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Gajendragadkar J.

It was during the pendency of the appeal that the present Act came into force on December 28, 1948. Therefore, in our opinion, it would not be open to the appellant to contend that the civil Court has no jurisdiction to try the plea which he has raised. Our attention has been drawn to an unreported decision o tfhe learned Chief Justice in *Rajgonda Appa Patil* v. *Anna Appaji*[1] in which a similar view has been expressed. My brother Vyas has also taken a similar view in *Bhimji Velji* v. *Pritamlal Bapubhai Desai.*[2]

We would, however, like to add that in the present appeal we are not called upon to consider whether it would be open to the decree-holder to secure possession of the agricultural land by executing the decree, which may be passed in his favour by the Civil Court. Before answering the said question, the effect of s. 29 will have to be considered. We are at present concerned only with the question as to whether the civil Court's jurisdiction is ousted in pending proceedings on the ground that in these proceedings a plea under s. 70 (*b*) is raised, and we answer that question in the negative.

Since this matter has been referred to us for the decision of the point of jurisdiction, we must now send it back to Mr. Justice Shah for disposal of the appeal in accordance with law.

Answer accordingly.

K. B. S.

APPEAL FROM ORIGINAL CIVIL

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Dixit.

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Dec. 16

BURJOR PESTONJI SETHNA, APPELLANT (ORIGINAL PLAINTIFF) *v.* NARIMAN MINOO TODIWALLA AND OTHERS, RESPONDENTS (ORIGINAL DEFENDANTS).*

Court-fees Act (VII of 1870), s. 7 (iv)—Suits Valuation Act (VII of 1887), s. 8—Plaintiff in possession of premises—Plaintiff's use and enjoyment of premises obstructed and interfered with—Suit for declaratory decree and consequential reliefs—Monthly rent of premises Rs. 302-8-0—Reliefs sought valued by plaintiffs at more than

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* O. C. J. Appeal No. 126 of 1952: Suit No. 135 of 1950.

[1] (1950) Civ. Rev. Appln. No. 686 of 1950, decided by Chagla C. J. on Nov. 30, 1950 (Unrep.).

[2] (1951) S. A. No. 666 of 1950, decided by Vyas J., on March 15, 1951 (Unrep.).

Rs. 25,000—Such valuation whether governs question of jurisdiction and conclusive.

Where a plaintiff files a suit for a declaratory decree and consequential reliefs, his suit falls under s. 7 (*iv*) of the Court Fees Act, 1870, which gives him an unfettered right to value the relief he seeks at any figure which he thinks proper, and if he has put a valuation then that valuation is conclusive for the purposes of s. 8 of the Suits Valuation Act, 1887, and the jurisdiction of the Court must be determined according to the valuation so put by the plaintiff. It is not open to the Court to go behind the valuation and to consider whether such valuation is proper or not.

Lakshman Bhatkar v. *Babaji Bhatkar*[1] and *Dayaram* v. *Gordhandas*,[2] distinguished.

Vachhani Keshabhai v. *Vachhani Nanabha*,[3] *Bai Hiragavri* v. *Gulabdas Jamnadas*,[4] *Sunderabai* v. *Collector of Belgaum*,[5] *Balkrishna* v. *Jankibai*,[6] *Govinda Krishna* v. *Hanmaya Lingaya*[7] and *Hari Sanker* v. *Kali Kumar*,[8] followed.

Kirty Churan Mitter v. *Aunath Nath Deb*[9] and *Boidya Nath Adya* v. *Makhan Lal Adya*,[10] referred to.

