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of those trees. Nor does the decree of the Judicial Commissioner contemplate that the under-proprietor should always maintain the land as a grove.

We therefore decree these appeals in part and modify the decree of the lower appellate court by giving the plaintiffs a declaration of their proprietary right to the grove in suit and to the effect that as superior proprietors they are entitled to get a one-fourth share in the produce of the trees growing in the grove. The rest of the appeals is dismissed.

The learned counsel for the respondents does not press the cross-objections. They are also dismissed.

We order each party to bear his own costs in this Court. This judgment will govern both the appeals.

Appeals decreed in part.

APPELLATE CIVIL

1939

September, 28

Before Mr. Justice Ziaul Hasan and Mr. Justice J. R. W. Bennett

BANKEY LAL AND OTHERS (DEFENDANTS-APPELLANTS) *v.* NAND LAL AND OTHERS (PLAINTIFFS-RESPONDENTS)*

Res judicata—*One judgment disposing of two appeals—Second appeal against decree in one of those appeals only—Decree in the other appeal, whether operates as* res judicata.

It is too broad a proposition that when there is one and the same judgment disposing of two separate appeals in which two separate decrees were prepared then if there is an appeal against one of the two decrees only, the judgment and the decree in the other appeal, against which no appeal is filed and which thus becomes final, would constitute *res judicata*, and is not applicable to each and every case in which the lower court disposes of two appeals by one and the same judgment.

Where two appeals were disposed of by the same judgment and a second appeal is filed against the decision in one of those appeals only on a point which was involved in that appeal alone and not in the other appeal and the decision in the other appeal did not affect the point arising for decision in this appeal, there is no legal bar to the hearing of the appeal.

*Second Civil Appeals Nos. 175 and 196 of 1936, against the order of Rai Bahadur Pandit Manmath Nath Upadhyay, District Judge of Sitapur, dated the 4th February, 1936, modifying the decree of Mr. Pearey Lal Bhargwa, Additional Civil Judge, Sitapur, dated the 29th October, 1934.

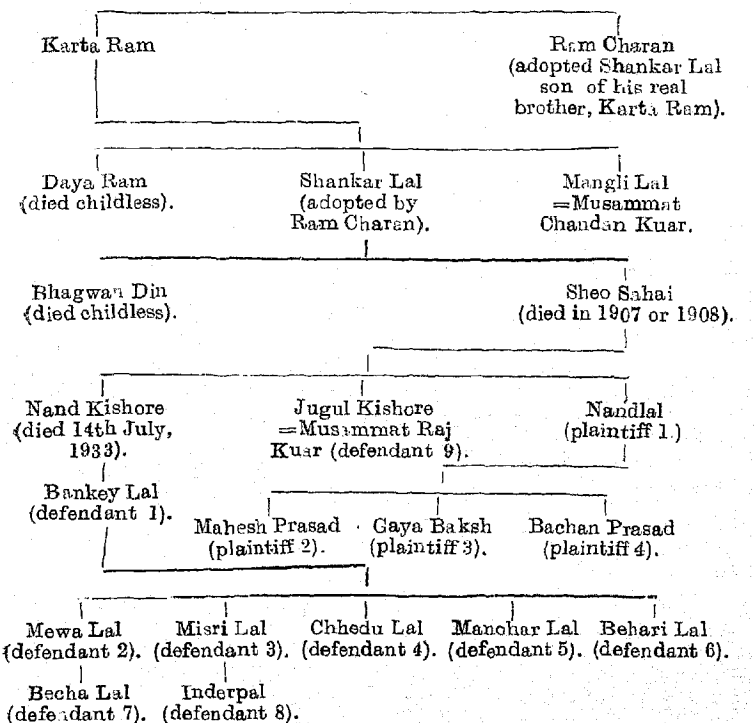
Bhagauti Din v. *Bhagwat* (1), dissented from. *Ram Sukh Dubey* v. *Rampat Tewari* (2), *Walliullah* v. *Ejaz Ali* (3), *Zaharia* v. *Debia* (4), and *Mrs. Gertrude Oates* v. *Mrs. Millicent D'Silva* (5), referred to.

Messrs. *D. K. Seth, C. P. Lal* and *Uma Shankar Srivastava,* for the appellants.

Mr. *S. C. Das,* for the respondents.

ZIAUL HASAN and BENNETT, JJ.:—These two appeals have been brought by the defendants to a suit for partition of joint family property against the appellate decrees passed by the learned District Judge of Sitapur in cross-appeals in the same suit.

