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in declining to remove the distress except on the terms of receiving payment for the item of affidavit and warrant to distrain and for the item of commission.

I gather from the judgment of the learned Judge that the practice prevails in the Small Cause Court in cases in which a landlord applies for a distress warrant of requiring the landlord to pay into Court in advance the whole of the sums which may become payable in respect of the costs of the warrant, and that until recently it was the practice of the Court, where the distress was released without a sale, to refund half the amount paid by the landlord ; and that this practice of refunding has been recently discontinued. As far as I can see, there is no justification for requiring payment of the costs in advance by the landlord. The costs are dealt with by the Act, and the scheme is to get them either under a notice in form C from the tenant, or on a sale under section 66, and the practice of requiring the landlord to pay them in advance seems to me to be illegal. Of course, the landlord necessarily has to pay for the costs of his own affidavit, and no doubt he gets these back from the Court, if and when the Court recovers the costs from the tenant, or on a sale.

RANGNEKAR J. I agree and have nothing to add.

Order accordingly.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Rangnekar.

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GURUSHIDDAPPA GURUBASAPPA BHUSANUR AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS *v.* GURUSHIDDAPPA CHENAVIRAPPA CHETNI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), section 11, explanation VI, Order I, rule 8—Res judicata—*Defendants sued in representative capacity in former suit—Permission under Order I, rule 8, not obtained—Second suit for the same relief sought under the provisions of Order I, rule 8—Suit barred—Estoppel.*

In 1930, the plaintiffs sued for redemption of a mortgage. They were claiming through the owner of the property and the principal contesting defendants who

* Second Appeal No. 422 of 1934.

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were styled as " Hubli Pinjrapole Samstha " were claiming as donees of the property from the representatives of the mortgagee of the property. The suit was filed under the provisions of Order I, rule 8, Civil Procedure Code, 1908. In 1926 the plaintiffs had filed a suit against the same defendants " Hubli Pinjrapole Samstha " for the same relief but without following the procedure prescribed by Order I, rule 8. A contention was raised that the second suit of 1930 was barred by *res judicata* and estoppel.

Held, (1) that the suit of 1930 was barred by *res judicate* as the first suit of 1926 was a representative suit within explanation VI of section 11 of the Civil Procedure Code, 1908, and need not have been brought under Order I, rule 8, of the Civil Procedure Code, 1908.

Kumaravelu Chettiar v. *Ramaswami Ayyar*,[1] *Varanakot Narayanan Namburi* v. *Varanankot Narayanan Namburi*,[2] *In re Pritt, Deceased—Morton* v. *The National Church League and Others*,[3] *Bedford (Duke of)* v. *Ellis*,[4] referred to ;

(2) that plaintiffs were estopped from contending that the " Hubli Pinjrapole Samstha ' was not represented in the earlier suit, they having allowed defendants to proceed with the suit on the footing that they were suing the defendants in a representative capacity.

Bensieck v. *Cook*,[5] referred to.

SECOND APPEAL against the decision of A. Majid, District Judge at Dharwar, confirming the decree passed by A. C. Sequeira, Subordinate Judge at Hubli.

Suit for redemption.

The property in suit originally belonged to one Mallappa. On April 2, 1890, he mortgaged it with possession to Chanavirappa. By a sale deed, dated July 15, 1890, Mallappa sold the property to Krishnasa, whose widow sold it to one Malharsa. Malharsa mortgaged it to Basappa on September 25, 1891. On February 1, 1910, Gurushidappa (plaintiff) got Basappa's rights assigned to him ; thereafter a suit No. 66 of 1911 was brought on the mortgage and in execution plaintiff purchased the property at a judicial sale.

Since the first mortgage, the property remained in possession of the mortgagee Chanvirappa. His son Gurushiddappa (defendant No. 1) gifted the property to the " Hubli Pinjrapole Samstha".

(1) (1933) L. R. 60 I. A. 278, s. c. 56 Mad. 657.
(2) (1880) 2 Mad. 328.
(3) (1915) 31 T. L. R. 299.
(4) [1901] A. C. 1.
(5) (1892) 110 Missouri 173, 19 S. W. 642.

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In 1926, the plaintiff had brought suit No. 31 of 1926 against the "Hubli Pinjrapole Samstha" to redeem the property in dispute on the allegation that defendant Pinjrapole was a donee from defendant No. 1. The suit was dismissed on July 8, 1927.

