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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.

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the partition decree as well as outside it) and for an injunction restraining the defendant from interfering with his possession of them, the defendant contended that the suit was barred under s. 47 (3) of the Civil Procedure Code and also by *res judicata* on account of the adjudication in the earlier execution proceedings:

Held, (i) that s. 47 (3) did not bar the issue in a separate suit as to who was the representative of the judgment-creditor inasmuch as the question did not relate to execution, discharge of satisfaction of the decree;

(ii) that however the provisions of s. 11 or at any rate the principle of *res judicata* applied even though the adjudication relied upon as a bar was given in execution proceedings;

(iii) that, therefore, the suit ought to be dismissed.

Rama Maruti v. *Mallappa Krishna*,[1] followed.

Kalipada De v. *Dwijapada Das*,[2] relied on.

Bhagwat Koer v. *Dhanukdari Prasad*,[3] distinguished.

Bhudeo v. *Gupteshwar*,[4] and *Shaligram* v. *Mst. Dhurpati*,[5] referred to.

The words "for the purposes of this section" used in s. 47 (3) of the Civil Procedure Code make it quite clear that when the question as to representation is determined, the determination is to hold only for the purpose of the section; but they do not exclude the operation of the principle of *res judicata* if and where it could be paplied in any subsequent suit.

Venubai v. *Damodar Sondur*,[6] referred to.

SECOND APPEAL from the decision of R. D. Shinde, Esquire, District Judge, Dharwar, confirming the decree passed by M. S. Hegde, Civil Judge, Junior Division, at Gadag.

Suit for declaration and injunction.

In 1939, one Kelvadeppa brought a suit in Bagalkot Court against his step-brother Venkappa and Venkappa's four sons for partition and possession of a one-half share in some two lands. The suit was decreed on August 15, 1940, and Kelvadeppa applied to the Bagalkot Court for executing the decree on May 30, 1941. While the Darkhast was pending, Kelvadeppa died on February 3, 1942, and his elder sister Rindawa (defendant) applied on July 2, 1942, to be brought on the record as the legal representative of the deceased alleging that she was his sole legatee under a will dated January 7, 1942, made by him. Venkappa, i. e., judgment-debtor No. 1 raised objections to her claim and contended that the will was a forged one, that after

(1) (1942) 44 Bom. L. R. 678.
(2) (1929) L. R. 57 I. A. 24 s. c. 32 Bom. L. R. 505.
(3) (1919) 22 Bom. L. R. 477, P.C.
(4) (1949) 28 Pat. 814.
(5) [1939] Nag. 165.
(6) (1933) 57 Bom. 641.

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Kelvadeppa's death his widow Rukamava had adopted one of his sons Rangappa (plaintiff) as son to her deceased husband on August 16, 1942, and that, therefore, the plaintiff alone was entitled to prosecute the Darkhast as the legal representative of Kelvadeppa. The plaintiff, who was judgment-debtor No. 4, also filed an application in the Darkhast on August 18, 1943, in which he raised two preliminary objections, viz. (1) whether the rival claims of himself as the adopted son of Kelvadeppa and of defendant as the legatee of Kelvadeppa could be decided under s. 47 of the Civil Procedure Code or whether they should be ordered to be tried by a separate suit, and (2) whether the defendant could ask for substitution of her name as the legal representative without making an application under O. XXI, r. 14 of the Civil Procedure Code. Later on the judgment-debtors gave up the preliminary issues and consented to the question of representation being decided in the Darkhast. On April 19, 1947, the Bagalkot Court found that the will produced by the defendant was the last and valid will of the deceased Kelvadeppa and that the defendant was entitled to proceed with the Darkhast. None of the judgment-debtors appealed against that order.

On June 16, 1947, the plaintiff brought the present suit against the defendant in Gadag Court again setting up his title as adopted son to the properties of the deceased Kelvadeppa (some of which were situate within the jurisdiction of Gadag Court) and denying the genuineness of the will left by the deceased. He prayed for a declaration that he was the owner of all the properties of Kelvadeppa and for an injunction from disturbing him in his possession of those properties.

The defendant *inter alia* contended that the suit was barred under s. 47 of the Civil Procedure Code as also by *res judicata.*

On August 16, 1948, the trial Court found in favour of the defendant on both the pleas and dismissed the plaintiff's suit.

