ORIGINAL CIVIL.

Before Mr. Justice Marten.

1917. *March* 29.

BHICOOBAI, WIDOW, AND ANOTHER (PLAINTIFFS) *v.* HARIBA RAGHUJI JAMBHOOKAR AND OTHERS (DEFENDANTS).*

The Indian Contract Act (IX of 1872), section 70—The Civil Procedure Code (Act V of 1908), Order I, Rule 8, Order XXI, Rule 89 and section 35—Suit by a member of a caste on behalf of himself and all other members—Suit dimissed with costs, the plaintiff being ordered to pay costs—Caste property attached in execution of decree—Attachment resisted by the caste—Caste property sold under order of Court-sale set aside on payment of all money under various attachments by two members of caste—Members paying money entitled to compensation out of caste property—Construction of decree in a representative suit—Observations in giving leave and drawing up order for costs in representative actions.

One S, a member of the Dakshani Fulmali caste, on behalf of himself and all other members of the caste sued two other members, the headmen of the caste for an account of the caste moneys received by them and for further relief. Prior to its institution the suit had been authorised by a resolution of the caste at a general meeting. The suit was dismissed and the Court ordered that the plaintiff should pay the defendants their costs of the suit. S appealed, and the appellate Court dismissed the appeal with costs.

In execution proceedings for the recovery of a portion of the costs the only immoveable property of the caste consisting of a *Sabhagraha* or Caste Meeting House was attached and after an unsuccessful attempt on behalf of the caste to have the attachment raised, the right, title and interest of S and all members of the caste in the property were sold. Subsequently two members of the caste B and H to save the property for the caste got the sale set aside under Order XXI, Rule 89, by paying to the purchaser the compensation required under the rule and to the judgment-creditors the moneys due under their attachment. B and H further paid off the moneys due under all other attachments, the total amount expended by them on behalf of the caste being Rs. 7,234. B and H claiming to be reimbursed for the amount paid by them sued the members of the caste praying that the defendants in their individual capacity and as representatives of the caste might be ordered to contribute towards the payment of the total amount paid by the plaintiffs and that in the alternative it may be declared that the plaintiffs had a charge on the *Sabhagraha* for the said amount. The defendants contended that no personal decree could be

* O. C. J. Suit No. 1182 of 1915.

passed against all the members of the caste, that the judicial sale and the warrants for attachment in the prior suit were made *per incuriam* without jurisdiction and were not binding on the caste, and that by the form of the decree in the prior suit S alone was liable for all costs incurred.

Held (1) that under section 70 of the Indian Contract Act the plaintiffs were entitled to compensation in respect of the moneys paid by them including the five per cent. amount paid to the purchaser under Order XXI, Rule 89 ;

(2) that on the plaintiffs undertaking not to levy execution except against the immoveable property or the shares of the members of the Fulmali caste therein, the defendants and all other members of the Fulmali caste should pay to the plaintiffs the sum of Rs. 7,234 ;

(3) that costs as between party and party of all parties be taxed and paid out of the immoveable property, the plaintiffs' costs having priority over those of the contesting defendants.

Suchand Ghosal v. *Balaram Mardana*[1], *Taff Vale Railway* v. *Amalgamated Society of Railway Servants*[2], and *Markt & Co., Limited* v. *Knight Steamship Company, Limited*[3], referred to.

In giving leave under Order I, Rule 8, in a representative action, the Court should exercise caution before it makes persons liable for large sums who are not actually parties to a suit nor have personally authorised it. On the other hand the representative should not be an impecunious person as otherwise a caste or similar body might carry on litigation with little fear of adverse consequences supposing the liability for costs fell only on their impecunious representative and not on themselves. Similarly in drawing up an order for costs in a representative action it should be stated whether the representative party alone or the representative and all other members of the body he represents are to bear the costs, assuming there is jurisdiction in the particular case to make such an order.

SUIT to recover money.

The 1st plaintiff, Bhicoobai, widow of Yeshawantrao Savlaram Meher, and 2nd plaintiff, Ranoji Ravjee Aroo, were members of the Dakshani Fulmali caste. The defendants Nos. 1—13 were also members of the same caste.

The plaintiffs sued the defendants in their individual capacity as members of the said caste and by leave

(1) (1910) 38 Cal. 1 at p. 7. (2) [1901] A. C. 426.
(3) [1910] 2. K. B. 1021 at pp. 1044, 1048.

1917.

