APPELLATE CIVIL

Before Harbans Singh, J.

SANT KEWALA NAND AND OTHERS,—*Appellants.*

versus

MANGAL SINGH AND OTHERS,—*Respondents.*

Regular Second Appeal No. 1148 of 1962,

1963

Feb., 28th:

Code of Civil Procedure (Act V of 1908)—S. 11 and Order 1, Rule 8—Representative suit filed—Some of the persons of the class omitted from the list—Whether such omitted persons bound by previous decision—Words and Phrase—'Malkan'—Meaning of—Whether includes non-proprietors in the village.

Held, that if the suit is, in fact representative in the sense that the matter in controversy is common to a class of persons and if some of that class are actually made defendants and some others are given in the list attached with the plaint, to whom a general notice under Order 1, rule 8, Civil Procedure Code, is sent, and by inadvertence or otherwise the names of one or more of that class are omitted from such a list, the decision in the case would be binding on such person or persons whose names have been so omitted. If it were otherwise, than the entire idea of a representative suit will be gone.

Held, that the word 'malkan' has a broader significance and means any owner in the village. The word 'malkan' includes proprietors as well as the non-proprietors residing and owning houses or sites in the village.

Second Appeal from the decree of the Court of Shri Badri Parshad Puri, District Judge, Hoshiarpur at Dharamsala, dated the 14th June, 1962 affirming that of Shri H. K. Mehta, Senior Sub-Judge, Hoshiarpur, dated the 30th June, 1961 granting the plaintiffs a decree for permanent injunction against the defendants to the effect that the defendants were restrained from flowing surplus water of the pond in question through the khal *in dispute and further ordering that the defendants would fill up the* khal

in question with earth to the level of the ground and dismissing the plaintiffs' claim for restraining the defendants from passing natural water of the pond through the Phirni *in question towards village Jallowal. Both the courts left the parties to bear their own costs.*

N. L. DHINGRA, ADVOCATE, for the Appellants.

ROOP CHAND, ADVOCATE, for the Respondents.

JUDGMENT

Harbans Singh, J. HARBANS SINGH, J.—The facts giving rise to this second appeal may briefly be stated as under: There is a pond (*chhapar*) towards the south of the *abadi* of village Khanur, tehsil and district Hoshiarpur and towards the south of this pond is a small area of a garden and beyond that garden is the *phirni* and the land and the *abadi* of village Jallowal. During the rainy season this pond overflows and the dispute between the residents of the two villages is with regard to the direction in which this surplus water should flow. It appears that in the year 1958 Sant Kewala Nand, who was the *muntzim* of the garden in which there is a *smadh* and which is towards the south of the pond referred to above, and three others of Khanur including the Gram Panchayat of Khanur filed a representative suit on their own behalf as well as on behalf of other residents of Khanur, against six residents of Jallowal and the Gram Panchayat of Jallowal seeking a mandatory injunction against the defendants that they would remove the additional earth put by them over the *phirni* (circular road), varying from 2 feet to six feet, by which the flow of the water from the pond along the *khal* passing through the garden and then across the *phirni* and thereafter over the land belonging to *mauza* Jallowal had been obstructed. The allegations made in the plaint were that since time immemorial the overflow of the water of the pond was towards the south and the water passed

through a *khal* which existed since long and then across the *phirni* towards *mauza* Jallowal and that after this *phirni* had been made during the consolidation proceedings of village Jallowal, in order to stop this natural flow of the water, the *phirni* had been reinforced by putting additional earth, etc., with the result that this natural flow was obstructed. An application was made that the named defendants be allowed to defend the suit for and on behalf of all other *malkan* of the village, list of whom, 295 in number, was attached as annexure 'A' to the plaint. This application was granted and a proclamation was made in the village. The three relevant issues in that case were Nos. 2, 3 and 4 as follows:—

(2) Whether the natural flow of the water from the pond has been from north to south through the channel ?

(3) Whether the plaintiffs have acquired a right of easement to pass water of the pond and the fields appurtenant thereto, i.e., B in Exhibit C. 1 towards village Jallowal through channel in Exhibit C. 1?

(4) Whether the natural flow of the water of the fields shown as B in Exhibit C. 1 had been from north to south ?