On appeal, the decree was confirmed by the District Judge of Dharwar on September 30, 1949.

The plaintiff appealed to the High Court.

G. P. Murdeshwar, for the appellant.

H. F. M. Reddy, for the respondent.

Bavdekar J.—This is a second appeal arising from a suit filed by one Rangappa, who claims to be the adopted son of one Kelvadeppa. It appears that this Kelvadeppa had obtained a decree

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against Venkappa, the father of the plaintiff Rangappa, Rangappa himself and three other sons of Venkappa. The decree was for partition and separate possession of two properties situated in the Badami Taluka of the Bijapur District. Kelvadeppa died after filing an application for execution of the decree, and a question arose as to whether his sister, the defendant Rindawa, was entitled to be brought on the record as his legal representative for the purpose of carrying on execution. Rindawa claimed under a will left by her brother; but the genuineness of this will was denied by all the four defendants —judgment-debtors. The question was then tried, and it was held by the executing Court that the will was a genuine one. It appears that the execution proceedings were then carried on by Rindawa.

Subsequently the plaintiff filed the suit, from which the present second appeal arises, for recovery of possession of all the properties left by Kelvadeppa, upon the footing that he was the adopted son of Kelvadeppa and the will, which had been propounded by Rindawa, was not a genuine one. Rindawa claimed, among other things, that the agitation of the question as to whether the will was genuine was barred by the adjudication in the earlier execution proceedings. She has succeeded upon this point in both the lower Courts, and the only question in the present appeal is as to whether there was such a bar of *res judicata*.

The bar under s. 47 (*3*) has also been mentioned, and it would be convenient to dispose of it in a few words. Now, s. 47 (*3*) says that where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court. The words "for the purposes of this section" make it quite clear that agitation of the same question is not barred for purposes other than those of s. 47, because of the provisions of s. 47 (*3*). Otherwise, there could be no point in the legislature using the words "for the purposes of this section". We do not intend to suggest that when any such question as falls within the purview of s. 47 (*3*) arises, a separate suit for the agitation of the same question is always permissible. But the sub-section itself does not bar the agitation of the question, which is determined under the provisions of that sub-section only for the purpose of s. 47, in subsequent suits. The agitation of such questions by a separate suit is barred when the question arises between parties to the suit in execution proceedings and relates to execution, satisfaction

or discharge of the decree. Its agitation in subsequent suits may be barred, for example, under s. 11 of the Code of Civil Procedure, or upon general principles of *res judicata,* their Lordships of the Privy Council having laid down that s. 11 is not exhaustive. But s. 47 (*3*) itself does not bar the agitation of the question in a subsequent suit.

Now, in order that the bar under s. 11 could arise, there must be a determination of the issue which arises at the moment in a former suit between the same parties litigating under the same title and in a Court competent to try the subsequent suit. It can hardly be disputed that the earlier proceedings were between the same parties, or that they were between parties, who were litigating under the same title, or that the Court, which determined the question, had competency to try the subsequent suit. It is quite true that the plaintiff in this case also claimed to be the adopted son of Kelvadeppa; but it is not as if it is only in that capacity that he raised the contention in the execution proceedings. If we look at the judgment, which has been brought on the record, we find that all the four judgment-debtors including the plaintiff filed one written statement and that all raised a contention that Rindawa, the defendant, was not entitled to represent the estate of Kelvadeppa. We do find that there was an application presented in the case on behalf of the plaintiff, calling himself an adopted son, but describing himself as judgment-debtor No. 4 also, and requesting that the questions which arose upon the written statement should be ordered to be decided by a separate suit. But the Court overruled this contention holding that under s. 47 (*1*) and sub-s. (*3*) the question as to who was the legal representative of the deceased Kelvadeppa for the purpose of carrying on the execution proceedings had got to be decided in the execution proceedings themselves, and that the question could not be decided by a separate suit. Thereupon the plaintiff submitted to the decision of the Court and said that the question whether Rindawa was or was not entitled to represent the estate of her brother should be decided by the Court. We are, therefore, quite clear that the plaintiff contested the will in the proceedings for the execution of the decree obtained by Kelvadeppa as a judgment-debtor and not as a rival claimant. A question does arise whether s. 11, which uses the word "suit" and not "execution proceedings" has application, when the prior adjudication was in execution proceedings, though arising from a different former suit. The word "suit", however, in the Code has been

