v. *Pranshankar*[1]. On the other hand there is a much later decision by Ranade, J., in the case of *Rajaram* v. *Ganesh*[2], which, in our opinion, states both the underlying principle and method of dealing with cases like this more correctly. It is true that in that judgment the learned Judge refers with seeming approval to the case of *Mancharam* v. *Pranshankar*[1], but the principle, he lays down, is that the general rule is against the alienability of *vrittis*. *Vrittis* may be alienated in special cases and under special conditions provided that such alienations can be supported by local usage and custom. That this was his ground is clear enough from the issues which he framed and remanded for trial. The learned Judge of first appeal appears to have followed exactly the course adopted by the learned Judges in *Rajaram* v. *Ganesh*[2], and having regard to the character of these *huks* and the desirability of preventing too free alienations of what in essence is a sacred and personal right, we are not prepared to say that the learned Judge of first appeal was wrong. We, therefore, think that his decree must now be confirmed and this appeal dismissed.

Appeal dismissed.

G. B. R.

(1) (1882) 6 Bom. 298. (2) (1898) 23 Bom. 131.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

1914.

July 8.

SUNDRA ALIAS NARABADA (ORIGINAL DEFENDANT 1), APPELLANT, *v.* SAKHARAM GOPALSHET GANDHI AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), section 11—Suit for declaration and recovery of possession—Defence of res judicata*—Parties not adequately represented in the former suit and suit not fully tried—No bar of* res judicata.

A suit brought by three plaintiffs as surviving coparceners of a joint Hindu family for a declaration that the property in suit formed part

* First Appeal No. 146 of 1913.

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of the joint family property and for possession was met by the plea of *res judicata*.

The previous suit, the decision in which was set up as *res judicata*, was filed in the year 1909 by the father of the present plaintiffs 2 and 3, who were minors and who were not joined as parties, against the present defendants and the present plaintiff 1 as defendant 4. The relief claimed in that suit was the same as that claimed in the present suit. The finding in that suit showed conclusively that the father of the present plaintiffs 2 and 3, who were then minors and were not parties, did not adequately represent them and the suit was not fully tried and the suit was accordingly dismissed.

Held, that the bar of *res judicata* did not arise as the present plaintiffs 2 and 3 were then minors and were not adequately represented.

Held further, that the present plaintiff 1, who was defendant 4 in the former suit, was no more than a *pro forma* defendant and took no active part and was not bound by the result of that suit the decree in which was in his favour.

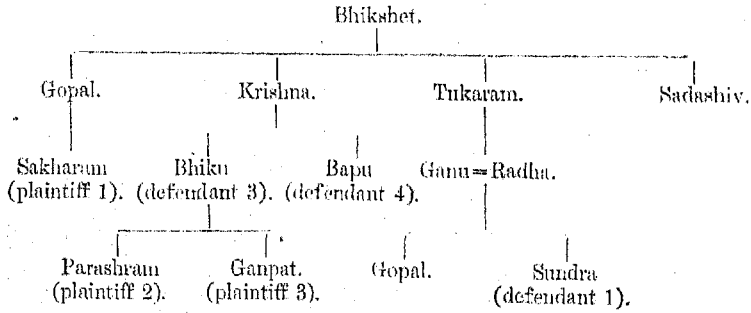
Raja Rampal Singh v. *Ram Ghulam Singh*[1], distinguished.

FIRST appeal against the decision of K. B. Wassoodew, Assistant Judge of Ratnagiri, in suit No. 128 of 1912.

The three plaintiffs (1) Sakharam Gopalshet Gandhi, (2) Parashram Bhikushet Gandhi and (3) Ganpat Bhikushet Gandhi, a minor by his guardian brother No. 2, brought the present suit as the surviving coparceners of a joint Hindu family to recover certain property and for a declaration to possess certain other property.

The defendants set up the preliminary plea of *res judicata*.

The relationship of the parties is shown in the genealogical tree below :—



[1] (1904) L. R. 32 I. A. 17.

The plaintiffs alleged that they and their uncle Tukaram were joint owners of certain lands. Tukaram traded in Bombay with the family nucleus and died leaving him surviving a son Ganu. The latter also died leaving a widow Radha, a son Gopal and a daughter Sundra. Some time after Ganu's son Gopal died and Radha collected her property including the assets of her husband and son and went to live with her brother Shamshet. After some time Radha died leaving her surviving her daughter Sundra. At the time of Radha's death, Shamshet was in possession of some of her property and the rest was in the possession of Sundra.

In 1909 Bhiku and Bapu as the survivors of the joint family had brought a suit against Shamshet and Sundra in respect of the property comprised in the present suit and claimed identical relief. Parashram and Ganpat who were minors then were not made parties. Sakharam Gopal, who was joined in the suit as defendant 4, was merely a *pro forma* defendant. That suit was dismissed.

The plaintiffs, thereupon, brought the present suit and the principal defendants 1 and 2 Sundra and Shamshet respectively contended that the suit was barred as *res judicata* by reason of the decision in the suit of 1909, as the plaintiffs 2 and 3 were then represented by their father Bhiku and plaintiff 1 was then defendant 4.

