LETTERS PATENT APPEAL.

Before Addison and Din Mohammad JJ.

MEHR MOHAMMAD KHAN AND ANOTHER (PLAINTIFFS) Appellants. 1937 *Feb. 1.*

versus

ADALAT KHAN (DEFENDANT) Respondent.

Letters Patent Appeal No. 148 of 1936.

Civil Procedure Code (Act V of 1908), S. 11, Explanation VI, O. 1, r. 8 and s. 91: Decision in a representative suit — whether binding on persons other than the plaintiffs expressly named in the plaint — Conditions requisite for such binding effect — Res Judicata.

The plaintiffs instituted a suit for the grant of a perpetual injunction restraining the defendant from obstructing a certain thoroughfare. The suit was dismissed on the ground that it was barred by the rule of *res judicata*, inasmuch as prior to the institution of the present suit two other persons had instituted a suit against the same defendant claiming a similar right and had been non-suited.

Held, that a decision in a representative suit binds all persons other than the plaintiffs expressly named in the plaint *only* when, (*a*), if the suit relates to a private right, the formalities as laid down in O. I, r. 8 are observed and, (*b*), if the suit relates to a public right, the formalities laid down in s. 91 of the Code of Civil Procedure are observed.

Explanation VI of s. 11 of the Code itself contemplates that the private right should be claimed 'in common for themselves and others'—*Bona fide* litigation will not excuse the neglect of statutory conditions.

And, as these conditions had not been observed in the previous suit for either a private or public right, it could not be *res judicata* in the present suit.

Kumaravelu Chettiar v. *Ramaswami Ayyar* (1), followed.

Letters Patent Appeal from the decree of Jai Lal J., passed in Civil Regular Second Appeal No. 500 of 1936, dated 1st October, 1936, affirming that of

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Mr. D. Falshaw, District Judge, Jhelum, dated 19th February, 1936, who affirmed that of R. S. Lala *Krishan Lal, Honorary Subordinate Judge, IVth Class, Jhelum, dated, 29th October, 1935, dismissing the plaintiffs' suit.*

GHULAM RASUL, for Appellants.

ACHHRU RAM, for Respondent.

The judgment of the Court was delivered by—

DIN MOHAMMAD J.—The facts giving rise to this appeal are these :—

Mir Muhammad Khan and Abdullah Khan instituted a suit against *Jamadar* Adalat Khan for a declaration that the defendant was not authorised to close a thoroughfare marked in the plan, as it had been in existence from time immemorial. They further asked for the grant of a perpetual injunction but they did not expressly specify in the plaint as to what relief they prayed for in that respect. The suit, however, was treated as one for the grant of a perpetual injunction restraining the defendant from obstructing the said thoroughfare.

The defendant resisted the suit on a variety of pleas including that of *res judicata*. Both the trial Judge and the District Judge dismissed the suit on the ground that it was barred by the rule of *res judicata* inasmuch as prior to the institution of this suit, two other persons Raj Wali and Feroze had instituted a suit against the present defendant claiming a similar relief and had been non-suited. The plaintiffs came up in appeal to this Court and Jai Lal J. before whom the appeal came on for hearing agreed with the decision of the Courts below and dismissed the appeal. Hence this Letters Patent Appeal.

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The sole question that falls to be determined in this case is whether the present suit was barred under Explanation VI to section 11 of the Civil Procedure Code. That Explanation reads as follows:—

"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."

Along with this is to be read rule 8 of Order 1 of the Civil Procedure Code, which says:

(1) "Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of, or for the benefit of, all persons so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct."

(2) "Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the Court to be made a party to such suit."

Counsel for the appellants contends that both Explanation VI to section 11 and rule 8 of Order 1 should be read together and unless all the formalities enjoined in rule 8 are observed, a suit, whether it relates to a public or a private right, does not bar a subsequent suit claiming the same relief. He further urges that the words 'claimed in common for themselves and others' as used in Explanation VI govern

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the words 'public right' as well as 'private rights' and inasmuch as in the previous suit instituted by Raj Wali and Feroze, no right was claimed in common 'for others,' the present suit will not be barred by the doctrine of *res judicata*.

