Privy Council Appeal No. 62 *of* 1930.

Kumaravelu Chettiar and others - - - - *Appellants*

v.

T. P. Ramaswami Ayyar and others - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH APRIL, 1933.

Present at the Hearing:

LORD BLANESBURGH.
LORD MACMILLAN.
SIR JOHN WALLIS.

[*Delivered by* LORD BLANESBURGH.]

At Tiruchendur in the Tinnevelly District, there is a temple dedicated to Subrahmanyaswami described by the appellants as a public temple of classic fame and great antiquity, open to and attended by all non-Panchama non-polluting Hindus from all parts of India, of all sects, including the appellants' "community of the Vaniya Vaisyas." In the suit, out of which this appeal arises, the appellants "for themselves and as representatives of all members of Tiruchendur Vaniya Vaisyas" set up a right to worship in the Inner Mayil Mahamantapam of the temple. The defendants were the trustees of the temple, certain sthanikars and servants under the control of the trustees and three members of the Vellala community of Tiruchendur. They were sued "for themselves, and as representatives of all persons similarly interested in the subject matter of the suit." The suit was filed under Order 1, Rule 8, of the Civil Procedure Code—a rule to which full reference must later be made, and the claim of the

plaintiffs was resisted by all the defendants on grounds set forth in detail in the written statement of the trustees. These comprised answers on the merits, with a separate defence of *res judicata*. The claim was barred, so it was alleged, by a decree pronounced in 1878 in a suit representative in character and seeking the same relief.

This defence, along with all the other answers made by the written statement, was repelled by the learned Subordinate Judge of Tuticorin, who on the 17th March, 1923, after a very elaborate judgment dealing with all the issues raised, decreed the suit. The respondents appealed to the High Court at Madras. In that Court the learned Judges found it convenient to deal with the plea of *res judicata* as one preliminary to all the others, and after full argument they came to the conclusion that it had been established. As, however, the course of decisions throughout India had not been uniform on the point at issue, they thought it well to refer the question of *res judicata* to the Full Court for decision. There, the same view was taken of the plea, and with an intimation to that effect the case was remitted to the learned Judges by whom the appeal had so far been heard, to pronounce upon the question whether the former suit had in fact, in its trial, been treated as a representative suit for the benefit of all Vaniyas so as to be fit to be decisive of the present case.

This question having later been answered in the affirmative by the learned Judges, it became unnecessary for them to go into any of the other issues raised on the appeal, which accordingly, by decree of the 16th November, 1927, was allowed and the suit dismissed. Hence the plaintiffs' present appeal to His Majesty in Council, upon which, it is agreed, that the only questions in *hoc statu* open for determination are the two which have by the High Court been decided in favour of the respondents. Whether the litigation is to proceed further or not will become clear after it has been ascertained whether the views of the High Court on these two questions are or are not well founded.

It will appear as the case develops, that the decision must finally be rested on a proper appreciation of the provisions of the Code of Civil Procedure with reference to representative suits. due regard being had to the conditions, if any such there be, which must be observed, if a decree in such a suit is to be binding on persons not actually parties or privies thereto. It will accordingly be convenient at the outset to trace the legislative history of representative suits.

Prior to the Code of 1877 such suits, although not unknown in India, were not the subject of legislation. With reference to them, the practice followed by the Courts there did not apparently, differ, in substance, from that which had, for at least a century, obtained in the Court of Chancery in England. This practice, as described by Lord Macnaghten, in the *Duke of Bedford* v. *Ellis* [1901] A.C. 1 is copiously referred to in the judgment of