The suit was dismissed by the trial Court but the appeal filed by the plaintiffs was accepted on 6th of April, 1960, and the relevant issues were decided in their favour and a decree was granted in favour of the plaintiffs against the defendants for mandatory injunction requiring the defendants to remove the bund shown in red colour in the site plan, Exhibit C. 1, erected on the *phirni* and to restore the site underneath it to its original level, so as to allow the free flow of the water of the pond through the nullah

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in dispute and also of the rain-water of the fields marked B in the site plan, Exhibit C. 1, on to the fields situated towards south of the bund up to 6th of May, 1960, otherwise the plaintiffs shall be entitled to get the same removed through execution of the decree on depositing necessary expenses, which shall be recoverable by them from the defendants as costs in execution". It is conceded that an appeal filed by the defendants against this appellate order was dismissed *in limine* by the High Court.

On 1st of June, 1960, however, the suit, out of which the present appeal has arisen, was filed by the plaintiffs, who were seven in number and were residents of Jallowal but were not land-owners in the village and are non-proprietors, being Harijans, against Sant Kewala Nand and the remaining persons who, were plaintiffs in the earlier suit, seeking a perpetual injunction to the effect that the defendants be restrained from allowing the water to flow from the pond in dispute situated in village Khanur towards Jallowal and that they should also be restrained from breaking any portion of the *phirni* shown red in the plan attached with the plaint and the defendants should not take any steps to pass the water of the said pond towards the area of Jallowal. The allegations made were that the water of the pond, in fact, always used to flow towards the north of the pond and that some four years ago the defendants dug a *khal* along the garden towards the south of the pond and towards the north of the land of Jallowal, with a view to pass the water towards Jallowal, and, in order to prevent this being done the plaintiffs along with other inhabitants of village Jallowal strengthened the periphery in order to check the flow of water towards village Jallowal, that the defendants assert that they had obtained a decree against the proprietors of village

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Jallowal restraining them from causing any obstruction in the flow of the water of the pond towards village Jallowal, that the plaintiffs were not parties to the earlier suit and were not bound by the decree granted in that suit and that the flow of the water through village Jallowal was likely to damage the houses and huts belonging to the plaintiffs and, consequently, they have brought this suit for permanent injunction. The suit was resisted, *inter alia* on the ground that the surplus water of the pond used to go through the *khal* in question towards village Jallowal from time immemorial, that natural flow of the water was from north to south and not *vice versa*, as alleged by the plaintiffs, and that the previous litigation operated as *res judicata*. The two main points in the case were whether the previous judgment dated 6th of April, 1960, operated as *res judicata* and whether the defendants have no right to flow water towards village Jallowal. The trial Court felt that the previous judgment did not operate as *res judicata* for the simple reason that the present plaintiffs, who were residents of village Jallowal and, therefore, interested in the matter, were not parties to the previous suit and were not bound by it constructively either because their names were not in the list 'A' attached with the plaint. On merits, it was held that the natural flow of the water was from north to south and, consequently, the defendants were entitled to the flow of the water over the garden and across the *phirni* towards *mauza* Jallowal. However, it was held that the defendants were not entitled to increase the burden of the servient land of Jallowal by digging a channel and thus, increasing the flow of the water from the pond. The defendants were, therefore, directed to fill up the channel to the level of the ground around it. In other respects, the suit of the plaintiffs was dismissed. This order was confirmed by the lower appellate Court.

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Although it was specifically pleaded on behalf of the defendants that the water always used to flow along the channel from time immemorial, this matter was not specifically put in issue, but it was assumed that the natural flow of water was along the entire land as such without there being any channel. On behalf of the appellants it was urged that when the water overflowed from the pond from time immemorial the water naturally eroded the land along its path and a channel was bound to come into existence by such erosion and flow of water. However, it is not possible for me to go into this question because this was not put in issue.

The learned counsel for the appellants, however, mainly argued the question of the previous judgment being *res judicata*. There can be no manner of doubt that the first suit was of a representative nature. All the residents of Khanur on one side and all the residents of village Jallowal on the other were interested in the matter in controversy. Explanation VI to section 11 of the Civil Procedure Code runs 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."

