

Moti Lal Vs. Ram Narain

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Court : Allahabad

Decided On : May-28-1917

Reported in : (1917)ILR39All551; 40Ind.Cas.1006

Judge : Tudball and ;Muhammad Rafiq, JJ.

Appellant : Moti Lal

Respondent : Ram Narain

Judgement :

Tudball and Muhammad Rafiq, JJ.

1. The facts of the case, so far as they are necessary for the purposes of this application, may be reduced to this. The present applicant obtained a preliminary decree in a partnership case against one Pirbhu Dayal and others. Pirbhu Dayal died after the preliminary decree had been passed. Some two years after his death, the plaintiff applied to have the name of his heir brought upon the record and asked the court to proceed with the suit. The heir objected on the ground that the application was barred by limitation as it ought to have been made within the period of six months from the date of the death. The court of first instance held that it was a case to which Order XXII, Rule 10, applied and granted the application as having been made within three years of his death. The defendants appealed. The court below has held that Order XXII, Rule 4, applied and that the application is barred by time. The plaintiff comes here in revision. The first plea taken before us

is that if Order XXII, Rule 4, applied, no appeal lay to the court below. As a matter of fact the applicant went into court urging that Order XXII, Rule 10, applied and the court of first instance agreed with him and passed an order under that rule, and an appeal did lie from such an order. It is again argued before us as a second point that Order XXII, Rule 10, applies to suits like the present, and not Order XXII, Rule 4. It is quite clear that Rule 10 applies to all other cases which are not dealt with or covered by Rules 1 to 9 in Order XXII. It is urged that a preliminary decree has been passed in this case and therefore Rule 4 cannot apply. With this we cannot agree. In our opinion the suit was still pending. A preliminary decree does not put an end to the suit. It must be continued up to the stage of the final decree. That being so, it is clear that Rule 4 covers the present case. If authority be deemed necessary for our decision, we would point to the case of *Jamnadaa Chhabildas v. Sorabji Kharsedji* (1891) I.L.R. 16 Bom. 27, which is a clear authority in point. Our attention was called to the case of *Chunni Lal v. Abdul Ali Khan* (1901) I.L.R. 23 All. 331. This, however, is by no means in favour of the present applicant. That was a mortgage suit to which Sections 88 and 89 of the Transfer of Property Act of 1882 applied. There it was held that a decree under Section 88 of the Transfer of Property Act, 1882, was only a decree nisi and not a final decree, and that the suit in which such a decree is passed does not terminate until an order absolute is made under Section 89. Whether the law laid down there was correct or incorrect, it is clear that the law, as it now stands, since the present Code of Civil Procedure came into force, is in accordance with that decision. The suit is clearly still pending. Rule 4 of Order XXII clearly does apply. The court of first instance was wrong in applying Rule 10, and we therefore disallow the present application with costs.