APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1897. *December* 13.

KESHAV AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* VINAYAK AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Jurisdiction—Immoveable property—Civil Procedure Code (Act XIV of 1882), Sec. 16—Varshásans charged on villages in Nizám's territory and paid in the same territory—Suit to establish title to a share in such varshásans—Plea of jurisdiction.

An objection to jurisdiction may be raised at any stage of a suit, even after remand by the High Court in second appeal.

Plaintiffs filed a suit in the Court of the First Class Subordinate Judge at Násik to establish their right to a certain share in two *varshásans* (annual allowances). The allowances were charged on the revenues of two villages in the Nizám's territory, and paid to the defendants by the treasury officers at Aurangabad in the same territory. The plaintiffs alleged that the *varshásans* were granted to a common ancestor of the parties and enjoyed as joint ancestral property, while the defendants contended that the allowances were granted to their grandfather as his exclusive property to descend to his heirs, and that plaintiffs had no right to share in them.

Held, that the Násik Court had no jurisdiction to try the suit. The *varshásans* were immoveable property, and there being a *bonâ-fide* claim of title to them, the claim should be determined according to the law in force in the Nizám's dominions. The suit should, therefore, be brought in the Courts of the Nizám, in whose territory the *varshásans* were granted and paid.

Plaintiffs could not claim a declaration of title, or ask for a refund of the allowances in a British Court, merely because the defendants happened to be residents in British territory.

SECOND appeal from the decision of J. B. Alcock, District Judge of Násik.

The plaintiffs sued for a declaration of their title to a one-third share in two ancestral *varshásans* (or annual allowances) received by the defendants from His Highness the Nizám's Government, and also to recover their share for the year 1890.

The *varshásans* were charged on the revenues of two villages situate in the Nizám's territory, and were paid to the defendants by the treasury officers at Aurangabad in the same territory.

* Second Appeal, No. 606 of 1897.

The suit was filed in 1891 in the Court of the First Class Subordinate Judge at Násik, where the defendants happened to reside at the time.

Defendants pleaded (*inter alia*) that the Court had no jurisdiction to entertain the suit, and that the *varshásans* were the self-acquired property of their father, in which the plaintiffs were not entitled to any share.

The Subordinate Judge rejected the plaintiffs' claim, holding that they had not proved their right to the *varshásans* in suit.

On appeal the District Judge raised the following issue only :—

"Have the defendants proved their exclusive right to the *varshásans* in suit, or have the plaintiffs proved their right to share in it?"

On this issue the District Judge found for the plaintiffs, and awarded their claim.

Thereupon the defendants preferred a second appeal to the High Court.

The appeal came on for disposal before a Division Bench (Jardine and Ranade, JJ.), which being of opinion that the case had not been properly dealt with by the District Judge, reversed his decision and remanded the case for a fresh hearing.

After remand, the District Judge raised a new issue, *viz.*, whether the Court had jurisdiction to hear this suit?

He found this issue in the negative and dismissed the suit. His reasons were as follows :—

"The allowances in dispute are a charge on the revenues of two villages in the Nizám's territory and are paid by the Nizám's Government. *Primâ facie*, therefore, the Násik Courts have no jurisdiction to entertain a suit brought to establish a title to a share in these allowances. The property [illegible] look into immoveable property, and under section 16 of the Code of Civil [illegible]ed before him present suit ought to be instituted in the Court within the [illegible]ection was taken jurisdiction that property is situated. There is a p[illegible] subject of the 5th the explanation appended to the section shows tha[illegible] case for retrial on to property situate in British India. There can be [illegible] fresh hearing in con- does not extend the jurisdiction of the Násik C[illegible]Native State."

Against this decision the plaintiffs a[illegible]

(6) A. C., 602.

(3) 23 Ch. D., 743.

(8) 5 Bom. H. C. Rep., 137, A. C. J.

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M. B. Chaubal, for appellants (plaintiffs):—The Násik Court has jurisdiction. The present suit is not one for the determination of any right or interest in immoveable property. It is really a suit to recover money, and to obtain a declaration that the plaintiffs have a right to take each year a certain sum of money from the defendants out of the cash allowances received by them. The right to draw the allowances from the Government treasury may be immoveable property, but the right to receive a share of the allowances when drawn by the defendants is not immoveable property. So far as the plaintiffs' share is concerned, it is money had and received by the defendant to plaintiffs' use—*Morbhat* v. *Gangadhar*(1).