In October 1930, the plaintiff again sued for redemption, alleging that the gift to the "Hubli Pinjrapole Samstha" was not valid and binding on the plaintiffs. This suit was brought under the provisions of Order I, rule 8, of the Civil Procedure Code, 1908.

The defendants contended, *inter alia*, that the suit was barred by *res judicata* by reason of the decision in Suit No. 31 of 1926 and estoppel.

The Subordinate Judge held that the suit was barred by *res judicata* and estoppel. His reasons were as follows:—

"It is suggested that Pinjrapole is neither a corporation nor had it got itself registered so as to make it a company authorised to sue or be sued in the name of an office-bearer or of a trustee and that an action lay against a great number of individuals who have not been cited in the action under Order I, rule 8, Civil Procedure Code, who had no opportunity to appear and contest the action. That being so, Mr. Pawate raises the contention that no finding in the first suit is *res-judicata* against the individuals who have been cited in this action under Order I, rule 8, Civil Procedure Code.

I think that this contention cannot be sustained because where a party has asserted a certain position in a previous litigation, namely that the person had been cited therein to appear and contest the action on behalf of the Pinjrapole, he cannot *reagitate* the matter on the assumption that he was not a representative of the Pinjrapole and that he did not contest the action in a representative character or capacity. He is estopped from challenging the validity of his own action by reason of conduct.

If a finding were necessary, I would hold both plaintiff and the person summoned to contest the action understood the suit to be such. The principle was also stated by Kumarswami Sastri and Devadoss JJ. in the case of *Sonachalam Pillai and others* v. *Kumaravelu Chettiar and others* (A.I.R. 1928 Mad. at page 447).

* * * * * *

The case is also governed by what was said in *Lalmohan Dhupi* v. *Ram Lakhmi* (A.I.R. 1932 Cal. at page 274): 'Where a person acting in a representative capacity has no such authority under the general law, if his litigation is to be a representative

one to bind others, he must get some other authority to assume such representative character. Such authority need not necessarily be express ; it may be implied.

'Such authority, if it is to be had from the Court, is ordinarily obtained in the form of an order, under Order I, rule 8, of the Code. But it need not necessarily be in that form. And if the suit is filed in a representative form and it is allowed to proceed in that character without objection and if a general issue is framed so as to put in issue the right of the whole class in whom it is alleged to exist and the evidence adduced is of a general character and the findings in the judgment are general in nature, that judgment is binding on the whole class notwithstanding that no leave under Order I, rule 8, has been obtained.'

For these reasons, I hold that the person therein was clearly contesting *bona fide* in the interest of all the members.

My final comments are that although the procedure prescribed by the Order I, rule 8, was not followed, the plaintiff cannot be heard to complain of the fact and further that the office-bearer in that suit contested the action in a representative character. I hold accordingly."

On appeal, the District Judge confirmed the decree, observing as follows :—

" The following authorities relied upon by the plaintiffs are clearly distinguishable from the facts of the present case, I.L.R. 20 All. 167 ; I.L.R. 20 All. 497 ; I.L.R. 20 All. 346 ; I.L.R. 47 All. 342 ; A.I.R. 1927 All. 789 and A.I.R. 1933, P. C. 183. The points decided in these cases are not at all disputed nor call for any consideration in the present case. In the present case, the plaintiffs having sued the Pinjrapole in the form in which they did in spite of the objections raised by the then defendants and the suit having been heard and decided on merits embracing all the averments which were the same as those made in the present plaint they cannot now turn round and get over the decision which went against them by raising the plea that the frame of the suit filed by them was bad. It is not therefore open, in my opinion, to the present plaintiffs, who had assumed a certain position in the previous suit, to reagitate the matter over again on the ground that the Pinjrapole institution was not duly incorporated and therefore not properly represented (*vide* 106 Ind. Cas. 484 Lahore and 14 Bom. L.R. 1211, P. C.)."

Plaintiffs appealed to the High Court.

S. V. Palekar, for the appellants.

A. G. Desai, for the respondents.

RANGNEKAR J. This is an appeal from a judgment of the District Judge of Dharwar, affirming a decree made by the Second Class Subordinate Judge at Hubli in a suit for redemption of a mortgage of certain property mentioned in the plaint. The suit was filed under the provisions of Order I,

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rule 8, Civil Procedure Code. The facts are not very clearly stated in the judgments, but it is sufficient to state that the plaintiffs are claiming through the owner of the property, and the principal contesting defendants, who are styled as the "Hubli Pinjrapole Samstha," are claiming as donees of the property from the representatives of the mortgagee of the property, who as a result of certain litigation had purchased the property at a Court-sale and claimed to have become owners of it. It was *inter alia* pleaded by these defendants that the suit was barred by *res judicata* by reason of a decree made in an earlier suit brought by the same plaintiff against them for the same relief in 1926. That suit was dismissed and the decree was confirmed in appeal. There was a second appeal to this Court, but the appeal was held to have abated. They also pleaded that the plaintiffs were estopped by their conduct from maintaining the suit. These are the only questions which have to be determined in this appeal.

