Thatôn, after hearing objections as to the irregularities in the course of the election, confirmed the election of the new trustees. Five old trustees have now applied to this Court in appeal urging that the holding of the new election is invalid since the District Court, Thatôn, has no power on mere application to vary the original scheme. The situation is somewhat piquant since it was on the application of the five old trustees that the original scheme was varied. This, however, does not operate as an estoppel against them since, if their contention be correct, the whole of the proceedings in connection with the variation of the scheme were annulled *ab initio*.

Proceedings in connection with the variation of a trust such as the Kyaiktiyo Pagoda Trust are governed by section 92 of the Civil Procedure. On a plain construction of section 92 it would appear that where it is desired to vary the terms of an express trust

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the proper course to adopt is for the Advocate-General, or two or more persons with his permission, to institute a suit to obtain such variation. But it has been held in the past that, where such a trust has been constituted by suit, subsequent variation of the trust can be made within that suit itself and that no fresh suit should be filed.

In *Veeraraghavachariar* v. *The Advocate-General of Madras* (1), the law on the subject has been discussed at great length by a Full Bench of the Madras High Court which, after reviewing exhaustively the case-law on the subject, has laid down the proposition that where a scheme has been framed any modification or alteration of the scheme is in effect a new scheme and power to frame is given only subject to the conditions specified in section 92 although there may be cases in which the Court reserves to itself the right to allow a person or persons to apply for a relief which will come within section 92 of the Civil Procedure Code.

Our attention has been drawn to *U Ba Pe* v. *U Po Sein* (2), a Bench ruling of the Rangoon High Court which contains the following passage: "It has been repeatedly held that in suits under section 92 of the Code, which in England would have come before the Courts of Chancery, the Court which framed a scheme has power to vary it." This judgment was delivered prior to the publication of *Veeraraghavachariar* v. *The Advocate-General of Madras* (1). The comment quoted is *obiter* since the point for decision in *U Ba Pe* v. *U Po Sein* was "that there a Court reserves to itself the right to confirm elections held under a scheme framed by it under the provisions of section 92 of the Civil Procedure Code and where

(1) (1927) 51 Mad. 31. (2) (1928) 6 Ran. 97.

application for confirmation is made by parties on the one side in the suit and is opposed by parties on the other side, the order is a decree in the suit itself and is therefore appealable as a decree under the Code." It will be seen therefore that the point at issue did not come whithin the purview of section 92 and that the decision of the Bench was not in conflict with the decision of the Full Bench just quoted. We are in complete agreement with the conclusions come at in *Veeraraghavachariar* v. *The Advocate-General of Madras* (1) and would merely add that it seems to us only right that where the presence or consent of the Advocate-General was necessary for the purposes of formulating a trust scheme his presence or consent should equally be necessary for varying it, particularly in such a case as the present one where the trust affects the interests of the whole community. If it were possible by mere miscellaneous application to vary the trust it would be possible for a small party of local inhabitants to alter the terms of the trust to the detriment of worshippers from remote parts of the province whose interests it would be the duty of the Advocate-General in a regular suit to protect.

We have been asked to hold that the election is valid under the old rules. This we cannot do for two reasons (1) because the resignation of the old trustees was clearly provisional on the introduction of their proposed scheme and (2) because it cannot be assumed that the electors who would be willing to elect trustees for a term of three years would be equally willing to elect these trustees for life, although the converse proposition might well apply. We therefore hold that the whole of the proceedings commencing with Civil Miscellaneous No. 5 of 1927 are void and

(1) (1927) 51 Mad. 31.

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that the appellants are still in office as trustees of the pagoda.

We may point out in passing that there are two vacancies which should have been filled up under the original scheme which provides for seven trustees. As the present situation has been created entirely by the act of the five appellants they will pay all the costs of the litigation. Advocate's fee in this Court five gold mohurs.

FULL BENCH (CIVIL).

Before Sir Henry Pratt, Kt., Officiating Chief Justice, Mr. Justice Cunliffe, and Mr. Justice Ormiston.

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June 20.

COMMISSIONER OF INCOME-TAX
v.
PHRA PHRAISON SALARAK. *

Income-tax Act (XI of 1922), ss. 4 (1), 5, 6, 7, 18 (2A), 42—Income "accruing and arising," meaning of—Source of income, the test—Place of receipt or earning—Remuneration paid in foreign territory by foreign Government for services rendered in British India—Interpretation of fiscal enactments.

A Siamese Forest Officer was stationed by his Government at Moulmein to collect royalties on behalf of his Government on timber extracted from Siamese forests and floated down to Moulmein. He received a remuneration from his Government which was paid to his credit in Bangkôk. He was assessed to income-tax in Burma. The Commissioner of Income-tax held that his remuneration could not be classed as 'salary' within the meaning of s. 7 (1) of the Income-tax Act, but that the remuneration was a taxable income under the heading (vi) *Other sources* of s. 6 of the Act and that it was 'income accruing or arising' in British India within the meaning of s. 4 of the Act. He referred the latter question to the High Court.

Held, that the words 'accrue and arise' (which words may be regarded as synonymous) when applied to income are to be governed by the source from which the income accrues and arises, not by the place where it is received or earned. A subject is not to be taxed without clear words to that effect and in case of doubt, the burden must not be imposed on the subject. The remuneration paid in Siam to a Siamese official for services rendered in Burma is not income accruing or arising in British India.

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* Civil Reference No. 2 of 1928.