His finding on issue (1) was as follows :—

"That the grant in question is not one made for future services and that there is no evidence to show that it is one made for past services."

His findings on issues (2) and (3) were as follows :—

"I, therefore, find issue (2) in the negative and on issue (3), I find that the devaswam became aware of its right to eject on account of forfeiture of the denial of title only in 1912."

This Second Appeal coming on for final hearing after the return of the findings of the lower Appellate Court the Court delivered the following

JUDGMENT.

We accept the finding and dismiss the Second Appeal with costs. (One set.)

K.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice and Mr. Justice Spencer.

SRIMAN MADABHUSHI GOPALACHARYULU (TENTH DEFENDANT), APPELLANT,

v.

EMMANI SUBBAMMA AND SEVENTEEN OTHERS (DEFENDANTS NOS. 3, 6, 7 TO 9, 11, 12, 14, 15 AND LEGAL REPRESENTATIVES OF SECOND DEFENDANT AND PLAINTIFF'S LEGAL REPRESENTATIVES), RESPONDENTS.*

1919, November 25 and December 16.

Civil Procedure Code (Act V of 1908), section 11, Explanation V and O. I, r. 8—Res judicata—Private right claimed in common by several persons—Suit by some, others being impleaded as defendants—Bona fide litigation—Decision, whether binding on representative of deceased defendant, not brought on record.

Explanation V to section 11, Civil Procedure Code, applies not only to cases where leave of Court has been granted under Order I, 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.

A decision in a suit, instituted and conducted bona fide by some only of agraharamdars of a village against the zamindar and the other agraharamdars

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* Second Appeal No. 465 of 1918.

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for a declaration as to the kattubadi payable by them to the zamindar, is res judicata against the representative of an agraharamdar who was a defendant but died pending the appeal and whose legal representative was accidentally not brought on record either in the appeal or the second appeal.

Rangamma v. *Narasimha Charyulu*, (1916) 31 M.L.J., 26, followed.

SECOND APPEAL against the decree of G. GANGADHARA SOMAYAJULU, the Temporary Subordinate Judge of Ellore, in Appeal Suit Nos. 391 and 402 of 1915, preferred against the decree of K. KALYANASWAMI, the District Munsif of Tanuku, in Original Suit No. 483 of 1914.

Two of the agraharamdars of Gopavaram Agraharam instituted a suit, Original Suit No. 56 of 1901, on the file of the Subordinate Judge's Court at Rajahmundry, against the Receiver of the Nidadavolu Estate and the zamindar who claimed the zamindari, for a declaration that the Receiver was entitled to kattubadi only at the rate of Rs. 550 per annum on Gopavaram Agraharam. The other agraharamdars were also impleaded as defendants in the suit. The Receiver contended that the zamindar was entitled to a higher amount of kattubadi, viz., Rs. 714-14-0 per annum. The Subordinate Judge decreed the suit in favour of the plaintiffs. There was an Appeal, Appeal Suit No. 451 of 1905, and a Second Appeal in that case and the High Court remanded the Appeal to the District Judge for fresh disposal. The District Judge, on remand, passed a decree declaring that Rs. 714-14-0 was the correct kattubadi payable on the Gopavaram Agraharam. A Second Appeal No. 838 of 1911, was preferred against the above decree of the District Judge, but was dismissed by the High Court. One of the agraharamdars, namely, Prathivadhi Bhayankaram Rukmaniamma, had been joined as the sixth defendant in Original Suit No. 56 of 1901. She was joined as a respondent in Appeal Suit No. 451 of 1905, but she died in March 1908 during the pendency of the appeal in the District Court, but neither in the District Court, nor in Second Appeal to the High Court, was the legal representative of the deceased sixth defendant brought on record, but the name of the deceased sixth respondent was still kept on the record of the Appeal and Second Appeal. The present suit (Original Suit No. 483 of 1914) was instituted by the Receiver of the Nidadavolu Estate for recovering kattubadi due for faslis 1320 to 1322 at the rate

