Late Supreme Court, Equity Side.

1867. Oct. 11.

The ADVOCATE GENERAL *ex relatione* DAYA MUHAMMAD, MUHAMMAD SAYA, PI'R MUHAMMAD KA'SAMBHA'I, and FA'ZALBHA'I GULA'M HUSEN,

MUHAMMAD HUSEN HUSENI (otherwise called A'GA' KHA'N) *et al.*

Terms on which new relators will be allowed to come in after decree to prosecute an appeal.

THIS (commonly called *the Khojá Case*) was an information and bill filed on the Equity side of the late Supreme Court by the Advocate General on the relation of the above-named relators, who were also plaintiffs.

The suit came on for hearing before ARNOULD, J., on the 16th of April 1866. The hearing occupied that and several succeeding days.

Nov. 12. A decree was given for the defendants, and the suit as against A'ga' Khán and those defendants in the same interest with him was dismissed, with costs to be paid by the relators and plaintiffs, and as against the other defendants, not in the same interest, without costs.

On a subsequent day (Feb. 1st, 1867) the costs of the Advocate General were directed to be paid by the relators and plaintiffs.

April 27. *Dunbar* (with him *Macpherson*), on behalf of the relators and plaintiffs, moved for leave to appeal to the Privy Council against the decree of the 12th of November 1866.

The Honorable L. H. Bayley (*Advocate General*), (with him *Howard*), for the first defendant, opposed the application.

Marriott (with him *Hayllar*) and *Green* (with him *McCulloch*) opposed on behalf of other defendants.

1867.
ADVOCATE GENERAL v. MUHAMMAD H. HUSENI et al.

PER CURIAM (ARNOULD, J.) :—Leave to appeal to the Privy Council granted, subject to deposit by the appellants with the Registrar of the sum of Rs. 10,000 in Government Promissory Notes, as security for costs of such appeal.

An order (9th August 1867) was subsequently made, by which it was directed that the Rs. 10,000 should be deposited on or before the 7th of September 1867.

Sept. 5. *White*, on behalf of Fázal Habíbbhái and Ráhim Hemráz (petitioners), one of whom was an original defendant not in the same interest as A'gá Khán, and the other a stranger to the suit, moved for a *rule nisi* that the petitioners, or such other persons of their nomination as might be approved of by the Court, should be substituted as relators in place of the then relators, with liberty to institute and proceed with the appeal, on their giving security for costs of such appeal; and that the time for giving such security should be extended to the 7th of October 1867.

Rule nisi.

This rule came on for argument on the 3rd of October 1867.

Marriott, for the original relators, moved that they should be dismissed from the suit.

The Honorable L. H. Bayley (with him *Pigot*), for A'gá Khán, showed cause against the *rule nisi* of the 5th of September, and contended that if the new relators were allowed to be substituted for the original relators, it should only be done on terms of their giving security not only for the costs of appeal, but also for the costs incurred by the defendants in the court below. They cited *The Attorney General* v. *The Corporation of Cashel* (*a*).

Mayhew and *Green* appeared on behalf of the other defendants.

Ferguson appeared for the Advocate General, and assented to the application on the terms contended for by A'gá Khán.

White (with him *Dunbar*) supported the *rule nisi*.

PER CURIAM: [redacted] relators to be dismissed from the suit

(*a*) Sau. & Sc. 333.

on payment of costs. New relators to be substituted on certain terms. Minutes to be spoken to.

Oct. 11. The case came on again on the minutes, and to settle the terms on which the new relators should be allowed to prosecute the appeal. The terms then settled differed materially from the terms settled on the 3rd of October, and were as follows :—

I. On paying their own costs of this application for that purpose, the old relators to be allowed to withdraw from the further prosecution of the appeal.

II. Fázal Habbíbbhái and Ráhim Hemráz to be substituted as new relators, in the stead of the old relators, for the purpose of prosecuting the appeal, and to be allowed, as such substituted relators, to prosecute the appeal on the following conditions :—

(a) That they lodge, on or before 4 P.M. on Monday the 9th of December 1867, the sum of Rs. 10,000 Government five per cent. promissory notes as security for the costs likely to be incurred in the appeal.

(b) That, on or before the said day and time, they also give security for the costs awarded to the defendants and the Advocate General by the decree in this cause, in an amount sufficient to cover the aggregate amount of such costs ordered to be paid by the original relators and plaintiffs under the decree of November 12th, 1866.

(c) Unless the conditions (a) and (b) are complied with, appeal not to be proceeded with, but at once to cease and determine.

III. The proceedings by the defendants and the Advocate General for recovery of their costs by execution under the decree, to be stayed from present date until further order.

Any attachment issued by the defendants or any of them, or by the Advocate General, on the property of the old relators or otherwise, for recovery of costs under decree, to be raised immediately on the giving by the petitioners of the security for such costs.

1867.

ADVOCATE GENERAL v. MUHAMAMAD H. HUSENI *et al.*

IV. The new relators to pay all costs of all parties appearing, on their application to be substituted as new relators.

Petitioner and parties respectively to pay their own costs of this day (11th October).

