

(1927) 09 MAD CK 0032
In the Madras High Court

Sonachalam Pillai and Others

APPELLANT

Vs

Kumaravelu Chettiar and Others

RESPONDENT

Date of Decision : 16-09-1927

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8

Citation : (1928) ILR (Mad) 128 : (1928) 27 LW 216 : (1928) 54 MLJ 8

Hon'ble Judges : William Phillips, J; Ramesam, J; Beasley, J

Bench : Full Bench

Judgement

1. The plaintiffs are Vaniyars or oil-mongers of Tiruchendur. They sue for a declaration that they are entitled to worship in the Subrahmaniaswami

temple at Tiruchendur by going into the inner Mayil Maha Mantapam, to go round all the prakarams in the temple, to place their Kavadies on the

koradu in front of the Valliamman shrine, etc., and for an injunction restraining the defendants from interfering with the right of worship.

2. The defendants, who are the Dharmakarthas, Stanikars of the temple and the three Vellala inhabitants of Tiruchendur, deny the plaintiffs' right to

go into the Mayil Maha Mantapam for the purpose of worship and their right to place Kavadies on the koradu in front of the Valliamman shrine

and contend that they and their caste-men are prohibited from going beyond the Irawatha Mantapam or going round any of the prakarams. The

Subordinate judge of Tuticorin has granted the plaintiffs the declaration and injunction prayed for. The defendants prefer this appeal.

3. The first point urged by the learned Advocate-General for the appellants is that the present suit is barred by reason of the decree in O.S. No. 14

of 1877 on the file of the Subordinate Judge's Court of Tuticorin which was confirmed on appeal to the High Court in A.S. No. 73 of 1878.

Before considering the appeal on the merits it is necessary to record a finding on the question of res judicata, for, if the suit is barred by reason of

the decision in the previous suit, it would not be necessary to try the appeal on the merits. The present suit is by the Vaniyars of Tiruchendur. They

have obtained permission under Order 1, Rule 8 of the CPC to sue on behalf of all the Vaniya Vysia residents of Tiruchendur. The plaintiffs in

O.S. No. 14 of 1877 were four Vaniyars, two of whom father and son were residents of Venkatramapuram, and the other two were residents of

Thattamadam Village, Then-karai Taluk, Tinnevely District. The plaint as translated in the printed record before us is admittedly incorrect and it

has been corrected. In prayer 1 the words ""and other Vaniyars"" should be added between the words ""plaintiffs"" and ""to worship"" and at the end of

the paragraph the words ""and to establish the right of the plaintiffs and others belonging to the Vaniyar caste."" Their allegation in the plaint was that

they and all the other Vaniyars had from time immemorial been in the habit of worshipping the deity going as far as the wooden Ali. (lattice),,

placed between Ardhamantapam and Mahamantapam in the temple of Sri Subrahmania Swami at Tiruchendur and also tying and taking Kavadies

and placing them before the Valliamman temple comprised within the compound of Sri Subrahmania Swami temple, and that on the 8th February,

1876, the 1st plaintiff was taking Kavadi and bowing in. worship within the temple of the said Sri Subrahmania Swami along with the plaintiffs 2 to

4, that the defendants 1 to 7 had pushed the plaintiffs out of the said temple unjustly and forcibly and they prayed that ""the Court may be pleased

to pass a decree establishing the right due to the plaintiffs to worship the deity going as far as the wooden lattice placed between Ardhamantapam

and Mahamantapam in the temple of Sri Subrahmania Swami and to tie and take Kavadies and place them before the Valliamman temple

comprised within the compound of the said temple of God Subrahmania and to establish the right of the Vaniyars and for a permanent injunction

restraining the defendants from causing obstruction to them and other Vaniyars and for damages for Rs. 5,000 for loss of dignity and mental pain

caused to the plaintiffs."" The defendants were the Maniyam, Archakar, other servants and the Dharmakarthas of the temple. They in their written

statement denied the right of the plaintiffs and other Vaniyars to go into the Mahamantapam and averred that from immemorial usage the limit

prescribed for their worship was the spot marked "C" in the plan, and that as they had exceeded that limit they were properly sent out of the

temple. The Subordinate Judge of Tuticorin after a careful consideration of the evidence dismissed the plaintiffs' suit. They appealed to the High

Court in A.S. No. 73 of 1878. Mr. Justice Innes and Mr. Justice Muttuswami Aiyar dismissed the appeal with the remark that

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.

4. It is urged by the learned Advocate-General that O.S. No. 14 of 1877 was filed by the plaintiffs to assert the right of all Vaniyars and as it was

litigated bona fide, Explanation 6 to Section 11 of the CPC applies to the case and the present suit which is brought for the same relief as that

claimed in that suit is barred by res judicata. The contention of Mr. Ramachandra Aiyar is that there is nothing to show that O.S. No. 14 of 1877

was brought to assert the right of the whole community of Vaniyars, that the provisions of Section 30 were not complied with and that it was a suit

for a personal remedy by way of damages and therefore the decision in that case cannot bar the present suit. It is urged by the learned Advocate-

General that permission need not be express and he relies on Krishna Kumara Deb v. Atul Chandra Chose (1924) CriLJ 612. He also urges

relying on Dhunput Singh v. Paresh Nath Singh ILR (1893) C 180 that the Court ought to presume that the rules and forms of pleading were

complied with by the Court. No doubt in the case of mandatory provisions of the processual law, in the absence of any evidence to the contrary,

the Court would presume that all rules and legal forms were complied with as the tribunal is presumed not to deviate from the rules and forms laid

down for its guidance. But where, as in this case, the provisions of Section 30 of the Code of 1877 are only enabling and not mandatory, such a

presumption does not arise. We are satisfied that no permission was applied for orally or in writing and that no permission was granted expressly

or impliedly u/s 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

Vaniyars interested along with the plaintiffs to worship in the Tiruchendur temple as alleged by the plaintiffs for the following reasons:

(1) There was no provision in the Code of 1859 corresponding to Section 30 of the later Codes.

