

Present : Porter and Schneider JJ.

1923.

JAYAWARDENE v. THE BAPTIST MISSIONARY
SOCIETY *et al.*

393—D. C. Chilaw, 6,777.

Action against the congregation of a church—Order under section 16 of the Civil Procedure Code—Representation order—Decree as to costs—How far binding on members of congregation who were not parties to action?

The effect of a representation order under section 16 of the Civil Procedure Code is to bind persons who are not parties, but who are represented as having a common interest, only in so far as the property which is the subject-matter of the action is concerned, but is ineffectual to render them liable in costs or damages.

IN action No. 5,502, D. C. Chilaw, the appellant corporation sued "the members of the congregation of the Baptist Church at Madampe" represented under section 16 of the Civil Procedure Code by certain seven persons in respect of the land on which the chapel, used by the congregation for worship, stands, alleging that the appellants were the lawful owners thereof, and that the members of congregation denied their right and refused to quit and restore possession on notice, and kept wrongful possession to the damage of the appellants.

By the decree in that action the appellants got judgment against the congregation for the premises and for damages and costs.

Under writ issued against the congregation in execution of the decree for damages and costs, the land in question in this case was seized, whereupon the plaintiff-respondent, who is a married woman, being the wife of the second defendant, preferred a claim which was disallowed.

The plaintiff thereupon instituted this action within fourteen days from the date of the said order disallowing the claim, praying that the said land be declared not liable to be sold in execution as being her property, and that it be released from seizure.

The District Judge gave judgment for plaintiff-respondent as prayed for, holding that though she is a member of the congregation, and as such bound by the decree in so far as it relates to the land and premises mentioned therein, she is not liable to pay the damages and costs awarded in the decree. The defendant appealed.

Samarawickreme (with him *M. Fonseka*), for first defendant, appellant.

H. V. Perera, for plaintiff, respondent.

Cur. adv. vult.

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June 15, 1923. SCHNEIDER J.—

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In action No. 5,502 of the District Court of Chilaw, the first defendant society as plaintiff obtained a decree against "the members of the congregation of the Baptist Church in Madampe" represented by the second defendant in this action, one Jane Amerasekera and five others, under a representation order duly made under the provisions of section 16 of the Civil Procedure Code.

The decree declared the first defendant society entitled to a certain allotment of land on which the Baptist Chapel, the Manse, and schoolroom stand, and directed the "defendants" to be ejected therefrom, and the first defendant society to be put and placed in possession thereof. It also directed the "defendants" jointly and severally to pay damages and costs. In execution of the portion of the decree for damages and costs, the land in dispute in this action was seized and was claimed, but unsuccessfully by the plaintiff who is the respondent in this action. She has brought this action under section 247, asserting that she is not bound by the portion of the decree in action No. 5,502 awarding damages and costs, as she was not a party in that action. On the facts the District Judge found that the plaintiff, respondent, was a member of the congregation of the Baptist Church in question, but on the law he upheld her contention that she was not bound by the decree. Accordingly, he gave judgment for the plaintiff, and the first defendant society has appealed.

Mr. Samarawickreme, who appeared for the appellant, confined his appeal to the question of law. In support of his contention he cited two decisions of the Courts of England, viz., *May v. Newton*¹ and *Jenkins v. Davies*.² I am unable to accept either case as supporting his contention that they should be regarded as enunciating a principle which should be adopted in the decision of this appeal. Both of them are administration actions under the English "Rules of the Supreme Court, 1883." They decide that when notice had been served upon a direction of the Court under Order XVI., rule 40, or when a representation order under rule 9 of that Order had been obtained, persons interested in the estate, but who were not named as parties, are bound by the proceedings. The decision in both cases obviously rest upon the express provisions of Order XVI., rule 40, that when notice had been served persons not parties on the record would be bound as if they had originally been made parties. Such a provision is not to be found in regard to proceedings connected with section 16 of our Code. The question raised by this appeal is whether persons represented under an order obtained under section 16 are "parties" to the action, so that they are bound by the decree in respect of all matters contained in it. I am, therefore, unable to regard those cases as of assistance in deciding this

¹ (1886) 34 L. R. Chan. Div. 347.