There can be no question that the plaintiffs in the previous case (who are now defendants) did litigate *bona fide;* that the litigation was in respect of a right claimed in common for themselves and others, namely, all the residents of Khanur. Similarly, there can be no manner of doubt that the defendants in that case also litigated *bona fide* in respect of a right claimed in common for themselves and other

residents of Jallowal. It is further clear that the provisions of Order 1, rule 8, Civil Procedure Code, were fully complied with. There is no difficulty in holding that not only the Gram Panchayat of Jallowal and six persons, who were actually made defendants in the case and prosecuted the same, would be bound by the decision in that case but all the 295 persons, who were mentioned in the list 'A', would be bound by the same. The question for consideration, however, is whether the mere fact that the names of the seven persons, who are now the plaintiffs, were not included in list 'A' would have the effect of not making the previous judgment binding on them. The argument on behalf of the respondents was that the intention of the plaintiffs in the previous case was to implead only the right-holders of village Jallowal and the persons, who were made actual defendants in the earlier case, were to represent themselves and other right-holders in the village and, consequently, they cannot be held to have represented the non-proprietors in the village. No doubt, the word used in the plaint is *'malkan'*. This may be taken to mean the land-owners, but, really speaking, the word *'malkan'* has a broader significance and means any owner in the village and it was not disputed that in view of the recent legislation that had come into force much earlier than 1958, when the first suit was brought, the non-proprietors, who had raised any houses on the lands in the village, had become owners of the sites under the houses and they have always been the owners of the *malba* and entitled to reside in those houses from generation to generation. In the wider sense of the term, therefore, the word *'malkan'* would include proprietors as well as the non-proprietors residing and owning houses or sites in the village. In any case, it is not denied that the proprietors as well as the non-proprietors were equally interested in the matter in controversy. The

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plaintiffs in the present case have specifically pleaded that the level of the *phirni* was raised by the plaintiffs and other residents of the village in order to stop the flow of the water in that direction. Consequently, when a general proclamation was made in the village about the previous suit having been filed, it was open to the present plaintiffs to appear before the Court and move for being made parties to the suit. The learned counsel for the respondents, however, urged that under no circumstances a person whose name is not included in the list attached with the plaint can be held bound by a decree granted in a representative suit. No authority directly on the point has been cited by the learned counsel on either side. Reliance was placed on behalf of the respondents mainly on a Privy Council ruling in *Kumaravelu* v. *Ramaswami* (1). In that case certain persons belonging to Vaniya caste went to a temple to perform a certain vow, and while engaged in performing it, defendants (the servants of the temple) turned them out of the temple. They brought a suit in which they sought, *inter alia,* the recovery of a sum as exemplary damages from the defendants. No permission of the Court was taken nor were any notices issued to persons of the same caste. In a subsequent suit the Madras High Court had held that the previous suit operated as *res judicata* having been filed in a representative capacity. Their Lordships of the Privy Council held that the previous suit was not a representative suit but was only a suit *inter partes* and the decision in the suit could not be *res judicata* under section 11, explanation VI. This decision of the Privy Council, therefore, is based on altogether different facts. The head-note (c) of the report, however, runs as follows:—

> "Order 1, R. 8 formulates an exception to the general principal that all persons interested

(1) A.I.R. 1933 P.C. 183.

in a suit shall be parties thereto. It is an enabling rule of convenience prescribing the conditions upon which such persons when not made parties to a suit may still be bound by the proceedings therein. For the rule to apply the absent persons must be numerous; they must have the same interest in the suit which, so far as it is representative, must be brought or prosecuted with the permission of the Court. On such permission being given it becomes the imperative duty of the Court to direct notice to be given to the absent parties in such of the ways prescribed as the Court in each case may require: while liberty is reserved to any represented person to apply to be made a party to the suit. The obtaining of the judicial permission and compliance with the succeeding orders as to notice are quite clearly the conditions on which the further proceedings in the suit become binding on persons other than those actually parties thereto and their privies."

In the present case there can be no manner of doubt that the procedure laid down under Order 1, rule 8, Civil Procedure Code, has been fully complied with. The sole question, however, is whether, if the suit is, in fact representative in the sense that the matter in controversy is common to a class of persons and if some of that class are actually made defendants and some others are given in the list attached with the plaint, to whom a general notice under Order 1, rule 8 Civli Procedure Code, is sent, and by inadvertence or otherwise the names of one or more of that class are omitted from such a list, the decision in the case would be binding on such person or persons whose name or names have been so omitted. In *Bishen Singh* v.