BHICOOBAI v. HARIBA RAGHUJI.

obtained from the Hon'ble Court as representing the whole of the said Dakshani Fulmali caste, under the circumstances stated below :—

In the year 1911, one Shankar Bapu Donke in pursuance of resolutions duly passed by the said caste in November 1910 filed a suit in the Hon'ble Court being Suit No. 559 of 1911 on behalf of himself and all other members of the said caste against one Sabaji Savlaram Meher and one Hariba Savlaram Meher who were the Patels or headmen of the caste, for a full and true account of all sums of money received by the said Patels by way of subscriptions, fees, donations and rents of the *Sabhagraha* or the caste property from the year 1898 to 31st October 1910.

The said suit was heard and decided on 2nd July 1912 against the said Shankar Bapu Donke by the Hon'ble Mr. Justice Heaton whose judgment and decree in the suit were confirmed on appeal on the 17th January 1913.

At the hearing of the suit the following among other issues were raised, viz., (1) whether the said Patels did not render the account and pay the balance due to the trustees, and (2) whether the said Shankar Bapu was entitled to maintain the suit. On the 1st issue it was held that the said Patels did render the account and pay the balance, and on the 2nd issue it was held that the said Shankar Bapu was entitled to bring and maintain the suit on behalf of himself and other members of the caste.

The said suit and appeal being dismissed with costs against Shankar Bapu Donke, the said caste in effect became liable to pay the costs incurred to the defendants in the suit.

As there was the balance of costs due to the said Patels both in the suit and appeal, the Patels attached

and sold the *Sabhagraha* (Caste Meeting House) through the Sheriff in execution of the decree passed in appeal for a sum of Rs. 3,900 only.

The *Sabhagraha* was worth more than Rs. 12,000.

The plaintiffs in the present suit being desirous to save the said *Sabhagraha* for the benefit of the caste paid off the balance of costs due to the defendants in Suit No. 559 of 1911, and paid off the purchaser of the *Sabhagraha* the compensation due to him thereby getting the sale set aside. On the balance of costs being paid the various attachments on the *Sabhagraha* were raised. The plaintiffs having spent in all Rs. 7,234 on account of the caste though not at the express request of the caste, filed the present suit praying (*a*) that the defendants in their individual capacity as members of the said caste and as representatives of the said caste may be ordered to contribute towards the payment of the said sum of Rs. 7,234 and (*b*) that in the alternative it may be declared that the plaintiffs have a charge on the said *Sabhagraha* for the said sum of Rs. 7,234 spent by them as aforesaid.

The principal contending defendants, i.e., defendants other than Nos. 11 and 12, pleaded that the judicial sale and warrants for attachment were all made *per incuriam* without jurisdiction and were not binding on the caste, which consisted of about 10,000 members, that some of them had taken no part or interest in the proceedings relating to Suit No. 559 of 1911, that the plaintiff in Suit No. 559 of 1911 was by the form of the decree personally ordered to pay the costs of the said suit, and that in any event the plaintiffs in the present suit were not entitled to any charge on the property.

At the hearing the defendants Nos. 11 and 12 expressed their willingness that the plaintiffs should have a

1917.

BHICOOBAI v. HARIBA RAGHUJI.

charge on their shares in the caste property and they were accordingly discharged from the suit.

F. Tyabji with *H. Tyabji*, for the plaintiffs.

B. J. Desai with *Strangman*, for defendants Nos. 1-5, 7, 9, 10 and 13.

V. M. Desai with *Mehta*, for defendant No. 8.

Kanga and *Munshi*, for defendant No. 11.

Chothia and *Desai*, for defendant No. 12.

MARTEN, J.:—This is an action in effect to recover out of the immoveable property of the Fulmali caste certain sums of money amounting in all to Rs. 7,234 which were paid by the plaintiff in order to set aside a judicial sale of this immoveable property and to satisfy certain other attachments which had been made against this property in Suit No. 559 of 1911. The defendants other than defendants Nos. 11 and 12 represent the caste under a representation order made in this action under Order I, Rule 8.

The defence in effect is that this judicial sale and the warrants for attachment were all made *per incuriam* without jurisdiction and are not binding on the caste, and that even if they are binding, the plaintiff is not entitled to any charge on the property, and is indeed without any remedy, for it is contended that as he is not entitled to a personal decree against all the members of the caste, he cannot by attachments get at the caste property. The immoveable property in question is the Caste Meeting House or *Sabhagraha* in Bombay. Beyond that it does not appear that the caste has any other property, immoveable or moveable. The facts are not really in dispute but must be stated in order to understand how the numerous technical points of law and practice arise. In particular the point arises as to what relief can be obtained by a plaintiff in an action

which the defendants are defending under a representation order.

