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the order for an indefinite time; non-fulfilment would, in such a case, be turned against him who was the cause of it. But here the condition is the Commissioner's conviction, that the proved state of facts is one in which execution may properly be ordered. The order in this case was made last April, and there was nothing in the Limitation Act to prevent that order from being applied for. The right to execution, which arose on the date of the order, was not affected by article 180, when effect was sought for it a few days afterwards, and, therefore, I think the decision of the Court below must be reversed.

Order reversed.

Attorneys for the appellant:—Messrs. *Ardesir, Hormusji and Dinshá.*

Attorneys for the respondents:—Messrs. *Little, Smith, Frere and Nicholson.*

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

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VISHNU SAKHA'RA'M NAGARKAR AND ANOTHER, (ORIGINAL APPLICANTS), APPELLANTS, *v.* KRISHNARA'O MALHA'R, DECEASED, BY HIS SONS AND HEIRS, A'NANDRA'O AND OTHERS, (ORIGINAL OPPONENTS), RESPONDENTS.*

Decree—Execution of a decree of the Agent for Sardárs—Rights of transferee of a decree—Civil Procedure Code (Act XIV of 1882), Secs. 2, 232, 649—*Jurisdiction—Waiver—Acquiescence.*

A. in 1839 obtained a decree against B., a *sardár* in the Court of the Agent for Sardárs. The decree was executed in the Agent's Court until B.'s death in 1868. B.'s status as a *sardár* under the exclusive jurisdiction of the Agent, did not descend to his sons, and the decree was transferred to the Court of the First Class Subordinate Judge at Ahmednagar for execution. Various objections were taken to the execution of the decree by that Court, but none on the ground that the Agent's decree could not be executed by a mere transfer to an ordinary Civil Court. The case went up twice to the High Court, under whose orders the execution was for several years continued in favour of A.'s representatives against the estate of B.'s sons. In 1885, one of A.'s representatives assigned his interest under the decree to C. and D. Thereupon the transferees C. and D. applied to the First Class Subordinate Judge at Ahmednagar to have their names substituted in the place of the transferor in the execution proceedings.

* Miscellaneous Appeal, No. 2 of 1886.

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The Subordinate Judge rejected this application, on the ground that he could not recognise the transfer of the decree either under sections 372 or 232 of the Civil Procedure Code (Act XIV of 1882). He also found that execution had been going on for several years contrary to the ruling in *Khusáldás* v. *Sakhárám Rámchandra*(1), which laid down that the Agent's decree could not be executed by a mere transfer to an ordinary Court,—the remedy in such cases being by a suit on the decree. On this ground, also, he refused to recognise the transfer of the decree.

Held, reversing the order of the lower Court, that the assignment of the decree-holder's rights to execution in this case was one approved by the law as contained in section 232 of the Code of Civil Procedure (Act XIV of 1882). The transferee of a decree gains by the transfer the rights of the transferor.

Held, also, that though the execution proceedings in this case had been for many years irregularly conducted by a mere transfer of the Agent's decree to an ordinary Civil Court, still as the Court which carried on the execution had jurisdiction to grant the same relief if a suit had been brought upon the decree, the irregularity, having been acquiesced in, did not vitiate the former proceedings in execution.

Where jurisdiction over the subject-matter exists, requiring only to be invoked in the right way, the party who has invited or allowed the Court to exercise it in a wrong way, cannot afterwards challenge the legality of the proceedings due to his own invitation or negligence. But if there is no jurisdiction over the subject-matter, the acquiescence of the parties concerned, cannot create it.

Where a decree is one of continuous operation, taking effect as each year furnishes proceeds for its satisfaction, it must be executed each year according to the law of procedure *then* in force.

APPEAL from the order of Ráv Bahádur Lálshankar Umiáshankar, First Class Subordinate Judge of Ahmednagar, in Miscellaneous Application No. 59 of 1885.

On the 15th November, 1839, one Krishnágir obtained a decree for Rs. 14,271, in the Court of the Agent for Sardárs in the Deccan against Krishnáráo Malhár, who was a third class *sardár*.

The decree was executed by the Court of the Agent for Sardárs at Poona till Krishnaráo's death in 1868. Krishnaráo's sons, Ánandráo and Yádhuvráo, were not *sardárs*. Accordingly, Narpurgar, the heir and legal representative of the original decree-holder, who had died previously to 1868, obtained a certificate from the Agent' Court under section 286 of Act VIII of 1859, and the decree was transferred to the Court of the First Class Subordinate Judge at Ahmednagar. On the 11th December,

(1) 12 Bom. H. C. Rep., 212.

1868, Narpurgar applied to attach the villages of Jávali and Shirasgám belonging to the deceased judgment-debtor.

