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which the daughter's sons are entitled to succeed to the management of the temple in dispute.

We have already quoted at some length from the evidence of the only two Ballavacharya Gosains called by the plaintiffs, and that very evidence in itself shows that there is no such custom or usage in force.

The other witnesses are Bhats or other classes of Gosains. They profess to give eleven instances in which daughter's sons have inherited temples from their maternal grandfathers. The evidence is vague and leaves it in doubt whether these maternal grandfathers were Bhats or Ballavacharya Gosains.

It is unnecessary to deal at length with this evidence. It has been fully discussed in the judgement of the lower court. We agree with that court that it falls far short of proving any such custom or usage as is put forward by the plaintiffs, especially in view of the instances in which arrangements have been made in certain temples by the widows and daughters of sonless Gosains to instal other Ballavacharya Gosains on the *gaddis* to the exclusion of their own grandsons and sons, who were Bhats.

The burden of proof being on the plaintiffs, they have in our opinion failed to discharge it. Their suit was therefore properly dismissed. It is unnecessary to decide the other points raised in the case.

We therefore dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Richards and Mr. Justice Tudball.

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February 28.

PARSOTAM RAO TANTIA AND ANOTHER (PLAINTIFFS) *v.* RADHA BAI (DEFENDANT).*

Partition—Suit for partition of family property—Subsequent suit by one defendant against another for declaration of title—Res judicata.

Where a suit for partition, to which all the members of the family are parties, has once been finally decided, it is not competent to a party defendant to such suit to reopen the questions thereby determined in a fresh suit for a declaration of right as against a co-defendant. *Sheikh Khoorshed Hossein* v. *Nubbee Fatima* (1), *Dost Muhammad Khan* v. *Said Begam* (2), *Assan* v. *Pathumma* (3) and *Ashidbai* v. *Abdulla Haji Mahomed* (4) referred to.

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* First Appeal No. 25 of 1908 from a decree of Girdhari Lal, Subordinate Judge of Cawnpore, dated the 7th of January, 1908.

(1) (1878) I. L. R., 3 Calc., 551.
(2) (1897) I. L. R., 20 All., 81.
(3) (1897) I. L. R., 22 Mad., 494.
(4) (1906) I. L. R., 31 Bom., 271.

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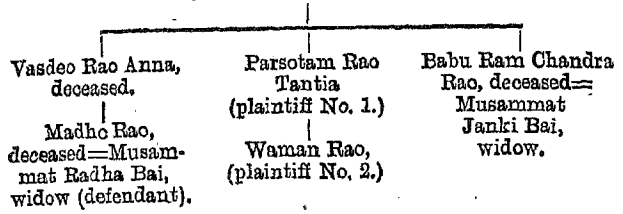
THE facts of this case were as follows:—

The parties were related to each other as indicated by the subjoined pedigree:—



The defendant was the widow of Madho Rao, nephew of the plaintiff No. 1, and cousin of the plaintiff No. 2. Madho Rao's name was during his lifetime recorded in the revenue papers in respect of the disputed shares in the 18 properties in question, and he was *lambardar* in respect of one of them. After his death the defendant applied to the Revenue Court for entry of her name in place of her husband. This application was opposed, but was finally decided by the Board of Revenue in her favour. The plaintiffs therefore instituted the present suit for a declaration that they are the owners and in possession of the disputed properties, basing their claim on the allegation that they and the deceased Madho Rao formed a joint Hindu family and therefore they became owners by survivorship. The defendant pleaded, *inter alia*, that as regards the nature of the property and the possession of Madho Rao, the matter was *res judicata* and that the suit was barred by section 42 of the Specific Relief Act. The court below framed one issue:—"Is or is not the suit barred by section 42 of the Specific Relief Act?", and held that the suit was so barred, and without entering into the merits or other issues arising in the suit, dismissed it with costs. The plaintiffs thereupon appealed to the High Court.

