

(1938) 03 MAD CK 0045
In the Madras High Court

Rathnaswami Nadar and Others

APPELLANT

Vs

The Prince of Arcot's Endowments under the control of His Highness the Prince of Arcot, G.C.I.E. represented by his authorised agent Shamsul Ulama Moulvi Mohammad Abdur Rahman Sahib Bahadur 'Shakeer'

RESPONDENT

Date of Decision : 30-03-1938

Acts Referred:

Citation : (1939) ILR (Mad) 1094 : (1938) 48 LW 109 : (1938) 2 MLJ 148

Hon'ble Judges : Venkatasubba Rao, J

Bench : Division Bench

Judgement

Venkatasubba Rao, J.—Mr. Narayanaswami Aiyar, the appellants" learned Counsel, set himself to the task of showing that the judgment is wrong from the judgment itself, as beyond the pleadings nothing has been printed. His contention, that the lower Court"s view that the lands form part of an "estate", or that they answer the description of "old waste", is wrong, does not require serious notice, as we cannot discover from the judgment that the appellants had any sort of possession, whether under the Act or outside it - which would confer on them any legal right.

2. Then as to his next contention, the facts are briefly these : The defendants were sued under Order 1, Rule 8, Civil Procedure Code, as representing a large number of villagers (about 150 in number) too numerous to be individually impleaded. In the plaint it is stated that in pursuance of a conspiracy, they combined in order to deny the plaintiffs" title and to take unlawful possession of the land. All that we need say is, that it does not appear from the judgment that this allegation has been made out. But we think on the facts as found, the plaintiffs were entitled to have recourse to Order 1, Rule 8. The fact seems to be that the tenure obtaining in respect of the lands held by the defendants, is that which goes by the name of karaiyedu. Under that system the lands are temporarily cultivated in separate shares by the co-sharers and are subject to

periodic re-distribution. The defendants' case, as may be inferred from the meagre record appears to be that in virtue of their holding certain other lands in the village under karaiyedu form, they are entitled to similar rights in the suit land. That is to say, the right of the whole community extends to the whole land and the right of each member is similar to the right of every other. We are therefore inclined to think that there is sufficient community of interest as to render the rule applicable. Even so, the lower Court in our opinion is wrong in passing a decree for mesne profits. Though the point is not covered by Indian authority, the law seems quite clear under the corresponding English rule, that the procedure pertaining to representative suits is inapplicable to actions of debt, to money claims or to liabilities in contract or in tort. The principle has been lucidly explained, and the authorities have been fully reviewed, by Fraser, J., in *Hardie and Lane, Ltd. v. Chiltern* (1928) 1 K.B. 663 whose judgment has been upheld by the Court of Appeal. *Walker v. Sur* (1914) 2 K.B. 930 is one of the several cases cited by the learned Judge. In a common law action of debt for professional services rendered, the plaintiff sued four named defendants on their behalf and on behalf of all other members of an incorporated religious society, most of the members of which resided abroad. Buckley, L.J., observed in the course of his judgment in *Walker v. Sur* (1914) 2 K.B. 930 :

If this order had not been appealed, and the plaintiff had gone to trial and asked for judgment, what judgment could he have obtained? At the most an order against these four persons****. But when he had obtained his judgment he could have had execution only against the share of these four persons in that property. There is nothing representative about that." (Page 935.)

3. Then the learned Lord Justice goes on to point out the distinction between an action for declaration and an action of debt:

The plaintiff has not asked for any declaration of right***which, if affirmed in his favour, could be enforced against individual members of the class. He is only suing for money, for which he wants judgment against certain persons, and he wants by this order to be in a position to say that he is pursuing his remedy against persons who are not parties in the sense of being parties on the record. It is true that Mr. Lowenthal has disclaimed that if he got judgment in this action he could enforce it against a person who is not a party; but that is not the question for our determination. We have to determine whether this action ought to go on so as that execution could be maintained against all the persons represented. In my judgment that would be impossible." (Cited in *Hardie and Lane, Ltd. v. Chiltern* (1928) 1 K.B. 663 .

4. Sargent, L.J., while upholding the judgment of Fraser, J., in the case of *Hardie* already referred to, after adverting to two important decisions (one relating to contract and the other to tort) declares:

The judgments of this Court in both these reported cases show decisively how impossible it is that the named defendants can adequately represent for the

purposes of defence the different individual members of the Association, since these individuals may obviously have defences separate and distinct from those of the named defendants and of each other. (Page 699.)

5. In the present case the Judge has granted a decree for a consolidated sum as representing the mesne profits. It is to be held that each individual of the 150 odd villagers is liable for mesne profits in respect of the entire land, although under the Karaiyedu form of enjoyment, no ryot is in occupation of more than a fractional share of the whole land. The injustice of such a decree is obvious and the principle of the English decision already quoted clearly applies. Nor can the decree in this respect be maintained as against the named defendants, no attempt having been made to apportion the liability, as what has been found due is the amount supposed to be payable by the entire group. We say nothing as to the plaintiffs' right to recover mesne profits, future or subsequent, in any separate proceeding; with that we are not concerned and we express no opinion on that matter.

6. In so far as the decree is for possession, different considerations apply. The facts are common, giving rise to the same liability in regard to each member. Let us apply the test laid down by Buckley, L.J. There can be no difficulty in executing the decree against the person either on the record or absent; the liability of one individual does not differ from the liability of another, - all being equally liable to be ejected. Then again, can it be said in the words of Sargent, L.J., that the absent members have defences separate and distinct from those of the named defendants and of each other? Here also the answer must be in the negative. In so far the decree is for possession, it should, we think, be upheld.

7. From the judgment of Fraser, J., cited above, it is clear that a representative suit will lie as much in respect of a declaration as for an injunction *Hardie and Lane, Ltd. v. Chiltern* (1928) 1 K.B. 663 . in respect of these two reliefs also the lower Court's decree must be confirmed.

8. In the result, in appeal No. 324 of 1933 the decree of the Court below is affirmed except in so far as it pertains to the recovery of mesne profits; that portion of the decree, as already stated is vacated. The order of that Court in regard to costs is maintained; in the appeal each party will bear his costs.

9. As to Appeal No. 88 of 1934 it is dismissed with costs.