1898

DEBI DAS v. NIRPAT.

deceased partner. When the representative of Abhe desires to recover from the partnership concern such interest as Abhe possessed in the firm, if he has to do so through the medium of a Court, he will have to obtain a succession certificate before he is entitled to a decree. We set aside the decree of the Court below dismissing the suit, and, as the case was wrongly dismissed upon a preliminary point, we remand it to the lower appellate Court for trial upon the merits.

Appeal decreed and cause remanded.

1898
April 14.

Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Banerji.

BENI RAI AND OTHERS (DEFENDANTS) *v.* RAM LAKHAN RAI AND ANOTHER (PLAINTIFFS).*

Appeal to Her Majesty in Council—Civil Procedure Code, section 596—Decree affirming the decision of the Court immediately below—Decree dismissing an appeal to the High Court for default of prosecution.

Held that a decree of the High Court dismissing an appeal for want of prosecution—the appellants not having supplied their counsel with materials upon which to argue the appeal when it was called on for hearing—was a decree affirming the decision of the Court immediately below, within the meaning of section 596 of the Code of Civil Procedure.

THE facts of this case sufficiently appear from the order of the Court.

Mr. *A. E. Ryves* and Munshi *Ram Prasad* for the appellants.

The Hon'ble Mr. *Conlan* and Pandit *Sundar Lal* for the respondents.

KNOX, ACTING C.J., and BANERJI, J.—This is a petition for leave to appeal to Her Majesty in Council. The value of the subject-matter of the suit is over Rs. 10,000, but there arise two questions which have to be determined before leave to appeal can be granted. The first question is, whether the decree now appealed from affirms or not the decision of the Court immediately below; secondly, whether any substantial questions of law are shown to be involved by the petition. As regards the first question, we find on referring to the judgment of this Court that it runs as follows:—

1898

BENI RAI v. RAM LAKHAN RAI.

"This appeal is not supported. It is therefore dismissed." The petition of appeal sets out that the appeal came on for hearing on the 26th of April 1897, and could not be supported because the papers for the translation and printing of which the appellant had applied were not ready. A reference to the record shows that the appellants did, on the 25th of December 1895, apply for the translation and printing of the papers which they considered necessary for their purpose in order to place the appeal before this Court. They, however, took no steps to deposit the money necessary for this purpose and their application consequently abated. They took no further interest in the matter until the 12th of February 1897, when they put in a second application for translation and printing of the papers they then considered necessary. Their application was granted conditionally upon the hearing of the appeal not being delayed in consequence of the laches they had shown in taking no steps for nearly two years in order to have the necessary papers translated and printed under the rules of this Court. The appeal came on for hearing on the 25th of April 1897. The appellants apparently did not through their counsel show any sufficient cause to the Judges before whom the appeal came on for hearing which would justify those Judges in granting an adjournment or in permitting them to refer to the record in the vernacular. In consequence of this the appeal was not supported, and a decree was passed dismissing the appeal and affirming the decision of the lower Court. It has been contended before us that a mere order of dismissal does not and cannot amount to an affirmation as intended by section 596 of the Code of Civil Procedure, and in support of this contention we were referred to the precedent *Asghar Reza v. Haidar Reza* (1). It is obvious that that precedent does not afford us any assistance in determining the matter now in dispute. That case was one in which the learned Judges of the High Court at Calcutta had before them for determination several issues of fact. The Court from which the appeal had been preferred had

(1) I. L. R., 16 Calc., 211.

contented itself with determining two issues only, considering them sufficient for the disposal of the case, and had left other issues untried. The High Court found on the two issues which had been tried contrary to the findings of the court below, but they proceeded to try further questions of fact and their decision on those questions of fact led them to dismiss the appeal. They thus came finally to the same conclusion in the suit as the Court of first instance, although they did not agree with the Judge who had tried the case on all his findings or in the reasons on which they were based. The learned Judge who gave leave to appeal to Her Majesty in Council found further that there were substantial questions of law involved which entitled the petitioners to a certificate that the case was a fit one for appeal. As regards the case before us the result of the appeal to us is that the findings of the Court below and the reasons on which they are based stand affirmed. There was no further finding of any kind by this Court. Under these circumstances we are unable to accept the contention of the learned counsel for the petitioners, and we hold that the decree of this Court did affirm the decree of the Court immediately below. The result of holding otherwise would be that an appellant, who, with the object of saving himself the expense of having the necessary papers translated for this Court, neglected to support his appeal before us, might claim leave to appeal direct to Her Majesty in Council by refraining from obtaining any determination by this Court upon the pleas raised. The appellants in fact want leave to ask Her Majesty in Council to do that which this Court might have done, but which the appellants by their own laches put it out of the power of the Court to do. The next question which arises is whether any substantial questions of law are involved in the appeal. We have gone through the various pleas raised. The only pleas that raise any question of law are the first and second pleas, and those pleas do not and will not arise where the decision on the question of fact is the same as that of the Court below. These questions

1898

BENI RAI v. RAM LAKHAN RAI.

of law do not, in our opinion, arise. Consequently we find ourselves unable to grant the leave asked for, and dismiss this application with costs.

Application dismissed.

1898
April 15.

Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Banerji.

BANSI LAL AND OTHERS (PLAINTIFFS) v. RAMJI LAL AND ANOTHER (DEFENDANTS).*

Civil Procedure Code, section 32—Order adding defendant—Means of questioning such order—Practice—Decree in previous suit defining rights of a party to a subsequent suit—Effect of such decree as against such party until set aside by proper procedure.

Where an order adding a defendant under section 32 of the Code of Civil Procedure was not appealed against and no objection was taken thereto in the memorandum of appeal from the decree in the suit in which it was passed, an oral objection taken in appeal to such order was disallowed. *Tilak Raj Singh* v. *Chakardhari Singh* (1) referred to.

Where there is a subsisting decree in a previous suit which as regards the subject-matter of a subsequent suit would take effect under section 13 of the Code of Civil Procedure, it is not open to the party whose rights are affected by such decree to question in the subsequent suit the validity of such decree, though it might have been open to such party in a separate suit to get the decree set aside. *Karamali Rahimbhoy* v. *Rahimbhoy Habibbhoy* (2) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Moti Lal* and Pandit *Baldeo Ram Dave* for the appellants.

Babu *Jogindro Nath Chaudhri* and Pandit *Sundar Lal* for the respondents.

KNOX, ACTING C.J., and BANERJI, J.—The property claimed in the suit out of which this appeal has arisen belonged originally to one Ishk Lal. He was the son of Jai Singh, who was one of five brothers, namely, Hardayal, Sawai, Ram Nath, Chunni Lal and Jai Singh. Hardayal's son was Daulat Ram, the father of the plaintiffs appellants. The respondent Ramji Lal is the

* First Appeal No. 54 of 1894 from a decree of Pandit Bansidhar, Subordinate Judge of Meerut, dated the 18th November 1895.

(1) I. L. R., 15 All., 119. (2) I. L. R., 13 Bom., 137.