the High Court, and need not be further elaborated now. It will suffice, as an illustration of the corresponding practice in India, to draw attention to a judgment of the Madras High Court pronounced in the year 1866 in the case of *Srikhanti* v. *Indupuram*, 3 Mad.H.C.R. 226. There, in the first of two suits, the plaintiffs had been 54 inhabitants of a village who claimed against 67 inhabitants of an adjoining village a revision or alteration of the boundaries between the two. The second suit, the subject of the report, was one by other villagers claiming the same relief against the adjoining village, and therein it was held that the two villages had each been effectually represented in the first suit and that the inhabitants of both were, in substance, parties to the earlier litigation, which was of a public nature dealing with a claim in which all had a common interest. In these circumstances the decree in the earlier suit was a bar to the claim being again litigated. The Court emphasised the fact that convenience, where community of interest existed, required that a few out of a large number of persons should, under proper conditions, be allowed to represent the whole body, so that in the result all might be bound by the decree, although some only of the persons concerned were parties named in the record. In the absence of any statutory provisions on the subject, the Courts in India it would seem, prior to 1877, assumed the task and duty to determine in the particular case whether, without any real injustice to the plaintiffs in the later suit, the decree in the first could properly be regarded as an estoppel against the further prosecution by them of the same claim.

In the 'seventies of the last century the subject was dealt with by legislation both in England and in India—in England, to refer to its legislation first, by Order 16, Rule 9, to the Judicature Act, 1873. The effect of that rule in relation to representative actions was, in substance, to introduce into all the Divisions of the High Court the practice which prior to the Act had obtained in the Court of Chancery. But, as was pointed out by Fletcher Moulton L.J., in *Markt* v. *Knight Steamship Company* [1910] 2 K.B. 1021, 1038, in extending the procedure to all Divisions of the Court, the rule also formulated it, and the question whether the enactment accurately or otherwise expressed the previous practice of the Court of Chancery became accordingly little more than academic.

A similar observation may, perhaps, with equal appositeness, be applied to the corresponding Indian legislation on the subject to which attention will presently be directed.

The English Order 16, Rule 9, which has remained unaltered until now, is in the following terms :—

> "Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the Court or a Judge to defend in such cause or matter, on behalf, or for the benefit of all persons so interested."

A passing reference to the English practice under that Rule in regard to two matters may be helpful here. First, it has been deemed essential that in a representative action the class of persons on behalf of whom relief is sought should be clearly defined. In the interests of precision it is expected that the class shall be so defined in the writ (see *e.g.* [1910] 2 K.B. 1034), but the gist of the requirement is that as the judgment in such an action is binding on all the members of the class represented, it is of the essence that the range of the estoppel be defined somewhere on the face of the proceedings. Again in England if the action is properly brought by plaintiffs as members of a class having a common interest to vindicate the rights of the class, it will be no objection that they may have added a claim in respect of some matter in which they say they have been wronged in their individual capacity (*Duke of Bedford* v. *Ellis supra*). But, all the same, it remains true that if the plaintiffs' claim is substantially one for damages for an alleged wrong to themselves individually, the suit is not held to be representative in the true or effective sense of the term.

In India representative suits were made the subject of legislation in the Code of Civil Procedure of 1877 by provisions clearly based on the English precedent, but with modifications introduced of definite—even of compelling—significance in relation to the very question here under consideration.

These provisions, contained originally in Section 30 of the Code of 1877, are now to be found in Order 1, Rule 8 of the Code of 1908 in the terms following :—

> "(1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service, or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.
>
> "(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule 1 may apply to the Court to be made a party to such suit."

The effect of this enactment standing alone appears to their Lordships to be as little open to doubt as is its purpose. As in 1873 had happened in England, it formulates in 1877 for India the former exception to the general principle that all persons interested in a suit shall be parties thereto. It is an enabling rule of convenience prescribing the conditions upon which such persons when not made parties to a suit may still be bound by the proceedings therein. For the section to apply the absent persons must be numerous ; they must have the same interest in the suit which, so far as it is representative, must be brought or prosecuted with the permission of the Court. On such permission being given it becomes the imperative duty of the Court to direct notice to be given to the absent parties in such of the ways

prescribed as the Court in each case may require : while liberty is reserved to any represented person to apply to be made a party to the suit.