NOTE.—March 14th, 1868. *Anstey* and *Fooks*, before the Judicial Committee of the Privy Council (*a*), appeared in support of a petition for special leave to appeal from the above order of the 11th of October, and prayed that the proceedings, evidence, judgment, decrees, and orders made in the above suit, so far as the same related to the matter of the appeal, should be transmitted, or that such further or other order, as to Her Majesty in Council might appear just and proper, should be made. *Anstey* contended that as an order had been made on the 3rd of October, allowing the new relators to be substituted for the old relators, and ordering the Advocate General to allow his name to be used on certain terms, the Court had no power to alter such terms, as it did by the order of the 11th of October. [Lord WESTBURY:—Does the Advocate General appear?] He does not. This application is *ex parte*. [Lord WESTBURY:—How, then, can we possibly entertain it? We cannot go into the merits of a petition which is directed adversely in fact against the Advocate General, in the absence of the Advocate General.] *Fooks*, on the same side:—This is a bill for relief as well as an information, and, so far as it is a bill, may be treated as a separate proceeding. I ask, therefore, to be allowed to amend the petition, and that my clients (one of whom was a defendant below), whose interests are injuriously affected by the decree, may have leave to appeal, making the Advocate General, and the original relators and plaintiffs in the court below, respondents for that purpose. We cannot do this without leave, and I submit this is the proper court to apply to for such leave. If your Lordships can see your way towards doing so, you will not allow this appeal, which is upon a question of great magnitude and importance, to be technically defeated. If leave, such as I contend for, be granted, it will of course only be upon certain terms. The equitable terms, I submit, were those ordered by the Court in the case of the original relators when they applied for leave to appeal, viz., the deposit of Rs. 10,000 to meet the costs of appeal.

Lord WESTBURY:—It is scarcely necessary to deal with this matter at length, but, to prevent miscarriage, we will make a few observations upon it.

In the court below, it appears that there was an information and bill filed, several persons being plaintiffs in the bill, and the information also being by the Advocate General at the suit of certain relators. Their information and bill were both dismissed, and an application is now made by two gentlemen, one of whom was a defendant in the cause, and the other

(*a*) Present. Lord WESTBURY, Sir J. W. COLVILLE, Sir E. V. WILLIAMS, Sir LAWRENCE PEEL.

a stranger, for this extraordinary purpose. It appears that an application was made by them in the court below to have the carriage of the cause so far as the Advocate General was concerned, and to have leave to present a petition of appeal. That application was a mistaken one, because the appeal could hardly, under the circumstances, be the appeal of the Advocate General alone. It ought to have been the appeal of the Advocate General and of the plaintiffs. However, the Court thought fit, upon certain terms being complied with, with regard to the payment of costs and the security for costs, that the conduct of the matter for the purpose of an appeal by the Advocate General should be given to the then applicants. Minutes were directed to be drawn up accordingly, but before these minutes were matured into an order, the Court, reflecting on the matter, thought proper to intimate to the Registrar that the order in some particulars was not to be drawn up, and that other directions should be substituted for those that were originally given by the Court in the matter when it first considered it. It is very competent to a Court of Equity to do that. It is done frequently, and it would be very unfortunate if there were any impediment in the way of its being done.

These petitioners, however, have conceived this monstrous and strange conception, that they have a right to come to this tribunal, and ask to present an appeal for the purpose of compelling the order being drawn up in conformity with the original opinion of the Court, and not in conformity with its amended judgment. That is a proposition incapable of being maintained, independent of the insuperable difficulty arising from the fact that the petitioners have no *locus standi* except that which should be conceded to them by the Advocate General. Now it must never be forgotten that it is the right of the Advocate General, and his duty, to intervene at any time, and if he thinks fit to take away the conduct of the matter from the relators he has a perfect right to do so; and the relators have no power at any time to take any step in the cause against the will of the Advocate General. Now the Advocate General has intimated his opinion that the present applicants should have no power to carry on the matter unless they complied with the terms prescribed by the Court in its amended judgment. They come here, in the absence of the Advocate General, to ask us to give them leave to appeal from that, and to cause the Advocate General to abide by the original, and apparently improvident, opinion of the Court. Such an application is quite unprecedented.

Now it is put to us in an amended form here that the decree is one from which the party has a right to appeal, and it is desired that we should give him liberty to appeal. If he desires such liberty, it must be only in his character of defendant. He cannot have liberty to appeal in the name of the Advocate General and in the name of the plaintiffs. If he desires to appeal, and conceives that he can bring forward the merits of the case upon his own appeal, let him apply in the ordinary form to the court below for leave to appeal.

The whole matter, as far as the application is directed to presenting an appeal in the name of the Advocate General and in the name of the plaintiffs, is a thing quite unheard of, but if one of the petitioners who is a defendant thinks proper to apply to the [redacted] below for leave to appeal, he will be perfectly at liberty to do so.

Mr. *A[redacted]*:—Will your Lordships add, "notwithstanding that the time has elapsed?" Lord WESTBURY:—Certainly not. We will not do or say anything which can be construed into an order beyond this, that we dismiss the petition.

Petition dismissed.