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of allowing perusal of them by the defendants at proper times, and of giving them up uninjured after the full execution of their decree or on the order of the Court.

We reverse the decree of the Subordinate Judge, and direct that it be replaced by one giving effect to this judgment. Costs in both Courts to be paid by the respondent.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1887. *March* 1.

AMRITRA'V KRISHNA DESHPA'NDE, (ORIGINAL DEFENDANT), APPLICANT, *v.* BA'LKRISHNA GANESH AMRA'PURKAR, (ORIGINAL PLAINTIFF), OPPONENT.*

Civil Procedure Code (Act XIV of 1882) Sec. 622—High Court's power of revision—Res judicata—Jurisdiction, meaning of the term.

The plaintiff sued the defendant to recover arrears of an annual allowance to which the plaintiff claimed to be entitled under a *sanad* dated 1846. The defendant in his defence raised certain points, most of which he had raised in a previous suit brought against him by the plaintiff for the recovery of arrears of the same allowance, and which in that suit had been decided against him. The lower Court held that the decision of the former suit operated as *res judicata*, and refused to allow the defendant to put forward any new matter which might and ought to have been urged as a defence in the former suit. A decree was made in favour of the plaintiff. The defendant applied to the High Court under section 622 of the Civil Procedure Code (Act XIV of 1882).

Held, (following *Hari Bhikáji* v. *Náro Vishvanáth*(1)), that the decision, even though wrong, of a question of *res judicata* was not a failure, or a cause of failure, to exercise jurisdiction, and did not warrant the interference of the High Court under section 622 of the Civil Procedure Code (Act XIV of 1882).

THIS was an application under section 622 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff sued to recover three years' arrears of an annual allowance of Rs. 50 granted by the defendant's father, Krishnáráv Amritráv Deshpánde, under a *sanad* dated 24th October, 1846. The allowance in question had been regularly paid by Krishná-

*Application under Extraordinary Jurisdiction, No. 66 of 1886.

(1) I. L. R., 9 Bom., 432.

ráv during his life-time. After his death the defendant refused to pay it. Thereupon the plaintiff filed a suit in 1872, similar to the present suit, against the defendant, and obtained a decree awarding his claim.

In the present suit the defendant raised a number of objections, most of which he had urged in the suit of 1872. The Subordinate Judge held that the decision in the former suit operated as a *res judicata*, and declined to proceed with the case any further, or to consider any new matter which might and ought to have been urged by way of defence in the former suit. He, therefore, awarded the plaintiff's claim with costs.

His decree was confirmed, on appeal, by the Acting Assistant Judge of Poona.

The defendant applied to the High Court under section 622 of the Civil Procedure Code (Act XIV of 1882).

A rule *nisi* having been granted,

Pándurang Balibhadra, for the plaintiff, showed cause :—This rule ought to be discharged. The decision of the Courts below is not open to review under section 622 of the Civil Procedure Code. The question of *res judicata* was raised in the suit, and the lower Court was bound to consider and decide it. Its decision of that question was within its jurisdiction. It refused to try over again an issue which it found had been previously decided by a competent Court between the same parties. In so deciding, it did not fail to exercise its jurisdiction. Its decision may have been wrong, but that is not the point under section 622. *Hari Bhikáji* v. *Náro Vishvanáth*[1] is a case in point: cites *Rájáh Amir Hássan Khán* v. *Sheo Baksh Singh*[2]; *Magnirám* v. *Jiwá Lál*[3]; *Chattarpal Singh* v. *Rája Rám*[4]; *The Queen* v. *Justices of Central Criminal Court*[5].

Mahádev Chimnáji Apte, for the defendant, *contra* :—The case turns on the interpretation of the word "jurisdiction" in section 622 of Act XIV of 1882. It means a power to adjudicate. If a matter is declared by law not to be triable again, a second trial

(1) I. L. R., 9 Bom., 432.
(2) L. R., 11 I. A., 237.
(3) I. L. R., 7 All., 336.
(4) I. L. R., 7 All., 661.
(5) L. R., 17 Q. B. Div., 598, at p. 602.

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of it is an excess of jurisdiction. The Privy Council case of *Rájáh Amir Hássan Khán* v. *Sheo Baksh Singh* does not confine this Court's supervision to cases of pecuniary or territorial jurisdiction.

The words "no Court *shall* try, &c.," in section 13 mean that no Court shall have jurisdiction. If, in the face of these words, a Court does proceed to retry a suit on an issue which has been previously adjudicated upon, it acts clearly *ultra vires*,—that is, in excess of the jurisdiction vested in it by law. A question of *res judicata* is thus one affecting jurisdiction—*Dhán Singh* v. *Basant Singh*(1); *Bádámi Kuar* v. *Dinu Rái*(2); *Sew Bux Bogla* v. *Shib Chunda Sen*(3).

