

1915.

INDIAN  
SPECIE BANK,  
LTD.,  
*In re*

SORABJI  
NUSSE-  
WANJI  
*v.*

C. A. PAT-  
WARDHAN.

For these reasons we think that the learned Judge was right in the order passed by him which we now affirm and we dismiss the appeal with costs.

Attorneys for appellant : Messrs. *Payne & Co.*

Attorneys for respondent No. 1 : Messrs. *Dhanjishah & Batliwala.*

Attorneys for respondents Nos. 2, 3, 4 : Messrs. *Bhai-shankar Kanga & Girdharlal.*

Attorneys for respondent No. 5 : Messrs. *Little & Co.*

*Appeal dismissed.*

G. G. N.

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## APPELLATE CIVIL.

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*Before Mr. Justice Batchelor and Mr. Justice Hayward.*

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August 18.

HARKISANDAS SHIVLAL AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS  
*v.* CHHAGANLAL NARSIDAS AND OTHERS ( ORIGINAL DEFENDANTS ),  
RESPONDENTS.\*

*Civil Procedure Code (Act V of 1908), Order I, rule 8—Suit by plaintiffs as representing the section of a caste to take account and to recover moneys belonging to the section—Meeting not properly convened—Suit opposed by numerous members of the section—Suit as representing the plaintiffs supported by a large number of the members—Representative suit not maintainable.*

The caste of the Dasa Lad Baniyas of Broach was divided into two sections, known as the Mojumpurias and Sheherias. The accounts and the funds of each section were separately kept by defendant No. 1, who was the headman of the whole caste. The plaintiffs were authorised to bring the present suit, at a meeting at the Mojumpuria section held on the 28th April 1909. It appeared that the meeting was irregularly convened. The plaintiffs brought the present suit, under Order I, Rule 8 of the Civil Procedure Code, to take accounts of the funds belonging to the Mojumpuria section from defendant

\* Second Appeal No. 544 of 1913.

No. 1, and to recover from him the amount that might be found due on such accounts being taken. Out of the 183 members constituting the Mojumpuria section, 112 supported the plaintiffs' contentions; whilst 70 members supported those of defendant No. 1. The First Court granted the reliefs sought; but the District Court disallowed the second relief. On second appeal:—

*Held*, that the suit as constituted must fail, for the plaintiffs could not represent nor sue on behalf of those numerous members of the Mojumpuria section who admittedly were in diametrical opposition to them in the present controversy.

*Held*, also, that the plaintiffs could not call in aid the private expressions of consent obtained after suit filed so as to supply that authority which was admittedly lacking at the time when the suit was in fact filed.

SECOND appeal from the decision of P. J. Taleyarkhan, District Judge of Broach, varying the decree passed by Vadilal T. Parekh, First Class Subordinate Judge at Broach.

Suit for taking accounts and recovering money.

The Dasa Lad Bania caste of Broach was divided into two sections. The one was known as Mojumpurias, and the other as Sheherias. Each section had its own funds, of which separate accounts were kept. The account-books and the funds were with defendant No. 1 who was the *sheth* or headman of the whole caste.

On the 28th April 1909, a meeting of the Mojumpuria section was held, at which a resolution was passed authorizing the plaintiff to sue defendant No. 1 for taking account of his management of the funds belonging to the section, and to recover the funds from him. The meeting was not convened in the usual way and not held at the usual place. It was attended by 58 members of the caste, of whom only 38 were *lahana-vallas*, *i.e.*, persons qualified to vote, out of 183 *lahana-vallas* in the section.

The plaintiffs brought the present suit, under the provisions of Order I, Rule 8 of the Civil Procedure Code, to take accounts of the funds belonging to the

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Mojumpuria section, and to recover from him the amount that may be found due on such accounts being taken.

In the course of the suit, 70 members of the Mojumpuria section, appeared and supported defendant No. 1, in his contention that the meeting of the 28th April 1909 was not properly convened. 112 members of the section presented applications supporting the plaintiffs' position.

The Subordinate Judge granted both reliefs sought, holding that the meeting of the 28th April 1909 was properly convened, and that the plaintiffs were duly authorised to bring the suit.

