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C.T. RAVIKUMAR, SHIRCY V. & K. HARIPAL, JJ.

R.S.A. Nos.275 of 2012 and 96 of 2015

Dated this the 31st day of May, 2021

ORDER

Haripal, J.

Is an appeal preferred against a decree passed in a representative suit incompetent, without making a further publication under sub-rule (2) of Rule 8 of Order I of the Code of Civil Procedure, hereinafter referred to as 'the CPC', is the precise question posed for consideration. This question came for our consideration by way of a reference made initially by a learned Single Judge.

2. Defendants 1 and 2 in O.S.No.357/1999 of the Munsiff's Court, Payyannur are the appellants in R.S.A.No.275/2012 and defendants 3 and 4 are the appellants in R.S.A. No.96/2015. They were impleaded in the suit in representative capacity representing the entire members of 'Maniyani' and 'Navudiya' communities of Karivellur village, respectively. The said suit was instituted alleging that the defendants are trying to construct a crematorium in the plaint schedule property. The learned

Munsiff dismissed the suit along with O.S.No.332/1999, a suit for injunction, where also some of the defendants were impleaded in their representative capacity, by a common judgment dated 30.06.2013, against which A.S.Nos.98/2003 and 99/2003 were preferred before the Sub Court, Payyannur. Learned Sub Judge, by judgment dated 17.01.2012, dismissed A.S.No.98/2003, which was preferred against the decree in O.S.No.332/1999, and allowed A.S.No.99/2003. By the said common judgment, the dismissal of O.S.No.332/1999 was confirmed and the decree dismissing O.S.No.357/1999 was reversed and a decree was granted upholding the right of the plaintiff over plaint 'B' schedule property. The court also found that the re-survey number given to plaint 'B' schedule is incorrect and the re-survey authorities viz., respondents 5 to 7, were directed to rectify the same and re-register the property in the name of the plaintiff. The defendants including supplemental defendants were directed, under a mandatory injunction, to remove the construction in the plaint 'B' schedule property; they were also restrained, under a permanent prohibitory injunction, from trespassing upon plaint 'B' schedule property or doing anything against the interests of the plaintiff. Aggrieved by the

same, defendants 1 to 4 have preferred these second appeals.

3. When the appeals had come up for final hearing before the learned Single Judge, it was argued that the suits were instituted by invoking the provision under Order I, Rule 8 CPC, but the same procedure was not followed before the appellate court and thus it was urged that the appeals were incompetent. In support of the contention the learned counsel for the appellants placed reliance on the decision reported in **Radha K.S. v. Sadasivan and another [2017 (1) KHC 118 : 2017 (1) KLT 102]**. But the learned Single Judge doubted the correctness of the decision in **Radha**, cited supra. We may hasten to state here that going by the well-nigh settled position a learned Single Judge cannot doubt the correctness of a Division Bench decision on the subject and reference is possible in such situation by a learned Single Judge only if there is a conflicting decision by another bench of co-equal strength on the subject. Still, we are inclined to answer the reference as the reasons for reference were fully endorsed by a Division Bench, when the matter came up for consideration before the Division Bench.

4. Accordingly, when the matter came before the Division Bench,

by order dated 20.07.2017, the Division Bench endorsed the view of the learned Single Judge that the decision in **Radha** requires reconsideration at the earliest. The Division Bench also appointed Adv.Sri.S.Vinod Bhat as amicus curiae to assist the Court in the case. Thus the matter came before us to pronounce on the correctness of the decision in **Radha K.S. v. Sadasivan and another [2017 (1) KHC 118]**.

5. According to the learned Judge, the observation of the Division Bench goes against the fundamental rule that an appeal is continuation of a suit. Moreover, if that view is accepted, that would result in unforeseeable difficulties to the litigants. A suit in the representative capacity could be instituted only when there are numerous persons having the same interest in the suit. Referring to sub-rule 4 of Order I, Rule 8 CPC, the learned Judge noticed that there were restrictions in abandoning a claim brought under Order I, Rule 8 CPC. Similarly, sub-rule 5 speaks about substituting the parties, if the suit was not prosecuted with due diligence. Sub-rule 6 makes it clear that a decree passed in a suit under Order I, Rule 8 CPC shall be binding on persons on whose behalf or for whose benefit the suit is instituted or defended. It is settled that the

decrees passed in such suits may even operate as *res judicata* against the parties whose interests are represented in the suit. However, the learned Judge noticed that, in the light of the dictum in **Kallara Sukumaran v. Union of India [1987 (1) KLT 226]**, since a Single Judge is not competent to refer only a question of law to the Division Bench, referred the entire case for consideration by a Division Bench.

6. **Radha K.S. v. Sadasivan and another** was rendered in A.F.As arose from an appeal preferred against the dismissal of a suit filed for declaration, recovery of possession and mandatory injunction. The suit was instituted by two persons with permission having been obtained under Order I Rule 8 of the Code of Civil Procedure. The contentious question arose from the following observations of the Division Bench:-

> "5. In the first appeal and cross-objections carried to this Court, the provisions of Order I Rule 8 of CPC were not complied with. That is a mandatory requirement to sustain the appeal, or the cross-objections, as the case may be, arising out of matters which were carried forward in the Trial court with permission under Order I Rule 8 of CPC. That not having been done, in re the first appeal and the cross-objections, the learned single Judge ought not to have

> adjudicated on those appeal and cross- objections.
>
> 6. Not only that, no reliefs purely declaratory in nature could have been granted in an ill-constituted appeal and cross-objections. The decree as such has now been passed by the learned single Judge, would only confuse matters relating to the eligibility of the deity as a juristic person; or that of the Devaswom; to seek declaration of title or to seek recovery of possession in accordance with law, in appropriate jurisdiction."

