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to suits for compensation for breach of contract. Inasmuch as, in the present case, it was expressly stipulated that the money should be returned if the new lease were not granted, it may no doubt be said that the defendant broke his contract when he failed to return the money. But in my opinion the more appropriate article is art. 62, for what the plaintiff really seeks is not compensation, which means damages, but to get back the money which he had deposited. As the period of limitation fixed by both the articles is the same, the question as to which article is most applicable becomes of no practical importance. We think the Judge was clearly right in holding the suit to be barred. It is therefore unnecessary to direct a notice to be sent to the lower Court, or a notice to be served on the respondent or his pleader.

We confirm the decision of the lower Appellate Court, and direct that the confirmation be notified to that Court under s. 551 of the Code of Civil Procedure.

Appeal dismissed.

Before Mr. Justice White and Mr. Justice Maclean.

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April 8.

TOPONIDHEE DHERJ GIR GOSAIN (PLAINTIFF) *v.* SREEPUTTY SAHANEE (DEFENDANT).*

Res judicata—Court of Competent Jurisdiction—Decision on Question of Title—Civil Procedure Code (Act X of 1877), s. 13.

When a question of title has to be, and is, decided by a Court of competent jurisdiction with reference to the value of the subject-matter in dispute, such decision, or the ultimate decision upon appeal from such decision, is final, and the question of title becomes a *res adjudicata* as between the parties to the suit, although it may have the effect of determining the title to an estate or estates, the value of which exceeds the jurisdiction of the Court in which the suit was instituted.

Per WHITE, J.—In considering, on the hearing of an appeal, the competency of a Court for the purpose of deciding upon a question of *res judicata*, the

* Appeal from Original Decree, No. 277 of 1878, against the decree of W. Wright, Esq., Subordinate Judge of Cuttack, dated the 23rd August 1878.

powers of the Court in which the suit was instituted, and not those of the Court in which the suit was decided on appeal, must be looked to.

THE facts of this case are fully stated in the judgments of the Court (WHITE and MACLEAN, JJ.)

Mr. *Branson* and Baboo *Mohesh Chunder Chowdhry*, Baboo *Hemchunder Banerjee*, and Baboo *Umbica Churn Bose* for the appellant.

Mr. *Twidale* and Baboo *Annoda Pershad Banerjee*, Baboo *Obhoy Churn Bose*, and Baboo *Chunder Madhub Mitter* for the respondent.

The following judgments were delivered

WHITE, J.—The appellant, who is the plaintiff in the Court below, has brought this suit in the Court of the Subordinate Judge of Cuttack, against the respondent, who is the defendant in the Court below, to be confirmed in the possession of certain lakhiraj resumed, and other lands in Mouza Boulang, and a cutcherry-house there; and also to recover possession of a considerable amount of other property, of which he states that he was dispossessed on the 18th of June 1868. He alleges that all the lands and property, the subject of the suit, were the ancestral and self-acquired property of a certain Mohunt Toponidhee Jugrup, who died on the 13th of Assar 1274 (corresponding with 27th September 1866), and he claims the whole property on the ground that he is the *chela* and heir of the deceased Mohunt. He values the entire property for the purposes of the suit at upwards of a lakh of rupees.

The defendant in his written statement denies the title of the plaintiff as *chela* and heir of the deceased Mohunt, and alleges that he (the defendant) is the person who really fulfils those characters; and he further pleads that the plaintiff is estopped from setting up the title upon which he sues, inasmuch as his alleged title has already formed the subject of adjudication by a competent Court, and has been determined adversely to the plaintiff.