The material facts are as follows:—The previous action, Suit No. 559 of 1911 was a representative action brought by one Shankar on behalf of himself and all other members of the Fulmali caste against two other members, for an account of certain moneys of the caste received by such two members and for further relief. This action had been authorised by a Resolution of the 6th November 1910 of the caste which will be found on pp. 79 and 80 of the appeal paper book in the suit. It is also clear from Mr. Justice Heaton's judgment in the same case that Shankar was authorized so to sue (see p. 238 of the appeal book where issue "No. 4" appears to be a misprint for issue No. 8). By the decree of the 2nd July 1912 the suit was dismissed by Mr. Justice Heaton and the Court ordered "that the plaintiff do pay to the defendants their costs of this suit" except of two full days' hearing on issue 4 and "that the defendant do pay to the plaintiff *his* costs of two full days" and that the one set of costs be set off against the other. Shankar appealed and by the appeal decree of the 17th January 1913, after describing Shankar as the appellant, the appellate Court confirmed Mr. Justice Heaton's decree and ordered that "the appellant do pay to the respondents their costs of this appeal." The members of the appellate Court were my Lord the Chief Justice and Mr. Justice Chandavarkar.

It was strongly urged before me that these decrees of Mr. Justice Heaton and the appellate Court meant that Shankar personally was to pay these costs and not the caste and it was pointed out particularly that in the decree of Mr. Justice Heaton the word 'his' was used with reference to the plaintiff and that in the appellate decree Shankar was described as the appellant and that

1917.

BHICOOBAI v. HARIBA RAGHUJI.

this would seem to negative any suggestion that the word 'plaintiff' or 'appellant' in those decrees would mean Shankar and all other members of the caste or enable execution to be obtained against anybody but Shankar.

However, on the 12th November 1913, there was an application for execution (Exhibit E) under Order XXI, Rule 11, which application as amended on the 18th November 1913 asked for the attachment of the above-mentioned immoveable property of the caste and the sale of the right, title and interest of the plaintiff and all the other members of the caste therein in respect of Rs. 729-3-8 being the balance of the costs of the appeal. On the 21st November 1913, this application for execution was granted by the prothonotary and a writ in form No. 55 was directed to issue. I think this application ought to have been brought before the Sitting Judge in Chambers. It appears to be of a novel character, and so far as has been ascertained from the enquiries which I have directed to be made, no similar order can be traced in the Prothonotary's office apart from the orders in this suit. Further, under Order XXI, Rule 17 (3), the amendment made in the application ought to have been signed or initialled by the Judge, which in point of fact was not done.

On the 9th January 1914, there was a similar application for attachment (Exhibit F) by the defendants for certain further costs amounting to Rs. 158-14-0. But in this case no sale was asked for. This application was granted by the Prothonotary on the 12th January 1914.

On the 15th January 1914, there was another application (filed on the 10th February 1914) for execution (Exhibit G) by the defendants for a balance of Rs. 2,628-5-0 in respect of further costs and the order on

this application was eventually made by the Prothonotary on the 5th March 1914.

On this same 10th February 1914, there was an order made by Mr. Justice Macleod (Exhibit I) on Summons No. 1 of the 15th January 1914 (Exhibit H) which was a summons taken out by Shankar's solicitor against Shankar to show cause why an order against Shankar for payment to his solicitor of Rs. 3,658-5-6 for costs should not be passed and why the costs of the summons should not be paid by Shankar. Mr. Justice Macleod sitting in Chambers made this summons absolute against the plaintiff and all the members of the caste and further ordered "that the plaintiff and all the members of the Fulmali caste do pay" to Shankar's attorney the said sum of Rs. 3,658-5-6 and the costs of the summons and that order. On this summons the attorney appeared by counsel. Shankar appeared in person. No body else appears to have been present on behalf of the other members of the caste although on this application Shankar's interests were in conflict with those of the other members of the caste for it was to his interest to get them to share his burden.

The present defendants contend that the learned Judge had no jurisdiction to make this order: that the summons did not and could not ask for an order against the caste, for it was made under Rule 815 of the Bombay High Court Rules and under that rule Shankar and not all the members of the caste would be "the client" of the solicitor within the meaning of the rule. It was further urged that no unqualified personal order such as this could be made against all the members of the caste, who are stated to number some 10,000 or more.

On the 3rd April 1914, Summons No. 2 (Exhibit J) was taken out by three members of the caste in effect to set

1917.

