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was left open. That decision seems to have proceeded on an interpretation of " loss " which is inconsistent with the later decisions. In effect the question of notice seems to come back to the prior question of loss. If the Railway Company plead want of notice they must show that this case of non-delivery was a case of loss. The position, therefore, on the merits, and on the technical question of notice is precisely the same, viz., the defendant company must plead and prove loss before it can rely either on the risk-note or on want of notice.

The appeal is dismissed with costs including the costs of the first hearing and of the remand.

JWALA PRASAD, J.—I agree.

S. A. K.

Appeal dismissed.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

PANDIT GOBARDHAN MISSIR

v.

SHAMA KANT LALL.*

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Code of Civil Procedure, 1908 (Act V of 1908), Order 1, rule 8—representative suit—Order 1, rule 8, failure to comply with provision of—suit whether maintainable—plaintiff, whether entitled to a decree against defendant before the Court.

Where the plaintiff brought a suit for a declaration, inter alia, that certain lands specified in the plaint belonged to him and that the defendants or any other member of the sabha or of the Hindu community had no right to the same, but no steps were taken by the plaintiff to comply with the requirements of Order 1, rule 8, Code of Civil Procedure, 1908, *held*, that

*Second Appeal no. 1027 of 1925, from a decision of Babu N. R. Chatterji, Subordinate Judge of Gaya, dated the 20th June, 1925, reversing a decision of Babu Nirmal Chandra Ghosh, Munsif of Gaya, dated the 20th December, 1920.

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the suit as framed was intended to be a representative suit and, therefore, was not maintainable as such.

Monmotho Nath Das v. *Harish Chandra Das* (1), followed.

Sajedur Raja v. *Baidyanath Deb* (2), not followed.

Held, further, that although the plaintiff could not get a decree against the sabha or the entire Hindu community, he was entitled to a decree against the defendants before the Court.

Haribans Narain Singh v. *Bhajoo Nonia* (3), followed.

Chuni Lal v. *Ram Kishun Sahu* (4), referred to.

Appeal by the defendants.

This was an appeal by the defendants against the decision of the Subordinate Judge of Gaya reversing the decision of the Munsif and decreeing the plaintiff's suit. There were six defendants in the suit. The first four defendants were the principal defendants and the remaining two defendants were pro forma defendants. The principal defendants were described in the plaint as persons who professed to be the Secretary, the Assistant Secretary, the President, and the Vice-President of a dharmasabha in Gaya. The suit was for a declaration that certain plots of land specified in the plaint and marked as plots nos. 77 and 79 with its goshas *A* and *B* in the map filed with the plaint and lying in the town of Gaya, belonged to the plaintiff and that the defendants nos. 1—4 or any other member of the sabha or of the Hindu community had no right to the same save and except the right of using the portions marked *E. G. H.* in the map as a path for going to and coming from the dharmasabha in plot no. 78 of the map; for a declaration that a latrine in plot no. 79 belonged to the plaintiff and was built by him for the use of his own men and that

(1) (1906) I. L. R. 33 Cal. 905. (3) (1919) 49 Ind. Cas. 796.
(2) (1893) I. L. R. 20 Cal. 897. (4) (1888) I. L. R. 15 Cal. 460 F. B.

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the defendants 1—4 or any other member of the sabha or of the Hindu community had no right to the same; and for delivery of possession over the plots nos. 77 and 79 and of the latrine.

The plaintiff's case was that the 16-annas of the property known as Mahalla Ramna in the town of Gaya belonged to his ancestor Dindayal Lal, on whose death his three brothers, Dirgopal Lal, the father of the plaintiff, Dulli Chand and Kanhaya Lal inherited the property in equal shares of 5-annas 4-pies each, that on the death of Dirgopal Lal his one-third share devolved upon the plaintiff; that there was a partition between the three brothers and in partition suit no. 112 of 1903 of the 1st Subordinate Judge's Court of Gaya the Mahalla Ramna and some other lands and houses representing the one-third share belonging to the plaintiff's father (who died during the pendency of the suit) were allotted to the plaintiff and he was in separate possession of the same, that there was a pucca hall in plot no. 78 of the map annexed to the plaint which was originally built by Dindayal Lal; but as he died without being able to occupy it, the house was considered inauspicious and it was allowed by his three brothers to be used by the Hindu community of the town of Gaya for holding religious meetings under the designation of " Saniti Sancharini Sabha " or " Sanatan Dharmasabha, " and a room attached to the hall was allowed to be used by the Hindu community as part of the hall and that the building came to be known as the " Dharmasabha;" that in the partition between the three brothers this hall and the room attached to it were left undivided, while the rest of the lands on all the four sides of the hall and the room in plot no. 78 were allotted to the plaintiff, and that since then the plaintiff had been in sir possession of the plots nos. 77 and 79 with its goshas until he was dispossessed therefrom on account of an order in a proceeding under section 145 of the Code of Criminal Procedure, instituted at the instance of the defendants, who

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claimed the said lands as appertaining to the dharmasabha.

