from the credibility of the plaintiff whose deposition was accepted by the court below. This application is without force. I accordingly dismiss it with costs.

Application dismissed.

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MUHAMMAD HASHIM v. MISRI.

FULL BENCH.

Before Justice Sir Pramada Charan Banerji, Mr. Justice Piggott and Mr. Justice Walsh.

1921 *December*, 8.

SHIAM LAL (DEFENDANT) *v.* MUSAMMAT LALLI AND OTHERS (PLAINTIFFS).*

Civil Procedure Code (1908), *order I, rule* 8—*Suit in representative capacity—Suit not invalidated by omission to publish notice.*

Order I, rule 8, of the Code of Civil Procedure (1908) requires that when a plaintiff brings a suit in a representative capacity he must first obtain the leave of the court to bring such a suit, and when the leave is granted, the court shall issue notice that the suit has been instituted. The provisions of the section as to the issue of notice are peremptory and the court is bound to issue notice as required by the rule. If, however, the court omits to issue notice, the result is not necessarily that the entire suit is vitiated and must be dismissed. The irregularity may be cured in appeal by the appellate court remanding the case to the court of first instance in order that the omission may be repaired. *Mukh Lal Singh* v. *Jagdeo Tewari* (1) referred to. *Dhunput Singh* v. *Paresh Nath Singh* (2) referred to by PIGGOTT, J.

THE facts of this case are as follows :—

The suit was brought by the respondents, who were residents of a certain mohalla in the city of Agra and sought to prevent the defendant from interfering with a *chabutra* which they alleged had been dedicated as a shrine and set apart for the use of the residents of the mohalla. The suit was instituted in a representative capacity under order I, rule 8, of the Code of Civil Procedure and the plaintiffs obtained what is called 'a representation order' from the court of first instance. Notice of the institution of the suit was, however, not given to the numerous persons interested—in this case the other residents of the mohalla—as required by the aforesaid rule, and this apparently was due to an oversight on the part of the officer of the court.

*Second Appeal No. 408 of 1920 from a decree of T. K. Johnston, District Judge of Agra, dated the 26th of February, 1920, confirming a decree of Tufail Ahmad, Munsif of Agra, dated the 11th of June, 1919.

(1) (1908) I. L. R., 35 Calc., 1021. (2) (1893) I. L. R., 21 Calc., 180.

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The Munsif of Agra decreed the suit and the lower appellate court confirmed the Munsif's decree.

The defendant appealed to the High Court, contending that the plaintiff's entire suit was vitiated by the absence of the required notice and should be dismissed.

The appeal originally came before WALSH, J., at whose instance it was referred to a Full Bench.

Munshi *Harnandan Prasad* (for Munshi *Narain Prasad Ashthana*), for the appellant :—

The issue of the notice under order I, rule 8, of the Code of Civil Procedure was necessary. The Legislature having used the word 'shall', the provision of law was not complied with if no notice was given. This case was referred to this Full Bench as there appeared to be a conflict of authorities between *Jawahra* v. *Akbar Husain*, (1) and *Gulba* v. *Basanta* (2). In cases like this, the issuing of notice in accordance with order I, rule 8, of the Code of Civil Procedure is not a mere simple formality. It is a condition precedent and the case could not be proceeded with unless the permission to sue in a representative capacity was made perfect by the court's issuing the required notice. The court was bound to do a certain act and having failed to do that, it had no jurisdiction to proceed with the case. A number of questions might have arisen if the notices had been served on the other persons interested and those questions had to be decided before the case could be proceeded with. The court ought to have issued the notices before the permission to sue in a representative capacity could be availed of. The language used in the rule is clear. The words 'but' and 'shall' are significant. The suit having ceased to be representative it became of a private nature. The original suit fails because the decree obtained was not the decree sought.

Pandit *Mangal Prasad Bhargava*, for the respondent :—

The suit was instituted in accordance with the provisions of law as laid down in order I, rule 8, of the Code of Civil Procedure. Notices were not issued to the persons interested, owing to the negligence of the court. It appeared that the office was to be blamed for that. It was the duty of the court

(1) (1884) I. L. R., 7 All., 178. (2) (1910) I. L. R., 32 All., 284.

to cause service of notices and the plaintiffs ought not to suffer for the court's negligence nor should the suit be dismissed. I am supported by *Mukh Lal Singh* v. *Jagdeo Tewari* (1). Reference was also made to *Ganapati Ayyan* v. *Savithri Ammal* (2), *Monmotho Nath Das* v. *Harish Chandra Das* (3), *Baiju Lal Parbatia* v. *Bulak Lal Pathuk* (4) and *Dhunput Singh* v. *Paresh Nath Singh* (5).

