1885.

AKOBA DÁDÁ v. SAKHÁRÁM.

application of the sister of the deceased debtor who was placed on the record; and a decree was ultimately passed against the latter in favour of the judgment-creditor, and an order made that, in default of payment by the defendant of Rs. 300 and costs, the plaintiff should recover that amount from the mortgaged premises, and the Court, (consisting of Sir Michael Westropp and Mr. Justice F. D. Melvill), held that the inheritance was not substantially represented so as to bind the son, who was a minor at the time, inasmuch as the existence of the minor son was ignored throughout the proceedings in that suit.

In the present case the plaintiff has been, as a fact, whatever the reason for it may have been, ignored throughout the proceedings in Suit 170 of 1871. The inheritance cannot, therefore, in our opinion, be said to have been substantially represented in that suit, and the plaintiff's right to the equity of redemption consequently remained unaffected by the auction sale to Sakhárám; and he is now entitled to redeem the mortgage, or to recover possession of it, if, as he alleges, the mortgage has been already satisfied.

We must, therefore, reverse the decree, and send the case back for trial subject to the above remarks. Plaintiff's costs throughout up to the present time to be borne by Sakhárám.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice Nánábhái Haridás and Sir W. Wedderburn, Bart., Justice.

1885. *March* 18.

HARI BHIKA'JI, APPLICANT, *v.* NA'RO VISHVANA'TH, OPPONENT.*

Extraordinary jurisdiction—Res judicata—Code of Civil Procedure (Act XIV of 1882,) Sec. 622.

A wrong decision on a question of *res judicata* is not a subject for the interference of the High Court under section 622 of the Code of Civil Procedure, Act XIV of 1882.

THIS was an application for the exercise of the High Court's extraordinary jurisdiction under section 622 of the Code of Civil Procedure, Act XIV of 1882.

* Extraordinary Civil Application, No. 43 of 1884.

1885.

HARI BHIKÁJI v. NÁRO VISHVÁNÁTH.

The plaintiff in 1882 sued the defendant to recover half the mesne profits in respect of a field called Ringniche Agar, (Sub-Nos. 1 and 2, Survey No. 99), in the village of Kothávade for the years 1879-1880 and 1881. The defendant contended that in a partition suit, which the plaintiff had brought against him in 1872, the field Ringniche Agar was not included; and that Sub.-No. 2 belonged exclusively to the defendant. The defendant admitted that half of Sub.-No. 1 belonged to the plaintiff, but that the amount of mesne profits, *viz.*, Rs. 140-7-3, was calculated at too high a rate. The Subordinate Judge awarded the claim; the Appellate Court, before which the defendant contended that the suit was *res judicata*, decided that it was not, but modified the decree of the Subordinate Judge by reducing the amount of mesne profits to Rs. 105-7-3.

The defendant applied to the High Court under section 622 of the Code of Civil Procedure, Act XIV of 1882, as no second appeal lay, and the Court granted a rule *nisi*.

Vásudev Gopál Bhándárkar in support of the rule.

Ghanashám Nilkant Nádkarni showed cause.

The arguments and cases cited appear from the following judgment of the High Court:—

NA'NA'BHA'I HARIDA'S, J.—The plaintiff Náro sued Hari Bhikáji for Rs. 140-7-3 as so much money received to his use, the same being his half share of the profits of a field called Ringniche Agar.

The Subordinate Judge made a decree for the full amount claimed. The defendant thereupon appealed, and the Assistant Judge of Ratnágiri modified that decree by awarding only Rs. 105-7-3, with all costs on the defendant, holding, upon the defendant's contention, apparently raised for the first time in appeal, that the subject-matter of the suit was not *res judicata*.

The suit being of the nature cognizable in a Court of Small Causes, and no second appeal lying in consequence, the defendant has applied to this Court to set aside the decrees of the lower Courts in the exercise of its extraordinary jurisdiction.

In support of the application it is contended that the lower Courts had no jurisdiction to try this suit under section 13, Civil Procedure Code, inasmuch as the matter in issue in this suit—

1885.

HARI BHIKÁJI v. NÁRO VISHVÁNÁTH.

the right to the profits—was also in issue in a previous suit between the same parties. It is, however, not denied that the suit itself is one within the jurisdiction of the lower Courts; but it is urged that the decree in the previous suit, having regard to the language of the above section, deprived them of their jurisdiction; that, by a wrong decision on that point, they could not give themselves jurisdiction; and that, therefore, we should quash their decisions under section 622, Civil Procedure Code, on the ground of their having exercised a jurisdiction not vested in them by law.

We are, however, not prepared to admit the soundness of this contention. The suit itself being within the jurisdiction of the Assistant Judge, we think he had jurisdiction to determine whether the defendant's plea of *res judicata* was made out or not; and, if he found it was not, he was bound to proceed with, and dispose of, the suit on the merits.

It is unnecessary for us to decide whether the Assistant Judge was right in the decision he came to on that point. Assuming, in favour of the defendant, that his decision on the question of *res judicata* is wrong, we are still unable, under section 622, Civil Procedure Code, to interfere with it. It was a question which, as stated above, he had jurisdiction, and was bound, to try. In doing so, therefore, it cannot be said that he exercised a jurisdiction not vested in him by law; and even if his decision be wrong in law—which is all that is or can be said in this case—we cannot on that ground alone interfere. We cannot say that, in coming to that decision, he acted "illegally or with material irregularity" within the meaning of section 622, Civil Procedure Code. See on this subject the cases collected in *Tejrám* v. *Harsukh*[1]; *In re Lakhykant Bose* [2]; *Pogose* v. *Catchick* [3]; *Amir Hassan Khán* v. *Sheo Baksh Singh*[4]; and *Shiva Náthájí* v. *Joma Káshináth* [5].

We must, therefore, discharge the rule, with costs.

Rule discharged.

(1) I. L. R., 1 All., 104, note (c).
(2) I. L. R., 1 Calc., 180.
(3) I. L. R., 3 Calc., 708.
(4) I. L. R., 11 Calc., 6; S. C. L. R., 11 I. A., 237.
(5) I. L. R., 7 Bom., 341.