The judgment of the trial Judge is not clear as to the grounds on which the suit was dismissed. The District Judge, however, appears to have proceeded on the assumption that the right claimed in the previous suit was a public right and consequently the subsequent suit came within the ambit of section 11, Explanation VI, and the same view found favour with the learned Judge of this Court. In view of the recent pronouncement made by their Lordships of the Privy Council in *Kumaravelu Chettiar* v. *Ramaswami Ayyar* (1), we have no hesitation in holding that neither the District Judge nor the learned Judge of this Court took a correct view of the law. As pointed out by their Lordships of the Privy Council, the words 'a public right or of' were added to Explanation V to section 13 (which now corresponds to Explanation VI to section 11) for the first time in 1908, and as it stood before the Civil Procedure Code was amended it merely referred to a private right and not to a public right. In the opinion of their Lordships, this amendment was introduced on account of the enactment of the new section 91 which dealt with public nuisance and a suit in relation to which could either be instituted by the Advocate-General or by two or more persons having obtained the consent in writing of the Advocate-General. At page 677, their Lordships have observed as follows:—

"So far as mere words are concerned it probably would have to be agreed that a suit in respect of a

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public nuisance brought by any member of the public would be a litigation 'in respect of a public right.' When, however, it is found that such a litigation where no special damage has been sustained is only authorised under the Code, if it be instituted with the consent in writing of the Advocate-General, is it to be said that the benefit of the Explanation (VI to section 11) is to be extended to a decree in such suit where no such consent has been obtained, the necessity for it having been, perhaps, overlooked? The answer must, it seems, be in the negative; but, although the instance is more striking, the same principle must, their Lordships think, apply to a decree in a representative suit properly so-called, when, in view of the provisions of the Code in that behalf, 'no persons interested in such right other than the persons litigating are affected by the decree.''

We are respectfully bound to follow this decision of their Lordships of the Privy Council and have no option but to hold that even if it were held that the previous suit related to a public right, the present plaintiffs will not be barred from claiming the same relief inasmuch as the decree made in the previous suit did not affect them in any manner and more especially as the formalities laid down under section 91 were not observed. This disposes of the ground taken by the District Judge as well as the learned Judge of this Court.

There still remains to be considered whether the subsequent suit was barred on any other ground. It is admitted that the previous suit was not instituted in the interest of any person other than the plaintiffs in that suit, nor was any private right claimed by the plaintiffs in that suit in common for themselves and others. It is further obvious that the notice enjoined

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in rule 8 of Order 1 was not issued. In these circumstances, we have no hesitation in holding that the subsequent suit was not barred under either Explanation VI to section 11 or rule 8 of Order 1. In this respect also we rely on the judgment of their Lordships of the Privy Council alluded to above. The following remarks made by their Lordships at page 676 of the Report are pertinent:

"Nor are their Lordships impressed by the general principles upon which apparently the Full Bench relied. First of all the learned Judges in ignoring the conditions imposed by the rule seem to have discounted altogether the requirements as to notice thereby made so prominent. The observance of these requirements, their Lordships hold to be essential. They constitute the nearest available substitute when dealing with numerous persons, scattered it may be throughout India, for the personal service upon a defendant required in the case of an ordinary suit. It is no more permissible to dispense with the one requirement than with the other, if the person in view is to be bound by the decree."

At page 672 of the Report their Lordships remarked as follows:

"But, even if it be assumed that the original suit was a representative suit governed by section 30 (Order 1, rule 8), but one which was prosecuted without leave of the Court and with no notice given of its institution either as required by the section or at all, then the very serious question arises whether the decree in such a suit is brought within section 13, Explanation (V), of the Code of 1877, which deals with the plea of *res judicata*."

