that which we have already indicated as the plain meaning of the language. Reference may also be made to the observations of Edge, C. J., in *Wali Ahmad Khan* v. *Ajudhia Kandu*[1].

With regard to the contention that this application will not lie, it will be enough to say that the only issue tried by the Subordinate Judge—whether the plaintiff was *wrongfully* dispossessed—was not an issue upon which the dispute between the parties could be properly adjudicated upon. There was thus a material irregularity by the Subordinate Judge in the use of his jurisdiction, and this application is in order under section 622, Civil Procedure Code.

The Subordinate Judge's decree must be reversed, and the plaintiff's claim must be decreed. The defendants-opponents will bear all costs throughout.

Decree reversed.

G. B. R.

(1) (1891) 13 All. 537.

APPELLATE CIVIL.

1904.
December 8.

Before Mr. Justice Russell and Mr. Justice Aston.

VARAJLAL BHAISHANKAR SELAT AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* SHOMESHWAR *alias* AMRATLAL HARIDAT BHAT (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), sections 373, 374—Limitation Act (XV of 1877), section 14—Cause of like nature—Withdrawal of a suit with permission to bring another—Limitation.

On the 15th April, 1898, two plaintiffs, a father and son, filed a suit against two defendants to recover damages for an assault which took place on the 7th April, 1898. The defendants pleaded misjoinder of parties and of causes of action. On the 14th November, 1901, the High Court on appeal gave effect to this plea of the defendants, but under section 373 of the Civil Procedure Code gave leave to one of the plaintiffs, whose name was struck out, to file, if so advised, a fresh suit in respect of his own cause of action. The plaintiff, whose name was so struck out, filed this suit on the 13th February, 1902.

Held, that the second suit was barred by limitation, for when a suit is withdrawn under section 373 of the Civil Procedure Code, with permission to bring

* Appeal No. 4 of 1904 from order.

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a fresh suit, the effect of section 374 of the Code is that limitation is to apply to the second suit as if it was the first.

Held, also, that section 14 of the Limitation Act did not apply to such a case.

Krishnaji Lakshman v. *Vithal Ravji* (1) followed.

APPEAL from an order passed by S. L. Batchelor, District Judge of Ahmedabad, reversing the decree passed by, and remanding the case to, Atmaram Jamnadas Kaji, Subordinate Judge, at Umreth.

The plaintiff and his father brought a suit (No. 246 of 1898), on the 15th April, 1898, in the Court of the Subordinate Judge at Umreth, against the defendants to recover damages for an assault alleged to have been committed by the latter upon the former on the 7th April, 1898.

The defendants in their written statement objected to the suit on the grounds, *inter alia*, of misjoinder of causes of action and of parties.

This objection was finally adjudicated upon in Second Appeal No. 99 of 1901 (2) when the High Court directed "that the papers be returned to the Court of first instance with permission to the plaintiffs . . . to elect which of them shall proceed on the plaint already filed." And the order ran: "under the provisions of section 373 we give leave to the plaintiff whose name is struck out to file, if so advised, a fresh suit in respect of his own cause of action."

Of the two plaintiffs the father elected to proceed with the suit: and the son filed, on the 13th February, 1902, a fresh suit.

The defendants pleaded limitation urging that "the plaintiff cannot deduct the time occupied in the former Suit No. 246 of 1898, which was instituted by him and his father jointly against the same defendants and which was withdrawn under section 373 of the Civil Procedure Code."

The Subordinate Judge held that the claim was time-barred. His reasons were:

Section 374 of the Civil Procedure Code clearly provides that when a suit is withdrawn with liberty to bring fresh action and the suit is thus instituted, the

(1) (1887) 12 Bom. 625. (2) (1901) 26 Bom. 259 at p. 267.

plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been brought.

Under the provisions of section 14 of the Limitation Act the time is allowed only when the Court is unable to entertain the first suit for want of jurisdiction. In the present case the previous suit did not fail for defect of jurisdiction but because it was badly framed by wrongfully joining causes of actions.

