

of limitation applicable to suits of this nature. We allow the appeal so far that in lieu of the decree for Rs. 57-3-4 passed by the court below we substitute a decree for Rs. 280-12-5. Parties will pay and receive costs in proportion to failure and success in both courts. The cross objections are dismissed with costs.

Appeal allowed.

1913

SHAYDA ALI
v.
PHULLO.

1913

February, 7.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

ANANT DAS (DEFENDANT) v UDAI BHAN PARGAS (PLAINTIFF).*

Civil Procedure Code (1908), section 11.—Res judicata—Two suits, one judgement and two decrees—Two appeals of which one abates before the other is heard.

A plaintiff instituted, on the same day and in the same court, two suits, in each of which the claim was for a declaration that he was the *mahant* of a certain *makh*. The one was against defendant *A* only, the other against defendants *A* and *S*. Both suits were decided by a single judgement, but a separate decree was framed in each. In the former suit *A* appealed. In the latter *S* appealed, but *A* did not. Pending *A*'s appeal *S* died and his appeal abated and the judgement in the case became final. *Held* that the hearing of *A*'s appeal was barred. *Zaharia v. Debia* (1) followed.

IN this case two suits were instituted in the court of the Subordinate Judge of Gorakhpur apparently on the same day. The plaintiff in both suits was *mahant* Udai Bhan Pargas *alias* Angan Das. In one suit the defendant was Anant Das; and in the other Anant Das and Sundar Das. In both suits the plaintiff claimed a declaration that he was *mahant* of a certain *makh*. In the latter suit the claim was as follows:—"The plaintiff's title and the defendants' want of title may be established, and it may be declared that the plaintiff is entitled to receive the papers and the box aforesaid. The box and the papers detailed below may be awarded to the plaintiff." In the earlier part of the plaint the plaintiff stated "but as both the defendants deny the plaintiff's title, he brings this claim against both the defendants in respect of a box which contains papers, documents, etc., . . . and which Sundar Das the defendant has taken back after the institution of this suit without the plaintiff's knowledge." Both the suits were tried together, and amongst the issues framed were the following:—"Is the plaintiff *chela* of Karan Das, and was he appointed *mahant*? Has the plaintiff a right to sue? What is the custom relating to the *mahantship*, and was the plaintiff

* First Appeal No. 131 of 1911, from a decree of Harbandhan Lal, Additional Subordinate Judge of Gorakhpur, dated the 26th of January, 1911.

(1) (1910) I. L. R., 33 All., 51.

1918

ANANT DAS
v.
UDAI BHAN
PARGAS.

appointed *mahant* according to that custom?" The result was that in the suit in which both Anant Das and Sundar Das were defendants there was a decree against both declaring the plaintiff's title. From that decree Sundar Das appealed, but Anant Das did not. This appeal, however, abated, Sundar Das having died, and no steps having been taken within time to bring his legal representative on to the record. The decree, therefore, in this case, became final. In the other case Anant Das appealed, but when the appeal came on for hearing a preliminary objection was raised to the effect that the decree in the first case having become final operated as *res judicata* in regard to this appeal.

The Hon'ble Dr. *Sundar Lal* and *Munshi Govind Prasad*, for the appellants.

Dr. *Satish Chandra Banerji* and *Munshi Iswar Saran*, for the respondent.

RICHARDS, C. J. and BANERJI, J.—A preliminary objection has been taken to the hearing of this appeal on the ground of *res judicata*. It is necessary shortly to state the facts in order that it may be understood how the question arises. Two suits were instituted in the court of the Subordinate Judge of Gorakhpur apparently on the same day. The plaintiff in both the suits was *mahant* Uday Bhan Pargas *alias* Angan Das. In the present suit Anant Das was the only defendant. In the other suit the defendants were (1) Sundar Das and (2) Anant Das, the appellant in this appeal. In both suits the plaintiff claimed a declaration that he was the *mahant* of a certain *math*. In the suit in which both Sundar Das and Anant Das were defendants the claim was as follows :—

"The plaintiff's title and the defendants' want of title may be established and it may be declared that the plaintiff is entitled to receive the papers and the box aforesaid. The box and the papers detailed below may be awarded to the plaintiff."