Ánandráo opposed this application, on the grounds, first, that he himself was a *sardár* and, therefore, not amenable to the jurisdiction of the ordinary Civil Courts; and, secondly, that his father, the deceased Krishnáráo, had only a life-interest in the *jáhgír* villages, and that they could not be attached for his debts after his death.

The case came ultimately before the High Court of Bombay. The objections were disallowed. Both villages were, accordingly, attached, and their annual income was thenceforward applied towards the satisfaction of the decree.

In 1876, Narpurgar died, and his heirs, Gajiandrágir and Nagnidrágir, were substituted in his place as decree-holders.

In or about the year 1885, Gajindrágir assigned his interest in the decree to Vishnu Sakhárám and Gangárám Yeshwant, who thereupon made an application to the First Class Subordinate Judge at Ahmednagar to have their names substituted for that of Gajindrágir in the execution proceedings.

This application was rejected by the Subordinate Judge, for the reasons stated in the following extract from his judgment:—

"The applicants say that their names should be substituted in the execution proceedings for Gajiandrágir, under section 372 of the Civil Procedure Code. But this section contemplates a proceeding before the determination of the *suit—Cally Churn Mullick* v. *Bhuggobutty Churn Mullick*[1]. By section 582 it has been made applicable to 'pending appeals.' The expression 'pending the suit,' in section 372 cannot apply to execution proceedings, because provision for assignees after decree is made in section 232 —*Gulábdás* v. *Lakshman Narhar*[2]; *Nagar Mal* v. *Macpherson*[3]. If, in such cases, section 372 be applied, the provision as regards assignment in section 232 will be useless. I, therefore, hold that the applicants' names cannot be substituted in the execution proceeding under section 372 of the Civil Procedure Code.

(1) 5 Calc, L. R., 108. (2) I. L. R., 3 Bom., 221.
(3) I. L. R., 3 All., 766.

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"Applicants' next contention is that their names should be substituted under section 232. But this section contemplates substitution of parties in a pending proceeding. It empowers the assignee to 'apply' for the execution of the decree to the Court which passed it.' This means a new application by the assignee—*Gulábdás* v. *Lakshman Narhar*(1).

"It also appears that the execution proceeding has been going on without jurisdiction. The High Court has held Ánandráo to be within the jurisdiction of this Court, on the ground *of his not being a sardár.* The question whether *the Agent's decree was enforceable* by execution or by a separate *suit, was never raised and decided in this case.* It has been often held that the Agent's decree can, under the circumstances of the present case, be enforced by a separate suit, and not by execution—*Khusáldás* v. *Sakhárám Rámchandra Dikshit*(2); *Govind Váman* v. *Sakhárám Rámchandra*(3); *Sakhárám Dikshit* v. *Ganesh Sáthe*(4).

"The above authorities clearly show that the present execution proceeding on the *darkhást* No. 1209 of 1868 is irregular. The Court, therefore, does not think it proper to substitute the applicants' names in such an irregular proceeding, and perpetuate the irregularity after it has been brought to its notice.

"It was also contended that the applicants should be considered as the assignor's representatives. But it has been held that they cannot be so considered under section 232—*The Secretary of State for India in Council* v. *Marjum Hosein Khán*(5).

"The opponent's *vakíl* says the application under section 232 should be to the Court *passing* the decree—*Kadir Bakhsh* v. *Ilahi Bakhsh*(6). But as the Agent's Court has ceased to have jurisdiction to execute the decree, I think this Court should be considered, under para. 2 of section 649 of the Civil Procedure Code, to be the Court passing it.

"The decisions, not allowing the Agent's decree to be executed by other Courts, appear to have been made before the 2nd para. of section 649 was enacted by Act XII of 1879. The new pro-

(1) I. L. R., 3 Bom., at p. 222.
(2) 12 Bom. H. C. Rep., 212.
(3) I. L. R., 3 Bom., 42.
(4) I. L. R., 3 Bom., 193.
(5) I. L. R., 11 Calc., 359.
(6) I. L. R., 2 All., 283.

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vision perhaps may allow execution of a decree like the present. But the new section has no retrospective effect, and, therefore, it cannot make the previous illegal proceeding a legal one.

"As remarked by the High Court in *Krishnaráv* v. *Krishnágir Guru Náráyangir*[1], the Agent's decree has already proved a most inconvenient one in execution. The proceeds of the villages come to less than the annual interest, and, therefore, complete execution can never be had in the way prescribed. Such a decree is sold by the decree-holder for Rs. 7,000 in all. The decree-holder wants to perpetuate the hardship on the judgment-debtor for Rs. 7,000. Under the circumstances of the case, I think it is just for him to ask the judgment-debtor whether he would pay the amount for which the decree is sought to be sold. The debtors' *vakíl* says that his client is willing to pay the amount to the decree-holders.

"For all these reasons I reject the application, with cost on the applicants."