If to a suit like this the provisions of section 14 of the Limitation Act are made applicable, section 374 of the Civil Procedure Code would become nugatory. The bar created by the latter section is not removed by the section of the Limitation Act, because the causes for which the withdrawal of a suit is allowed, are not causes of 'like nature' with defect of jurisdiction: see *Pirjade* v. *Pirjade* (I. L. R. 6 Bom. 681); *Krishnaji Lakshman* v. *Vithal Ravji* (I. L. R. 12 Bom. 625); *Ramji* v. *Chandmal* (I. L. R. 10 All. 587).

On appeal the District Judge reversed the decree passed by the Subordinate Judge, and remanded the case to the Court of the Subordinate Judge of Umreth, for a decision on the merits. The grounds of his judgment were expressed as follows:—

Plaintiff relies on section 14 of the Limitation Act. This consideration has been weighed by the Sub-Judge who, however, has disallowed it, mainly by reason of the rulings at I. L. R. 6 Bom. 681 and I. L. R. 17 Mad. 299. As I shall indicate presently this Madras decision was subsequently overruled. Thus Mr. Justice Melville's pronouncement at I. L. R. 6 Bom. 681 is the principal authority making in defendant's favour. But upon the best consideration that I can give to the matter, I do not think that plaintiff is defeated by this ruling. In the first place his Lordship in that case was dealing chiefly with applications for execution. Secondly, the finding proceeds upon the generalization that causes for which "the withdrawal of a suit or application may be permitted are not causes of a like nature with defect of jurisdiction." If, then, it should appear that in any given case a suit was withdrawn for want of jurisdiction or for a cause of a like nature, then, I apprehend, his Lordship's decision will not be pertinent. And that, I think, is certainly a true account of what has happened here. I refer to the High Court's judgment in Appeal No. 99 of 1901, where their Lordships reversed the earlier decrees in this litigation, and in doing so pointed out that, though reluctant to interfere at that stage, they had no option under the law as it stood. "As the law now stands" runs the judgment, "it does not appear to authorise two separate suits in which separate plaintiffs are concerned to be instituted and tried together, nor does it give the Courts any jurisdiction to entertain suits thus instituted." Further on also, allusion is made to the same point, and on a study of the whole judgment I am led to believe that the decrees were reversed because, owing to misjoinder of parties and causes of action, the Courts had no jurisdiction. This opinion is supported by the nature of their Lordship's action. They did in fact allow the plaint to be withdrawn with permission to file fresh suits; but that permission

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would be nugatory if the ruling cited for defendants is to be applied, inasmuch as the further suit would be already time-barred when their Lordships decided the appeal. I must infer that a permission given was a permission capable of being used: in other words, that the suit was not considered time-barred when the appeal was heard by their Lordships. If that is so, then the suit is not time-barred now, for section 14 of the Limitation Act, which alone could have saved it then, will save it now.

I am strengthened in this opinion by a more general view of the current of decisions upon the point now involved. For Mr. Justice Melville's decision in I. L. R. 6 Bom. 681 has been dissented from *quoad* execution proceedings, in I. L. R. 10 Bom. 62 and 11 Bom. 467. And as regards suits, there is a fairly long *catena* of rulings in favour of the view that such a case as this is saved by section 14 of the Limitation Act.

These rulings are quoted on the margin and I would especially point to the Allahabad Full Bench ruling at p. 248 of Vol. 22. There the principle was laid down that section 14 would be applicable if the Court's inability to entertain the former suit arose from a cause not connected in any way with want of good faith or due diligence on the part of the plaintiff. Here there is no such allegation even against the plaintiff. The only reproach to which he is open is that he made a mistake of law which was shared by the original Court and the Court of first appeal. It must be allowed that he honestly did his best to get his case tried on its merits and that he failed only because the Court was unable to give him such a trial. As I read the decisions of the High Court, this is precisely the kind of case for which the concessions of section 14 of the Limitation Act were intended by the Legislature, and I think, therefore, that the Sub-Judge was wrong in dismissing the suit as time-barred because not protected by that section.

I. L. R. 20 Mad. 48.
" 22 Mad. 494.
" 22 All. 248.
" 10 Cal. 86.
" 23 Cal. 821.

The defendants appealed to the High Court.

