APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Cornish.

1937, March 16.

SWAMINATHA ODAYAR (SIXTH RESPONDENT), APPELLANT,

v.

T. S. GOPALASWAMI ODAYAR AND SIXTEEN OTHERS (RESPONDENTS 2 AND 3; THIRD PETITIONER, RESPONDENTS 9, 10, 27, 28, 31, 33 TO 37 AND NIL), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XLI, r. 20—"Person interested in the result of the appeal" within the meaning of—Test to be applied to find out who is.

In order to find out whether a person is "interested in the result of the appeal" within the meaning of Order XLI, rule 20, of the Code of Civil Procedure, the test to be applied is, would the parties not impleaded be prejudiced by modifications made behind their backs in the decree under appeal?

Subramanian Chetty v. *Veerabadran Chetty*(1) followed. *V. P. R. V. Chokalingam Chetty* v. *Seethai Acha and others*(2) relied on.

APPEAL against the decree of the Court of the Subordinate Judge of Kumbakonam dated 26th September 1932 and passed in Interlocutory Application No. 695 of 1930 in Original Suit No. 22 of 1924.

V. Radhakrishnaiya and *S. Ramanuja Ayyangar* for appellant.

T. R. Venkatarama Sastri and *K. S. Desikan* for third respondent; *N. A. Krishna Ayyar* for first and second respondents; *T. R. Srinivasa Ayyangar* for fourth respondent; *S. Venkatesa Ayyangar* for fifth respondent; *S. R. Subramania Ayyar* for sixth respondent; *P. R. Ganapathi Ayyar* and *N. K. Ananta Padmanabhan* for seventh respondent; *K. Bashyam Ayyangar* and *V. C.*

* Appeal No. 60 of 1933.

(1) (1908) I.L.R. 31 Mad. 442. (2) (1927) L.R. 55 I.A. 7; I.L.R. 6 Ran. 29.

Veeraraghavan for eighth and ninth respondents ; *R. Viswanathan* and *S. Thiagarajan* for eleventh, twelfth and thirteenth respondents ; *R. Rajagopala Ayyangar* for sixteenth and seventeenth respondents ; *K. S. Sankara Ayyar* for eighteenth respondent ; *S. Sankara Ayyar* for nineteenth respondent ; *T. Krishnaswamy Ayyar* for twentieth respondent.

Respondents ten, fourteen and fifteen were unrepresented.

Cur. adv. vult.

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The JUDGMENT of the Court was delivered by VENKATASUBBA RAO J.—An objection which ought to have been taken *in limine* has been raised at the closing stage of a long argument, to the effect that the appeal is incompetent on account of certain parties not having been added as respondents. We do not at present propose to set out the history of this long-drawn litigation, for it is sufficient to state just a few facts in order to deal with the contention raised. This was a partition suit commenced nearly two decades ago and the members of the family, to which the action relates, owned considerable properties when it started, but they have since been reduced, with the exception of the sixth defendant, to such straits that some are represented by the assignees in insolvency, and the others by the trustees under a composition deed. The only solvent member of the family now is the sixth defendant and he is the appellant before us. There are several memoranda of objections in the nature of cross-appeals which have been filed. The principal contesting respondent is the third defendant represented by the Receiver in insolvency and

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the preliminary objection referred to above has been raised by his Counsel, Mr. Venkatarama Sastri. In the action, originally the family was divided into three branches; the first consisting of the plaintiff, the second of defendants 1 and 2 and the third of defendants 3 to 8. The preliminary decree of the trial Court passed in 1924 separately allotted to the sixth defendant of the third branch a distinct share, the integrity of this branch not having been otherwise disturbed. We must observe that defendants 3, 4, 5, 7 and 8 form two sub-families; (i) defendant 3 and his sons defendants 5 and 7 and (ii) defendant 4 and his son defendant 8. An appeal from the preliminary decree was filed here, and during its pendency the third defendant was adjudicated insolvent in 1925 and the fourth defendant in 1927. With only one aspect of the appellate decree passed by the High Court we are now concerned, namely, that it effected a further sub-division of shares as between the third and the fourth defendants. The ultimate position as settled by the High Court's decree, so far as the shares were concerned, was this:

	SHARE.
(1) Plaintiff	1/5th
(2) Defendants 1 and 2... ...	4/15ths
(3) Defendant 6	4/15ths
(4) Defendant 3 and his sons, defendants 5 and 7 ...	2/15ths
(5) Defendant 4 and his son, defendant 8 ...	2/15ths.

