

APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Heaton.*

DARVES HAJI MAHAMAD SIDIK AND ANOTHER (ORIGINAL PLAINTIFFS),
APPELLANTS, v. JAINUDIN VALAD HAJI BADRUDIN AND OTHERS
(ORIGINAL DEFENDANTS), RESPONDENTS.*

1906.

August 13.

Civil Procedure Code (Act XIV of 1882), section 539—Suit relating to public charity—Suit filed by only one plaintiff with the consent of the Advocate General—Amendment of plaint by subsequent addition of second plaintiff—Consent of the Advocate General to the amendment—Suit defective in a material particular.

A suit relating to a public charity was instituted by one plaintiff only with the consent of the Advocate General under section 539 of the Civil Procedure Code (Act XIV of 1882). The defendant having objected to the institution of the suit by one plaintiff, the plaint was amended by the addition of the second plaintiff and the Advocate General consented to the amendment.

Held dismissing the suit in appeal that the suit was defective in a material particular. The suit was bad at its institution and its amendment by adding second plaintiff did not better it.

FIRST appeal from the decision of R. S. Tipnis, District Judge of Thána, in original Suit No. 2 of 1902.

The plaintiff sued to obtain certain reliefs with respect to the property in dispute which was *wakf*. The Advocate General had given his consent to the suit under section 539 of the Civil Procedure Code (Act XIV of 1882).

The defendants answered *inter alia* that the plaintiff alone had no right to bring the suit under section 539 of the Code.

An issue having been raised as to whether there was "any objection to plaintiff alone bringing this suit," arguments were heard on the point along with other points of law involved in the case.

In the course of the arguments the defendants contended that the suit being instituted by one plaintiff only, it did not comply with the condition laid down in section 539 of the Civil Procedure Code and was consequently not maintainable.

The plaintiff admitted the existence of the defect and applied for time to amend the plaint by joining some other interested

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person as co-plaintiff. The time having been granted, the plaintiff and his son Gulam Mustaffa presented an application with the previous consent of the Advocate General endorsed on it for amendment of plaint and the suit as proposed in the application. The consent was in the following terms:—"I give my consent to the amendment of the plaint of this suit as proposed."

The defendants objected to the joinder of Gulam Mustaffa as plaintiff 2, but the Court overruled the objection and the suit proceeded at the instance of the two plaintiffs. On the merits of the case the Judge partially allowed the claim.

The plaintiffs appealed and the defendants filed cross-objections under section 561 of the Civil Procedure Code. One of the cross-objections was that the Judge was wrong in granting the plaintiffs' application for the amendment of the plaint.

D. M. Gupte appeared for the appellants (plaintiffs) and argued the appeal on the merits.

V. B. Pradhan appeared for the respondents (defendants):— Before entering on the merits of the case we submit that the Judge was wrong in granting the application for the amendment of the plaint. The Judge relied on sections 27 and 32 of the Civil Procedure Code. Section 27 is not applicable because in the present case there was no mistake as to the plaintiff, nor was there any doubt as to whether the suit was in the name of the real plaintiff. With respect to section 32 the Judge says that though the added plaintiff is the son of the original plaintiff, he is, in his own right, interested in the *wakf*, so his presence was necessary to adjudicate completely and effectually the matter in dispute. The conclusion of the Judge seems to be that even without the amendment the Court had jurisdiction to adjudicate the suit, but as such adjudication would not be complete and effectual the other party was joined. Our contention is that without the amendment the Court could not have proceeded with the suit at all.

[JENKINS, C. J.:—But the second paragraph of section 32 empowers the Court to join any plaintiff who ought to have been originally joined.]

The Judge has not relied on that paragraph.

[JENKINS, C. J.:—We can support the order of the Judge by relying on that paragraph.]

Our next contention is that the amendment changed the character of the original suit. Such an amendment could not be allowed under section 53 of the Code.

Further, the consent of the Advocate General to the amendment was not such a consent as is contemplated by section 539 of the Code. That section makes the consent of the Advocate General a condition precedent to the institution of the suit: *Gopal Dei v. Kanno Dei*⁽¹⁾.

Though we took the objection under section 539 of the Code at the outset, the amendment was allowed at a later stage of the suit.

[JENKINS, C. J.:—We will hear Mr. Gupte on this part of the argument.]

Gupte:—There was, no doubt, the initial defect in the suit, but on defendant's objection the defect was sufficiently cured by the addition of another plaintiff with the consent of the Advocate General. The consent of the Advocate General would refer back to the institution of the suit: *Ramayyanganar v. Krishnayyanganar*⁽²⁾. The defect, we submit, was not a material defect affecting the case on the merits. Under section 32 of the Civil Procedure Code, the Court is empowered to join any person as plaintiff or defendant whose presence it considers to be necessary for proper adjudication.

JENKINS, C. J.:—This appeal arises out of a suit relating to a public charity and purporting to be brought under section 539 of the Code of Civil Procedure.

The circumstances under which such a suit can be instituted are indicated in the section: it may be instituted by the Advocate General acting *ex-officio* or by two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate General.

This suit was not instituted by the Advocate General, so it must be seen whether it can be said, that two or more persons

(1) (1903) 26 All. 162.

(2) (1886) 10 Mad. 185.

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having an interest in the trust and having obtained the consent in writing of the Advocate General, instituted this suit. In our opinion it cannot.

What is meant by the institution of the suit is set forth in detail in Chapter V of the Code.

It is conceded that the institution of the suit within the meaning of Chapter V was not by two persons, but by one only; and the fact that the Advocate General consented to the institution of the suit by one person can give it no validity.

The objection was taken at once in the written statement and that led to an amendment of the plaint by the addition of the second plaintiff.

That addition the learned Judge appears to have thought he was entitled to make under section 27 or section 32 of the Civil Procedure Code, and the Advocate General signed the following certificate:—"I give my consent to the amendment of the plaint of this suit as proposed."

But the section nowhere speaks of the consent of the Advocate General to an amendment of the plaint, and in our opinion, it would be unduly forcing the words of the Code to hold that by virtue of this consent given by the Advocate General it can be said of this suit that it was instituted by two persons having an interest in the trust and having obtained the consent in writing of the Advocate General.

The words of the section are explicit and the Courts cannot alter the scheme of the Legislature by giving to the words of the section the effect for which the appellant contends in this case.

The defendants have throughout adhered to their point that the suit was bad at its institution and that its amendment did not better it; and we can find nothing in the conduct of the defendants that deprives them of the right of insisting now before us in appeal that the provisions of section 539 have not been complied with.

In our opinion the suit is one which is defective in a material particular and is one which we must dismiss with costs throughout.

Suit dismissed.

G. B. R.