Burjor Pestonji Sethna (plaintiff) was a tenant of a flat on the third floor of a building known as Mazda building. He was paying rent of Rs. 302-8-0 per month. He claimed that his tenancy also comprised in addition to the flat on the third floor, a terrace and a room on the terrace which was above the third floor. Nariman Todiwalla and others (defendants) purchased the property in May, 1949. By various acts the defendants deprived the plaintiff of the use and enjoyment of the terrace and the room thereon. The plaintiff thereupon filed a suit on January 28, 1952, against the defendants setting out the various acts of obstruction and interference of the plaintiff's user and enjoyment of the terrace and the room thereon and praying, *inter alia*, for a declaration that the terrace along with the room thereon was comprised in the plaintiff's tenancy, for mandatory injunction for removing the obstructions and for permanent injunction restraining the defendants from in any manner obstructing or interfering with the plaintiff's exclusive use and enjoyment of the terrace and the room thereon during the continuance of his tenancy. The plaintiff valued the reliefs sought at more than Rs. 25,000.

(1) (1883) 8 Bom. 31.
(2) (1906) 31 Bom. 73.
(3) (1908) 11 Bom. L. R. 30.
(4) (1913) 15 Bom. L. R. 1123.
(5) (1918) 21 Bom. L. R. 1148 P.C.
(6) (1919) 22 Bom. L. R. 289.
(7) (1920) 22 Bom. L. R. 1450.
(8) (1905) 32 Cal. 734.
(9) (1882) 8 Cal. 757.
(10) (1890) 17 Cal. 680.

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The suit came on for hearing before Shah J. on June 18, 1952, and the defendants having raised an objection as to the jurisdiction of the High Court to try the suit, the matter was referred to the Taxing Master of the High Court to ascertain and report on the value of the subject-matter of the suit.

The Taxing-Master was of opinion that the suit fell under s. 7 (*iv*) (c) of the Court-fees Act and the plaintiff was entitled to put his own valuation. He, therefore, called upon the plaintiff to state the exact value of his claim in the suit. The plaintiff thereupon stated in oath that he valued the reliefs claims by him in the plaint at Rs. 44,000. On this, the Taxing-Master reported to the Court that the value of the subject-matter of the suit was Rs. 44,000.

After the report of the Taxing-Master, the matter came on for hearing before Shah J. who dismissed the suit on October 1, 1952, holding that the subject-matter of this suit was below Rs. 25,000 and that consequently the High Court had no jurisdiction to entertain the suit.

The plaintiff appealed from the judgment of Shah J.

M. V. Desai, with *R. B. Andhyarujina,* for the appellant.

K. T. Desai, with *K. H. Bhabha,* for the respondents.

Chagla C. J. This appeal raises a question of jurisdiction of this Court to try a suit filed in this Court. The learned Judge below held that as the subject-matter of the claim was below Rs. 25,000 the High Court had no jurisdiction and that the suit should have been instituted in the City Civil Court which has now been invested with jurisdiction to try suits up to Rs. 25,000 which were at one time triable by the High Court on its Original Side. It may be mentioned that the plaintiff himself valued th relief sought by him at more than Rs. 25,000.

The plaintiff is a tenant of a room on the third floor of a property known as Mazda Mansion situated at Warden Road, and the plaintiff's case is that his tenancy comprises in addition to the flat on the third floor a terrace and a room on the terrace which is above the third floor. The defendants purchased the property in question in May 1949 and the plaintiff's grievance in the suit is that by various acts the defendants deprived the plaintiff of the use and enjoyment of the terrace and the room on the terrace. The plaintiff says that in the first instance the defendants locked the room of his flat from inside which led to the terrace and the terrace room. When the plaintiff

succeeded in getting that lock removed and again obtain access to the terrace and the terrace room, according to the plaintiff, the defendants barricaded the door which led to the terrace from outside and thus prevented the plaintiff from having access to the terrace and the terrace room. Under these circumstances the plaintiff sought for a declaration that the terrace and the room thereon was comprised in the plaintiff's tenancy, for a mandatory injunction against the defendants for removing the barricade, and for a permanent injunction restraining the defendants from obstructing or interferring with the plaintiff's exclusive use and enjoyment of the terrace and the terrace room.