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interpreted to mean execution proceedings also. It is true that when a question has been decided in a suit or an execution proceeding, agitation of the same question respectively in execution or in another execution proceeding has been held to be barred, irrespective of the provisions of s. 11, but that is because the suit or the earlier execution proceeding cannot be said to be a former suit. No such difficulty arises, when the earlier execution proceeding arises from a different suit. One can conceive of cases when the same question may have been decided between the same parties in execution in a former suit. A creditor may e. g. have obtained two decrees against a debtor, and a question may arise between them in execution proceedings arising from both the suits whether the defendant was an agriculturist on a particular date (the same in both cases). If it is determined in execution in one suit, that would be a determination in a former suit with reference to the execution proceeding arising from the other suit. But even if that is not so, it is well established now that s. 11 is not exhaustive and its principle has application, apart from the limited provisions of that section.

The principal contention which has been taken, therefore, on behalf of the plaintiff is that what was decided in the earlier proceedings was the question of the right of the sister to represent her brother's estate. That question again was decided in a summary manner, and it is contended that the determination of such a question in a summary manner for the purpose of providing representation to the estate of a deceased person cannot, in a subsequent suit, bar by the principles of *res judicata*, whether under s. 11 or otherwise, the agitation of the same question in a suit regularly filed for the determination of the question.

Mr. Murdeshwar, who appears on behalf of the plaintiff in the second appeal, draws in this connection our attention to the Privy Council case of *Bhagwat Koer* v. *Dhanukdari Prasad.*[1] It appears that in that case one Jugal Kishore died in 1872, and then one Bachhu applied for a certificate to collect the debts due to the estate, alleging that he was joint with Jugal Kishore. Anandi Koer, the widow of the deceased, opposed that application, alleging that Jugal Kishore and Bachhu were separate and that she was entitled to succeed Jugal Kishore and obtain a widow's estate. The District Judge decided against her and gave the certificate to Bachhu's son

[1] (1919) 22 Bom. L. R. 477, P. C.

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Mahabir, Bachhu himself having died in the meanwhile. Subsequently one Dhanukhdhari Singh claimed Jugal Kishore's estate from Mahabir's widow Bhagwat Koer and her adopted son, one Ragheshvar Indar Sahi, claiming as the representative of Jugal Kishore at Anandi's death. Bhagwat Koer contested the decision, claiming that Anandi Koer had completely surrendered her estate in 1874 to Mahabir, and the latter thereupon became the absolute owner. The question then arose as to who was the heir of Jugal Kishore upon his death, and it was contended that the decision of the District Judge in the proceedings for the grant of a certificate barred by *res judicata* the agitation of the question as to whether Jugal Kishore was or was not separate from Bachhu. Their Lordships of the Privy Council observed that the decision of the District Judge being given only upon a question of representation did not preclude Anandi Koer from raising the question of title again in a suit properly instituted for that purpose.

Mr. Murdeshwar relies, in the first instance, on these observations of their Lordships of the Privy Council. He relies, in the second instance, upon a decision of the Patna High Court in the case of *Bhudeo* v. *Gupteshwar.*[1] In that case a preliminary decree was passed in favour of one Janki Pandey, and the judgment-debtors preferred an appeal to the High Court. Janki Pandey died during the pendency of the appeal, and two persons were substituted as heirs in his place. The appeal was dismissed and a final decree was passed in favour of the two legal representatives. Subsequently in a suit between the two, in which one claimed that he was the sole person entitled to the entire decretal amount, it was held that there could not be a bar of *res judicata,* inasmuch as the decision under O. XXII, r. 5 of the question whether a certain person is or is not the legal representative of a deceased plaintiff is not an issue arising in the suit itself, but is really a matter collateral to the suit and one that had to be decided before the suit itself could be proceeded with. The appointment of a legal representative is not the determination of any issue which is properly raised in the suit itself and cannot operate as *res judicata.* Mr. Murdeshwar thirdly relies upon a decision of the Nagpur High Court in *Shaligram* v. *Mst. Dhurpati.*[2] In that case there was raised a question as to whether the decision of a question as to whether a person is or is not the representative of a party to a decree becomes final, whether on the ground of *res judicata*

[1] (1949) 28 Pat. 814. [2] [1939] Nag. 165.