It appears that, in 1871, the defendant's tehsildar brought a

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suit on behalf of his master, in the Collector's Court, under Act X of 1859, against one Anund Beharee, to recover from him rent for the years 1276-77 Amli, and also damages for its detention in respect of ten'gunths and nine biswas of land occupied by Anund Beharee, and forming part of a thirteen-anna share of Mouza Nagpore, claimed by the defendant as a portion of the estate belonging to him as heir of the deceased Mohunt. In that suit the plaintiff intervened under s. 77 of the foregoing Act, which allows an intervention where the intervening party has actually and in good faith received and enjoyed the rent before and up to the time of the commencement of the suit. The Collector has no authority under that section to enquire into the title of the rival claimants to the suit, but must decide the suit, so far as they are concerned, according to the result of his enquiry as to whether the intervening party was before, and at the commencement of the suit, in actual receipt and enjoyment of the rent. But the section also contains a proviso that the decision of the Collector shall not affect the right of either party, who may have a legal title to the rent, to establish his title by suit in the Civil Court, if instituted within one year from the date of the decision. The plaintiff's intervention was unsuccessful, and the Collector, on the 9th of October 1871, passed a decree against Anund Beharee in favor of the defendant's tehsildar for Rs. 12-3-4-8.

On the 16th of December 1871, the plaintiff filed, in the Munsif's Court at Pooree, a plaint against the tenant Anund Beharee, and also against the present defendant and his tehsildar, alleging that the thirteen annas share of Mouza Nagpore was his ancestral property and in his possession, and that, after the death of his *guru, viz.*, the deceased Mohunt, he had collected the rents from the ryots in that mouza, and stating that the suit was brought "to set aside the order of the Collector of the 9th of October 1871 by determination of his (the plaintiff's) title to the ten gunths nine biswas of land," the subject of the rent-suit. He valued the last mentioned land at Rs. 17-7-10-8, which, as appears from his schedule of valuation, was made up of Rs. 5-4-6 stated to be the approximate value of these lands, and of Rs. 12-3-4-8, the amount of the Collector's decree.

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The present defendant, on the 7th of February 1872, put in his written statement to that suit, in which he denied that the plaintiff ever was in possession of the thirteen annas share of the mouza or had any title to the same, and alleged that the title and possession was in himself. The defendant also specifically denied that the plaintiff was the *chela* and heir of the deceased Mohunt, and alleged that he (the defendant) was the *chela* and heir, and as such was in possession.

On the 13th of March 1872, the Munsif settled several issues, and amongst them this—"Was the plaintiff as the *chela* and heir of Mohunt Jugrup, deceased, in possession as proprietor and in receipt of rent of the ten gunths and nine biswas through the tenant Anund Beharee, or is the present defendant in possession of the entire thirteen annas of Mouza Nagpore as heir and *chela* of the deceased Mohunt, and as such collected rent from the tenant Anund?"

Upon this issue the Munsif found that "it was satisfactorily proved that the plaintiff was the real *chela* and heir of the deceased Mohunt, and was also in possession as proprietor of the thirteen annas of Mouza Nagpore, which included the land in dispute, and was also in receipt of rent from the tenant Anund Beharee," and accordingly made a decree in the plaintiff's favor.

The defendant appealed from this decree to the Officiating Judge of Cuttack, who, on the 8th of August 1872, after examining the evidence adduced by the plaintiff, found that the plaintiff was not, as he alleged, the *chela* of the deceased Mohunt Jugrup, and accordingly dismissed the suit.

Although the Officiating Judge limits his finding to the *chelaship* of the plaintiff, yet I think it must be treated as a finding against the plaintiff's heirship as well. The Judge, in commencing his examination of the plaintiff's evidence, expressly states that he is dealing with the issue on the merits, which is the issue in the Munsif's Court recited above. The plaintiff had also in his plaint based his heirship on the allegation that he was a *chela*, and his claim was resisted by the defendant on the ground that he was not a *chela*.

Against this decision the plaintiff preferred to this Court the only appeal which he could prefer, *viz.*, a special appeal,

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which, on the 17th of June 1873, was dismissed with costs. Inasmuch as the decree of the lower Appellate Court was based on its finding upon the evidence against the plaintiff, it was a decree which could not be disturbed in special appeal, unless the plaintiff could show that the decision was bad on one or other of the grounds set forth in s. 372 of the old Code, Act VIII of 1859, which he must have failed to do.

