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consideration, as indeed it has been, under the auditor's report and the order of the learned Judge.

For the reasons given above, we allow this application, set aside the orders of the court below, dated the 25th of November, 1933, and the 13th of February, 1934, and direct the court below to pass appropriate orders in the case in view of the observations made in our judgment, and if any property or accounts belonging to the ward was admittedly in the possession of the guardian he should be ordered to deliver the same to the ex-minor and if the guardian applies for a discharge the court should refuse to give such a discharge as it is obvious that the minor objects to, and the court is not satisfied with, the accounts submitted by the guardian, unless a suit by the minor for rendition of accounts is barred by time now. The minor should try and obtain redress by means of a regular suit and the question of discharge will naturally abide the result in such a suit. The guardian, we understand, claims a certain sum from the ex-minor, and he can also, if so advised, institute a suit for the recovery of the same. Under the circumstances of the case we direct the parties to bear their own costs in the court below and in this Court.

APPELLATE CIVIL

Before Mr. Justice Harries and Mr. Justice Rachhpal Singh

ANTU RAI AND OTHERS (DEFENDANTS) *v.* RAM KINKAR RAI
AND ANOTHER (PLAINTIFFS)*

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Civil Procedure Code, order XXII, rule 5—Dispute among several persons as to who is the legal representative of a deceased appellant—Order deciding one of them to be the legal representative—Subsequent suit between same persons regarding succession to the deceased person—Res judicata.

A decision under order XXII, rule 5 of the Civil Procedure Code of a dispute as to which of several persons is the heir and legal representative of a deceased appellant is a decision in a

*First Appeal No. 42 of 1932, from a decree of Krishna Das, Subordinate Judge of Ghazipur, dated the 9th of January, 1932.

summary proceeding for the purpose of continuance of the appeal, and can not operate as *res judicata* in a subsequent suit between the same persons regarding succession to the property of the deceased person, which property was not in suit in the earlier litigation. *Raj Bahadur v. Narain Prasad* (1), dissented from.

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Dr. K. N. Katju and Messrs. A. P. Pandey and Janaki Prasad, for the appellants.

Mr. B. E. O'Connor, Dr. N. P. Asthana and Messrs. M. L. Chaturvedi and B. N. Sahai, for the respondents.

HARRIES and RACHHPAL SINGH, JJ.:—This is a defendants' first appeal against a decree for possession passed by the learned Subordinate Judge of Ghazipur. The plaintiffs in the suit claimed possession of certain properties specified in schedule A of the plaint and that claim was substantially decreed, hence the present appeal.

The plaintiffs claimed the properties as being the reversioners of one Gopal Rai deceased who died whilst still a minor on the 14th of December, 1918. At the date of his death the plaintiffs alleged that their father Sheo Tahal Rai was the nearest heir and was thus entitled to the estate by right of inheritance. Sheo Tahal Rai, however, admittedly died some time after Gopal Rai and the plaintiffs as his only sons now claim that they are entitled to the property as representing their father. After much litigation in the revenue courts the defendants obtained mutation of their names in the revenue papers, hence the plaintiffs were compelled to bring this suit for possession of the properties.

The defendants' case was that the plaintiffs were not the nearest heirs of Gopal Rai, but on the contrary they were only very distantly related to the deceased. They allege that they are the nearest heirs and are therefore entitled to Gopal Rai's property by right of inheritance. In answer to these contentions of the defendants the plaintiffs replied that the defendants were in any event estopped from setting up that they were the nearest heirs

(1) (1926) I.L.R., 48 All., 422.

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of Gopal Rai deceased and further that the issue as to who were the nearest heirs of Gopal Rai deceased had already been decided against the defendants and in favour of the plaintiffs and that the matter was therefore *res judicata*. A number of other subsidiary issues were raised in the case, but it is not necessary to refer to them in this judgment as the points have not been pressed by one side or the other in this appeal.

* * * * *

The plaintiffs have contended in this appeal that the defendants are estopped from alleging that they are the nearest heirs of Gopal Rai deceased. It is urged that an order of the Subordinate Judge of Ghazipur, dated the 9th of December, 1919, has once and for all determined that the heirs of Gopal Rai deceased are the plaintiffs. This was an order passed *inter partes* and it is claimed that therefore the defendants are barred from further agitating the matter.

It appears that Gopal Rai was a party in a suit No. 100 of 1917 which was decided against him and he appealed and became appellant in appeal No. 2 of 1918. During the pendency of the appeal Gopal Rai died and application was made by a number of persons to be substituted as appellants in his place. Sheo Tahal Rai, the father of the plaintiffs, and the defendants made such applications and the matter was decided eventually by the learned Subordinate Judge of Ghazipur who held upon the evidence which had been adduced before him that Sheo Tahal Rai, the father of the present plaintiffs, was the nearest heir and ordered that his name be brought on the record in place of Gopal Rai deceased. This was a summary proceeding, but it has been urged before us that the decision of the learned Subordinate Judge concludes the matter and the question as to who is entitled to succeed Gopal Rai deceased is now *res judicata*.

