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1931, was an application made in accordance with law, and that the subsequent application made on the 5th of July, 1934, was accordingly within time.

It should be added that the learned counsel for the respondents argued further that in any case the application that was made by the decree-holders on the 6th of July, 1931, for time to file certain papers in itself constituted an application to the court to take a step in aid of execution, and that that application itself would operate to save limitation for the subsequent application of the 5th of July, 1934. This argument is supported by a reference to the case of *Haridas Nanabhai Gujrati* v. *Vithaldas Kisandas Gujrati* (1), and would appear to be a correct argument. It is not, however, necessary to decide that point definitely in view of the opinion we have both arrived at as to the validity of the main application of the 6th of July, 1931. I therefore concur in the order proposed, namely that the appeal be dismissed with costs.

Smith, J.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge and Mr. Justice H. G. Smith

1937 *January*, 11

MUSAMMAT BARFO (DEFENDANT-APPELLANT) *v.* NARAIN PRASAD AND ANOTHER (PLAINTIFFS-RESPONDENTS)

Hindu Law—Succession—Reversioner's suit for succession—Evidence not only of his being relation but also of absence of nearer heirs, if essential—Second appeal—Raising question of law for first time in appeal—Court's power to allow raising of legal pleas in appeal.

It is incumbent on a plaintiff claiming as a reversioner not only to establish the particular relationship set up by him, but also to give some evidence showing *prima facie* that there are no nearer heirs. *Ganga Dass* v. *Kashi Ram* (2), relied on.

*Second Civil Appeal No. 234 of 1935, against the decree of W. Y. Madeley, Esq., I.C.S., District Judge of Lucknow, dated the 27th of May, 1935, upholding the decree of Pandit Girja Shankar Misra, Additional Civil Judge of Lucknow, dated the 28th of August, 1934.

(1) (1912) I.L.R., 36 Bom., 638. (2) (1928) O.W.N., 932.

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Although it is within the discretion of a court of appeal to entertain a plea raising a pure question of law even though it has not been raised in the lower court, yet when the defendant had expressly withdrawn a plea in the trial court and it is not raised in the grounds of appeal it is not right to entertain the plea in second appeal. *Sajjad Husain Khan* v. *Amir Jahan* (1) and *Same* v. *Srinibash Mahato* (2), referred to.

Messrs. *Ishwari Prasad* and *Girja Shankar*, for the appellant.

Messrs. *Radha Krishna Srivastava* and *B. K. Dhaon*, for the respondents.

SRIVASTAVA, C. J. and SMITH, J.:—This is a second appeal by the defendant against the appellate decree of the learned District Judge of Lucknow confirming the decree of the learned Additional Civil Judge of that place.

The dispute related to the property of one Mannu Lal, who was succeeded by his widow Musammat Bhagwandei who died on the 28th of October, 1929. The original plaintiff, Lal Bihari, claimed as a *pitra bandhu* of the 34th degree of Mannu Lal. The defendant denied the alleged relationship of the plaintiff with Mannu Lal, and questioned his title to succeed as a *bandhu*. Both the lower courts have found that Lal Bihari's mother, Musammat Gujro, was the daughter of one Salik Ram, and that the plaintiff had established his title to succeed as a *bandhu* of Mannu Lal, whose grandfather also named Mannu Lal, was Salik Ram's full brother.

The learned counsel for the defendant-appellant has not questioned before us the finding about the alleged relationship of Lal Bihari with Mannu Lal. He has, however, contended that the plaintiff has failed to show that there were no nearer heirs alive at the date of the death of Musammat Bhagwandei. It may be noted that Lal Bihari, the original plaintiff, died at an early stage

(1) (1919) 7 O.L.J., 17. (2) (1936) O.W.N., 670.

of the suit, and his sons, Narain Prasad and Ram Kishen, were substituted in his place. It was held by one of us in *Ganga Dass, Mahant and another* v. *Kashi Ram and another* (1), that it is incumbent on a plaintiff claiming as a reversioner not only to establish the particular relationship set up by him, but also to give some evidence showing *prima facie* that there are no nearer heirs. The question therefore is whether the plaintiffs have in the present case succeeded in giving such *prima facie* evidence or not. They examined a number of witnesses who proved certain admissions of Mannu Lal himself, his widow, Musammat Bhagwandei, and his ancestor, Bhagwan Das *alias* Nui, showing that Mannu Lal had no nearer relations in existence. This evidence has been believed by both the courts below, and it has been held that it affords sufficient *prima facie* proof to shift the onus on the defendant to prove the existence of persons who could be nearer heirs than the plaintiffs. We may also note that the plaintiffs served interrogatories on the defendant requiring her to state the names and the relationship of any persons alleged to be nearer heirs than the plaintiffs. The defendant did not choose to give any replies to these interrogatories. She did not even set up any counter pedigree. In the circumstances we can see no sufficient ground to disagree with the finding of the lower court. We must hold that the evidence which has been accepted by the courts below is *prima facie* sufficient to discharge the initial burden of proof which lay on the plaintiffs to show the absence of nearer heirs.

Next an application was made to us for permission to add a new ground of appeal about the present suit being barred by *res judicata* by reason of the dismissal of an application which had previously been made by Lal Bihari for letters of administration. This plea was raised by the defendant in her written statement, but on the date of issues her counsel, who represents her in

(1) (1928) 5 O.W.N., 932.

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Srivastava C.J. and Smith, J.

this Court also, made a definite statement withdrawing the plea. It was not raised in the grounds of appeal filed by the defendant in the lower appellate court, and has also not been raised in the grounds of appeal filed in this Court. In *Sajjad Husain Khan* alias *Shamsher Bahadur* v. *Musammat Amir Jahan and others* (1), it was held that a point of law distinctly raised, but not pressed, in first appeal cannot be allowed to be raised and discussed in second appeal. In *Same* v. *Srinibash Mahato, since deceased, and others* (2), their Lordships of the Judicial Committee observed that the appellate court can rightly decline to allow the appellant to go into the question of *res judicata* on the ground that it had not been properly raised by the pleadings or in the issues. Although it is within the discretion of a court of appeal to entertain a plea raising a pure question of law even though it has not been raised in the lower court, yet in the present case, taking all the circumstances into consideration, and more particularly in view of the defendant's having expressly withdrawn the plea in the trial court, we do not think it would be right for us to entertain the plea now. We accordingly dismiss Civil Miscellaneous Application No. 14 of 1937 for permission to add a new ground of appeal.

The result therefore is that the appeal fails, and is dismissed with costs.

Appeal dismissed.

(1) (1919) 7 O.L.J., 17. (2) (1936) O.W.N., 670.