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or because of the provisions of s. 47 of the Code of Civil Procedure, and it was held that it became final on the ground that s. 47 of the Code of Civil Procedure had so provided. But it was said that such a decision would be final only in that suit and will not operate as *res judicata* in a subsequent suit though a separate suit with regard to the parties' death within the earlier execution proceedings would be barred by s. 47. The question as to whether in a subsequent suit the adjudication will bar the agitation of the same question by the principle of *res judicata* did not directly arise, however, in that case.

On the other hand, Mr. Reddi, who appears on behalf of the defendant, relies upon a decision of a single Judge of this Court in *Rama Maruti* v. *Mallappa Krishna.*[1] Mr. Justice Divatia held in that case that a finding arrived at in execution proceedings in a contest between the plaintiff and defendant that the former is the adopted son of the owner of the property in dispute operates as *res judicata* in a subsequent suit between the same parties regarding another portion of the property, the case being governed by s. 47 (3) and not by O. XXII, r. 5 of the Code of Civil Procedure, 1908.

Now, it is quite true that in the case of *Bhudeo* v. *Gupteshwar* there are observations to be found to the effect that the determination of a question under O. XXII, r. 5 does not operate as *res judicata* as this question is decided in the suit collaterally. It appears to us, however, that the decision could well have been put upon the ground that even upon the footing that there was a dispute in the earlier suit between the two persons, who claimed to be the heirs of the deceased Janki Pandey, the principle of *res judicata* would not apply on the ground that they did not claim through parties ranged on the opposite side. Both claimed under one of the parties to the earlier suit, namely, Janki Pandey. It is true that there can be *res judicata* between co-plaintiffs, and their Lordships of the Patna High Court have dealt with the question as to how far that doctrine could apply. But apart from the fact that the rival claimants were not co-plaintiffs, but were heirs of the same plaintiff, the Court came to the conclusion that the conditions upon which the bar of *res judicata* applied as between co-plaintiffs were not satisfied. That was sufficient to dispose of the question.

[1] (1942) 44 Bom. L. R. 678.

In the case of *Bhagwat Koer* v. *Dhanukdari Prasad*,[1] the question as to whether there was a partition between the three brothers was gone into in proceedings for a certificate under the provisions of Act No. XXVII of 1860. That Act specifically provided by s. 5 that it did not affect the right of the person entitled to the whole or any part of the moneys received by virtue of a certificate issued under the Act to recover the same by a regular suit against the holder of the certificate. It was arguable, however, that when a question was decided between two rival claimants to the certificate, the application of the principle of *res judicata* would not allow the Act of 1860 to affect the right of either, and the decision embodies the principle that if in an earlier proceeding, which is not a suit, any question is decided between the parties in a summary manner for the purpose of securing representation, that will not come in the way of the same question being raised in a later regular suit by any of the parties. As a matter of fact, their Lordships of the Privy Council have repeatedly pointed out that s. 11 of the Code of Civil Procedure is not exhaustive, and the principle of *res judicata* embodies a rule which has application apart from the provisions of that section; and they have applied this principle where in an earlier proceeding for administration to the estate of a deceased person dispute arose between two rival claimants as to who was his nearest heir, and the question was decided for the purpose of the grant of letters of administration; *Kalipada De* v. *Dwijapada Das*.[2] Mr. Murdeshwar, who appears on behalf of the plaintiff, says that their Lordships pointed out that the earlier proceedings being contentious had been tried as a suit. That is undoubtedly true; but that does not alter the fact that the earlier proceedings were merely for the purpose of determining who was to represent a particular estate, nor the fact that they were not a suit. That was why the Privy Council had to put their decision on the ground that the principle of *res judicata* had application apart from the provisions of s. 11 of the Code of Civil Procedure. If at all, therefore, there is any such rule as contended by Mr. Murdeshwar in regard to decisions obtained on questions of representation, it must be restricted to cases where the earlier proceedings are intended to be disposed of as summary proceedings. In that case, the determination of a question merely for the purpose of representation may not prevent the agitation of the same question again in a suit regularly filed

[1] (1919) 22 Bom. L. R. 477, P. C. [2] (1929) L. R. 57 I. A. 24.

