

that conclusion), the term "order" is necessarily identical with "judgment." It is plain, I think, from the concluding part of s. 464, that an "order" submitting the case to the High Court was one within the contemplation of that chapter. By analogy, an order by the Magistrate of the District committing a case for trial at Sessions may well be supposed to be such an order as was contemplated by "judgment," sentence, or order in s. 46. If that be so, is there any reason to be gathered from the section itself, or from the general provisions of the Code, for restricting the meaning of the term? It is said that the Legislature has left to the trying Magistrate the power of [246] determining by what tribunal the final sentence shall be passed. No doubt he can either dispose of the case himself, or by the concluding para. of s. 46 send it for trial at the Sessions, and by s. 221 ought to do so, if he is of opinion that it is a proper case; but this scarcely disposes of the question, whether, if he is not of that opinion, and thinks it best to send up the proceedings to his superior, the District Magistrate, the latter is to be deprived of the exercise of his discretion as to its being a proper case for the Sessions, and of the power of committing it for trial given by s. 143. If that has been the intention, I should have expected it to be clearly expressed, and that such comprehensive terms as "judgment, sentence, or order" would not have been used.

Nor does the existence of a finding of guilty on the record militate against the exercise of such power by the District Magistrate, as it is plain that the finding is not intended to be binding on him, and that he may direct an acquittal; and, as is pointed out by the High Court of Madras (I. L. R., 1 Mad. 289), an order of committal for trial will have the same effect. It was said that the power is given specially in s. 45, and not so in s. 46; but this even does not appear to me to be entitled to much weight as it may well have been thought necessary to give more specific directions when dealing with Subordinate Magistrates whose powers are of such a varying nature. For the above reasons, and also because there appears to be an unanimity of opinion amongst the members of the Court, that the construction which gives the power of committal to the District Magistrate is the more convenient one, I think that the ruling of the Division Court on the 30th August 1877 should not be followed, and that the Sessions Judge should be directed to try the case.

January 8, 1880. This being the opinion of his Lordship the Chief Justice, it was followed, and the appeal was disposed of on the merits by Pinhey and F. D. Melvill, JJ., who reduced the sentence to transportation for ten years.

4 B. 247.

[247] APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Pinhey.

SHIVALINGAYA (*Original Plaintiff*), Appellant v. NAGALINGAYA (*Original Defendant*), Respondent.* [29th July, 1878.]

Civil Procedure Code (Act VIII of 1859), s. 2—Act XXIII of 1861, s. 11—Res judicata.

On the 30th June 1855, S., a Lingayat priest, died possessed of moveable and immoveable property. The right of succession to it being disputed, the District

* Regular Appeal No. 55 of 1877.

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Judge placed it under the management of the nazir, under Reg. VIII of 1827, s. 9. In 1869, Sanganasaya representing himself as the disciple of S., and claiming, as such, to be entitled to the whole of the property left by S., brought a suit (No. 962 of 1869) against the defendant to establish his right to the property in question, and to recover possession of it. The suit was compromised by an agreement, upon which the Court passed a decree on the 23rd March 1870, dividing the property of S. in certain shares between Sanganasaya and the defendant. When Sanganasaya and the defendant applied for possession of the property in execution of this decree, the nazir, who had it in his charge, resisted them. The execution proceedings dropped in consequence of the death of Sanganasaya. The plaintiff thereupon (as a disciple of Sanganasaya deceased), and the defendant sued the nazir separately, each claiming the whole property of S. The plaintiff's suit was rejected on the ground that he failed to prove himself the disciple of Sanganasaya. In that suit the plaintiff produced neither the compromise made between Sanganasaya and the defendant, nor the decree passed on it in suit No. 962 of 1869. The defendant succeeded in his suit, and obtained possession of the whole property. The plaintiff then sued, as the disciple of Sanganasaya, to recover from the defendant the portion of the property of S. which fell to the share of Sanganasaya according to the compromise on which the decree in suit No. 962 of 1869 was made.

Held by West, J., that the suit was barred. *First*, because the plaintiff had been judicially pronounced not to be the disciple of Sanganasaya in his suit against the nazir to which the defendant was a party as the true successor or *prima facie* successor represented by the nazir in that suit. It was not open to those who had as heirs sued the official representative of an estate, and failed, to sue the owner, when ascertained, a second time on the same right. *Secondly*, because the plaintiff, in his suit against the nazir, was bound to bring forward every ground on which he could claim the property; and if the compromise effected by Sanganasaya was such a ground, that compromise and the decree founded on it ought to have been brought forward to sustain the claim, as it would have shut out a ground of defence consisting of the defendant's superior right. As the plaintiff omitted to do so, the more recent decree, which pronounced him not entitled to any part of the property of S., superseded the earlier one, which ineffectually awarded Sanganasaya a moiety of that property as against the person not in possession; and [248] while that decree was unreversed, another decree could not be made awarding to the same plaintiff one-half of the same property in the same right as against the defendant whom the nazir represented in the earlier suit.