The applicants appealed against this decision to the High Court.

Ghánashám Nilkant Nádkarni for the appellants:—There is nothing in the Code of Civil Procedure to prevent the transfer of the Agent's decree to the ordinary Courts for execution. Section 649 invests the Subordinate Judge with the same authority as if he had passed the decree, the Agent having ceased to exercise jurisdiction. If the decree-holder could have got execution, the assignees can. Reading section 2 with section 232, the assignee has the same rights as the assignor. The objection as to the jurisdiction of the Subordinate Judge was not taken until now by the heirs of the judgment-debtor. They are, therefore, estopped from taking it now. Cites *Mangal Prasád's case*[2] and *Moru* v. *Gopál*[3].

Mahádev Chimnáji Apté for the respondents:—The cases cited are on the question of limitation. If a party does not avail himself of the plea of limitation *in limine*, he must be taken to have waived it. But when, as in the present case, the Court

(1) Printed Judgments for 1874 at p. 151. (2) L. R., 8 Ind. App., 123.
(3) I. L. R., 2 Bom., 120.

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has no jurisdiction, consent or acquiescence of the parties cannot create or give jurisdiction. The Agent's decree could not be enforced, except by a suit—*Khusáldás* v. *Sakhárám Rámchandra*[1]. All the execution proceedings, therefore, prior to the passing of the new Code of Civil Procedure were *coram non judice*. Section 649 of the present code is a new provision. It has no retrospective effect. It cannot validate that which was invalid.

WEST, J.:—We are of opinion that the assignment of the decree-holder's right to execution in this case was one approved by the law as contained in section 232 of the Code of Civil Procedure (Act XIV of 1882). A decree-holder, according to section 2 of the Code, includes "any person to whom a decree is transferred," and the transferee gains by the transfer the rights of the transferor.

The decree in this case was originally passed against a *sardár*, Krishnaráo Malhár, by the Agent for Sardárs, and it was of such a character that, as pointed out in this Court some years ago, it could never be completely executed, except by the voluntary act of the judgment-debtor. On the death of Krishnaráo, his *status* of *sardár* under the exclusive jurisdiction of the Agent did not descend to his sons, and the decree was transferred to the Court of the First Class Subordinate Judge at Ahmednagar for execution. Various objections were taken to the execution, and the case came up twice to this Court, under whose orders the execution has for several years been continued in favour of the representatives of the original judgment-creditor against the estate of the judgment-debtor's sons. At a somewhat later period the question having been distinctly raised, it was held in another case that a decree of the Agent could not be executed by mere transfer to an ordinary Court; that the remedy in such a Court was by a suit on the decree. The Subordinate Judge in the present case found that execution had been going on contrary to this decision, and he made this one of the grounds for refusing to recognize the transfer of the decree. The objection, if valid, was equally valid against the transferring decree-holders as against their transferees. To the one case as to the other the principle applies that was laid down in *Anpurnábái's case*[2] and in the subsequent case *Gopál-*

(1) 12 Bom. H. C. Rep., 212. (2) Printed Judgments for 1874, pp. 218—224.

ráv Vithal Deshpánde v. *Bhavanráv 'Nágnáth Mutálik*[1]. The same principle has lately been insisted on by the English Courts in analogous cases: *Ex parte Pratt*[2] and *Ex parte May*[3]. It is this, that where jurisdiction over the subject-matter exists, requiring only to be invoked in the right way, the party who has invited or allowed the Court to exercise it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings due to his own invitation or negligence. In the present instance, the Subordinate Judge has for many years been carrying on the execution under an order of the High Court which he was bound to obey. The High Court had jurisdiction over the matter in every aspect of it, and the sons of the judgment-debtor contested in the High Court the right of the judgment-creditor as against them on exactly the same grounds that they could have taken had they been sued on the decree. They did not contend that their liability could be enforced only by a fresh suit in the Subordinate Judge's Court; and having chosen their ground, and taken their chance of victory in the execution proceedings, they could not, and indeed did not, ask to fight the battle over again. It was the Subordinate Judge who raised the objection for them. Had there indeed been no jurisdiction over the subject-matter, the acquiescence of the parties concerned could not create it; but as there was a jurisdictional power, and the questions at issue were investigated and determined, the irregularity, according to the subsequent ruling in another case, was covered by the assent with which this Court acted. See *Ex parte Anderson*; *In Re Anderson*[4]; *The Queen* v. *Hutchings*[5]; *Chowdhri Murtaza Hossein* v. *Mussumat Bibi Bechunnissa*[6]; and *Koylash Chunder Ghose* v. *Shaikh Ashruf Ali*[7].

