

ORIGINAL CIVIL.

FULL BENCH.

*Before Sir C. Farran, Kt., Chief Justice, Mr. Justice Strachey
and Mr. Justice B. Tyckji.*

1897.
August 20.

FERNANDEZ AND OTHERS (PLAINTIFFS) v. RODRIGUES AND
OTHERS (DEFENDANTS).*

*Civil Procedure Code (Act XIV of 1882), Sec. 30—Permission of Court—
Leave of Court when to be given—Practice—Proceduro.*

In a suit brought under section 30 of the Civil Procedure Code (Act XIV of 1882) the permission of the Court, required by that section may be given subsequently to the filing of the suit.

REFERENCE from chambers.

This suit was filed on the 17th December, 1896, by the plaintiffs, who described themselves in the title of the plaint as "the Fabricueiro and Wardens of the property of the Church of N. S. de Salvaçao, on behalf of themselves and all others the parishioners of the said church."

The suit was brought against the Vicar of the said church, the Bishop of Daman and others to have certain funds and properties declared to belong to the parishioners or congregation of the said church, &c., &c.

On the 14th June, 1897, the defendants filed their written statement in which they contended (*inter alia*) that the suit was not maintainable without permission of the Court under section 30 of the Civil Procedure Code (Act XIV of 1882), and that the requisite permission had not been obtained by the plaintiffs.

On the 29th July, 1897, the plaintiffs took out a summons calling on the defendants to show cause "why the Court should not give permission to the plaintiffs (if such permission be necessary) under section 30 of the Civil Procedure Code (Act XIV of 1882) to prosecute this suit on behalf of all parties interested in the subject-matter of the suit, and why the Court should not give notice of the institution of this suit by advertisement as provided by the said section.

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At the hearing before the Judge in chamber it was contended on behalf of the defendants that under section 30 the permission of the Court must be given before or at the filing of the plaint and could not be given subsequently, and that the Judge in chamber had no jurisdiction to make the summons in this case absolute.

Macpherson for defendants showed cause:—The suit is brought under section 30 of the Civil Procedure Code (Act XIV of 1882), but leave to sue should have been first obtained—*Jan Ali v. Atawur Ruhmun*⁽¹⁾; *Jan Ali v. Ram Nath*⁽²⁾; *Maharajah of Burdwan v. Tarasundari*⁽³⁾. Leave cannot be granted afterwards—*Lutifunnissa v. Nazirun*⁽⁴⁾; *Dhunput v. Paresh Nath*⁽⁵⁾; *Chandulal v. Awad bin Umar Sultan*⁽⁶⁾; English Judicature Act, 1875; Order XVI, Rule 9; Order XVIII, Rule 2; *Clark v. Wray*⁽⁷⁾; *Hunt v. Worsfold*⁽⁸⁾.

: *Lang* (Advocate General) for plaintiffs in support of the summons:—The Court can give the required leave when it is applied for, just as it can add parties. In effect we are applying to add parties—section 32 of the Civil Procedure Code (Act XIV of 1882); *Hira Lal v. Bhairon*⁽⁹⁾. The acceptance of the plaint was sufficient permission to sue.

FARRAN, C. J.:—I am of opinion that the Judge below had power to make this summons absolute. Under the old Chancery practice it was not necessary to obtain leave before the trial. The question was considered at the trial, and if the suit was not properly brought it was then dismissed. That was the practice at first introduced and prevailing in these Courts and it was subsequently enacted in the Civil Procedure Code.

The question raises no point of jurisdiction, and there is nothing which makes it essential that leave should be given before the filing of the suit. It is a point analogous to that of adding of parties. It is clear that where a suit is defective as to parties the requisite parties can be added after suit filed.

(1) 9 Cal. L. R., 433, at p. 413.

(2) I. L. R., 8 Cal., 32.

(3) I. L. R., 9 Cal., 619 at 624.

(4) I. L. R., 11 Cal., 33.

(5) I. L. R., 21 Cal., 180.

(6) I. L. R., 21 Bom., 351.

(7) 31 Ch. D., 68.

(8) (1896) 2 Ch., 224.

(9) I. L. R., 5 All., 602.

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No doubt the proper course is to obtain leave before suit filed, but there is nothing to show that, if this is not done, the omission cannot be supplied. The Civil Procedure Code itself does not make it necessary, and after all it is that which must be our guide.

STRACHEY, J.:—I am of the same opinion. No doubt, the word “sue” used in the section includes the whole suit and everything done in the suit, and, therefore, seems to imply that leave should be given before anything done in the suit. But there is nothing to indicate that when that is not done, the matter should not be set right on the earliest occasion afterwards.

Some sections in the code which require leave to be given obviously imply that, if it is not given before suit, it cannot be given at all, and the suit must be dismissed. But I do not think that is the case in suits coming under section 30. In such cases the defect may be remedied at the earliest moment.

B. TYABJI, J.:—I have little to add. I have taken the same view from the first. It is really a question of adding parties. On a former occasion in a case of similar character I have added members of a caste both as plaintiffs and defendants. This case is not exactly the same, but I think the principle to be applied is the same.

In construing section 30 we must look to see if the jurisdiction depends on permission only; clearly here it does not. In the case of *Chandulal v. Awad bin Umar Sultan*⁽¹⁾ decided by Strachey, J., the suit was against a foreign prince. Such a case is on a different footing altogether. *Prima facie* the Court had no jurisdiction in that case. It had none at all, but for the permission given. This, however, is a provision dealing merely with the most convenient way of bringing the proper parties before the Court and has nothing to do with jurisdiction. The interests of justice require that the Court should have such a power as we are asked to exercise here.

Summons absolute.

Attorneys for the plaintiffs:—Messrs. *Little and Co.*

Attorneys for the defendants:—Messrs. *Daphtary and Ferreira.*

(1) *Ante*, p. 351.