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for the determination of that question. Mr. Murdeshwar says that in this case the question appears to have been determined on affidavits. Rindawa filed affidavits in support of the will. The judgment-debtors, after vacillating, ultimately took no steps to deny the allegations, or the facts deposed to in the affidavits filed on her behalf. In the result, the will was found to be proved. But what actually happened in this case cannot possibly make any difference to the general principle. Even if the Court allows affidavits to be filed in determining the question, which arises under s. 47 (*3*), it is always open to any party to require that the deponents should be recalled for the purpose of cross-examination. It was also open to the plaintiff to examine a handwriting expert, as Mr. Murdeshwar says that it is desirable should be done, for the purpose of finding out as to whether the will which was propounded by the defendant was signed by Kelvadeppa or not. It cannot possibly be said, therefore, that when a question is to be settled under s. 47 (*3*), it is intended that it should be disposed of summarily. In that case, there is no reason why the decision should not subsequently operate as *res judicata* in a suit between the same parties.

Then, we come to the provisions of s. 47 (*3*) and the words "for the purposes of this section" in that sub-section. Now, this section is almost similar to O. XXII, r. 5. The principal difference seems to be the words "for the purposes of this section," and the question which falls to be determined is, what is the import of these words. One explanation which has been put forward before us is that these words have been used in order to bring in the limitations which have been mentioned in s. 47 (*1*), and this Court took the view in *Venubai* v. *Damodar Sondur*,[1] that the effect of these words is to import in sub-s. (*3*) the limitations mentioned in s. 47 (*1*). Mr. Murdeshwar argues that there are other reasons besides why the words have been enacted in that section. He says that the purpose in the first instance is in order to make it clear that even if there is a determination of the question as to who is the legal representative in execution, the real representative will not be barred in a subsequent suit instituted by him from contending that whatever might have been decided in the execution proceedings, he was the legal representative entitled to the benefits which have been obtained by the person actually brought on the record in execution as the legal representative. Secondly, the words have been put in in order to provide that the bar under s. 11 of the Code of Civil Procedure did not apply.

[1] (1933) 57 Bom. 641.

Now, there are difficulties in the way of accepting the first of these explanations. If it is held that the words were used for the purpose of importing the limitations which are mentioned in s. 47 (*1*), the question which does arise is, what happens in case a question as to the representation to a deceased party arises in execution proceedings and the opposite party, say, for example, the judgment-debtor, took no interest whatsoever in the matter. It is obvious that such a question ought to be decided by the Court. Section 47 (*3*) has *ex hypothesi* no application. There is O. XXII, r. 5 to be considered. But apart from the fact that Mr. Justice Divatia threw a doubt upon the applicability of the section to execution proceedings in *Rama Maruti* v. *Mallappa Krishna*, the question which would arise would be why, in case O. XXII, r. 5 had application to execution proceedings, it was considered necessary to enact s. 47 (*3*) at all. Order XXII, r. 5 is general in its terms. It is not confined to the cases in which the question as to whether any person is the legal representative of a deceased party arises between the person claiming as a legal representative and the opposite party. Nor is it confined to cases in which the question arises between two rival claimants. *Prima facie*, therefore, it would appear that s. 47 (*3*) was entirely redundant in case O. XXII, r. 5 had application to execution proceedings in general. One possible reason which one may give as to why it was felt necessary to enact s. 47 (*3*) is to make it quite clear that when a question as to who was the legal representative arose between a person claiming to be the legal representative of a party and the opposite party, then the question will fall within the purview of s. 47, and then because of the definition of "decree" in s. 2, it would amount to a decree. Whatever that might be, for the purpose of the present case it does not make any difference whether s. 47 (*3*) is or is not limited to the cases, in which the question of representation arises between a person claiming to be representative and the opposite party. Mr. Murdeshwar can succeed only in case he can show that there is something in that section which makes s. 11 of the Code of Civil Procedure inapplicable. He says that the words "for the purposes of this section" have been enacted in order to make it quite clear in the first instance that the person, who is the actual legal representative, will not be barred in a subsequent suit from agitating the question that he is the proper legal representative and he is entitled to recover from the person found to be a legal representative in the execution proceedings whatever advantage