But even assuming that the suit is one relating to immoveable property, the proviso to section 16 of the Civil Procedure Code (Act XIV of 1882) would give jurisdiction to the Court at Násik, as the defendants reside at Násik, and the relief sought can be entirely obtained through their personal obedience. All that we seek is to make the defendants personally liable to pay us our share. We ask for a decree against the defendants personally; the Násik Court is competent to pass that decree and enforce it against the defendants.

Lastly we contend that it was not open to the District Judge to raise the question of jurisdiction after the case had been remanded by the High Court. The case was remanded for a rehearing on the merits. It was then too late to raise the plea of jurisdiction—*Ratanshankar* v. *Gulabshankar*(2); *Temulji* v. *Fardunji*(3).

Shivram P. Bhandarkar, for respondents:—This is a suit to establish plaintiffs' title to immoveable property, the claim for arrears being merely incidental to the main relief. An interest in a *varshásan* allowance is immoveable property—*Balvantrav* v. *Purshotam*(4), *Maharana Fatesangji* v. *Desai Kalliarajiji*(5); *Collector of Thána* v. *Hari Sitaram*(6). That being so, the suit will not lie in any Court in British India, as the *varshásans* are charged on villages situate in a Native State and payable in that

(1) (1883) I. L. R., 8 Bom., 534.
(2) (1867) 4 Bom. H. C. Rep., 173, A. C. J.
(3) (1868) 5 Bom. H. C. Rep., 137, A. C. J.
(4) (1872) 9 Bom. H. C. Rep., 99.
(5) (1873) 10 Bom. H. C. Rep., 281
(6) (1882) I. L. R., 6 Bom., 546.

State. The Courts cannot entertain suits relating to immoveable property situate outside their local jurisdiction—Civil Procedure Code (Act XIV of 1882), section 16. The proviso to the section applies only when the property is situate in British India—*Prem Chand Dey* v. *Mokhoda Debi*[1]; *Vithalrao* v. *Vaghoji*[2]; *Crisp* v. *Watson*[3]. As to the English rule, see *The British South Africa Company* v. *Companhia De Moçambique*[4]; *In re Hawthorne*[5]. It is objected that the question of jurisdiction was raised too late. But the point was taken by the defendants in their written statement. But even if not, the plea of jurisdiction can be raised at any stage of a suit.

M. B. Chaubal, in reply:—I admit that if this suit had been brought by the whole family to establish their title to the *varshásans* in question, the Násik Court would have had no jurisdiction. But this is a suit by one branch of the family against another branch to recover its share of the *varshásans* after they are received from the Nizám's Government. It is thus a suit for money had and received to the plaintiff's use.

PARSONS, J.:—Two points arise for immediate decision in this appeal:—

1. Whether after remand by this Court the Judge of the lower appellate Court could dispose of the case on a point of jurisdiction?

2. Whether the Court of first instance had jurisdiction to hear the suit?

1. The case of *Temulji* v. *Fardunji*[6] was relied on by the appellants on the first point. That, however, was a very peculiar case, and it was only held in it that "as the case was remanded for retrial on its merits, the Judge had no authority to look into the question of jurisdiction which was then raised before him for the first time." In the present case the objection was taken in the Court of first instance and formed the subject of the 5th issue there. This Court did not remand the case for retrial on the merits, but remanded the appeal for a fresh hearing in con-

(1) (1890) I. L. R., 17 Cal., 693.
(2) (1892) I. L. R., 17 Bom., 570.
(3) (1893) I. L. R., 20 Cal., 689.
(4) (1893) A. C., 602.
(5) (1883) 23 Ch. D., 743.
(6) (1868) 5 Bom. H. C. Rep., 137, A. C. J.