declared in the previous suit. The suit was brought against the agraharamdars, one of whom, the tenth defendant, claimed to be the legal representative of Rukmaniamma, who was the sixth defendant in the previous suit as already stated. The plaintiff contended that the decision as to the amount of kattubadi in the previous litigation was res judicata in the present suit; the tenth defendant pleaded that it was not res judicata, as Rukmaniamma, under whom he claimed, died before the remand order in the High Court, and her legal representative was not brought on record in the later proceedings in the previous suit. Both the Lower Courts held that it was res judicata and decreed the suit. The tenth defendant preferred this Second Appeal.

The Hon'ble *T. R. Ramachandra Ayyar* and *T. R. Krishnaswami Ayyar* for the appellant.

P. Venkataramana Rao for the seventeenth respondent.

WALLIS, C.J.

WALLIS, C.J.—The subject of this suit is the amount of the kattubadi payable to the plaintiff zamindar by the defendants who are agraharamdars, and the question argued before us is whether this is res judicata against the tenth defendant by reason of the decree in Second Appeal No. 838 of 1911 confirming the decree in Appeal Suit No. 451 of 1905, which decided the question against the agraharamdars, reversing the decree of the Subordinate Judge in their favour.

In Civil Suit No. 56 of 1901, in the Court of the Additional Subordinate Judge's Court of Rajahmundry, two of the agraharamdars sued the Receiver of the Nidadavolu Estate and the zamindar for a declaration that the kattubadi was only Rs. 550, joining the other agraharamdars as defendants.

The Additional Subordinate Judge of Gōdāvari gave the plaintiffs a decree in Civil Suit No. 56 of 1901, which was reversed on 1st December 1910 by the District Judge of Kistna in Appeal Suit No. 451 of 1905. Prathivadhi Bhayamkaram Rukmaniamma, one of the agraharamdars through whom the present appellant (the tenth defendant) claims, was impleaded as the sixth defendant in the former suit and as the fourth respondent in the Appeal to the District Court. She died in March 1908 nearly three years before the disposal of the appeal and the

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appellant, who was the Receiver of the Nidadavolu Estate, failed to bring on her legal representatives, nor were they made parties in the Second Appeal to this Court preferred by the plaintiffs in Second Appeal No. 838 of 1911. The District Judge has found the amount of the kattubadi in the present case to be res judicata against the tenth defendant, Sriman Madhabushi Gopalacharyulu, on the ground that he was impleaded in the Second Appeal as the representative of the deceased Rukmaniamma, but this appears to be an error as Prathivadhi Bhayankaram Gopalacharyulu who was impleaded as the fourth respondent in the Second Appeal was the ninth defendant in the original suit and a different person from the present tenth defendant.

We must take it then that no legal representative of Rukmaniamma, through whom the tenth defendant claims, was brought on after her death either by the contesting defendant in his appeal to the District Court or by the plaintiffs in their Second Appeal to this Court. It has none the less been argued before us that the suit is res judicata as against the tenth defendant by virtue of Explanation VI of section 11 of the Code of Civil Procedure, Act V of 1908, which says that

"where persons litigate bona fide in respect 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."

It is clear from the judgment of the District Judge in the previous suit, which was confirmed in Second Appeal, that the plaintiffs in the previous suit were litigating on behalf of themselves and the other agraharamdars, whom they joined as defendants, because they were unwilling to sue as plaintiffs, as regards the amount of kattubadi, and that they obtained a decree in the Munsif's Court which was reversed by the District Judge on the ground that the full amount of kattubadi claimed by the contesting defendant, the Receiver of the Estate, was payable; and the position therefore is that Rukmaniamma, the sixth defendant and her heirs were not represented in the Appeal when the District Judge set aside the decree, which the plaintiffs had obtained on her behalf as well as their own, or in the Second Appeal preferred by the plaintiffs in which that decision was affirmed. If there had been no Appeal to the District Court

