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We, therefore, reverse the decree and remand the appeal to the District Judge for a fresh decision, having regard to the above remarks. Costs to abide the result.

Decree reversed. Case remanded.

APPELLATE CIVIL.

*Before Mr. Justice Batty and Mr. Justice Aston; and on reference
before Mr. Justice Chandavarkar.*

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December 5.

BALABAI, LEGAL REPRESENTATIVE OF DECEASED MAHADEV NARAYAN (ORIGINAL PLAINTIFF), APPELLANT, v. GANESH SHANKAR PANDIT AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1893), sections 365, 367, 588 clause (18), and 591—Limitation Act (XV of 1877), schedule II, article 175A—Suit to recover possession—Death of the plaintiff pending suit—Legal representative—Practice—Procedure.

On 30th November, 1897, Mahadev Narayan sued to recover certain property from the defendants. He died on the 27th February, 1899, and his niece Balabai (his sister's daughter) applied to be put on the record as his heir and legal representative. It did not appear that the defendants had notice or knowledge of her application, and on the 5th June, 1899, her name was placed on the record under section 365 of the Civil Procedure Code (Act XIV of 1893). In July, 1899, Balabai applied to be allowed to prosecute the suit as a pauper. The defendants opposed this, but took no objection to her right to appear as Mahadev's representative. In August, 1899, the first defendant filed his written statement, in which for the first time he raised the question as to Balabai's right to represent the deceased plaintiff Mahadev. The case subsequently came on for hearing and issues were raised on the pleadings, the first issue being whether Balabai was Mahadev's legal representative. Evidence was taken on all the issues, and the Court found all of them in Balabai's favour, and passed a decree accordingly. The defendant appealed, and the Appellate Court, being of opinion that other issues were unnecessary until the issue as to Balabai's right to represent Mahadev was decided, raised only one issue upon that point. It found that Balabai was not the nearest heir and legal representative of the deceased plaintiff Mahadev, and thereupon it reversed the lower Court's decree and dismissed the suit. On second appeal,

Held, by Chandavarkar and Batty, JJ. (Aston, J., dissenting), reversing the decree and remanding the case for a decision on the merits, that the lower Appellate Court was wrong in going into the question as to Balabai's right to

* Second Appeal No. 34 of 1902.

represent the deceased plaintiff Mahadev and in dismissing the suit on finding that she had no such right.

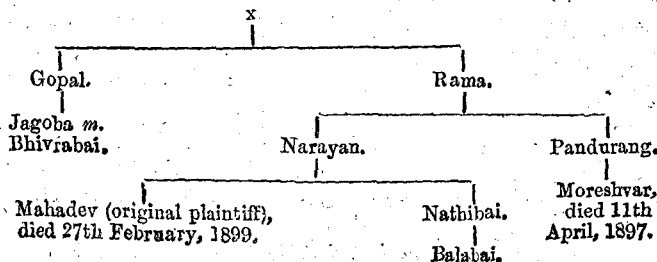
Per Chandavarhar, J. :—The Subordinate Judge acted rightly under section 365 of the Civil Procedure Code (XIV of 1882) in placing Balabai on the record. It was doubtful whether he could afterwards re-open the question and consider it at the hearing under section 367. But assuming that he could, he decided it with the other issues. His decision on that point was an order appealable under clause 18 of section 588. But the defendant did not appeal against that order. He appealed against the whole decree and in his appeal he objected to the order. Under section 591, however, he could, in such case, only object to the order if it affected the decision of the case. It was not shown that the order made by the Subordinate Judge under section 367 had affected the decision of the case. There is no provision in the Code that, if a person claiming as legal representative of a deceased plaintiff fails to prove that he holds that position, the suit must be dismissed. Inasmuch as the defendant had failed to show that the order under section 367 had affected the decision, the lower Appellate Court ought not to have reversed the decree of the Court of first instance.

SECOND appeal from the decision of Ráo Bahádur V. V. Phadke, First Class Subordinate Judge, A. P., at Thána, reversing the decree of E. T. Rego, Subordinate Judge of Bassein.

On the 30th November, 1897, the plaintiff Mahadev Narayan filed this suit as heir of his first cousin Moreshvar Pandurang to recover certain property from defendants.

The defendants were the maternal uncles of Moreshvar Pandurang, who on his death had taken possession of his estate.

On the 27th February, 1899, the suit being then pending, the plaintiff Mahadev Narayan died, and on the 23rd May, 1899, his niece Balabai, the daughter of his sister Nathibai, applied, under section 365 of the Civil Procedure Code (XIV of 1882), as his heiress, to have her name entered on the record as his legal representative. No other application was made, and on the 5th June, 1899, her name was entered on the record. It did not appear that defendants had any notice of Balabai's application. The following table shows the relationship :



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In June, 1899, Balabai applied to be allowed to prosecute the suit as a pauper. Notice was issued to the first defendant and he opposed her application, but he did not then question her right as legal representative of Mahadev. Balabai's application was granted.

On the 8th August, 1899, the first defendant filed his written statement and in it he stated (*inter alia*) that he did not know whether Balabai was or was not the heir of the deceased Mahadev Narayan.

The suit thus constituted came on for hearing on the 18th August, 1899, before the Subordinate Judge. Issues were raised on the pleadings, the first of which was in the following terms: "Whether the heir-plaintiff Balabai is not the legal representative of deceased plaintiff Mahadev Narayan?" The others related to the merits of the case and are not material to this report.

During the hearing, a witness, Bhivrabai, was examined, who stated that she was the widow of one Jagoba, a paternal cousin of Narayan, the father of the deceased plaintiff Mahadev Narayan. She did not, however, herself set up any claim to the estate of the deceased, or ask to be placed on the record as the legal representative of Mahadev.

On the 31st August, 1900, the Subordinate Judge gave judgment for the plaintiff Balabai. He found on the first issue in her favour, viz., that she was the legal representative of the deceased Mahadev, and he awarded her claim in the suit. In his judgment he said:

There is no record nor evidence to prove that Gopal was the full brother of Rama. On Moreshtar's death his nearest heir was Mahadev, the plaintiff, since deceased. On Mahadev's death his sister's daughter, the only surviving issue in the family, must succeed.

Bhivrabai, as the widow of Jagoba, can have no *locus standi*. She has not contested for it. If she likes, she may do it hereafter. But she cannot remain silent and allow defendant to devastate everything because he is her sister's husband.