The case went back to the trial Court which in due course passed a final decree, which the sixth defendant as the appellant now attacks.

The preliminary decree, which was confirmed by the High Court, has held defendants 3 to 8

jointly accountable to the other branches of the family in respect of certain matters, that is to say, the question, as between defendants 3 to 8 on the one hand and the plaintiff and defendants 1 and 3 on the other, is concluded by the judgment already pronounced by the High Court; but the point yet remained to be decided, namely, as among themselves (i.e., defendants 3 to 8) how much of this common burden was each of the sub-groups to bear, in other words, how much was to be borne by the third defendant's sub-group consisting of himself and his sons, defendants 5 and 7, and how much by the fourth defendant's sub-group consisting of himself and his son, defendant 8, and how much by the sixth defendant? The learned Subordinate Judge, after dealing under various heads with sums of money amounting to several lakhs, passed a final decree, containing in the result, *inter alia*, the following directions:

(i) The sixth defendant shall pay Rs. 2,177-9-0 to the plaintiff's branch, Rs. 10,515-7-6 to defendants 1 and 2, and Rs. 18,385-1-6 to the fourth defendant's branch.

(ii) The third defendant's branch shall pay the fourth defendant's branch Rs. 10,932-2-3.

The sixth defendant complains that the Subordinate Judge has wrongly apportioned the liability, his contention being that, had the learned Judge given effect to correct legal principles, a large amount would have been found payable to him by the third defendant's branch.

The preliminary objection arises thus. While the third and the fourth defendants (through the Official Receiver of West Tanjore and the Official Assignee of Madras respectively) have been

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impleaded as respondents to the present appeal, their sons have not been, and it is argued that their non-joinder is fatal to the appeal. Mr. Radhakrishnayya, the appellant's learned Counsel, in answer contends that the sons of the third and the fourth defendants, though proper parties and might have been joined as a matter of convenience, are not necessary parties. This argument, in our opinion, is well founded. The lower Court throughout refers to the entities known as the third defendant's branch and the fourth defendant's branch; nowhere does it in its long judgment refer to their sons as possessing any individual or distinct interest. Indeed, they have been so treated as if their individuality has become merged in that of their fathers and their separate existence has not been recognized or even noticed. This is not surprising, as the judgment of the High Court did not direct an *inter se* division, notwithstanding that their fathers had been adjudicated insolvents. What is more, when the various points bearing on the question of the apportionment were being considered in the lower Court all the parties concerned assumed without hesitation that the Official Receiver in each case represented adequately and properly the interests of the sub-family as a whole; not a single point seems to have been put forward as affecting the interests of the sons as distinct from those of their fathers. In fact, if the sub-group gained, each member of it gained also; if it lost, it was equally patent that every member likewise lost. This being so, the learned Subordinate Judge in the decretal portion of his judgment directs the third defendant's branch to pay and the fourth defendant's

branch to receive. Though, therefore, in the lower Court the sons were formally on the record, they had no separate entity and the decree passed does not recognise their existence. They are in our view therefore proper but not necessary parties to this appeal. The appellant's Counsel, however, as a matter of expediency and convenience, now applies that they should be added as respondents. Much time and money has already been wasted and every step should be taken, if possible, to prevent the remnant of this estate from being wrecked. We therefore comply with his request and direct the sons or their representatives to be joined.

Granting, however, that the parties sought to be added are not merely proper but necessary parties, the effect of whose non-inclusion is fatal to the appeal, the question arises, whether the defect can be cured under Order XLI, rule 20, Civil Procedure Code, which runs thus:

> "Where it appears to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent."

Mr. Venkatarama Sastri broadly argues, relying upon the decision of the Judicial Committee in *V. P. R. V. Chokalingam Chetty* v. *Seethai Acha and others*(1), that no person, against whom the right of appeal has become barred, can ever be added as a respondent under this provision. We are unable to agree that this is the effect of the decision cited above. It must be remembered that

(1) (1927) L.R. 55 I.A. 7; I.L.R. 6 Ran. 29.