BHICOOBAI v. HIRÀBAI RAGHUJI.

aside the attachments made by the Prothonotary on the defendant's application for execution (Exhibits E,F and G). The affidavit in support of the application (Exhibit J1) shows that the application was principally based on the allegation that Shankar was not authorized to bring the suit although in paragraph 21 of the affidavit there is a general allegation that the attachment was illegal. This application came before Mr. Justice Batchelor in Chambers on the 9th April 1914, and was dismissed with costs. It does not appear on what grounds the application was dismissed, but both parties were represented by counsel and I must take it that the parties had all proper opportunities for putting forward any grounds on which they claimed that the orders for attachment were illegal. I can understand the applicant's main allegation being a denial of Shankar's authority to bring Suit No. 559 of 1911, for unless they could establish this, they might well have thought that Shankar would have been entitled to an indemnity by the caste on the same lines as an ordinary agent would be entitled to indemnity under section 222 or 223 of the Indian Contract Act. Indeed the caste seem to some extent to have recognized their obligation for the fourth Resolution on p. 80 of the Appeal Paper Book shows that a caste fund at the Bank was to be applied in payment of the costs of the suit. This caste fund has, however, long since been exhausted and I do not think this Resolution confined Shankar's right of indemnity to this particular fund. If wise counsels had prevailed in the caste the proper course would seem to have been to have paid the liability which Shankar had incurred on the authority of and on behalf of the caste. However a line of passive resistance and technical objections has in fact been adopted up to and including the trial of the present action and as the caste stand on their strict legal rights I have to determine

what those rights actually are. As regards this summons (Exhibit J) of the 3rd April 1914 I should add that it was taken out by the applicants in pursuance of a Resolution passed at the meeting of the caste on the 1st February 1914 as appears from paras. 14 and 15 of the affidavit J.

The caste appear to have accepted the situation under Mr. Justice Batchelor's order. At any rate there was no appeal from his order, nor was there any other attempt to set aside the warrants of attachment, nor any attempt to set aside the order of Mr. Justice Macleod of the 10th February 1914. Accordingly the property was put up for sale and on the 17th June 1914 "the right, title and interest of the appellant Shankar and of all others the members of the Fulmali caste" in the property were sold to one Narayan Narso Ketkar for Rs. 3,900. This appears from the Sheriff's certificate of the 1st July 1914 (Exhibit L).

On the 10th July 1914, the present plaintiffs took out summons No. 3 (Exhibit M) to set aside the sale under Order XXI, Rule 89. The evidence of the second plaintiff, which I accept, is that he took this step because he thought the property was sold at an undervalue, and that he wished to preserve it for the caste but that in so doing he had no intention of making a gift to the caste of the moneys necessary for him to pay in order to set aside the sale. It appears from pp. 80 and 105 of the Appeal Paper Book that the second plaintiff was formerly a trustee and treasurer of the caste, but I understand from him that he no longer held that office at the date of this application. The application was opposed but on the 25th July 1914 an order (Exhibit N) was made by Mr. Justice Macleod setting aside the sale on payment of Rs. 195 to the purchaser being his compensation under Order XXI, Rule 89 (1) (A), and Rs. 729-3-8 to the

1917.

BHICOOBAI v. HARIBA RAGHUJI.

judgment-creditors in respect of their attachment (Exhibit E); and the balance of the money paid into Court by the present plaintiffs was ordered to be returned to them. This was because the sale was only in respect of the attachment (Exhibit E) and consequently the sale could be set aside on payment only of the moneys due under that attachment. However the present plaintiffs realised that it was no good paying off merely that attachment (Exhibit E) because the judgment-creditors threatened to proceed, and no doubt would have proceeded, to obtain sales in respect of their other attachments. Accordingly the whole of the attachments were paid off and incidentally Shankar's solicitor was also paid the greater portion of his claim for costs under Mr. Justice Macleod's order of 10th February 1914 (Exhibit I). The aggregate of these payments amounts to Rs. 7,234. The particulars of them are contained in Exhibit B to the plaint and their payment has been proved to my satisfaction.

I may here dispose of one small point by saying that the first plaintiff appears now to have no interest in the matter and that her name should be struck off the record accordingly. She joined originally because she had been a surety for the second plaintiff in obtaining a loan from one Gangaram which was applied in payment of the purchaser and the judgment-creditors. Gangaram subsequently sued the second plaintiff for the moneys so advanced and obtained judgment (Exhibit V) in Suit No. 922 of 1916 and it appears that this judgment has now been satisfied. The first plaintiff has therefore no longer any interest in the matter and it is clear that the second plaintiff in fact provided or became liable for the moneys which he now claims to be reimbursed. The second plaintiff being unable to obtain any reimbursement from the caste eventually brought this action on the 4th October 1915. The plaint

asks in effect in prayer (*a*) for a personal decree against the defendants and in prayer (*b*) for a declaration of charge in respect of the Rs. 7,234 paid by him.