The following pedigree of the parties is not disputed before us—



It will be seen that the plaintiffs to the suit are Nandlal and his three sons while the defendants are the widow of Jugul Kishore, brother of Nand Lal, and the

(1) (1933) 10 O.W.N., 1093. (2) (1927) A.I.R., Oudh, 575.
(3) (1911) 15 O.C., 22. (4) (1910) I.L.R., 33 All., 51.
(5) (1932) I.L.R., 12 Patna, 139.

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son, grandsons and great-grandsons of Nand Kishore, the other brother of Nand Lal.

The plaintiffs claim a half share in ten items of immovable property mentioned in List A attached to the plaint and a similar share in the movables entered in List B.

The learned Civil Judge who tried the case decreed the plaintiffs' claim to the extent of a one-third share in five items of the List A properties and dismissed the suit with regard to the other items and to the movables mentioned in List B. In regard to three of the items for which the plaintiffs' suit was decreed, the plaintiffs were directed to pay their one-third proportionate share of the money that Nand Kishore spent on redeeming those properties from mortgages made while the family was joint. Against this decree both the parties appealed to the District Judge who dismissed the defendants' appeal altogether but allowed the appeal of the plaintiffs to this extent that he set aside the condition of payment of money by the plaintiffs in respect of two of the properties, namely, Aswamau and Juharyamau properties holding that those properties were redeemed by Nand Kishore while the family was still joint and presumably with joint family funds. He retained the condition imposed by the trial Judge with regard to the Gujrehta property which was redeemed by Nand Kishore in 1912 by payment of Rs.498 after the family separated according to the defendants' case, about July, 1909.

Appeal No. 175 was brought by the defendants against the decree of the learned District Judge allowing the plaintiffs' appeal and No. 196 was brought by them against the decree of the lower appellate court by which their own appeal was dismissed. The latter appeal was however filed beyond time. Limitation admittedly expired on the 9th May, 1936. This Court was closed from the 11th May to the 10th July, 1936 and appeal No. 196 was filed on the 11th July, 1936.

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No application under section 5 of the Indian Limitation Act was filed but the learned counsel for the appellants asks us to condone the delay in filing this appeal. The learned counsel for the respondents on the other hand argued not only that there are no grounds for extending the benefit of section 5 of the Limitation Act to appeal No. 196 but also that as this appeal cannot be entertained being barred by time, the other appeal No. 175 also fails as the decree of the lower appellate court in the defendants' appeal has become final and operates as *res judicata.*

We are not prepared to admit appeal No. 196 as there are no grounds on which the benefit of section 5 of the Limitation Act can be given to the appellants. At the same time we are not prepared to hold that appeal No. 175 is barred by reason of appeal No. 196 being time barred and consequently not maintainable. The learned counsel for the respondents relied on the case of *Bhagauti Din* v. *Bhagwat* (1) decided by a learned Judge of this Court sitting singly. In that case it was laid down that when there is one and the same judgment disposing of two separate appeals in which two separate decrees were prepared then if there is an appeal against one of the two decrees only, the judgment and the decree in the other appeal against which no appeal is filed and which thus becomes final would constitute *res judicata.* With the greatest respect to the learned Judge we think the proposition has been laid down too broadly and is not in our opinion applicable to each and every case in which the lower appellate court has disposed of two appeals by one and the same judgment. In *Ram Sukh Dubey* v. *Rampat Tewari* (2) a Bench of this Court approved of the decision of MR. PIGGOTT, Judicial Commissioner of Oudh in *Waliullah* v. *Ejaz Ali* (3) in which it was held that where there have been two decrees passed by the lower

(1) (1933) 10 O.W.N., 1093. (2) (1927) A.I.R., Oudh, 575.
(3) (1911) 15 O.C., 22.

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appellate court and both of them require to be set aside in order to give the dissatisfied party the relief which he seeks and a second appeal is filed against one decree only, the decision which is allowed to become final operates as *res judicata* in respect of the second appeal. Now in the present case though the learned District Judge decided both the appeals by one judgment and though the operative portion of the judgment which governed both the appeals was copied out in both the decrees, yet it is clear that the question whether or not the plaintiffs were liable to pay anything to Nand Kishore on account of the redemption of three mortgages arose in the plaintiffs' appeal alone and not in the defendants' appeal so that the order of the learned Judge on that question must be deemed to be a part only of the decree passed in the plaintiffs' appeal. The learned District Judge's decree on the points raised by the defendants in their appeal has no doubt become final by reason of appeal No. 196 having been brought beyond time but there is nothing in that decree which affects the question how far the plaintiffs are liable on account of the redemption of the mortgages by Nand Kishore.