The District Judge, on appeal, was of opinion that the meeting was not regularly convened. He, therefore, declined to grant the second relief, on the following grounds:—

It is proved by the evidence of plaintiffs' own witnesses that the meeting in question was not duly convened. That being the case, those who kept away from it were within their rights in doing so, and the resolution passed at the meeting could not bind them, nor could it be treated as a resolution of the Mojumpur section. It was merely a resolution of the persons who has passed it, and it could not for a moment be said that the plaintiffs were authorised by the Mojumpur section to bring the suit. It is not a Mojumpur section or a majority of that section that wants to get the funds into its own hands but only a minority composed of fifty-eight members of the section who wishes to do so. The case reported in I. L. R. 19 Bom. 507, has, therefore, no application here, and the Court cannot give effect to the resolution on which the suit is based

Moreover, defendant 1 is admittedly in management of immoveable properties which belong to the entire caste, and could only be in management thereof for the entire caste and not for the sections composing it. A substantial part of the caste fund consists of three endowments admittedly made to the entire caste for giving caste-feasts on certain days. The amounts of these endowments have been divided into two equal shares and one such share credited in the account of each section. This must have been presumably done by the entire caste, for as I said above the endowments were made for the benefit of the entire caste and not for each section separately. The feasts are given to the entire caste and not to each section separately, and the expenses are equally

divided between the two and debited to their respective accounts. Now if the Mojumpur people get all the money in the Mojumpur *khata* into their own hands, this arrangement would be upset. But it is obvious that the arrangement could not be upset except with the concurrence of the entire caste. The Court cannot do anything which would bring about that result, for that would be an interference with the autonomy of the caste. It appears that latterly defendant No. 1 had made an unauthorized alteration in the accounts in relation to these endowments. He had removed the credit items relating to the endowments from the *khatas* of the two sections, and instead opened new *khatas* in the names of the donors and transferred the items to those *khatas*.

If the alteration in the mode of keeping accounts was prejudicial, it was no more prejudicial to the Mojumpur section than to the city section. It is true that the alteration was unauthorized. But the proper remedy of the plaintiffs and their partisans was to move the caste to rescind the alteration, and not come to Court to get half of the endowment money into their own hands. Defendant No. 1 is in custody of the cash placed to the credit of the Mojumpur section in pursuance of the scheme under which the two separate funds have been formed, and are being added to, by the caste from the caste endowments and the revenues of the caste properties. He is, in my opinion, not the agent of this or that section but is a trustee of the whole caste. The character and extent of his responsibility to the sections are the same as those of any trustee of a caste to a member of the caste. He does not hold the funds in question as agent of the Mojumpur section but as trustee of the caste and cannot part with them without the orders of the caste.

The plaintiffs appealed to the High Court: whilst defendants filed cross objections to the decree.

*B. J. Desai*, with *T. R. Desai*, for the appellants.— We represent the Mojumpur faction. The suit has been brought by us on behalf of the faction under the provisions of Order I, Rule 8 of the Civil Procedure Code, 1908. The plaintiffs were authorized to bring the suit at a meeting of the faction, where a resolution was passed by 56 members out of 180 members constituting the faction. Thus, at the meeting 56 members supported the plaintiffs; but since the institution of the suit other members have put in an application supporting the plaintiffs and some members have written letters approving of the plaintiffs' action. These with 56 members who passed the resolution, number 110.

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Hence, it appears that the plaintiffs are supported by 110 members, when only 72 members support the defendant. The lower appellate Court has held that the meeting of the faction was not duly convened, and the resolution passed was not valid and legal. Even if that finding were accepted, the present suit should be maintained, supported as it now appears by a large majority of the faction. See *Lalji Shamji v. Walji Wardhman*.<sup>(1)</sup>

*H. C. Coyaji*, with *D. A. Khare*, for respondents Nos. 1 to 4, 6, 7, 9, 10, 13, 14, 16, 18, 21, 25 to 27, 31 to 36, 38 to 40, 42, 45, 48, 51, 52, 59 and 62, was not called upon.

BATCHELOR, J.:—The plaintiffs, who are the appellants before us, are like the defendants members of a caste known as the Dasa Lad Baniyas of Broach, and the caste is divided into two sections known as the Mojumpurias, (Mojumpur being a hamlet of Broach in which certain members of the caste lived or used to live), and the Sheherias or the city section. The plaintiffs belonged to the Mojumpur section, while the principal defendants belonged to the Sheheria section. The plaintiffs in their plaint set out that they were authorized by the Mojumpur section on the 18th of April 1909 to bring this suit, which they accordingly did bring under Order I, Rule 8 of the Civil Procedure Code, as representing the members of the Mojumpur section. The object of the suit was to depose the 1st defendant from the position which he appears to occupy both in the Mojumpuria and in the Sheheria sections of the caste, and the principal prayers made in the plaint were that the accounts of the Mojumpur section should be settled from Samvat 1953, and that the 1st defendant should be compelled to pay to the plaintiffs the amount that might be found due upon those accounts being taken.