The first defendant appealed, and the first ground of appeal was that the "lower Court had erred in holding that the plaintiff Balabai was the legal representative of the deceased Mahadev Narayan."

The Judge was of opinion that, until that point was decided, it was unnecessary to consider the other grounds of appeal. He accordingly reframed the lower Court's first issue as follows: "Whether plaintiff is the heiress and legal representative of deceased Mahadev Narayan," and reserved the question of other issues until that was decided. He found that issue in the negative and against the plaintiff, being of opinion that Bhivrabai's evidence, which was not contradicted, showed that Balabai was not the heir of the deceased Mahadev. He was of opinion that although Bhivrabai did not herself claim the inheritance, that fact was no ground for awarding it to one who was not the heir. He, therefore, allowed the appeal and reversed the decree of the lower Court.

The plaintiff preferred a second appeal to the High Court. The following points were taken in the memorandum of appeal:

(1) That the lower Court erred in law in holding that Balabai was not the legal representative of Mahadev Narayan.

(2) That no one had come forward to oppose Balabai's right to be put on the record, although her name had been substituted on the 5th June, 1899, until at the hearing Bhivrabai's evidence was taken.

(3) That there was no evidence to prove that Bhivrabai's father-in-law Gopal was brother of Rama, the grandfather of the deceased Mahadev.

(4) That the lower Court ought not to have gone into the question of Balabai's right to be placed on the record, especially as Bhivrabai was neither a party to the suit nor had she appealed against the order of the Subordinate Judge.

The second appeal was argued before Batty and Aston, JJ.

In the course of the argument the following point, which was not taken in the memorandum of appeal, was raised, viz., whether there had not been a "dispute" in the Court of first instance as to whether Balabai was the legal representative of Mahadev Narayan (the original plaintiff) and whether the Subordinate Judge, instead of proceeding to deal with the suit on the merits, ought not therefore to have followed the procedure prescribed by section 367 of the Civil Procedure Code (XIV of 1882), and have either stayed the suit until the question had been decided or have decided the question at the hearing.

The Judges who heard the second appeal differed in opinion. Batty, J., was of opinion that the decision of the lower Appellate

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Court was wrong and that the case should be remanded for a decision on the merits. He held that the dismissal of a suit solely because of a doubt as to the heirship of the persons named in the record as the representative of a deceased plaintiff was an error in law; that the merits of the plaintiff's claim (*i.e.* Mahadev's) could not depend on whether he was properly represented or not; and that the lower Court was mistaken in dismissing the claim on the ground that Balabai had not shown that no one else could proceed with the suit.

Aston, J., on the other hand, held that it was vital to the success of the suit prosecuted by Balabai (after Mahadev's death) that she should be adjudged the nearest heir of Mahadev; that there was nothing to be gained by prosecuting the suit as legal representative of Mahadev, if Balabai was not his nearest heir, in whom alone the property in suit vested; that the lower Appellate Court had found as a fact (which could not be questioned in second appeal) that Balabai was not the nearest heir of Mahadev, and from that finding it followed that she had no right to the property, which never vested in her as legal representative of Mahadev, not being his nearest heir. He was therefore of opinion that the decree of the lower Court should be confirmed.

The following were the judgments delivered :

BATTY, J.:—This suit was instituted on 30th November, 1897, by one Mahadev Narayan, to recover possession of certain moveable and immoveable property as the estate of his deceased cousin Moreshvar, whose heir Mahadev Narayan alleged himself to be. The defendants, it was alleged, wrongfully retained possession of that estate.

Mahadev Narayan, the original plaintiff, died during the pendency of the suit, viz., on 27th February, 1899. One Balabai, his sister's daughter, proceeded with the suit and filed a Vakalatnama on 5th June, 1899. The first defendant did not object to Balabai's representative character till the 8th August, 1899, but on that day put in a written statement in which he refused to admit that Balabai was the nearest heir to the deceased plaintiff. He advanced, however, no arguments at the time on the point,

On the 4th July, 1900, the first defendant was examined and appears then to have disputed the right of Balabai to represent the deceased plaintiff Mahadev, though it would seem he admitted his ignorance as to the pedigree of the family and uncertainty as to whether the deceased Mahadev had a cousin named Jagoba.

On the 25th August, 1900, one Bhivrabai, widow of Jagoba, was put forward as the nearest heir to Mahadev, the deceased plaintiff, and was examined as a witness. She is the sister of the first defendant's wife.

The Court of first instance gave judgment on 31st August, 1900, and was of opinion that Bhivrabai had been put forward by the first defendant to assert her right as against Balabai to represent the deceased plaintiff Mahadev Narayan. Bhivrabai claimed that right as widow of Jagoba, a son of one Gopal alleged by her to be the great-uncle of the deceased Mahadev, but the Court of first instance states that there is no record or evidence to prove that Gopal was the full brother of Mahadev's grandfather. Having found on the merits that the claim put forward originally by Mahadev was in the main established, the Court of first instance gave a decree in favour of the plaintiff.

The lower Appellate Court, observing that the first defendant did not admit that Balabai was an heiress of the deceased plaintiff Mahadev, deemed it unnecessary to look into other grounds of appeal, and finding that Bhivrabai was confirmed in her story by her brother and substantially by the first defendant, and that one of the plaintiff's witnesses was unable to say whether Mahadev or Moreshvar's father had any agnatic kin or not, reversed the decree of the lower Court. With reference to the fact that Bhivrabai had not come forward to claim the inheritance, the lower Appellate Court observed that this fact would be no ground for awarding it to one who is not the heir.

Thus the suit instituted by Mahadev Narayan which the lower Court held established, has been rejected by the lower Appellate Court, not because it held the claim insufficiently established, but merely because the person entered on the record as representing the plaintiff had not proved that there was no nearer heir to the plaintiff. The merits of the deceased plaintiff's claim cannot, it

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seems to me, depend on whether that plaintiff has been properly represented or not; and I think, therefore, that the Court was mistaken in dismissing the claim on the ground that the representative had not shown that no one else could be allowed to proceed with the suit. The case would, no doubt, have been different if the suit had originally been instituted by Balabai claiming as heir to Mahadev or to Moreshvar. For, in those circumstances, Balabai would have based her suit on her right as heir, and would have been bound to establish it. But the suit, as instituted, was not based or dependent on Balabai's heirship, and could not properly be dismissed on her failure to prove her heirship. The question of Balabai's right to represent Mahadev was, I think, a question which could only affect the decision as to the person who should be admitted on the record for the purposes of prosecuting the suit, and was not pertinent for the purpose of deciding whether Mahadev's claim should be decreed or rejected.

