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upon the property by the decree in execution of which he purchased the property.

I, therefore, set aside the decree of the courts below and dismiss the suit of the plaintiff with costs throughout.

Ross, J.—I agree.

Decree set aside.

APPELLATE CIVIL.

Before Sculu Prasad and Ross, JJ.

MUSSAMMAT RAM DEI

v.

MUSSAMMAT BAHU RANI *

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Code of Civil Procedure, 1908 (Act V of 1908), Order XXIII rule 1(4)——withdrawal of suit by some of several co-plaintiffs——fresh suit, whether barred by res judicata *——Partition, cause of action for, is recurring.*

Where a court has allowed a suit to be withdrawn in contravention of Order XXIII, rule 1 (4), of the Code of Civil Procedure, 1908, and has granted leave for a fresh suit to be brought on the same cause of action, a second suit is nevertheless barred.

Raj Kunwar Mahton v. *Ram Khelawan Singh* (1), distinguished.

In the the present case, however, the suit was one for partition and inasmuch as the cause of action in such a suit is a recurring one the High Court held that the suit was maintainable.

Appeal by the plaintiff.

The facts of the case material to this report are stated in the judgment of Ross, J.

Bankin Chandra De, for the appellant.

Purneudu Narain Sinha and *Murari Prasad*, for the respondents.

Ross, J.—This is an appeal by the plaintiff in a suit for partition which was dismissed by the Subordinate Judge of Patna. The parties are widows of two persons who were

*Appeal from Original Decree No. 96 of 1918, from a decision of B. Abinas Chandra Nag, Subordinate Judge of Patna, dated the 17th November, 1917.

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descended from one Ram Bahadur, the common ancestor. Ram Bahadur had three sons. One of these sons had a son Bal Kishun Lal who was married to one Jeona Bahu and had a son Radha Kishun, the husband of the plaintiff. Another son had a son Naunidh, whose son was Banwari the husband of the two defendants. In 1878 there was a partition between Bal Kishun and his cousin Naunidh by which most of the ancestral properties were divided, but certain houses, gardens and movables remained joint. Naunidh as the elder was the custodian of this property. In 1886 a partition was effected between Bal Kishun and his son Radha Kishun by which the share of Bal Kishun's branch in the properties which had remained joint became exclusively Bal Kishun's. On the 17th of February, 1888, Bal Kishun executed a Will which, so far as it related to ancestral property, was in favour of his wife Jeona Bahu, and in April, 1888, he died. In June, 1888, an agreement purported to be made between Radha Kishun and Naunidh by which the latter obtained exclusive title to the ancestral properties which had hitherto been joint and granted in exchange certain of his own properties to the former. Radha Kishun died two years later, in April, 1890. In December, 1890, an *ekrarnama* was executed by Jeona Bahu by which she gave 8-annas of her share in the properties in suit to the plaintiff Must. Ramdei. In 1898 a Will of all the properties formerly joint was executed by Naunidh by which these properties were dedicated to the family deity and the two defendants were appointed administrators. In 1901 the plaintiff sued for partition of these properties, but the suit was withdrawn with liberty to bring a fresh suit. This fresh suit has now been instituted in 1916 in respect of the same properties.

The defence was that the suit was barred by the rule of *res judicata* and by limitation and also that the plaintiff had neither title nor possession and that the property in suit was in possession of the *thakur*.

The learned Subordinate Judge held that the rule of *res judicata* barred the suit. The appellant relies on the

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recent decision of a Full Bench of this court [*Raj Kumar Mahton* vs. *Ram Khelawan Singh* (1)] and argues that the Subordinate Judge was not entitled to question the order of his predecessor even if that order was not strictly within the terms of Order XXIII, rule 1. It appears to me, however, that that case was distinguishable from the present. Clause (*4*) of Order XXIII, rule 1, lays down that nothing in this rule shall be deemed to authorize the court to permit one of several plaintiffs to withdraw without the consent of the others. This clause limits the jurisdiction of the court to grant permission to withdraw a suit to cases where all the plaintiffs join in the application. In the suit of 1901 there were four plaintiffs, Ramdei, Jeona Bahu and two persons Kuldip Sahai and Raghunath Sahai who were apparently financing the litigation. The application for withdrawal was on behalf of Ramdei and Jeona Bahu alone, and in my opinion on such an application the Subordinate Judge had no jurisdiction to permit the suit to be withdrawn at all.

[The remainder of the judgment is not material to this report.]