The Assistant Judge found that the decision in the former suit did not operate as *res judicata* and he allowed the suit to proceed. His grounds were :—

"The whole suit appears to have been conducted by the plaintiffs with a singular want of industry or interest." This is in short the conduct of the plaintiffs in the former suit, whose action, it is urged, should be binding on the present plaintiffs. In view of the above facts I do not think that the plaintiffs in the present case were fully and fairly represented in the former suit and so far as plaintiffs 2 and 3 are concerned the former decision cannot operate as *res judicata*

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With regard to plaintiff 1 who was defendant 4 in the former suit, it is an admitted fact that he did not defend that suit. He was impleaded as a matter of form and no specific relief was claimed against him. The plaintiffs in that suit contended that defendant 4 was not living in union with the descendants of the deceased Tukaram. On this point the order of the Court is silent and therefore it cannot be said that the issue between the plaintiffs and defendant 4 was finally decided in that suit.

Defendant 1 Sundra appealed.

V. R. Sirur for the appellant (defendant 1) :—We rely on the plea of *res judicata*. The former suit was decided against the father of the present plaintiffs 2 and 3, so they cannot re-agitate the question of their title : *Raja Rampal Singh* v. *Ram Ghulam Singh*[1].

K. N. Koyaji for the respondents (plaintiffs) :—The decision relied on has no application. That was the case of a son claiming as heir under his father. Here the sons claim independently of their father in respect of ancestral family property. Further the father did not represent his minor sons who were not parties to that suit in a proper and adequate manner as is manifest from the judgment of the first Court and of the High Court in appeal. They are, therefore, not bound by the result of that suit. Plaintiff 1 who was defendant 4 in the former suit was not a necessary party. He took no active part in that suit and it was not necessary to decide any questions between him and the then plaintiff.

Sirur in reply :—The question of *res judicata* cannot be affected by the circumstance that the present plaintiffs 2 and 3 who were then minors were not adequately represented by their father. They claim under their father who was then the managing member and are, therefore, barred under section 11 of the Civil Procedure Code. Plaintiff 1, who was defendant 4 in

(1) (1904) I. R. 32 I. A. 17.

the former suit, is also barred as the issues and findings in that suit covered his rights in the property.

BEAMAN, J. :—The plaintiffs, three in number, in this suit are seeking to obtain property from the defendant-appellant, grand-daughter of one Tukaram, on the ground that Tukaram and their ancestors were joint. The only question which we have to answer here is whether the matter in issue is *res judicata* by reason of the decision in a suit of 1909 in which the present plaintiff 1 was defendant 4, and the father of the present plaintiffs 2 and 3 was plaintiff. Doubtless we should have been glad to hold that the matter was *res judicata*, although the position occupied by plaintiff 1 in that suit might have occasioned some difficulty, for there can be no doubt but that the matter substantially in issue here was substantially in issue there, and was decided against the father of the present plaintiffs 2 and 3. Unfortunately plaintiffs 2 and 3 were not made parties to that suit. Still the matter might have been *res judicata* against them under the principle, and, we think, also the words of section 11 of the Civil Procedure Code which has recently been interpreted in this sense by their Lordships of the Privy Council in the case of *Raja Rampal Singh* v. *Ram Ghulam Singh*[1], had it not been for a very important circumstance which distinguishes this case from cases falling in that general class. Here the plaintiffs 2 and 3 were minors at the time of the suit of 1909, and the finding of the learned Judge who tried that suit shows conclusively that the father of these minors did not adequately represent them. He comments most adversely upon the manner in which the suit was conducted before him, and makes the conduct of these plaintiffs' father the ground of saddling the defendants in spite of their success with their own

[1] (1904) L. R. 32 I. A. 17.

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costs. In these circumstances we feel that it would be impossible to say that these minors who were not parties to that suit, and are judicially declared not to have been adequately represented at the trial, are bound by its result. They are, therefore, at liberty to proceed with the present litigation, and since plaintiff 1 was no more than a *pro forma* defendant in the former suit, and appears to have taken no active part in it, and the decree speaking generally appears to have been in his favour as one of the defendants, we feel some doubt in holding that he is bound by the result either to the extent of being precluded from prosecuting this litigation. We must, therefore, confirm the decree of the Court below upon this preliminary point and remand the case to be dealt with upon the merits. Costs costs in the cause.

Decree confirmed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Shah.

1914.
July 20.

HARCHAND PANAJI (ORIGINAL APPLICANT), APPELLANT, *v.* GULABCHAND KANJI (ORIGINAL OPPONENT), RESPONDENT.*

Suit in a Baroda Court—Defendant's objection to jurisdiction and other pleas—Defendant's contentions overruled—Decree against defendant—Transfer of decree to a British Court for execution—Refusal to execute the decree on the ground of nullity—Voluntary submission to the jurisdiction of the Baroda Court—Execution by British Court.

In a suit brought in a Baroda Court, the defendant objected to the jurisdiction of the Court to try the suit and also raised other pleas. The Court overruled the defendant's contentions and passed a decree against him. The decree having been subsequently transferred to a British Court for execution that Court refused to execute it on the ground of its being a nullity as the defendant had not voluntarily submitted to the jurisdiction of the Baroda Court, he having

* Second Appeal No. 640 of 1913.