(2) The provisions of Section 30 were for the first time enacted in the Code of 1877 which came into force on the 1st October 1877; and

(3) It was very unlikely that the pleaders of Tuticorin would have become familiar with the provisions of the new Code before the 8th November

1877, the date on which the plaint was filed.

(4) Neither in the plaint nor in the written statement which is found in the printed records of A.S. No. 73 of 1878 nor in the judgment is there any

reference to the new provision contained in Section 30 of the Code.

5. The next question is whether O.S. No. 14 of 1877 was brought in order to establish the right of the whole community and not merely the

personal right of the plaintiffs on record. The only materials upon which any conclusion can be arrived at are the plaint, the judgment and the

decree. In paragraph 1 of the plaint it is stated that the plaintiffs belong to the third caste, Vaisyas. In paragraph 2 the averment is

the plaintiffs and all the other Vaniyars have from time immemorial been in the habit of worshipping the deity,"" etc.

6. In paragraph 3 they (meaning the defendants)

have also from that date to this day been obstructing the entire community of Vaniyars including the plaintiffs from crossing the outside compound

and entering in,

In paragraph 4 it is alleged

on account of the aforesaid act and obstruction the plaintiffs and other Vaniyars have been lowered in the estimation of the people of other castes

of an equal status.

In prayer 1 the relief is asked for establishing the right due to the plaintiffs to worship the deity, etc., and to establish the right of the Vaniyars; and

in prayer 2 injunction is asked for against the obstruction caused to the plaintiffs and other Vaniyars.

7. Issue 1 is in the following terms:

(1) Whether oil-mongers commonly known as ""Vaniyar"" are admitted into the plaint temple to worship at the spots A and B?

8. An attempt was made by the plaintiffs to raise the larger issue whether the

plaintiffs were Vaisyas as they hoped by proving that they were Vaisyas they would be entitled to go to the Mahamantapam of the temple for worship. The Subordinate Judge thought it was unnecessary to consider the issue "whether the plaintiffs come under the class of Vaisyar," as he thought that the claim was "based entirely upon immemorial usage and "the question of caste was not one capable of easy decision among Hindus." The decree simply says that the suit is dismissed. From the pleadings, from the issue, from the way in which evidence was adduced and the number of witnesses examined and the contentions of the parties appearing in the judgment, we have no hesitation in holding that the suit was brought to assert not merely the title of the plaintiffs but also the right of the Vaniyars to enter the Mahamantapam of the temple and the relief asked for was not one personal to the plaintiffs but one which was common to them as well as to all the Vaniyars. The mere addition of a claim for damages does not change the nature or the character of the suit which was one for the establishment of the right of the whole community of which the plaintiffs were members. That the suit was litigated bona fide cannot be disputed. A large number of witnesses were examined; various documents were produced and every attempt was made to prove the case to the hilt. After they were defeated in the Subordinate Judge's Court, the plaintiffs preferred an appeal to the High Court where also they sustained a defeat. There is no suggestion, much less proof, that O.S. No. 14 of 1877 was not conducted bona fide by the plaintiffs. The question is whether the decision in that suit bars the present suit. There are a number of decisions on the point and they are not quite reconcilable. We shall deal with cases which support the appellants' contention. In Gudimolla Rangamma and Another Vs. Panchangam Narasimhacharyulu and Others, it was held that

Explanation 6 to Section 11 of the CPC is not confined to cases in which the prior suit was brought with the permission of the Court under Order 1, Rule 8 thereof. The Explanation does not become inapplicable because the prior suit was for the establishment of the plaintiff's individual right in addition to the right claimed by him in common to himself and others in so far as his claim in respect of the latter right is concerned.

9. In that suit some Agraharamdars brought a suit to eject the defendants from

their possession. In a former suit for the same relief, one of the plaintiffs in the later suit was not a party to the earlier suit. It was contended that inasmuch as the plaintiff was not a party to the previous suit, he was not bound by the decision in that suit. Sadasiva Aiyar and Moore, JJ., held that the plaintiffs' suit was barred by the decision in the previous suit. Sadasiva Aiyar, J., after an examination of several cases on the point came to the conclusion that Explanation 6 to Section 11 made no reference to Order 1, Rule 8 and, therefore, Order 1, Rule 8 cannot control Explanation 6. He observed at page 31:

The addition of an individual claim to a right of way cannot prevent the decision as to the right claimed on behalf of all the Agraharamdars (it is also the right claimed in the present suit) from being res judicata in the present suit.

10. Moore, J., observed at page 32:

The, joint right which the plaintiff claimed is identical with, the relief sought for in the present suit, and he was clearly litigating bona fide in the interests of all the Agraharamdars. I am unable to agree with the Subordinate Judge that Explanation 6 to Section 11 of the CPC must be treated as confined to cases in which permission to sue in a representative character is obtained under Order 1, Rule 8 of the Civil Procedure Code.

11. In *Gopalacharyulu v. Subbamma* (1919) ILR 43 M 487 : 1919 38 MLJ 493 it was held

Explanation 5 to Section 11, Civil Procedure Code, applies not only to cases where leave of Court has been granted under Order 1, Rule 8, but also to cases where some of the persons claiming a private right in common with others litigate bona fide on behalf of themselves and such others.