In the present suit, the Subordinate Judge of Cuttack, considering that the result of the above litigation between the plaintiff and the defendant had finally decided the question of heirship to the deceased Mohunt adversely to the plaintiff, and also that, upon the authority of *Krishna Behari Roy* v. *Brojeswari Chowdranee* (1), the matter was *res judicata*, has dismissed the plaintiff's suit.

The plaintiff does not appear to have excluded from his present suit the ten gunths and nine biswas of land, which formed the subject of the litigation commenced in the Munsif's Court. As regards that fragment of the deceased Mohunt's, he must unquestionably be held to be concluded by the issue of that litigation; and that this was so was not disputed on behalf of the appellant. But as regards the residue of the estate, the appellant argues:—1*st*, that under Act X of 1877 (the Civil Procedure Code), as amended by Act XII of 1879, the question of the heirship of the appellant was not *directly* in issue in the suit in the Munsif's Court. That suit, he contends, was only to establish his title to the rent of a small portion of the deceased's estate, whilst the present suit relates to the entire estate, and seeks for a confirmation of his possession of a portion of that estate and for khas possession of the remainder, and that in the former suit the question of heirship came only indirectly and collaterally before the Court.

The prayer of the appellant's plaint in the Munsif's Court appears to claim, under his alleged title as heir, possession of the ten gunths and nine biswas of land. But reading the prayer by the light of the statements in the body of the plaint, and of the issues settled by the Munsif, to which reference has been made, I think that what the appellant

(1) L. R., 2 I. A., 283; S. C., I. L. R., 1 Calc., 144.

really sought was to establish his legal title to the rent. The suit was brought within a little more than two months after the decision of the Collector, and may fairly be considered as a suit of the class mentioned in the proviso of s. 77 of Act X of 1859. Whether that suit, however, was brought to establish his title to the land or the rent, appears to me to make no difference. His title to either rested on the same basis, and the same issue would have to be tried, *viz.*, whether the appellant was *chela* and heir of the Mohunt.

In the present suit also the right to any relief depends entirely upon his having this issue determined in his favor. The groundwork of the decision in the suit in the Munsif's Court is the same as what, if the present suit succeeds, must be the groundwork of the decision in the Subordinate Judge's Court, and the same evidence to establish the appellant's heirship as was given in the Munsif's Court must be given again before the Subordinate Judge of Cuttack.

I am unable, therefore, to see that the matter directly in issue in this suit was not also directly in issue in the suit in the Munsif's Court.

The next objection taken is, that the Munsif's Court was not a Court of *competent* jurisdiction within the meaning of s. 13 of the Code as amended. It is argued that, as the Munsif was not competent to try a suit for the recovery of the *whole* estate of the deceased Mohunt, or to entertain a suit for a declaration of the appellant's title to the whole estate as heir of the deceased Mohunt by reason of the estate exceeding in value the Munsif's jurisdiction, the Munsif's Court ought, therefore, not to be treated as competent to decide finally the question of the plaintiff's heirship.

It is to be observed that the Munsif decided the suit in favor of the appellant, and found that he was the real *chela* and heir, and that it is the Court of the District Judge which, reversing that decree on appeal, has in effect found that the appellant was not the heir.

If, therefore, this suit could be considered as one instituted in the District Judge's Court, there is no question but that that Judge was competent to try a suit for the entire estate, and the

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question now raised would fall to the ground. But in considering the competency of a Court for the purpose of deciding upon a question of *res judicata*, we must, I think, look to the powers of the Court in which the suit was instituted, and not to the powers of the Court by which that suit was decided on appeal.