In the earlier part of the plaint the plaintiff stated "but as both the defendants deny the plaintiff's title, he brings this claim against both the defendants in respect of a box which contains papers, documents, etc., . . . and which Sundar Das, the defendant, has taken back after the institution of this suit without the plaintiff's knowledge."

Both the suits were tried together in the court below and amongst the issues framed were the following:—“Is the plaintiff *chela* of Karan Das and was he appointed *mahant*? Has the plaintiff a right to sue? What is the custom relating to the *mahantship*, and was the plaintiff appointed *mahant* according to that custom?” These issues were decided in favour of the plaintiff. The result was that in the suit in which both Sundar Das and Anant Das were defendants, there was a decree against both the defendants, declaring the plaintiff’s title, after the issues to which we have referred had been decided. From the decree in that suit Sundar Das alone appealed, but Anant Das did not prefer an appeal. The appeal of Sundar Das abated by reason of the fact that after his death no steps were taken to bring his representatives on the record within the time allowed by law. Anant Das, however, did appeal in the suit out of which the present appeal arises, which, as we have already mentioned, was decided at the same time as the other suit, and by one and the same judgement. We must here mention that, although both suits were disposed of by the same judgement, separate decrees were drawn up in each case.

The respondent now by way of a preliminary objection contends that the appeal of Sundar Das having abated and Anant Das not having appealed from the decree in that suit, there is now a binding decree against him unappealed from. The appellant Anant Das, on the other hand, contends that section 11 of the Code of Civil Procedure, which deals with *res judicata*, does not apply to the present case, because the two suits were tried together and disposed of by one judgement on the same day, and secondly, because in any event, in the suit in which both Sundar Das and Anant Das were defendants, the real question was the title to the particular property mentioned in the plaint in that suit, and that therefore the decree which was given in that suit cannot be said to operate as *res judicata* on the question of the title to the property in dispute in the suit out of which the present appeal arises.

Section 11 of the Code is as follows:—“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent

1913

 ANANT DAS
 v.
 UDAI BHAN
 PARGAR.

1913

ANANT DAS
v.
UDAI BHAN
PARGAS.

to try such subsequent suit, or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

In explanation (1) "former suit" is defined as denoting a suit which has been decided prior to the suit in question, whether or not it was instituted prior thereto. It cannot for one moment be contended that the decree in the suit in which both Sundar Das and Anant Das were defendants has not now become final as against Anant Das. Beyond all question the issue as to whether the plaintiff was or was not the *mahant* was decided in that suit and we are now called upon to decide the same issue in the present appeal. The result might be that if we were now to hear the appeal, there would be one binding decree declaring that Uday Bhan was the *mahant*, and another equally binding decree declaring that he was not, both decrees being in suits to which Anant Das was a party. It seems to us that it was to prevent anomalies of this description (amongst other reasons) that section 11 was enacted. No doubt it is somewhat unfortunate in the present case that the appellant is unable to have the question decided by this Court by reason merely of the fact that he did not appeal against the decree in the other suit. This view of the rule of *res judicata* was taken in the Full Bench case of *Zaharia v. Debia* (1), a decision which is of course binding on us.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

1913

February, 7.

Before Mr. Justice Sir George Knox and Mr. Justice Muhammad Rafiq.
KUNWAR SEN AND OTHERS (DEFENDANTS) v. JWALA PRASAD AND OTHERS
(PLAINTIFFS).*

Act No. XLIX of 1873 (North-Western Provinces and Oudh Land Revenue Act), sections 140, 148 and 167—"Proprietor"—Mortgage by muafidar—Sale of mahal for default in payment of Government revenue—Rights of purchaser and mortgagees of the muafi.

Where certain *muafidars*, whose rights as such accrued before the year 1870, and were not shown to have been created by the zamindars of the *mahal* in which the *muafi* land in question was situate, executed a usufructuary mortgage of such land, and thereafter the *mahal* was sold for default in

* Second Appeal No. 152 of 1912 from a decree of H. Dupernex, District Judge of Farrukhabad, dated the 14th of December, 1911, reversing a decree of Ganri Shankar, Subordinate Judge of Fatehgarh, dated the 16th of May, 1911.

(1) (1910) I. L. R., 33 All, 51.