12. Sir John Wallis, C.J., who felt considerably pressed by the argument that Explanation 5 was enacted at the same time as Section 30 in the Code of 1877 and therefore the explanation is applicable only to cases where the consent of the Court to the institution of the suit had been given

u/s 30, observes at page 492:

The explanation no doubt applies to such cases, but it is not in terms confined to them. It may be, that if a suit to which Section 30 is applicable

were brought without the consent of the Court, the plaintiff could not be considered to be litigating bona fide on behalf of the other persons

interested, that is, not only honestly but with due care and attention, or in other

cases in which he failed to implead parties who ought to have been joined, but it is in terms wide enough to include accidental slips where no real prejudice has been caused, and we should not in my opinion be justified in refusing to apply it to such cases.

He considered almost all the cases on the point and referred to the decision of Sir John Edge, C.J., in *Ram Narain v. Bisshishar Prasad* ILR

(1888) A 411 as to the care that should be taken in applying the explanation only to cases which come within its very wording. These two cases

were followed by Sir William Ayling and Odgers, JJ., in *Chenraya Goundan v. Athappa Goundan* (1923) 18 LW 177, wherein they held the fact

that the former suit was not instituted with the leave of the Court under Order 1, Rule 8, Civil Procedure Code, did not exclude the application of

Explanation 6 to Section 11. In *Varanakot Narayanan Namburi v. Varanakol Narayanan Namburi* (1880) ILR 2 M 328 it was held by Kernan

and Forbes, JJ., that Explanation 5 of Section 11, Civil Procedure Code, is not limited to the case of a suit u/s 30. In that case a decree was

obtained against a karnavan of a Malabar Tarwad. The suit was brought to set aside the decree. The question for decision was whether the

plaintiff, a member of the Malabar Tarwad, was bound by the decree against the karnavan of the Tarwad declaring that a certain land was not the

jenm of the Tarwad but was held by the karnam on kanom. The karnavan was the defendant in the previous suit. After referring to the position of

the karnavan of the Malabar Tarwad and its usages, the learned Judges observed at page 332:

Explanation 5 is not limited in its language to a suit u/s 30 which authorises a suit or defence by one or more parties on behalf of numerous other

parties having the same interest in a suit. In such suits the parties suing or defending must have permission of the Court to sue or defend, and must,

in the plaint or defence, purport to sue or defend expressly on behalf of himself and the others, and notice is required to be given to those

interested who are not parties to the suit.

13. This observation of the learned Judges was relied upon by Sadasiva Aiyar, J., in *Gudimolla Rangamma and Another Vs. Panchangam*

Narasimhacharyulu and Others, . In *Madhavan v. Keshavan* ILR (1887) M 191, Kernan and Parker, JJ., observe:

There are no grounds for supposing that the litigation of the Uralars with 5th defendant was not bona fide and therefore we think that the matter is

res judicata u/s 13, Clause (5) of the Civil Procedure Code.

14. In that case the Uraima right over a certain Devaswam was vested in certain illams, one Urala representing each Illam. All the Illams except

that of plaintiff were represented in the litigation with defendant 5 in 1881. The plaintiff in the later suit was not a party to the previous one. The

learned Judges held that the plaintiff was bound by the decision in the previous suit inasmuch as the previous suit was in the nature of the assertion

of the common right of all the Uralars. We may remark here that Explanation 6 of the present Code was Explanation 5, and Order 1, Rule 8, was

Section 30, of the previous Code. In Chandu v. Kunhamed ILR (1891) M 324 : 1891 1 MLJ 529 the mortgagee of the share of defendant 1 in a

paramba brought a suit for possession of that share. An issue was raised in the previous suit whether the paramba was partible or not and was

decided against the present defendant No. 2 who was defendant 6 in the previous suit. Sir Arthur Collins, C.J., and Handley, J., held that the

present defendant 1 and the other co-sharers may be said to claim under the plaintiffs in that suit by Explanation 5 of Section 13 of the Code of

Civil Procedure

and therefore the decision in the previous suit adverse to the 2nd defendant's title was res judicata and conclusive against him in the present suit.

15. It is argued by Mr. Ramachandra Aiyar that these cases do not touch the point as Gudimolla Rangamma and Another Vs. Panchangam

Narasimhacharyulu and Others, was a case of agharamdars and the case in Gopalacharyulu v. Subbamtana ILR (1919) M 487 : 1919 38 MLJ

493 was also a case of agharamdars and to such cases the provisions of Section 30 could not be applied and therefore they are not authorities

for the contention as to res judicata. His argument is that Section 30 is applicable only to cases where there are numerous parties who cannot all be

conveniently brought before the Court, but where parties are not too numerous they should all be made parties to the action as no one is authorised

to file a suit or defend one on behalf of another, and therefore the provisions of Explanation 6 must be confined to cases covered by Order 1, Rule

8, and also to cases where persons are by law entitled to represent a class or

authorised by persons to represent them before the Court.

Explanation 6 of Section 11 of the present Code is:

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.

16. This Explanation is a reproduction of Explanation 5 of the Codes of 1877 and 1882 with the addition of the words "'of a public right'". These

words were added on account of the enactment of the new Section 91 of the present Code. Where persons litigate bona fide in respect of a

private right claimed in common for themselves and others, i. e., where persons bring a suit or defend a right common to themselves and others and

the litigation is not merely for the benefit of the persons on record but for all the persons who are interested in that common right, all other persons

interested in such right shall be deemed to claim under the persons so litigating. If Section 30 is to govern this explanation, the legislature would not

have used the words "'deemed to claim under the persons so litigating,'" for when permission is granted u/s 30 to a few persons to sue or defend on

behalf of the whole class, every member of that class is a party to the proceeding. The use of the words "'deemed to claim,'" we think, gives a clue

to the meaning of the section where persons sue for themselves as well as on behalf of others; though they may not get the permission of Rule 8,

yet their litigation is for the benefit of the whole class and when that litigation is conducted bona fide, there is no reason why the decision in that suit

should not bind all the persons for whose benefit it was conducted. It has been held in a number of cases that Rule 8 is only an enabling provision.