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their Lordships' judgment delivered by Sir JOHN WALLIS confirmed the judgment of the Rangoon High Court in *V. P. R. V. Chokalingam Chetty and one* v. *Seethai Acha*(1) and that the Judges of the Rangoon Court in their judgment followed the Madras decision in *Subramanian Chetty* v. *Veerabadran Chetty*(2) to which Sir John WALLIS was himself a party. The point is fully and clearly dealt with in the Madras case, and to understand the Privy Council decision we must turn to the exposition of the law contained in the judgment of the Madras High Court. Now let us turn to the facts in *V. P. R. V. Chokalingam Chetty* v. *Seethai Acha and others*(3) to appreciate the real import of that decision. There were two suits, but, for the present purpose, it is sufficient to advert to one of them. The plaintiff there challenged the transfer made by the insolvent to the first defendant and by the first to the second defendant, Singaram Chetty, the defendant in possession. The District Judge dismissed the suit, holding that the sales were perfectly valid and not benami as alleged. The plaintiff filed an appeal to the High Court at Rangoon, but did not implead the first defendant as a respondent. The constitution of the appeal was impeached on the ground that the first defendant, a necessary party, had not been impleaded. An application was then made under Order XLI, rule 20, but the learned Judges rejected it, holding that the first defendant, who was sought to be newly added, was not "a person interested in the result of the appeal" within the meaning of the decision in *Subramanian Chetty* v. *Veerabadran Chetty*(2) which they were prepared

(1) (1924) I.L.R. 2 Ran. 541. (2) (1908) I.L.R. 31 Mad. 442
(3) (1927) L.R. 55 I.A. 7; I.L.R. 6 Ran. 29.

to follow. In the last-mentioned case the learned Judges (WHITE C.J. and WALLIS J.) explain that the section was inserted

> "to protect parties to the suit who had not been made respondents in the appeal from being prejudiced by modifications made behind their backs in the decree under appeal".

Then, turning to the words "interested in the result of the appeal", the learned Judges observe that they imply that the party whom it is sought to bring on record must be shown to be interested in the result of the appeal before he is brought on, for,

> "once he is brought on, he may be said to acquire an interest as a result of being brought on".

Now, applying that test, it is perfectly clear that in the Rangoon case the first defendant, whom it was sought to bring on the record newly, was not a person "interested in the result of the appeal". Supposing the appeal had gone on, and as a result, the sale in favour of the second defendant, Singaram Chetty, had been set aside by the appellate Court, how could it be said that the absent first defendant was "interested in the result of the appeal"? The decision of the High Court could not in the slightest degree affect the trial Court's finding (which had become *res judicata*), that as between the plaintiff and the first defendant the sale was perfectly valid. In that case, therefore, the first defendant had no possible interest in the result of the appeal; it mattered little to him whether it succeeded or failed. It is unnecessary to refer at any length to the facts of *Subramanian Chetty* v. *Veerabadran Chetty*(1), but it will be seen that there, as in the Rangoon case, the parties newly sought to be added were not interested in

(1) (1908) I.L.R. 31 Mad. 442.

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the result of the appeal; in other words, to them it was a matter of perfect indifference whether the appeal was allowed or rejected.

The test in each case therefore is, as put in the Madras case, would the parties not impleaded be prejudiced "by modifications made behind their backs in the decree under appeal"? Let that test be applied here. Supposing the appellate decree modifies the trial Court's decree by imposing a larger burden upon the third defendant, what happens? The sons are not directly affected by the appellate decree, they not being parties to it. That is undoubtedly so, but yet the result of any diminution of their father's assets will *ipso facto* be to diminish the extent of their own assets; in other words, in the language of *Subramanian Chetty* v. *Veerabadran Chetty*(1), they will be

> "prejudiced by modifications made behind their backs in the decree under appeal".

Ma Than May v. *Mohamed Eusoof*(2), upon which the third defendant's Counsel relies, does not, if properly understood, help him. There, the second defendant, who was sought to be impleaded, does not answer the description of a person "interested in the result of the appeal". He had obtained a certain right under the trial Court's decree and that right, whatever might happen to the appeal, could not have been affected by its result. Thus, the actual decision in *Ma Than May* v. *Mohamed Eusoof*(2) does not conflict with the view we have taken. Granting therefore that the parties sought to be added are necessary, as distinguished from, proper parties,

(1) (1908) I.L.R. 31 Mad. 442. (2) (1931) I.L.R. 9 Rang. 624.

we have no doubt whatever that Order XLI, rule 20, applies.