In the case of the death of a plaintiff, it does not become the duty of the Court in which the suit is pending to decide who is the plaintiff's heir. The procedure is regulated by sections 365, 366 and 367. If the legal representative applies, the Court must enter his name under section 365, and proceed with the suit. If no application be made within the time limited by article 175A of schedule II of the Indian Limitation Act, 1877, there are two courses open, viz., either (a) to pass an order that the suit shall abate, or on defendant applying in this behalf (b) to pass an order for bringing in the legal representative and proceeding with the suit. If the suit abates, section 371 may thereafter come into operation. But the suit is not liable to dismissal. If any dispute arise as to who is the legal representative, section 367 applies. And as held in *Subbaya v. Saminadayyar*⁽¹⁾ the phrase "any dispute" is wide enough to cover a dispute on that point between the person claiming to represent the deceased plaintiff and the defendant. It need not be between persons claiming to represent the deceased plaintiff. And when such a dispute does arise, it is not the province of the Court to decide who is the rightful heir or to reject the suit altogether on

(1) (1895) 18 Mad. 496.

failure by the person claiming to be representative to establish affirmatively his right as *heir*. The Court has again two courses open, viz., either to stay the suit until the fact has been determined in another suit, or to decide at or before the hearing of the suit, not whether the person claiming is the heir, but only as to "*who shall be admitted to be such legal representative for the purpose of prosecuting the suit.*" No decision is required or can be passed in such a case on the right of heirship; nor can the suit be dismissed on the ground that such right of heirship has not been established against all possible comers. A decision on that point would not be binding if passed in such a case, even between the rival claimants, and all that is needed and all that can be done in the suit is to decide who shall proceed with it, without in any way affecting the ultimate liability or right of the persons in favour of whom or against whom the order is passed.

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It appears to me that a dismissal of the suit solely on the ground of a doubt as to the heirship of a person whose only claim is to proceed with it as the representative of a deceased plaintiff, is an error in law and unsustainable; and that the lower Appellate Court's decree must for that reason be set aside in this appeal.

Had the lower Appellate Court's decision been one under section 367, this Court could not, under section 588, have interfered therewith. But the lower Appellate Court's decision did not purport to be under section 367, nor has the lower Appellate Court given to it the operation of a decision under section 367. It is not as a decision under that section that the decree is liable to be set aside on appeal. The decree is open to objection as one rejecting a suit on a ground which could not justify rejection.

It appears to me immaterial whether objection specifically referring to section 367 was or was not taken in the lower Appellate Court or in the memorandum of appeal to this Court. The procedure adopted was opposed to that laid down in the Code as explained in *Bhikaji v. Purshotam*⁽¹⁾ and *Vithu v. Bhima*.⁽²⁾ The lower Appellate Court has, it seems, gone no further than to

(1) (1885) 10 Bom. 220.

(2) (1890) 15 Bom. 145.

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decide that Balabai has not succeeded in establishing her right of heirship to Mahadev. It was not necessary for her to do that. It was only necessary to decide who was to be admitted as legal representative for the purpose of prosecuting the suit. If that point be disputed, the *onus* would not be upon Balabai to disprove any rival claim.

In deciding who should be admitted for the purposes of prosecuting the suit, the Court should, I think, take into consideration the fact that Balabai's name had been more than a year on the record before any rival claimant was suggested; that the rival then put forward was not produced till six days before judgment was delivered; that she (the rival claimant) is the sister-in-law of the defendant; that the defendant, as is to be gathered from the judgment of the Court of first instance, professes no knowledge of the family pedigree; that Balabai had apparently no opportunity of rebutting any evidence adduced as to her rival's relationship; and that the rival herself made no claim to be allowed to proceed with the suit.

The decree of the lower Court should, in my opinion, be reversed, and the case should be sent back to the lower Court in order that the procedure prescribed by the Code may be followed, and that a decision on the merits may be passed in due course. The costs in that case should, I think, abide the result. I understood that the pleaders on both sides accepted this as the only possible solution of the case.

As, however, my learned colleague differs from me, procedure under section 575 of the Code will now be necessary.

ASTON, J.:—There can be no doubt that the substituted plaintiff Balabai, the present appellant, was admitted to the record on 5th June, 1899, to prosecute the suit as legal representative of the deceased original plaintiff; that the suit was then proceeded with as required by section 365 of the Code, no objection being made by the defendants to the suit being so proceeded with (section 32 of the Civil Procedure Code); that the issues framed were the issues on which Balabai went to trial; and the issues decided were an adjudication *inter partes*.

It was vital to the success of the suit thus prosecuted by Balabai (after Mahadev, original plaintiff, died) that she should be

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adjudicated the nearest heir of Mahadev. There was nothing to be gained by prosecuting the suit as legal representative of Mahadev if Balabai is not his nearest heir, in whom alone the plaint property vested. The defendants did not admit that she is the nearest heir. The first issue in the Court of first instance was treated as covering this question, and that Court decided that Mahadev was the nearest heir of Moreshvar, and Balabai must succeed to Mahadev, without, however, explicitly deciding whether Balabai is the *nearest* heir of Mahadev. The lower Appellate Court decided *inter partes* that there is a nearer heir to Mahadev, namely, one Bhivrabai, and that Balabai is not the nearest heir and legal representative. That finding is an adjudication between Balabai (admitted on her own application to prosecute the suit) and the defendants, who suffered her to prosecute the suit but disputed her title to the plaint property, the fact that she is the nearest heir not being admitted (see defendant No. 1's written statement, 8th August, 1899, Exhibit 39). As a finding of fact that Bhivrabai is the widow of a first cousin of Mahadev's father, that finding cannot be contested in this second appeal. On that finding it is now immaterial to inquire whether it was right or wrong to admit Balabai to prosecute the suit as legal representative of Mahadev, for it follows from that finding that she has no right to the plaint property, which never vested in her as legal representative of Mahadev if she is not his nearest heir.

I think that Balabai cannot now be allowed to get rid of that finding in the manner sought, so as to give her a fresh opportunity to have the issue tried whether she is the nearest heir of Mahadev. That would, I fear, be an irregularity in procedure more serious than that now alleged (though nowhere set out in the pleading) as to the procedure of the Courts below, which, so far as Chapter XXI of the Code is concerned, was, I think, correct.