At the hearing before me, defendants Nos. 11 and 12 were willing that the plaintiffs should have a charge on their shares. They accordingly made terms and were discharged. The plaintiff for his part abandoned his claim against all the defendants personally. There was subsequently some little controversy as to whether this barred the plaintiff's claim to get at the immoveable property by the enforcement of any personal decree, but in the end it was agreed that the admission was not to prevent the plaintiff from obtaining a decree affecting the shares of the members of the caste in the caste property. It was also admitted by the remaining defendants that they fairly represented the caste and on looking into their qualifications I think this is so.

The main question for my consideration is whether on the above facts the plaintiff is entitled to any and if so what relief in respect of the payments he has made. It is clear that the moneys were not paid at the request of the caste. He accordingly cannot sue in what may correspond in India to a common law action for money paid to another's use. Further it is not suggested that he took any assignment of the judgment debts which he paid off. He accordingly first put his case on the ground that he had in fact paid off a charge on property belonging to himself and others and that he was therefore entitled to stand in the shoes of the incumbrancer. If the alleged charge had been a mortgage instead of an attachment, this might well have been the case: see *Butler* v. *Rice*[a], a decision of Warrington J. which has recently been cited with approval by Batchelor and

[a] [1910] 2 Ch. 277.

1917.

BHICOOBAI v. HARIBA RAGHUJI.

Shah JJ. in *Tangya Fala* v. *Trimbak Daga*[1]. But I do not think the attachment is a charge in that sense and I do not see that even the judgment-creditor and the purchaser between them can be said to have a charge on the property within the principles applied in *Butler* v. *Rice*[2]. It is clear for instance that if the judgment-debtor went bankrupt, the judgment-creditor could not claim priority over other creditors as would be the case if the attachment created a charge: see *Krishnasawmy Mudaliar* v. *Official Assignee of Madras*[3]; *Raghunath Das* v. *Sundar Das Khetri*[4]; and *Jitmand* v. *Ramchand*[5].

Alternatively the plaintiff's case was put on sections 69 and 70 of the Indian Contract Act and particularly on the latter section which runs as follows:—

"70. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

Now on this section 70 and apart from any question as to the validity of the warrants for attachment and as to the true position of the caste, I think the plaintiff would be entitled to succeed. It has been urged that this section ought in effect to be confined to cases arising under section 69 but I respectfully wish to adopt the words of Sir Lawrence Jenkins in *Suchand Ghosal* v. *Balaram Mardana*[6] where he says:

"The terms of section 70 are unquestionably wide, but applied with discretion they enable the Courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract."

Now in the present case it is clear what the plaintiff did was lawful. Further he did this in my opinion for

(1) (1916) 40 Bom. 646 at pp. 652, 653.
(2) [1910] 2 Ch. 277.
(3) (1903) 26 Mad. 673.
(4) (1914) L. R. 41 I. A. 251 at p. 254.
(5) (1905) 29 Bom. 405.
(6) (1910) 38 Cal. 1 at p. 7.

the caste and he did not intend to do it gratuitously. I also think the other members of the caste have enjoyed the benefit of his deed for their shares in the caste property have been preserved from a sale at an undervalue. *Prima facie*, therefore, I think the plaintiff is entitled to compensation. It may be that the plaintiff also brings himself under section 69 but I am content to deal with the case under section 70.

How far then is the position affected by the warrants of attachment? The first main contention of the defendants is that they have enjoyed no benefit under section 70 inasmuch as these warrants of attachment were invalid and not binding on the defendants and consequently the sale, even if completed, would have passed nothing to the purchaser. In short the defendants say that the plaintiff paid off something which the caste was under no obligation to pay and that accordingly the plaintiff cannot claim any compensation. In my judgment it is no longer open to the defendants to contest the legality of these orders. In considering whether the caste derived any benefit from the plaintiff's payments, I think one has to consider whether the members of the caste were bound by the attachments as between themselves and the judgment-creditors, and that if they were, it is immaterial to consider whether as between the caste and some third party, the matter was or was not *res judicata* from a technical point of view. There has been no appeal from Mr. Justice Batchelor's order declining to set aside the attachments (Exhibits E, F and G) and no appeal against Mr. Justice Macleod's order (Exhibit I). I think therefore that the caste were bound by these attachments as between themselves and the judgment-creditors and are not now entitled to say to a third party who relieved them of the consequence of such attachments that in fact they were under no liability

1917.

