Courts subordinate to its jurisdiction. But this circumstance does not affect the vitality of its jurisdiction any more than it affects the fact of its actual existence.

The decision, therefore, of the Subordinate Judge, which proceeds on the applicability of s. 649 to the case before him, is, in our opinion, erroneous.

That being so, and there being no other section in the Code under which the order of the Subordinate Judge can be upheld, we must allow this appeal, and set aside the order with costs.

Appeal allowed.

Before Mr. Justice White and Mr. Justice Field.

HURROSOONDARY DASSEE AND ANOTHER (JUDGMENT-DEBTORS) *v.* JUGOBUNDHOO DUTT AND OTHERS (DECREE-HOLDERS).* 1880 *June* 28.

Application for Execution of Decree—Res judicata.

An order refusing an application to execute a decree is not an adjudication within the rule of *res judicata*.

Delhi and London Bank v. *Orchard* (1) followed.

Baboo *Akhil Chunder Sein* and Baboo *Kashee Kant Sein* for the appellants.

Baboo *Bungshi Dhur Sein* for the respondents.

THE facts of this case sufficiently appear in the judgment of the Court (WHITE and FIELD, JJ.), which was delivered by

WHITE, J.—This was an appeal against an order of the District Judge of Dacca, dismissing an appeal which the appellants before us had preferred against an order passed by the Munsif of Moonsheegunge on the 23rd of May 1879.

On the 8th of July 1878, the appellants had procured the reversal of an order by which the Munsif had directed execution to issue for the possession of certain land under a decree

* Appeal from Appellate Order, No. 58 of 1880, against the order of R. F. Rampini, Esq., Officiating Judge of Dacca, dated the 27th November 1879, affirming the order of Baboo Jodoo Nauth Dass, Munsif of Moonsheegunge, dated the 23rd May 1879.

(1) I. L. R., 3 Calc., 47; S. C., L. R., 4 I. A., 127.

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obtained by the respondents. The reversal was procured on the ground that execution was barred. Inasmuch as, before the reversal was obtained, the respondents had been put in possession of the land by the first Court, it became necesssay for the appellants to apply, and they accordingly applied on the 23rd of May 1879, to be restored to possession. In consequence, however, of certain prior proceedings that had taken place (to which I shall presently refer), the Munsif simply made an order that a notice should be served on the opposite party,—that is, the respondents,—directing them to give up possession; which order the District Judge has confirmed on appeal.

The prior proceedings alluded to are these: Very shortly after the appellants obtained the reversal of the order for the execution, they, on the 6th of November 1878, made a similar application to the one that was made in May 1879,—namely, to be restored to possession of the land. The Munsif on that occasion, instead of making the order, merely directed, as he did on the 23rd May 1879, that a notice should be given calling upon the respondents to give up possession. His reason for making the order in that limited form was, that he could find no section in the Civil Code which directed that, when a decree which had been executed is reversed, restitution should be made, or which provided any machinery for effecting the restitution. The reason is altogether insufficient. There was no occasion to resort to any section of the Code in order that a first Court may give effect to the order of an Appellate Court reversing its own order. It has full authority, and is moreover bound, to execute the order of the Appellate Court; and if, before the reversal, anything has been done under its own order, it has full authority, and is moreover bound, to undo what has been so done, and to put the parties back into precisely the same position as they stood in before its own order was made. No appeal was preferred by the appellants against the Munsif's order of the 6th of November 1878; but after waiting some time and not getting possession, they again applied to the Munsif to be put into possession. The Munsif refused that application (the ground on which he did so is not stated); but on that occasion the appellants did appeal to Mr. Dickens, the then Judge of Dacca.

Mr. Dickens dismissed the appeal, on the ground that it was out of time, but at the same time made some observations which the present Judge of Dacca thinks that the appellants misunderstood, and which were, that the proper course for the appellants to adopt was to apply to have effect given to the order of the 6th November 1878.

The present Judge of Dacca is of opinion that the suggestion made in Mr. Dickens's order when he dismissed the appeal, was a suggestion that the proper way of carrying out the order of the 6th November was to direct the issue and service of the notice mentioned in the order. He has accordingly, in that view of the case, dismissed the appeal, which was preferred to him against the order of the 23rd of May 1879; and he further states that, in consequence of the order of the 6th November 1878 not having been appealed against by the appellants, it must be accepted as final and binding in the matter, and that whether it is right or wrong, it is now *res judicata*.

It is not necessary to consider what Mr. Dickens meant when he made the suggestion referred to, because whatever might have been his intention, the appellants, in May 1879, made a fresh application to be put in possession of the property, which, in our opinion, ought to have been granted, unless the order of the 6th of November is properly held to have the effect of a *res judicata*. It is not clear that the several applications ought to be treated as distinct applications to be restored to possession, rather than as one continued application; but, taking them as distinct applications, they were in substance applications for the execution of the Appellate Court's decree. It has been held by the Privy Council in *Delhi and London Bank* v. *Orchard* (1), that the refusal of an application to execute a decree is not a bar to a second application being made for the execution of the same decree. The precise ground upon which their Lordships' decision proceeded is not stated. Possibly, it may have been that the refusal of the application was not to be considered as an adjudication on the point. But whatever their reasons may be, the case that I have cited is a clear authority, that the application which the appellants made on the 23rd May 1879 is

(1) I. L. R., 3 Calc., 47; S. C., L. R., 4 I. A., 127.

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not barred by the refusal either of their application on the 6th of November 1878, or of their intermediate applications between that date and the 23rd of May.

We have been referred to a case (appeal from Appellate Order, No. 169 of 1878), in which my brother Mitter and myself held, that a question decided in the course of prior execution proceedings was deemed *res judicata*, and could not be raised again in subsequent proceedings. But that was a very different case from the present. There the question was as to the construction of a decree; it was raised by the judgment-debtor a second time after it had on a previous application for execution been decided in favor of the judgment-creditor, and after the judgment-debtor had preferred an appeal against the decision, but had not thought fit to prosecute it.

The orders of both the lower Courts must be set aside, and we make the following order, that the appellants be restored to the possession of the property of which the respondents were put in possession under the order for execution, which has been reversed.

Appeal allowed.

Before Mr. Justice Jackson and Mr. Justice Tottenham.

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May 20.

KOYLASH CHUNDER KOOSARI AND ANOTHER (TWO OF THE DEFENDANTS) *v.* RAM LALL NAG (PLAINTIFF).*

Appeal from Appellate Decrees — Appellant dissatisfied with Findings in Judgment — Civil Procedure Code (Act X of 1877), ss. 540 and 584.

An appellant, who has obtained a decree setting aside the decision of the Court of first instance, is not entitled to a further appeal to the High Court, on the ground that he is dissatisfied with some of the findings recorded in the judgment of the lower Appellate Court, an appeal from an appellate decree under s. 584 being strictly restricted to matters contained in the decree alone.

IN this suit the material facts are as follows:—One Prosonno Chunder Chowdhry, together with other co-sharers in an estate,

* Appeal from Appellate Decrees, Nos. 1776 and 1777 of 1879, against the decree of A. C. Brett, Esq., Judge of Jessore, dated the 25th June 1879, reversing the decree of Baboo Monmothonath Chatterjee, First Munsif of Bageerhat, dated the 16th December 1878.