The judgment under appeal before their Lordships of the Privy Council had held that Explanation

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VI was not controlled by Order 1, rule 8, and that if a Court allowed a suit, to which the rule applied, to proceed in a representative capacity for the benefit of numerous parties, all those parties would be bound by the decree if the contest leading to it were *bonâ fide*, even although the procedure prescribed by the rule was in no respect followed. In relation to this finding of the Full Bench of the Madras High Court, their Lordships of the Privy Council observed as follows:

"The far-reaching importance of this pronouncement of the Full Bench, couched as it is in general terms, will at once be recognised. It introduces into section 11, with Explanation VI—itself an enactment of adjective law only—a result which attaches to the explanation the effect of new substantive law in that it clothes with all the binding force as against them of a *res judicata* a decree in a representative suit, which, apart from the explanation, has no binding effect upon the persons therein expressed to be represented. A pronouncement which has this result is not one to be accepted readily, and their Lordships believe it to be mistaken."

In face of such a clear pronouncement of their Lordships of the Privy Council, it is not necessary for us to pursue the matter any further. Suffice it to say, that the construction placed by us upon the judgment of their Lordships of the Privy Council is that a decision in a representative suit binds all persons other than the plaintiffs expressly named in the plaint *only* when, (*a*) if the suit relates to a private right, the formalities as laid down in Order 1, rule 8, are observed, and (*b*) if the suit relates to a public right, the formalities laid down

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in section 91 of the Civil Procedure Code are observed. Explanation VI itself contemplates that the private right should be claimed by the plaintiffs in common for themselves and others, and rule 8 of Order 1 makes it incumbent upon Courts to give the prescribed notice of the institution of the suit to all those persons on whose behalf or for whose benefit the plaintiffs or defendants are permitted by the Courts to sue or be sued as the case may be. We may here observe that the contention raised by the appellants' counsel that the words 'claim in common for themselves and others' governed both 'public right' and 'private right' is altogether erroneous. As stated above, the words 'public right' were added in 1908 and they stand by themselves. Even the construction of the sentence in which these words stand leads to the same conclusion.

In the presence of the Privy Council judgment referred to above, it does not appear to us to be necessary to discuss any further the judgments of the Courts in India. We may, however, remark in passing that our judgment in *Bishen Singh* v. *Bakhshish Singh* (1), does not lay down any principle which is in conflict with the judgment of their Lordships of the Privy Council. Before we close, we may refer once more to the Privy Council judgment in order to clarify the position of the law in relation to the use of the word '*bonâ fide*' in Explanation VI to section 11. Their Lordships remarked:

"*Bonâ fide* litigation will not excuse the neglect of statutory conditions. If the litigation be not *bonâ fide* the most complete observance of these conditions will not give to the decree the force of a *res judicata*."

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We accordingly accept this appeal, set aside the judgments of the Courts below and remand the case to the trial Court for disposal in accordance with law. We, however, wish to indicate for the guidance of the trial Court that on the issues involving the determination of the question whether section 11 or section 91, Civil Procedure Code, bars the present suit, our decision is in favour of the plaintiffs and that the trial Court shall have to dispose of the rest of the case now.

As the question was not free from difficulty, we leave the parties to bear their own costs incurred so far.

A. N. C.

Appeal accepted.

LETTERS PATENT APPEAL.

Before Coldstream and Jai Lal JJ.

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Feb. 2.

SADHU RAM (PLAINTIFF) Appellant,

versus

DHANPAT RAI-TELU RAM (DEFENDANT) Respondent.

Letters Patent Appeal No. 143 of 1936.

Civil Procedure Code (Act V of 1908), S. 73: Rateable distribution among several decree-holders—some decrees being against the judgment-debtor individually and another against him as a partner in a firm — whether all against 'the same judgment-debtor.'

A. held three money decrees against M. of which he sought execution. B. who had a decree against the firm of M. and H., in which M. was a partner, and not against M. in his individual capacity, applied for rateable distribution.

Held, that B's application was not competent under section 73 of the Code of Civil Procedure as M., as a partner of the firm M. and H. was not 'the same judgment-debtor' within the meaning of the section.