from the decree of the Subordinate Judge, the issue as to the kattubadi would apparently have been res judicata in her favour, by virtue of the Explanation, although she had been impleaded only as a defendant and had remained ex parte, because the relief had been claimed on her behalf—see *Somasundara Mudali* v. *Kulandaivelu Pillai*(1); and equally of course it would have been res judicata against her if her representative had been properly impleaded in the Appeals. The question whether the Explanation is applicable although Rukmaniamma was not represented either in the appeal or in the Second Appeal is of considerable difficulty. The Explanation was first enacted as Explanation V of section 13 of the Code of 1887 in which section 30 (now Order I, rule 8) was first enacted. Section 30 again was taken with an important modification from Order XVI, rule 9, of the new Rules of the Supreme Court which embodied the practice of the Court of Chancery in representative suits, as explained by Lord ELDON in *Cockburn* v. *Thompson*(2). Order XVI, rule 9, of the Rules of the Supreme Court under the Judicature Act provided that

"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 authorized by the Court of a Judge to defend in such cause or matter, on behalf of or for the benefit of all persons so interested,"

and where a plaintiff properly so sues, the persons whom he represents are bound: *Markt & Co., Limited.* v. *Knight Steamship Co., Ltd.*(3). This rule was reproduced in section 30 of the Code of 1877, with this important modification that the permission of the Court is required to enable the plaintiff to sue in such a case, whereas under Order XVI, rule 9, no such permission is required in the case of plaintiffs. It therefore follows that in India the legislature considered that a plaintiff ought not to be allowed to represent the other parties interested in the case mentioned in the section without the leave of the Court. Section 11 and the Explanation were enacted at the same time, and must be read together, and it has sometimes been stated that the Explanation is applicable only to cases where the consent of the Court to the institution of the suit had been given

(1) (1905) I.L.R., 28 Mad., 457 (F.B.).
(2) (1809) 16 Ves., 321. (3) [1910] 2 K.B., 1021.

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under section 30 : *Thanakoti* v. *Muniappa*(1), *Baiju Lal Parbatia* v. *Bulak Lal Pathuk*(2), *Srinivasa Chariar* v. *Raghava Chariar*(3). 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. This is the view taken in *Rangamma* v. *Narasimhacharyulu*(4), but before coming to that decision it is desirable to refer to the other decisions of this Court which have been cited. In *Varankot Narayanan Namburi* v. *Varankot Narayanan Namburi*(5), it was merely held that a decree against the karnavan of a Malabar tarwad was binding on the other members of the tarwad, even though no order under section 30 had been obtained. This proceeded on the ground that the karnavan sufficiently represented the other members of the tarwad without any order under section 30, and even where the section was in terms inapplicable, as where the members of the tarwad are not numerous. Similarly a widow sufficiently represents her husband's estate ; and the nearest reversioner, it is now settled, sufficiently represents other reversioners in contesting an adoption which would exclude them all. This case does not seem to me to help us, as the other members of the tarwad were properly represented throughout the litigation by the karnavan. In *Thanakoti* v. *Muniappa*(1) a ryot had sued for damages to his crops, caused by the defendants' diversion of certain water, which the plaintiff claimed to be entitled to along with the other ryots of the village. The suit was dismissed on the ground that they had not the right claimed, but the Explanation was held not to debar other ryots, not parties to the former suit, from bringing similar suits. This decision proceeded on the ground that the Explanation was inapplicable as the plaintiff in

(1) (1885) I.L.R., 8 Mad., 496. (2) (1897) I.L.R., 24 Calc., 385.
(3) (1900) I.L.R., 23 Mad., 28. (4) (1916) 31 M.L.J., 26.
(5) (1880) I.L.R., 2 Mad., 328.

the first suit had not sought any relief for the other ryots, which is in accordance with the subsequent ruling of the Full Bench in *Somasundara Mudali* v. *Kulandaivelu Pillai*(1), but the judgment also contains the following observations as to the effect of the Explanation:

"Now, unless the other plaintiffs were aware of the suit of plaintiff No. 3 and authorized him to make the claim for them (of which there is neither allegation nor evidence), plaintiff No. 3 would have had no authority to claim on their behalf so as to bind them from afterwards bringing their own suit. One party having a right in common with others is not at liberty or authorized to sue in his own name to establish the right of 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. If that section had been followed, which it was not, then the other plaintiffs would be bound."