WEST, J. :—The question before us is whether a Court determining that a particular question in a case is *res judicata* and thereon declining to try it again, fails to exercise jurisdiction, in the event of its view being wrong, so as to give occasion for the exercise of the power given to this Court by section 622 of the Code of Civil Procedure. By declining to go into an inquiry which was pertinent to the merits of the case, it is contended, the Courts below have failed, or may have failed, to exercise a jurisdiction vested in them; and the question of whether the point of *res judicata* was properly decided is, therefore, one open to review by the Court. No inferior Court can give itself jurisdiction, or deprive itself of jurisdiction, by a wrong decision of a preliminary point on which the jurisdiction itself depends; and here the Court in pronouncing on *res judicata* has decided a preliminary point, and thence concluded (wrongly it may be) that it cannot go into the question further. Such is the argument.

Now, jurisdiction, according to the exact conception of it formed by the Roman lawyers, consists in taking cognizance of a case involving the determination of some jural relation, in ascertaining the essential points of it, and in pronouncing upon them. An inquiry into whether the jurisdiction exists is not an exercise of jurisdiction over the case itself, but an investigation of another question altogether, that of whether the conditions of cognizance are satisfied. There is in the determina-

(1) I. L. R., 8 All., 519. (2) I. L. R., 8 All., 111. (3) I. L. R., 13 Calc., 225.

tion of such a question no adjudication in the stricter sense, no ascertainment of jural relations and command consequent thereon. This inquiry, therefore, may properly be reviewed in many cases, where, when the exercise of a true jurisdiction in the fuller sense has taken place, no appeal or even review may be possible: (see *Colonial Bank of Australia* v. *Willan*[1]). If the objection that might have been raised as a preliminary one is not, in fact, raised until the hearing of the case has proceeded to a certain stage, the inquiry thus provoked is not thereby changed in its character. It is only in a second intention of the word that "jurisdiction" is used in speaking of such an inquiry as an "exercise of jurisdiction." Objections affecting jurisdiction must relate either to the person, the place, or the character of the suit. If a Court has competence in these respects it may exercise jurisdiction, and does exercise it, whether correctly or erroneously, in dealing judicially with a cause placed before it: (see *The Queen* v. *The Justices of Central Criminal Court*[2]).

Jurisdiction, again, however, has two closely related, but distinct, senses. It means sometimes authority, sometimes the exercise of the authority, and this either in investigation or by way of command. Where the law speaks of exercise of jurisdiction, or failing to exercise jurisdiction, it means using or failing to use authority in entering on an inquiry and carrying it to a judicial conclusion. The exercise of jurisdiction is not declined when such a conclusion has been arrived at, merely because, had the decision on a particular point been different, further questions would have had to be disposed of. Here, the Court had to inquire and determine whether a certain right or group of rights existed, and whether an alleged infringement of them had taken place. As to one question arising in this inquiry, it was said "the point has been previously adjudicated." The Court had then to take notice of the prior judgment to construe it and to determine its bearing on the case before the Court. In doing this the Court was exercising its jurisdiction. On finding that the question had been decided, it took that as conclusive, instead of trying the question over again. Its decision accepting the

(1) L. R., 5 P. C. at p. 443. (2) 17 Q. B. Div. at p. 602.

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prior decision on this point was an exercise of jurisdiction and as final as its determination of any other point in the case. It proceeded no further with the inquiry on that particular point; but this course was one not in the way of declining jurisdiction, or failing to exercise it, but one of the exercise of jurisdiction, and necessitated because the particular subject was exhausted by its determination. As authority, the Court's jurisdiction was retained; as an exercise of authority it had reached its legal termination. The decision of a question of *res judicata*, as of limitation or the like, raised in a case is not, even though wrong, a failure, or a cause of failure, to exercise jurisdiction, any more than a wrong decision on the whole litigation. We agree with the previous decision of this Court in *Hari Bhikáji* v. *Náro Vishvanáth*[1], and discharge the rule with costs.

Rule discharged.

(1) I. L. R., 9 Bom., 432.

ORIGINAL CIVIL.

Before Mr. Justice Farran.

1887. *March* 11.

AMRUTLAL KA'LIDA'S, (PLAINTIFF), *v.* SHAIK HUSSEIN, MAHOMED EBRA'HIM, AND SHUMSUDIN, (DEFENDANTS).*

Mahomedan law—Wakfnáma—Wakf—Perpetuity—Ultimate trust in favour of charity.

M., the father of the three defendants, executed an instrument purporting to be a *wakfnáma* in favour of his heirs and descendants, generation after generation. The office of *mutwáli* he reserved for himself for life, and, in the event of his death, he appointed his wife and youngest son (Mahomed Ebráhim) *mutwális*, with certain powers of delegation, upon the following conditions:—The said *mutwális* having received the annual income of the property, and having defrayed the expenses of repairs and the taxes, &c., were to divide the balance into four equal shares, and to make over one share to his son Shumsudin and his descendant after descendant for their expenses; one share, in like manner, to his son Shaik Hussein; one share, in like manner, to his son Mahomed Ebráhim; and as to the remaining share, to pay one-half thereof to his wife, Ashábibi, for expenses; and one-half thereof to his sister, Shábanbibi, for expenses. The deed then proceeded:—

"If any one from among my heirs and (? or) descendant after descendant should die, then the said *mutwális* shall make his or her funeral outlays accord-

* Suit No. 415 of 1886.