In other words, the Division Bench found that a decree passed in a representative suit when taken in appeal, is ill-constituted so long as provisions under Order I, Rule 8 CPC were not complied with. According to the Division Bench, it is a mandatory requirement to sustain the appeal, or cross objection and that not being done, the Single Judge, who heard the first appeal, ought not to have adjudicated the appeal and the cross objection. To put it in other words, in order to sustain an appeal or cross objection preferred against a decree in a suit where Order I, Rule 8 CPC publication was made also, such a publication is peremptory, in the absence of such publication, the suit or cross objection is incompetent. We have been called upon to pronounce on the correctness of the dictum.

7. We have heard Sri. P.B. Krishnan, learned counsel for the appellants, Sri. Ranjith Thampan, learned Additional Advocate General, assisted by Sri. M.A. Johnson and Smt. Deepa Narayanan, learned Government Pleaders, Sri. Chelur Sreekumar and Sri. Mahesh Ramakrishnan, learned counsel appearing for the party respondents and also Sri. Vinod Bhat, learned Amicus Curiae. Elaborate and thread-bare arguments were addressed by all the learned counsel and we place on record the erudite and deep research made by the learned counsel and the Amicus Curiae on the subject. We appreciate the great efforts made by them in assisting the court in resolving the controversy.

8. According to the learned counsel for the appellants, the fact that appeal is the continuation of the suit, alone is not a sufficient ground to doubt the correctness of **Radha,** quoted supra. Referring to the decisions reported in **Union of India and another v. Raghubir Singh (Dead) represented by LRs, etc.) [(1989) 2 SCC 754], Panduranga v. State of Karnataka [2013 (1) KLT 874 (SC)]** and **Pradip Chandra Parija and others v. Pramod Chandra Patnaik and others [(2002) 1 SCC 1]** the learned counsel pointed out that the single Judge is bound to follow the decision rendered by the

Division Bench. At the same time, the learned counsel pointed out that, if pronouncement of a bigger or larger Bench is patently illegal, then alone the Judge can refer the matter to a Division Bench. According to him, in that case, a small window is available to him to refer the matter to a Division Bench.

9. The dictum in such an eventuality has been laid down by the Hon'ble Supreme Court. No doubt, the decision rendered by the Division Bench on a point is binding on a single Judge. Such a decision is binding even on a Bench of co-equal strength. The decisions relied on by the learned counsel were rendered in the particular facts of the case. The decision in **Pradip Chandra Parija** deals with a case in which a Division Bench of the Hon'ble Supreme Court, doubting the correctness of the dictum of a three-Judge Bench, referred the question directly to a Bench of five Judges. Adverting to the same, the Hon'ble Court held that, in the circumstances, the proper course is to refer the matter before the Division Bench to a Bench of three Judges, setting out the reasons that it could not agree with the earlier judgment; If, then the Bench of three Judges also comes to the conclusion that, the earlier judgment of a Bench of three Judges is incorrect, reference to

a Bench of five Judges is justified. Referring to this decision, in **Panduranga**, cited supra, it has been observed that, if a Bench of two learned Judges concludes that an earlier judgment of three learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before a Bench of three Judges setting out the reasons why it could not agree with the earlier judgment.

10. Here, in our view, the course adopted by the learned single Judge cannot be faulted. For two reasons such an argument should not trouble us. Firstly, our attention was drawn to the Full Bench decision of the Hon'ble Supreme Court in **Pradip Chandra Parija**, cited supra, where mention is made about referring the matter, if the Division Bench is of the opinion that the earlier judgment of three learned Judges 'is so very incorrect that in no circumstances can it be followed.' In other words, in a given situation, as rightly pointed out by the learned counsel, the Hon'ble Supreme Court has left a small window open to a learned single Judge or Benches of lesser strength, if the Judge or Judges find that in no circumstance the Division Bench decision be followed, the option is to refer the matter to be decided by a Division Bench. Here, that was what done by the learned Single Judge.

11. Secondly, when the matter was placed before the Division Bench, the Bench also readily endorsed the view that **Radha,** quoted supra, requires reconsideration. From the order of the learned Single Judge dated 06.04.2017, it is very patent that the learned Judge was trekking very cautiously, fully conscious of the limitation in doubting the correctness of an earlier Division Bench decision. The learned Judge has also cited the decision in **Kallara Sukumaran**, cited supra. Standing within the narrow contour and fully conscious of the limitation in doubting the correctness of a Division Bench ruling, the learned single Judge was placing the entire matter before the Hon'ble the Chief Justice.

12. The learned counsel for the appellants strongly supported the proposition of law laid down in **Radha**, quoted supra. The learned Additional Advocate General endorsed his argument. According to the learned counsel for the appellants, the procedure in a representative suit being exception to the general rules in Rules 1 and 3 of Order I CPC, has to be strictly and narrowly interpreted. An order on an application seeking permission/direction is an interim order, the original sanction is not conclusive. It does not survive the judgment and merges with the judgment.

According to the learned counsel, the scope of appeal from a decree in a representative suit is determined by the terms of the decree and not controlled by permission or direction given under Order I, Rule 8 CPC. The scope of appeal in a representative suit depends upon the nature of the decree passed, subject matter of the appeal and the status of the appellant. Depending upon the nature of the decree, appeal memorandum should be accompanied by an application under Order I, Rule 8 CPC; whether one has a right of execution also is important. Even though an appeal is the continuation of the suit, that principle has to be understood in the light of the peculiarities of the representative suit. According to him, in a representative suit, the decree furnishes an independent starting point for the purpose of appeal and thereafter fresh publication in the appeal stage cannot be dispensed with. He also made reference to Rule 4 of Order XLI CPC. An order passed in an application under Order I, Rule 8 CPC is not one appealable and, therefore, does not conclusively determine the rights of the parties. It is only a step-in-aid to make a representative action. Such a proceedings before the trial court cannot bind the appellate court. According to the learned counsel, any procedure that advances the requirements of natural justice and furthers cause

of substantial justice is to be preferred, that it is only safer to make a further publication in appeal. In short, the learned counsel concluded that **Radha**, is correctly decided, that whatever procedure adopted has to be repeated, which means, eo nomine parties should be given notice and others should be notified by publication in appeal. He has also stated various circumstances in which repetition of the proceedings would be required at the appellate stage as well.