I must confess that if I were unfettered by authority, I should be inclined to hold that the Munsif's Court, although competent to try the issue of heirship for the purpose of arriving at a conclusion upon a matter wholly within the jurisdiction, *viz.*, the right to the rent of the ten gunths nine biswas of land, was yet not competent to find upon that issue, so as to make it *res judicata* in a suit instituted in a Court of superior jurisdiction and relating to a large estate whose value is far beyond the pecuniary limits of the Munsif's jurisdiction. I am much impressed with the judgment of Peacock, C. J., in *Mussamut Edun* v. *Mussamut Bechun* (1). The learned Chief Justice there lays it down, that "concurrency of jurisdiction in the two Courts is a necessary part of the rule which creates the estoppel," known as *res judicata*, and that, "in order to make the decision of one Court final and conclusive in another Court, it must be the decision of a Court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is given in evidence as conclusive." One exception, no doubt, exists, but it was probably not referred to in the case cited, because it was thought to be unnecessary for the purposes of the judgment. The exception is, that the judgment of the inferior Court is conclusive upon the matter actually decided by that Court.

The learned Chief Justice in the case cited bases his judgment upon the answers given by the Judges in the *Duchess of Kingston's case* (2), and he points out that, if the question of the concurrency of the jurisdiction of the two Courts is treated as immaterial, the whole procedure as regards appeals might be entirely changed.

In the present case, the appellant succeeded in the Munsif's Court, but had his suit dismissed in the Appellate Court, and

(1) 8 W. R., 175, at p. 179; S. C., 2 Ind. Jur. (N. S.), 265.

(2) 2 Smith's L. C., 784.

if the issue of heirship is treated as *res judicata*, the title which he claims to a large estate, asserted to be of the value of more than a lakh of rupees, will have been finally decided without his being able to have the opinion of the High Court upon the merits of his title, and without having a right of appeal to the Privy Council. No doubt, little sympathy will be felt for the plaintiff, inasmuch as he brought himself into the difficulty in which he is placed by choosing to sue in the Munsif's Court to establish his legal title to the rent of an insignificant portion of the deceased Mohunt's estate, instead of bringing a suit in the District Court in the first instance to recover the whole estate. But I can easily suppose the case of a party, who is in actual possession of a large estate, but is dragged into the Munsif's Court as a defendant in a suit brought by a rival claimant, who sues a tenant of the estate for the rent of a few fields and is met by the defence that the rent is payable to the party who is in possession of the rest of the estate. If the rival claimant succeeds in the Munsif's and District Judge's Courts, or fails in the first and succeeds in the second Court, upon an issue of title to the estate, the rival claimant can, by availing himself of the doctrine of *res judicata*, turn the other party out of the remainder of the estate, and the defeated party will be then deprived of a large property—it may be of the value of several lakhs of rupees—without being able to procure the judgment either of this Court or of the Privy Council on the merits of his title.

There are numerous decisions of this Court relating to the question of *res judicata*, but in none of these, except two, was the Court, as far as I can gather the facts from the reports, dealing with the judgments of Courts other than Courts of concurrent jurisdiction.

In two cases, however, the judgments of an inferior Court, deciding an issue which was the foundation of the plaintiffs' claims in their suits brought in a superior Court, were unquestionably held to be conclusive in the latter. The first case is that of *Nund Kishore Singh* v. *Hurree Pershad Mondul* (1). It is not a case easy to understand as reported, but it appears

(1) 13 W. R., 64

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to have been a regular appeal against a decree of a Subordinate Judge, declaring that the plaintiff had a patni right in an entire village and directing that he should get possession. The defendants, who were the appellants before the High Court, amongst other defences, contended that the suit was *res judicata*, and therefore barred by s. 2 of the Code of 1859, because in a former suit brought by the plaintiff in a Munsif's Court against the appellants for cutting some trees and dispossessing him of some jungle land pertaining to the mouza, an issue was raised as to the plaintiff's title to the mouza as patnidar, which issue the Munsif declined to try; but the Judge on appeal tried and decided against the plaintiff. Markby, J., in giving the judgment of the Court, says:—"At the same time we wish it to be clearly understood that even had the plaintiff been able to show that he had a cause of action separate and distinct from that in the former suit, we do not think it at all follows that the plaintiff would not have been concluded by the previous decision. Having heard the argument on that point, we desire to express our entire concurrence in the decision of the High Court of Madras in the case of *Mohideen* v. *Mahomed Ibrahim* (1), which is in point. The land now claimed and the land which the plaintiff sought to recover in the former suit is all held under one title. The whole question of the plaintiff's patni title was raised and decided in the former suit; and we consider that decision conclusive between these parties as to every portion of land held under that title. On this ground also, therefore, we think the suit ought to be dismissed."