Section 649 of the Civil Procedure Code, as the Subordinate Judge admits, covers such a case as the present. But then he says it cannot be given a retroactive effect, and the execution proceedings having been illegal from the beginning in his Court, cannot be validated by the recent legislation. No one, however,

(1) Printed Judgments for 1874, p. 279.
(2) L. R., 12 Q. B. Div., 334.
(3) L. R., 12 Q. B. Div., 497.
(4) L. R., 5 Ch. App., 473.
(5) L. R., 6 Q. B. Div., 301.
(6) L. R., 3 Ind. App., 209.
(7) 22 Calc. W. R. Civ. Rul., 101.

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seeks to undo what has been done: the judgment-debtors do not complain of the first steps of the execution. As to the present and future steps, we think that the Agent's Court is one that has ceased to execute jurisdiction *ratione personæ*, and that the Subordinate Judge's Court being the one in which the judgment-debtors would have to be sued, is capable of executing the Agent's decree now and in future. The decree is one of continuous operation taking effect as each year furnishes proceeds for its satisfaction, and each year it utters anew a command which has to be fulfilled according to the law of procedure then in force. The new law, therefore, governs all steps in execution subsequent to its own enactment, and we must reverse the order of the Subordinate Judge, with costs.

Order reversed.

NOTE.—The following is a report of *Anpurnábái's case* (Printed Judgments for 1874, p. 218,) referred in the above judgment:—

NA'RO HA'RI *v.* ANPURNA'BA'I.*

Res judicata—Cause of action—Jurisdiction, plea of—Acquiescence.

In 1862, Náro Hari obtained a decree against Anpurnábái, which declared him to be entitled to the possession of certain lands then in her possession. Anpurnábái applied in *formâ pauperis*, but her appeal was dismissed on the ground that her poverty was not established. Náro Hari then applied for execution of the decree. The decree had been made by the Principal Sadar Amin at Ahmednagar; but as the Court of that Judge was closed, Náro's application for execution was presented to the Acting Assistant Judge, who was then in charge of the Adálat,—the Zilla Judge being on tour in the districts. The application was, in the first instance, merely dated, and filed among the records of the Principal Sadar Amin's Court, as no one had been placed in charge of the duties of the Principal Sadar Amin. Some weeks afterwards, the Assistant Judge, having been authorized to take charge of the Principal Sadar Amin's duties for the disposal of urgent business, took up the application, and granted an order for execution, which was carried out by possession being delivered to Náro Hari in April 1864.

In July, 1864, a new Principal Sadar Amin having taken office, Anpurnábái applied to be restored to possession, alleging that Náro Hari by an agreement, subsequent in date to the decree, had bound himself not to enforce it, except by taking payment in annual instalments which she on her part had engaged to pay. The Principal Sadar Amin rejected her application, on the ground *(inter alia)* that execution having been completed, the application was too late, and that the order having been made by the Assistant Judge he had no authority to interfere with what had been done under it. On appeal, the Zilla Judge upheld this

* Regular Appeal No. 55 of 1873; Printed Judgment File for 1874, p. 218.

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decree, on the ground that execution had been completed. On the 9th November, 1865, Anpurnábái filed an application to be allowed to sue Náro Hari in *formâ pauperis*. Alleging his agreement not to enforce his decree of 1862 by taking possession, she claimed restitution of the property. She contended that he had obtained execution in evasion of his agreement, and that she had a right to be reinstated. Her application was rejected by the Principal Sadar Amin.

On the 28th March, 1870, a new Subordinate Judge having succeeded to the former one, Anpurnábái presented another application to sue in *formâ pauperis*. In this she did not refer to her unsuccessful application of 1865, but alleged that "Náro and Govind, having by fraud deprived me of property inherited from my husband, hold it wrongfully. I, therefore, claim the property and mesne profits." The Subordinate Judge rejected the application, as being founded on the same cause of action as the previous unsuccessful one. He was, however, induced to review his order, and on review he considered that his decision had been erroneous, and that the application was not barred. He, accordingly, proceeded to try the case on its merits, and he made a decree in Anpurnábái's favour for restitution of the property, on the ground that the Assistant Judge had in 1864 acted without legal authority. He was of opinion that no one but the Principal Sadar Amin could execute the Principal Sadar Amin's decree, and that the permission acquired by Náro Hari being then tainted with illegality could not be maintained against Anpurnábái's claim based on her former possession. Náro appealed to the High Court.

Held, that the present suit was barred, the cause of action set forth being the same as that on which the former suit of 1865 was based. In that suit what Anpurnábái had sued on, was the wrongful dispossession to which she had been subjected by Náro in evasion of his agreement not to excute his decree in that way. In the present suit she alleged deprivation by fraud. No other fraud was suggested than the trick of evading the alleged agreement on which the suit of 1865 was founded. The Subordinate Judge on review had admitted the plaintiff's application, not to try whether there had been fraud or not, but whether there had been valid execution or not. A Judge ought not to take the case out of the hands of the litigants, and make for the plaintiff or the defendant a case which he had no intention to make for himself. When a Judge finds that the application as made—not as the applicant's claim may be moulded by the astuteness of the Judge—rests on a cause of action already once relied on, he is bound to dismiss it.

