1916.

VINAYAKRAO BALASAHEB v. SHAMRAO VITHAL.

tainable. That being so, we express no opinion as to the merits of the case on any other point of controversy between the parties. The appeal must be dismissed with costs, the lower Court's decree being affirmed. Respondent No. 1 alone will have the costs.

SHAH, J.:—I agree.

Decree affirmed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

1916.

August 7.

MOTA HOLIAPPA AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v.* VITHAL GOPAL HABBU (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), section 11—Res judicata—*Decision embodied in decree operates as* res judicata.

In 1900 the defendants obtained a *mulgeni* (permanent) lease of certain lands from the then manager of the temple. In 1910, the plaintiff, the new manager, sued the defendants in ejectment praying that the *mulgeni* lease was not binding on him and that the defendants being annual tenants should be evicted. The Court held in favour of the plaintiff on the first ground, but for want of notice held that he was not entitled at that stage to evict the defendants. Then after due notice given, the plaintiff again sued to eject the defendants. They again pleaded the *mulgeni* lease. The Court held that that defence was not open to them, as it was barred by *res judicata*. On appeal,

Held, that the defence was barred by *res judicata*; for the decision of the Court in the earlier suit in favour of the plaintiff upon the first part of his prayer found a place in the decretal order and was as much decreed as the other part of the prayer which in the second part of that decretal order was rejected.

SECOND appeal from the decision of C. V. Vernon, District Judge of Kanara, confirming the decree passed by V. V. Wagh, First Class Subordinate Judge at Karwar.

* Second Appeal No, 587 of 1915.

Suit in ejectment.

The lands in dispute were given in 1900 on *mulgeni* (permanent) lease by the then manager of the temple of Argi Shri Mahadev to defendants.

In 1910, the plaintiff, the present manager of the temples, sued to eject the defendants from the lands, praying first that the *mulgeni* lease was not binding on him, and secondly, that the defendants as *chalgeni* (yearly) tenants were liable to be evicted. The Court held in plaintiff's favour on the first part, but as he had not given notice to the defendants to quit, the second prayer was not granted. The order ran as follows :—

"It is declared that the *mulgeni* lease, Exhibit 38, is not binding on the plaintiff. It is, therefore, set aside. The plaintiff's suit is dismissed. Each party should bear his costs."

The plaintiff next gave notice to the defendants terminating the *chalgeni* lease ; but as they did not give up possession, he filed the present suit to eject them.

The defendants again pleaded that they were entitled to hold the lands under the *mulgeni* lease ; and that as the lease was more than 12 years old the plaintiffs' claim was time-barred.

The Subordinate Judge held that the claim was not barred by limitation ; and decreed the plaintiff's claim, holding that the defendants were barred by *res judicata* from pleading the *mulgeni* lease, on the following grounds :—

The defendants contend that as the plaintiff's suit is dismissed the finding regarding the *mulgeni* lease does not bind them. But this is not so.

The Court did not dismiss the suit so far in its entirety. The Court allowed the suit so far as it related to the *mulgeni* and set aside the *mulgeni*. When it was ordered by the Court the plaintiff's suit was dismissed it meant that it was dismissed so far as it related to the possession of the land claimed by the plaintiff. In fact the plaintiff in that suit got all the relief he would

1916.

MOTA HOLIAPPA v. VITHAL GOPAL.

have been entitled to had he filed only a suit for having the *mulgeni* lease wrongly obtained by the temple's *chalgeni* tenants set aside.

The finding of the Court that the *mulgeni* is null and void has not merely remained a finding but has been made the subject of a positive decretal order setting the lease aside. That being so the defendants cannot again set up their *mulgeni* against the plaintiff. Their only remedy was to appeal from that order. As they have not appealed the order is binding on them.

On appeal, this decree was confirmed by the District Judge.

The defendants appealed to the High Court.

G. S. Mulgaokar, for the appellants.

Nilkanth Atmaram, for the respondent.