These observations may be read as meaning that in such a case the other ryots could not have been bound unless they were impleaded in the former suit on an order obtained under section 30. That in my opininon might properly be so, because a plaintiff who sued on their behalf without impleading them could not be considered to be litigating on their behalf bona fide, i.e., with due care and attention, and the Explanation should not be read as setting at nought the ordinary rules as to the joinder of parties. Be that as it may, it is a very different case from the present one. In *Madhavan* v. *Keshavan*(2) it was held that, where four out of five trustees sued to recover trust property, the trust which was the real plaintiff was sufficiently represented and bound by the decision, and that the fifth trustee was not entitled to sue again on its behalf. The decision was so understood by the Full Bench in *Somasundara Mudali* v. *Kulandaivelu Pillai*(1) and does not, I think, really help either side. In *Chandu* v. *Kunhamed*(3) certain members of a Muhammadan family sued to recover their share in certain land joining the other members of the family as defendants, and it was held that a subsequent suit by a plaintiff claiming under one of these defendants for the recovery of that defendant's share was barred under the Explanation, but

(1) (1905) I.L.R., 28 Mad., 457 (F.B.).
(2) (1888) I.L.R., 11 Mad., 191. (3) (1891) I.L.R., 14 Mad., 324.

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this decision was afterwards overruled by the Full Bench in *Somasundara Mudali* v. *Kulandaivelu Pillai*(1), following the Full Bench in *Surender Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry*(2), on the ground that the plaintiff had not been suing in the first suit on behalf of the other members of the family impleaded as defendants, but merely claiming his own share. *Latchanna* v. *Saravayya*(3) was to the same effect, and was also overruled by the Full Bench in *Somasundara Mudali* v. *Kulandaivelu Pillai*(1). It was held by the Full Bench in that case, overruling the decisions just cited, that where a co-sharer sues for his own share impleading the other co-sharers as supplemental defendants but not claiming any relief for them, the decision is not res judicata against them, although they were parties to the suit.

In these cases the Court had not to consider a case where the plaintiff in the second suit had not been impleaded in the first suit or properly represented in it by virtue of an order under Order I, rule 8, or otherwise.

The only decision of this Court governing the present question appears to be *Rangamma* v. *Narasimhacharyulu*(4), where it was held upon the language of the Explanation that the decision in a suit brought by one agraharamdar to recover the suit property for himself and the other agraharamdars, fourteen of whom were impleaded as defendants Nos. 3 to 16 and remained ex parte, was res judicata in a subsequent suit for the same reliefs brought by the fourth defendant so impleaded and another agraharamdar who for some reason had not been made a defendant in the previous suit. The learned Judges held that the plaintiff in the former suit had been litigating bona fide in respect of a private right claimed in common for himself and others, and that the second plaintiff, though not a party to the suit, was bound by virtue of the Explanation.

The language of the Explanation may seem dangerously general and EDGE, C.J., has observed in *Ram Narain* v. *Bisshishar Prasad*(5), that we should be careful in applying it, and that it should not be applied to any case which does not come within its

(1) (1905) I.L.R., 28 Mad., 457 (F.B.).
(2) (1886) I.L.R., 13 Calc., 352. (3) (1895) I.L.R., 18 Mad., 184.
(4) (1916) 31 M.L.J., 26. (5) (1888) I.L.R., 10 All., 411.

