

## APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1890.  
January 18.

BHAVANISHANKAR (ORIGINAL APPLICANT), APPELLANT, v. NARANSHANKAR (ORIGINAL OPPONENT), RESPONDENT.\*

*Res judicata*—Suit by C for mesne profits as devisee of land under will of A—Will held valid and C's claim allowed—Application by C as legal representative of A for execution of decree obtained by A—Question of validity of will again raised—Civil Procedure Code (Act XIV of 1882), Sec. 244.

A obtained a decree against B for possession of certain land, and then died. Thereupon C applied for execution of the decree as A's legal representative, relying upon a will made by A in his favour. At the same time, C filed a suit to recover Rs. 140 as mesne profits of the land. The execution proceedings were stayed till after the disposal of the suit for mesne profits. In this suit, B contended that the will in question was not executed by A, and that A was not of sound disposing mind at the time of the alleged execution of the will. The Subordinate Judge found on both these points against B and passed a decree for mesne profits. This decree was upheld, on appeal, by the District Judge.

After the decision of this suit, the Subordinate Judge took up C's application for execution of the original decree obtained by A. This application was resisted by B on the same grounds on which he had defended the suit for mesne profits. He impeached the validity of the will on the grounds of non-execution by, and unsoundness of mind of, the testator. The Subordinate Judge held that the matter was *res judicata*; he, therefore, overruled this objection, and ordered execution to issue. The District Judge held that as the suit for mesne profits was in the nature of a Small Cause suit, in which there was no second appeal, the decision passed in that suit did not operate as *res judicata* in the present execution proceedings. He, therefore, reversed the Subordinate Judge's order and remanded the case for a fresh decision.

*Held*, reversing the remand order, that the question whether C was entitled to execute the decree as A's representative fell within the last clause of section 244 of the Code of Civil Procedure (Act XIV of 1882). The Subordinate Judge, who had raised an issue as to the validity of the will relied upon by C in the suit for mesne profits, was entitled to act upon his determination of that issue in the execution proceedings.

SECOND appeal from the decision of E. H. Moscardi, District Judge of Surat.

One Bai Parvati obtained a decree for possession of certain land. The decree did not award mesne profits from the date of the suit till delivery of possession.

\*Second Appeal, No. 528 of 1898.

Bai Parvati died shortly after this decree, leaving a will by which she bequeathed to one Bhavanishankar Jekrishna all her rights under the decree.

On the strength of this will, Bhavanishankar filed a *darkhást* for the execution of the decree, and at the same time filed a suit to recover Rs. 140 on account of mesne profits.

The *darkhást* and the suit were filed on the same day—1st March, 1897.

The execution proceedings were stayed till after the suit for mesne profits should be decided.

In this suit the chief questions at issue between the parties were (1) whether Bai Parvati had executed the will relied upon by the plaintiff, and (2) whether she was of sound disposing mind at the time of execution of the will.

The Subordinate Judge found both these issues in Bhavanishankar's favour, and awarded him mesne profits as claimed. This decree was upheld, on appeal, by the District Judge.

After this decision, the application for execution came on before the Subordinate Judge.

The judgment-debtors resisted the *darkhást* on the same grounds as those on which they had already defended the suit for mesne profits; as before, contending that Bai Parvati had not duly executed the will, and that she was not of sound disposing mind at the time of execution.

The Subordinate Judge held that on both these points the decision in the suit for mesne profits operated as *res judicata*. He, therefore, granted the application and ordered execution to proceed.

On appeal the District Judge held that the matter was not *res judicata*. He, therefore, reversed the Subordinate Judge's order and remanded the *darkhást* for a fresh decision on the merits. His reasons were as follows:—

“In *Kunjo Behary Singh v. Madhub Chundra Ghose* (I. L. R., 23 Calcutta, 885) it was decided that no second appeal lies from a suit for mesne profits where the value of the subject-matter in dispute is less than Rs. 500, because

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such a suit is cognizable by a Court of Small Causes, and in *Govind bin Lakshmanshet Anjorlekar v. Dhondbarav bin Ganbarav Tambye* (I. L. R., 15 Bom., 104) it was held that decisions in previous suits, which were in the nature of Small Cause suits and in which there was no right of second appeal, did not operate as *res judicata* in cases in which a second appeal lay. In this case a second appeal lies, and consequently the findings in the suit for mesne profits are not *res judicata* in the present *darkhāst*."

Against this decision Bhavanishankar appealed to the High Court.

*Ganpat S. Rao* for appellant.

*Manekshah Jehangirshah* for respondent.

PARSONS, J.:—We think that the point at issue falls within the words of the last clause of section 214 "determined by a separate suit" and that the Subordinate Judge, who had stayed the execution proceedings pending a suit between the same parties in which an issue had been raised as to the validity of the will under which the applicant claimed, and which the opponents disputed on the ground of non-execution by, and unsoundness of mind of, the testatrix, was entitled to act upon his determination of that issue in the execution proceedings. It follows, therefore, that the District Judge, who himself confirmed, on appeal, the finding as to the validity of the will, should not have reversed the order and remanded the *darkhāst* for a fresh decision. He could and should have acted in the execution proceedings upon the determination he had come to upon the same point in the suit.

We reverse the order made by the lower appellate Court and restore that of the Court of first instance, with costs in this and the lower appellate Court on the opponents.

*Order reversed.*