My reasons for so holding are stated in detail below.

I think there is no point arising out of the pleadings or taken in the grounds of appeal on which the case can now be remanded for a fresh decision whether Balabai is or is not the legal representative of Mahadev. She was admitted to prosecute

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the suit as his legal representative and has remained a party to the record ever since, and the *question for decision is whether she is entitled to recover the plaint property from defendants*. If Bhivrabai is a nearer heir, then I think that Balabai is not so entitled, for the defendants may set up *jus tertii*.

The original plaintiff in this case was Mahadev Narayan. He died on 27th February, 1899. His deceased sister's daughter, Balabai, claiming to be legal representative of deceased plaintiff, applied within the period of limitation prescribed by law, article 175A, schedule II of the Act (XV of 1877), to have her name entered in place of deceased plaintiff Mahadev (see section 365, Civil Procedure Code), and the Court entered her name on 5th June, 1899, and *proceeded with the suit*, in accordance with the express direction of the Code, section 365, "and the Court shall thereupon enter his name and proceed with the suit" after such substitution. No application "to be admitted to be such legal representative for the purpose of prosecuting the suit" has been made from beginning to end of the suit by any other person. The period prescribed by law within which such application under section 365 of the Civil Procedure Code had to be made ended on 27th August, 1899. On 8th August, 1899, the first defendant, in his written statement, declined to admit that Balabai is the nearest heir of Mahadev.

On the 16th August, 1899, an issue was framed "whether the heir-plaintiff Balabai is not the legal representative of deceased plaintiff Mahadev Narayan." Heir-plaintiff is what Balabai styled herself in her application.

Up to the 4th July, 1900, the defendants, who raised this issue, had not suggested the name or existence of any other heir or legal representative of Mahadev, and even on 4th July, 1900, when the first defendant was examined he still declared his ignorance.

On the 25th August, 1900, one Bhivrabai, a sister-in-law of the first defendant, stated in the witness-box that she is the widow of one Jagoba, a first cousin of Mahadev's father. She did not, however, apply to have her name entered on the record in place of the deceased Mahadev, original plaintiff. It was far too late under the law of limitation even if she wished to do so.

On the 31st August, 1900, the Court of first instance decided *inter alia*, in disposing of the suit, that Balabai is heir to the property in dispute (and therefore the legal representative of the deceased original plaintiff Mahadev). The Subordinate Judge remarked in his judgment: "On Mahadev's death his sister's daughter, the only surviving issue in the family, must succeed. Bhivrabai as the widow of Jagoba can have no *locus standi*. She has not contested for it. If she likes she may do it hereafter. But she cannot remain silent and allow defendant to devastate everything because he is her sister's husband."

Though the first issue in the suit was worded as already described, the question was treated as one whether Balabai is the heiress of Mahadev and thus entitled to the plaint property, and it was on this basis that the issue was decided in the affirmative and the claim to the landed property and to part of the cash was awarded.

The first defendant appealed, making Balabai (the substituted plaintiff) and the remaining defendants, respondents in the appeal: and his first ground of appeal was that the first Court erred in holding that Balabai is the legal representative of deceased Mahadev Narayan. The lower Appellate Court, without dealing with other issues in the appeal, framed the issue whether plaintiff is *the heiress* and legal representative of deceased Mahadev Narayan, and deciding this in the negative reversed the decree of the Court of first instance and dismissed Balabai's suit.

Balabai now appeals to this Court, and her pleader conceded that if Bhivrabai is the widow of a cousin of Mahadev's father, then she is the nearer heiress to Mahadev and excludes Balabai. At first the only position taken by appellant's pleader was that the lower Appellate Court, though it decided that Balabai is not the heiress of Mahadev, had not explicitly said that Bhivrabai is proved to be the heiress.

On that point I think that the lower Appellate Court has said enough to show that it held it proved that Bhivrabai is the widow of Mahadev's father's first cousin. This is the only intelligible conclusion to be drawn from the judgment of the lower Appellate Court. We have here a clear finding of fact,

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and no conditions alleged which can prevent such a finding from binding the appellant in this second appeal.

But later in the course of the argument a point, not based upon any of the grounds in the memorandum of appeal, was brought forward, that there had been an error in the procedure of the Court of first instance (as to which there was no cross objection in the lower Appellate Court). The point thus taken at the hearing of this second appeal was that there was a "dispute" in the Court of first instance whether Balabai is the legal representative of Mahadev (original plaintiff deceased), and therefore the Subordinate Judge, instead of proceeding with the suit, should have followed the procedure prescribed by section 367 of the Civil Procedure Code, which runs as follows :

If any dispute arise as to who is the legal representative of a deceased plaintiff, the Court may either stay the suit until the fact has been determined in another suit, or decide at or before the hearing of the suit who shall be admitted to be such legal representative for the purpose of prosecuting the suit.

The argument is somewhat elusive, because there were two disputes each of which is sought to be treated as a "dispute" covered by the provisions of section 367, and, secondly, because the wording of the first issue in the Court of first instance diverts attention from the real basis on which that issue was decided, namely, whether Balabai is the heiress of Mahadev.

One of the disputes sought to be treated as covered by section 367 is Bhivrabai's assertion on 25th August, 1900, that she is the widow of a first cousin of Mahadev's father. This assertion was made two years after the period of limitation for applying to have her name substituted for Mahadev's on the record had expired. It was not accompanied by any such application, and the Subordinate Judge's judgment leaves it to be inferred that she was not willing to have her name entered in order to proceed with the suit. If Balabai had not made her own application in time, the suit must have abated. If Balabai had not so applied and the suit had abated (see sections 361-366), then, of course, the suit might have been revived under the conditions set out in section 371; but the suit neither abated nor was dismissed (see section 370) under Chapter XXI, and we are, therefore, not concerned with section 371. I am unable to see

how as to this part of the case there is such a dispute as is covered by section 367.

Then it is said that the defendants, by raising the issue "whether the heir-plaintiff is not the legal representative of deceased plaintiff Mahadev Narayan," created such a dispute as is covered by the provisions of section 367.