Manubhai Nanabhai, for the appellants (defendants) :—The words "other cause of a like nature" in section 14 of the Limitation Act (XV of 1877) must be held to mean causes which are in their nature analogous to defect of jurisdiction. Misjoinder of parties is not such a cause. It is not an intrinsic defect in the authority of the Court or otherwise, and would bear no analogy to "defect of jurisdiction." See *Tirtha Sami* v. *Seshagiri Pai* [1]; *Pirjade* v. *Pirjade* [2]; *Krishnaji Lakshman* v. *Vithal Ravji* [3]; *Musammut Munna Jhunna* v. *Laljee Roy* [4]; *Sultan* v. *Ala Bakhsh*. [5]

(1) (1893) 17 Mad. 299.
(2) (1882) 6 Bom. 681.
(3) (1887) 12 Bom. 625.
(4) (1864) 1 W. R. 121.
(5) (1893) 28 Punj. Rec. No. 45

What the Legislature requires under section 14 is similarity of the causes themselves in their own nature, and not a similarity of the effects. The latter would be a misleading test. This distinction has not been properly kept in view in *Mathura Singh* v. *Bhawani Singh*.(1)

The cases cited by the lower appellate Court do not consider the effect of section 374 of the Civil Procedure Code. In fact the lower appellate Court has not at all adverted to this section. The mere fact that permission has been given cannot save limitation.

The words of section 374 of the Civil Procedure Code are quite clear. The period occupied by the first suit cannot be deducted, because the second suit is to be taken as being itself the first. This is a condition imposed by the Legislature upon persons who get the benefit of the indulgence under section 373 of the Code. If section 14 of the Limitation Act is applied to such cases, section 374 would be rendered nugatory. Refers to *Pirjade* v. *Pirjade* (2); *Krishnaji* v. *Vithal* (3); *Kifayat Ali* v. *Ram Singh* (4); *Bai Jamna* v. *Bai Ichha*. (5)

M. N. Mehta, for the respondent (plaintiff):—Section 374 of the Civil Procedure Code does not take away the benefit given by section 14 of the Limitation Act. The case of *Krishnaji* v. *Vithal* (3) is not against this view. It is rather in my favour. Section 14 of the Limitation Act has been expressly referred to therein. The Full Bench case of *Mathura Singh* v. *Bhawani Singh* (6) governs this case.

[RUSSELL, J.—Does it refer to section 374 of the Civil Procedure Code?]

No. In that case the plaint was returned for want of jurisdiction.

Section 374 of the Civil Procedure Code is meant to lay down simply this, that the plaintiff when he is given the permission

(1) (1900) 22 All. 248.
(2) (1882) 6 Bom. 681.
(3) (1887) 12 Bom. 625.
(4) (1885) 7 All. 359.
(5) (1886) 10 Bom. 604.
(6) (1900) 22 All. 248.

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cannot be allowed to deduct the time occupied in the first suit, merely on account of the permission being granted; but he must at the same time satisfy all the requirements of section 14 of the Limitation Act. Section 374 must be construed in such a way as to reconcile it with section 14.

In the previous suit, the High Court could not apply section 578 of the Civil Procedure Code, because it held that there was defect of jurisdiction or something analogous to it (see I. L. R. 26 Bom. 259). So section 14 of the Limitation Act must be held to govern this case.

RUSSELL, J.—This is an appeal from an order of the District Judge at Ahmedabad, whereby the case was remanded for trial on the merits. The plaint was filed on the 15th April, 1898, by two persons, a father and son, against two defendants for damages for an assault upon the former by the latter and alleged to have taken place on the 7th April, 1898.

The defendants filed their written statement on the 7th June, 1898, and set up, *inter alia*, misjoinder of causes of action and of parties. This plea was overruled by the lower Courts and damages awarded to the plaintiff, but on the 14th November, 1901, the High Court reversed the decrees, see *Varajlal* v. *Ramdat* [1], and made the following order: "Under the provisions of section 373 we give leave to the plaintiff whose name is struck out to file, if so advised, a fresh suit in respect of his own cause of action."

The fresh plaint was filed on the 13th February, 1902, by the son, the suit of the other plaintiff, his father, remaining on the file. The Subordinate Judge of Umreth rejected this fresh plaint on the question of limitation, but the District Judge reversed his decree.