The direction of all these matters, in striking contrast to the English rule, is placed in the hands of the Court, and the obtaining of the judicial permission and compliance with the succeeding orders as to notice, are, as it seems to their Lordships, quite clearly the conditions on which the further proceedings in the suit become binding on persons other than those actually parties thereto and their privies. In their Lordships' view the position under Section 30 is correctly and clearly stated by Ameer Ali J. in *Baiju Lal* v. *Bulak Lal* I.L.R. 24 Calc. 385, where he says :—" The effect of Section 30 is that unless such permission is obtained by the person suing or defending the suit, his action has no binding effect on the persons he chooses to represent." " If the course prescribed by Section 30 is not followed in the first case, the judgment does not bind those whose names are not on the record," is another correct statement of the position. See *Srinivasachariar* v. *Ragavachariar* I.L.R. 23 Mad. 28.

It is convenient now to examine the decree which has been found to be a bar to the present suit. It is one by which the Subordinate Judge of Tuticorin, on the 19th June, 1878, dismissed original suit No. 14 of 1877. It was affirmed by the High Court at Madras on the 28th April, 1879, in Appeal Suit No. 73 of 1878.

The records of the suit appear to have been destroyed under the rules for the destruction of documents, and the nature and details of the litigation can now only be gleaned from public copies of the plaint, of the judgment and decree of the Subordinate Judge, and of the judgment of the High Court on appeal, all produced by one of the respondents.

From these documents it appears that the suit followed upon an unsuccessful magisterial prosecution of the plaintiffs for alleged criminal trespass into the Tiruchendur temple on the 8th of February, 1876. In the suit the complaint, which before the magistrate had been a trespass on the part of the accused, became the illegal ejection of the plaintiffs from the temple. The suit was commenced on the 8th of November, 1877. The Code of 1877 had come into force on the 1st of October previously. The proceedings were accordingly regulated by Section 30, although it may well have been, as is now pointed out by the High Court, that the pleaders at Tuticorin had not yet become familiar with the provisions of the section.

The plaintiffs were four Vaniyas (three of them members of a family of the village of Venkataramapuram), and a fellow caste man of Thattamadam. It was they who had been prosecuted for trespass. No one from Tiruchendur was added as plaintiff. Nor was this omission accidental, because, as appears from the judgment of the Subordinate Judge, it had been matter of complaint by the plaintiffs that none of the Tiruchendur people

would give evidence in their favour, and that even their own castemen of that place would not come forward through fear of the defendants. In other words, the plaintiffs did not even suggest that they were then representing Tiruchendur Vaniya Vaisyas in any sense. But it is on behalf of these Vaniyas alone that the present suit is brought. At the very outset, therefore, it becomes more than doubtful whether these local Vaniyas, the only appellants here, were in any way interested or concerned in the earlier litigation. The difficulty, it will be seen, increases and becomes more general on further examination.

A mere perusal of the plaint in the suit is enough to produce the impression that it was to obtain redress for the unjust and forcible exclusion of the plaintiffs from the temple on the aforesaid 8th February, 1876, that the suit was really launched. For that exclusion, exemplary damages assessed at Rs. 5,200 are claimed by the plaintiffs individually. The order and description of the defendants lend colour to this view. Defendants 1 to 7, servants apparently of the temple, are alleged to have been the actual aggressors: defendant 8, the manager, and defendants 9 to 11 Dharmakartar of the temple are alleged to have permitted and connived at the aggression, while the claim against all the eleven is purely individual and in no sense representative. It is true that, following upon the charge of personal aggression there is an allegation that the defendants since its date had been obstructing the entire community of the Vaniyas including the plaintiffs from crossing the outside compound of the temple and entering in. It is true also that there are elsewhere in the plaint references to Vaniyas generally and that by the original prayer, as now correctly translated by the learned Subordinate Judge, the right asserted was " the right of the Vaniya caste including the plaintiffs and others," and was expressed in terms which are in substance the same as those in the present suit. Nevertheless the impression persists, if the pleading be read as a whole, that it was the rights or wrongs of the individual plaintiffs which were in contest, and that the position of members of the Vaniya caste generally came under notice only for the reason that it was as Vaniyas that the plaintiffs had suffered any wrong at all at the defendants' hands. The language of representation is nowhere used, and the conclusion that the relief claimed was really individual is strongly confirmed by the remaining records of the suit still extant. There is, first, the decree of the 19th June, 1878. It begins with " Particulars of the Claim " in the words following:—

> " This suit has been brought for the recovery of Rs. 5,200 as ' exemplary damages ' for a declaration that plaintiffs are entitled to enter into the Subrahmanyaswami temple at Tiruchendur for worship at the spots marked A and B in the plan of the temple, Exhibit A, and for the issue of a permanent injunction restraining defendants from causing any obstruction to their doing so."