There would be some inconsistency in treating Bhivrabai's assertion of heirship as a denial of the right of Balabai to be treated as legal representative of Mahadev, and in refusing to treat the issue just quoted as bringing in question Balabai's right of heirship. This issue, as already shown, was treated in both the lower Courts as bringing into issue Balabai's right of heirship, and the decision in both Courts was on that basis, though the lower Appellate Court reframed the issue. Balabai's name had already been substituted on the record for Mahadev's, and the defendants did not apply to have it struck off, but were content to let the suit proceed with Balabai as substituted plaintiff, and to go to trial on the issues subsequently framed and recorded. If the defendants had instead asked for Balabai's name to be struck off the record, and the Court had refused such application, then there might have been room for contending that such a dispute is covered by section 367, if that section does not refer merely to rival claimants to be entered as legal representative of a deceased plaintiff. But even then the matter would be only important as to whether there would have been a regular appeal from such refusal or an appeal under section 588, clause 18, read with section 367, rather than an appeal under section 585, clause (2), read with section 32—where a person has once been admitted to the record as legal representative of a deceased plaintiff that person is a party, and any dispute raised *inter partes* as to that substituted plaintiff's right of representation (not inheritance) so as to have such substituted plaintiff struck out comes properly under section 32 and not under section 367 of the Code.

If sections 365, 366, 367 are read together I think that they show affirmatively that the dispute contemplated in section 367 is a dispute as to "who shall be admitted to be such legal representative for the purpose of prosecuting the suit." These

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are the very words at the end of section 367. If section 367 be read with section 588, clause 18, I think it becomes clear that the dispute contemplated in section 367 is *not* an issue on the merits framed and recorded between a plaintiff and defendant.

Balabai claimed in her application of 23rd May, 1899, to be heiress of Mahadev, and therefore to be his legal representative, and the question, whether she was heiress of Mahadev, became the main issue in the suit in which the Court on her own application allowed her name to be entered in place of Mahadev.

Section 367 provides that, when a dispute therein contemplated arises, the Court may either *stay the suit* until the question who is the legal representative has been determined *in another suit* or decide itself who shall be admitted, &c.; and section 588, clause (18), provides a right of appeal from orders under section 367. But it is difficult to see how such provisions can apply to an issue on the merits framed as between the parties to the suit after a new plaintiff has been admitted as legal representative of a deceased plaintiff to prosecute the suit, and no application is made under section 32.

If, on the other hand, the "dispute" meant in the argument is the belated assertion of Bhivrabai, how could the Court deal with such an assertion on a dispute under section 367 when Bhivrabai's name even did not transpire till two years after any application of hers to be entered on the record, even if made, must have been at once rejected as time-barred?

I do not think that the words "for the purpose of prosecuting the suit," or any other words in section 367, prevent the issue whether Balabai is the nearest heir of Mahadev being adjudicated in the present case which she has been allowed to prosecute upon to this Court.

The cases *Bhikaji v. Purshotam*⁽¹⁾ and *Vilhu v. Bhima*⁽²⁾ do not say that a dispute within the meaning of section 367 need not be between persons claiming to represent the deceased plaintiff. In the Madras case, *Subbaya v. Saminadaiyyar*,⁽³⁾ this was said. But if that case be examined, it will be seen that the dispute was between an alleged adopted son who claimed

(1) (1885) 10 Bom. 220.

(2) (1890) 15 Bom. 145.

(3) (1895) 18 Mad. 496.

to have his name substituted for a deceased plaintiff, and on the other side a defendant who claimed that the right to sue did not survive as the deceased plaintiff's share had passed to defendant by survivorship. The District Munsiff refused the application of the adopted son to have his name entered, holding that the right to sue had not survived. The District Judge concurred, and held that no appeal lay against an order that the right to sue had not survived (section 365 allowing such applications for substitution of names only where the right to sue survives). The Madras High Court decided that an adopted son is the legal representative of the persons to whom he is adopted, and section 371 would prevent the institution by him of any fresh suit, and treated the order of the Munsiff as an order within the meaning of section 367.

In that case up to the stage of second appeal the adopted son had not been made a substituted plaintiff, and there had been no adjudication *inter partes* that the adopted son was not the heir to the property in dispute.

If the Madras case, *Subbayya v. Saminadayyar*,⁽¹⁾ be compared with the Bombay case, *Bhikaji v. Purshotam*,⁽²⁾ it will be found that in both there was a refusal to substitute the name of a son, adopted in the former and a minor in the latter case, in place of a deceased plaintiff, and an order was made under section 366, Civil Procedure Code, for abatement of the suit. The Madras High Court ruled that the adopted son had a right of appeal by treating the matter as a dispute within the meaning of section 367. The Bombay High Court did not suggest that section 367 could be used so as to give the claimant plaintiff a right of appeal by reference to section 367, but treated the order under section 366 as virtually a decree within the meaning of section 2 of the Civil Procedure Code, and, therefore, held that there was a right of appeal. So far, therefore, the Madras decision is at variance with the above quoted decision of this Court.

In the case of *Bshen Chunder v. Shamachurn*,⁽³⁾ Lord Westbury, who delivered the judgment, said : " This case is one of considerable importance, and their Lordships desire to take advantage

(1) (1895) 18 Mad. 496.

(2) (1835) 10 Bom. 229.

(3) (1870) 11 Moore's I. A. 7.

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of it for the purpose of pointing out the absolute necessity that the determination in a cause should be founded upon a case, either to be found in the pleadings, or involved in, or consistent with, the case thereby made." This is quoted with approval by Sir Barnes Peacock in the case of *Mylapore v. Yeo Kay*.⁽¹⁾

Throughout the pleadings in all three Courts there is no suggestion that there was any irregularity in procedure, far less that there was any such error prejudicing the appellant Balabai. Mahadev instituted the suit to recover certain property claiming it as heir of one Moreshvar, deceased. When Mahadev died, then Balabai claiming to be heiress of Mahadev applied, calling herself "heir-plaintiff," on 23rd May, 1899, within the period of limitation prescribed, to have her name substituted for Mahadev's as plaintiff. Her application was granted *ex parte* on 5th June, 1899, and ever since she has remained on the record as substituted plaintiff. No one else has ever applied to prosecute the suit and any such application has long ago become barred by the law of limitation. The defendants could have applied under the second paragraph of section 366 to have any nearer heir substituted, but did not so apply, and any such application is now long since barred by the law of limitation. The defendants could presumably have asked under section 32 of the Civil Procedure Code for Balabai's name to be struck off if she is not the legal representative of Mahadev, but they never did this. On the 8th August, 1899, the defendant No. 1 filed this written statement, saying he did not know whether Balabai is the nearest heir or not of Mahadev and did not admit that she was, and the suit proceeded and Balabai has remained on the record as substituted plaintiff ever since.