In her first suit, Anpurnábái's complaint was that she had been deprived by Náro Hari of a possession to which she was entitled. Náro had, no doubt, obtained a special right through his decree, but he had resigned that right by the alleged agreement. Had Anpurnábái recognised the decree as actively subsisting, so as to give Náro a real right in the property notwithstanding his agreement, her suits must have been for damages for breach of the agreement which, thus viewed, could entitle her only to compensation for the injury inflicted on her by Náro's breach of it. The deprivation, of which she complained in her first suit, was represented as a simple act of wrong perpetrated with the aid of the Court's machinery. She must be taken to have complained of Náro's having seized her

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property without any right, the right he had acquired having been abandoned. At the time of the first suit, all the circumstances of the execution were as well known to her and as capable of being brought forward as at any later period. Averring a wholly wrongful ouster, she ought to have relied on all the circumstances which went to constitute that breach of duty on Náro's part. Amongst these were the proceedings by which Náro had got possession of the property. The cause of action, therefore, in the second suit was the same as in the first, *viz.* a wrongful disturbance of a possession, resting not on any particular relation between the parties, but on a proprietorship that imposed on all persons a duty of non-interference.

Held, also, that Anpurnábái, not having challenged the legality of the Assistant Judge's order, granting execution of the Principal Sadar Amin's decree, in any of her applications for restitution of the property, or even on appeal to the Zilla Judge, must be taken to have acquiesced in the irregularity; and that such acquiescence debarred her from objecting to the jurisdiction of the Assistant Judge after the proceedings had been carried to completion.

THIS was an appeal from the decision of Ráv Bahádur Vishnu Moreshvar, First Class Subordinate Judge of Násik, in Suit No. 1691 of 1870.

The facts of this case are sufficiently stated in the head-note and in the following judgment of the Court (West and Nánábhái, JJ.), which was delivered on the 30th September 1874:—

WEST, J.:—The facts of this case have been so sifted in the course of the arguments, which have occupied the Court for several days, that they may now be stated, so far as is necessary for the purposes of this judgment, in a very brief summary. Náro Hari in 1862 obtained a decree against Anpurnábái, by which he was declared to have become owner of certain lands in her possession through the operation of a clause of conditional sale in a mortgage from her to him. As to other lands, he was declared entitled to possession until the amount of the mortgage-debt should be paid off. Anpurnábái appealed in *formâ pauperis*, but her appeal was dismissed on the ground that her poverty was not established. Náro Hari then sought execution. The decree had been made by the Principal Sadar Amin at Ahmednagar; but the Court of that Judge being closed, the application for execution was presented to the Acting Assistant Judge, who was at the time in charge of the Adálat,—the Zilla Judge being on tour in the districts. This application was, in the first instance, merely dated and filed amongst the records of the Principal Sadar Amin's Court,—the Zilla Judge, to whom the Assistant Judge applied for instructions, having informed him that no one had been placed in charge of the duties of the Principal Sadar Amin. Some weeks afterwards, the Assistant Judge, having received from the Zilla Judge an intimation that he was placed in charge of the Principal Sadar Amin's duties for the disposal of urgent business, took up the application, and granted an order for execution, which was carried out by possession being delivered to Náro Hari. These transactions took place in March and April, 1864. In July, a new Principal Sadar Amin having taken office, Anpurnábái presented to him an application, praying that she might be restored to possession, as Náro Hari, by an agreement, subsequent in date to the decree, had bound himself not to enforce it, except by taking payment

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in annual instalments, which she on her part had engaged to pay. The Principal Sadar Amin rejected this application, on the grounds that the original agreement, relied on, was not produced; that, execution having been completed, the application came too late; and that, the order having been made by the Assistant Judge, he had not authority to interfere with what had been done under it. This last ground was pronounced erroneous by the Zilla Judge, when an appeal was made to him; but he upheld the Principal Sadar Amin's order, on the ground that, as execution had been completed, no relief could now be granted in the way in which it was sought.

On the 9th November, 1865, Anpurnábái filed an application to be allowed to sue Náro Hari in *formâ pauperis*. Relying on his alleged agreement not to enforce his decree of 1862 by taking possession, she claimed restitution of the property made over to him in execution of his decree. His proceedings having been taken in evasion of his engagement, she contended that she had a right to be reinstated. Her application was rejected by the Principal Sadar Amín, on the ground that the decree, under which Náro Hari had been placed in possession, was still in force, and that the claim, raising a dispute as to the execution of the decree, was barred by the operation of section 11 of Act XXIII of 1861.

