
(1916) 05 CAL CK 0058
In the Calcutta High Court

Ahmed Ali

APPELLANT

Vs

Abdul Majid

RESPONDENT

Date of Decision : 09-05-1916

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8

Citation : 39 Ind. Cas. 773

Hon'ble Judges : Richardson, J;N.R. Chatterjea, J

Bench : Division Bench

Judgement

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

2. 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 CPC 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* 21 B. 784 ; 11 Ind. Dec. (N.S.) 528. There it was held that 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 u/s 30 of the old CPC may be given after the commencement of the suit: see *Chennu Menon v. Krishnan* 25 M. 399 and *Srinivasa Chariar v. Raghava Chariar* 23 M. 28 ; 7 M.L.J. 281 ; 8 Ind. Dec. (N.S.) 414. The same view has been taken by the Allahabad High Court in the case of *Baldeo Bharthi v. Bir Gir* 22 A. 269 ; A.W.N. (1900) 69 ; 9 Ind. Dec. (N.S.) 1211. The cases in our Court on the point are *Jan Ali v. Ram Nath Mundul* 8 C. 32 ; 9 C.L.R. 433 ; 4 Ind. Dec. (N.S.) 21, *Oriental Bank Corporation v. Gobind Lall Seal* 9 C. 604 ; 13 C.L.R. 142 ; 4 Ind. Dec. (N.S.) 1050 and *Lutifunnissa Bibi v. Nazirun Bibi* 11 C. 38 ; 5 Ind. Dec. (N.S.) 779. In these cases it has been held that the plaintiff is not entitled to institute a suit without obtaining leave u/s 30 of the old Code of Civil Procedure. But in none of these cases, except the case of the *Oriental Bank Corporation v. Gobind Lall Seal* 9 C. 604 ; 13 C.L.R. 142 ; 4 Ind. Dec. (N.S.) 1050, 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 *Oriental Bank Corporation v. Gobind Lall Seal* 9 C. 604 ; 13 C.L.R. 142 ; 4 Ind. Dec. (N.S.) 1050, 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 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* 81 C. 180 ; 10 Ind. Dec. (N.S.) 752, in which it is stated that the decisions of this Court lay down that the leave of the Court u/s 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 u/s 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 *Oriental Bank Corporation v. Gobind Lall Seal* 9 C. 604 ; 13 C.L.R. 142 ; 4 Ind. Dec. (N.S.) 1050, 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* 11 C. 213 ; 5 Ind. Dec. (N.S.) 901, 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 u/s 30 of the Code, and, as such, only permissible when leave to sue in 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 CPC 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* 9 C. 604 ; 13 C.L.R. 142 ; 4 Ind. Dec. (N.S.) 1050 and hold that leave can be granted under Order I, Rule 8, of the CPC subsequent to the filing of the suit.

3. 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 u/s 92 of the CPC 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.

4. We are of opinion that the provisions of Order I, Rule 8, of the CPC 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 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.