The plaintiff, therefore, instituted the suit for the reliefs set out above. In paragraph 16 of the plaint the plaintiff denied that the plots in suit were ever the land of the sabha, and that those plots had ever been in use and possession of the sabha as owners thereof. He submitted that the defendants 1—4 or any other member of the sabha or of the Hindu community had no right to those plots, save and except to the use of the portions defined and marked as *E. G. H.* in the map as a path for access to the dharmasabha house. In paragraph 18 of the plaint the plaintiff stated that as numerous persons of the local Hindu community in common with the defendants 1—4 had the same interest, he craved leave under Order 1, rule 8, Civil Procedure Code, to sue the defendants nos. 1—4 as representing all the persons so interested.

The defence of the defendants 1—4 was that the hall in plot no. 78 as well as the plots of land claimed by the plaintiff belonged to the dharmasabha, that the whole piece of land had all along from time immemorial been used for holding religious lectures etc., that the land was dedicated for this purpose, that the hall and the room were built by the sabha with subscription money, and that the sabha and the members and office-bearers thereof had been openly and adversely as of right exercising acts of possession and of ownership over the entire land. They denied the title as well as the possession of the plaintiff and set up the plea of limitation. In paragraph 10 of their written-statement these defendants alleged that they were only some of the office-bearers of the dharmasabha and they alone could not defend the suit on behalf of the sabha or of the entire Hindu community interested therein and that the affairs of the sabha were looked after and managed by an executive committee which ordinarily consisted of the office-bearers and about eleven other members.

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Various issues of fact and law were raised, and the first issue was as to whether the suit was tenable as laid. The contention of the defendants was that there had been no compliance with the provisions of Order 1, rule 8 of the Civil Procedure Code and, therefore, the suit was not maintainable. The Munsif found that no permission had been given by the Court and no notices were issued as directed by Order 1, rule 8. The Munsif, however, relying on a decision of the Calcutta High Court in *Sajedur Raja* v. *Baidyanath Deb* (1) was of opinion that there was no necessity for the issue of notices or advertisements under Order 1, rule 8, and that the non-compliance with the requirements of the said rule was not fatal to the maintainability of the suit. He, however, found on the merits against the plaintiff and dismissed the suit.

On appeal the Subordinate Judge confirmed the decision of the Munsif. There was a Second Appeal to the High Court and the decision of the Subordinate Judge was set aside and the appeal was remanded for re-hearing. After remand the appeal was heard by another Subordinate Judge who set aside the decree of the Munsif and decreed the entire claim of the plaintiff.

Defendants 1—4, therefore, came up in Second Appeal to the High Court.

P. Dayal, (with him *Kailaspati*, *S. Dayal*, *N.K. Prasad II*, *Kedar Nath Verma*, *B. K. Prasad* and *Satdeo Sahay*), for the appellants.

Rai Guru Saran Prasad and *Chowdhry Mathura Prasad*, for the respondents.

KULWANT SAHAY, J. (after stating the facts set out above, proceeded as follows:)—It is contended on behalf of the defendants 1—4 that the suit was not maintainable on account of non-compliance with the

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provisions of Order 1, rule 8, Civil Procedure Code; that the learned Subordinate Judge has not considered the material documents produced in evidence on behalf of the defendants in deciding the queston as regards the title of the plaintiff; that the learned Subordinate Judge has not considered the entire evidence as regards the plaintiff's possession; and, that, in any event, even if the plaintiff has title, he cannot get actual possession because the defendants had acquired a customary right by way of easement to hold meetings, etc., on the lands in suit.

As regards the points other than the one relating to the maintainability of the suit, it is clear that the learned Subordinate Judge has considered all the documents as well as the oral evidence in the case. His findings are that it had been clearly proved by the oral and documentary evidence that Mahalla Ramna belonged to the plaintiff, that Dindayal Lal had built the hall and, because it proved inauspicious, his brothers allowed it to be used by the Hindu community as a dharmasabha buildings, that there was no dedication, that the whole of Mahalla Ramna and the disputed lands were included in the takhta allotted to the plaintiff in the partition suit, and that the plaintiff had been all along in possession thereof. These findings are findings of fact based upon evidence in the case, and there is no substance in the argument of the learned Advocate for the appellants that the learned Judge did not consider the entire evidence as regards possession or as regards title. It is true that the learned Subordinate Judge in one part of his judgment has observed that as the land in dispute was admittedly waste-land and that as the plaintiff had proved his title to it, it was not necessary for him to prove possession within twelve years inasmuch as he had not been actually dispossessed, but that there had been a technical dispossession on account of the order in the proceeding under section 145 of the Code of Criminal Procedure. The learned Subordinate Judge, however, considered the entire evidence in the

case and observed that the plaintiff had examined witnesses and filed documents to prove that he had been exercising acts of possession over the disputed land and that this evidence could not be brushed aside as worthless and incredible. The finding of fact, therefore, that the plaintiff had title and possession cannot be interfered with in Second Appeal.