The plaintiffs contend that the bar of *res judicata* does not arise, as the parties in the suit were not the same in the earlier suit or claiming under any of the parties to the earlier suit, and that the identity of the parties being different, the earlier decision is not binding on them. They say that the Pinjrapole is an unregistered association and, therefore, as the earlier suit was not brought against the members of the Pinjrapole or under the provisions of Order I, rule 8, Civil Procedure Code, and as the present suit is a representative suit there is no identity of parties. To this it is answered that the earlier suit also was a representative suit within the meaning of Explanation VI of section 11 of the Civil Procedure Code, and that being the case, the bar of *res judicata* would apply. There is some dispute between the parties as to the exact description of the defendants in the title of the plaint in the earlier suit. Unfortunately neither side has produced the original plaint and it is not on record, but the decree in the original suit, which is available and which sets out the plaint,

describes the defendants as "The Hubli Pinjrapole Samstha by its President Mahadeva Niranjanappa Sindgi," and that is also how the defendants are described in the title in the decree of the High Court in second appeal in the earlier suit. The appellants' counsel, therefore, says that the suit was brought against the Pinjrapole by its President, and as the Pinjrapole was an unregistered association, the suit was not properly constituted. On the other hand, the learned counsel for the defendants says that in the earlier proceedings the President was sued as representing the Pinjrapole. The Court interpreter has translated the title of the previous suit which was in Kanarese as follows: "The Hubli Pinjrapole Samstha of this the President Mahadeva Niranjanappa Sindgi." This, in my opinion, means the defendant in the suit was the President and not the Institute, and the only question would be whether he was sued in a representative character and as representing the Pinjrapole and all its members.

The principle admitted in all Courts upon questions affecting the suitor's person and liberty and his property is that the rights of no man shall be decided in a Court of justice unless he himself is present. Therefore, all persons having an interest in the object of the suit ought to be made parties, and the test is the interest the person sued or suing has in the specific relief prayed. But this general rule has an exception. It is that the Courts to avoid inconvenience and to do justice once for all allow one or more persons to represent others though absent, and that is why the principle of representation is adopted. Persons may be joined in a suit either on account of something personal, as for instance having either sold or bought goods, or like officers of corporation as possessing certain knowledge, or because they are the owners or guardians of certain interests which the suit will affect. Upon the first ground they must be joined in their own person. Upon the other grounds the proceedings can go on with equal prospect of justice if the interests concerned are effectually

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and virtually protected. The absent parties in such cases appear by their representative or representatives; their interests are protected or claims enforced. A familiar instance is that of an executor or administrator. The rule, however, is, as observed by Sir John Leach in *Lanchester* v. *Thompson*[1] at p. 13, "Where it is attempted to proceed against two or three Individuals, as representing a numerous Class, it must be alleged that the suit is brought against them in that character, . . . " Story on Equity Pleadings puts the case with regard to the latter class of cases in this way (pp. 118-19):

"The second class of cases, constituting an exception to the general rule, and already alluded to, is, where the parties form a voluntary association for public or private purposes, and those who sue or defend, may fairly be presumed to represent the rights and interests of the whole."

This exception is adopted by the Courts to avoid inconvenience, because if all persons interested are made parties, there would be considerable delay by abatement, change of interest, etc., and justice will be hampered. Is there, then, anything contrary to these principles in the Civil Procedure Code? I think not. Explanation VI of section 11, Civil Procedure Code, is in these terms:

"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."

The other rule, which allows a representative suit being brought against one or two persons or more persons as representing a larger body of persons, is contained in Order I, rule 8, Civil Procedure Code.

"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."

[1] (1820) 5 Madd. 4.