13. On the other hand, Sri. Chelur Sreekumar, the learned counsel for the respondents supported the view of the learned single Judge, who doubted the correctness of the decision in **Radha**, and also the endorsement of the Division Bench. According to the learned counsel, in a representative action, once permission/direction is issued, its effect will continue till the determination of the proceedings as in the case of leave granted under Section 92 CPC. It being a discretionary decision, the appellate court is well within its limits to make publication. But it cannot be made as a pre-condition for the competency of the appeal. There is no fresh adjudication of the dispute before the appellate court. According to the learned counsel, repetition of the procedure under Order I, Rule 8 is a duplication, it cannot be

stipulated as a pre-condition for maintaining an appeal. It will have the effect of curtailing the appeal, which is a valuable right of the parties.

14. Adv. Sri. Mahesh Ramakrishnan supported the arguments of Adv. Sri. Chelur Sreekumar. According to the learned counsel, **Radha** has laid down a very harsh proposition, making publication mandatory at the appellate stage. Even though such publication is not out of place in exceptional circumstances, so long as Rule 20 of Order XLI CPC confers ample jurisdiction to the appellate court to make such a publication, it is wrong to say that, without such a publication the appeal is incompetent. According to the learned counsel, even the correctness of sanction given under Rule 8 of Order I CPC can be canvassed in the appeal; once the procedure is followed by the trial court, the nature of the suit is changed and it becomes a representative action. According to the learned counsel, sanction and publication are different. While insisting repetition of a publication by the appellate court, the Division Bench has ignored the intrinsic unity of the suit, appeal and second appeal. The learned counsel also added that the Division Bench holding that an appeal without complying Order I, Rule 8 CPC in a representative suit in a representative decree, is an intrusion into the

province of the legislature.

15. A representative action or representative suit is not defined in the Code. However, explanation given to sub-rule (2) to Rule 3-B of Order XXIII CPC defines a representative suit thus:-

> "*Explanation*.- In this rule, "representative suit" means,-
> (a) a suit under Section 91 or Section 92,
> (b) a suit under rule 8 of Order I,
> (c) a suit in which the manager of an undivided Hindu family sues or is sued as representing the other members of the family,
> (d) any other suit in which the decree passed may, by virtue of the provisions of this Code or of any other law for the time being in force, bind any person who is not named as party to the suit."

The law on the point has been stated by the Hon'ble Supreme Court in **R. Venugopala Naidu and others v. Venkatarayulu Naidu Charities and others (AIR 1990 SC 444)**. According to the Apex Court, a representative suit binds not only the parties named in the suit title, but all those who are interested in the suit. It is for that reason that explanation VI to Section 11 of the Code constructively bars by res judicata the entire body of interested persons from re-agitating the matters directly and substantially in issue in an earlier suit under Section 92 of the Code.

16. A representative action or class action is comprised mainly under

Sections 91, 92 and also under Order I, Rule 8 of the Code. Section 91 deals with a suit instituted by the Advocate General or with the leave of the court, by two or more persons, seeking reliefs of declaration or injunction or such other relief, in the case of a public nuisance or other wrongful act affecting, or likely to affect the public. Sub-clause (2) to Section 91 makes it clear that such a suit will lie even independently also. Both the suits under Sections 91(1)(b) and 92 CPC can be instituted only after obtaining leave of the court. These can generally be described as representative action. But there are difference in the procedure to be followed in both these types of actions on the one hand and the one under Order I, Rule 8 CPC on the other. From the wordings of Section 91(1)(b) and Section 92 itself it is evident that in the case of a suit filed under the provisions, leave of the court is a pre-condition for institution. [See: *R.M. Narayana Chettiar and another v. V.N. Lakshmanan Chettiar and others (AIR 1991 SC 221*)]. In other words, the plaintiffs should first move the court with an application seeking leave and that application should precede the institution of the suit meaning that, prior to the grant of the leave, there cannot be any valid suit, that the court cannot pass interim orders in the suit before granting leave. [See the decision in

Mathew v. Thomas (1982 KLT 493)]. On the other hand, in the case of a representative action under Order I, Rue 8 CPC, there is no such pre-condition. Permission can be granted to the plaintiff or plaintiffs or direction can be issued to the defendant or defendants under Order I, Rule 8 CPC during the course of enquiry or trial. Such a permission or direction is not at all a condition precedent for the institution of the suit. It can be granted at any time, even at the appellate stage, in appropriate cases.

17. In a suit under Section 92 CPC, Section 15 of the Code is not applicable. That means, the forum is fixed by the statute. But Section 15 is applicable in a suit under Section 91 or under Order I, Rule 8 CPC. Every such suit shall be instituted in the court of the lowest grade competent to try it.

18. Order refusing leave under Sections 91 and 92 CPC is an appealable one whereas appeal or revision is not contemplated against an order granting or refusing permission or direction under Order I, Rule 8 CPC.

19. If permission seeking leave under Sections 91 and 92 CPC is declined, the matter ends there and such a suit cannot see the light of the day. As noticed earlier, a relief similar to one under Section 91 CPC can be claimed de hors the aid of the provision also. On the other hand, even if

permission or direction sought under Order I, Rule 8 CPC is declined, still the suit can be proceeded with, the difference being, then the decree passed in such a suit will bind only the parties to the suit and it will not obtain a representative character.