Held by PINHEY, J., that the property claimed in the present suit had been specifically awarded to Sanganasaya by the decree of the 23rd March 1870, and if that decree were not time-barred, Sanganasaya or his legal representative could obtain possession by taking out execution proceedings in that decree. The present suit, therefore, was barred alike by s. 2 of the Civil Procedure Code (Act VIII) of 1859, and s. 11 of Act XXIII of 1861; and the fact that execution of the decree in suit No. 962 of 1869 was time-barred, did not confer on Sanganasaya, or any legal heir of his, a new right to sue for the estate of S., or any part of it.

[R., 25 B. 115.]

THIS was an appeal from the decision of G. Druitt, Acting Assistant Judge at Poona, in suit No. 7 of 1876.

The plaintiff Shiyalingaya brought this suit to recover possession of certain moveable and immoveable property from the defendant Nagalingaya, according to an agreement made between the plaintiff's *guru* Sanganasaya and the defendant. A Lingayat priest by name Shidramaya died on the 30th June 1855, leaving certain moveable and immoveable property. A dispute arising about the right of succession to it, the District Judge placed it under the management of the nazir, under Reg. VIII of 1827, s. 9. In 1869 one Sanganasaya, representing himself as the disciple of the said Shidramaya, deceased, and as such entitled to the whole of the property left by him (Shidramaya) brought a suit (No. 962 of 1869) against the defendant to establish his right to the property in question, and

to recover possession of it by removing the obstruction caused by the defendant. This suit was compromised by an agreement, upon which the Court passed a decree on the 23rd March 1870, awarding the property of Shidramaya in certain shares to the plaintiff and defendant. When Sanganasabasa and defendant applied for possession of the property in execution of this decree, the nazir, who had it in his charge, resisted them. The execution proceedings dropped in consequence of the death of Sanganasabasa. The plaintiff thereupon (as the disciple of Sanganasabasa, deceased) and the defendant separately sued the nazir, each claiming the whole of the property left by Shidramaya. The plaintiff's suit (No. 1172 of 1871) was dismissed on the 18th August 1873, on the ground [249] that he failed to prove himself the disciple of Sanganasabasa. In that suit the plaintiff did not produce either the compromise made between Sanganasabasa and the defendant or the decree passed on it in suit No. 962 of 1869. The defendant succeeded in his suit (No. 70 of 1873), and obtained a decree in his favour on the 27th August 1874. The whole property of Shidramaya was, accordingly, made over to the defendant on the 11th February 1875. The plaintiff now sued as the disciple of the said Sanganasabasa, deceased, to recover from the defendant the portion of the property of Shidramaya which fell to the share of Sanganasabasa according to the compromise on which the decree in suit No. 962 of 1869 was made on the 23rd March 1870.

The defendant pleaded that the claim was barred by limitation and by previous litigation under s. 2 of the Civil Procedure Code (Act VIII) of 1859, and that Sanganasabasa was not the plaintiff's *guru*.

The Assistant Judge held that the suit was not barred either by limitation or by the previous suit, under s. 2 of Act VIII of 1859. He, however, rejected it on the ground that the plaintiff did not prove himself to be the disciple of Sanganasabasa as alleged in the plaint.

The plaintiff produced in the Court below an agreement (Ex. No. 16) purporting to have been executed between himself and the defendant on the 16th January 1873. It provided for the division of the property of Shidramaya between the plaintiff and defendant, whatever might be the result of the suits brought by each of them separately against the nazir. The Assistant Judge rejected it as inadmissible in evidence from want of registration.

The plaintiff appealed to the High Court.

The defendant objected, in appeal, to the decision of the lower Court under s. 348 of Act VIII of 1859, on the ground, among others, that the Assistant Judge was wrong in not holding the plaintiff's suit barred under s. 2 of that Act.

The principal question argued in the High Court was whether or not the suit was barred by the previous suits between the nazir and the parties to the present suit.

[250] *Framji Kaikhusru*, for the appellant.—The plaintiff's suit against the nazir (No. 1172 of 1871) does not bar his present suit, as the defendant was no party to it. Besides, the decree in that suit was only a declaratory decree, as the property of Shidramaya was then not in the possession of the defendant but in that of the nazir.