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Bakhshish Singh (2), a Division Bench of the Lahore High Court had even gone to the extent that if the prior suit is of a representative nature and is prosecuted *bona fide* and no injury had been caused for the non-compliance of the provisions of Order 1, rule 8, even then the findings in the previous suit barred a subsequent suit on the ground of *res judicata*. The relevant portion of head-note (b) is as follows:—

> "The test to be applied was whether the previous litigation was *bona fide* and whether any injury had resulted to the plaintiffs in the subsequent suit on account of the omission to comply with the provision of O. 1, R. 8 in the former suit. The previous litigation could not be said to be not *bona fide* nor had any injury resulted to the present plaintiffs by omission to comply with O. 1, R. 8. Hence findings in previous suit barred the subsequent suit on ground of *res judicata*."

It may be mentioned here that the Privy Council case of *Kamara Velu* mentioned above was noted and distinguished in this case. Reference may also be made to *Chuhar Singh* v. *Raghbir Singh* (3). The head-note (b) runs as follows:—

> "In order to bring a suit within Explanation VI, the following conditions must be established: (1) that there must be a right claimed by one or more persons in common for themselves and others not expressly named in the suit; (2) that the parties not expressly named in the suit must be interested in such right and (3) that the litigation must have been conducted *bona fide* on behalf

(2) A.I.R. 1936 Lah. 13.
(3) A.I.R. 1956 Punj. 241.

of all parties interested. In plain words, Explanation VI of the section extends the meaning of the words "under whom they or any one of them claim".

Thus, whereas there is no direct authority in support of the contention raised on behalf of the counsel for the respondents, the observations made in the decided cases referred to above rather militate against the contention of the respondents. Otherwise too, the very idea underlying Explanation VI and the provisions of Order 1, rule 8, will be defeated if such a highly technical view is taken. Order 1, rule 8, applies to cases where the parties interested are numerous. In the present case all the residents of a village were interested. While giving the names of all the residents it is not difficult to imagine a situation where names of one or two residents get omitted. For example, there may be a resident of a village living at a distant place, like Bombay. On the date the suit is brought he may be dead without the plaintiffs having knowledge about it; they may either omit to mention his name or mention his name (he being dead, this would be no better than not mentioning his name) and fail to mention his legal representatives who would be the real persons interested in the matter. If the omission of their names in the list alone is going to make the decree not binding on such legal representatives, then the entire idea of a representative suit will be gone. In the present case, there being a general proclamation in the village, the matter is presumed to have come to the knowledge of all the residents that the dispute was about the flow of the water towards village Jallowal and if the present plaintiffs failed to move the Court to make them parties to the suit as being interested, they cannot be allowed to raise the controversy once again after the same has been decided up to the High Court.

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Having given my best consideration to the question, I am of the view that the present litigation is barred by *res judicata* and, consequently, I accept this appeal, set aside the judgment and the decree of the Courts below and dismiss the suit of the plaintiffs. In the peculiar circumstances of the case, there will be no order as to costs.

R.S.

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Before Daya Krishan Mahajan and Prem Chand Pandit, JJ.

PHUMAN AND OTHERS,—*Appellants.*

versus

THE STATE OF PUNJAB AND OTHERS,—*Respondents.*

First Appeal From Order No. 92 of 1961.

1963

March, 19th.

Code of Civil Procedure (Act V of 1908)—Order 22—Whether applies to proceedings under S. 18 of Land Acquisition Act—Land Acquisition Act (I of 1894)—Ss. 20, 21, 23 and 26—Whether inconsistent with the provisions of Order 22 C P. Code—Ss. 18 and 30—References under—Respective scope of—Limitation Act (IX of 1908)—Article applicable to an application for bringing on record legal representatives of a deceased party in a reference under S. 18 of Land Acquisition Act—Whether Article 176 or 181.

Held, that section 53 of the Land Acquisition Act, 1894 has made the provisions of the entire Code of Civil Procedure applicable to all proceedings before the Court under that Act unless they are inconsistent with anything contained in the Act. It follows, therefore, that the provisions of Order 22, rule 3 would apply, unless it could be shown that they were inconsistent with anything contained in the Act. There is no specific provision in this Act, which says that the principles of abatement would not apply to the proceedings before the Court under the Act. There is no force in the argument that under the provisions of sections 20, 21, 23 and 26 of the Act, the Court was bound to