Munshi *Harnandan Prasad* in reply:—

None of the cases referred to help the plaintiffs. In fact I. L. R., 35 Calc., 1021, supports the defendant in a way. If other members of the mohalla had been parties to the suit they might have supported the defendant. The provisions of order I, rule 8, of the Code of Civil Procedure, must be strictly complied with. I rely on *Harbans Narain Singh* v. *Bhajoo Nonia* (6).

BANERJI, J. :—In the city of Agra there is a mohalla called mohalla Poorabyan in which there is a platform. To the west of that platform is the house of the defendant and between the house and the platform there was a wall in which, according to the lower appellate court, there was a niche which was worshipped by some residents of the mohalla. The present suit was instituted by two persons residing in that mohalla, one of whom stated that her father, one Pooran, had made a dedication of the land on which the platform exists to a deity called *Bhuinya* and that the platform had been built on the land and had been used by all the residents of the mohalla. The other plaintiff, who is a resident of the mohalla, also made statements to the same effect. Their complaint is that the defendant has set up a door in his wall and has also opened out a portion of the wall which separated his house from the chabutra and has thereby opened a passage over the chabutra. They accordingly instituted the present suit for an injunction restraining the defendant from passing over the chabutra. They also claimed to have the wall, alleged to have been pulled down by the defendant, rebuilt. The plaintiffs distinctly stated in their plaint that they instituted the suit under order I, rule 8, of the Code of Civil Procedure on behalf of all

(1) (1908) I. L. R., 35 Calc., 1021.
(2) (1897) I. L. R., 21 Mad., 10.
(3) (1906) I. L. R., 33 Calc., 905.
(4) (1897) I. L. R., 24 Calc., 385.
(5) (1893) I. L. R., 21 Calc., 180.
(6) (1919) 49 Indian Cases, 796.

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the residents of the mohalla who are interested in the platform. With the plaint they filed an application asking for leave, under order I, rule 8, of the Code of Civil Procedure, to bring the suit on behalf of all the residents of the mohalla. The court granted the leave asked for and made an order to the effect that an advertisement should be made giving notice of the suit apparently to all persons concerned. As a matter of fact no notice was issued and no advertisement was made as directed by the court. The lower appellate court says that this omission was due to the negligence of the officials of the court. In the court of first instance, however, no question was raised by the defendant on the ground that no notice was issued. The defence was that the platform and the site of it belonged to the defendant as his own private property and that he was entitled to use it for passage into his own house. The first court proceeded to try this point, and finding for the plaintiffs made a decree against the defendant. On appeal the question was raised whether the omission to issue a notice was fatal to the suit. That court held against the defendant on the point and on the merits agreed with the court of first instance that the platform was used by the residents of the mohalla as a shrine and was in fact a shrine to which the defendant had no title. On second appeal the question was again raised that, inasmuch as notice was not actually issued as required by order I, rule 8, the suit ought to have been dismissed. The case has been referred to a larger Bench by the learned Judge before whom the second appeal came on for hearing, and he apparently was of opinion that there was some conflict between the ruling of the Full Bench of this Court in *Jawahra* v. *Akbar Husain* (1), and *Gulba* v. *Basanta* (2). These two cases have also been referred to in the argument before us and in my opinion the question we have to decide in this appeal was not considered and decided in those two cases. In the Full Bench case the real point which was decided was whether the plaintiffs could maintain the suit, and it was held that they were competent to do so in their own individual right and the question of their representative capacity was not determined. The same was the case with the other ruling mentioned above. In that case also

(1) (1884) I. L. R., 7 All., 178. (2) (1910) I. L. R., 32 All., 284.