The defendants suffered her to prosecute the suit and were content that the suit should proceed with Balabai as substituted plaintiff. They cannot now say that the suit should not have been proceeded with with Balabai as plaintiff. Balabai cannot now say, after she has been substituted as plaintiff on her own application, and has prosecuted the suit as plaintiff, that the Subordinate Judge should have held some sort of proceeding to ascertain if she is the legal representative of Mahadev, or should have stayed the suit under section 367 merely because the

(1) (1887) 14 I. A. 168; 14 Cal. 801.

Defendant did not admit that she was the nearest heir of Mahadev. The defendants apparently conceded that Mahadev was the heir of Moreshvar and that the estate of Moreshvar would go to the nearest heir of Mahadev.

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Though the first and main issue on which the plaintiff Balabai and the defendant went to trial was worded as already set out, it was evidently understood by the parties, and was treated, as raising the question whether Balabai is the nearest heir of Mahadev. In that sense this issue was decided in the Court of first instance in favour of Balabai. In the lower Appellate Court it was decided that there is a nearer heir of Mahadev, one Bhivrabai. It is conceded by Balabai's pleader that if Bhivrabai is the widow of the first cousin of Mahadev's father, then she is a nearer heir to Mahadev than Balabai. But this is what the lower Appellate Court has decided, that Bhivrabai is, and Balabai is bound by that finding of fact. As Balabai is, according to this finding, a more distant heir than Bhivrabai, the cause of action did not survive to Balabai, and it matters not whether she is the legal representative of Mahadev or not, if the plaintiff's property never vested in her. In order to succeed in this suit Balabai had to prove that she is the nearest heir of Mahadev. This was a question on which the parties to the record went to trial, and I think that it was open to both the Courts below to decide the suit on this issue. It is difficult to see what can be gained by sending the case back in order that this issue, vital to the success of Balabai in this case, may be converted in either of the lower Courts into a question whether Balabai's name as substituted plaintiff should be struck off the record. There seems to be ground for holding that this cannot be done and ought not to be done at this stage of the case, even if it were not sacrificing substance to mere form.

Looking to the finding of fact recorded by the lower Appellate Court, I would confirm the decree appealed against. If the contention is that Balabai must succeed in this case if she is the legal representative of Mahadev, though not his heir, I think for the reasons already stated, on the authority of the Privy Council decision in *Eshen Chunder v. Shamachurn*⁽¹⁾ already cited,

(1) (1870) 11 Moore's I. A. 7.

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that this plea, which was nowhere taken in the lower Courts or in the grounds of appeal to this Court, cannot now be entertained.

Treating the contention on the merits, I see no substance in it, when the mere admission to prosecute a suit as legal representative does not give a right to the relief sued for. If Balabai is not the nearest heir, then the property of Mahadev has never vested in her even though she be allowed to sue as his legal representative. Moreover, it follows from the lower Appellate Court's finding on the facts that she is not the legal representative of Mahadev. Her claim to be his legal representative was based on her assertion of heirship as niece. She was admitted to prosecute the suit, and the main issue on which she went to trial was really whether she is the nearest heir. The result is an adjudication *inter partes* that one Bhivrabai, a nearer heir, exists and that Balabai is neither next heir nor legal representative of Mahadev.

Owing to the above difference of opinion, the case was referred to Chanda-varkar, J., under section 575 of the Civil Procedure Code (Act XIV of 1882).

Sitaram S. Patkar for the appellant Balabai (plaintiff):—It is clear that Balabai, as the daughter of Mahadev's sister, is Mahadev's heir: Mayne's Hindu Law, page 700. The defendant has no title to it at all.

But apart from the question of Balabai's right, we submit that the lower Appellate Court was wrong in raising the question and dismissing the suit. Balabai had been placed on the record under section 365, Civil Procedure Code (XIV of 1882), on her application. No other person has ever applied to represent the deceased Mahadev. Bhivrabai, no doubt, at the hearing in the Court of first instance, stated that she was the widow of Jagoba, the first cousin of Mahadev's father. But she did not claim to represent Mahadev in the suit. The lower Appellate Court has dismissed the suit, because in its opinion Balabai had not proved she was the nearest heir of the plaintiff Mahadev. But that was not the question at the hearing. The suit was brought by Mahadev, and Balabai had been placed on the record after his death to represent him. No appeal was made against the order placing her on the record, under section 588, clause (18), of the

Civil Procedure Code (Act XIV of 1882). The suit was decided on the merits by the first Court, and in appeal against that decree no objection could be taken against the order placing Balabai on the record, unless it could be shown that the order affected the decision of the case: see section 591, Civil Procedure Code (XIV of 1882). That was not shown: *Sankali v. Murlidhar*.⁽¹⁾ The procedure of the lower Court was wrong: *Bhikaji v. Purshotam*⁽²⁾; *Vithu v. Bhima*.⁽³⁾

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Gangaram B. Rele for respondent (defendant 1):—A sister's son is a *bandhu*, and even as such he cannot inherit unless all the *sapindas* are exhausted. A sister's daughter is not even a *bandhu* and is not an heir: West and Bühler, page 476. Balabai is not, therefore, Mahadev's heir. Bhivrabai is the widow of Jagoba, who was a *gotraja* of the deceased Mahadev. Bhivrabai is, therefore, also a *gotraja*, and would exclude a *bandhu* and much more one who is not a *bandhu*.

If, then, Balabai did not inherit Mahadev's property, she had no right to represent him. She is not the rightful owner. The defendants are in possession and are entitled to hold it against every one but the rightful owner.

We had no notice of the order placing Balabai on the record and so we could not appeal against it. We questioned her right in our written statement, and when we appealed against the decree we objected to the order.

CHANDAVARKAR, J.:—The facts, which are necessary for the determination of the question on which Batty and Aston, JJ., have differed, are not disputed, and are shortly as follows:

The suit was brought by Mahadev as the cousin of Moreshtar to recover certain property from the defendants. The plaint was filed on the 30th of November, 1897. On the 11th of November, 1898, defendant No. 1 applied for and obtained time to put in his written statement. In the meanwhile, *i.e.* on the 27th of February, 1899, the plaintiff Mahadev died. The present appellant, Balabai, applied on the 23rd of May, 1899,

(1) (1890) 12 All. 200.

(2) (1885) 10 Bom. 220.

(3) (1890) 15 Bom. 145.

