

## APPELLATE CIVIL.

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*Before Mr. Justice Birdwood and Mr. Justice Parsons.*

VITHU, (ORIGINAL PLAINTIFF No. 3), APPELLANT *v.* BHIMA', (ORIGINAL  
PLAINTIFF No. 2), RESPONDENT.\*

1890,  
September 15.

*Civil Procedure Code (Act XIV of 1882), Sec. 367—Procedure when rival parties claim to be the representatives of deceased plaintiff—Rival claimants cannot all be admitted on the record as legal representatives of a deceased plaintiff—Appeal—Appeal by one plaintiff against another—Practice—Procedure.*

Pending a suit for redemption, one of the plaintiffs died. Thereupon A., claiming as the adopted son, and B., as the daughter of the deceased, made separate applications, under section 365 of the Code of Civil Procedure (Act XIV of 1882), to be placed on the record. The Subordinate Judge ordered both claimants to be entered on the record as legal representatives of the deceased plaintiff, and proceeded with the suit. At the hearing he found that A.'s adoption was proved, and that B. was not the legal heir of the deceased. He, therefore, passed a decree for redemption in A.'s favour.

Against this decree B. appealed, making A. alone the respondent in the appeal. The Appellate Court held that B., and not A., was the heir of the deceased. It, therefore, passed a decree in B.'s favour and against A. On second appeal to the High Court,

*Held*, that the Subordinate Judge could not, under section 367 of the Code of Civil Procedure (Act XIV of 1882), admit on the record both the rival claimants as legal representatives of the deceased plaintiff, or adjudicate by his decree between their rival claims.

*Held*, also that the appellate Court ought not to have allowed one plaintiff to appeal against the other, or to have decided the rights of different plaintiffs *inter se*.

SECOND appeal from the decision of M. H. Scott, District Judge of Satara, in Appeal No. 159 of 1888 of the District File:

This action was instituted by Manyába and Ramá, widow of Bábáji, to redeem certain lands from mortgage.

Manyába died shortly after the institution of the suit, and his son, Rávji, was allowed to continue the suit in his place.

Ramá also died pending suit. Thereupon Vithu, claiming as the adopted son, and Bhimá, as daughter of the deceased, made separate applications under section 365 of the Code of Civil Procedure (Act XIV of 1882) to be entered on the record. The Subordinate Judge ordered both the rival claimants to be put on the record in place of the deceased plaintiff, and proceeded with

\* Second Appeal, No. 958 of 1889.

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the suit. He raised issues, first, as to the *factum* of Vithu's adoption, and, secondly, as to the relationship of Bhimá to the deceased. He found that Vithu's adoption was proved, and that he, and not Bhimá, was the heir of Ramá. He, therefore, passed a decree for redemption jointly in favour of Vithu and Rávji.

Against this decision Bhimá appealed to the District Court, making Vithu alone the respondent.

The District Judge held that Vithu's adoption was not proved, and that Bhimá was the daughter and heir of the deceased Ramá. He amended the decree of the Subordinate Judge by declaring that Bhimá, and not Vithu, was entitled to redeem jointly with Rávji.

Against this decision Vithu preferred a second appeal to the High Court.

*Ganesh Rámchandra Kirloskar* for appellant:—The District Court ought not to have allowed one plaintiff to appeal against the other. It is not merely an irregular, but illegal, procedure: see *Bhúghirthibái v. Bayá*<sup>(1)</sup>. The whole proceeding in appeal must, therefore, be quashed.

*Dáji Abáji Khare* for respondent:—No objection was taken to this procedure in the Court below. It is too late, therefore, to object to it here. If no appeal lies as between co-plaintiffs, then this Court in second appeal has no power to interfere in the matter—*Har Náráin Singh v. Kharag Singh*<sup>(2)</sup>.

BIRDWOOD, J. :—On the death of the plaintiff Ramá, applications were separately made by Vithu and Bhimá under section 355 of the Code of Civil Procedure (Act XIV of 1882). The Subordinate Judge admitted both the rival claimants to be the legal representatives of the deceased for the purpose of prosecuting the suit. This order is opposed to the plain provisions of section 367 of the Code. After hearing the suit, the Subordinate Judge came to the conclusion that Bhimá had no right to the property in suit, as she was not the legal heir of Ramá, and he made a decree in favour of Vithu only. Against this decree Bhimá appealed, making Vithu alone the respondent, and the lower ap-

(1) 1 I. L. R., 5 Bom., 264.

(2) 1. L. R., 9 All., 447.

pellate Court amended the Subordinate Judge's decree and made a decree in favour of Bhimá and against Vithu. Vithu now appeals to this Court against this decree.

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We think that the second appeal is admissible, and that in the appeal we can deal with any illegal order that may have been made by either of the lower Courts (see *Har Náráian Singh v. Kharag Singh*<sup>(1)</sup>). The Subordinate Judge was clearly wrong in adjudicating by his decree between the rival claims of the two co-plaintiffs on the record, who, if successful as against the defendant, were entitled to a joint decree, which would leave it open to them to adjust their respective claims subsequently. And the District Judge ought not to have allowed one plaintiff to appeal against the other, or to have decided the rights of different plaintiffs *inter se* (see *Bhághirthibái v. Baya*). As these erroneous proceedings had their origin in the illegal order of the Subordinate Judge in admitting on the record two rival claimants as the legal representatives of the deceased plaintiff, instead of either staying the suit until the matter in dispute had been determined in another suit, or deciding at or before the hearing of the suit who should be admitted to be the legal representative for the purpose of prosecuting the suit, it is necessary that the case should be reconstituted on a legal basis.

We, therefore, reverse the decrees of both the lower Courts and the order admitting Vithu and Bhimá as the legal representatives of Ramá, and remand the case to the Court of first instance, in order that it may adopt the procedure laid down in section 367 of the Code of Civil Procedure, and re-hear the case according to law. Costs to abide the result.

*Decree reversed and case sent back.*

(1) I. L. R., 9 All., 447.

(2) I. L. R., 5 Bom., 264.