Babu *Surendra Nath Sen* (with him Babu *Jogindro Nath Chaudhri*), for the appellants submitted that the court below had erred in holding that the suit was barred by section 42 of the Specific Relief Act. The plaintiffs appellants were in possession of the property in dispute. Long after the institution of the suit the defendant was *lambardar* of one of the villages. The oral evidence produced by the plaintiffs proved their possession, and

no attempt was made to rebut that evidence. The court below had ignored that evidence altogether. Any change of possession brought about after the institution of the suit was not within the scope of section 42 of the Specific Relief Act. Further, the plaintiffs applied for amendment of the plaint, which was refused. This was eminently a case in which the amendment should have been allowed. He cited *Kisandas Rupchand* v. *Rachappa Vithoba* (1).

The Hon'ble Pandit *Moti Lal Nehru* (with him the Hon'ble Pandit *Sundar Lal*), for the respondent, contended that on the evidence the plaintiffs were not in possession of the property; that the fact of their being *lambardars* of some villages did not prove that they were in possession on their own account, and that the application for amendment of the plaint was made only when the Subordinate Judge was on the eve of delivering judgement. That application was therefore properly rejected. The suit was barred by the rule of *res judicata* having regard to the decision of this Court in *Parsotam Rao* v. *Musammat Janki Bai* (2). He also relied on *Khoorshed Hossein* v. *Nubbee Fatima* (3), *Assan* v. *Pathumma* (4), *Ashidbai* v. *Abdulla Haji Mahomed* (5) and *Dost Muhammed* v. *Said Begam* (6).

Babu *Surendra Nath Sen*, in reply, submitted that the issue as to *res judicata* ought not to be determined in this Court, as all the facts of the case were not known. The Subordinate Judge took evidence only on the issue whether the suit was barred by section 42 of the Specific Relief Act. The former adjudication could not be pleaded as a bar, because the parties to the present suit were co-defendants in the former suit, and there was no hostility between the defendants *inter se* and between each of the defendants and the plaintiffs. None of the cases cited by the respondent laid down any general principle. They enunciated a special rule of law having reference to the particular facts of the case. The defendant, Madho Rao, was a *pro formâ* defendant and the conduct of the suit was not in his hands. He cited *Brojo Behari Mitter* v. *Kedar Nath Mozumdar* (7).

(1) (1909) I. L. R., 33 Bom., 644.
(2) (1907) I. L. R., 29 All., 354.
(3) (1878) I. L. R., 3 Calc., 551.
(4) (1897) I. L. R., 22 Mad., 494.
(5) (1906) I. L. R., 31 Bom., 271.
(6) (1897) I. L. R., 20 All., 81.
(7) (1886) I. L. R., 12 Calc., 580.

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The attention of the Court was drawn to paragraphs 5 and 7 of the plaint, which disclosed that the present suit was based upon a different title, which accrued since the decision of the suit now pleaded as a bar.

[The argument was then adjourned.]

Babu *Jogindro Nath Chaudhri*, for the appellants, on a subsequent hearing, submitted that there was a document, dated the 31st January, 1905, which was a testamentary instrument and had the effect of investing Waman Rao with the right of ownership in the property belonging to Madho Rao. It was immaterial whether the property was joint family property or otherwise. The document in question was intended to create a right in favour of Waman Rao equal to extent to what would have accrued to him by rule of survivorship if the family were joint.

RICHARDS and TUDBALL, JJ.:—This appeal arises out of a suit brought by the plaintiffs for a declaration that they were the proprietors in possession of, and the defendant Musammat Radha Bai had no right to, the property in suit and that the said Musammat Radha Bai was not entitled to get her name entered in the revenue papers. Musammat Radha Bai is the widow of Madho Rao, who was a nephew of the plaintiff Parsotam Rao. A pedigree of the family, which is admitted to be correct, will be found at page 5 of the paper book. One Nana Narain Rao made a will, under which he divided up his property between his sons. The will contained a provision that it might be well for the family of Nana Narain Rao if, notwithstanding the division, it continued together. The terms of the will gave rise to some litigation which was commenced about the year 1901. In that suit one Babu Ram Chandra Rao, one of the three sons of Nana Narain Rao, claimed a partition. He claimed that if his father's will operated to divide the family, he was entitled to a partition by metes and bounds of the property bequeathed to him. If, on the other hand, the family was joint and undivided, notwithstanding the will, he claimed usual partition of all the family property. Parsotam Rao was a defendant to that suit, as also Madho Rao representing the third brother. Madho Rao and Parsotam Rao pleaded that the family was separate. At that time they considered it best for their interests to plead separation, which would