² (1891) 64 L. T. NS Chan. Div. 824.

appeal. The same reason holds good for not accepting Mr. Samarawickreme's contention that *Jenkins v. Davies (supra)* is authority for holding that the represented persons are before the Court for all purposes, including that of allotment of costs, and that the decree as to costs, therefore, binds such parties.

Mr. Samarawickreme also cited the case *Aiyangar v. Aiyangar*.¹ This case undoubtedly sustains the argument that the decree binds the persons represented, but it is also clear that in that case the decree was regarded as binding on them only in so far as the property or interest was concerned. It was expressly held that an injunction against the "actual defendants" was not binding on the persons represented as an injunction was personal in nature. Nor does the case *Sahib Tambi Marakayar v. Hamid Marakayar*² cited by him sustain his contention. On the contrary, it seems to me it is directly opposed to his contention. For although the actual point for decision was how far an action against a partnership would bind the partners, who were not actual parties, it states: "The general rule of law undoubtedly is, that in suits where one person is allowed to represent others, as defendant in a representative capacity, any decree passed can bind those others only with respect to the property of those others which he can in law represent, and no personal decree can be passed against them, although the parties on record *eo nomine* may be made personally liable. This is the principle applied in suits against a Hindu family as represented by its managing member and in suits to which Order I., rule 8, of the Civil Procedure Code, 1908, is applicable. It has consequently been held that an injunction in a decree in the latter class of cases is not binding on those who were not actually parties to the record. See *Sadagopachari v. Krishnamachari* and *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar*."

Order I., rule 8, referred to in that passage, corresponds to section 16 of our Code and section 30 of the Indian Code of 1882.

Mr. Perera for the respondent cited the "*The Law of Costs*" by Sastri and Iyer at page 110. The case *Sajedur Raj v. Baidya Nath Deb and others*³ is referred to in that book. Calcutta Weekly Notes are not available, but the facts of that case are stated in the book as being that the plaintiffs sued the defendants "on behalf of themselves and of forty-two others, thirty-six of whom had intimated their willingness that the suit should be carried on by the plaintiffs." The action was for the dismissal of a Mohunt, and to set aside an alienation of property by him. In a note at the bottom of page 111, the authors of the book cite from the judgment of Macpherson J. in *Sejedur Raj v. Baidya Nath Deb (supra)*, and I take the following from that citation as a commentary which is applicable to section 16 of our Code, and as a commentary with which I am entirely in agreement. "Persons on whose behalf the suits were

¹ (1910) I. L. R. 33 Mad. 483.

² (1913) I. L. R. 36 Mad. 414.

³ 1 C. W. N. 65.

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instituted, but who did not themselves join as plaintiffs in the suit, were not parties to the suit in the sense that they had any voice or control in the conduct of it, or that they could be made liable for costs. Possibly the effect of section 30 might be that they would be bound by the decision, but it would not follow from that they were parties to the suit, and section 32 of the Code distinctly provides that any person on whose behalf a suit is instituted under section 30 may apply to the Court to be made a party. That indicates that until he is formally joined as a party, he is not a party simply because a suit may have been instituted by another person for their joint benefit."

It would accordingly appear that the cases cited support Mr. Perera's contention that the effect of a representation order under section 16 of our Procedure Code is to bind persons who are not parties, but who are represented as having a common interest, only in so far as the property which is the subject-matter of the action is concerned, but is ineffectual to render them liable in costs or damages. I would accept this view. Section 16 of our Code follows closely the language of the Indian Code of 1882, section 30. It employs the words "parties" and "party" as in that Code, where it means persons and person. In the present Indian Code (*Act V. of 1908*) the word "parties" has been replaced by the word "persons." The proviso to section 19 of our Code employs the correct term "persons" showing clearly that the word "parties" in section 16 was intended for "persons."