Manekshah Jehangirshah, for the respondent.—The plaintiff's present suit is *res judicata* by reason of his previous suit against the nazir. The defendant must be supposed to be a party to that suit, inasmuch as he was represented in it by the nazir. The nazir acted as a trustee for whichever party might prove his claim to the property of Shidramaya.

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The following are the judgments of the Court:—

WEST, J.—The alleged *guru* of the present plaintiff sued the defendant Nagalingaya in 1869 to establish his right to property of which one Shidramaya had died possessed, and which was then in the custody of the nazir. That suit was compromised, and a decree, embodying the terms of the compromise, directed that each party should have a part of the estate.

When the plaintiff's alleged *guru*, Sanganasasaya, sought to execute the decree, he was resisted by the nazir, who had not been a party to the suit, and as Sanganasasaya died, that proceeding dropped. After some time the present plaintiff, asserting his right as heir to the deceased Shidramaya through Sanganasasaya, sued the nazir for the whole of the property comprised in Shidramaya's estate. In that suit he failed, it having been found that his adoption as disciple by Sanganasasaya was not proved.

In a subsequent suit, brought by the defendant Nagalingaya against the nazir, possession was awarded to him, and he now holds the property.

The plaintiff Shivalingaya now sues as joint heir of Shidramaya to recover from Nagalingaya a moiety of the estate, and he relies on the compromise embodied in the decree, dated 23rd March 1870, on the suit of 1869 between the defendant and Sanganasasaya. [251] Of this, however, he is prevented from taking the advantage, for two reasons:

The first is, that he has been judicially pronounced not to be the disciple of Sanganasasaya. It is contended that the present defendant was not a party to the suit against the nazir in which this adjudication took place; but the truth is, that he was a party, being, as the true successor, or *prima facie* successor, represented in that suit by the nazir. It is not open to those who have as heirs sued the official representative of an estate and failed, to sue the owner, when ascertained, a second time on the same right. Though the defendant's right was undetermined, it subsisted during the previous suits, and was effectively represented at the cost and risk of his estate.

The second reason is, that when Shivalingaya sued the nazir for the property, he was bound to bring forward every ground on which he could claim it. If the compromise effected by Sanganasasaya was such a ground, that compromise, and the decree founded on it, ought to have been brought forward to sustain the claim. It is said that the nazir would have refused recognition to a compromise in a suit to which he was not a party; but as he represented the true successor, and the true successor was Nagalinga, he represented Nagalinga, and supposing the prior compromise and decree to have been binding, he would have been bound by it as Nagalinga's representative. It would have shut out a ground of defence consisting in Nagalinga's superior right. If, therefore, the present plaintiff in suing the nazir did not intend to forego the advantages of the prior compromise and decree, he was bound to bring them forward, seeing that he had to establish his right against any possible claim of another successor which the nazir might set up. As the matter stands now, the more recent decree, which pronounces Shivalingaya not entitled to any part of Shidramaya's property, has superseded the earlier one, which ineffectually awarded Sanganasasaya a moiety of that property as against a person not in possession; and while that decree stands unreversed,

another decree cannot be made, awarding to the same Shivalingaya one-half of the same property [252] in the same right as against Nagalingaya, whom the nazir in the earlier suit represented.

An agreement was adduced and rejected in the Court below, by which it appears that the parties to this suit agreed to divide the estate, whichever of them might succeed in obtaining possession of it from the nazir. If this agreement was made and is valid, the plaintiff may or may not be able to proceed upon it against the defendant; but it cannot aid him in the present suit, which is clearly barred as brought upon a cause of action already adjudicated on. We must, therefore, confirm the decree of the District Court with costs.

PINHEY, J.—I am of opinion that this suit is barred by s. 2 of the Civil Procedure Code (Act VIII) of 1859, on two grounds:

One Shidramaya, a Lingayat priest, died in 1855, leaving property, part of which is the subject of this suit. The right of succession to the property of Shidramaya being disputed, it appears that the property was by the District Judge placed under the management of the nazir at Sholapur, under the provision of s. 9 of Regulation VIII of 1827.

In 1869, Sanganabasaya, representing himself as the adopted disciple of Shidramaya, and, as such, entitled to the whole of Shidramaya's property, brought a suit against the present defendant, Nagalingaya, to establish his right to the whole property of Shidramaya, and to recover possession of it, and to remove the obstruction raised by the defendant Nagalingaya to his getting possession of the property. This suit was compromised by an agreement, upon which the Court passed a decree on the 23rd March 1870, awarding the whole of the property of Shidramaya in specific shares to plaintiff and defendant (Ex. No. 6).