very wording. I entirely agree, and should certainly hesitate to hold that any litigation had been bona fide, within the meaning of the Explanation, in which there had been a substantial departure from the accepted rules as to the joinder of parties, as for instance by suing without the leave of the Court in a case properly falling under Order I, rule 8, or in suits as regards public rights, without the authority prescribed in sections 91 and 92. At the same time, I cannot say, on the strictest construction, that the plaintiff's litigation in the earlier suit in this case was otherwise than bona fide within the meaning of the section. He impleaded all the other agraharamdars as defendants, including Rukmaniamma through whom the present tenth defendant claims, and they remained ex parte. When she died after being impleaded as a respondent in the first defendant's Appeal to the District Court and before the hearing of the Appeal, the failure to bring on record her legal representatives was due to the default of the other side. When the plaintiff appealed to this Court from the decree of the District Court, the fact that he did not implead the representative of the deceased sixth defendant who had been ex parte in the first Court, and whose legal representatives had not been brought on by the other side in the District Court, cannot in my opinion be said to constitute such a want of bona fides as to render the Explanation inapplicable. On this ground, therefore, I would support the Subordinate Judge's finding that the tenth defendant in this suit, who claims through the sixth defendant in the previous suit, is bound by res judicata, and would dismiss the Second Appeal with costs.

WALLIS, C.J.

SPENCER, J.—The question to be decided is whether the decision of the District Judge of Kistna, in Appeal Suit No. 451 of 1905, dated 1st December 1910 (Exhibit A in these proceedings), confirmed in Second Appeal by the High Court in Second Appeal No. 833 of 1911 on 7th August 1913 (Exhibit XVII), is res judicata against the tenth defendant, who is the appellant before us, on the point of Rs. 714-14-0 being the correct amount of kattubadi payable by the agraharamdars on the Gopavaram Agraharam. It appears that the sixth defendant in that suit, whose name was Prathivadhi Bhayankaram Rukmaniamma, was dead at the time when the High Court passed its remand order on 17th September 1909, and when the District Judge delivered

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his judgment on 1st December 1910, although her name was still kept on the record. The Subordinate Judge is of opinion that this defect is cured by the fact that the tenth defendant was on the record as Rukmaniamma's legal representative, when the High Court judgment finally disposing of the Second Appeal was passed on 7th August 1913.

The District Judge's judgment in Appeal Suit No. 451 of 1905 shows the name of Prathivadhi Bhayankaram Gopalacharyulu as sixth respondent and the same individual's name appears as fourth respondent in the High Court's judgment.

The tenth defendant's name is Sriman Madhabhushi Gopalacharyulu. The Subordinate Judge therefore appears to be in error in his statement that this tenth defendant was added as the legal representative of Rukmaniamma in the Second Appeal to the High Court.

A suit instituted for settling the amount of kattubadi due to the receiver of the estate upon this agraharam was one in which all the agraharamdars were necessarily interested. In *Venkatasubramaniyam* v. *Rajah of Venkatagiri*(1) it was recently held, by KRISHNAN, J., and myself, that agraharamdars are jointly and severally liable for all the jodi payable on their agraharam. We followed prior decisions of this High Court in *Ellaiya* v. *Late Collector of Salem*(2), *Ramayya* v. *Subbarayudu*(3), and *Sobhanadhi Appa Rau* v. *Gopalkristnamma*(4).

Under Explanation VI to section 11, Civil Procedure Code, when there is a final decision by a competent Court in respect of a private right claimed in common by parties to the suit and others and the litigation is conducted bona fide, all persons interested in that right are bound by the result of the litigation.

In *Rangamma* v. *Narasimhacharyulu*(5), it has been held by SADASIVA AYYAR and MOORE, JJ., that this Explanation is not confined to suits brought under Order I, rule 8, by a few persons representing a numerous class after obtaining the Court's permission, and after giving notice to others who may be interested. This decision followed the dictum in *Varankot Narayanan Namburi* v. *Varankot Narayanan Namburi*(6), under the Code of 1859.

(1) S.A. Nos. 359 and 1789 of 1918 (unreported).
(2) (1866) 1 M.H.C.R., 59.
(3) (1890) I.L.R., 13 Mad., 25.
(4) (1893) I.L.R., 16 Mad., 34.
(5) (1916) 31 M.L.J., 26.
(6) (1880) I.L.R., 2 Mad., 328.