The second case is that of *Bemolasoondury Chowdrain* v. *Punchanun Chowdhry* (2), in which a similar decision is given. There the defendants had successfully intervened in a rent-suit brought in the Munsif's Court by the plaintiffs against a tenant of a portion of the land in dispute in the second suit, and the defendants succeeded in establishing their right as against the plaintiffs. The second suit was brought by the plaintiffs against the same defendants in the Court of the Subor-

(1) 1 Mad. H. C. Rep., 245. (2) I. L. R., 3 Calc., 705.

dinate Judge to get possession of a half share of several villages which the plaintiffs claimed under the same title as they had put forward in the Munsif's Court. The Subordinate Judge dismissed the suit brought in his Court. This Court, to which the plaintiffs had appealed, affirmed the decision of the lower Court, and in the course of their judgment said:—"Another bar to the entertainment of this suit is the prior adjudication recognizing the title of the defendants in the suit of Saroda Gobind Chowdhry *v.* Komul Ghose. In that suit the plaintiffs chose to intervene, and the question of title as between them and the defendants was distinctly raised and determined. They are, therefore, estopped under the ruling of the Full Bench in *Gobind Chunder Koondoo* v. *Tarruck Chunder Bose* (1) from setting up this title now. This principle is also recognized in the new Code of Civil Procedure, s. 13, expl. 4."

In both these cases a decision on the question of *res judicata* appears to have been unnecessary, as the Courts considered that there were other sufficient grounds in the one case for reversing, and in the other case for affirming, the decrees appealed against. In each case the Court, in passing their decision on the foregoing question, relied upon authorities which, when examined, appear not to touch the question of concurrency of jurisdiction. In the Madras case cited by Mr. Justice Markby—*Mohideen* v. *Mahomed Ibrahim* (2)—both the suits seem to have been brought on the Original Side of the High Court. In the Full Bench case cited by Kemp, J., both the suits appear to have been instituted in the Munsif's Court.

These circumstances diminish the authority of these cases, but there remains the Privy Council decision referred to by the Subordinate Judge of Cuttack, which shows that concurrency of jurisdiction is not necessary to raise the estoppel. In *Krishna Behari Roy* v. *Brojeswari Chowdranee* (3), the appellant and plaintiff had brought a suit in the District Judge's Court of Rajshahye to set aside the adoption of the

(1) I. L. R., 3 Calc., 145. (2) 1 Mad. H. C Rep., 245.
(3) L. R., 2 I. A., 283; S. C., I. L. R., 1 Calc., 144.

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respondent. The appellant had previously intervened in a suit which the respondent had brought in the Court of the Principal Sudder Ameen to set aside certain patni leases granted by his adoptive mother. The ground of the intervention was, that the appellant was the heir and that the respondent had no title as adopted son. The issue was tried and found against the intervenor and in favor of the adoption. The District Judge held that the appellant's suit was barred by reason of the judgment in the former one. A special appeal was preferred to this Court, which upon such an appeal was not competent to go into the evidence, and the decree was affirmed. The Judicial Committee upheld the decision of this Court, thus holding that the Court of the Principal Sudder Ameen, although a Court of inferior jurisdiction to that of the District Court, was a Court of competent jurisdiction. The case in the Privy Council was decided upon s. 2 of Act VIII of 1859 (the first Code of Civil Procedure). But the words in that section relating to the competency of the Court in which the former suit is heard remain the same in the new Code, and the amending Act has made no alteration in this respect.