The learned Judge below has taken the view that the suit falls under s. 7 (*xi*) (*e*) of the Court-fees Act, and according to him the suit should be valued as laid down in that section according to the amount of the rent of the property to which the suit refers, payable for the year next before the date of presenting the plaint, and on that valuation clearly the value of the suit is far below Rs. 25,000. So the first question we have to consider is whether the learned Judge below was right in coming to the conclusion that the suit fell under s. 7 (*xi*) (*e*) of the Court-fees Act. In order that the suit should fall under that sub-section the tenant must be illegally ejected by the landlord and the tenant must be suing to recover the occupancy of the property from which he has been ejected. In other words, it must be a suit for possession by a tenant against his landlord. In order to decide whether this is a suit for possession, the question is whether on the averments in the plaint it could be said that the plaintiff was not in possession at the date when he filed the suit. If the plaintiff was not in possession, then the only substantial relief he can obtain in the suit is the relief of possession. We agree with Mr. K. T. Desai when he contends that what we must look at is not the form of the plaint but its substance and if in substance the plaintiff was not in possession at the date of the institution of the suit, he cannot convert a suit for possession into a suit for a declaration and injunction merely by giving to the plaint the necessary form and inserting in it the necessary averments.

In our opinion, it is clear, reading the plaint as a whole, that the plaintiff was in possession at the date of the filing of the suit, that his complaint is that his right to possession was challenged by the landlord by the various acts of the landlord, and

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that by reason of certain things that the landlord did he was deprived not of his possession but of the use and enjoyment of the terrace and of the room of which he always was in possession. Nowhere in the plaint does the plaintiff allege that he was deprived of his possession. Nowhere in the plaint does he contend that he was ejected by the landlord. His whole case is that he was throughout in possession, that he was entitled to possession, and that his possession was interfered with by the barricading of the door leading to the terrace which deprived him of his access to the terrace and deprived him of the use and enjoyment of the terrace. It is rather significant that it is not even the defendants' case in the written statement that the plaintiff was not in possession at the date of the filing of the suit. It is perfectly correct that in order to determine the jurisdiction of the Court we have got to look at the plaint, but when the defendants' contention is that the plaintiff was deprived of his possession and that the suit is substantially for possession, we are entitled to consider what the defendants' own case is on this point, and as we just said it is not the case of the defendants that the plaintiff was deprived of his possession. If that had been the case we would have expected a preliminary objection on the part of the defendants that the plaintiff is not entitled to ask for an injunction. It is obvious that it is only a party in possession that can claim the relief of injunction. If a party is not in possession, then the only relief he can claim is the relief of possession. Therefore, with respect to the learned Judge below, in our opinion, the suit does not fall under s. 7 (*xi*) (*e*). In our opinion the suit is substantially for a declaration as to the plaintiff's right and for a consequential relief, viz. the two injunctions sought by the plaintiff, and the suit falls under s. 7 (*iv*) (c) which deals with suits for obtaining a declaratory decree or order where consequential relief is prayed.

Now, in cases falling under s. 7 (*iv*) (c) it is provided that the plaintiff shall state the amount at which he values the relief sought and the Court-fee payable is on the amount at which the plaintiff has valued this relief. Sub-s. (*v*) of s. 7 deals with suits for possession and it is rather significant that in suits falling under sub-s. (*v*) Court-fee is to be paid on the value of the subject-matter. In cases falling under sub-s. (*iv*) of s. 7 the Court-fee to be paid is on the amount at which the relief is valued. So in one case the Legislature emphasizes the relief which the plaintiff seeks in the suit; in the other case what is emphasized is the subject-matter of the suit. The distinction is

obvious and the reason for the distinction is also obvious, because the suit falling under sub-s. (*iv*) the subject-matter is not capable of being valued, and therefore, the Legislature leaves it to the plaintiff himself to put such figure upon the relief which he seeks as he thinks proper. In its very nature the value put by the plaintiff upon his relief must be arbitrary and the Legislature puts no limitation or restriction upon the right of the plaintiff to value his relief at any figure that he thinks proper. It is not a case of the plaintiff exercising his discretion; it is a case of the plaintiff having a right in law to value his own relief and that right is an unfettered right.