As regards the last ground that, in any event, the defendants had acquired the right to hold meetings, etc., as a customary right by way of easement, it appears from the pleadings as well as the decisions of the Courts below that no such point was ever taken by the defendants had acquired the right to hold meetings, declaration could be made in their favour.

There remains, however, the first point for consideration, viz., the question as regards the maintainability of the suit for want of compliance with the provisions of Order 1, rule 8 of the Civil Procedure Code. It is clear that the suit as framed was intended to be a representative suit, and the plaintiff did ask for a decree which would be binding not only on the defendants but also on the entire Hindu community as well as the dharmasabha of Gaya. No steps were taken by the plaintiff to comply with the requirements necessary to enable him to obtain such a decree. In my opinion the learned Munsif was clearly wrong in holding that there was no necessity for the issue of notices as contemplated by Order 1, rule 8, and that the non-compliance with the requirements of the said rule did not affect the maintainability of the suit. The case of *Sajedur Raja* v. *Baidyanath Deb* (1) relied upon by the Munsif was dissented from in *Monmotho Nath Das* v. *Harish Chandra Das* (2) and in my opinion was not correctly decided.

The point, however, has not been discussed by the learned Subordinate Judge in his judgment. The appellants produce two affidavits of their two pleaders,

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one of whom was the senior pleader who argued the case on their behalf before the Subordinate Judge, and the other was the junior pleader who appeared with him. Both these gentlemen swear that they did take the point in argument before the Subordinate Judge. It is unfortunate that the learned Subordinate Judge has not noticed this point and has made a decree in favour of the plaintiff in terms of the prayers contained in the plaint. It is clear, however, that such a decree cannot be made in the present case. It has been argued on behalf of the appellants that the whole suit should be dismissed and that no decree can be made even as against the defendants who were before the Court. I am, however, unable to accept his contention. Although the plaintiff is not entitled to a decree declaring his rights as against the dharmasabha of Gaya or the entire Hindu community, there is no reason why he should not get a decree for what it might be worth as against the defendants before the Court. His allegation was that these defendants, who are now the appellants before us, did take active part in denying his title and were the persons at whose instance the proceedings under section 145 of the Criminal Procedure Code were taken. His rights were infringed by the appellants in particular, and nothing has been shown as to why a decree should not be made as against these defendants. The cases referred to by the learned Advocate for the appellants were cases where this question was not specifically raised and decided, namely, as to whether the suit could not be decreed as against the defendants actually before the Court for non-compliance with the provisions of Order 1, rule 8 of the Code of Civil Procedure. On the other hand, in *Harbans Narain Singh* v. *Bhajoo Nonia* (1) Manuk, J. referred to the Full Bench decision of the Calcutta High Court in *Chunt Lal* v. *Ram Kishen Sahu* (2) and was of opinion that there was no reason or principle why a suit should not lie

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under section 42 of the Specific Relief Act against any one who formally claims to use the land as a public right and thereby endangers the title of the owner. These observations apply to the facts of the present case and the proper decree, therefore, that ought to be made in the present case is not a decree in terms of the prayers contained in the plaint as has been done by the learned Subordinate Judge, but a decree declaring the title of the plaintiff and awarding him possession as against the defendants 1—4 alone. This decree will not be binding either on the dharmasabha or on the Hindu community as a whole, but will be binding as against the defendants 1—4 personally.

The decree of the Subordinate Judge must, therefore, be modified to this extent. In other respects the decree will stand. The value of such a decree in favour of the plaintiff will not be much and the plaintiff-respondent, therefore, is not entitled to the costs of this appeal. The order for costs in the Court below will stand.

MACPHERSON, J.—I agree.

Appeal allowed.
Decree modified.

REVISIONAL CRIMINAL.

Before Jwala Prasad and Ross, JJ.

RAMGULAM TELI

v.

KING-EMPEROR.*

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Code of Criminal Procedure, 1898, (Act V of 1898), section 162, scope of—stage at which accused is entitled to copy of statement made before the police during investigation.

*Criminal Revision no. 751 of 1927, from an order of G. Chandra, Esq., Special Magistrate, Bettiah, dated the 26th of October, 1927.