tie Ram Chandra Rao to the particular property bequeathed to him by the will. However, during the pendency of the suit, Ram Chandra Rao died and his widow took his place; and then it became the interests of the defendants Madho Rao and Parsotam Rao to urge that the family was joint. By doing so, the rights of Musammat Janki Bai, the widow of Babu Ram Chandra Rao, would be limited to a mere right of maintenance. The suit was litigated from court to court, and finally there was a binding decree of the High Court holding that the family was separate. This decree was passed in March, 1907. Madho Rao died in 1905, while the litigation was pending, but subsequent to the preliminary decree in the original court. The learned Subordinate Judge has dismissed the present suit on the ground that the suit is barred by the provisions of section 42 of the Specific Relief Act. It appears that after the decision of the High Court already referred to mutation of names was passed in favour of Musammat Radha Bai in respect of the share of Madho Rao, and the learned Judge held that it follows that Musammat Radha Bai must be deemed to be in possession, and that therefore the plaintiffs' suit fails because they have sued for a mere declaration without asking for possession. At the same time the learned Judge refused to allow the plaintiffs to amend the plaint by adding a claim for possession on payment of the proper court fees. We think it is impossible to support the decree of the court below on the ground on which it was passed. If there was nothing else in the case, we certainly would have allowed the plaint to be amended under the circumstances, so that all points might be threshed out between the parties. We, however, think that there is another clear ground on which the plaintiffs' suit ought to be dismissed, namely, that having regard to the decision in the suit of *Babu Ram Chandra Rao* v. *Parsotam Rao and Madho Rao*, it is no longer open to the plaintiffs Parsotam Rao and his son to bring the present suit. The decree passed in the previous suit was a decree ascertaining and declaring the rights of the parties in a suit for partition. Madho Rao, Parsotam Rao and Ram Chandra Rao were, as already mentioned, parties to that suit. It is argued on behalf of the appellants that inasmuch as it does not appear that there was any dispute or conflict of interests between the plaintiffs

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in the present suit and Madho Rao, and as they were all arrayed on the defendants' side in the prior suit, the decision in that suit cannot operate as *res judicata*, and that the plaintiffs are now entitled to re-open the entire question as between themselves and Radha Bai, the widow of Madho Rao. The nature of a partition suit has been dealt with in a number of cases. In the case of *Sheikh Khoorshed Hossein* v. *Nubbee Fatima* (1) the learned Judges were of opinion that "a decree for partition is not like a decree for money or the delivery of specific property, which is only in favour of the plaintiff in the suit. It is a joint declaration of the rights of persons interested in the property of which partition is sought, and such a decree, when properly drawn up, is in favour of each share-holder or set of share-holders having a distinct share." This case was cited with approval by a Bench of this Court in the case of *Dost Muhammad Khan* v. *Said Begam* (2). The remarks of the learned Judges will be found at page 87 of the Report. They observe:—"In a suit for partition (as the former suit was) the decree is or ought to be a joint declaration of the rights of the persons interested in the property of which partition is sought, and is a decree in favour of each sharer. It decides what interest each of the sharers has in the property, the subject of partition, whether those sharers be plaintiffs or defendants, and renders unnecessary any subsequent suit by any of such sharers for a declaration of his interest in the property." In the case of *Assan* v. *Pathumma* (3) the Madras High Court deals with the nature of a partition suit at page 499:—"If on the other hand they were suits for partition, which in my opinion, they really were, *a fortiori* the plaintiffs were entitled to join. For in a suit for partition each co-owner, as against another, occupies in himself the role of plaintiff as well as defendant. It is in consequence of the reciprocal character of the right which co-owners have in the matter of partition that even those who are not actual plaintiffs can claim that their shares be allotted to them by the decree." The learned Judge refers to the case of *Sheikh Khoorshed Hossein* v. *Nubbee Fatima*, already referred to, and also to Domat's Civil Law, paragraph 2757. In the case of *Ashidbai* v. *Abdulla Haji Muhammad* (4) the learned Judge says, at page

(1) (1878) I. L. R., 3 Calc., 551.
(2) (1897) I. L. R., 20 All., 81.
(3) (1897) I. L. R., 22 Mad., 494.
(4) (1906) I. L. R., 31 Bom., 271.