BEAMAN, J. :—We are clearly of opinion that if this suit were not *res judicata* by the decision of the suit of 1910, the plaintiff's claim would be barred by limitation. The only substantial question, therefore, is whether the present suit is *res judicata*. The point arises in this way. In 1900 the defendant obtained a *mulgeni* lease from the manager of the temple, the predecessor-in-title of the plaintiff. In 1910 the plaintiff sued, the suit taking the form of ejectment, to recover possession of the land from the defendant on the ground that the *mulgeni* lease was bad and no longer binding on him and that for breach of condition of the annual lease therefore the tenant was liable to immediate eviction. The plaintiff prayed for two quite distinct reliefs as is made abundantly clear from the judgment and the final order. Those reliefs were, first, that it should be declared that the *mulgeni* lease of 1900 was invalid and not binding upon the plaintiff; second, that the plaintiff was thereafter entitled to evict the defendant as a *chalgeni* or yearly tenant from the land in suit. The Court decided in favour of the plaintiff on the first ground, but for want of notice held that he was not entitled at that stage to evict the defendant, that

is to say, the suit was for a declaration and consequential relief, and the decree grants the declaration but dismisses the rest of the prayer of the plaintiff on account of a technical flaw. Those being the facts, the case is clearly, we think, distinguishable from the authorities to which our attention has been drawn such as *Ghela Ichharam* v. *Sankalchand Jetha* ;[1] *Rango* v. *Mudiyeppa* ;[2] *Thakur Magundeo* v. *Thakur Mahadeo Singh*[3] and *Parbati Debi* v. *Mathura Nath Banerjee*.[4] The general rule deducible from these cases is one which has our complete concurrence, viz., that where an issue not material to the decision has been decided and is not embodied in the decree it will not constitute *res judicata* against the party who by reason of the decree being in his favour would not be in a position to appeal against the decision upon the separable single issue. That is not the case here. As we pointed out the decision of the Court in favour of the plaintiff upon the first part of his prayer finds a place in the decretal order and is as much decreed as the other part of the prayer which in the second part of that decretal order was rejected. In our opinion this constitutes clear *res judicata* so far as the point now before us is concerned. We think that the defendant in that suit might have appealed had he wished to do so against so much of the decree as declared his *mulgeni* lease invalid and no longer binding upon the present plaintiff. We think the whole difficulty has arisen out of an unfortunate looseness of language in the latter part of the decree. What the learned judge undoubtedly meant was not that the plaintiff's suit is dismissed, but that the rest of the plaintiff's suit is dismissed, and this is made the clearer by the order of the Court which immediately follows: "Each party to

(1) (1893) 18 Bom. 597.
(2) (1898) 23 Bom. 296.
(3) (1891) 18 Cal. 647.
(4) (1912) 40 Cal. 29.

1916.

MOTA HOLIAPPA v. VITHAL GOPAL.

pay its own costs," the learned Judge evidently having been of the opinion that the plaintiff had succeeded on at least half the claim and the defendant on the other half. And we need only add that the part on which the plaintiff succeeded is by far the most substantial and important.

This being our view it necessarily follows that the present appeal fails and the decision of the lower Courts must be confirmed with all costs.

Decree confirmed.

R. R.

APPELLATE CIVIL.

1916.

August 8.

Before Mr. Justice Beaman and Mr. Justice Heaton.

KAVASJI SORABJI AIBADA (ORIGINAL APPLICANT), APPELLANT *v.* BAI DINBAI (ORIGINAL OPPONENT), RESPONDENT.*

Probate—Letters of Administration—Executor not renouncing on citation must take out probate—Letters of Administration can otherwise issue.

An executor called upon by citation to accept or renounce is clearly compellable, if he accepts, to take out probate within a limited time. If he does not do so, Letters of Administration with copy of the will annexed may be granted to any competent applicant.

APPEAL from the decision of M. S. Advani, District Judge of Surat.

Application for Letters of Administration to the estate of one Manekji.

Manekji, who was the husband of opponent, had made a will on the 6th May 1912, whereof the opponent was appointed the sole executrix. After Manekji's death, she carried on the management of his estate as directed in the will; but she did not take out probate of the will.

* First Appeal No. 44 of 1916.