The Court-fees Act deals with the revenue which the State derives from the institution of suits. It does not deal with the question of jurisdiction of the Court; but when we turn to s. 8 of the Suits Valuation Act, it provides:

> "Where in suits other than those referred to in the Court-fees Act, 1870, s. 7, paragraphs v, vi and ix, and paragraph x, cl. (*d*), Court-fees are payable *ad valorem* under the Court-fee Act, 1870, the value as determinable for the computation of Court-fees and the value for purposes of jurisdiction shall be the same."

Therefore, except in those cases referred to in s. 8 of the Suits Valuation Act, where Court-fees are payable not at a fixed rate but *ad valorem,* then the value for the computation of the Court-fees and the value for the purpose of jurisdiction is the same, and as suits falling under s. 7 (*iv*) (*c*) are not exempted under s. 8, when a relief is valued by the plaintiff at a particular figure the value for the computation of Court-fees is the same as the value for the purposes of jurisdiction. In this particular case the plaintiff has valued the relief which he seeks over Rs. 25,000. If Court-fees were payable in the High Court of Bombay, then the plaintiff would have to pay Court-fees on such a value and that value would also determine the jurisdiction of the Court. The question arises as to what is the proper construction to be placed on the expression "the value as determinable for the computation of Court-fees." It is suggested that "determinable" does not mean as determined by the plaintiff, but "determinable" means as determined by the Court, and on this an argument is based by Mr. K. T. Desai that it cannot be left to the option of the plaintiff to determine in which Court he will file his suit. Mr. Desai says that the plaintiff cannot exaggerate the value of his relief so as to confer jurisdiction upon the High Court and deprive the City Civil

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Court of its jurisdiction. In our opinion, it is clear that "determinable" in s. 8 of the Suits Valuation Act means determinable as laid down in the Court-fees Act and not determinable by the party but determinable by law, and we must turn to the Court-fees Act in order to find out how the value is to be determined, and when we turn to s. 7 (*iv*) (*c*) the value is to be determined by the plaintiff being given the right to state the amount at which he values the relief.

Now this being the position on a construction of the relevant sections of the Court-fees Act and the Suits Valuation Act, the question is whether the authorities by which we are bound have laid down anything to the contrary. The learned Judge has taken the view that it is not open to the plaintiff to put any arbitrary valuation, however unrelated to the subject-matter it may be, upon the subject-matter of the suit and to institute a suit in such Court as he desires to institute it. With respect to the learned Judge, as we have just pointed out, this is not a case of valuation of the subject-matter of the suit. It is a case of valuation of the relief in the suit. The learned Judge has strongly relied on a decision of this Court reported in *Dayaram* v. *Gordhandas*.[1] What has been particularly relied upon are the observations of Acting Chief Justice Russell in that case, and the remarks are (p. 77):—

> "the words in s. 8 of the Suits Valuation Act 'as determinable' are important; 'determinable' by whom? Surely by the Court who has to try the case. For, whether or not a suit has been properly valued is a preliminary question which ought to be disposed of before the case goes to trial."

This seems to suggest that it is not open to the party to put his own valuation upon the relief he seeks under s. 7 (*iv*) (*c*) for the purpose of invoking the jurisdiction of the Court, or, in other words, although a party may put his own valuation for the purpose of paying Court-fees under the Court-fees Act, when it comes to the question of jurisdiction under s. 8 the Court would not be bound by the valuation put by the plaintiff upon his own relief, but would itself determine what the proper value is. Now, if *Dayaram* v. *Gordhandas*,[1] laid down the correct law, undoubtedly the learned Judge below was right in the conclusion at which he arrived. But it is necessary to bear in mind that in that particular suit the plaintiff claimed possession and Mr. Justice Aston who delivered a concurring judgment with that of the learned Acting Chief Justice took the

[1] (1906) 31 Bom. 73 s. c. 8 Bom. L. R. 885.