A little reflection will show that Mr. Venkatarama Sastri's contention cannot be correct, for, as already observed, according to him no person against whom the right of appeal has become barred, can ever be added as a respondent under this provision. If this argument be sound, Order XLI, rule 20, can never be brought into play ; it must for all practical purposes remain a dead letter. It is difficult to conceive a case where the right of appeal does not become barred as against a party not impleaded by the time the appeal comes on for hearing ; for under the rule, be it noted, the action to be taken is at the hearing of the appeal.

Lastly, it remains to observe that the power given to the Court is discretionary under the rule in question. The point then is, in view of all the circumstances of the case, is the discretion to be exercised in favour of the appellant or not? In the first place, it is significant that, although the fifth defendant had died about two years previous to the judgment under appeal, no one thought it necessary to bring his representatives on the record in the lower Court. So much for the fifth defendant. Now turning to the seventh, it is not a little strange that, even in the decree passed by the lower Court in 1932, he was described as "minor male child, not named". That was the way in which he was originally described in the plaint filed in 1919 ; he still remained in 1932 "a minor, not named". That shows what little importance was attached to his presence on the record. Secondly, the same Advocate, curiously

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enough, represented in the lower Court the appellant and the seventh defendant, although their interests directly conflicted. Now turning to the eighth defendant (the fourth defendant's son), it is inexplicable how he came to be represented by the same Advocate as represented the twenty-seventh respondent. A glance at the decree will show how their interests conflicted. Our object in referring to these facts is to point out that in the lower Court no one thought that the sons possessed any interest whatever which required a separate representation. Thirdly, as already observed, under the lower Court's judgment the sons had no separate entity, which fact might well have misled the appellant. Strong grounds exist therefore in our opinion to induce us to exercise our discretion in favour of the appellant.

The question then is, what is the proper order to make? The fifth defendant, as already observed, had died during the pendency of the suit in the lower Court. In this case, from the previous judgment of the High Court there was an appeal filed to the Privy Council by the ninth defendant with whom we are not concerned at this stage. In that appeal, the fifth defendant's sons (two in number) were brought on the record as his legal representatives. It has been held in *Brij Indar Singh* v. *Kanshi Ram*(1) that the substitution of a new party for one stage of a suit is effective for all future stages of that suit; we may therefore regard the fifth defendant's sons as having been constructive parties to the suit in the lower Court. We learn that one of these two sons

(1) (1917) L.R. 44 I.A. 218; I.L.R. 45 Cal. 94.

has since died ; we therefore direct the surviving son of the fifth defendant, the seventh defendant and the eighth defendant to be added as respondents. Notice will issue to them immediately and the further hearing of the appeal is adjourned to 30th March 1937.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Venkataramana Rao.

KUPPU GOVINDA CHETTIAR (PLAINTIFF), PETITIONER,

v.

UTTUKOTTAI CO-OPERATIVE SOCIETY BY ITS LIQUIDATOR (DEFENDANT), RESPONDENT.*

1937, January 29.

Court Fees Act (VII of 1870) as amended by Madras Act (V of 1922), sch. II, art. 17-A (iii)—Co-operative society—Liquidator of—Order of, under sec. 42 (2) (b) of the Co-operative Societies Act (Indian) (II of 1912)—Suit for declaration that such order is null and void—Court-fee payable on.

The court-fee on a plaint which prays for a declaration that the order of a liquidator of a co-operative society determining the amount of contribution payable by the plaintiff under section 42 (2) (*b*) of the Co-operative Societies Act is null and void has to be calculated under article 17-A (iii) of Schedule II to the Court Fees Act (VII of 1870) as amended by Madras Act (V of 1922).

PETITIONS under sections 115 of the Code of Civil Procedure (Act V of 1908) and 107 of the Government of India Act, praying the High Court to revise the orders of the District Court of Chingleput in Original Suits Nos. 1 and 12 of 1935 respectively.

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* Civil Revision Petitions Nos. 692 and 693 of 1936.