Upon the then plaintiff Sanganabasaya and the present defendant endeavouring to obtain possession of Shidramaya's property in execution of this decree, they were resisted by the nazir, who had been put in possession of the property by the District Judge. Whether the nazir was or was not justified in resisting the execution of this decree need not be and cannot be determined in the present suit. Being resisted in the execution of this decree [253] by the nazir and Sanganabasaya—the first plaintiff having died—the present plaintiff Shivalingaya (as adopted disciple of Sanganabasaya) and the defendant both sued the nazir separately for possession of the property of Shidramaya. The result of these two suits was, that the present plaintiff's claim to the property was rejected on the ground that he was not proved to be the adopted disciple of Sanganabasaya, and that the defendant's claim was successful, and the whole property of Shidramaya was handed over to him.

Now the present plaintiff Shivalingaya sues as the disciple of Sanganabasaya, deceased, to recover from Nagalingaya possession of the portion of Shidramaya's property which was allotted to Sanganabasaya by the compromise according to the terms of which the decree dated 23rd March 1870 was passed. But the objection to the present claim, under s. 2 of Act VIII of 1859, appears to me to be twofold. First, the right of Shivalingaya to sue for the estate of Shidramaya, or any portion thereof, as the adopted disciple of Sanganabasaya has been determined by the decree in the suit brought by him against the nazir, when the nazir was in possession of the estate and represented the then unknown, or, at all events, undetermined owner. And, secondly, if this difficulty were got over, and it were possible to regard Shivalingaya as the legal representative of Sanganabasaya, I am of opinion that still the present

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plaintiff could not succeed in this suit. The property, of which possession is sought in this suit, was specifically awarded to Sanganabasaya as against the defendant by the decree of the Court dated 23rd March 1870; and, if that decree were not time-barred, Sanganabasaya or his legal representative could now obtain possession of the property claimed in this suit by taking out execution proceedings on that decree. Therefore, I hold that the present suit is barred alike by s. 2 of Act VIII of 1859 and s. 11 of Act XXIII of 1861, and that the fact of execution of the decree passed in 1870 being time-barred, does not confer on Sanganabasaya, or on any legal heir of his, any new right to sue for the estate of Shidramaya, or any part thereof.

It was argued that the decree of 23rd March 1870 must be [254] regarded as a mere declaratory decree, because the estate of Shidramaya, at the date of the decree, was in the possession of the nazir, and not in the possession of the defendant; but I do not agree to this. The suit was not merely for a declaration of right, but also to obtain possession of the estate of Shidramaya, and to remove defendant's obstruction to Sanganabasaya taking possession of it from the nazir, and the decree passed was one for possession of the estate of Shidramaya, which the nazir may or may not have been justified in resisting, and which might now be executed if it were not time-barred.* The decree of the lower Court will be affirmed with costs.

Decree affirmed with costs.

4 B. 234.

APPELLATE CIVIL.

*Before Sir Michael Roberts Westropp, Kt., Chief Justice, and
 Mr. Justice Kemball.*

GOPAL HANMANT GUMASTE (Original Plaintiff), Appellant v.
 SAKHARAM GOVIND AND OTHERS (Original Defendants),
 Respondents.* [23rd June, 1879.]

Bombay Act III of 1874, ss. 10 25, and 56—Representative vatandar—Civil Court—Jurisdiction—Res judicata.

A decree of the District Court at Sholapur, made in 1863, declared the plaintiff to be a hereditary deputy *vatandar* of a certain *deshpande vatan* vested in the defendants as hereditary *vatandars*, and, as such deputy, entitled to receive a certain sum annually out of the income of the *vatan*. The plaintiff received moneys from time to time under his decree. He was not, however, subsequently to the decree, registered and treated as "a representative *vatandar*" under Bombay Act III of 1874, s. 56. In 1875 plaintiff made a *darkhast* for the attachment of a certain amount belonging to the *vatan* for arrears due to him under his decree. The money was accordingly attached. Subsequently, the Collector issued a certificate to the Subordinate Judge, who had attached it, for the removal of the attachment, under Bombay Act III of 1874, s. 10. The Subordinate Judge accordingly ordered it to be removed, and his order was affirmed by the Assistant Judge in appeal. The plaintiff thereupon specially appealed to the High Court.

Held that the lower Courts had no option, but to raise the attachment on receiving the Collector's certificate,

Held, also, that as the plaintiff having, according to law as it stood in 1863, succeeded in then establishing his right to be a hereditary deputy *deshpande*, he was [255] entitled to the benefit of s. 56 of Bombay Act III of 1874. His *status*

* Miscellaneous Special Appeal, No. 7 of 1876.