This decree is an official document issued by the authority of the Court. In it there is not from its beginning to its end the slightest hint that any persons other than the plaintiffs and defendants named as parties are interested in or affected by it. So also, in his judgment, leading to the decree, the learned Subordinate Judge describes the plaintiffs' claim in the following similar terms :—

> " Plaintiffs are ' Vaniyas or oilmongers.' They went on the 8th February to the . . . temple . . . to perform a certain vow, and while engaged in performing it, defendants 1 to 7 (the servants of the temple) turned them out of the temple on the ground that they had transgressed the limits prescribed for the admission of their caste people, and then prosecuted them for criminal trespass before the sub-Magistrate. That officer convicted them of the offence laid to their charge, but the Head Assistant Magistrate on appeal quashed the conviction. And now plaintiffs seek the recovery of the sum of Rs. 5,200 ' as exemplary damages ' from defendants 1 to 7 and defendants 8 to 11, the manager and trustees of the temple, and pray for a declaration that they and their family are entitled to make their worship at the spots marked A and B in the plan of the temple, Exhibit A, and for a permanent injunction restraining defendants from causing any obstruction to their doing so."

More colourless upon this point, but still pointing to the same conclusion, is the judgment of the 28th April, 1879, of the High Court on appeal. There the learned Judges say :—

> " We think the reasons assigned by the Judge who passed the decree dismissing the plaintiffs' suit are satisfactory to show that plaintiffs have not made out the right they claim."

Nor is the omission of all reference to representation a mere question of form. Their Lordships bear in mind that Section 30 is an enabling enactment. It in no way debars a member of a community from maintaining a suit in his own right, although the act complained of may also be injurious to the whole community. This, in the view of the Board, is the very privilege which the plaintiffs in the earlier suit were exercising.

Further, with reference to that suit their Lordships have regard to the finding of both Courts in India—a finding made with emphatic assurance by the High Court—and one so important in each aspect of this appeal that they quote it textually :—

> " We are satisfied," say the learned Judges, " that no permission was applied for orally or in writing, and that no permission was granted expressly or impliedly under Section 30 corresponding to Order 1, Rule 8, Civil Procedure Code, to the plaintiffs to sue on behalf of or for the benefit of all the Vaniyas interested, along with the plaintiffs, to worship in the Tiruchendur temple as alleged by the plaintiffs."

In the result with all these converging considerations in mind their Lordships are in agreement with the learned Subordinate Judge that the original suit, at all events by the date of the decree, had become one from which every trace of representation was eliminated : that the decree of dismissal was as it bears to be a decree *inter partes* only : and that if the plaintiffs had, by the learned Subordinate Judge, been held entitled to judgment, they would have obtained from him, at the most, the individual

order in the terms which, as he stated, they were then claiming. Further, their Lordships, at this stage of the case are much impressed by the fact that Section 30 was never invoked. Its provisions may have been only dimly appreciated by the pleaders in November, 1877, but it cannot be assumed that they were not familiar to the learned Judge by June, 1878, and to the High Court by April, 1879, and it is preferable to conclude that they were in no way referred to because on the true view of the case as presented to both Courts the suit was not one to which they had any application.

The learned Judges of the High Court hold the view that the earlier suit was, and was conducted as, a representative suit governed by Section 30, but they do not, as their Lordships very respectfully think, face fully the difficulties in the way of that conclusion. Their view that the reference to " family " in the quoted passage from the judgment of the learned Subordinate Judge is a slip for " community " is not, in the face of the contemporaneous decree, one to be safely accepted : the omission of all reference to representation cannot properly be regarded as a mere question of form, and, in the result, their Lordships, if it were necessary, would be prepared to hold that this plea of *res judicata* had not been made good for the simple reason that the original suit is not shown by the respondents to have been a representative suit at all.