The District Judge relied on a number of cases, *viz.*, *Deo Prosad* v. *Pertab Kairee* [2]; *Venkiti Nayak* v. *Murugappa* [3]; *Assan* v. *Pathumma* [4]; *Mathura Singh* v. *Bhawani Singh* [5]; *Mullick Kefait*

(1) (1901) 26 Bom. 259, p. 267; 4 Bom. L. R. 878, at p. 882.
(2) (1883) 10 Cal. 86.
(3) (1896) 20 Mad. 48.
(4) (1899) 22 Mad. 494.
(5) (1900) 22 All. 218.

v. *Sheo Pershad* (1), as showing that a case such as the present is covered by section 14 of the Limitation Act. In none of these cases, however, had the original suit been withdrawn under section 373 of the Civil Procedure Code. No doubt there is a considerable conflict between the Courts in India, as to whether misjoinder of parties or causes of action is a "cause of like nature" within that section. But the District Judge has omitted to notice that this is a case of withdrawal of the suit and that can only be under section 373 of the Code. With regard to that section, section 374 of the Code of Civil Procedure is clear. That is as follows: "In any fresh suit instituted on permission granted under the last preceding section, the plaintiff shall be bound by the law of limitation as if the first suit had not been brought," and is practically to the same effect as the corresponding part of section 87 of Act VIII of 1859, with regard to which the Privy Council in *Watson* v. *The Collector of Rajshahye* (2) held that "there is no power in the Courts in India, similar to that exercised by Courts of Equity or Common Law in England, to dismiss a suit with liberty for the plaintiff to bring a fresh suit for the same matter, or to enter a non-suit. Such power of the Indian Courts is limited to questions of form, as in the case (1) of misjoinder of parties, or of the matters in suit (2) where a material document has been rejected for not having a proper stamp, and (3) if there has been an improper valuation of the subject-matter of the suit." When, therefore, a suit is withdrawn under such circumstances, section 374 of the Civil Procedure Code provides in effect that the first suit is not to be taken into consideration at all. The effect of which is that limitation is to apply to the second suit as if it was the first.

The District Judge has laid considerable stress on the fact that this Court granted permission to the plaintiff to file this suit, but as we have pointed out that liberty was given to the plaintiff "if so advised." The fact (under these circumstances) of this Court having so given such liberty does not seem to us to affect the question.

(1) (1896) 23 Cal. 821.

(2) (1869) 13 Moo. I. A. 160.

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The case of *Pirjade* v. *Pirjade* (1) was only dissented from in *Tarachand Megraj* v. *Kashinath Trimbak* (2) as to its applicability to execution proceedings, and these two cases support our view herein while *Krishnaji Lakshman* v. *Vithal Ravji* (3) is directly in support of it. There Parsons J. (p. 633) says: "The former suit did not fail for want of jurisdiction or any defect of a like nature, such as is contemplated by section 14 of Act XV of 1877: (see *Bai Jamna* v. *Bai Ichha*)(4). It was withdrawn by the plaintiff himself, as it was defective for want of parties, and he was allowed to bring a fresh suit. It appears, therefore, that section 374 of the Civil Procedure Code applies to the case."

The result is that we must reverse the order of the District Court and dismiss the suit with costs on the plaintiff throughout.

R. R. *Order reversed.*

(1) (1882) 6 Bom. 681.
(2) (1885) 10 Bom. 62.
(3) (1887) 12 Bom. 625.
(4) (1886) 10 Bom. 604.

CRIMINAL REVISION.

Before Mr. Justice Batty and Mr. Justice Aston.

EMPEROR *v.* WALIA MUSAJI AND ANOTHER.*

1904.
December 14.

Gambling Act (Bombay Act IV of 1887), secs. 4, 5, 7†—Common gaming house—Jamátkhána of the Borah community.

The accused were found playing for money with cards in a building ordinarily used as a *Jamátkhána*, but accessible to such members of the Borah

* Criminal application for Revision No. 248 of 1904.

† Sections 4, 5 and 7 of the Bombay Prevention of Gambling Act provide as follows:

"4. Whoever—

(*a*) being the owner or occupier or having the use of any house, room or place, opens, keeps or uses the same for the purpose of a common gaming house,

(*b*) being the owner or occupier of any such house, room or place knowingly or wilfully permits the same to be opened, occupied, kept or used by any other person for the purpose aforesaid,

(*c*) has the care or management of, or in any manner assists in conducting the business of any such house, room or place opened, occupied, kept or used for the purpose aforesaid,