BHICOOBAI v. HARIBA RAGHUJI.

to the judgment-creditors. Still less can they say that where the third party is as here another member of the caste. Accordingly for the purposes only of the present case and without expressing any individual opinion of my own, I think it must be assumed that the attachments were valid.

It was next urged by Mr. B. J. Desai in his clear and able argument that section 70 only conferred a personal right and not any charge. I am inclined to think that he is right in this view, but as the plaintiff's counsel disclaimed any intention to get priority over other creditors such as would result from a charge, I do not think it necessary to determine the point.

It was next urged by the defendants that no personal decree could be made against the caste. Now this point seems to me to be one of considerable difficulty. It raises in effect similar questions to those which have been hotly debated in Trade Union and in other cases in England, and these questions seem to be in some doubt in spite of several appeals to the Court of Appeal or the House of Lords. I notice for instance that in the Annual Practice (England) for 1916 at p. 241, Notes to R. S. C., Order XVI, Rule 9 "Combination of Persons" there seems to be considerable doubt in the mind of the writer of the note, as to what relief can in fact be obtained. Mr. Desai boldly argues that you cannot get a personal decree against a body such as this caste and accordingly the plaintiff is without any remedy. A similar argument was advanced in *Taff Vale Railway* v. *Amalgamated Society of Railway Servants*[1]. There in dealing with an argument as to whether an unregistered trade union can be sued, for instance, a co-operative society owning a manufactory which was a nuisance to its neighbours, and in dealing with the

[1] [1901] A. C. 426.

argument of Mr. Haldane (as he then was) to the effect that in such a case there was no remedy and that you must pounce upon the individual offender, Lord Macnaghten at p. 439 said :—

"It seems to me that this is a reduction to absurdity. I should be sorry to think that the law was so powerless ; and therefore it seems to me that there would be no difficulty in suing a Trade Union in a proper case if it be sued in a representative action by persons who fairly and properly represent it."

I think the word "by" means "which is defended by." It cannot refer to the plaintiffs in that action.

Then at p. 443 Lord Lindley in dealing with the rule allowing some persons to sue or be sued on behalf of themselves and all others having the same interest, said as follows :—

"The principle on which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. The principle is as applicable to new cases as to old, and ought to be applied to the exigencies of modern life as occasion requires."

He then goes on :—

"I have myself no doubt whatever that if the Trade Union could not be sued in this case in its registered name, some of its members (namely, its executive committee) could be sued on behalf of themselves and the other members of the Society, and an injunction and judgment for damages could be obtained in a proper case in an action so framed. Further, it is in my opinion equally plain that if the trustees in whom the property of the Society is legally vested were added as parties, an order could be made in the same action for the payment by them out of the funds of the Society of all damages and costs for which the plaintiff might obtain judgment against the Trade Union."

And finally on p. 445 he says :—

"Your Lordships have not now to consider how a judgment or order against a Trade Union in its registered name can be enforced. I see no difficulty about this ; but, to avoid misconception, I will add that if a judgment or order in that form is for the payment of money it can, in my opinion, only be enforced against the property of the Trade Union, and that to reach such property it may be found necessary to sue the trustees."

1917.

BHICOOBAI v. HARIBA RAGHUJI.

I may add that the first above observation of Lord Lindley was approved by Lord Justice Buckley in his dissenting judgment in *Markt & Co., Limited* v. *Knight Steamship Company, Limited*[1]. Now it is no doubt true that in certain other English cases representative actions have been held not to lie. For instance, from *Mercantile Marine Service Association* v. *Toms*[2] and *London Association for Protection of Trade* v. *Greenlands, Limited*[3] and in particular the speech of Lord Parker at pp. 38-39, it would appear that actions for tort, such as libel, would not lie. Further, in *Walker* v. *Sur*[4], where a common law action for debt was attempted to be brought against an unincorporated religious society, leave to sue the defendants on behalf of all members of the society was refused. In that case there was no common fund and no trustees, and it was held that execution could only be obtained against the individuals sued. Indeed, counsel for the plaintiff disclaimed that if he got judgment in the action he could enforce it against a person not a party to the action (see p. 936).

In *Russell* v. *Amalgamated Society of Carpenters and Joiners*[5], it was held that an action for payment out of the funds of the society would not lie against the secretary and trustees, the action not being a representative one. In the case I first mentioned, viz., *Markt & Co., Limited* v. *Knight, Steamship Company, Limited*[6], Lord Justice Moulton, differing from Lord Justice Buckley, thought that the plaintiff could not sue for himself and all other cargo owners for breach of contract in connection with the carriage of goods by sea.