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under section 365 of the Civil Procedure Code, to have her name entered on the record in place of the deceased as his legal representative. She was brought on the record on the 5th of June, 1899, without, apparently, any notice to the defendant or knowledge on his part. On the 12th of July, 1899, the pleader of defendant No. 1 put in a *purshis*, stating that Balabai should not be allowed to prosecute the suit in *forma pauperis*. No question was then raised disputing her right as the legal representative of the deceased.

On the 8th of August, 1899, defendant No. 1 put in his written statement, in which for the first time he stated that he did not know whether Balabai was the heiress of the deceased plaintiff Mahadev, as alleged by her. Issues were raised on the 16th of August, 1899, and the first issue was "whether the heir-plaintiff Balabai is not the legal representative of deceased plaintiff Mahadev Narayan." Evidence was taken on that as well as the other issues, and the Subordinate Judge, in the Court of first instance, finding all the issues in favour of the plaintiff, gave Balabai a decree entitling her to recover possession of the property in dispute from defendant No. 1, and awarding her costs from defendant No. 1 personally and from the estate of defendant No. 2, deceased. The Subordinate Judge, in recording a finding in Balabai's favour on the first issue which related to her representative character, said :

Now as regards plaintiff's heirship, defendant 1, the chief opponent, has no knowledge of the heirs of the deceased Moreshvar. Still he denies plaintiff's right. No person has come forward to oppose plaintiff's right or to be added as co-plaintiff, though the suit has been pending for three years. Even witness Bhivrabai, who is put forward as the nearest heir, did not come forward to give her evidence or to put her claim till the last day. It is a wonder how she was cited, if defendant 1 did not know her pedigree or that of Moreshvar. Her sister is given in marriage to defendant 1. He, therefore, must have put her up.

From this decree the first defendant appealed to the District Court at Thána. The appeal was heard before Ráo Bahádur V. V. Phadke, Subordinate Judge with Appellate Powers, and he raised only one issue, reserving others. The only issue raised was "whether plaintiff is the heiress and legal representative of deceased Mahadev Narayan." On that issue he held in the negative and rejected the suit.

The question is "whether the lower Appellate Court could go into the question as to the representative character of Balabai and reject the suit on finding that she did not hold that character." The determination of that question depends on sections 365, 367 and 591 of the Code of Civil Procedure. Under section 365, where a sole plaintiff dies, his legal representative, where the right to sue survives, may apply to the Court, and the Court *shall* thereupon enter his name and proceed with the suit. The duty of entering the name and proceeding with the suit is imposed on the Court in imperative terms by this section, only where the person is either admitted to be the legal representative of the deceased or where no dispute is raised as to his representative character. Here, when the application was made by Balabai, it is true there was no admission of her claim. Nor was there any question raised then disputing it, and the Court entered her name on the record.

It does not appear, however, that when the name was so entered, the first defendant had any notice of Balabai's application. From the *roznama* it appears that when the case was called on on the 24th of March, 1899, it was adjourned to the 26th of June, but before that, viz., on the 5th of June, Balabai made her application to be put on the record as the deceased plaintiff's legal representative, and the Court granted the application. This must be presumed to have been done without any notice to and behind the back of the first defendant, because, as I have said, there is nothing to show that the defendant had notice of Balabai's application. When the Court ordered her name to be entered on the record, without notice to the defendant, it was the act of the Court. But "an act of the Court shall prejudice no man" (*Moor v. Roberts*⁽¹⁾), and the defendant had a right to question that act in proper time.

But when after that, the case was taken up on the 26th of June, 1899, then at least the first defendant had intimation of Balabai's claim, as appears from the *roznama*. Notice was ordered to issue to him why Balabai should not be allowed to prosecute the suit as a pauper. He raised no dispute as to her right to prosecute the suit as the legal representative of the deceased plaintiff. Neither

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(1) (1858) 3 C. B., N. S., 830.

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on the 26th of June, 1899, nor on the 12th of July, 1899, when the suit was taken up, did he deny Balabai's right as the heiress and legal representative of the deceased plaintiff, and the Court passed an order in the presence of the pleaders of the parties allowing Balabai to prosecute the suit in *forma pauperis*.

From this statement of facts, which appear from the *roznama*, it is clear that the Court was right in acting under section 365 of the Code in entering Balabai's name on the record. Whatever error it had committed in the beginning was waived by the defendant's conduct, and the act of the Court stood complete so as to fall properly within the requirements of that section. "When there is no dispute as to the applicant being the legal representative, the procedure prescribed by section 365 is to be followed" (*Muttuswami Ayyar, J., in Oula v. Beepathee*⁽¹⁾). That procedure was substantially followed here. Having acted under that section, the Court was bound under it to proceed with the suit.

What the Subordinate Judge did, however, subsequently was this. After the suit had been called on and adjourned on several dates, it was taken up on the 8th of August, 1899, when the first defendant put in his written statement, in which he substantially denied for the first time Balabai's right to prosecute the suit as the legal representative of the deceased plaintiff. The Subordinate Judge raised issues, the first of which was in these terms: "Whether the heir-plaintiff Balabai is not the legal representative of deceased plaintiff Mahadev Narayan."

The circumstances under which this issue was raised are noted as follows in the *roznama*:

In the event of a dispute being raised by the defendant that plaintiff Balabai is not the legal representative of the deceased plaintiff Mahadev Narayan, but that some other person is the legal representative, it was necessary to decide that question before raising the issues. Therefore the suit was adjourned to this date for the purpose of raising issues, and for hearing. But no such dispute having proceeded from the defendant, there is no reason left for making any inquiry before the raising of the issues. Therefore the issues are raised to-day, 16th August, 1899.

This endorsement made in the *roznama* is rather obscurely

(1) (1893) 17 Mad. 209.

worded. It is not quite clear what the Subordinate Judge meant: whether he meant to hold that, because the defendant had not raised the dispute before the raising of the issues, he must be taken to have admitted Balabai's right to prosecute the suit as the deceased plaintiff Mahadev's legal representative and the suit must be heard on the merits, or whether he meant that although no inquiry as to Balabai's right had been held before the raising of the issues—*i. e.*, before the case came on for hearing—because the defendant had not raised any dispute, yet, as he raised a dispute at the hearing, the inquiry as to it should take place with the inquiry on the merits. I construe the endorsement to mean the latter. In my opinion the Subordinate Judge intended to proceed under section 367 of the Code.