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sequence of the defective and faulty hearing (see Second Appeal No. 554 of 1894, decided 26th November, 1895). It is settled law that an objection to jurisdiction may be raised at any stage of a suit, even for the first time in second appeal: see *Sayad Nyamtula* v. *Nana*[1]; *Velayudam* v. *Arunachala*[2]. It could only be on the ground of acquiescence or waiver that a Court would be justified in refusing to entertain an objection when raised, and there is the authority of the Privy Council to show that when a Court has no jurisdiction over the subject-matter of a suit, the parties cannot by their actual consent confer that jurisdiction upon that Court—*Meenakshi Naidoo* v. *Subramaniya Sastri*[3].

2. The suit was brought to obtain a declaration that the plaintiffs are entitled to certain share in two *varshásan* allowances charged on the revenues of the villages of Vaijpur and Thoskargaon in the territories of His Highness the Nizám and paid by the treasury officers at Aurangabad in the same territories, and to recover the amount of that share for the year 1890 from the defendants, who are alleged to have been paid the whole of the allowances at Aurangabad. The *varshásan* allowances are immoveable property. Mr. Chaubal, for the plaintiff-appellants, admitting this and admitting also that a suit by the family to establish its right to the *varshásans* could not be brought in British India, has argued that the suit will lie against the defendants who reside in British India to recover from them the share to which the plaintiffs allege they are entitled, because the relief claimed can be entirely obtained through the personal obedience of the defendants. He relies on the proviso to section 16 of the Code of Civil Procedure. The explanation, however, to that section shows that property in it means property situated in British India, which these *varshásans* are not. Before the plaintiffs can get a decree against the defendants for the money amount they claim, they must prove their right to the share they claim in the *varshásan* allowances themselves. They allege that right and very properly ask the Court in this suit to determine it; the suit is, therefore, one for the determination of a right to, or interest in,

(1) (1888) I. L. R., 13 Bom., 424. (2) (1889) I. L. R., 13 Mad., 273.
(3) (1887) L. R., 14 I. A., 160; S. C. I. L. R., 11 Mad., 26.

immoveable property situated outside British India, and it is, I think, quite clear that a Court in British India has no jurisdiction to hear such a suit. In the case of *The British South Africa Company* v. *The Companhia De Moçambique*[1], it was decided that the Supreme Court of Judicature had no jurisdiction to entertain an action to recover damages for a trespass to land situate abroad, and it was there admitted that the Court could not make a declaration of title or grant an injunction to restrain trespasses over such land. In the case of an estate in land or of a right annexed to such an estate, "as property of this kind is to be held according to the laws of the country where it is situated, and as the right of granting it is vested in the ruler of the country, controversies relating to such property can only be decided in the state in which it depends" (Story, Conflict of Laws (8th Ed.), section 553 at page 771). In *In re Hawthorne; Graham* v. *Massey*[2], Kay, L. J., says: "I am not aware of any case where a contested claim depending upon the title to immoveables in a foreign country strictly so called, being no part of the British dominions or possessions, has been allowed to be litigated in this country simply because the plaintiff and defendant happened to be here," and after citing some cases thus concludes: "But the case is infinitely stronger where the contested claim is based upon the right to land, where that land is situate not in Scotland but in Dresden, where the question whether the plaintiff has any claim or not must be determined by the law of Saxony as to immoveables, and where the only ground for instituting proceedings in this country is the fact that the defendants are resident here. All these circumstances concur in this case and in my opinion the Courts of Civil Judicature in *England*, which sit, as Lord Westbury said in *Cookney* v. *Anderson*[3], to administer the municipal law of this country, have no authority to determine in such a case as this whether or not the plaintiff's claim is well founded."

This decision is very apposite to the present case where the defendants are in no fiduciary relations with the plaintiffs, are not bound by contract with them, and the claim is not based upon a suggestion of fraud. It is a *bonâ fide* claim on both sides

(1) (1893) A. C., 602. (2) (1883) 23 Ch. D., 743.

(3) (1862) 1 De J. & S., 365.