20. In the case of Order I, Rule 8 CPC, even without an application, permission can be granted or direction can be issued suo motu by the court, if situation so warrants.

21. Moreover, a suit under Sections 91 or 92 CPC deals with special category of cases. Section 92 CPC can be instituted only in respect of public charities seeking reliefs under Section 92 CPC. There is no such stipulation in a representative suit under Order I, Rule 8 CPC. If there is commonness of interest, such suit can be instituted and prosecuted.

22. Again, it is the publication made under sub-rule (2) of Rule 8 of Order I CPC that facilitates the proceedings to obtain representative character of the suit. No such publication is mandatory in a suit instituted under Sections 91 and 92 CPC.

23. In this connection, it requires to be mentioned that, yet another area possible for representative action, as rightly suggested by the learned

counsel for the appellants, is under Section 53 of the Transfer of Property Act, challenging transfer by the debtor to defraud the creditor. But this is in the realm of a private right in contrast to proceedings under Sections 91 and 92 of CPC, where proceedings for protecting public rights are contemplated. In proceedings under Sections 91 and 92 CPC and Section 53 of the Transfer of Property Act, publication of notice is not a pre-requisite. But in such cases also, there is no prohibition in effecting publication.

24. Order I, Rule 8 CPC reads thus:-

> "**R.8. One person may sue or defend on behalf of all in same interest**-(1) Where there are numerous persons having the same interest in one suit,-
>
> a) one or more of such persons may, with the permission of the Court sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested;
>
> b) the Court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested.
>
> (2) The Court shall, in every case where a permission or direction is given under sub-rule (1), at the plaintiff's expense, give notice of the institution of the suit to all persons so interested, either by personal service, or, where, by reason of the number of persons or any other cause, such service is not

reasonably practicable, by public advertisement, as the Court in each case may direct.

(3) Any person on whose behalf, or for whose benefit, a suit is instituted, or defended, under sub-rule (1), may apply to the Court to be made a party to such suit.

(4) No part of the claim in any such suit shall be abandoned under sub-rule (1), and no such suit shall be withdrawn under sub-rule (3), of Rule 1 of Order XXIII, and no agreement, compromise or satisfaction shall be recorded in any such suit under Rule 3 of that Order, unless the Court has given, at the plaintiff's expense, notice to all persons so interested in the manner specified in sub-rule (2).

(5) Where any person suing or defending in any such suit does not proceed with due diligence in the suit or defence, the Court may substitute in his place any other person having the same interest in the suit.

(6) A decree passed in a suit under this rule shall be binding on all persons on whose behalf, or for whose benefit, the suit is instituted, or defended, as the case may be.

Explanation.- For the purpose of determining whether the persons who sue or are sued, or defend, have the same interest in one suit, it is not necessary to establish that such persons have the same cause of action as the persons on whose behalf, or for whose benefit, they sue or are sued, or defend the suit, as the case may be."

This has to be read along with Rule 4 of Order VII CPC and Rule 20 and

Form Nos.9 and 10 of the Civil Rules of Practice.

25. The condition necessary for the maintainability of a representative suit is that the persons on whose behalf the suit is instituted must have the same interest. The interest must be common to them all or they must have a common grievance, which they seek to get redressed. Community of interest is therefore essential and it is a condition precedent for bringing a representative suit. The right of the claim which they seek to establish in the suit must be one which is common to them all and each individual among the body of persons must be interested in the litigation.

26. In order to bind a decree passed in a representative suit, procedure laid down under Order I, Rule 8 CPC has to be followed. A decree obtained in a suit instituted in accordance with the provisions of Order I Rule 8 CPC will be binding as res judicata on all members that belong to the class who are sought to be represented. The decree obtained in such a suit will be binding on the entire class of persons, which is evident from Explanation VI to Section 11 CPC, which reads thus:-

> "Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and

> others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

The decision in a representative suit on any issue will, if the question is raised in any subsequent proceedings, be binding not only on the parties but also on all the persons who are interested in such right and who were constructively represented in the previous stage. Such a result would depend not only on the requirements of Section 11 CPC, but it must be shown that the persons who represented the others conducted the litigation 'bona fide'.

27. The general rule is that, all persons whose right to relief in respect of, or arising out of the same act or transaction or series of acts or transactions is alleged to exist in such persons, whether jointly or severally or in the alternative and if such person brought separate suits, any common question of law or fact would arise, may be joined in one suit as plaintiffs. Similarly, all persons may be joined in one suit as defendants where any right to relief in respect of, or arising out of the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative and if separate suits were brought against such persons, any common question of law or fact would arise. The above

statements are in tune with Order I, Rules 1 and 3 respectively. That is the golden rule. Rule 8 of Order I CPC is an exception to the general rule. The object of this provision is to facilitate the decision of questions in which a large body of persons are interested, without recourse to the ordinary procedure. In cases where the common right or interest of a community or members of association or large sections is involved, there would be practical difficulty in the institution of suits under the ordinary procedure, where each individual has to maintain an action by a separate suit. To avoid numerous suits being filed for decision of a common question, Order I, Rule 8 CPC has been incorporated. It is the existence of a community of interest among the persons on whose behalf or against whom the suit is instituted that should be the governing factor in deciding whether the procedure under this rule could properly be adopted or not. This is subject to the essential condition that the interest of a person concerned has really been represented by the others. If there has been any clash of interests between the persons concerned and his assumed representative or if the latter due to collusion or for any other reason neglects out of malintent to defend the case, he cannot be considered to be a representative.