On the 28th March, 1870, a new Subordinate Judge having succeeded to the former one, Anpurnábái presented another application to sue in *formâ pauperis*. In this there is no reference to her unsuccessful application of 1865. She says: "Náro and Govind Hari, having by fraud deprived me of property inherited from my husband, hold it wrongfully. I, therefore, claim the property and mesne profits." The Subordinate Judge's attention was drawn by the defendants to the former application, and on this he rejected the application as being founded on the same cause of action as the previous unsuccessful one. He was induced, however, to review his order; and then, considering that he had been in error in his earlier view, he concluded that the application was not barred. Proceeding to investigate the case on its merits, he gave to Anpurnábái an unconditional decree for restitution, on the ground that the Assistant Judge had acted in 1864 without legal authority. No one but the Principal Sadar Amin could execute the Principal Sadar Amin's decree, and the possession acquired by Náro Hari being thus tainted with illegality, could not, he thought, be maintained against Anpurnábái's claim based on her former possession.

Against this decision, the present appeal has been made; and as to the objection that it was not competent to the Subordinate Judge to review his first order of rejection, we think that the construction placed on the sections of the Code treating on that subject has given to them an extension, which fully embraces the case we have now to deal with. Though limited in terms to cases in which decrees have been passed, they have been held to include final orders generally; and if the Subordinate Judge came to the conclusion that he had been mistaken in his view of the law, there was nothing, we think, to prevent his adopting a correct one on review, and dealing with the case accordingly.

In the exercise of his power of review, the Subordinate Judge determined that the cause of action in the present suit was a different one from that on which the suit of 1865 had been based, and that, consequently, the bar provided by

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section 310 of the Code of Civil Procedure did not apply. On this it has been contended for the respondent that the decision thus admitting the case for trial, not being one affecting the merits of the case, is not open to appeal; but as section 210 says that a second application on the same cause of action shall not be entertained, the wrong reception of such an application is, we think, an excess of jurisdiction, and the order, under which it is received, one affecting the jurisdiction of the Court within the meaning of section 350 of the Code. It is a well-recognised principle that, where the capacity of a Court to deal judicially with a particular matter depends on some collateral circumstance, its decision in a preliminary inquiry into whether the circumstances, which would give it jurisdiction, exist or not, is open to review. In a regular appeal, the facts are as open to consideration for this purpose as the law; but in the present case, the facts on which this part of the inquiry turns are not disputed.

The substantial question then next arises of whether the present suit was barred; and this depends on whether the cause of action set forth by the plaintiff was the same as in the earlier proceeding. What Anpurnábái had sued on in that earlier proceeding was the wrongful dispossession to which she had been subjected by Náro in evasion of his agreement not to execute his decree in that way. In the present case again she says: "Náro and Govind have by fraud deprived me of my property, and wrongfully withhold it." No fraud is specifically set forth in the plaint, but it has not been suggested that there was or could have been any other than the alleged trick on which the suit of 1865 was founded. This appeared so to the Subordinate Judge in the first instance, and he properly dismissed the application; but afterwards, on review, he admitted it not to try whether there had been fraud or not, but whether there had been a valid execution or not. The power, which is given to a Court by section 141 of the Code of Civil Procedure to modify the issues in the course of a trial, is meant to enable it to bring out the questions really arising out of the counter-averments of the parties. It is not intended that the Judge should take the case altogether out of the hands of the litigants and make for the plaintiff or the defendant a case which he had no intention of making for himself. The power of the Court in admitting a case under section 310 is still more limited. That section is intended to guard defendants against the harassment of repeated actions by plaintiffs, who themselves have nothing to lose. If the application is itself barred, it is not open to the Court to convert it into something essentially different, if, as in the present instance, it is studiedly vague, and omits all mention of a prior application. The Judge, when the facts are brought to his notice, ought to reject it rather than by a forced construction find in it a ground for disturbing possession and opening litigation anew. If there really is a cause of action different from what was previously relied on, it can be made the ground of another application: the Judge in making one out for the plaintiff, as he has done here, exceeds his duty. It has been urged for the respondent that the Subordinate Judge gathered the materials for the change that he made in the character of the claim from his oral examination of the pleaders of the parties. The record of the case does not present details, which support this suggestion; but, if it did, the course taken by the Subordinate Judge would still have been irregular. The Subordinate Judge is to examine the petitioner, or the agent of the petitioner, as to the merits of the

claim, and as soon as he finds that the application as made—not as the applicant's case may be moulded by the astuteness of the Judge—rests on a cause of action already once relied on, he is bound to dismiss it.