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of title to the *varshásan* allowances paid by the Government of the Nizám, which the plaintiffs say were granted to a common ancestor of the parties to be enjoyed as ancestral property, while the defendants say that they were granted to their grandfather as his own exclusive property to descend to him and his heirs. This claim will have to be determined according to the law in force in the Nizám's dominions. It may be that under it such *varshásans* are impartible, or that they descend to the eldest son only, or that they are subject to some other special mode of devolution or even of disbursement. It may be that, under some such form of Pensions Act as is here in force, claims to such allowances are not cognizable by the Civil Courts, but are left for the decision of the ruling power itself. In the present case that power has seen fit to pay the allowances to the defendants. I am of opinion that if the plaintiffs feel themselves aggrieved at this, they must apply to that power for redress or sue in the Courts of the country in which the *varshásans* were granted and are paid, and that they cannot claim a declaration of their title or the refund of the allowances in the Courts of this country, merely because the defendants happen now to be residents here. We confirm the decree with costs.

RANADE, J.:—In this case the original suit was brought by the appellant-plaintiffs to establish their right to a specific share in two *varshásans* payable out of the revenues of two villages in the Nizám's territories, and received from the Aurangabad treasury by the respondents Nos. 1—5 as representing the eldest branch of the common family of the parties. Appellants stated that they had received their share of the allowances down to 1883-84, since which time respondents had refused to pay, and along with the establishment of their rights to share the allowances, appellants claimed a specific sum for one year's share. The respondents Nos. 1—5 denied the appellants' right to a share in the allowances, which they claimed as the self-acquisition of their own immediate ancestor; and among other objections they urged that the Násik Court had no jurisdiction to try the suit. Though an express issue was laid down on this point of jurisdiction, the Court of first instance did not decide it, as it found that the appellants had failed to establish their right.

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The District Court in appeal reversed this decree, and awarded the whole claim. In Second Appeal, (No. 551 of 1894), the decree of the District Court was reversed, and the case was remanded for a fresh hearing. In the inquiry on remand, the District Judge held that the Násik Court had no jurisdiction to entertain the suit, and he accordingly dismissed the appeal.

In the present appeal, Mr. Chaubal has taken exception to this decision on two grounds: (1) that the question of jurisdiction should not have been raised at this late stage in the District Court; and (2) that the Násik Court had jurisdiction, as the plaint sought to establish the personal liability of the respondents to pay to the appellants their share in the allowances at Násik.

I agree with Mr. Justice Parsons in holding that neither of these two contentions is well founded. As regards the first point, our attention was drawn to the ruling of this Court in *Temulji* v. *Fardunji*[1] in which it was no doubt laid down that when the High Court has remanded a suit for retrial on the merits, the lower appellate Court has no authority to raise a question of jurisdiction for the first time. The present case may, however, be distinguished on the ground that here the question of jurisdiction had not been raised for the first time in the remand inquiry. The defence had been specially pleaded in the Court of first instance at the earliest stage of the inquiry. Moreover, this Court has always held that a question of jurisdiction may be raised at any stage even in second appeal, and also after a remand order which directed an inquiry into the merits —*Bhai Trimbakji* v. *Tomu*[2]; *Motilal* v. *Jamnadas*[3]; *Krishnarao* v. *Muncherji*[4]; *Ganpatrav* v. *Bai Suraj*[5]. The Madras High Court has similarly ruled that the question of jurisdiction is not of such a technical character that the appellate Court can properly disregard it—*Keshava* v. *Lakshminarayana*[6]; *Velayyan* v. *Arunachala*[7]. This is also the view of the Calcutta and Allahabad High Courts—*Chowdhry Wahid Ali* v. *Mulka Ali*[8]; *Nidhi Lal* v. *Mazhar Husain*[9]. Even if the lower appel-

(1) 5 Bom. H. C. Rep., 137, A. C. J.
(2) (1865) 2 Bom. H. C. Rep., 193.
(3) (1865) 2 Bom. H. C. Rep., 40.
(4) P. J. for 1873, Case No. 49.
(5) (1870) 7 Bom. H. C. R., 6 Mad., 192.
(6) (1882) I. L. R., 13 Mad., 273.
(7) (1883) I. L. R., Ben. L. R., 53.
(8) (1870) 14 W. R. C. Rep., 79.
(9) (1884) I. L. R., [illegible]

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late Court had not raised the question, it is plain that in the present appeal, respondents could have raised it before us, and it would have been incumbent upon us to consider it. This first point of the appellants' pleader's contention must, therefore, be overruled.