(1) [1910] 2 K. B. 1021 at pp. 1044, 1048.
(2) [1916] 2 K. B. 243.
(3) [1916] 2 A. C. 15 at pp. 38, 39.
(4) [1914] 2 K. B. 930 at p. 936.
(5) [1912] A. C. 421.
(6) [1910] 2 K. B. 1021.

There, after quoting Lord Macnaghten in *Bedford (Duke of)* v. *Ellis*[1], viz.: "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." Lord Justice Moulton in *Markt & Co.'s case*[2] said:—"These words show that where the claim of the plaintiff is for damages the machinery of a representative suit is absolutely inapplicable. The relief that he is seeking is a personal relief, applicable to him alone, and does not benefit in any way the class for whom he purports to be bringing the action." Then after saying on p. 1039 that the parties represented are not liable for costs although bound by the estoppel created by the decision, the learned Judge said on p. 1040:—"The proper domain of a representative action is where there are like rights against a common fund, or where a class of people have a community of interest in some subject-matter. Here there is nothing of the kind."

Lord Justice Moulton in that case was dealing with a representative action where the alleged class were plaintiffs. In the *Taff Vale case*[3] their Lordships were dealing with a case where the alleged class or society were defendants. I do not think these observations of Lord Moulton when read as a whole are really inconsistent with what was said by Lord Macnaghten and Lord Lindley in the *Taff Vale case*[4].

In the present case which I have to deal with we have a common property, namely, the immoveable property in question. It is not altogether clear in whom that property is actually vested but the caste has trustees and as I have already said the 13th defendant is a trustee and the remaining defendants fairly represent the caste. Further, if the observations I have just

(1) [1901] A. C. 1 at p. 8.
(2) [1910] 2 K. B. 1021 at pp. 1035, 1040.
(3) [1901] A. C. 426.
(4) [1901] A. C. 426.

1917.

BHICOOBAI v. HARIBA RAGHUJI.

quoted of Lord Moulton at p. 1040 apply where the defendants are the representative body, we have in the present case a "class of people," viz., the caste having a "community of interest in some subject-matter," viz., the immoveable property in question. There are other authorities which Mr. Tyabji's industry has brought to my notice. But no authority on all fours with the present case has been cited to me and I must decide this case as best as I can from general principles and with the help in particular of the observations of Lord Macnaghten and Lord Lindley which I have quoted. Accordingly after consideration of the case as a whole I think that I can and that I ought to apply section 70 of the Indian Contract Act, although in the present case the "another person" mentioned in section 70 consists of this large caste. I think however it would be unfair to make a personal decree *simpliciter* against the members of a large body such as this, for it would enable the plaintiff to select one member to bear a burden which should be shared by all. In fact Mr. Tyabji wisely disclaimed any intention of the plaintiff so doing. On the contrary the plaintiff is willing to obtain compensation out of the caste property and that property alone, and this seems to me to be the fair way in which compensation should be given in the present case provided anything in the nature of a charge is avoided. It may in form be necessary to make a personal decree but I think this can be obviated by the plaintiff undertaking not to levy execution except against the immoveable property in question or the shares of the members of the caste therein.

As regards the amount for which the plaintiff is claiming compensation, I do not think there is any substantial difference between the various sums, although only one of the attachments included a direction for sale. If the attachments had not been

satisfied there would no doubt have been an immediate application for sale and this would only have involved further costs. These observations apply, I think, as well to the order obtained by Shankar's solicitor as to the attachments.

It was however said that in any event I ought not to allow the five per cent. compensation paid to the purchaser under Order XXI, Rule 89 and *Dori Lal* v. *Patti Ram*[1] and *Suchand Ghosal* v. *Balaram Mardana*[2] were cited in support of that contention. With very great respect to the learned Judges who decided those cases, I think that the plaintiff in the case before me is entitled to compensation in respect of this five per cent. The order I propose to make will in effect be confined to the immoveable property. In effect therefore it is different from a case where the defendants have personally to pay the compensation in cash. Here, but for the plaintiff's act, the defendants would have lost the property. If then they get any part of the property back, they are not damnified. Consequently I see no injustice in their in effect getting back the balance of the property after payment of the plaintiff's claim. In short, this five per cent. compensation was all part of the moneys the plaintiff had to pay in effect to redeem the property and I see no substantial difference in principle between it and the costs of the application to set aside the sale and the actual sum for which the application was originally levied.

The order therefore which I propose to make is to declare that the second plaintiff is entitled to compensation in the manner hereinafter appearing in respect of the moneys paid by him, particulars whereof are

(1) (1911) 8 A. L. J. R. 622.