The learned counsel for the respondents has also relied on *Zaharia* v. *Debia* (1) but in that case the cross-appeals were brought by two rival pre-emptors who were parties to each other's suit in the trial court and the suit of one of whom was decreed and of the other dismissed. It is obvious that the suit of *M* being decreed necessarily involved the dismissal of the suit of *Z*, the rival pre-emptor, and as Z appealed from the dismissal of his own suit but not from the decree decreeing *M's* suit, it was rightly held that the appeal was barred.

In *Mrs. Gertrude Oates* v. *Mrs. Millicent D'Silva* (2), also relied on by the learned counsel for the respondents, the issue whether the partnership had come to an end

(1) (1910) I.L.R., 33 All., 51. (2) (1932) I.L.R., 12 Patna, 139.

arose in both the cross-suits and as that issue had been decided in both the suits in one of which no appeal was filed, the appeal in the other suit involving the same question was manifestly barred by *res judicata*.

We are therefore of opinion that there is no legal bar to the hearing of appeal No. 175 in the circumstances of the present case and we have consequently allowed the learned counsel for the appellants to argue the appeal on the merits.

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We are however of opinion that the only point arising in appeal No. 175, namely, to what extent, if any, the plaintiffs are liable to contribute towards the redemption of the three mortgages in question has been rightly decided by the learned District Judge. There is satisfactory evidence of there being a nucleus in the joint family in question. The family not only possessed an ancestral house but also at least a six pies share of Aswamau. Moreover, some family property was sold by Sheo Sahai to one Lal Bahadur for a sum of Rs.6,000 and the sale-deed (Ex. A-12) shows that out of the sale consideration a sum of Rs.3,052 was received by the vendor in cash. There is no evidence how this large sum of money was spent and in the absence of evidence on the point, the money should be presumed to have remained in the family. There are thus good grounds for presuming, as the learned District Judge has done, that Aswamau and Juharyamau properties were redeemed with joint family funds as they were admittedly redeemed before the family separated in 1909. In these circumstances the mere fact that Nand Kishore or other members of the joint family were earning money on their own account cannot help the appellants.

We therefore hold that the learned Judge was right in his order that the plaintiffs are liable only to the extent of one-third of the amount paid by Nand Kishore for redeeming the Gajrehta property.

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Both the appeals are consequently dismissed with costs and the decrees of the lower appellate court confirmed.

Appeals dismissed.

Before Mr. Justice Ziaul Hasan and Mr. Justice Radha Krishna Srivastava

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RANI ANAND KUNWAR (APPLICANT) *v.* THE COMMISSIONER OF INCOME TAX (OPPOSITE-PARTY)*

Income Tax Act (XI of 1922), sections 30, and 66—Appeal—Assessees' right of appeal on the ground that he was not liable to assessment at all—Objection denying liability to assessment, whether necessary for right of appeal.

Every assessee, who has been assessed by the Income Tax Officer, has an unqualified right of appeal under section 30(1) whether he had questioned his liability to assessment under the Act before the Income Tax Officer or not.

There is no statutory provision requiring a person, who is called upon to furnish the return of his income, to make an objection before the Income Tax Officer to the effect that he is not liable to assessment under the Act. The absence of a dispute by an assessee as to his liability of being assessed under the Act where he had an opportunity of raising it may be a ground for not entertaining it in appeal but would not take away the right of appeal that is granted to him in express terms by Statute or for saying that in such a case there can be no proceedings in law under section 31, of the Indian Income Tax Act. *Karam Chand* v. *Commissioner of Income Tax* (1), *Biradhmal Lodha v. Income Tax Commissioner, United Provinces* (2); and *Asoka Mills, Limited* v. *Commissioner, Income Tax, Bombay* (3), distinguished.

Mr. *H. D. Chandra,* for the applicant.

Mr. *Ram Prasad Varma,* Rai Bahadur, for the opposite-party.

ZIAUL HASAN and RADHA KRISHNA, JJ.:—These are two applications under section 66, clause (3) of the

*Applications under section 66, Indian Income Tax Act, Nos. 2 and 3 of 1936, for revision of the order of K. P. Verma, Esq., Commissioner of Income Tax, Central and United Provinces, Lucknow, dated the 30th October, 1936.

(1) (1931) A.I.R., Lahore, 601. (2) 8 I.T.L.J., 63.
(3) 7 I.T.L.J., 127.