The doctrine laid down by Peacock, C. J., was not referred to in any of the cases which I have cited, nor, so far as anything appears in the reports, was brought to the notice of the Courts which decided these cases. Notwithstanding this, I think I am bound by the decision of the Privy Council, which, having the facts before it, expressly decides the appeal of *Krishna Behari Roy* on the ground that the main issue which he sought to have tried in his suit had already been determined by a Court of competent jurisdiction.

I must hold, therefore, that the Munsif's Court was a Court of competent jurisdiction within the meaning of s. 13 of the Code as amended.

This case was argued on both sides on the hypothesis that the Code as amended by Act XII of 1879 governed the case. The decree appealed from was passed on the 23rd of August 1878. It is not necessary to determine whether the case is really governed by the Code as amended, or by the Code as it stood in 1878, inasmuch as the 13th section as amended, if

it really differs in meaning from the 13th section as it stood before the amendment, is the more favorable of the two to the appellant's contention, and inasmuch as I hold that even under the section as amended the appellant's suit cannot be maintained, the appeal is dismissed with costs.

MACLEAN, J.—I concur in dismissing this appeal, and in holding that the suit is barred under s. 13, Civil Procedure Code (Act X of 1877).

The suit No. 40 of 1872 was brought by the present plaintiff in consequence of an unfavorable decision in a rent-suit under Act X of 1859, and instead of bringing it to establish his right to the rents as provided by s. 77 of that Act, he brought it to establish his possessory right to the lands. He valued the suit at Rs. 5-4-6 for the land, and Rs. 12-3 for the rent, and he based his claim upon his position as *chela* and heir of a deceased Mohunt, who died in 1868. A dispute had at that time arisen between the plaintiff and defendant as to the succession to the mohuntship, and various proceedings, of which the rent-suit was one, had taken place between them relative to the succession. In his plaint in the present suit, the plaintiff alleges that since 1868 he has been 'gradually' dispossessed by the defendant of most of the properties held by the former Mohunt, and I have no doubt that when the suit No. 40 of 1872 was brought the plaintiff had a cause of action for a considerable portion of the property. He chose, however, to confine that suit to a small portion of the property, and to put in issue his title as *chela* and heir of Jugrup Gir Gosain. The defendant objected to the suit proceeding, but joined issue with him upon the question of title, and I am satisfied that that question was one which, in the words of s. 13, Act X of 1877, expl. ii, ought, under the circumstance in which the defendant was placed, to have been made "ground of defence," and it was therefore directly and substantially in issue in the suit No. 40 of 1872.

It may be that the Court in which that suit was instituted was a Court which could not have tried the suit brought to assert a title to the entire estate of Jugrup Gir Gosain; but, as I have stated, the plaintiff elected to put his title in issue in a Court of limited jurisdiction and to sue for a small portion

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of an estate, when in point of fact his title and possession of much more than that suit involved had been challenged and disturbed; and for my part I believe that the plaintiff was endeavouring to obtain, as hinted by the District Judge, "a cheap decision as to his claim to a very large estate." It is very probable, therefore, that a plea under s. 7, Act VIII of 1859 would have been a sufficient answer to this suit. No such plea however has been raised, and we are only dealing with the plea of estoppel, and I have stated my opinion that the issue now raised was raised and decided in the suit of 1872.

As to the competency of the Munsif to deal with a question of title to land worth Rs. 5-4, there can be no question, and I concur in the opinion that the decision on that title is conclusive between the parties as to every portion of land held under that title—*Nund Kishore Singh* v. *Huree Pershad Mundul* (1). Were it otherwise, a number of suits might be brought in Courts of limited jurisdiction for portions of an estate, and the party in possession who might have successfully defended his title in each or all of them might be harassed by a further suit for the whole estate in a Court of exclusive jurisdiction.

In my opinion, the decision relied upon by the Subordinate Judge—*Krishna Behari Roy* v. *Brojeswari Chowdranee* (2)—applies to this case, and the suit cannot be maintained.

The appeal will be dismissed with costs.

Appeal dismissed.

(1) 13 W. R., 64. (2) L. R., 2 I. A., 283; S. C., I. L. R., 1 Calc., 144.