28. The scope and object of this Rule has been discussed and explained by the Hon'ble Supreme Court thus, in the oft quoted decision in **Chairman, Tamil Nadu Housing Board v. T.N. Ganapathy [AIR 1990 SC 642): (1990) 1 SCC 608]**:-

> "7. .....The provisions of O.I R.8 have been included in the Code in the public interest so as to avoid multiplicity of litigation. The condition necessary for application of the provisions is that the persons on whose behalf the suit is being brought must have the same interest. In other words either the interest must be common or they must have a common grievance which they seek to get redressed. In Kodia Goundar v. Velandi Goundar, ILR (1995) Mad 335:(AIR 1955 Mad 281), a Full Bench of the Madras High Court observed that on the plain language of O.I, R.8, the principal requirement to bring a suit within that Rule is the sameness of interest of the numerous persons on whose behalf or for whose benefit the suit is instituted. The Court, while considering whether leave under the Rule should be granted or not, should examine whether there is sufficient community of interest to justify the adoption of the procedure provided under the Rule. The object for which this provision is enacted is really to facilitate the decision of questions, in which a large number of persons are interested, without recourse to the ordinary procedure. The provision must, therefore, receive an interpretation which will subserve the object of its enactment. There are no words in the Rule to limit its scope to any particular category of suits or to exclude a suit in regard to a claim for money or for injunction, as the present one."

29. To apply the provisions of Order I, Rule 8 CPC the following conditions have to be satisfied:-

(i) the parties are numerous;

(ii) they have the same interest in the suit;

(iii) the necessary permission of the court is obtained or direction under clause (b) of sub-rule (1) is given, and

(iv) notice under sub-rule (2) is given.

The power to grant permission to the parties either to sue or be sued in a representative capacity is conferred on the court and the said power is required to be exercised after being satisfied as to whether the subject matter of the suit concerns the interest of numerous persons or not. The court will have to apply its mind and grant permission. It is not an empty formality. A suit cannot become a representative suit merely because some positive averments are made in the plaint stating that it is filed on a representative capacity. Permission of the court under Rule 8 is mandatory.

30. We are sure that, under the scheme, occasions may arise when more than one publication may be required in a representative action. First such publication has to be made under sub-rule (2) of Rule 8 of Order I CPC. At times, if drastic amendments are made in the plaint or written statement, another publication may become necessary. Everything depends upon the facts and circumstances of the case. If a plaintiff/defendant who joined the

plaint in representative capacity decides to abandon the suit, then also, making a further publication is not out of place. [See the decision in *Ulahannan Kurian v. Markose (2002 (2) KLT 880)]*. Similarly, in the event of entering an agreement or compromise also, sub-rule (2) of Rule 3-B of Order XXIII CPC sounds the necessity of making a publication. But these publications cannot be equated with a publication in an appeal suit.

31. It is also an accepted principle that Order I, Rule 8 is an enabling provision. It is a rule of convenience. In this connection, the following observation in **Kumaravelu Chettiar and others, v. T.P. Ramaswami Ayyar and others (AIR 1993 PRIVY COUNCIL 183)** is apposite to extract. The Privy council has held that it is an exception to the general principle that all persons interested in a suit shall be parties thereto. The Privy Council proceeded thus:-

> " ..... 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. ……."

32. The object for which this provision is enacted is really to facilitate the decision of the question in which a large number of persons are interested without recourse to the ordinary procedure. The provision must therefore receive an interpretation which will subserve the object of an enactment. In **the Chairman, Tamil Nadu Housing Board v. T.N. Ganapathy**, quoted supra, this principle has been upheld and held that there are no words in the Rule to limit its scope to any particular category of suits or to exclude a suit in regard to a claim for money or for injunction.

33. Regarding the consequence of passing a decree under Order I, Rule 8 or Section 92 of the Code, in **Ahmad Adam Sait and others v. M.E. Makhri and others [AIR 1964 SC 107]**, the Supreme Court held that Explanation VI to Section 11 of CPC illustrates one aspect of constructive res judicata. Where a representative suit is brought under Section 92 and a decree is passed in such a suit, law assumes that all persons who have the

same interest as the plaintiffs in the representative suit were represented by the said plaintiffs and therefore, are constructively barred by res judicata, the matter directly and substantially in issue in an earlier suit. Regarding the effect of passing a decree in a representative suit, the court held thus:-

> "17. A similar result follows if a suit is either brought or defended under O. I, R. 8. In that case, persons either suing or defending an action are doing so in a representative character, and so, the decree passed in such a suit binds all those whose interests were represented either by the plaintiffs or by the defendants. Thus, it is clear that in determining the question about the effect of a decree passed in a representative suit, it is essential to enquire which interests were represented by the plaintiffs or the defendants. If the decree was passed in a suit under S. 92, it will become necessary to examine the plaint in order to decide in what character the plaintiffs had sued and what interests they had claimed. If a suit is brought under O. I R. 8, the same process will have to be adopted and if a suit is defended under O. I R. 8, the plea taken by the defendants will have to be examined with a view to decide which interests the defendants purported to defend in common with others. ….."

34. In **Chairman, Tamil Nadu Housing Board**, quoted supra, the main question was whether in a money claim an action under Order I, Rule 8

CPC is maintainable. Answering the question in the affirmative, the Hon'ble Supreme Court held thus:-

> "7. …..... The provisions of Order 1 of Rule 8 have been included in the Code in the public interest so as to avoid multiplicity of litigation. The condition necessary for application of the provisions is that the persons on whose behalf the suit is being brought must have the same interest. In other words either the interest must be common or they must have a common grievance which they seek to get redressed. In Kodia Goundar and Another v. Velandi Goundar, ILR (1955) Mad 335: (AIR 1955 Mad 281), a Full Bench of the Madras High Court observed that on the plain language of Order I, Rule 8, the principal requirement to bring a suit within that Rule is the sameness of interest of the numerous persons on whose behalf or for whose benefit the suit is instituted. The Court, while considering whether leave under the Rule should be granted or not, should examine whether there is sufficient community of interest to justify the adoption of the procedure provided under the Rule. The object for which this provision is enacted is really to facilitate the decision of questions, in which a large number of persons are interested, without recourse to the ordinary procedure. The provision must, therefore, receive an interpretation which will subserve the object for its enactment. There are no words in the Rule to limit its scope to any particular

> category of suits or to exclude a suit in regard to a claim for money or for injunction, as the present one."