(2) (1910) 38 Cal. 1.

1917.

BHICOOBAI v. HARIBA RAGHUJI.

contained in Exhibit B to the plaint. Then on the second plaintiff by his counsel undertaking not to levy execution under this order excpte against the immoveable property mentioned in the Schedule hereto or the shares of the members of the Fulmali caste therein, order that in pursuance of the said declaration the defendants and all other members of the Fulmali caste other than the second plaintiff do pay to the second plaintiff the sum of Rs. 7,234.

The costs as between party and party of plaintiff and defendants other than defendants Nos. 11 and 12 (but including in the costs of the plaintiff the costs ordered to be paid by him to defendant No. 11) to be taxed and paid out of the immoveable property in question and so that such costs as between the parties to this action are to be paid in the following order of priority, viz., first the plaintiff's costs other than those ordered to be paid by him to defendant No. 11, secondly, the costs of the defendants other than defendants Nos. 11 and 12, and thirdly, the costs ordered to be paid by the plaintiff to defendant No. 11.

As regards the costs, section 35 of the Civil Procedure Code gives me, I think, wider powers than would be the case in England. I have under that section power to determine out of what property the costs shall be paid. As this action is in effect with reference to the immoveable property in question, I think, I have the power to direct the costs to be paid out of it. Having then the power I think I ought to exercise it. The case is a difficult one and the caste was entitled to fight it. Under these circumstances if I did not deal with the defendants' costs it would probably mean another action to recover them, and this in its turn might result in another action by the defendants to that action for their costs, and so on *ad infinitum*.

I accordingly answer the formal issues raised in the case as follows :—

No. 1. Whether the second plaintiff is entitled to any charge on the caste property and if so, as regards whose interests therein and for what amount ?

Answer.—No.

No. 2. Whether the second plaintiff is entitled to any other relief in this suit ?

Answer.—Yes, to the extent and for the reasons mentioned in my judgment.

There were two other issues originally raised in the case, namely, whether the leave under Order I, Rule 8, in this action should not be revoked, and whether the second plaintiff in any event was entitled to the relief claimed in prayer (*a*) of the plaint. Both these issues were subsequently abandoned. The case however proceeded on the footing that the representation order had been amended by confining it to the defendants other than defendants Nos. 11 and 12. That order should therefore be treated as being so amended accordingly.

In conclusion I wish to add this. I think caution will be required in the future in giving leave under Order I, Rule 8 and in drawing up order for costs in representative actions. Caution is, I think, necessary as I have already found sitting as Chamber Judge before one makes persons liable for large sums who are not actually parties to a suit nor have personally authorized it. On the other hand the representative should not be an impecunious person as otherwise a caste or similar body might carry on litigation with little fear of adverse consequences supposing the liability for costs fell only on their impecunious representative and not on themselves. Then as regards the Court's orders, the appellate decree and also that of Mr. Justice Heaton in the present case have apparently

1917.

HICOOBAI v. HARIBA RAGHUJI.

been construed as imposing a personal liability on all the members of the caste. This cannot always be intended. For instance, if a creditor's administration action or a debenture-holder's action was dismissed with costs, I take it that apart from some very special circumstances the person liable for costs would be the plaintiff alone and not the other creditors or debenture-holders who very possibly might have never even heard of the action. Indeed the dictum I have quoted of Lord Moulton in *Markt & Co., Limited* v. *Knight Steamship Company, Limited* [1] goes further than this and applies to all representative actions where the class is suing by its representatives. Any difficulty of this sort can, I think, be avoided by naming the representative party if he alone is to bear the costs, viz., by ordering that the plaintiff A or the defendant B do pay the costs. If on the other hand the representative and the party he represents are to bear the costs then the order can be that the plaintiff A or the defendant B and all other members of the body in question do pay the costs, assuming there is jurisdiction in the particular case to make such an order. In any case where the Court thinks it can properly direct the costs to be paid out of any particular property under section 35 of the Civil Procedure Code, the order will be to that effect accordingly, and the difficulty I have mentioned will not arise.

Solicitors for plaintiffs: Mr. *S. A. Tyabji.*

Solicitors for defendants Nos. 1–5, 7, 9 and 13: Messrs. *Craigie, Blunt & Caroe.*

Solicitors for defendant No. 8: Messrs. *Amin & Desai.*

Solicitors for defendant No. 11: Messrs. *Mancher-shaw & Narmadashankar.*

Solicitor for defendant No. 12: Mr. *M. B. Chothia.*

G. G. N.

[1] [1910] 2 K. B. 1021 at p. 1039.