His second ground of objection, namely, that the Násik Court had jurisdiction to try the suit, turns upon the consideration whether the appellants' claim in the Násik Court falls under the description of the class of suits referred to in section 16, or whether it falls under section 17 of the Civil Procedure Code; in other words, whether it is a suit for the determination of any right or interest in immoveable property, or is a suit which seeks to fix a personal liability upon the respondents. The plaint, and the valuation of the claim which was raised to ten times the value of the appellants' share of the allowance, show clearly that the appellants sought a determination of their interest in immoveable property. The *varshásan* allowances are admittedly immoveable property, and the difference which divided the Judges in *The Collector of Thána* v. *Krishnanath Gomad*[1] has no bearing in the present dispute. As the appellants' right to a share was contested by the respondents, they could only succeed by establishing their title to a share in the allowance. Where the right was not in dispute, or was otherwise established, the claim to receive any one or more years' share would certainly be a claim to fix a personal liability on the respondents, and as such maintenable in the Court within whose local jurisdiction the cause of action for money had and received arose. This was the case in the matter of the *varshásan* allowance referred to in *Ratanshankar* v. *Gulabshankar*[2] on which ruling the appellants' pleader chiefly relied. The High Court there held that there was jurisdiction to try a suit in which money due for a share in some [illegible] Gaikwádi allowance was received by the defendant on his own a[illegible] plaintiff's account, even though the question of title might [illegible] incidentally arise. In the present case the question of title does n[illegible]n for one [illegible]tally arise. It is the principal point in dispute, the cla[illegible]stinction not year's allowance being only a corollary to it. The d[illegible]ted above was affirmed in *Chintaman* v.

(1) (1880) I. L. R., 5 Bom., [illegible]., 322. (2) (1867) 4 Bom. H. C. Rep., 173.

Madhavrav[1]. The evident object of the detailed provisions of section 16 is to limit jurisdiction in respect of claims to immoveable property to the Court within whose local jurisdiction such property may be situated, and as a rule Indian Courts have no power to decide on rights and interests in immoveable property lying outside their local jurisdiction—*Prem Chand Dey* v. *Mokhoda Debi*[2]; *Sreenath* v. *Cally Doss*[3]; *Srimati Kamini Soondari* v. *Kali Prosunno*[4]. This same view was approved in *Crisp* v. *Watson*[5], and in *Land Mortgage Bank* v. *Sudurudeen*[6] a claim for the specific performance of a contract relating to the sale of property outside local jurisdiction was disallowed, though such a claim was decreed by this Court on its Original Side in *Holkar* v. *Dadabhai*[7] on the analogy of the practice of Equity Courts in England. This analogy should, however, not be pressed too far. On the strength of this same analogy a suit to recover money charged on immovable property was at one time held by this Court to be not a suit for land—*Balvantrao* v. *Purshotam*[8], but the latest decision has now established an accord between this and the other High Courts, which have held that such suits fell under section 16—*Vithalrao* v. *Vaghoji*[9]. There is no allegation of any trust in this case such as distinguished the claim in *Juggodumba* v. *Puddomoney*[10], and in respect of which relief could be claimed in equity by constraining the conscience.

On the whole, it is clear that the present suit fell within the substantive clause of section 16, and that it is not covered by its proviso, for complete relief cannot be obtained by the personal obedience of the respondents in this case. The District Judge, therefore, very properly rejected the claim. The present appeal must, therefore, be dismissed with costs.

Appeal dismissed.

(1) (1869) 6 Bom. H. C. Rep., 29 (A.C.J.)
(2) (1890 I. L. R., 17 Cal., 699 at p. 703.
(3) (1879) I. L. R., 5 Cal., 82.
(4) (1885) L. R., 12 I. A., 215.
(5) (1893) I. L. R., 20 Cal., 689.
(6) (1892) I. L. R., 19 Cal., 358.
(7) (1890) I. L. R., 14 Bom., 353.
(8) (1872) 9 Bom. H. C. Rep., 99.
(9) (1892) I. L. R., 17 Bom., 570.
(10) (1875) 15 Ben. L. R., 318.