it was held that order I, rule 8, which corresponds to section 30 of the former Code of Civil Procedure, did not apply to that case and that the plaintiffs were entitled to maintain the suit in their own right. There is, therefore, no conflict, in my opinion, between the two rulings to which I have referred. The real point to be considered is whether the omission of the court to issue notice as required by order I, rule 8, vitiates the whole suit and entails a dismissal of it. In my opinion the result of the omission to issue notice is not the dismissal of the suit. It is an irregularity committed by the court which omitted to issue the notice. Order I, rule 8, requires that when a plaintiff brings a suit in his representative capacity he must first obtain the leave of the court to bring such a suit and when the leave is granted, the court shall issue notice that the suit has been instituted. The provisions of the section as to the issue of notice are undoubtedly peremptory and the court was, therefore, bound to issue notice as required by the rule. If the court omitted to issue notice it committed an irregularity, and a grave irregularity, which might be remedied by the appellate court sending back the case to the court of first instance to comply with the requirements of the law. A number of rulings have been cited to us but the only one which seems to me to approach the case most nearly is the decision of the Calcutta High Court in *Mukh Lal Singh* v. *Jagdeo Tewari* (1). In that case the appellate court had dismissed the suit on the ground that notice had not been issued by the court of first instance as required by the section which governed the case. It was held that the suit ought not to have been dismissed, but the court remanded the case in order that the irregularity committed by the court of first instance might be remedied by the issue of notice. It seems to me that this is the proper view to take of the matter now before us, and, as the court of first instauce omitted to issue notice, the right course would be to send back the case to the court of first instance with directions to take up the case at the stage at which it ought to have issued notice and to issue notice and then proceed with the suit and re-try it. I think this is what should be done in all cases in which an omission of this kind

(1) (1908) I. L. R., 35 Calc., 1021.

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occurs. I had, however, considerable hesitation in sending back the case to the court of first instance inasmuch as it seems to me that this irregularity did not affect the case on the merits. It was not the defendant's contention that he had the permission of the other residents of the mohalla to open a door; on the contrary, he was repudiating the rights of the residents of the mohalla who alleged that the platform in question was a shrine which was held by all of them for general worship. The defendant claimed to be the owner of the land and, therefore, the omission of the notice did not, in my opinion, prejudice him on the merits. I am also of opinion that no question of jurisdiction was involved in the case. The learned Munsif was competent to hear the suit but he only committed an irregularity in the exercise of his jurisdiction. However, as my learned colleagues are of opinion that the case should go back to the court of first instance in order that the provisions of law should be complied with and that no court should overlook or omit to carry out what the law requires, I am prepared to agree to an order remanding the case to the court of first instance for the purpose mentioned above.

PIGGOTT, J.:—I concur generally in what has just been said. I felt impressed by the arguments based on the wording of section 99 of the Code of Civil Procedure, and undoubtedly one would hesitate about having a re-trial of a suit of this sort in view of the pleadings and of the case set up by the defendant in the trial court, if it were possible to do so. My real difficulty in this case is that I think that in a sense a question of jurisdiction is involved: that is to say, if the plaintiffs are to be allowed to sue in a representative capacity and if there is a decree in their favour at all on this claim, it must be a decree granted to them in a representative capacity. The court below gave them the required permission, but neglected to comply with the mandatory provisions of the law as to the procedure to be followed in order to make such permission effective. I am much impressed by the view taken by the learned Judges in *Dhunput Singh* v. *Paresh Nath Singh* (1), where they suggest that any permission granted prior to the issue of the notice required by

(1) (1893) I. L. R., 21 Calc., 180 (187).

what is now Order I, rule 8, of the Code of Civil Procedure, is subject to the result of the issue of such notice. In effect, I am inclined to doubt whether, in the absence of such notice, the plaintiffs could hold any thing more than a conditional permission to sue in a representative capacity, granted subject to necessary conditions which were never fulfilled. If so, it becomes doubtful whether the decree in their favour as it stands is really a decree granted to them according to the terms of their claim, that is to say, in a representative capacity. I feel clear in my own mind that, if I had been sitting in place of the learned District Judge of Agra as a court of first appeal, I would have declined to bring this particular case within the scope of section 99 of the Code of Civil Procedure and would have sent it back to the learned Munsif with a direction to obey the clear provisions of the law. I prefer to do as a court of second appeal what I think the lower appellate court should have done, and for this reason I think the order which ought to be passed is as suggested at the close of the judgment of Mr. Justice BANERJI.

