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The decree will be varied in the above particulars, and in all other respects will be confirmed. The parties to bear their own costs.

Decree varied.

APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Parsons.

1896. *January* 27.

GANESH JAGANNATH DEV (ORIGINAL DEFENDANT), APPELLANT, *v.* RAMCHANDRA GANESH DEV AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Probate—Application by executors for probate—Order refusing probate—Subsequent suit by executors as persons entitled under will to property of deceased—Res judicata—Probate and Administration Act (V of 1881*), Sec.* 12, *Chap. V, Secs.* 59 *and* 83*—Succession Certificate Act (VII of* 1889*).*

The plaintiffs applied to the District Court at Poona under the Probate and Administration Act (V of 1881) for probate of a will of which they were appointed executors. The defendants opposed their application, and on appeal the High Court rejected it, holding that on the evidence the execution of the will was not proved. The plaintiffs thereupon filed the present suit as the persons beneficially entitled under the will for a declaration that the property of the deceased belonged to them, and for an injunction to restrain the defendant from obstructing them in the enjoyment of it. The defendant contended that the suit was barred as *res judicata*.

Held, that this suit was not barred by the order refusing probate of the will.

The refusal to grant probate does not conclusively show that the will propounded is not the genuine will of the testator.

APPEAL from the decision of W. H. Crowe, District Judge of Poona, reversing the decree of Rao Sáheb P. V. Gupte, Subordinate Judge of Háveli, and remanding the case for retrial.

In the year 1890 the plaintiffs as executors appointed thereby applied to the District Court at Poona for probate of the will of one Jagannath Gajanan Dev.

The defendant opposed the application, which, however, was granted, and an order was made ordering probate to issue.

The defendant appealed to the High Court, which reversed the order of the Judge, holding that, on the evidence before the Court, due execution of the will was not proved. (See Printed Judgments for 1891, p. 194.)

*Appeal, No. 39 of 1895 from order.

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The plaintiffs then filed this suit in the Subordinate Judge's Court as persons beneficially entitled under the will for a declaration that the property of the deceased belonged to them and for an injunction restraining the defendant from obstructing their enjoyment of it.

The defendant contended that the suit was barred by the previous order of the High Court rejecting the application for probate.

The Subordinate Judge dismissed the suit, holding that having regard to section 83 of the Probate and Administration Act (V of 1881) the decision of the High Court operated as *res judicata* between the parties.

On appeal by the plaintiffs the Judge reversed the decree and remanded the case for re-trial and determination on the merits under section 562 of the Civil Procedure Code (Act XIV of 1882).

The defendant now appealed to the High Court against this order of remand.

Nagindas T. Marphatia appeared for the appellant (defendant) :—The plaintiffs base their claim in this suit on the will which this Court has refused to admit to probate. We submit that this order of refusal is binding and conclusive, and cannot be questioned in this suit. An order holding a will to be proved is a decree *in rem*—*Komollochun* v. *Nilruttun*[1]. This order must be equally conclusive. The parties here are the same and cannot re-open the question. The issue as to execution of the will was, in effect, raised between them and was finally decided.

[PARSONS, J. :—Is it necessary to have probate for the purpose of filing a suit to recover property ?]

Probate is necessary for the purposes of administration.

Ramdatt V. Desai appeared for the respondents (plaintiffs) :—In this case the Hindu Wills Act does not apply, and it is not necessary to take probate—*Shaik Moosa* v. *Shaik Essa*[2]. Further in order that a finding may operate as *res judicata*, it must be a finding in a suit. The former proceedings were not in a suit,

(1) I. L. R., 4 Cal., 360. (2) I. L. R., 8 Bom., 241.

but in a miscellaneous application. That finding, however, was merely that the will was not proved. That means that the will was neither proved nor disproved. A finding of this nature cannot prevent us from bringing a fresh suit to establish our title—*Bapuji Jagannath and another*[1]; *Arunmoyi* v. *Mohendra*[2]. See also section 149, clause (*b*), of the Probate and Administration Act (V of 1881).

It is the grant of the probate that operates as a judgment *in rem*, but a refusal to grant probate on the ground that the will was not proved cannot do so. Section 59 of the Probate and Administration Act makes the grant of probate conclusive, but it makes no similar provision as to a refusal of probate.

Again, this suit has been brought in the Subordinate Judge's Court. It could not be brought in the District Court in which the application for probate was made. Under section 13 of the Civil Procedure Code (Act XIV of 1882) the suit must be such as could have been brought in the District Court in order to make the finding in the former proceeding *res judicata*.