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he may have received from the execution. That is undoubtedly one of the effects of the use of these words; but even so that does not dispose of the question. When subsequently a suit is filed and the bar relied upon is not the bar under s. 47, but the bar under s. 11, what has got to be found is as to whether the words which have been used are so strong as to exclude the operation of s. 11 when it applies otherwise or the principle of *res judicata* when the section in terms has no application, and in my view, those words are not so strong. The words indeed make it quite clear that when the determination is made, the determination is to hold only for the purpose of the section; but they do not secure that if the principle of *res judicata* can be applied in any subsequent suit, its operation would be excluded because of those words.

In that case, as Mr. Justice Divatia pointed out in *Rama Maruti* v. *Mallappa Krishna*,[1] the principle of *res judicata* has been applied when the earlier proceeding, in which the adjudication relied upon as a bar was arrived at was in execution proceedings, as it was in the present case, and if that is so, there being no other reason made out as to why the provisions of s. 11 or the principle of *res judicata* should not be applied, it must be held that there was a bar.

The appeal must, therefore, be dismissed with costs.

Chainani J. In the proceedings instituted for executing the decree obtained by Kelvadeppa from Bagalkot Court, the Court held that Kelvadeppa had executed a will in favour of Rindawa; that it was legal and valid; that it could operate upon the property of Kelvadeppa, and that as the present plaintiff had been adopted after the death of Kelvadeppa, Rindawa and not the present plaintiff, was the legal representative of Kelvadeppa. The question for consideration is whether this decision bars the present suit.

Section 47 (*3*) C. P. C. provides that

"Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court."

This provision has been enacted evidently in order to make it clear that the question as to who is the legal representative of a deceased party should be decided by the Court executing the decree, and not by a separate suit. The object of the provision is to enable execution proceedings to go on and to prevent

[1] (1942) 44 Bom. L. R. 678.

their abrupt termination by reason of death of one or the other party. The words "for the purposes of this section", in my opinion, mean "for the purposes of determining the questions referred to in sub-s. (*1*)", that is, all questions arising between the parties to the suit, in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree. The Court will no doubt decide the question as to who is the representative of a party for the purposes of the proceedings before it, but this decision will have the same effect as its decision on any other question, and would be binding on the parties to the execution proceedings, or their representatives. Mr. Murdeshwar has contended that the words "for the purposes of this section" mean that the decision of the Court will be binding on the parties only in the proceedings under the section, i. e. in the execution proceedings, and not in any other proceedings, and that it would be open to the parties to re-agitate the same question in some other proceedings. Something can undoubtedly be said in support of this view, but after careful consideration, I consider that the better view is the one indicated by me above, that once the executing Court has decided who is the representative of a party, its decision on this question will have the same effect as its decision on any other question. It is a general principle of law that the same question should not be litigated twice, for otherwise there would be no end to litigation or to use the words of Lord Coke, "great oppression might be done under colour and pretence of law"; see the observations of their Lordships of the Privy Council in *Singh* v. *Singh,*[1] *Hook* v. *Administrator-General of Bengal,*[2] and *Ramchandra Rao* v. *Ramchandra* Rao.[3] I will point out subsequently that the questions whether the will relied upon by Rindawa was genuine and was the last will of Kelvadeppa and whether consequently Rindawa was the legal representative of Kelvadeppa arose between Rindawa on the one hand and all the judgment-debtors on the other. The dispute was not fought out only between Rindawa and the present plaintiff in his capacity as the adopted son of Kelvadeppa. It was also fought out between Rindawa and all the judgment-debtors, the present plaintiff being judgment-debtor No. 4. Both the parties had an opportunity to lead evidence on the matters in dispute. It appears that the evidence consisted of affidavits, but the persons who had made affidavits

[1] (1916) L. R. 43 I. A. 91 at p. 98. [2] (1921) L. R. 48 I. A. 187.
[3] (1922) L. R. 49 I. A. 129.

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could have been summoned and cross-examined. The executing Court gave its decision, after hearing all the parties and after they had led such evidence as they wanted to adduce. If the decision of the Court that the will was genuine and valid and that Rindawa was the legal representative of Kelvadeppa was wrong, the judgment-debtors, or any of them, could have appealed against it. But they did not do so. Having regard to the general principle of law that the same question should not be allowed to be litigated twice, the plaintiff cannot be allowed to re-agitate the same question in the present suit.