view that the suit fell under schedule II, art. 17, clause 1 of the Court-fees Act of 1870. Therefore, really, on the facts of that case the observations were not called for, with respect, from the learned Acting Chief Justice. We do not look upon 31 Bom. 73 as a direct decision construing s. 8 in reference to s. 7 (*iv*) (*c*) of the Court-fees Act, and the view we take is supported by an identical view taken by the various decisions of this Court following upon *Dayaram* v. *Gordhandas*.[1]

The first is a decision reported in *Vachhani Keshabhai* v. *Vachhani Nanbha*.[2] That is a judgment of Sir Basil Scott, Chief Justice and Mr. Justice Batchelor, and it was laid down in that case that in a suit for a declaration of title to land and consequential relief regarding the same, the Court must accept the value of the relief stated in the plaint for the purpose both of the Court-fees and jurisdiction. This case makes it perfectly clear that it is not open to the Court to go behind the valuation put by the plaintiff upon the relief he seeks when the suit falls under s. 7 (*iv*) (*c*), and at p. 34 the learned Chief Justice refers to the decision in *Dayaram* v. *Gordhandas*[1] and points out:

"We have been pressed by a decision of the Court in *Dayaram* v. *Gordhandas*, but that is a case which is clearly distinguishable, because the learned Judges there treated it as a suit in which there was a claim for possession."

The next decision to which reference might be made is *Bai Hiragavri* v. *Gulabdas*.[3] That is a judgment of Mr. Justice Batchelor and Mr. Justice Shah. In that case the plaintiff valued the suit for the purpose of Court-fees at Rs. 130 and for the purpose of jurisdiction it was valued at Rs. 10,000. The suit was for partnership and for accounts and Mr. Justice Batchelor points out at p. 1127:

"The suit however is a suit for accounts and as such falls under cl. (*f*) of sub-s. (*iv*) of s. 7 of the Court-fees Act, and by that Act the amount of fees payable in the suit is to be computed according to the amount at which the relief sought is valued in the plaint. By s. 8 of the Suits Valuation Act the value determinable for the computation of Court fees and the value for the purpose of jurisdiction shall be the same. It was, therefore, in this suit wholly unnecessary for the plaintiffs to fix any value for jurisdiction, nor could the value, which the plaintiffs fixed for that purpose, have any real effect, seeing that the law lays down what the value for the purpose of jurisdiction shall be."

Therefore, the Court took the view that once the plaintiff had valued his relief under s. 7 (*iv*) at Rs. 120, that was the value also for the purpose of jurisdiction, and Mr. Justice

[1] (1906) 31 Bom. s. c. 8 Bom. L. R. 885.

[2] (1908) 11 Bom. L. R. 30.

[3] (1913) 15 Bom. L. R. 1123.

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Batchelor at p. 1128 refers to various decisions of the Bombay High Court and then points out:

"It is necessary only to add that this catena of decisions is not really broken by the case of *Dayaram* v. *Gordhandas*, for that case has been distinguished and its authority weakened by the decision in *Vachhani Keshabhai* v. *Vachhani Nanbha*."[1]

Therefore, according to Mr. Justice Batchelor it was the consistent view of this Court that it was the right of the plaintiff to value his relief under s. 7 (*iv*) and that that was the value which must also govern the question of jurisdiction under s. 8 of the Suits Valuation Act.

Then we have the decision of the Privy Council reported in *Sunderabai* v. *Collector of Belgaum*.[2] The Privy Council there was hearing an appeal from a decision of our High Court and one of the questions that had to be considered was whether an appeal lay to the Court of the District Judge, Belgaum or to the High Court direct and the High Court had affirmed the principle which the Privy Council quotes with approval, and the principle is that when a plaintiff sues for a declaratory decree and asks for consequential relief and puts his own value upon that consequential relief, then for the purpose of Court-fees and also for the purpose of jurisdiction it is the value that the plaintiff puts upon the plaint that determines the same. Therefore, we have the High authority of the Privy Council which has put its imprimatur upon the view consistently taken by this Court on the proper construction of s. 8 of the Suits Valuation Act.

