

1925
March, 2

Before Mr. Justice Walsh and Mr. Justice Dalal.

RAJ BAHADUR (DEPENDANT) v. NARAIN PRASAD
AND OTHERS. (PLAINTIFFS).*

Civil Procedure Code, order XXII, rule 5—Determination that a certain person is not the legal representative of a deceased party—Res judicata.

Where it has once been decided in a proceeding under order XXII, rule 5, of the Code of Civil Procedure that a certain person is (or is not) the legal representative of a deceased party, the same question cannot be re-agitated in a separate suit. *Parsotam Rao v. Janki Bai* (1) and *Raoji Bhikaji v. Anant Laxman* (2), referred to.

* THE facts of this case were as follows :—

One Chhotey Lal had two sons, and the widow of one of them, Musammat Ganeshi, made certain transfers in favour of Raj Bahadur. Musammat Ganeshi had a daughter, Musammat Katori, who was the heir to the property on the death of her mother. She instituted a suit in 1917 for a declaration that the transfers were beyond the power of a Hindu widow and were not binding on her. During the pendency of the suit she died, on the 12th of November, 1917. Narain Prasad applied to the court to be brought on the record as representative in interest of Musammat Katori on the ground that Musammat Katori had given birth to a son who died the day after he was born and Narain Prasad was successor in interest of his wife through that son. On the question whether Narain Prasad was or was not the legal representative of Musammat Katori, the finding of the court was that no son was born to Musammat Katori and that Narain Prasad was not her legal representative. The suit therefore abated and was dismissed. Prior to the dismissal of the suit Narain Prasad, who claimed the property, and the sons of Durga Prasad,

* First Appeal No. 88 of 1925, from an order of Aghor Nath Mukerji, Additional District Judge of Bareilly, dated the 16th of February, 1925.

(1) (1905) I.L.R., 28 All., 109.

(2) (1918) I.L.R., 42 Bom., 535.

brother of Musammat Ganeshi's deceased husband, had referred the question in dispute to arbitration and an award was passed in favour of Narain Prasad. This award had been passed before the dismissal of Musammat Katori's suit; the award, however, was not pleaded in support of Narain Prasad's application. After the dismissal of his application Narain Prasad filed the present suit against Raj Bahadur for a declaration that the transfers made by Musammat Ganeshi were invalid and inoperative, and also for possession. The trial court dismissed the suit on the finding that it was barred by the principle of *res judicata*. On appeal, the Additional District Judge disagreed with this finding and remanded the suit for trial. Against this order the defendant appealed.

Munshi *Sarkar Bahadur Johari*, for the appellant.

Mr. *B. Malik* and Dr. *Surendra Nath Sen*, for the respondents.

The judgement of the Court (WALSH and DALAL, JJ.), after stating the facts as above, thus continued:—

We are of opinion that the proceedings in the suit of Musammat Katori subsequent to her death bar the present suit of the plaintiff. The court which heard Musammat Katori's suit was entitled under order XXII, rule 5, to decide the question whether Narain Prasad was or was not the legal representative of Musammat Katori and the decision would be binding on the parties. On behalf of the respondent reference was made to the case of *Parsotam Rao v. Janki Bai* (1). The facts of the case do not appear very clearly from the judgement and it is not clear whether the

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learned Judges desired to decide or not that once the question of a legal representative was decided by a court under order XXII, rule 5, it could be re-adjudicated upon in a regular suit. Reference is there made to some vital issue arising in that case—whether two Hindu brothers were separate or were members of a joint Hindu family. If the learned Judges desired to decide that a question once determined under order XXII, rule 5, would not operate as *res judicata*, we are not prepared to follow that opinion, with all respect. In a Bombay case, *Raoji Bhikaji v. Anant Laxman* (1), a Bench of that Court held that where a party died between the passing of a preliminary decree and a final decree in a suit for partition and the cause of action survived, the court was bound to determine the question of the successor in interest of the deceased party under order XXII, rule 5, and decide such dispute without referring the parties to a separate suit.

As to the award, Narain Prasad ought to have pleaded it in support of his right to be brought on the record as representative in interest of Musammat Katori. The words of section 11 of the Code of Civil Procedure, explanation IV, are :—“ Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit ”. It must therefore be taken that in the suit of Musammat Katori a court having jurisdiction decided that Narain Prasad was not her representative in interest either through her son or on the basis of an award given by arbitration in a dispute between himself and the sons of Durga Prasad. We have already held that such a finding is binding on the parties.

(1) (1918) I.L.R., 42 Bom., 535.

We decree the appeal, restore the decree of the Subordinate Judge and dismiss the plaintiff's suit with costs of all the courts.

*Before Sir Grimwood Mears, Knight, Chief Justice, and
Mr. Justice Lindsay.*

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SHEO DARSHAN SINGH (OPPOSITE PARTY) *v.* BENI
CHAUDHRI AND OTHERS (APPLICANTS).^{*}

Mortgage—Suit for redemption—Costs awarded by appellate court—Failure to deposit in time—Charge on mortgaged property.

Where in a suit for redemption of a mortgage the appellate court increases the amount of the costs payable by the plaintiff, such costs, in the absence of any direction to the contrary, form part of the money chargeable on the mortgaged property, and if they are not paid within the time limited the plaintiff is not entitled to possession. *Aminu Bibi v. Ram Shankar Misra* (1), followed.

THE facts of this case were as follows :—

Babu Sheo Darshan Singh brought a suit for redemption of a mortgage and obtained on the 22nd of April, 1919, a preliminary decree. The court found that the plaintiff had to pay for redemption a sum of Rs. 1,747-8-6 for principal and interest and Rs. 69-2-0 for costs, making a total of Rs. 1,816-10-6.

The item for costs just referred to included only two-thirds of the costs incurred by the defendants mortgagees.

This sum was deposited by the plaintiff mortgagor in court and on the 26th of June, 1919, a final decree under order XXXIV, rule 8, was passed. On the 15th of July, 1919, the plaintiff was put in possession of the mortgaged property.

Meanwhile the mortgagees appealed against the preliminary decree and on the 2nd of December, 1920,

* Appeal No. 31 of 1925, under section 10 of the Letters Patent.

(1) (1919) I.L.R., 41 All., 473.