A determination in execution proceedings can operate as *res judicata* in a subsequent suit between the same parties; see *Ram Kirpal Shukal* v. *Mussamat Rup Kuari*,[1] and *Shamrao* v. *Shantaram*.[2] It was observed in the former case that the binding force of a judgment depended upon the general principles of law, and not upon s. 13 of Act X of 1877, which corresponded to s. 11 of the present Code. In *Hook* v. *Administrator-General of Bengal*,[3] their Lordships observed that s. 11 of the Code of Civil Procedure, 1908, is not exhaustive of the circumstances in which an issue is *res judicata*, and that the plea of *res judicata* can be raised, apart from the limited provisions of the Code. This decision was re-affirmed in *Kalipada De* v. *Dwijapada Das*.[4] Mr. Murdeshwar has, however, urged that while this may be the position in respect of decisions given on other questions, a determination on the question as to representation can never operate as *res judicata*. He has relied on the observations of the Privy Council in *Bhagwat Koer* v. *Dhanukdari Prasad*,[5] in which at page 481 it was observed that the decision of the District Judge, given in proceedings for a succession certificate, that the deceased was joint with his brother at the time of his death and that consequently his brother was his representative, having been given only upon a question of representation, did not preclude the parties from raising the question of title again in a suit property instituted for that purpose. These observations were made in an appeal from a decision given in a proceeding for a succession certificate under Act XXVII of 1860. It will be seen from s. 5 of that Act that it specifically saved the right of a person, who might "be entitled to the whole or any part of the moneys realized by virtue of a (succession) certificate" to "recover the same by regular suit against the

[1] (1883) L. R. 11 I. A. 37.
[2] (1934) 37 Bom. L. R. 123.
[3] (1921) L. R. 48 I. A. 187.
[4] (1929) L. R. 57 I. A. 24.
[5] (1919) 22 Bom. L. R. 477.

holder of the certificate"; see also the proviso to s. 9 of the Act. I do not, therefore, think that the Privy Council intended to lay down as a universal rule that a decision on a question of representation can never operate as *res judicata*. In fact, in *Kalipada De* v. *Dwijapada Das*,[1] the Privy Council held that a decision given in proceedings under the Probate and Administration Act 1881 that a certain person is the nearest heir of the deceased, for the purpose of deciding to which one of the rival claimants the letters of administration to the estate of the deceased should be granted, is binding in a subsequent suit between the parties to the earlier proceedings, and those claiming under them.

Mr. Murdeshwar has also urged that the dispute in the execution proceedings was only between Rindawa and the present plaintiff in his capacity as adopted son and that as the adopted son was not a party to these proceedings, the decision given therein cannot operate as *res judicata*. Exhibit 25, is a copy of the proceedings before the executing Court. This shows that after Rindawa had made an application for the substitution of her name in place of the deceased Kelvadeppa, on the ground that she was a legatee under a will, which had been executed by Kelvadeppa, notices were issued to the judgment-debtors and that in answer to those notices the judgment-debtors filed written statement, in which they denied the execution of any will by Kelvadeppa and contended that the will relied upon by Rindawa was a forgery and that Rindawa was consequently not the legal representative of the deceased decree-holder, but that his representative was judgment-debtor No. 4, the present plaintiff. The dispute, therefore, arose between Rindawa and the present plaintiff, not only in his capacity as an adopted son, but also in his capacity as one of the judgment-debtors. The present plaintiff subsequently made an application, in which he raised various contentions. On this application, two issues were framed and tried as preliminary issues, and these were:—

"(1) Whether the question at issue, namely, whether the legatee or the adopted son can execute the decree, relates to the execution of the decree, and if so, whether it is outside the scope of s. 47 of the Civil Procedure Code?

(2) Whether the so-called legatee Rindawa can apply for mere substitution of her name without applying for execution under O. XXI, r. 11 of the Civil Procedure Code?"

These questions could have been raised by the plaintiff only in his capacity as judgment-debtor No. 4. Mr. Murdeshwar's argument that the executing Court decided the dispute about the

[1] (1929) L. R. 57 I. A. 24.