It is open to the defendants in a case to bring to the notice of the Court that leave ought to be obtained as was done in Vasudevan Nambudri and

Others Vs. Sankaran Nambudri and Others, . But where the defendants do not object to the suit proceeding without the permission under Rule 8,

the persons for whose benefit the litigation is conducted cannot in case of failure to succeed turn round and say that they are not bound by it, for, if

the common right had been established, they would be the first to claim the benefit of that decision.

17. We shall now deal with the cases relied on by Mr. Ramachandra Aiyar in

support of his contention. In "" Kombi v. Lakshmi ILR (1882) M 201

it was held that if it was sought to make a decree in a suit binding on a Malabar Tarwad, the procedure laid down in Section 30 of the Code of

Civil Procedure, 1877, should be followed if the members are numerous. Innes and Muttuswami Aiyar, J., observe at page 206:

If a tarwad does not strictly fall within the denomination of a corporation, Section 30, in cases in which the members of the tarwad were numerous,

would at all events apply, which, while authorising one of the persons interested to defend by leave of the Court on behalf of all, requires notice of

the institution of the suit to be given to all; and a decree in such case, it is presumed, would be a decree against the entire body defending by such

person.

18. The question there was whether a decree which was obtained against the Karnavan was binding upon the whole Tarwad. In Vasudeva v.

Narayana ILR (1882) M 121 the same question arose whether a decree obtained against the Karnavan of a Nayar Tarwad or of a Nambudri

111am is binding on the family. Innes, J., held differing from Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi ILR (1880) M

328 that

Every member of the tarwad is interested in the joint property and ought to be made a party or have notice u/s 30, so that he may have the option

of coming in as a party in any suit, the object of which is to affect the property.

Kernan, J., who agreed with Innes, J., does not observe that Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi ILR (1880) M

328 was wrongly decided but explains the decision on the facts. He observes at page 129:

I fully assent to the proposition that all persons whose interests are sought to be prejudicially affected by a suit, should be parties to it. But there are

exceptions to that rule when such interests are considered to be sufficiently represented and protected by parties to the suit.

19. In Gopalan v. Valia Tamburatti ILR (1883) M 87 Sir Charles Turner, C.J., and Kernan, J., observe that

A practice has prevailed in Malabar whereby the Karnavan has been recognised as representing the tarwad and entitled to sue or defend suits as

such representative without the association of the other members of the tarwad,

who were nevertheless held bound by decrees passed in such suits, unless they showed mala fides in their representative. This practice had its origin in convenience but now that the Code of Civil Procedure, Section 30, contains a special provision to obviate the inconvenience, where a number of persons in the same interest have occasion to assert or defend their rights by suit, it may be doubted how far the practice would be now upheld and it is advisable that resort should be had to the provisions of Section 30, Civil Procedure Code.

20. In *Ittichan v. Velappan* ILR (1885) M 484 it was held that although the property of a Tarwad may be attached and sold in execution of a decree when the Karnavan is sued as representative of the Tarwad, members of the Tarwad who are not parties to the proceedings and have not been represented in the manner prescribed by the Code of Civil Procedure, are not estopped from showing that the debt for which the decree was passed was not binding on the Tarwad.

21. The principle of this decision is explained by Muttuswami Aiyar, J., in *Sri Devi v. Kelu Eradi* ILR (1887) M 79. In another case, *Thanakoti v.*

Muniappa ILR (1885) M 496, in the same volume, the decision in a suit, in which some ryots of the village claimed the right to use water during the

day-time which right was common to themselves and other villagers, was held not to bar a subsequent suit for the same relief in assertion of the

same right by persons who are not parties to the previous suit. Hutchins, J., held on the facts that in the previous suit, the claim was not on behalf of

the others, but it was for damages caused to himself individually, and the suit was not a representative suit u/s 30, nor was it under the law as it

existed before the amendment of the Code. Kernan, J., observes at page 499:

One party having a right in common with others is not at liberty or authorised to sue in his own name to establish the right of the others except by

their authority. Explanation 5 must be read with the provisions of Section 30 and the principles to be found in that section.

22. In *Sri Devi v. Kelu Eradi* ILR (1887) M 79 it was held that the junior members of the Pathirakat Arikkar Tarwad were entitled to recover

property of which the Tarwad was dispossessed in execution of a decree against the Karnavan and senior Anandravan on proof that the decree

was not substantially correct. The learned Judges explain at page 83 the grounds

of the decision of the Full Bench in *Ittichan v. Vclappan* ILR

(1885) M 484. They observe:

It was held by the Full Bench that the intention to implead the Karnavan as representative of the Tarwad must appear from the proceedings in the

first suit, and that the debt recognised by the decree must be binding on the entire Tarwad.

23. They observe at page 82:

The decision in *Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi* ILR (1880) 328 is a clear authority for the position that

Explanation 5 of Section 13 of the CPC is not limited to the case of a suit in which the provisions of Section 30 were complied with, and we

should follow it if subsequent decisions did not throw doubt upon it.

The question whether a Karnavan could represent the Tarwad in a properly framed suit is only one of historic interest as it has been definitely

settled by the Full Bench in *Vasudevan v. Sankardn* ILR (1897) M 129 : 7 MLJ 102. It was held in that case

a decree in a suit in. which the Karnavan of a Nambudri Illam or a Marumakkatayam Tarwad is, in his representative capacity, joined as a

defendant and which he honestly defends is binding on the other members of the family not actually made parties.