The aspect of import of leave granted under Order I, Rule 8 CPC stands described in the **State of Andhra Pradesh v. Gundugola Venkata Suryanarayana (AIR 1965 SC 11)** thus:-

> "13. Counsel for the State of Andhra Pradesh said that a person who seeks to institute a suit in a representative capacity must establish that he had obtained sanction of the persons interested on whose behalf the suit is proposed to be instituted, and when it is to be instituted against the Government or against a public officer, before serving the notice he must, besides obtaining the authority from all the persons so interested, set out in the notice the names, descriptions, and places of residence of all the persons sought to be represented by him. But there is nothing in S. 80 of the Code or O.I R. 8 Code of Civil Procedure which supports this submission, and there is inherent indication in O.I R. 8 to the contrary. To enable a person to file a suit in a representative capacity for and on behalf of numerous persons where they have the same interest, the only condition is the permission of the Court. The provision which requires that the Court shall in such a case give, at the plaintiff's expense, notice of the institution of the suit to all persons having the same interest, and the power reserved to the Court to entertain an application from any person on

> whose behalf or for whose benefit the suit is instituted, indicate that no previous sanction or authority of persons interested in the suit is required to be obtained before institution of the suit. Nor is there anything in S. 80 that notice of a proposed suit in a representative capacity may be served only after expressly obtaining the authority of persons whom he seeks to represent. Section 80 requires that the name, description and place of residence of the plaintiff must be set out in the notice and not of persons whom he seeks to represent. …....."

35. Now a question that arises for consideration is who could be said to be parties to a suit instituted in a representative capacity. Sub-rule (3) to Rule 8 of Order I CPC provides that any person on whose behalf or for whose benefit a suit is instituted or defended, under sub-rule (1) may apply to the court to be made a party to such suit. Notwithstanding the representative character of the plaintiffs or defendants already on record, it would be open to anyone belonging to that class of persons to apply to be made a party to the suit. A 'party' to such a suit is therefore one who is impleaded pursuant to the publication made under sub-rule (2) of Rule 8 of Order I CPC, who is brought on record. Such a party is normally named as 'eo nomine' party. The others who are not brought on record can be only

deemed to be parties and will not be parties as such. In that view of the matter, it is an accepted principle of law that Section 47 CPC will not work as a bar to institute a fresh suit against such persons. In other words, there can be no execution of a personal decree against persons who are not impleaded as defendants, even though they were sought to be represented by the defendants on record by reason of the procedure in Order I, Rule 8 having been followed.

36. The learned counsel had raised incidental questions also. One aspect came to the fore was whether violation of the decree by person or persons who were not parties to the suit has any legal consequence. This question was pointedly considered by the Madras High Court in **Kodia Goundar and another v. Velandi Goundar and others (AIR 1955 Mad 281)**. After surveying the earlier judicial pronouncement, the Full Bench of the Madras High Court, which has received stamp of approval by the Apex Court, held that a personal decree passed in a representative suit is executable only against the parties to the suit. According to the High Court, Order I, Rule 8 should not be construed to mean that the entire body of persons interested in the litigation should be deemed to be actually parties to it and

that such a construction is to some extent negatived by sub-rule (2) which suggests that any person is not a party until the court allows the application and makes him a party. The court proceeded to observe in paragraph 12 as follows:-

> "12. …..... This principle that a decree for injunction cannot be extended so as to render those who are not 'eo nomine' defendants liable for disobedience of the decree is based on sound and equitable grounds. Before any person could be proceeded against personally for disobedience of a decree of court, it must be shown that he was bound personally by the decree and obliged to obey such a decree. To entitle the decree-holder therefore to proceed against such persons who are not parties on record the injunction must be revived against them, which must be by a separate suit and in such a suit an opportunity will be afforded to them to raise appropriate defences. Without a revival therefore of the decree for injunction against these other persons, no proceedings in pursuance of the decree could be started against them."

Thus the court concluded that if no execution of a decree could be maintained against those persons who are not impleaded as defendants on the ground that they are not bound to obey the decree personally, it is obvious that they cannot be held liable for any willful disobedience of such a decree.

37. Even though a learned Single Judge of this Court in **James v. Mathew [2012 (4) KLT 666]** held that a decree for injunction, in the case of willful disobedience is enforcible under Rule 32 of Order XXI CPC against persons who are not eo nomine parties as well, the Apex Court has held that no personal decree can be passed against persons who are not parties to the suit. [See the decision in *V.J. Thomas v. Pathrose Abraham and others (2008) 5 SCC 84*].

38. There is also substance in the arguments of the learned counsel for the respondents that there is no right as such in a party to sue or be sued in a representative capacity. Once the requirement is apprised to the court, it is the responsibility of the court to grant permission or issue direction for complying the necessary formalities. In normal cases, if the procedure is not complied, necessarily it will end in passing a decree inter parties in contrast to a representative decree. Once it is brought under Order I, Rule 8, it becomes a representative suit or a class action. Individuals are relegated to the background. Then it will become representative suit or class action. However, we have come across at least one decision of the Apex Court reported in **Singhai Lal Chand Jain (Dead) v. Rashtriya Swayam Sewak**