That was a case where a declaratory decree had been obtained against the karnavan of a tarwad. A decree to which a karnavan is a party binds the other members of the tarwad, because he is their recognized representative in suits, as was well settled by a Bench of four Judges, in *Vasudevan* v. *Sankaran*(1). But *Rangamma* v. *Narasimha Charyulu*(2), and the case before us are instances of private rights claimed by some individuals in common with others rather than as representatives of a body of persons. *Somasundara Mudali* v. *Kulandaivelu Pillai*(3), was a Full Bench case under the Code of 1882. The words "claimed in common," occurring in Explanation V to section 13 of that Code, and repeated in Explanation VI of the present Code, are explained therein as referring to rights to relief which would benefit such parties by being granted, and give them such an interest as would enable them to join as co-plaintiffs under section 26 (now Order 1, rule 1).

There can be no doubt that agraharamdars have such a common interest, for as each agraharamdar can be made to pay the whole of the jodi if others do not pay, all are equally interested in the demand being decreased to the lowest possible figure, or at least not being increased.

Judged by this standard, I feel clear that the decision in A.S. No. 451 of 1905 is binding on the parties to this suit, including the tenth defendant, as that litigation was, so far as it appears, conducted bona fide.

But Mr. T. R. Ramachandra Ayyar has sought to draw a distinction in a case where a party is represented at one stage of the suit and afterwards ceases to be represented owing to a failure to bring his legal representatives on record. If such cases are to be made exceptions to the general rule, it would be necessary to import words into Explanation VI to section 11, which are not there. "All persons interested in such right," must then be understood as meaning, "all persons who are not already parties to the suit and are interested in such right."

I see no reason to put such a limited construction on the plain words of the explanation.

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(1) (1897) I.L.R., 20 Mad., p. 129. (2) (1916) 31 M.L.J., p. 26.
(3) (1905) I.L.R., 28 Mad., 457 (F.B.).

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I agree with my Lord the Chief Justice that the Lower Court's decision is right and that this appeal should be dismissed with costs.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Coutts Trotter.

1920, January 20, 21 and 27.

KING-EMPEROR (COMPLAINANT), APPELLANT,

v.

MESSRS. A. M. HOOSANALLY & CO., REPRESENTED BY ALLY MUHAMMAD SAMSUDDEEN AND THREE OTHERS (ACCUSED), RESPONDENTS.*

Income-tax Act (VII of 1908), sec. 24, proviso 2, 39 (d), 40 and 41—Failure to produce accounts—Prosecution under sec. 39 (d)—Penal Assessment—Levy of, whether a bar to prosecution—Bar under sec. 24, proviso 2, whether applicable.

Section 24, proviso 2, of the Indian Income-tax Act, does not bar the prosecution of an accused for an offence under section 39 (*d*) of the Act, for failure to produce accounts, when penal assessment had been levied on him, under section 24, in consequence of his making a false return of his income.

APPEAL against the order of acquittal of E. H. M. Bower, the Fourth Presidency Magistrate, Egmore, in Calendar Case No. 6850 of 1919 (Georgetown Court).

The respondents, who are a firm of traders in Madras, were called upon by the Collector of Income-tax, Madras, to submit a return of their income for assessment of income-tax. On 12th August 1918, they furnished a return showing an income of Rs. 18,836-12-0 As the Collector was not satisfied with the truth of their return he issued notice to them, under section 18 of the Act, to produce their account books on 4th February 1919. They failed to produce their account books, in pursuance of the notice, nor did they appear before him on a subsequent notice issued to show cause why they should not be prosecuted under section 39 (*d*) of the Act. The Collector thereupon by an order, dated 13th March 1919, directed their prosecution under the said section and a complaint was accordingly made on 3rd April 1919,

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* Criminal Appeal No. 650 of 1919.