Mr. Ramachandra Aiyar relies upon some of the observations of the learned Judges in the case, but the question turned upon the principle of

substantive law whether a Karnavan could represent the Tarwad so as to bind it. The Karnavan of a Nambudri Illam or a Marumakkatayam

Tarwad could bind the Illam or Tarwad when he acts in a representative capacity. Shephard, J., observes at page 139:

The 30th section is of a permissive character. So far as concerns the principle involved there was nothing new in the provision. It had been acted

on before the Code of 1877 came into force [*Srikhanti Naraya-nappa v. Indupuram Ramalingam* (1866) 3 MHCR 226].

24. Subrahmanya Aiyar, J., observes at page 142, after referring to the case of Hindu widows with reference to reversioners and other persons

having an estate analogous to that of a Hindu widow,

In the cases last mentioned the limited owners possess the representative capacity to sue or defend by virtue of their position. This, as already

shown, is eminently true in the case of a Karnavan. Consequently, he does not require the aid of Section 30 to be a representative, but has the

inherent right to act as such, provided, of course, there is in the particular case no conflict between his own interest and that of the family.

25. In *Srinivasa Chariar v. Raghava Chariar* ILR (1899) M 28 : 1899 7 MLJ 281 Shephard, J., held that Section 30 was only an enabling

provision and a suit was not liable to be dismissed by reason of the failure of the plaintiffs to obtain permission given u/s 30 of the old Code. The

omission could be rectified at any stage if objection is taken by the defendants. The above are the cases of the Madras High Court which take a

different view from the view in *Gudimolla Rangamma and Another Vs. Panchangam Narasimhacharyulu and Others*, , *Gopalacharyulu v.*

Subbamma ILR (1919) M 487 : 1919 38 MLJ 493 , *Chenraya Goundan v. Athappa Goundan* (1923) 18 LW 177, *Varanakot Narayanan*

Namburi v. Varanakot Narayanan Namburi (1880) ILR 2 M 328 and *Madhavan v. Keshavan* ILR (1887) M 191.

26. In *Muhammad Amir- v. Sumitra Kuar* ILR (1914) A 424 it was held by Sir Henry Richards, C.J., and Sir Pramadha Charan Banerji, J., that

where a suit had been brought by two persons as members of the public for a declaration that certain property was waqf property, and it had been

decided that the property in question was not waqf, the decision operated as res judicata in the case of any other similar suit which might be

brought by other members of the public as such claiming a similar declaration. The learned Judges held that the previous litigation was a bona fide

one and that the plaintiffs were litigating as members of the public and not in the private capacity. In *Baiju Lal Parbatia v. Bhulak Lal Pathnk* ILR

(1897) C 385 it was held that Section 30 of the Code was an enabling provision and did not debar the plaintiffs from suing in their own right in that

case. Ameer Ali, J., at page 389, observes:

That section (meaning Section 30) is, as has been already pointed out, an enabling section and must be read, it seems to me, in conjunction with

Explanation 5 to Section 13 of the Civil Procedure Code.

27. In *Shankarlal v. Dakar Temple Committee* (1925) 28 Bom. LR 309 it was held that Order 1, Rule 8, Civil Procedure Code, is merely an

enabling rule and does not prevent a representative suit being brought in any

manner that the law permits.

28. The principle of Section 30 was given effect to before it was enacted. A representative suit could be brought by a few persons in order to

obtain a relief common to them as well as a number of other persons. In *Srikhanti Narayanappa v. Indupuram Ramalingam* (1866) 3 MHCR 226

it was observed:

Convenience requires that in suits where there is community of interest amongst a large number of persons, a few should be allowed to represent

the whole; and if the whole body be represented in the suit, then it is proper that the whole body should be bound by the decree, though some

members of the body are not parties named in the record.

29. The learned Judges Bittleston, Ag. C.J., and Ellis, J., after considering the English practice held that the principle of representation should be

applied to the members of a Hindu village community. In *Anandrav Bhikaji Phadke v. Shankar Daji Charya* ILR (1883) B 323 West, J., observes:

The case of *Jenkins v. Robertson* (1867) LR 1 App. Cas. 117 is instructive in this respect and indicates that it may be consistent with general

principles that certain judicial proceedings taken by, or against, a select number as representing a large class may, if fairly and honestly conducted,

bind or benefit the whole class.

30. Before Section 30 was enacted, the practice was in vogue, both in Bombay as well as in Madras, for persons to bring a representative suit to

obtain relief in respect of a right common to themselves as well as others and the decision in such a suit was held to bind the persons whom they

represented provided the right claimed was litigated bona fide. The terms of the Explanation 6 of the present Code which are the same as the terms

of the Explanation 5 of the old Code except for the addition of the words "public right" are so wide as to include cases where the right common

to the plaintiffs on record as well as others is litigated bona fide in the interest of the whole class, and there is no warrant in any other provisions of

the Code to limit it only to cases coming u/s 30 or to cases where persons, either by law or by act of parties, are entitled to represent the others

whose names do not appear as parties on the record. It is urged that there is danger in giving a literal interpretation to Explanation 6, for, if a few

persons are allowed to sue on behalf of a large community, the community would

be bound by the decision in the suit litigated bona fide, though the case might not have been placed in all its aspects owing to the ignorance of the plaintiffs or their inability to secure evidence which would really help them. On the other hand, a right which is common to the members of a numerous community should not be litigated for every infraction by a few persons coming forward each time as plaintiffs and thereby harassing the defendants who are obliged to defend several actions in protecting their rights. It is unnecessary to pursue this speculation any further. As there is a serious conflict of authority on the point, we think a reference ought to be made to the Full Bench of the High Court for a clear decision on the point. We would therefore refer the following question to the Full Bench:

Is Explanation 6 to Section 11 controlled by Order 1, Rule 8 of the Civil Procedure Code, so as to render 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 res judicata by reason of a decision given after bona fide contest in a previous suit

filed without leave u/s 30, Civil Procedure Code, 1877, by some other members of the community claiming the same right and seeking to enforce it

on behalf of the community?