Whether the cause of action, as conceived by the Subordinate Judge, was in this case one which could, for juridical purposes, be regarded as different from that on which the suit of 1865 had been brought, is a question of some complexity. In the most abstract view of it, a cause of action implies a right, a correlative duty, a failure in that duty, and a secondary right thus engendered to the assistance of a Court. Under systems, such as the Roman law or the English common law, in which the development of legal rights and duties has been greatly influenced by the reaction of a highly artificial mode of procedure, appropriate forms of action can be found for nearly all the ordinary cases which the legal consciousness of the community recognises as justifying an exercise of the coercitive power of the State; but as the variety of human relations greatly exceeds that of the conceptions, upon which a system of actions can be framed, it happens that the same transaction or group of circumstances may furnish a ground for several different actions. In such cases, different causes of action arise to the party injured; but as it is felt that the same set of facts, which the mind at once grasps as jurally integral, ought not to be made the basis of repeated proceedings, the complaining party is allowed to frame his complaint in various ways, and the rule obtains that all the circumstances, which exist when the former of two actions is brought and can be brought forward in support of it, shall be brought forward then, not reserved for a second action arising out of the same events. The cause of action is regarded as identical, though the form of action differs on the second occasion, and the test applied is whether the evidence to support both actions is substantially the same—*Hitchin* v. *Campbell*(1); *Martin* v. *Kennedy*(2). Under a freer system of procedure, such as that of the Equity Courts in England or of the Civil Courts in India, second suits are to be admitted more sparingly than when the plaintiff has to proceed by set forms of action. As he can bring forward his whole case unfettered by artificial restraints, and seek all remedies that the Court can justly award upon the facts proved, there is no reason why he should be permitted to harass his opponent and occupy the time of the Courts by repeated investigations of a set of facts, which ought all to have been submitted for adjudication at once. His cause of action, into whatever Protean forms it may be moulded by the ingenuity of pleaders, is to be regarded as the same, if it rests on facts which are integrally connected with those upon which a right and infringement of the right have already been once asserted as a ground for the Court's interference. What facts are thus intimately connected so as properly to form a single subject of judicial inquiry must, it would seem, depend on the detailed development of the substantive law itself. The stand point, from which rights and duties are viewed, differs in some respects for each community, and thus legal relations group themselves variously in a closer or looser association. Even within the same system, there is, as on all questions of degree, room for contrary opinions as to an essential unity subsisting or not between a matter newly submitted for decision and one already dealt with. It is in these circumstances

(1) 2 W.Bl., 831. (2) 2 Bos. and Pul., 69.

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that the practical difficulties of the application of the principle of *res judicata* consist. What has really been the scope of a judgment will be variously decided according to the unity, which, from the point of view chosen, or imperatively suggested by the system to be administered, subsists or not between the two groups of facts and the legal relations springing from them, which the new suit brings into mutual comparison. A wholly different right or a wholly different group of acts infringing it—different that is according to the central ideas of the legal system—will give rise to a different cause of action. Had the new case been brought forward along with the old, it would have given rise to two inquiries instead of one, and where there is a real separateness of the matters to be investigated, separate investigations are desirable. This is the principle involved in Lord Westbury's decision in the case of *Hunter* v. *Stewart* (4 De G. F. & J., 168), which has been adopted in repeated decisions of this Court, but without any conscious departure from the rule that matters naturally connected with each other so as to be proper for investigation together ought to be brought forward at the same time and are to be considered as forming but a single cause of action, because their legal effects could be exhaustively analysed in a single action and a single inquiry. In the case of *Soorjomonee Dayee* v. *Suddanund Mahapatter*(1), the Privy Council say: "Their Lordships are of opinion that the term cause of action is to be construed with reference rather to the substance than the form of action." They would not allow a matter once disposed of, to be litigated again in a suit framed so as to differ formally from the previous one; and by substance they seem to mean the aggregate of circumstances on which the former suit proceeded or ought to have proceeded with reference to the relief sought to be obtained.

In the present case, Anpurnábái's complaint in her first suit was that she had been deprived of a possesssion, to which she was entitled, by the defendant Náro Hari. Náro had obtained a decree, but the right which this conferred on him he had resigned by a special agreement. The deprivation, to which she was subjected, was thus represented as a simple act of wrong perpetrated with the aid of the Court's machinery, but still a lawless invasion entitling her to restitution. Anpurnábái did not rely on the engagement made by Náro as the foundation of her right. That rested on her proprietorship good against all the world. She put the agreement forward as an extinction, by a means within the competence of the parties, of a special right acquired by Náro through his decree. Had she recognized the decree as actively subsisting so as to give to Náro a real right in the property notwithstanding his agreement, her suit must have been for damages for the breach of the agreement, which, thus viewed, could entitle her only to compensation for the injury inflicted on her by Náro's breach of it. The only alternative is that she admitted the decree to have been legally executed, though, as Náro had engaged not to execute it, she was thus entitled to be reinstated. If, however, for the purposes of the earlier suit, she admitted the decree to have been legally executed, she could not, in a later suit, rest on the execution's having been a mere nullity. It must be taken that she meant to complain of Náro's having seized her property without any right, the right he had acquired having been abandoned. At the time when this first suit was brought,