But even if it be assumed that the original suit was a representative suit governed by Section 30, but one which was prosecuted without leave of the Court and with no notice given of its institution, either as required by the section or at all, then the very serious question arises whether the decree in such a suit is brought within Section 13, Explanation 5, of the Code of 1877, which deals with the plea of *res judicata*. The section, with the addition of the words printed in square brackets and inserted for the first time in 1908, has now become Section 11, Explanation 6 of the present Code. It is as follows :—

> " No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."
>
> *Explanation VI.*
>
> " Where persons litigate, *bona fide*, in respect of [a public right or of] a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

Based upon that enactment, the question with reference to this defence of *res judicata*, referred by the High Court to the Full Bench, was, as interpreted by the Full Bench, as follows :—

> " Is Explanation 6 to Section 11 controlled by Order 1, Rule 8, of the Civil Procedure Code so as to prevent a subsequent suit filed with leave under Order 1, Rule 8, by two or more members of the community who

claim a right in common to them and the other members of the community, and seek to enforce it on behalf of themselves and the community, being *res judicata* by reason of a decision given after *bona fide* contest in a previous suit filed without leave under Section 30 C.P.C. 1877 by some other members of the community claiming the same right and seeking to enforce it on behalf of the community ? "

The question, of course, as has been already shown, is based upon assumptions in regard to the " previous suit," which their Lordships do not accept, but its object and meaning will, perhaps, be best appreciated by the answer returned which, shortly stated, was, that Explanation 6 is not controlled by Order 1 Rule 8, and if a Court allows a suit to which the rule applies to proceed in a representative capacity for the benefit of numerous parties all these parties will be bound by the decree, if the contest leading to it were *bona fide*, even although the procedure prescribed by the rule was in no respect followed. The far-reaching importance of this pronouncement of the Full Bench, couched as it is in general terms, will at once be recognised. It introduces into Section 11, with Explanation 6—itself an enactment of adjective law only—a result which attaches to the explanation the effect of new substantive law in that it clothes with all the binding force as against them of a *res judicata* a decree in a representative suit which, apart from the explanation, has no binding effect upon the persons therein expressed to be represented. A pronouncement which has this result is not one to be accepted readily, and their Lordships believe it to be mistaken.

Before considering it critically, however, it will be convenient to recall the circumstances in which, in the Code of 1908, the words " a public right of " were added to the explanation. The addition, it will be found, throws light upon the question at issue.

In the Code of 1908 there was introduced, for the first time, a provision—Section 91—by virtue of which the Advocate-General or two or more persons, with his consent in writing, might, in the case of a public nuisance, institute a suit, though no special damage had been caused, for a declaration and injunction, and for such other relief as might be appropriate to the circumstances of the case. If the plea of *res judicata* was to apply to the decree in such a suit, some addition to Explanation 6 seemed to be called for. The addition of the words " a public right or of " in the place where they are found was apparently regarded as sufficient for that purpose, because it is everywhere accepted that the enactment therein of Section 91 was the only reason for their insertion in the same Code of 1908.

Their Lordships will presently advert to the light thrown upon the explanation as a whole by the introduction of these words.

The view of it taken by the Full Bench, however, purported to be based rather upon authority and upon certain general considerations than upon its actual wording. And here their Lordships doubt whether any representative authority can be found broad enough to cover the present case, while with the general