Ramesam, J.

31. The facts of the case are fully stated in the referring judgment and need not be repeated here. The question referred to the Full Bench is stated as follows:

Is Explanation 6 to Section 11 controlled by Order 1, Rule 8 of the Civil Procedure Code, so as to render 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 res judicata by reason of a decision given after bona fide contest in a previous suit

filed without leave u/s 30, Civil Procedure Code, 1877, by some other members of the community claiming the same right and seeking to enforce it

on behalf of the community?

32. As was pointed out at the time of the argument by my Lord the Chief Justice, the word "" render "" in the second line seems to be a slip for

prevent"" ; the sentence will then run "" so as to prevent a subsequent suit... on behalf of themselves and the community being res judicata

33. The idea is, if Order 1, Rule 8 does not control Explanation 6 to Section 11 and the Explanation has its full effect unhampered by any other

consideration, then there is res judicata; if Order 1, Rule 8, controls Explanation 6, that is, effect is not to be given to Explanation 6 on the ground

that the procedure in Order 1, Rule 8, is not followed, then there is res judicata. The question referred to us is, which of these two alternatives is to

be adopted?

34. It is true that Explanation 5 to Section 13 in the Code of 1877 corresponding to Explanation 6 to Section 11 of the present Code was

introduced for the first time along with other explanations in the Code of 1877 and Section 30 of that Code corresponding to Order 1, Rule 8, of

the present Code was also introduced for the first time in that Code following the enactment of Order XVI, Rule 9, in 1873 in the Supreme Court

Rules of Practice in England. Prior to the Code of 1877, that is, in the Act of 1859, there is nothing corresponding to Section 30 of the Codes of

1877 and 1882 and the section relating to res judicata was a very general section without the explanations which appear in the Codes of 1877,

1882 and 1908. But this does not mean that the principles of the law of res judicata were changed or underwent an alteration in 1877. In theory

the law was always the same and the same principles were always applied ; only the expression of that law in the form of a section in the Code as

required by Indian conditions underwent alterations as time went on. A representative suit by some persons only on behalf of a large class similarly

interested was allowed both in England and India prior to 1877 and if such a suit was bona fide litigated, the judgment in it was held to bind

persons not actually parties to the litigation. In the *Duke of Bedford v. Ellis* (1901) App. Cas. 1. Lord Macnaghton observes as follows:

There is no reason whatever for so restricting the rule, which was only meant to apply the practice of the Court of Chancery to all divisions of the

High Court. The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice, the Court required the

presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so

numerous that you never could ""coma at justice"", to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience : for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.

35. Again at page 10, he observed:

I doubt whether it is accurate to say that in the case of representative suits we have advanced a long way since the days of Lord Eldon. It is, of course, not necessary nowadays to go to a Court of Law in order to establish legal rights. But in all other respects I think the rule as to representative suits remains very much as it was a hundred years ago.

From the time it was first established it has been recognised as a simple rule resting merely upon convenience. It is impossible, I think, to read such

judgments as those delivered by Lord Eldon in *Adair v. New River Co.* (1805) 11 Ves. 429 : 32 ER 1153 and in *Cockburn v. Thompson* (1809)

16 Ves. 321 : 33 ER 1005 without seeing that Lord Eldon took as broad and liberal a view on this subject as anybody could desire.

36. Earlier at page 9 Lord Macnaghton mentions the case of *Chaytor v. Trinity College* (1796) 3 Ans. 841 as one of the earliest applications of the

rule. The case in *Commissioners of Sewers of the City of London v. Gellatly* (1876) 3 Ch. D 610 is a good example (vide Daniel's Chancery

Practice, Vol. I, page 175). When, in the year 1866, it was held by the Madras High Court that the decree in a former suit defining the boundary

between two villages was binding on the inhabitants of one of the villages in a later suit though they were not parties to the former suit on the

ground that the former suit was a representative one [*Srikhanti Narayanappa v. Indupuram- Ramalingam* (1866) 3 MHCR 226] they were merely

following the well-established English practice. The learned judges observe:

This principle of representation is acted upon in English Courts of Common Law.

37. They refer to *Queen v. The Inhabitants of Haughton* (1853) 1 El.& Bl. 501 : 118 ER 523 and proceed:

The same principle is recognised by the English Courts of Equity, when they allow suits to be maintained by a few expressly for themselves and

others with whom they have a community of interest, as by some inhabitants of a parish for themselves and the rest.

38. Similarly in *Anandrav Bhikaji Phadke v. Shankar Daji Charya* (1883) ILR 7 B 323 at 328 West, J., observed at page 328:

The case of *Jenkins v. Robertson* (1867) LR 1 App. Cas. 117 is instructive in this respect, and indicates that it may be consistent with general principles that certain judicial proceedings taken by, or against, a select number as representing a large class may, if fairly and honestly conducted, bind or benefit the whole class....

39. In the last mentioned case which was from Scotland, though it was held that there was no *res judicata* on the ground that the former litigation

terminated in a compromise, all the Scotch Lords were agreed that but for that fact the former decision would have barred the second suit as *res*

judicata. It appears therefore that even prior to 1877 (1873 in England) if there was a properly constituted representative suit and the trial in it

proceeded on the footing of representation, the judgment in it may bind in a later litigation persons who were not actually parties to it. The cases

falling under Explanation 6 after 1877 may be grouped under the following heads:

1. Where permission has been expressly granted by the Court u/s 30. This is a plain case and it is conceded by both parties that the decision in the

earlier suit will bar the later suit as *res judicata*.