(1) (1895) 19 Bom. 507.

The trial Court made a decree in favour of the plaintiffs, but upon appeal that decree was amended by the learned District Judge who refused the prayer that the 1st defendant should be called upon to refund the moneys due to the Mojumpur section, though he allowed the plaintiffs' claim to the extent that accounts should be taken from the 1st defendant. From that decree the plaintiffs bring this present appeal, while the respondents have filed cross-objections in respect to that portion of the decree which was in the plaintiffs' favour.

We have had a very careful argument from Mr. Desai on behalf of the plaintiffs-appellants, but I am of opinion that this suit was misconceived and must fail. As I have shown, the plaintiffs purported to be suing on behalf of the whole Mojumpur section, or sub-caste, by virtue of Order I, Rule 8. But it seems to me clear upon the very face of things that the plaintiffs could not, under Order I, Rule 8, sue on behalf of those numerous members of the Mojumpur section who admittedly were and are in diametrical opposition to them in this present controversy. In no sense could those persons be said, I think, to be represented by the plaintiffs in this suit. For in no sense could it be said, as the language of the Rule requires, that they and the plaintiffs held the same interest in the suit and that the plaintiffs in bringing this suit were suing for or on behalf of these dissentient members. But then it was said that in any event the suit was good, considered as brought by the plaintiffs for themselves and for those members of the Mojumpur section who at the meeting of 18th of April 1909 recorded their opinions in favour of the plaintiffs' views. There, however, the difficulty is the learned appellate Judge's finding of fact that this meeting was irregularly convened, and Mr. Desai has very properly and candidly admitted that that finding of fact is binding upon him in second appeal.

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The result, therefore, is that the constitution of this suit cannot be justified by reason of anything that took place at the meeting of the 18th of April 1909. That difficulty was, as I understand, admitted by Mr. Desai who, however, sought to remove it by reference to events that occurred after the filing of the suit; and the contention was that, although at the date of the filing of the suit, the plaintiffs were without that authority upon which they purported to base their suit, yet such authority was subsequently supplied to them by the circumstance that after the filing of the suit numerous members of the Mojumpur section communicated to the plaintiffs their adherence to the position which the plaintiffs were adopting. Thus by the application, Exhibit 73, 42 such members expressed their adherence. By the letters and postcards, Exhibits 74 to 87, 14 other members gave a like expression of opinion. The total, according to Mr. Desai's calculation, would give 112 members consenting to the plaintiffs' action out of a total membership of 183. Now it was admitted in the course of the argument that in this matter there is neither statutory law nor custom which can guide us to a decision, and that in consequence under the Regulation of 1827 our determination must be founded upon equity and good conscience. But it seems to me that the rules of equity and good conscience forbid the inference that an expression of opinion obtained in private after a suit filed is on the same level as the open casting of a man's vote at a public meeting. For, at the public meeting there are his friends to support him, and there are his adversaries to correct him or any other member on his side if any misrepresentation or exaggeration should be used in argument; whereas opinions obtained by one party in private behind the back of the other party may be obtained by inducements or representations which, if they were known to the Court, would not

be approved by the Court. I think, therefore, that it is not possible to call in aid these private expressions of consent obtained after suit filed so as to supply that authority which was admittedly lacking at the time when the suit was in fact filed. That being so, the suit as constituted must, I think, fail.

We have carefully considered whether under Order 6, Rule 17, we ought not to allow, even at this late stage of the litigation, the plaintiffs to amend their plaint. I am of opinion that permission ought not to be granted for the reason that if it were granted, it would expose the defendants to an injury which could not be compensated in costs. For the amendment of the plaint in the manner suggested would alter the whole fabric and character of the suit, and however the amended claims might be worded, the result would be that they would be claims now sprung upon the defendants for the first time, claims which the defendants up till now have never had any opportunity either of considering or of resisting.

In my opinion, therefore, the whole suit fails and should be dismissed with costs throughout.

HAYWARD, J.:—I entirely concur.

*Suit dismissed.*

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