It is to be observed that counsel in the lower court never claimed that this order operated by way of *res*

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judicata but merely urged that it had some evidentiary value in support of the plaintiffs' case. However, it is urged before us that this order does operate as a complete bar and wholly estops the defendants from setting up their present contention that they are in fact and in law the persons entitled to succeed to Gopal Rai.

Counsel for the appellants relies upon the case of *Raj Bahadur v. Narain Prasad* (1). In that case a Bench of this Court decided that where a party died during the pendency of a suit and the cause of action survived, the court was entitled to decide the question of the legal representative of the deceased without referring the parties to a separate suit and the decision was binding on the parties and would operate as *res judicata*. In that case reference is made to an earlier case of this Court, viz., *Parsotam Rao v. Janki Bai* (2), in which a contrary view is taken. The report, however, of this case does not clearly set out the facts but the Court does appear to have held that a decision in a summary proceeding that certain persons are entitled to be substituted as personal representatives of a deceased party to a suit is not a final determination of the matter and does not constitute a bar on the ground of *res judicata*. It will therefore be seen that the decisions of this Court upon the question are conflicting.

However, in the case of *Samsarivusa Sarvathi Palekhan v. Pathumma* (3) a Bench of the Madras High Court held that the question whether a person should be admitted as the legal representative of a deceased plaintiff to continue a suit cannot be regarded as one of the questions arising for the decision of the suit itself. That Bench expressly held that an order such as the order relied upon in this present case does not operate as a bar and does not amount to *res judicata*. A similar view has also been taken by the Judicial Commissioners' Court, Nagpur, in the case of *Musammatt Laxmi v.*

(1) (1926) I.L.R., 48 All., 422. (2) (1905) I.L.R., 28 All., 109.
 (3) (1913) 20 Indian Cases, 950.

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Ganpat (1). In that case KOTVAL, A.J.C., held that an order rejecting an application to be brought on the record as the legal representative of a deceased appellant is not a decree and does not constitute *res judicata*.

The same view has also been taken by a Bench of the Lahore High Court in the case of *Chiragh Din v. Dildar Khan* (2). In that case it is expressly laid down that where in a proceeding under order XXII, rule 5 a person is or is not held to be the legal representative of a deceased party, the same question can be re-agitated in a separate suit and is not barred by the rule of *res judicata*.

From the above it will be seen that there is a preponderance of authority against the plaintiffs' contention. The order of the learned Subordinate Judge substituting Sheo Tahal Singh, the father of the present plaintiffs, in place of Gopal Rai was an order passed under order XXII, rule 5 of the Civil Procedure Code and it was passed in the course of a suit which did not concern the property in dispute in this case. In our judgment such an order cannot possibly be held to debar the present defendants from alleging that they as the nearest heirs of Gopal Rai are entitled to succeed to his property. The issue involved in the present case is a very different issue from that involved in the summary inquiry into the question as to who should be substituted for Gopal Rai as appellant in the appeal during the pendency of which he died. The facts of the Allahabad case of *Raj Bahadur v. Narain Prasad* (3), cited above, which appears to favour the present plaintiffs' view are very different from the facts of the present case. However, if it was intended to lay down in that case that a decision in a summary inquiry under order XXII, rule 5 of the Civil Procedure Code for ever barred any one again claiming property as the heir of the deceased party in the suit, then we respectfully dissent from it. In

(1) A.I.R., 1921 Nag., 23.

(2) A.I.R., 1934 Lah., 465.

(3) (1926) I.L.R., 48 All., 422.

our judgment the view expressed in the earlier Allahabad case, viz., *Parsotam Rao v. Janki Bai* (1) previously cited, is to be preferred to the later case. The view that an order passed under order XXII, rule 5 does not operate as *res judicata* is supported by abundant authority in other High Courts and that being so we hold that the order passed by the learned Subordinate Judge of Ghazipur in appeal No. 2 of 1918 does not operate as a bar to the present contention of the defendants.

For the reasons which we have given above we are satisfied that Gendu Rai was not a brother of Nihal Rai and therefore that the plaintiffs were not related to Gopal Rai in the manner suggested by them. Further we are satisfied that Gendu Rai, the ancestor of Gopal Rai deceased, belonged to an entirely different branch of the family which included the present appellants. In our judgment the learned Subordinate Judge was not justified in coming to the conclusion to which he did and that being so his decision cannot stand. In our judgment the defendants have established their right to this property and that being so the plaintiffs have no claim whatsoever to it and their claim should have been dismissed.

In the result, therefore, we allow this appeal and set aside the decree of the learned Subordinate Judge and dismiss the plaintiffs' claim.

REVISIONAL CRIMINAL

Before Mr. Justice Allsop

EMPEROR *v.* MUHAMMAD KHALIL*

Criminal Procedure Code, section 139A—Scope of inquiry—Summary inquiry whether denial of the public right is frivolous or otherwise—Final decision of question of title not aimed at.

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*Criminal Reference No. 802 of 1935

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