2. Though no permission was sought or was given u/s 30, still some of the parties sue or are being sued in a representative capacity. Where a

plaintiff sues in a representative capacity he has authority to so represent other persons not parties to the suit under the general law. Where a

defendant is being sued in a representative capacity he has similarly authority under the general law to represent other persons not parties and he is

himself willing to conduct the litigation on behalf of such others.

Examples of the second heading easily occur in Hindu Law and Malabar Law. Where the manager of a Hindu joint family sues or is being sued on

behalf of the family, where the Karnavan of a tarwad sues, or is being sued on behalf of the tarwad, or where a Hindu father sues or is being sued

as manager of a sub-branch consisting of himself and his sons, the manager, Karnavan or the father, as the case may be, acting in a representative

capacity will bind others whom they represent. As to the case of a Malabar

tarwad there is a very large number of decisions of this Court which are quoted in the referring judgment. I do not think it is necessary to refer to them in detail. They begin with Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi ILR (1880) M 328 and end with the decision of the Full Bench in Vasudevan v. Sankaran (1897) ILR 20 M 129 : 7 MLJ 102 (FB), in which the matter was finally set at rest. It is unnecessary to discuss these cases because Mr. Ramachandra Aiyar, the learned vakil for the respondents, conceded the correctness of the last Full Bench decision. He concedes that Section 30 is not confined to cases where leave is expressly sought for and obtained but will cover cases where under the law a person like the Karnavan of a tarwad has authority to represent other persons not parties to the suit.

3. Where the trustees of a temple sue or are being sued, for example, the case Madhavan v. Keshavan ILR (1887) M 191, where the litigation by certain Uralars of a Devaswom was held to bind the other Uralars. But Mr. Ramachandra Aiyar distinguishes this case on the ground that in such cases the idol of the temple is the real party in both suits and there is no question of one party representing another. Though he is able to distinguish the case in Madhavan v. Keshavan ILR (1887) M 191 in this way because it happened to be a case of trustees of a Hindu temple, I doubt whether the said ground of distinction will be available in cases of private trust. In a case where there are a number of trustees (not of a religious institution but) acting on behalf of some cestui que trust under some trust deed and only some of the trustees are sued, I fancy the decision would be the same as in Madhavan v. Keshavan ILR (1887) M 191. Both the cestuis que trustent and the other trustees would be bound by a litigation conducted bona fide by some only of the trustees and the distinction suggested by Mr. Ramachandra Aiyar will not be applicable in such a case. So far as the cestuis que trustent are concerned it may be said that they claim through the trustees but as to the co-trustees, Explanation 6 must be invoked. But apart from the above three categories there may still be a large number of cases which cannot be labelled under a particular heading and in which there may be several persons with similar interest and some only may sue but purporting to sue on behalf of all the others. If in such a case permission of the Court u/s 30 was not sought for by oversight and the

Court itself overlooks the necessity for the procedure u/s 30, what is the result of final decree in the case? This is really the point to be decided before us. Mr. Ramachandra Aiyar contends in such a case that the failure to obtain leave u/s 30 is fatal and that the suit cannot be regarded as a representative suit. His contention amounts to this : A suit is representative or not according as leave is given u/s 30 or not in all cases where there is no authority under the general law. I agree with Mr. Ramachandra Aiyar's contention to this extent, namely that, where a person acting in a representative capacity has no authority under the general law, if his litigation is to be a representative one so as to bind others, he must at least get authority from the Court; but this does not necessarily mean that such authority from the Court should be necessarily in the form of an order on a petition filed u/s 30 of the Code of Civil Procedure. If a suit filed by a plaintiff in a representative capacity was allowed to proceed in that character without objection by the defendant and by the Court and if a general issue is framed so as to put in issue the right of the whole class in whom it is alleged to exist and the evidence adduced is of a general character and the findings, the judgment and the decree are also perfectly general in their nature, I do not see why such a judgment should not bind persons not parties to the suit in spite of the fact that no application was filed u/s 30 and no order passed on it. The object of Section 30 in the Codes of 1877 and 1882 and of Order XVI, Rule 9 in the Supreme Court Rules was merely to make more definite some kind of procedure which was previously going on for more than 100 years in England and India. The prior procedure was apparently not regulated by any enactment and was more a matter of practice left to the discretion of the individual Judges. Later on, it took a more definite shape the object being to impose some safeguards and to avoid possible hardships in the working out of the rule of res judicata by reason of representative suits. It was supposed that a special notice to the persons having any right where they are not numerous, or a general notice where they are very numerous, and the provision permitting any of them to be made parties would avoid any possible hardship or injustice arising out of the rule of res judicata by reason of Explanation 6. But if the exact procedure prescribed in the section is not followed though the suit proceeds in a representative capacity, it does

not follow that the character of the suit is altered. All that can be said at the most is that there is an irregularity. It is possible sometimes that the

irregularity may be serious; and if there is any reason to think that the serious irregularity has led to collusion or fraud or a grossly negligent conduct

of the case, then the Court will hold that the litigation was not carried on bona fide and will not hold a later suit barred by *res judicata*. But when

there is no ground to suspect that the irregularity was serious or led to collusion or fraud, or by reason of want of publicity the case was conducted

in an improper manner, the irregularity is by itself no ground for holding that Explanation 6 is not applicable. The irregularity may be an element in

considering the question whether the former litigation was conducted bona fide. [See e. g., *Kumaramdy Kudumban v. Venkatasubramania Aiyar*

(1926) 52 MLJ 641]. But in spite of the irregularity, if one comes to the conclusion that the conduct of the litigation was bona fide, the irregularity

itself does not matter : in other words, I am of opinion that Explanation 6 to Section 11 is not controlled by Order 1, Rule 8, of the Code of Civil

Procedure. I may here observe that it is not correct to say that the power of one person to represent others when there is no authority under the

general law is based on their consent as was supposed by Kernan, J., in *Thanakoti v. Muniappa* ILR (1885) M 496, where he says:

Unless the other plaintiffs were aware of the suit of plaintiff 3 and authorised him to make the claim for them, plaintiff 3 would have had no authority

to claim on their behalf so as to bind them from afterwards bringing their own suit.