WALSH, J.:—I agree with the order proposed. My opinion is that negligence to comply with the provisions of Order I, rule 8, is fatal to the granting of a decree to a plaintiff as representing the inhabitants of a mohalla, such as the plaintiffs seek and have obtained. With regard to the suggestion that this point does not affect the merits of this particular case or the jurisdiction of the court under section 99 of the Code of Civil Procedure, my view is that it does both. Permission in terms of the rule is fundamental to representative procedure. The court has no jurisdiction to ignore or to break its own rules or to grant the decree in the face of a breach of law. No doubt in this case it was an oversight by the court. That makes no difference. We do not know whether the plaintiffs' claim to represent the whole class is well-founded in fact, and the court on hearing objections might refuse the permission sought to sue in a representative capacity. I am quite satisfied that the dismissal of this suit would have bound all the class whom the plaintiffs claim to represent. If the suit is either decreed or dismissed without notice to the class which is supposed to be represented, their mouth is closed. They might no doubt seek

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by application to set the decree aside. In my opinion we ought not to pass a decree which we also think ought to be set aside if it was objected to. The objection should precede and not follow the decree. I agree with Mr. Justice BANERJI that there is no conflict between I. L. R., 32 All., 284 and I. L. R., 7 All., 178, but there is direct conflict between the head-notes. I am now satisfied that the head-note in I. L. R., 32 All., is wrong and misrepresents the decision. It says that the court decided that where numerous persons are similarly interested in the subject-matter of the suit, a suit brought by one or more of the persons for the protection of the rights of all is not bad merely because the plaintiffs have not obtained permission. The insertion of the word 'all' in that head-note alters the entire decision. The word is not to be found in the judgment and it is clear on examination that the court was dealing with a suit by some members suing in their own right and not on behalf of all the members of the community. The case was relied on in argument before me as binding upon me and I was misled by the head-note into thinking that the case conflicts with the principles laid down in I. L. R., 7 All. I merely mention this fact because the expression is repeated twice in the Calcutta decision. To say that order I, rule 8, is not peremptory is likely to create misunderstanding by persons who do not understand what is really meant by the decision. If there were no provision upon the subject in the new Code, the old Code which compelled everybody who was interested in the subject-matter of the suit either to join as plaintiffs or as defendants would presumably be followed. It is the duty of the plaintiff who makes an application unless he can come within such express provision to enable him to sue in his representative capacity to join all persons as parties in his suit. Order I, rule 8, enables him with the permission of the court to dispense with that which would otherwise be necessarily binding upon him, namely, the joinder of other members, and to confine the claim to himself. I agree that the case ought to go back to the court of first instance.

BY THE COURT.—The order of the Court is that the appeal is allowed, the decrees of the courts below are set aside and the case is remanded to the court of first instance through the lower

appellate court with directions to restore it to its original number in the register and to try it after issue of notice as required by order I, rule 8, of the Code of Civil Procedure. The costs of this appeal will follow the event.

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Appeal allowed.

MISCELLANEOUS CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

RAM SUKH (DEFENDANT) *v.* MRS. L. E. O'NEAL (PLAINTIFF).*

1921 *December*, 13.

Regulations—1877—*III* (*Ajmer Laws*), *sections* 6 *and* 9—*Pre-emption*—"*Sale*"—*Possession given and price paid, but no deed of sale executed.*

Held that according to the law in Ajmer-Merwara a right of pre-emption may be enforced where possession of the property claimed has been delivered and the price paid, although no deed of sale has been executed and registered. *Begam* v. *Muhammad Yakub* (1) referred to.

THIS was a reference made under the Ajmer Courts Regulation, 1877, by the Chief Commissioner. The facts out of which it arose are thus stated in the referring order :—

"A resident of Ajmer named Birdha mortgaged his land usufructuarily to one Ram Sukh and subsequently sold it to him for Rs. 400. In order, however, to defeat a possible claim for pre-emption on the part of one Mrs. O'Neal, who owned the adjoining plot, no formal sale-deed was executed. This, at any rate, is the explanation given in the statement of the vendor and he further states that Ram Sukh paid the full price agreed upon and that his possession then changed from that of mortgagee to that of owner. Mrs. O'Neal becoming aware of the transfer filed a suit for pre-emption in respect of the plot of land. The claim was contested by Ram Sukh, who pleaded, *inter alia*, that as there was no regular sale-deed as required by section 54, Transfer of Property Act, there was no legal sale and, therefore, no suit for pre-emption lay. The court of first instance accepted the defendant's plea and dismissed the suit, but the Additional District Judge in appeal, following the ruling in 16 Allahabad, 344, held that the plaintiff had obtained a right of pre-emption inasmuch as the defendant Ram Sukh had in fact purchased the plot

* Civil Miscellaneous No. 356 of 1921.

(1) (1894) I. L. R., 16 All., 344.