

(1935) 04 CAL CK 0031
In the Calcutta High Court

Golam Rabbani alias Lal Mia and Another	APPELLANT
Vs	
Dewan Abul Khair Ahmad Ali alias Mahmud Mia and Others	RESPONDENT

Date of Decision : 18-04-1935

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92, 93

Citation : 163 Ind. Cas. 67

Hon'ble Judges : Rau, J;D.N. Mitter, J

Bench : Division Bench

Judgement

D.N. Mitter, J.—This Rule raises a question of some importance. It appears that one Daraga Amiruddin, a rich merchant and zamindar of Dacca, built a Mosque, which is popularly known as Badamtoli Mosque situate at 1 Akmal Khan Road, Dacca and dedicated the property attached thereto for its upkeep and maintenance and acted as the mutawalli thereof till his death. After the death of the said mutawalli one Nurunnessa Bibi became a mutawalli of the said wakf properties and the mosque; and while so acting she executed a Towliatnama on Poush 16, 1330, B.S. by which she appointed the opposite party No. 3 Dewan Abul Khair Ahmad Ali the mutawalli. By this towliatnama certain rules of succession to the towliat were laid down and by virtue of those rules opposite party No. 3 became the mutawalli 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 mutawalli misappropriated the income of the wakf properties and ultimately leased out the wakf 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 u/s 92 of the Code of Civil Procedure, and the learned District Judge by his order dated February 25, 1933, removed opposite party No. 3, from the office of the mutawalli and appointed in his place opposite party No. 5, namely Moulvi Asad Bukht, who is a stranger to the family of the wakif and also to the family of the last deceased mutawalli, as a mutawalli. 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 the wakif and also to the family of the deceased mutawalli Nurunnessa Bibi as the mutawalli 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 mentioned, was brought by two relators Golam Rabbani alias Lai Mia 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 relations 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 Mouhi Abdul Khaleque of 17 Syed Hasan Ali Lane, Dacca, that she is a pardanashin lady and as there was no publication of the call for nomination from the public for the appointment of the new mutaivalli 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 to wliatnama 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 January 30, 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 mutawalli 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 No. 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 en account of 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.

2. 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 petition obtain the sanction of the Collector of the District, and he has relied on a decision of the Allahabad High Court in the case of Chhabila Ram and Another Vs. Durga Prasad and Others, . 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 u/s 92 of the CPC 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 Kethoot Paha Miswaian Menpee v. Moothedath Malliseri Illath 40 M. 110 : 34 Ind. Cas. 384 : 3 L.W. 305 : (1916) 1 M.W.N. 402 : 31 M.L.J. 279 : AIR 1917 Mad. 389. 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 Council in the case of Raja Anand Rao v. Ramdas Duduram 48 I.A. 12 : 62 Ind. Cas. 737 : 13 L.W. 318 : (1921) M.W.N. 24 : 17 N.L.R. 37 : 25 C.W.N. 794 : 48 C. 493 : 30 M.L.T. 194 : AIR 1921 P.C. 123 Their Lordships dealt with the question thus: "There was also a point that the person 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 Muhammadan 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 47 Ind. Cas. 983 : 97 P.R. 1918 : 173 P.W.R. 1918 : AIR 1918 Lah. 146. It has also been followed in the Rangoon High Court. See the case of C.E. Dooply v. M.E. Moolla 5 R. 263 : 103 Ind. Cas. 261 : AIR 1927 Rang. 189. The Allahabad decision does not seem, in our opinion, to lay down the correct legal position.

3. 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.

4. There will be no order as to costs.

Rau, J.

5. I agree.