(1931) 33 BOMLR 546

Bombay High Court

Case No: First Appeal No. 354 of 1928

M.I. Kadri		APPELLANT
	Vs	
Khubmiya Mahomedmiya		RESPONDENT

Date of Decision: Nov. 20, 1930

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 92

Citation: (1931) 33 BOMLR 546

Hon'ble Judges: Patkar, J; Broomfield, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Patkar, J.

In this case an application was made by the committee appointed by Government to manage the Mussalman waki properties in the Ahmedabad city for the removal of the trustees of the mosque of Shah Kubh situated in the city. A scheme with regard to this religious institution was framed by the District Court in suit No. 11 of 1898, but the applicants were not parties to the original suit. Rules 1 and 6 of the scheme were as follows:--

1. The defendants and their heirs shall during their good conduct be the trustees and managers of the Shah Kubh mosque and of the property belonging to the said mosque including the shops described in the plaint.

6. These rules shall be subject to such modifications or additions as this Court may from time to time see fit to make.

2. An application, No. 254 of 1913, was made on January 19, 1916, to make certain additions to the rules, and the District Judge made certain additions but declined to remove the trustees. In First Appeal No. 139 of 1916 Batchelor J. observed as follows:--

The learned District Judge refers to the trouble which this mosque has already caused him, and if further trouble of the same kind is continued later, it seems to me it will be for the District Judge to consider whether it will not be right to remove the mutavallis from their appointment on a properly based application coming from persons prejudicially affected by laxity of management.

3. There were other applications to the District Court, applications Nos. 201 of 1903, 96 of 1907, and 386 of 1908, to which it is unnecessary to refer except for the purpose of indicating the practice of this Court and subordinate Courts to entertain applications for modification or alteration of schemes from time to time. The learned First Class Subordinate Judge did not agree with the view in Abdul Hakim Baig v. Burramiddin ILR (1925) Mad. 580, on the ground that it was in conflict with the Bombay view expressed in Damodarbhat v. Bhogilal ILR (1899) 24 Bom. 45, 1 Bom. L.R. 509, but following the latter case held that the remedy of the applicants was to make an application first for the modification and alteration of the scheme so as to include in it a provision for the removal of the trustees, if necessary. The learned Judge, however, though he disagreed with the view taken in Abdul Hakim Baig v. Burramiddin, held that it was not competent to make the present application with-out the consent of the Collector or the Advocate General, and he further held that as the present applicants were not parties to the suit, they had no right to apply for a modification of the scheme.

4. According to the decision in Chandraprasad v. Jinabharthi (1930) 33 Bom. L.R. 520 I think that the rule in the scheme giving liberty to apply for a modification of the scheme is not ultra vires, and that where such a rule giving liberty to apply exists, it would be permissible to make an application for the modification of the scheme without the consent of the Advocate General.

5. The difficulties in the way of the present applicants are, first, that the applicants were not parties to the original suit in which the scheme was settled, and, secondly, that there is no provision in the scheme authorising the Court to remove the trustees, if necessary. The scheme settled by the District Court in a representative suit is binding on all persons interested in the religious endowment within the moaning of explanation VI of Section 11 of the Civil Procedure Code. Mr. Justice Batchelor in appeal No. 139 of 1916 expressed the opinion that it would be for the District Judge to consider whether it will not be right to remove the mutavallis from their appointment on a properly based application coming from persons prejudicially affected by laxity of management. I think, however, that the proper persons who can apply under the liberty reserved in the scheme are the parties to the suit. If, however, the previous parties are dead, or are colluding with the defendants or negligent in applying, it would be permissible for the Court to bring the applicants on the record under Order I, Rule 10, and I think for such an application the consent of the Advocate General is not necessary. In Chhabile Ram v. Durga Prasad ILR (1915) All. 296 it was held that where a person who was a party to such a suit u/s 92 dies, another person making an application to be brought on the record must obtain the consent of the Advocate General. This view has not been followed by the Madras High Court in

Parameswaran Munpee v. Narayanan Nambodri ILR (1916) Mad. 110, where it was held that the Court has power under Order I, Rule 10, Clause (2), to add other persons interested in the trust as parties, not because they are the legal representatives of the deceased plaintiff but 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 that the consent of the Advocate General to such an addition is not necessary. The Madras view has been followed by the Lahore High Court in Gopi Das v. Lal Das (1918) P.R. No. 97 of 1918, and by the Rangoon High Court in C.E. Dooply v. M.E. Moolla ILR (1927) Ran. 263. To the same effect is the view taken by the Judicial Committee in Anand Rao v. Ramdas Daduram (1920) L.R. 48 IndAp 12. If the conclusion, which I have reached in the case of Chandraprasad v. Jinabharathi referred to above, that a suit does not come to an end after the scheme is settled u/s 92, and that applications can be made from time to time to modify or alter the scheme, is correct, it would follow that the proper remedy of the present applicants is to make an application to the lower Court to bring them on the record under Order I, Rule 10, on the ground that they are really parties to the representative suit by the very fact of its having been instituted on behalf of all persons interested in the trust, and I do not think that the consent of the Advocate General or the Collector is necessary for such an application. It would be permissible for the applicants also to apply for an amendment of the scheme so as to include a provision for the removal of the trustees, if necessary. Whether such amendment should be allowed or not is solely within the discretion of the District Judge under the scheme.