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In my opinion, these two rules are based upon the principles which I have set forth above. But it is argued on behalf of the appellants that Order I, rule 8, controls Explanation VI of section 11, and, therefore, the only way in which the Pinjrapole could have been sued in the earlier suit was under Order I, rule 8, and admittedly that was not done. In the first place, there was no evidence before the Court in the earlier suit—there is none on the record before me—to show how many members the Pinjrapole had in 1926. Secondly, Order I, rule 8, is exhaustive of what it says, and it is clear from it that it is only when the parties are numerous that a suit can be brought under the provisions of Order I, rule 8. That it is possible for a suit to be a representative suit within the meaning of Explanation VI, although it need not come under Order I, rule 8, and, therefore, need not be brought under the provisions of that Order, has been held from very earliest times in this country, and I need only refer to one old case in *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi*,[1] where it was held that Explanation V of section 13 of the old Code, corresponding to Explanation VI of section 11, Civil Procedure Code, 1908, was not limited to the case of a suit under section 30, which now corresponds to Order I, rule 8, of the present Civil Procedure Code. Explanation VI, therefore, is not confined to cases covered by Order I, rule 8, but would include any litigation in which, apart from the rule altogether, parties are entitled to represent interested persons other than themselves. But Mr. Palekar relies on *Kumaravelu Chettiar* v. *Ramaswami Ayyar*,[2] where it was held that, in a representative suit instituted under Order I, rule 8, of the Code of Civil Procedure, 1908, the decision in a former suit does not operate as *res judicata* by force of section 11, Explanation VI, unless the former suit was instituted in compliance with the above rule (formerly section 30 of the Code of 1877), namely, by permission of the Court, the Court giving

[1] (1880) 2 Mad. 328. [2] (1933) L. R. 60 I. A. 278, s. c. 56 Mad. 657.

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notice as therein prescribed to all persons interested. If the suit is one under Order I, rule 8, that is to say, if parties are numerous, then, of course, the provisions of that rule must be strictly complied with, otherwise Explanation VI of section 11 will not apply even though the omission is due to inadvertence and has caused no injury. But Explanation VI is not confined to suits under Order I, rule 8, but extends to any litigation in which, apart from the rule altogether, parties are entitled to represent interested persons other than themselves; and that is clear from the observations of their Lordships at p. 294. This is what their Lordships say:

> "And the result of the decisions has shown that the explanation is not confined to cases covered by the rule, but extends to include any litigation in which, apart from the rule altogether, parties are entitled to represent interested persons other than themselves."

But it is argued that in the passage, which I have quoted, the Privy Council observed that in such cases parties ought to be entitled to represent others, and if a person is not entitled to represent others, he cannot sue or be sued in a representative capacity. This, of course, is a correct proposition. But it is difficult to see how it applies to the facts of this case. In this case, in the earlier suit, it was *inter alia* pleaded that the suit as framed was not maintainable. It is true that in their written statement the defendants did not specify clearly the grounds on which the contention was based, but it was open to the plaintiffs by an application to compel them to set out the grounds on which this plea was based. The plaintiffs, however, took no steps in the matter. Fourteen issues were raised in the case, including the issue that the suit was not maintainable. The Court went into the merits of the case and recorded findings on the first six or seven of them. No finding was recorded on this particular issue as to the maintainability of the suit, and it seems to me to be pretty clear that this, along with some other issues, was abandoned by the parties. Therefore, the position is that the issue

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as to the constitution of the suit against the President as representing the Pinjrapole was specifically raised and given up. The abandonment of the issue must mean that in any case the defendant conceded and admitted that he was sued in a representative capacity and as representing the Pinjrapole. The plaintiff acquiesced in this and elected to proceed with the suit on the footing that the President was sued in a representative character. Both the parties, therefore, proceeded upon the footing that it was a representative suit. The suit was conducted *bona fide*; the Court was satisfied that the other parties, who might have been joined, wished the Court to decide in the presence of one party, that is the President. The plaintiff took the chance of getting a decree in his favour, as did the Pinjrapole, and the litigation went on in three Courts on that footing. It is conceded that the question that the Pinjrapole was not sued properly, or that the President did not represent it, or that the suit was not well constituted, was never raised in the three Courts; and on these facts it is difficult to see why it cannot be held that the President was entitled to represent the Pinjrapole, or that the suit was in a representative character. Mr. Desai has very properly drawn my attention to the evidence, which shows that so far as the Pinjrapole is concerned, the litigation was adopted by the institution, and that the costs of the litigation were defrayed out of the funds of the institution. It is no answer to say that the plaintiff was ignorant of the constitution of the Pinjrapole. It was his suit, and it was his duty to see that proper parties were before the Court; otherwise even if he succeeded, and the suit in fact was not a representative suit, the decree would not bar the rights of the other members of the Pinjrapole. Apart from this, the objection raised can hardly come out of the mouth of the plaintiffs. It is true that in the case of an unregistered association the ordinary rule is to sue the members individually, but I am unable to see why some of the members, or a few of