It is urged, however, that the Subordinate Judge did not proceed and could not have intended to proceed under section 367 when he raised his first issue, bringing into controversy Balabai's right to prosecute the suit as the deceased plaintiff Mahadev's heir and legal representative. In support of this argument I am asked to take notice of what the Subordinate Judge actually did. He had entered Balabai's name on the record under section 365; he raised the issue after the defendant had put in his written statement; he did not decide it at or before the hearing; but as a matter of fact having raised it with other issues which related to the proper merits of the suit itself, he decided it *with* them. I am asked to infer from all this that the first issue was raised simply because the Subordinate Judge and the parties intended to make the question of Balabai's heirship a question on the merits, and not a preliminary question under section 367. I cannot, however, read the terms of the endorsement in that way. The date on which the endorsement was made had been fixed for the raising of issues. The Subordinate Judge says that it had been so fixed with a view to decide in the meantime the question of Balabai's right as the heir and legal representative in case the defendant should raise it. The defendant, however, did not raise the question till the case was taken up on the date fixed for issues. Therefore, the Subordinate Judge thought it was of no use adjourning the case for the issues and making an inquiry into the question beforehand, but that the two might go together.

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That is the construction I put upon the endorsement. Moreover, if I can attribute the action taken by the Subordinate Judge to some section in the Code, I ought to so attribute it instead of speculating about it and ascribing it to something not warranted expressly by the Code. The question of Balabai's right to come in as the heir and legal representative of the deceased plaintiff could be dealt with, according to the Code, either under section 365 or under section 367. The Subordinate Judge had dealt with it at first under section 365, under the impression, which was of course correct as matters then stood, that there was no dispute. But at the hearing a dispute was raised and he raised an issue on it. That could bring the question under section 367 and no other. It is true the Subordinate Judge did not decide the question at or before the hearing as required by that section: that, however, was only an error in procedure, and a mere error in the procedure prescribed by a section does not justify the conclusion that the Court did not act or purport to act under it, if it is only under that section that the Court could act. There is no other section which gave the Subordinate Judge jurisdiction to try the question, and treat it as part of the merits of the suit.

It should be borne in mind that the Legislature has studiously provided a special procedure for certain questions which arise in connection with a suit where those questions are only preliminary stages in its determination. The object evidently was to prevent such questions from embarrassing the proper merits of the suit itself. When a plaintiff dies, the suit cannot proceed because there is none suing. The Legislature provides that his legal representative can come in his place; when he is allowed to come, the defect is made up, and there is a suit to proceed. The suit is then a suit on the merits. A Court has no jurisdiction after that stage has been reached to go back and inquire into the right of the legal representative to proceed with the suit side by side with an inquiry into the merits. Such twofold inquiry is bad, because the Court proceeds in that case with the suit when there is no one suing or allowed to sue. The contention urged before me, that in this case Balabai was *formally* put on the record under section 365, but that the Court and the parties left her right to be determined in the suit itself, is opposed to the very scheme of the Code of Civil Procedure. If the Court and the parties acted contrary to the Code, and if the irregularity was cured by the consent of the parties, it could only be cured to this extent, that

the Court must be taken to have exercised jurisdiction under section 367 if not under section 365. I can see no valid ground for holding that the Court could treat the preliminary issue (without the determination of which there was no suit to proceed and the suit could not proceed under the Code) as an issue on the merits of the suit and not under section 367. There is nothing in the case to show that the parties asked the Court to treat that issue as a suit on the merits; and the mere fact that it was raised with the issues on the merits is not, I think, sufficient to take it out of the category within which the Code of Civil Procedure clearly says it should fall.

As, however, the Subordinate Judge had already entered Balabai's name on the record under section 365 and as the defendant had not questioned that order at the earliest opportunity when he could have questioned it, his jurisdiction was exhausted and the subsequent action taken under section 367 is open to question. But assuming that in allowing the question to be reopened at the hearing the Subordinate Judge acted rightly, he was in error in not conforming to the provisions of section 367 which require that the dispute referred to in it should be decided *at or before the hearing*. Here the Subordinate Judge tried the issue under section 367 with the issues on the merits of the suit and disposed of them all together in favour of the plaintiff. So far as he decided the issue under section 367, the decision was an order appealable under clause 18 of section 588 of the Code. The defendant could have appealed and got it set aside, if he had proceeded under that clause; but, instead of appealing against the order only, he appealed against the decree passed by the Subordinate Judge and it was on that appeal that he questioned the order passed under section 367. Section 591, however, lays down the limits of the right of an appellant to question such an order. He can question it only on the ground of "any error, defect or irregularity in any such order affecting the decision of the case." In *Sankali v. Marlidhar*⁽¹⁾ the Allahabad High Court interpreted the section to mean that the error, defect, or irregularity should be in procedure or in law, not in matters

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(1) (1890) 12 All. 200.

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of fact; and that even then, *i.e.* where there is any defect, &c., in procedure or in law, it should be such as to affect the decision of the case. There was, no doubt, an error in procedure so far that the Subordinate Judge did not pass the order under section 367 as required by that section, but dealt with the question of Balabai's right to be treated as the heir and legal representative of the deceased plaintiff along with the questions affecting the suit on its merits. But has that erroneous procedure affected the decision of the case? The argument urged before me by Mr. Rele for the respondent was that it did affect the decision of the case, inasmuch as, if Balabai was not the legal representative, the suit should be dismissed. But there is no provision in the Code which says that a suit should be dismissed, if a person claiming as the legal representative of the deceased plaintiff in it fails to prove that claim. The question of the dismissal of the suit stands on different considerations altogether, according to the Code. If no person comes forward and applies to be put on the record within the period prescribed by law after the plaintiff's death, the Court has to proceed under section 366. There is no other ground urged to show that the erroneous procedure observed by the Subordinate Judge in passing the order under section 367 affected the decision of the case. The evidence taken as to the merits of the suit, *i.e.* as to the deceased plaintiff Mahadev's right to the property, was considered by the Subordinate Judge apart from the evidence as to Balabai's right to be treated as his legal representative. It cannot be said, then, that the latter evidence influenced the decision of the case on the merits of the suit.

Under these circumstances I am of opinion that the Subordinate Judge with Appellate Powers committed an error in law in reversing the Subordinate Judge's decree and dismissing the suit on the ground that Balabai was not the heiress and legal representative of the deceased plaintiff Mahadev.

I reverse the decree of the lower Appellate Court and remand the case for a decision by the lower Appellate Court on the merits. Costs to abide the result.

Decree reversed. Case remanded.