The real point raised by this appeal is whether persons represented under an order under section 16 are parties to the action. I am of opinion that they are not.

The policy of our Procedure Code is to be found enunciated in section 33 that every "action shall, as far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute and so as to prevent further litigation." It is a good general rule that all persons interested ought to be made parties to an action, however numerous they may be so as "to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action" (section 18). But that general rule yields to the exigencies of special cases to meet the requirements by which section 16 authorizes one or more persons who have a common interest with numerous persons with the permission of the Court to sue or be sued "on behalf of all parties so interested." And section 19 allows any such persons "to apply to the Court to be made a party." It also enacts "that all parties whose names are so added as defendants shall be served with a summons in manner hereinafter mentioned, and the proceedings as against them shall be deemed to have begun only on the service of such summons." The provisions and language of section 19 must clearly be regarded as drawing a distinction between a "person" on whose behalf an action is

instituted or defended and " parties " to an action. It would therefore follow that a decree in an action constituted under section 16 cannot bind the persons who are not parties personally. It cannot be that the decree is not to bind them at all, for then the provisions of section 16 would be useless. In what respect does it bind them. It binds them only in so far as their " common interest " with the actual parties to the action is concerned, for the parties to the action represent the rest only to that extent. It would lead to some startling results to take any other view. A person who had a " common interest " might never have heard of the action, in spite of the public advertisement mentioned in section 16, and if he had heard of the action might have disclaimed any interest in the " interest " said to be " common " rather than run the risk of an action. Is it equitable that his personal property should be taken in execution ? Suppose the common interest of such a person be with the plaintiffs, is it equitable that he and perhaps a hundred others like him should be allowed a share in the damages awarded ? It was stated at the argument that the congregation of the church in question was divided into two factions or parties, one of which favoured the first defendant society and the other which denied and resisted that claim. Should the first defendant society be permitted to levy execution upon the personal property of the very members of the congregation who not only did not dispute but favoured its claim ? Then, again, who are the members of the congregation ? Are they those who were members before the date of the institution of the action or at the date of the institution, or between the date of institution and the date of judgment or during all those periods ? If those who were members of the congregation before the date of the institution are included, the question naturally arises how far back is one to go ? Will a person who was a member one or two years before the institution of the action and had ceased to take any interest in the church be liable to have execution levied upon his personal property ? An interval of time must needs have elapsed between the institution of the action and the date of the decree. Are those who became members in that interval liable personally ? A congregation is not an entity. Its component members are constantly changing. The decree would, therefore, be enforceable in respect of costs and damages against groups constituted differently as the decree is regarded as enforceable against a group which existed at a particular stage of the action.

One of the cases mentioned at the argument was *Walker v. Sur*.¹ In that case the plaintiff sued four defendants on their own behalf and as members of the " Brotherhood of St. John of God." What Kennedy L.J. said in the course of his judgment may be usefully cited here. He observed : " When I consider the nature of a money claim, I think the case becomes for this purpose reasonably clear,

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because day by day, if this is a large body, one member is going out and another is coming in. The body is continually changing, and to give a judgment against all the members for debt would be to include the case of an incoming member, who would be made liable though he was not a member at the date of the contract, and in the case of an outgoing member you would have to take the state of things at the date of the judgment. A judgment could not very well be given against one who had ceased to be a member, and yet they are all supposed to be those persons who are said to be represented. If this order stands they would, I suppose, be any body who at the date—I do not know whether it would be at the date of the commencement of the action or of the judgment—is a member of the society.”

It seems to me that the persons who came forward as plaintiffs or who are sued as defendants must be deemed to have accepted a personal responsibility for costs and damages which may arise as the result of the action.

I would for these reasons hold that the order as to the payment of costs and damages being personal binds only the person who were named as party defendants in the action, and I dismiss the appeal, with costs.

PORTER J.—I agree.

Appeal dismissed.