

1911:

VELCHAND

v.
FLAGG.

the King's Bench Division in England. The English case appears of considerable similarity to the present one and the plaintiffs were the same in both cases suing upon agreements in very much the same form. It is to be observed, however, that the provisions of section 74 and its illustration (g) were not brought to the notice of the learned Judge. Similarly in the Indian cases section 74, as amended by Act VI of 1899, does not seem to have been brought to the notice of the Court in argument.

We are of opinion that the learned Subordinate Judge has rightly decided this case. He has allowed one-and-a-half per cent. per mensem, that is, interest at 18 per cent. upon the amount actually due in respect of sums advanced. This we have no doubt is reasonable compensation.

We affirm the decree and dismiss the appeal.

Decree confirmed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Davar.

ABDUL REHMAN BAPUSAHEB AND OTHERS (PLAINTIFFS) v.

CASSUM EBRAHIM AND OTHERS (DEFENDANTS).*

1911.

June 20.

*Civil Procedure Code (Act V of 1908), section 92—Sanction of Advocate-General—
Plaint amended—New defendant and prayers added—No sanction of Advocate-General to amendments.*

Two plaintiffs as relators, having previously obtained the sanction of the Advocate-General under section 92 of the Civil Procedure Code, filed a suit against three defendants in respect of certain charitable properties. When the suit was called on for hearing two of the defendants were struck off and the plaintiffs asked for and obtained leave to add another person as defendant and they amended the plaint and prayed for certain reliefs against the added defendant. No sanction

* Suit No. 450 of 1909.

of the Advocate-General was obtained previous to the amendment of the plaint and the addition of the new defendant.

Held, that the plaintiffs were not entitled to maintain the suit against the added defendant on the ground that no sanction of the Advocate-General was obtained previous to his being made a defendant in the suit and previous to the amendment of the plaint.

Attorney-General v. Fellows⁽¹⁾ followed.

THE facts of this case appear from the judgment.

Strangman, Advocate-General, with *Jafferbai* for the plaintiffs.

Mirza and Khan for defendants.

DAVAR, J.—On the 15th of June 1909, the two plaintiffs filed this suit against three defendants, Mahomedali Ebrahim, Cassum Ebrahim and Cawasji Motabhai, alleging that the property in the plaint mentioned, was religious charitable property, that the first two defendants had arranged to mortgage the said property to the third defendant pursuant to an order obtained from the Court and got from him Rs. 500 as earnest money, that though the intended mortgage fell through the third defendant had obtained a collusive decree against the first two defendants and that the third defendant had attached the said charitable property and was about to have the same sold.

They prayed for a scheme, for a declaration that the order authorizing the mortgage was null and void and might be set aside, for an order restraining the sale, for accounts, and for further and other relief.

Pending suit the first defendant died. The suit was called on for hearing before me on the 15th of August last when his name was ordered to be struck off. The second defendant did not appear and the third defendant agreed to remove his attachment and pay certain costs and went out of the suit. It was then stated to me that one Abdul Rehman bin Ahmed claimed to be the owner of the property and it was necessary to add him as a party defendant and proceed with the suit against him. The plaintiffs applied for leave to add him as a

1911.

ABDUL
REHMAN
vs
CASSUM
EBRAHIM.

(1) (1820) 1 J. & W. 254.

1911.

ABDUE
REHMANv.
CASSUM
EBRAHIM.

defendant and to amend their plaint. Their application was acceded to and the suit stood over.

The plaintiffs before the institution of the suit had obtained the sanction of the Advocate-General under section 92 of the Civil Procedure Code and such sanction is endorsed at the foot of the plaint and bears the same date as the day on which the plaint was admitted.

Pursuant to the order of the 15th of August 1910 the plaint was amended on the 4th of October 1910. Mahomedali Ebrahim's name was struck off. Cassum Ebrahim became the first defendant, Cowasji Motabhai became the second defendant, and Abdul Rehman was added as the third defendant. In the body of the plaint the plaintiffs added two paragraphs and three prayers. In the added paragraphs they allege that *after* the filing of this suit the third defendant had taken forcible possession of the said charitable property, got the same transferred to his name in the Collector's books, and had been since then in possession recovering the rents and profits thereof and appropriating the same to his own use.

The added prayers ask that the third defendant may be ordered to hand over possession of the property to the trustees to be appointed by the Court, that it may be declared that he is not a fit and proper person to be the *Mujavar* of the Durgah, and that pending suit a Receiver may be appointed to take charge of the property. No sanction was obtained from the Advocate-General previous to the amendment of the plaint. In his written statement the third defendant contends that so far as he is concerned, this suit is bad, as the consent of the Advocate-General was not obtained to the institution of this suit as against him.