Then there are two subsequent decisions of this Court after the decision of the Privy Council to which reference might be made. One is *Govinda* v. *Hanmaya*.[3] It is a judgment of Sir Norman Macleod, Chief Justice, and Mr. Justice Fawcett. In that case in a suit for injunction the plaintiff valued the claim at Rs. 10 for the purpose of Court-fees and Rs. 500 for the purpose of jurisdiction and he paid Court-fees on Rs. 10. The trial Court called upon him to pay Court-fees on the latter amount and this Court in appeal held reversing the order of the trial Court that the plaintiff was entitled under s. 7 (*iv*) (*d*) of the Court-fees Act to value his claim at Rs. 10 for the purpose of Court-fees and it was wholly unnecessary for him to fix any other for the purpose of jurisdiction, under s. 8 of the Suits Valuation Act, 1887. What is to be borne in mind is the language

[1] (1908) 11 Bom. L. R. 30.
[2] (1918) 21 Bom. L. R. 1148.
[3] (1920) 22 Bom. L. R. 1450.

used by the learned Chief Justice that the plaintiff was entitled under s. 7 (*iv*) to value his claim. There is a judgment to the same effect in the same volume of the Bombay Law Reporter at p. 289, *Balkrishna* v. *Jankibai.*[1] It is a judgment of Mr. Justice Shah and Mr. Justice Hayward, and there also the Court held that the plaintiff had a right to value his claim for the purpose of Court-fees in a suit for a declaration and for an injunction by way of consequential relief, and the value for the purpose of jurisdiction is the same.

Now, in making the observations on which Mr. K. T. Desai has relied, Mr. Justice Russell in *Dayaram* v. *Gordhandas,* relied on two decisions of the Calcutta High Court reported in *Boidya Nath Adya* v. *Makhan Lal Adya,*[2] and *Kirty Churn Mitter* v. *Aunath Nath Deb,*[3] and the view taken was that the Legislature did not intend to leave it to the plaintiff to choose the Court in which he should bring his suit by assigning an arbitrary value to the subject-matter of the suit, and this observation was made in reference to s. 7 (*iv*) of the Court fees Act. Both these decisions were considered in a later decision of the Calcutta High Court in *Hari Sankar Dutt* v. *Kali Kumar Patra,*[4] and a division Bench of that Court consisting of Mr. Justice Brett and Mr. Justice Woodroffe at p. 739 distinguished these two cases and they expressed the opinion that they do not support the proposition that the Court is not bound to accept the value of the relief put by the plaintiff under s. 7 (*iv*) of the Court-fees Act for the purpose of jurisdiction, and in this case the Calcutta High Court has clearly laid down that the Court is bound to accept the value of the relief both for the the purpose of Court-fees as well as for the purpose of jurisdiction.

Mr. K. T. Desai has relied on an earlier judgment of this High Court in *Lakshman Bhatkar* v. *Babaji Bhatkar,*[5] and Mr. Desai says that the decision in *Dayaram* v. *Gordhandas* was based upon the earlier judgment of this Court. When we turn to *Lakshman* v. *Babaji,*[5] we find that the suit there was for recovering a specific amount, viz. Rs. 5,199-2-6 which the plaintiff alleged was the value of his share in the joint property of the family to which the plaintiff and the defendants belonged. The contention of the defendants was that the value was much smaller and the Subordinate Judge who tried the matter held that the

[1] (1919) 22 Bom. L. R. 289.
[2] (1890) 17 Cal. 680.
[3] (1882) 8 Cal. 757.
[4] (1905) 32 Cal. 734.
[5] (1883) 8 Bom. 31.