40. I think the real basis of the power to represent in such a case is derived from the action of the Court in permitting the action to go on on that

basis. The consent of the others need not be obtained, *Markt & Co., Ltd. v. Knight Steamship Company, Ltd., Sale & Frazar v. Knight*

Steamship Company, Ltd. (1910) 2 K B 1021. Examples of cases in which similar conclusion was reached are not wanting. In *Gudimolla*

Rangamma and Another Vs. Panchangam Narasimhacharyulu and Others, Sadasiva Aiyar and Moore, JJ., held that one *Agraharamdar* was

bound by the result of a former litigation in which he was represented by another *Agraharamdar* and the litigation was conducted bona fide; but no

order was obtained under Order 1, Rule 8 in that case. *Res judicata* followed because the issue raised a very general question applying to all the

Agraharamdars. It might have been prudent for the Court to follow the procedure in Order 1, Rule 8 in that case. But the fact that they did not follow, did not make it less *res judicata*. The decision in *Gopalacharyulu v. Subbamma* ILR (1919) M 487 : 38 MLJ 493 was also a case of Agraharamdars. Wallis, C.J., and Spencer, J., held that Explanation 6 applies not only to cases to which the procedure in Section 30 applied but also to other cases and it was in terms wide enough to include accidental slips where no real prejudice has been caused. These two cases were sought to be distinguished by Mr. Ramachandra Aiyar on the ground that the parties there were not numerous and Section 30 could not in strictness be applied. He also argues that *Gudimolla Rangamma and Another Vs. Panchangam Narasimhacharyulu and Others*, was wrongly decided. These two cases were followed in *Chenraya Goundan v. Athappa Goundan* (1923) 18 LW 177, which was a case of trustees of a temple. In *Chandu v. Kunhamed* ILR (1891) M 324 : 1891 1 MLJ 529 it was held in a suit by a mortgagee of one share, that the decision in a previous suit on a general issue whether the paramba was partible or not bound the other sharers in a later litigation. It is true that this was, overruled by a Full Bench in a later case. But the ground was that the other so-sharer who was sought to be bound when asked to join the plaintiff refused to join and when impleaded as a defendant remained *ex parte* and he was not interested in the decreeing of the prior suit. Several other cases referred to by Mr. Ramachandra Aiyar, such as for instance the decisions in *Srinivasa Chariar v. Raghava Chariar* ILR (1899) M 28 : 1899 7 MLJ 281, relying on *May v. Newton* (1886) 34 Ch. D 347, *Walker v. Sur* (1914) 2 KB 930 and *Thedla Ranganayakamma v. Maddi Jagayya* (1926) IndCas 375, *Baijn Lal Parbatia v. Bhulak Lal Pathuk* ILR (1897) C 385 are not decisions holding that the absent parties were not bound in the later litigation but either granting leave u/s 30 or refusing to grant such leave. Observations occur in these cases discussing the binding nature of the decree without leave being obtained u/s 30, but they are in the nature of *obiter dicta*.

41. In *Muhammad Amir v. Sumitra Kuar* ILR (1914) A 424 Richards, C.J., and Banerji, J., held that the decision in a suit by two persons as members of the public for a declaration that certain property was *waqf* was binding upon the other members of the public claiming a similar

declaration. All that we have got to see is whether the former suit was allowed by the Court to proceed to the end as a representative suit and

whether the suit was considered by that Court in that way. If this test is satisfied, what procedure was actually followed is not strictly pertinent to

the matter.

42. In the present case the learned Judges who referred the matter to the Full Bench observe:

We are satisfied that no permission was applied for orally or in writing and that no permission was granted expressly or impliedly u/s 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 Vaniyars interested along

with the plaintiffs to worship in the Tiruchendur Temple as alleged by the plaintiffs.

43. As I understand this observation, especially the portion of it using the word "" impliedly "" what the learned Judges meant to say is that no order

purporting to be u/s 30, either expressly mentioning the section, or without mentioning it but merely with reference to it, was passed. But lower

down the same page they observe:

From the pleadings, from the issue, from the way in which evidence was adduced and the number of witnesses examined and the contentions of the

parties appearing in the judgment we have no hesitation in holding that the suit was brought to assert not merely the title of the plaintiffs but also the

right of the Vaniyars to enter the Mahamantapam of the temple and the relief asked for was not one personal to the plaintiffs but one which was

common to them as well as to all the Vaniyars. The mere addition of a claim for damages does not change the nature or the character of the suit

which was one for the establishment of the right of the whole community of which the plaintiffs were members. That the suit was litigated bona fide

cannot be disputed. A large number of witnesses were examined; various documents were produced and every attempt was made to prove the

case to the hilt.

44. Though no order was passed u/s 30 impliedly or expressly, when we remember that that section was only a section laying down a definite

procedure for what was somewhat indefinite prior to 1877 but otherwise really attaining the same object as before, it is still open to the learned

Judges to find whether the Subordinate Judge who tried the former suit with reference to the issues, findings, etc., meant to allow the suit to

proceed in a representative capacity for the benefit of all Vaniyars. As I think there is no express finding and as it is a question of fact, we have

nothing to do with the matter. I only observe that it is open to them to so find if they choose to do so with reference to the pleadings, the issues,

judgment and decree.

45. My answer to the reference is that Explanation 6 to Section 11 is not controlled by Order 1, Rule 8.

William Phillips, Kt., Officiating C.J.

46. I agree.

Beasley, J.

47. I agree.