

ORIGINAL CIVIL.

Before Mr. Justice Davar.

RAO SAHEB MANAJI RAJUJI KALEWAR, PLAINTIFF, v. KHANDOO
BALOO, DEFENDANT.*

1911.

June 16.

Civil Procedure Code (Act V of 1908), Order XXXIII—Suit by widow in formâ pauperis—Death of plaintiff—Right of executor who is not a pauper to continue the suit in formâ pauperis.

The privilege of maintaining a pauper suit is a personal privilege granted to people who have no means of carrying on or continuing litigation, and there seems to be no authority whatever for holding that the representative of a pauper is entitled to continue the suit of his testator or testatrix in *formâ pauperis*, even though admittedly he is not a pauper, simply because his testator or testatrix was a pauper.

ONE Maloobai, a widow, filed this suit in *formâ pauperis* against the defendant on the 12th August 1909, praying *inter alia* that the defendant might be ordered to deliver up a certain deed of gift to be cancelled and to hand over any title-deeds relating to certain properties. Pending the hearing of the suit, *viz.*, on the 25th December 1909, Maloobai died leaving a will, dated 15th June 1908, whereby she appointed the present plaintiff Rao Saheb Manaji Rajuji and one Madhavrao Mahadeo her executors. Rao Saheb Manaji applied for and obtained probate on the 15th June 1910 and by a Chamber order, dated 18th June 1910, his name was brought on the record as plaintiff in the place of the deceased Maloobai. On the 17th June 1910 an order was made by the Prothonotary which directed amongst other things that the said Rao Saheb be at liberty to continue the suit in *formâ pauperis*. On the suit being called on for hearing on the 1st of April 1911, Davar J., on the application of counsel for the defendant, ordered that the first issue, *viz.*, whether the plaintiff can maintain or continue this suit in *formâ pauperis*, be tried as a preliminary issue. The Court further ordered the Prothonotary to give notice to the Government solicitor to appear by counsel on the argument if he thought fit.

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Vakil and B. J. Wadia, for the plaintiff.

Talyarkhan and Kanga, for the defendant.

Strangman, Advocate-General, for Government.

DAVAR, J. :—Maloobai, widow of Rajanna Mahadavji, originally petitioned to this Court to be allowed to institute this suit in *formâ pauperis* against Khandoo Baloo, the present defendant, praying for certain reliefs in connection with a document which she alleged the defendant had fraudulently got her to execute. She was granted leave to sue in *formâ pauperis* and her petition became a suit. In that suit she claimed that the defendant may be ordered to deliver up to be cancelled a certain deed of gift which she alleged he had obtained fraudulently from her and she prayed that the title-deeds of her property may be ordered to be returned to her.

Pending the hearing of the suit she died, but she was a woman who was either herself very astute or was in very astute hands, and before her death she made a will whereby she appointed Rao Saheb Manaji Rajuji Kalewar, the executor thereof, and she disposed of the property which she was claiming in the suit in certain ways in that will. The defendant was one of her nephews. She had three other nephews, and I am told that the will is in favour of the other three nephews. Rao Saheb Manaji Rajuji, on the 16th of June 1910, made an affidavit setting out the circumstances under which he became executor of Maloobai's will and he prayed that this Honourable Court may be pleased to allow his name to be brought on the record as plaintiff in place of the deceased Maloobai and that he may also be allowed to continue the suit in *formâ pauperis*. On the 17th of June 1910, an order was made by the Prothonotary, which, amongst other things, directed that the said Rao Saheb Manaji Rajuji Kalewar be at liberty to continue this suit in *formâ pauperis*.

The suit came on for hearing before me on the 1st of April 1911. Mr. Talyarkhan, for the defendant, asked me to try as a preliminary issue the following question, namely, whether the plaintiff can maintain or continue this suit in *formâ pauperis*.

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The order of the Prothonotary of the 17th of June 1910 seems to me to be very unusual. At all events that is the first time I came across an instance where a well-to-do and a titled citizen of Bombay was allowed to continue a suit as a pauper and I allowed the arguments on that issue to stand adjourned and directed the Prothonotary to give notice to the Government solicitor and inform him that the Court would hear counsel on behalf of Government, if they wished to be heard. I have no doubt the Prothonotary in making the order was influenced by arguments, such as Mr. Vakil has addressed to the Court on the argument of this question before me. But it seems to me a most anomalous thing to permit the present plaintiff to continue the suit against the defendant as a pauper. All the provisions of Order XXXIII of the Civil Procedure Code seem to negative the idea of anybody but an actual pauper, a real pauper, a man without means, being permitted to maintain or defend a suit in *formâ pauperis*. Mr. Vakil admits that if his client had come before the Court and asked to institute this suit in *formâ pauperis*, the application would necessarily have to be refused. But he contends that permission once being given to Maloobai, her representative, as a matter of right, is entitled to come in and continue the suit with the same privilege that was accorded to his testatrix. This is an argument which I am not prepared to accept. The privilege of maintaining a pauper suit is a personal privilege granted to people who have no means of carrying on or continuing litigation, and there seems to be no authority whatever for holding that the representative of a pauper is entitled to continue the suit of his testator or testatrix in *formâ pauperis*, even though admittedly he is not a pauper, simply because his testator or testatrix was a pauper.