When the suit was called on for further hearing before me on the 15th instant, the first defendant appeared in person and stated that he did not wish to contest the suit. The case against the second defendant had been dealt with and he went out of the suit on the 15th of August 1910 and did not

appear at the adjourned hearing. The third defendant appeared by counsel and the first issue raised by the learned counsel on his behalf is "whether the plaintiffs can maintain this suit as against the third defendant Abdul Rehman." This issue was argued as a preliminary issue and I reserved judgment.

It is conceded that this is a suit which falls within the provisions of section 92 and the plaintiffs could not have instituted the same without the sanction of the Advocate-General. The only question raised by the learned Advocate-General was whether any further sanction was necessary previous to the amendment of the plaint and the addition of a new defendant. He also contended that the third defendant had waived the objection if valid, and put in certain correspondence previous to the amendment in support of his contention.

As to the first point, if we turn in the first instance to the English practice, it is quite clear that the previous sanction of the Attorney General is necessary before an amendment could be made in an action instituted by relators in respect of public charitable properties.

In *Attorney-General v. The Ironmongers' Company*⁽¹⁾ it was held that a relator's action is the action of the Attorney General, the Master of the Rolls at the end of the case remarking that he did not know anything more important to the general interest of charities and of the public so far as it was interested in charities, than that the authority and discretion of the Attorney General in all these proceedings should be maintained perfectly unbroken, unfettered and unbiassed.

In *Attorney-General v. Fellows*⁽²⁾, the Lord Chancellor said that an amendment could not be permitted without the sanction of the Attorney General. If it were, the whole information except the introduction might be changed. The order in that case was to take the information off the file with costs.

The Indian authorities seem to point the same way. The object of providing that in charity suits the previous sanction

1911.

ABDUL
REHMAN
v.
CASSUM
EBRAHIM.

(1) (1840) 2 Beav. 313.

(2) (1820) 1 J. & W. 254.

1911.

ABDUL
REHMAN
v.
CASSUM
EBRAHIM.

of the Advocate-General should be a condition precedent to the institution of the suit is to save trustees from harassing and vexatious actions at the instance of irresponsible parties. The Advocate-General considers the facts placed before him and if he finds that the proposed suit is a necessary or a proper one, he sanctions the same. If after he has exercised his discretion and authorized a suit of a particular nature, praying for particular specified reliefs against particular parties, the relators are permitted to change the nature of the suit and pray for reliefs not contemplated at the time of the institution of the suit and that against parties other than parties against whom the Advocate-General has sanctioned the suit, the safeguard provided by section 92 of the Civil Procedure Code would be wholly defeated and the effect of the section would be practically nugatory.

In *Sayad Hussein Miyan v. Collector of Kaira*⁽¹⁾, a Division Bench of our Court held that when sanction was given to the institution of a suit under section 539 of the Code of Civil Procedure, Act XIV of 1882, which section with some alterations corresponds with section 92 of the present Code, the suit must be limited to matters included in the sanction. The learned Judges held that it was not competent to the Court to enlarge the scope of the suit and grant reliefs other than those included in the terms of the sanction.

That the sanction of the Advocate-General is a condition precedent to the institution of the suit is very clear from the wording of the section itself and if any authority is needed for this, it is furnished by the decision of the Allahabad High Court in *Gopal Dei v. Kanno Dei*⁽²⁾.

If it is a condition precedent to the institution of the suit, it is quite clear that it is equally a condition precedent to the amendment of the plaint, more especially if by the amendment other party or parties are added to the suit and other reliefs are claimed against such added parties.

On the 15th of June 1909 the Advocate-General gave his sanction to the institution of "this suit" which was the suit as

(1) (1895) 21 Bom. 257.

(2) (1903) 26 All. 162.

it was framed then. The amendment refers to a cause of action which arose *after* the institution of the suit and the reliefs claimed against the third defendant are quite distinct from the reliefs claimed originally against the other defendants. The Advocate-General had no opportunity of considering the case against the third defendant. He has sanctioned no suit against him. Though the third defendant is distinctly and specifically referred to in paras. 2 and 4 of the plaint as it was originally framed, the plaintiffs left him out of the suit. It was only when his solicitors wrote and claimed that his client ought to be made party to the suit that the plaintiffs consented to add him as a party defendant. I see nothing in the correspondence that could possibly lead me to hold that the third defendant has at any time waived his objection which he has formulated in his written statement.

I hold on the first issue that the plaintiffs are not entitled to maintain this suit as against the third defendant on the ground that no sanction of the Advocate-General was obtained previous to his being made a defendant in the suit and previous to the amendment of the plaint.

The suit as against him must be dismissed and the plaintiffs will pay all his costs; including costs reserved.

Suit dismissed.

Attorneys for the plaintiff: *Messrs. Jamsetji, Rustamji & Devidas.*

Attorneys for the defendant: *Messrs. Edgelow, Gulabchand, Wadia & Co.; and Mirza, Mirza & Mangaldas.*

B. N. L.