JWALA PRASAD, J. [His Lordship stated the facts of the cases and decided the other issues raised in the appeal and then proceeded as follows:—] During the hearing of the previous case and after the examination of some witnesses, a petition for withdrawal was filed on behalf of two of the plaintiffs, Jeona Bahu and Ram Dei, stating that the said partners Raghunath and Kuldip had stopped defraying the expenses of the litigation. The court recorded the following order on the 2nd December, 1902,

"On application the plaintiffs are allowed to withdraw from the suit with permission for a fresh suit as per judgment recorded."

The judgment referred to in this order has not been printed, but I called for the judgment from the court below. It is in the following words:

"On application the plaintiffs are allowed to withdraw from the suit with permission for a fresh suit. Plaintiffs Nos. 1 and 4 shall pay costs to defendants."

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The plaintiff No. 1 is Ram Dei, and 4 is Jeona Bahu. Neither the judgment nor the order-sheet make any reference to plaintiffs 2 and 3, Raghunath and Kuldip. They did not also join in the petition for withdrawal. Fourteen years after, the present suit had been instituted by Ram Dei alone (Jeona Bahu having been dead by this time) for the partition of the properties in dispute.

The first question then arises whether the withdrawal of the suit in 1902 in any way bars the present suit. No doubt under Order XXIII, rule 1, a suit may be withdrawn with permission to bring a fresh suit, and when once this permission is given, no other court will question the propriety of the permission. This view is now settled in this court by the last Full Bench decision in the case of *Raj Kumar Mahton* vs. *Ram Khelawan Singh* (1). In the present case, however, the suit was withdrawn by only two out of the four plaintiffs, and the question then arises whether the Full Bench decision governs the present case. Order XXIII, rule 1, clause (4), prohibits the court to permit one of several plaintiffs to withdraw without the consent of the others. Therefore in order to exercise the jurisdiction vested in the court to permit the withdrawal of a suit with permission to bring a fresh suit it is necessary that the court should obtain previously the consent of all the parties. If this condition be not fulfilled, there is no jurisdiction in the court to permit the plaintiff to withdraw. When a jurisdiction is conferred upon the fulfilment of a condition, it is necessary that the condition should have been fulfilled before the jurisdiction could be exercised. The Full Bench decision, therefore, does not apply to the present case. Here two of the plaintiffs who were alleged to have acquired an interest in the property were left out of account altogether. As a matter of fact they were said to have turned back upon their promise. If that were so it was absolutely essential for the court to find out whether those plaintiffs had consented to the withdrawal of the suit or not. Neither the judgment not the order-sheet makes any reference to those plaintiffs Nos. 2 and 3. There is nothing in

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the petition also to show that they have expressed their consent in any manner that the suit should be withdrawn. I have therefore no hesitation in agreeing with my learned brother that the suit in the present case was not withdrawn; but that does not preclude the present plaintiff from instituting a suit for partition inasmuch as the cause of action in a suit for partition is a recurring one and a joint owner at any time has a right to come to court provided he proves that he has a subsisting joint title and possession in the property within the period of limitation. Ram Dei, therefore, had a right to institute the suit for partition if she was able to prove that she had a joint title in the property and that she was in possession with the defendants or their predecessors-in-interest within the period of limitation; in other words she is entitled to bring a suit if her title to the property, if any, is not lost by adverse possession in favour of the opposite party.

[The remainder of the judgment is not material to this report.]

LETTERS PATENT.

Before Jwala Prasad and Ross, JJ.

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December, 16.

CHOWDHURY RAM PRASAD RAI

v.

MAHESH KANT CHOWDHURY. *

Execution of Decree——application for withdrawal by decree-holder, wether court may refuse——appeal from order refusing withdrawal, maintainability of——Second appeal from order reversing first court's order——power of High Court to exercise revisional power——Code of Civil Procedure, 1908 (Act V of 1908), section 115, Order XXI, rule 1, and Order XXIII, rule 4.

There is nothing in the Code of Civil Procedure, 1908, to prevent a decree-holder who has taken out execution of his decree from withdrawing the execution and having it dismissed.

Where the decree-holder's application to withdraw the execution was disallowed by the Munsif, and, on appeal, the Munsif's order was set aside by the District Judge, *held*, that the orders of the Munsif and of the District Judge were made without jurisdiction and that the High Court was competent in an appeal from the order of the District Judge to set aside both orders under section 115.

* Letter Patent Appeal No. 62 of 1920.