291:—"When a suit for partition is brought by a person alleging that it is undivided property and that he has a share in it, the law requires that in order to enable the court to ascertain such person's share it must have before it as parties to the suit all the persons admittedly having or claiming to have shares in the property, otherwise there cannot be a valid, final and binding decree for partition. The quantum of the share of the plaintiff must be determined with reference to the number of sharers and their respective shares. And such a determination of the shares, being essential for the determination of the plaintiff's share, enables the court to pass a complete decree for partition allotting to each party, whether he is plaintiff or defendant, his share. In such a case it is obvious injustice that a defendant should be driven to another suit to have his share, already determined, partitioned off. That is the reason of the rule." We quite agree with the view taken in the several cases we have referred to, and we think that the plaintiffs cannot re-open any of the questions which were tried in the former suit. It is worthy of note that when the appeal in the former litigation was decided, the widow of Madho Rao, *i.e.*, the present defendant, was arrayed as a respondent with the present plaintiffs as appellants.

At the conclusion of the judgement our attention was called to paragraphs 5 and 7 of the plaint. With regard to paragraph 5, where it is pleaded that re-union took place, we must say that this question of re-union has already been decided in the former suit. The learned Judges say:—"But in addition to this there had never been a joint title to the testator's property in the hands of his sons. Nana Narain Rao held it as self-acquired property, he made three separate devises to his sons, who took separately as self-acquired property the interest so devised to them. That being so, a question of reunion does not arise. That cannot be reunited which had never been joint." In paragraph 7 of the plaint it is alleged:—"Madho Rao executed a document on the 31st of January, 1905. In it he repeated the allegation of his family being joint and fixed only a maintenance allowance from Rs. 50 to Rs. 75 for Musammat Radha Bai in case she refused to live with the plaintiffs. If for some reason or other, the family of the plaintiffs [and Madho Rao] should be considered to be

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separate according to law, the result of this document would be that Madho Rao made the plaintiffs owners of the property and only fixed a maintenance allowance for the defendant." Having regard to the above allegations, which raised a question which had not been specifically dealt with in the court below, we allowed an adjournment to enable the appellant to produce before us the document of the 31st January, 1905. Mr. *Surendra Nath Sen* has produced a certified copy of the said document. We assume, merely for purposes of argument, that this document of the 31st January, 1905, is a genuine document and proceed to consider its provisions in order to ascertain if it could possibly have any bearing on the present appeal. The document (assuming it to be genuine) was executed by Madho Rao a day before his death. At that time the litigation between Musammat Janki Bai and Parsotam Rao and Madho Rao was still pending. We have already pointed out that Madho Rao in conjunction with Parsotam Rao was at that particular period setting up the case that the family was joint for the purpose of defeating the claim of Musammat Janki Bai as the widow of Baba Ram Chandra Rao. The relevant portion of the document is a declaration by Madho Rao that the family was joint, and an exhortation to his nephew Waman Rao Bhaiya, to whom the document was addressed, as to how he should manage the property, and giving instructions as to the amount of maintenance to be paid to the widow in certain events. It is contended that this document ought to be construed as a will and that the declaration as to the family being joint ought to be construed as a bequest of the property of Madho Rao to the other members of the family, as if the family was joint and not separate. We think it quite impossible to give this construction to the document. The document was executed solely for purposes of the then pending litigation, in the hope probably that it might be used as evidence. In the view we take of the true construction of the document, it can have no bearing, even on the assumption that it is genuine, on the present appeal. The order of the Court accordingly is that the appeal be dismissed with costs.

Appeal dismissed.