considerations invoked they are not in sympathy. As to authority they are impressed by the fact that even before the Code of 1908 there were several decisions—*Thanakota* v. *Muniappa*, I.L.R. 8 Mad. 496, may be selected as typical—in which the view was taken that if what may be called an Order 1 Rule 8 suit was to have the benefit of the explanation the conditions of the Rule must have been complied with fully. While in other cases in which it might superficially be supposed that the opposite view had been taken it will be found that the question at issue was not so much whether, where none of the conditions of the Rule had been complied with the benefit of the explanation could be extended to the decree in a suit expressly within the terms of the Rule—which is the present case—as whether to bring the decree within the explanation, the conditions of the Rule had not to be observed even in a suit which while within the words of the explanation was not within the words of the rule at all. And the result of the decisions has shown that the explanation is not confined to cases covered by the Rule but extends to include any litigation in which, apart from the Rule altogether, parties are entitled to represent interested persons other than themselves. Nor are their Lordships impressed by the general principles upon which apparently the Full Bench relied. First of all the learned Judges in ignoring the conditions imposed by the Rule seem to have discounted altogether the requirements as to notice thereby made so prominent. The observance of these requirements, their Lordships hold to be essential. They constitute the nearest available substitute when dealing with numerous persons, scattered it may be throughout India, for the personal service upon a defendant required in the case of an ordinary suit. It is no more permissible to dispense with the one requirement than with the other if the person in view is to be bound by the decree. It may indeed be the case that in some representative suits, however far-reaching the notice, absent persons will have only a chance of knowing that litigation affecting their interests is on foot. But of that chance they are not to be deprived. It will be as good a chance as the Court can give, and they are entitled to rely on the due discharge by the Court of its duty in this matter—one of the most responsible with which it could be entrusted.

And the fact that in very many instances the notice directed will not achieve its full purpose: and that many persons concerned may remain in ignorance of the proceedings, may well have prompted the further condition of the explanation that the decree in such a suit to be binding on absent persons must follow a *bona fide* litigation. This condition the Full Court seem to regard as the panacea for all irregularity. In their Lordships judgment it is not so to be read. *Bona fide* litigation will not excuse the neglect of statutory conditions. If the litigation be not *bona fide* the most complete observance of these conditions will not give to the decree the force of a *res judicata*.

In their Lordships' view the difficulty in associating the

explanation with the rule is occasioned only by the generality of the words of the rule, and that difficulty, as they think, is removed by the addition to the explanation made in 1908.

So far as mere words are concerned it probably would have to be agreed that a suit in respect of a public nuisance brought by any member of the public would be a litigation " in respect of a public right." When, however, it is found that such a litigation where no special damage has been sustained is only authorised under the Code if it be instituted with the consent in writing of the Advocate-General, is it to be said that the benefit of the explanation is to be extended to a decree in such a suit where no such consent has been obtained, the necessity for it having been, perhaps, overlooked? The answer must, it seems, be in the negative; but although the instance is more striking, the same principle must, their Lordships think, apply to a decree in a representative suit properly so-called, when, in view of the provisions of the Code in that behalf, " no persons interested in such right other than the persons litigating, are affected by the decree." While however their Lordships are of opinion that the conclusion they have reached on this important question is justified even on the wording of the explanation, they are by no means unconscious of the difficulties pointed out by the High Court of Madras in *Gopalacharyulu* v. *Subbamma*, I.L.R. 43 Mad. 487, and they would not exclude the possibility of a decree being within the benefit of the explanation where the litigation having been *bona fide* the omission to comply with the conditions of the rule has been inadvertent, and no injury from the omission has been sustained by the plaintiff in the second suit. But it is, their Lordships think, imperative to have it recognised that the burden upon a defendant seeking a ruling to that effect is heavy indeed. No encouragement should, they think, be offered to litigants, if they would obtain the full benefit of Order I, Rule 8, to be careless in securing full compliance with the conditions of the Rule both in the letter and in the spirit.

On the whole case accordingly their Lordships have reached the conclusion that the learned Subordinate Judge was right in holding that the defence of *res judicata* had not been established.

This appeal therefore should be allowed, and the case be remitted to the High Court with a direction to dispose on the merits of the defendants' appeal from the decree of the 17th March, 1923.

And their Lordships will humbly advise His Majesty accordingly.

The appellants are entitled to their costs of this appeal, and of the appeal to the High Court as from the day when it was opened. The remaining costs of that appeal already incurred, and all further costs thereof hereafter to be incurred, will be dealt with by the High Court when disposing finally of the appeal.

In the Privy Council.

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