6. The next question is whether an appeal is competent. Having regard to the decision in Jeranchod v. Dakore Temple Committee (1926) 27 Bom. L.R. 872., the order passed by the learned Subordinate Judge is not an order in execution u/s 47 of the Civil Procedure Code. In Lambodar v. Dharanidhar (1933) 28 Bom. L.R. 64 it was held that no appeal lies to the High Court from an order passed by the District Judge as a persona designator under a scheme for management of a charitable institution. It was, however, observed at page 67, that the case where the District Judge has declined to exercise the functions imposed upon him by the scheme or in the exercise of those functions entirely failed be exercise any discretion in the matter, stood on a different footing. I am not prepared to say in the present case that the lower Court failed to exercise jurisdiction vested in it by law.

7. I would, therefore, dismiss the present appeal with costs and would decline to interfere in revision with the order of the lower Court, without prejudice, however, to the right of the present applicants to apply to the lower Court under Order I, Rule 10, Clause (2), to bring them on the record and to make an application for amendment or alteration of the scheme so as to include in it a provision for the removal of the trustees, if necessary, and for any other relief.

Broomfield, J.

8. On the main question as to the competency of the Court to modify a scheme on application and to remove trustees, if the scheme as originally framed or as modified gives this power, we have taken the view favourable to the appellants in our judgments in Chandraprasad v. Jinabharthi (1930) 33 Bom. L.R. 520, where we have held that we are not prepared to follow Abdul Hakim Baig v. Burramiddin ILR (1925) Mad. 580 and Veeraraghavachariar v. Advocate General, Madras ILR (1927) Mad. 31. In this respect we are in agreement with the First Class Subordinate Judge.

9. The special difficulties in this case are (1) that the scheme does not provide for the removal of trustees, and (2) that the applicants were not parties to the suit. As to the first point, I am of opinion that the Court might have permitted the application to be amended so as to pray for both a modification of the scheme providing for the removal of trustees when necessary and also the removal of the present trustees. It would seem that the two matters must be considered together, as the Court would not he likely to consider it necessary to modify the scheme in that way unless satisfied that the present trustees are unsatisfactory. But this must be treated as an application in revision. We cannot say that the First Class Subordinate Judge has been guilty of any irregularity in the exercise of his jurisdiction seeing that on this point he has merely followed the decision of this Court in Damodarbhat v. Bhogilal ILR (1899) 24 Bom. 45, 1 Bom. L.R. 509.

10. As to the second point the First Class Subordinate Judge has clearly fallen into some confusion of thought. In para 13 of his judgment he has stated that the decision of the Madras High Court in Abdul Hakim Baig v. Burramiddin cannot be followed because it is in conflict with Damodarbhat v. Bhogilal. In paragraph 14, however, he relies on the same Madras case and holds on the strength of it that the proper course would be to apply to the Advocate General for permission to obtain a specific relief and that after the Advocate General gives permission an application may be made Section 92, however, does not apply to applications at all. So when once it is held that an application under a scheme is maintainable, Section 92 cannot make the consent of the Advocate General or Collector a condition precedent. If a scheme may be modified from time to time on application to the Court, so that the Court in effect assumes the administration of the trust, it appears to me to ho necessary to hold as a corollary that any person interested in the trust may apply to the Court, and not only the original parties, who in course of time will all disappear. A scheme may provide for applications being made by persons interested (not necessarily parties to the suit) as was done in Prayag Doss Ji Varu, Mahant v. Tirumala Srirangacharlavaru ILR (1905) Mad. 319. The scheme which has been framed in the present case imposes no limitation as to the person who can make the application nor indeed does it even require that an application should be made at all. The provision in the scheme is: "These rules shall be subject to such modifications or additions as this Court may from time to time see fit to make." My learned brother holds that it is necessary that the persons applying should be formally made parties to the suit. That implies that the suit is to be regarded as perpetually pending, a view which in my opinion is open to doubt for the reasons I have given in my judgment in Chandraprasad v. Jinabharthi. With great

respect I doubt the legal necessity of this procedure, which I think moreover might easily lead to complications in the administration of a scheme. However, as long as there remains any doubt as to the legal position it is clearly desirable that persons making applications should be formally brought upon the record ex majore cautela. Subject to the above remarks, therefore, I agree with the order proposed by my learned brother.