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genuineness and validity of the will only between two persons claiming to be the representative of the deceased decree-holder Kelvadeppa, and not between the parties to the execution proceedings cannot, therefore, be accepted.

Mr. Murdeshwar has also relied on the decision of the Patna High Court in *Bhudeo* v. *Gupteshwar*,[1] in which it has been held that the decision of the question under O. XXII, r. 5, Code of Civil Procedure, whether a certain person is or is not the legal representative of a deceased plaintiff is not on an issue arising in the suit itself, but it is really on a matter collateral to the suit. In that case after a preliminary decree had been passed in favour of J., he died during the pendency of an appeal preferred by the judgment-debtors. A & B were then substituted in J.'s place. Thereafter A brought a suit against B for declaration that he was the sole heir of J and, therefore, entitled to the entire money due on the decree. It was held that the suit was not barred by *res judicata*. It does not appear that the judgment-debtors in the first suit had raised a dispute as to whether A or B or both were the representatives of J. The question was, therefore, decided not between the parties to the suit but between persons claiming to be the representatives of one of those parties. That is not the position here. In this case, as I have pointed out above, the judgment-debtors had specifically denied that Rindawa was the legal representative of Kelvadeppa. The dispute was, therefore, between a person claiming to be the representative of the decree holder and the judgment-debtors, one of whom was the present plaintiff. Its determination by the executing Court was necessary in order to enable the execution proceedings to be carried on. For the purpose of determining this question it was necessary to decide whether the will relied upon by Rindawa was genuine and valid. It is, therefore, difficult to hold that this question did not arise or was not decided in the execution proceedings.

It has been held by the Privy Council in *The Raja of Pittapur* v. *Shri Rajah Row*,[2] that a decision on an issue in a suit will bar the trial of the same issue in another suit, even if the subsequent suit relates to different properties. The same principle would apply when the former decision was given in execution proceedings. I am, consequently, of the opinion that the question whether a valid will had been executed by Kelvadeppa in favour of Rindawa is *res judicata* and cannot be tried again in

[1] (1949) 28 Pat. 814.

[2] (1884) L. R. 12 I. A. 16.

the present suit. This view is also in accordance with that taken by Mr. Justice Divatia in *Rama Maruti* v. *Mallappa Krishna.*[1]

The plaintiff's claim must consequently fail. I, therefore, agree with my learned brother that the appeal should be dismissed with costs.

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Appeal dismissed.

M. W. P.

APPELLATE CRIMINAL

FULL BENCH

The Hon'ble Mr. M. C. Chagla, Chief Justice, Mr. Justice Dixit, and Mr. Justice Shah.

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Bombay Rents, Hotel and Lodging House Rates Control Act (Bom. LVII of 1947), ss. 18 (1), 5 (8), 6—Receipt of premium by landlord in consideration of agreement to grant lease—Liability of landlord for penalty under s. 18—"In respect of," meaning of—Some connection between grant of lease and receipt of premium sufficient—Penal statute—Rules of construction.

Where a landlord receives a premium in consideration of an agreement to grant a lease in future of certain premises under construction, the lease to come into force on the completion of the premises, the receipt of the premium, though not simultaneous with the grant of the lease, is still *in respect of* the grant of a lease within the meaning of s. 18 (*1*) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, and the landlord is liable to be convicted under the section.

The expression "in respect of" has the widest connotation; it means in its plain meaning "connected with or attributable to." Therefore, it is not necessary that the receipt of the premium should be simultaneous with the grant of the lease. So long as some connection is established between the grant of the lease and the receipt of the premium by the landlord, the provisions of the section would be satisfied. Such a nexus is present in a case where the landlord accepts a premium for the purpose of granting a lease in future.

If two possible and reasonable constructions can be put upon a penal provision, the Court must lean towards that construction which exempts the subject from penalty rather than one which imposes a penalty. The principle of construing a statute in order to suppress a mischief and to advance the object of the legislation does not apply to a penal statute. It is not competent to the Court to stretch the meaning of an expression used by the Legislature in order to carry out the intention of the Legislature. A penal statute must be construed according to its plain, natural and grammatical meaning.

* Criminal Appeal No. 592 of 1952.

[1] (1942) 44 Bom. L. R. 678.