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plaintiff had intentionally valued his claim too high in order to bring the suit within the higher jurisdiction. It was on these facts that Mr. Justice West who heard the matter with Mr. Justice Nanabhai Haridas made certain observations on which Mr. Desai relies, and the principle which Mr. Justice West enunciates is that the jurisdiction of the Court properly having cognizance of the cause is not to be ousted by unwarrantable additions to the claim of the plaintiff. With respect, we entirely agree with that principle, and it should also be borne in mind that throughout the Court-fees Act was not referred to at all and no question arose for the construction of s. 7 (*iv*) of the Court-fees Act or s. 8 of the Suits Valuation Act. All that the Court laid down was that the plaintiff by inflating his claim of the property which he claimed to beyond Rs. 5,000 had deprived the Junior Civil Judge of jurisdiction and had invoked the jurisdiction of the Senior Judge, and the Court said that the plaintiff was not entitled to do so. The Court was not dealing with a case where the plaintiff in law was given the right to put his own valuation upon the relief which he sought.

Having reviewed these authorities, it is clear in our opinion that the law accepted by this Court and clearly enunciated in the various decisions to which reference has been made, is that a plaintiff is entitled to put his own valuation upon the relief which he seeks in the suit if the suit falls under s. 7 (*iv*) of the Court-fees Act, and if he has put a valuation then that valuation is conclusive for the purpose of s. 8 of the Suits Valuation Act and the jurisdiction of the Court must be determined according to the valuation so put by the plaintiff. It is not open to the Court to go behind that valuation and to consider whether the valuation is a proper valuation or not. In this case, inasmuch as we have held that the suit falls under s. 7 (*iv*) (*c*) of the Court-Fees Act, it was open to the plaintiff to put his own valuation upon the relief which he sought and as the valuation that he has put is more than Rs. 25,000 we are bound by that valuation in view of s. 8 of the Suits Valuation Act. Therefore, for the purposes of jurisdiction the suit must be valued at more than Rs. 25,000. If that is the position, then the High Court has jurisdiction to try the suit and the City Civil Court has not. We are, therefore, of the opinion that the learned Judge, with respect to him, was in error in coming to the conclusion that this Court had no jurisdiction to try the suit.

The result is that the decision of the learned Judge below will be set aside. The suit will, therefore, go back to the trial

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Court for disposal according to law. The appeal will be allowed with costs. Decree of the trial Court set aside. Respondents to pay to the appellant the costs of this issue in the Court below including the costs of the reference to the Taxing Master. Interim order passed by Mr. Justice Coyajee on March 3, 1950 restored. Cross-objections dismissed with costs. Costs of the notice of motion dated January 31, 1950 and the commission issued to London to be dealt with by the trial Court.

Attorneys for appellant: *Payne & Co.*

Attorneys for respondent: *Aibara & Co.*

Appeal allowed.

P. M. P.

APPELLATE CIVIL

Mr. Justice Bavdekar and Mr. Justice Chainani.

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Jan. 7

RANGAPPA KELVADEPPA KONI (ORIGINAL PLAINTIFF), APPELLANT *v* RINDAWA VASANGOWDA PATIL (ORIGINAL DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), ss. 11, 47, O. XXII, r. 5—Death of judgment-creditor pending execution of decree—Rival claims regarding representation to deceased—Contest between judgment-debtor claiming to be adopted son of deceased by his widow and sister of deceased setting up title under will—Judgment-debtor challenging genuineness of will—Adjudication by executing Court on question of representation—Suit by judgment-debtor again raising question of his title as to all properties of deceased—Whether suit is barred by s. 47 (3) and res judicata.

The adjudication under s. 47 (*3*) of the Civil Procedure Code, 1908, of the question of representation to a deceased judgment-creditor in execution proceedings operates as *res judicata* in a subsequent suit between the same parties filed for the determination of the same question.

One K who was executing a decree for partition and possession died during the pendency of the execution proceedings. On his death, his rival representatives were one of the judgment-debtors (plaintiff) who claimed to have been adopted after the death of K by his widow and the elder sister of K (defendant) who set up her title under a will alleged to have been left by the deceased. The other judgment-debtors supported the plaintiff's title and they and the plaintiff in his capacity as a judgment-debtor denied the genuineness of the will. The executing Court found in favour of the defendant and allowed her to carry on the execution proceedings. The plaintiff having filed a suit for a declaration of his title to all the properties of the deceased (i. e. those included in

* Second Appeal No. 1378 of 1949.