Sangh, Panna and others (AIR 1996 SC 1211), where, even though procedure under sub-rule (2) of Rule 8 of Order I CPC was not complied in the peculiar facts position obtained in the case, the Apex Court ruled that still an eviction through its Manager, the President and the Member who all were diligently prosecuting the suit, in which case execution of the decree cannot be frustrated for mere want of permission under Order I, Rule 8 CPC. In that case, a suit for eviction was decreed against the respondents in which the office bearers of the respondents were parties. The matter went upto the Supreme Court and the decree was confirmed. Thereafter, when the decree was put to execution for evicting the tenant, the respondents opposed the decree of eviction on the ground that the appellants had not followed the procedure under Order I, Rule 8 CPC and that the decree was a nullity. The contention was upheld by the execution court, which was confirmed in revision by the High Court. The appellant moved the Hon'ble Supreme Court with special leave. The Supreme Court held that even though permission of the court was not taken to be sued in a representative capacity, since the President of the Sangh, the Manager and the Member had duly represented the organisation and defended the case and also having regard to the fact that

there is no allegation of collusion, such a technical plea cannot hold good for the mere reason that procedure under Order I, Rule 8 CPC was not followed and the decree cannot be defeated. Thus the Apex Court allowed the appeal.

39. But this decision has turned up on its own facts. The ordinary rule is that procedure under sub-clause (2) of Rule 8 of Order I CPC shall be followed for the purpose of making the suit a representative one. If the procedure is not complied and publication is not made, a suit will not become a representative action and a decree passed will bind only the eo nomine parties.

40. Having said the various features of representative action under Order I, Rule 8 CPC, now we shall revert to the core issue, that is the correctness of the pronouncement made in the decision in **Radha**. The Division Bench has held that it is mandatory on the part of an appellate court to repeat the provisions of Order I, Rule 8 CPC for sustaining an appeal or cross objection before the appellate court. For various reasons we are unable to agree with the proposition. Firstly, the very statement, it is a mandatory requirement, in our assessment, is an overstatement. There is no such mandate in the Code requiring the publication under Order I, Rule 8 CPC at

every stage of the proceedings. Secondly, a mandatory provision is one which has to be obeyed in its letter and spirit and anything done without such compliance stands vitiated. [See the decision reported in *Bharat Hari Singhania and others v. Commissioner of Wealth Tax and others (AIR 1994 SC 1355)]*. Since there is no such provision in the Code, we cannot say that it is mandatory. Moreover, we have not come across any judicial pronouncement making such procedure imperative at every stage of the proceedings.

41. As correctly argued by the learned counsel for the respondents, when it is said that granting permission or issuing direction is a matter of discretion, it cannot be said to be mandatory. These two propositions cannot go together.

42. More importantly, an appeal is essentially the continuation of the original proceedings. Appeal is the right of entering the superior court and invoking its aid and interposition to redress the error of the courts below. [See: *Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat (AIR 1970 SC 1)]*. An appeal is a rehearing of the order passed by an inferior court or tribunal preferred before a superior court for the purpose of testing the

soundness of a decision and proceedings of an inferior court or tribunal, entirely subjecting the facts as well as the law to a review and a retrial. [See: *Tirupati Balaji Developers Pvt.Ltd. and others v. State of Bihar and others [(2004) 5 SCC 1]*. According to the Hon'ble Supreme Court, the superior forum shall have jurisdiction to reverse, confirm, annul or modify the decree or order of the forum appealed against, that the appellate jurisdiction inherently carries with it a power to issue corrective directions binding on the forum below.

43. In a long line of decisions the courts have declared that appeal is a vested right supported by statute, that gets crystalised on the date of institution of the suit. In the decision reported in **Garikapati Veeraya v. N. Subbiah Choudhury and others [AIR 1957 SC 540]** the Hon'ble Supreme Court has stated thus:-

> "(23). From the decisions cited above the following principles clearly emerge:
>
> (i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.
>
> (ii) The right of appeal is not a mere matter of procedure but is a

> substantive right.
>
> (iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.
>
> (iv) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.
>
> (v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise."

This position has been reiterated by the Apex Court in numerous subsequent pronouncements. [*See: Nahar Industrial Enterprises Ltd. v. Hongkong & Shanghai Banking Corporation (2009) 8 SCC 646*) etc.*]*

44. In this connection, we have to make special mention about sub-rule (2) of Rule 4 of Order III CPC, where it is provided that every such appointment of pleader, made under sub-rule (1) of Rule 4 of Order I CPC, shall be filed in court and shall, for the purposes of sub-rule (1), be deemed to be in force until determined with the leave of the court by a writing signed by

the client or the pleader, as the case may be, and filed in court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client. This aspect also goes in tune with the intrinsic unity of the suit, appeal and second appeal, all are part of the same proceedings.

45. That means, on the date of institution of the suit, there is no law which insisted that on filing the appeal the aggrieved had to repeat the procedure under Order I Rule 8 before the appellate court. That vested right of appeal has got decided on the date of institution of the suit. Unless such a right is interfered by a legislative intervention having retrospective operation, any spoke put to cripple that vested right is illegal and against the scheme of things. It is a substantive right of the party which cannot be curtailed in a light-hearted manner.

46. The learned counsel for the appellants wanted to impress that on permission granted by the trial court, if publication is made before the trial court, its effect will expire at the termination of the trial court proceedings, is something against the very scheme of the Code. We are of the view that the proposition that the permission granted by the trial court or direction given, is ephemeral, cannot be approved. As indicated earlier, class of representative

actions are suits filed under Sections 91 and 92 CPC and one where publication is made under Rule 8 of Order I CPC. There cannot be any doubt that leave granted under Sections 91 and 92 CPC will sustain till the termination of the proceedings. In our considered view, the very same analogy is applicable in an action under Order I, Rule 8 CPC as well. If permission is granted or direction is issued, as the case may be under Order I, Rule 8 CPC, that proceedings will obtain the character of a representative action, once procedural formalities are complied. A decree passed in such a suit is a representative decree which will hold the field until the termination of proceedings or unless reversed by a higher court. It is against the scheme of things to argue that such procedure has to be repeated intermittently for boosting up or intensifying the sanction once granted. It cannot be equated with an indigent proceedings to be followed at every stage. In other words, once the procedure under Order I, Rule 8 is complied, that would change the very character of the suit; once the character of the suit is obtained, it will be maintained throughout unless interfered with and changed by the hierarchy of the courts.