FARRAN, C. J.:—The plaintiffs in this case had applied, under the provisions of "The Probate and Administration Act, 1881," for probate of the will of Jagannath Gajanan Dev, who died at Chinchwad on the 19th August, 1890, of which will they alleged themselves to be executors. The High Court, in appeal, on the 14th July, 1891, rejected the application on the ground that on the evidence before the Court due execution of the will was not proved. The present defendant had entered a caveat against that application; and had appealed against the order of the District Judge of Poona, who had in the first instance granted it. The proceedings were accordingly contentious proceedings under section 83 of the Act.

The plaintiffs have now filed the present suit as the persons beneficially entitled under the will for a declaration that the property of the deceased belonged to them and for an injunction to restrain the defendant from obstructing them in the enjoyment of it. The defendant contended before the Subordinate Judge that the suit was barred as being *res judicata*, and his

(1) I. L. R., 20 Bom., 674. (2) I. L. R., 20 Cal., 883 at p. 895.

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plea was allowed. The District Judge, on appeal, held that it was not so barred, and remanded the suit for trial upon the merits. Against that remanding order the defendant has preferred the present appeal.

We agree with the District Judge that the order on appeal of the High Court of the 14th July, 1891, does not debar the plaintiffs from filing the present suit. The judgment in *Shaik Moosa* v. *Shaik Essa*[1] determines that such a suit as the present can be maintained by a Hindu, in cases to which, as here, the Hindu Wills Act is not applicable, without the necessity of proving the will under Act V of 1881. The circumstance that the Court has refused to grant probate of the will clearly cannot render probate necessary in cases in which it was optional for the party interested under the will to apply for it. It merely relegates the parties to their former position.

The contention of the pleader for the appellant was, that as the grant of probate under the Act is conclusive proof, so long as the grant remains unrevoked, of the title of the executors and of the genuineness of the will admitted to probate—*Komollochun* v. *Nilruttun*[2], a similar consequence, but in an opposite sense, must flow from the refusal of the Court to grant probate. This is not so. The conclusiveness of the probate rests upon the declared will of the Legislature as expressed in sections 59 and 12 of the Act. There is no section which declares that any corresponding result in an opposite sense shall flow from the refusal to grant it. From a refusal to grant probate it by no means follows that in the opinion of the Court the will propounded is not the genuine will of the testator. It may be based on entirely different grounds. Doubtless under the provisions of Act VII of 1889 such a refusal, until a fresh application shall be successfully made, may operate to prevent the executor recovering debts due to the deceased, but it has, so far as we know, no other disenabling effect.

It has, however, been further argued that the issue which has to be determined in this suit has already been directly and substantially in issue and has been heard and determined between

(1) I. L. R., 8 Bom., 241. (2) I. L. R., 4 Cal., 360.

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the same parties in the contentious proceedings taken under Chapter V of Act V, 1881. In point of fact, however, no issue was ever raised throughout these proceedings, and the High Court only held that on the evidence on the record the due execution of the will had not been proved. It came to no conclusion as to whether it was a forgery or not. Such a finding cannot, we think, be treated as a final decision of the Court upon the genuineness or otherwise of the will. The Act does not in express terms preclude a fresh application on the part of the executors when they are in a position to support it with more complete proof.

Without, therefore, deciding whether, if an issue upon the question of forgery had been raised and decided, it would have concluded the parties in the present suit, we are of opinion that the decision of the District Court in the present case is correct, and we accordingly confirm the order with costs on the appellant.

Order confirmed.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

YADAO BABAJI SURYARAO (ORIGINAL PLAINTIFF), APPELLANT, *v.* AMBO AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1896. *January* 28.

Mortgage—Apportionment of mortgage-debt—Question of apportionment first raised in second appeal—Practice.

A plaintiff, who had purchased part of certain mortgaged property and sued for possession, obtained a decree ordering that he should get possession on payment of the whole mortgage-debt. He did not in the lower Courts ask that the mortgage-debt should be apportioned, but did so in second appeal to the High Court. Under the circumstances the High Court refused to interfere with the decree. The plaintiff had a remedy by suit for contribution.

SECOND appeal from the decree of L. G. Fernandez, First Class Subordinate Judge, A. P., of Thána.

In 1885 the first and second defendants mortgaged the plots of land in dispute together with some other land for Rs. 300 to one Martand.

* Second Appeal, No. 271 of 1895.