In this case there is no question that the plaintiff is in well-to-do circumstances. He is not beneficially interested in the estate of Maloobai and he is carrying on this suit in the interest of the three nephews of Maloobai. I do not know whether the three nephews are paupers or not. They may be in well-to-do circumstances. They may have their rights; they will be able to establish those rights by taking such steps

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as may be necessary to carry on the fight which Maloobai had begun. Here we have an executor without any personal interest in the estate of Maloobai fighting other people's battle and insisting on continuing the suit with the privilege to which Maloobai was entitled but to which he is clearly not entitled.

Reliance is placed upon a very ancient case—*Bhagbut Doss v. Buloram Doss*⁽¹⁾. Since yesterday evening when the argument stood over, I have gone through all the cases that were cited before me and this is a case which I have tried to understand the reasoning of and I regret to say I have failed. The learned Judges begin there by saying that there was no provision to be found in Chapter V, Civil Procedure Code, for an enquiry that the applicant who claimed to be the representative of an admitted pauper was a pauper or not and because there is no provision for an enquiry, their Lordships held that the man ought to be allowed to continue the suit in *forma pauperis*. I confess I absolutely fail to grasp reasoning of the decision. I should have thought that the absence of such provision in the Code was very strong argument for holding the other way. Whatever may be the meaning of that judgment, I am not prepared to follow it.

Then the case of *Arunachala v. Ayyavu*⁽²⁾ was cited. Looking through the case I find that that was a case in which the administratrix who sought to institute the proceedings as the administratrix of her husband in *forma pauperis* was admittedly herself a pauper. In this case the plaintiff is admittedly a man of means.

I find that in a case decided by Mr. Justice Starling, *viz.*, *In the matter of the will of Dawubai*⁽³⁾, there are very clear indications that an executor or an administrator would not be allowed either to institute or maintain or continue legal proceedings, unless and until it was shown that he himself was a pauper.

(1) (1865) 3 W. R. (Mis.) 20.

(2) (1884) 7 Mad. 318 at p. 320.

(3) (1893) 18 Bom. 237.

Under these circumstances I am clearly of opinion that Rao Saheb Manaji Rajuji is not entitled to maintain this suit in *forma pauperis*.

I find on the issue that the present plaintiff is not entitled to maintain or to continue the suit in *forma pauperis*. Plaintiff must pay defendant's costs incurred by him from the 17th of June 1910 up to date.

Attorneys for the plaintiff: *Messrs. Dadachanji & Pocha.*

Attorneys for the defendant: *Messrs. Mulla & Mulla.*

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ORIGINAL CIVIL:

Before Mr. Justice Beaman.

BHAISHANKER NANABHAI AND OTHERS, PLAINTIFFS, v.
MORARJI KESHAVJI & Co., DEFENDANTS.*

1911.

July 24.

Civil Procedure Code (Act V of 1908), section 11—Res judicata—Consent decree amounts to res judicata—Consent decree between predecessors-in-title of parties in suit—Injunction granted in former suit—Res judicata and estoppel distinguished.

A consent decree has to all intents and purposes the same effect as *res judicata* as a decree passed *per invitum* and this notwithstanding the words in section 11 of the Civil Procedure Code "has been heard and finally decided."

In re South American and Mexican Company⁽¹⁾, followed.

A consent decree come to between the predecessors-in-interest of the present parties touching matters now substantially and directly in issue between them is *res judicata*.

Res judicata ousts the jurisdiction of the Court while estoppel does no more than shut the mouth of a party. Estoppel never means anything more than that a person shall not be allowed to say one thing at one time and the opposite of it at another time; while *res judicata* means nothing more than that a person shall not be heard to say the same thing twice over.

THE plaintiffs in this suit were the officiating Trustees of the Goculdas Tejpal Charities and as such were entitled to a certain immoveable property situated at Dady Sett Agiary.

* Suit No. 46 of 1911.

(1) [1895] 1 Ch. 37.