47. Having said that there is no provision in the Code insisting the

repetition of procedure under Order I, Rule 8 CPC, the immediate question is whether there is justification in following such a procedure at every stage. We have already observed that once a suit obtains the character of a representative suit, it would maintain that character till the termination of the proceedings.

48. It can also be stated that granting permission or issuing direction is a discretionary decision of the court. Such a discretion should be exercised based on equitable principles known to law. That is why it is said that granting or refusing permission or issuing direction is not an empty formality. The courts should be conscious of the implications of a decree being passed in a representative suit, which will bind not only the parties but also whom the parties supposedly represent. It may even affect the rights of parties who are yet to born. [See: *Soman and others v. Appootty and others (AIR 1988 Kerala 212)*].

49. The learned counsel on both sides have pointed out that very often trial courts exercise this jurisdiction in a most routine, mechanical manner, without due application of mind. We have no doubt that such a tendency should be discouraged. When a power of discretion is exercised, it

should be done in a most diligent and judicious manner. In this context, we would like to reiterate the wise counsel given by Subramonian Potti, J., as he then was, in the following words in **Narayani Kamalakshi and others v. Kunchiyan Bahulayan and others (AIR 1972 Ker. 269)**:-

> "3. ..... Since the consequence of a decision reached with parties represented under Order 1, Rule 8 is one of debarring them from raising the question over again, courts have necessarily to consider the requirements under Order 1, Rule 8 not as mere formalities or matters of form. I am mentioning this here because in my experience, motions made under Order 1, Rule 8 have been considered by the subordinate courts very lightly and as a matter of course. Judicial discretion of the courts in the matter of grant of such permission have rarely been seen exercised. Courts must remember that by granting such permission, the court is really seeking to bind those parties who are not on the party array in the suit, and any contest by them on the same question later would be barred by res judicata. Therefore, the Court owes a duty to those who are not on the party array but are still considered as represented in the suit to see that they are not prejudiced. In considering any application that may come up before Court seeking permission to represent parties under Order 1, Rule 8, the courts have to keep this in view. The Court must insist upon parties furnishing the addresses of persons when their

> addresses are ascertainable and when the number is such that personal service would not be impracticable, the Court must necessarily direct such personal service on fine parties besides publication. …....."

50. The publication contemplated under sub-rule (2) of Rule 8 of Order I CPC is a matter of procedure for giving intimation to all concerned. By making a publication, an invitation is sent affording opportunity to those who are interested and to those who share common interest to join the proceedings and to assist the court in resolving the dispute. It may not be appropriate for this Court to shut the door tight and foreclose the appellate courts that, in no circumstance, such an order shall be passed. We only say that it is not mandatory and appeal being continuation of the suit and when the proceedings obtains the character of a representative suit, it is maintained throughout and it is not necessary to follow the procedure intermittently.

51. The intrinsic unity of the proceedings under the Code also requires to be highlighted. The proceedings of the trial court at the threshold originates from a suit where parties, subject matter, cause of action, etc. are detailed. It is from the decree passed by the trial court that a cause of action for the appeal arises. The original proceedings, appeal and second appeal

cannot be kept in watertight compartments. There is no fresh adjudication by an appellate court. The inherent power of the appellate court also enables it to do whatever possible for adjudication of the dispute and undoing or correcting the mistakes committed by the inferior court.

52. An appeal being the continuation of the original proceedings, no fresh adjudication takes place. Appeal courts re-examine and re-assess the legality and correctness of the decree passed by the trial court. It can consider both the questions of law as well as facts. In the process, the vires of granting sanction or issuing direction under sub-rule (2) of Rule 8 of Order I CPC can be examined by the appellate court. All latent aspects can be raised before the appellate court. It can also be stated, having regard to the facts, that plaintiffs/defendants are not the proper persons to represent a common cause or a particular interest, that there is clash of interest among the parties, etc. Similarly, sufficiency of the attempt made by the trial court in publishing the notice also can be the subject matter of grievance in the appeal. In other words, no fresh adjudication takes place in appeal and what all matters already considered, in the light of the rival contentions and the findings thereon, are carried to the appellate court for exercise of its higher

wisdom.

53. We do not think that Rule 4 of Order XLI CPC has application in the present context. At the same time, Rule 20 of Order XLI CPC is capable of taking care of the situation. Moreover, it should be emphasised that the sweep of power under Rule 33 of Order XLI CPC is wide enough to determine any question arising for determination in appeal not only between the appellant and the respondent but also between respondent and co-respondents. The appellate court can pass any decree or order, only thing is that the parties before the lower court should also be before the appellate court and the question raised must properly arise out of the judgment impugned in appeal of the lower court.

54. The upshot of the above discussion is that the learned Single Judge is justified in doubting the correctness of **Radha.** There is nothing mandatory that the appellate court should invariably direct publication of notice whenever a decree in a representative suit is challenged. Merely for the reason that such publication is not made, the appeal will not become incompetent. That means, **Radha K.S. v. Sadasivan and another [2017 (1) KHC 118 : 2017 (1) KLT 102]** is not correctly decided. We may hasten to

add that we have not stated anything foreclosing the power of the appellate court to direct publication of notice whenever situation demands, depending upon the facts and circumstances of the case.

The reference is answered as above.

Sd/-
C.T. RAVIKUMAR
JUDGE

Sd/-
SHIRCY V.
JUDGE

Sd/-
K.HARIPAL
JUDGE

okb/09/12/2020

//True copy// P.S. to Judge