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the members, cannot sue or be sued for themselves and on behalf of the other members. If the members are numerous, then, of course, the procedure laid down in Order I, rule 8, must be followed. But whether persons interested are numerous or not is a question of fact, and, as I have pointed out, in this case there is no evidence on this point. Why cannot then the plaintiffs sue two or three or even one member as representing the others, provided this position is made perfectly clear in the pleadings? The whole question is, whether the Pinjrapole was represented and sued in a representative capacity, and if two or three can represent, say, twelve people, I am unable to see why on principle one cannot sue or be sued if the fact is made sufficiently clear. If that is so, and the other conditions in Explanation VI are satisfied, as they admittedly are in this case, it is difficult to see why Explanation VI is not applicable, and why a decree in such a litigation cannot bind not only the plaintiff but those persons who are absent but are held by the Court to be represented by the person or persons on record. Admittedly there was no cause of action in this case against the President, except as representing the Pinjrapole. He raised the defence that the suit was not maintainable, and that defence was subsequently abandoned by him.

I may now refer to an English case, *In Re Pritt, Deceased—Morton* v. *The National Church League*,[1] where it was held that, where an unincorporated charity is sued, the proper practice is to sue a responsible official, like the treasurer or secretary, on behalf of the charity. In that case an objection was raised that the charity, which was the National Church League, had been sued by name, and counsel suggested that this practice was not correct in the case of an unincorporated charity. Eve J. intimated that where unincorporated charities were sued, the proper practice was to sue a responsible official, like the treasurer or secretary,

[1] (1915) 31 T. L. R. 299.

on behalf of the charity. In this connection I may also refer to the remarks of Lord Macnaghten in *Bedford (Duke of)* v. *Ellis*,[1] which are in these words (page 8) :—

"Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could 'come at justice', to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience; for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent."

Upon the whole, therefore, I have come to the conclusion that the lower Courts were right in holding that the suit was barred by *res judicata*.

But I think there is another answer to the plaintiff's contention, and that is estoppel. In my opinion, having allowed the defendant to proceed with the suit on the footing that he was suing him in a representative capacity, having assumed this position and taken the chance of a decree in his favour in three Courts, clear estoppel arises against the plaintiff to prevent him from now contending in this suit that the Pinjrapole was not represented in his own earlier suit. Supposing there had been a decree against the Pinjrapole, could the Pinjrapole have disputed it in another litigation brought by them or some of the others? I think not. The obvious answer would have been that they were estopped. The principle is: *Allegans contraria non est audiendus* "He is not to be heard who alleges things contradictory to each other". In other words, as Lord Kenyon says, a man shall not be permitted to "blow hot and cold" with reference to the same transaction, or insist, at different times, on the truth of each of two conflicting allegations, according to the promptings of his private interest. Sherwood C. J., in *Bensieck* v. *Cook*,[2] observed as follows :—

"Having assumed the role of being a proper and necessary party defendant, having pleaded to the merits, she cannot, after being cast in the suit, now change

[1] [1901] A. C. I. [2] (1892) 110 Missouri 173, 19 S. W. 642.

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front, and insist that error occurred in making her a party defendant. Courts of justice cannot be trifled with in this way. Parties litigant are not allowed to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold. Having elected to adopt a certain course of action, they will be confined to that course which they adopt."

The plaintiff must be taken to have represented to the Court in the earlier suit that the President was sued in a representative capacity, that the suit was well constituted, and invited or allowed the Court to try the suit in a wrong way, and now he wants to go back upon it. He must be taken in the earlier suit to have insisted upon the President being sued in a representative capacity. In my opinion, there can be no stronger case of an absolute waiver or election or of conduct rendering it wholly inequitable to permit him now to resile from the position he then adopted.

In the result, therefore, the appeal must be dismissed with costs.

Appeal dismissed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Broomfield and Mr. Justice Sen.

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GANGADHAR LAXMAN DESHPANDE AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS *v.* DATTATRAYA LAXMAN DESHPANDE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), Schedule II, paragraph 20—Application to file award—Award leaving matters of detail to be settled by mutual arrangement—Award declaratory and not void for indefiniteness—Award dealing with insignificant property outside British India—Award can be filed by deleting the property outside jurisdiction.

Where an award (in an arbitration without the intervention of a Court) deals with an estate which is a considerable one and one item of property which is quite insignificant is outside British India, the award can be maintained on the principle

*Appeal from Order No. 39 of 1935.