(1) 20 Calc. W. R. Civ. Rul. at p. 380.

all the circumstances of the execution were as well known to her and as capable of being brought forward as at any later period. Averring a wholly wrongful ouster, she ought to have relied on all the circumstances which went to constitute that breach of duty on Náro's part. Amongst these, if they were a mere semblance of execution, were the proceedings by which Náro had got possession of the property. Anpurnábái had either elected to treat the execution as in itself effectual, and, because effectual, a violation of the agreement, or else had intended to rely on it as no execution at all. In the former case, as we have seen, her election bound her; in the latter, she was bound to bring forward the nullity of the execution in support of her complaint. It was intimately connected with the matters, on which she did rely, and is to be regarded as part of the essential circumstances, uniting with the final act of expulsion to make Náro's conduct legally injurious, and, therefore, a cause of action. And if abandoning the whole connected series of circumstances, which constituted the cause of action in the larger sense, we confine our view, as some jurists and judges have done (see Savigny Syst., sec. 370; 2 Wms., S. 63*e*; *Durham* v. *Spence* (1), to the final act by which the alleged wrong on the part of the defendant attained its consummation, that act was the expulsion of Anpurnábái. According to either view, the cause of action in the second suit is to be deemed the same as in the first, a wrongful disturbance of a possession, resting not on any particular relation between the parties, but on a proprietorship that imposed on all persons a duty of non-interference.

The application, therefore, was barred, and ought to have been dismissed. The Subordinate Judge does not suggest that the execution was sought and obtained from the District Court through any crafty devices on Náro's part, by which a fraudulent advantage was obtained beyond what could have been gained in the Court of the Principal Sadar Amin. If there was anything irregular, it sprang from an ignorance shared alike by the Courts and the parties. The proceedings, so far as questions of regularity and jurisdiction were concerned, were acquiesced in for several years. Náro, if now turned out, would, in seeking execution, be barred by the Act of Limitation. This would be to make the ignorance of Anpurnábái not merely uninjurious to herself, but a means of depriving Náro of his legal right. It is obvious that, in such circumstances, her claim could not, with any approach to justice, be conceded without undoing the past for Náro as well as for her. The Subordinate Judge has simply awarded her possession; but if her position is thus to be made what it was nine years ago, so must Náro's. The order for her restitution ought to have been accompanied by one enabling Náro now to execute his decree. On this, he would immediately regain possession, and the plaintiff would take nothing by her suit. It might have occurred to the Subordinate Judge that, where the relief sought could be granted only on terms which would make it futile and illusory, except for purposes of mere vexation, it should, in the interests of peace and good policy, be withheld. We may share Mr. Vishnu Moreshvar's pity for an unfortunate and perhaps ill-used lady, but we must not allow such a feeling to influence our judgment in the administration of the law.

(1) L. R., 6 Ex., 46.

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In the view of the case, which we have taken, it becomes unnecessary to pronounce definitively upon the legal position of the appellants Náro and Govind as in possession of lands in dispute. For them, it has been contended that, as they are now in actual possession and as they are able to defend that possession by a decree passed in their favour, their possession ought to be maintained, however irregularly acquired. In the recent case of *Rám Newaz Singh* v. *Kishunrái*(1), the High Court of the North-West Provinces said : " If a person, in whose favour a decree has been passed, obtains possession peaceably without the aid of the Court.....he is rightfully in possession." Anpurnábái did not forcibly resist the eviction to which she was subjected, and thus, in one sense, possession was gained peaceably by Náro and Govind. But, then, this was obtained, whether rightly or wrongly, by the help of the District Court. In the case of *Taylor* v. *Cole*(2), Lord Kenyon says : " A person, who has a right of entry, (obtained in that case on a sale under a *fieri facias*) may enter peaceably, and being in possession, may retain it.....and this will not break in upon any rule of law respecting the mode of obtaining the possession of land." But in the case of *Doe dem Stephens* v. *Lord*(3), where a mortgagee, after obtaining a decree in ejectment and allowing execution to become barred, took out a writ of *habere facias possessionem* and thus got possession, the writ was set aside for irregularity. The mortgagor then sought to be reinstated by a writ of restitution, and was met by the arguments that the judgment stood unreversed, and that the mortgagee's possession being rightful could not be disturbed. Upon this, the Court, though they could not give a writ of restitution, yet ordered possession to be restored to the mortgagor. Lord Denman said the mortgagee "sued out another writ, by which he was enabled to obtain possession with an appearance of authority from the Court which he was not entitled to. He ought not to keep that possession ; " and Pattison, J. : " It ought not to go forth that a party having obtained judgment in ejectment may enter without a writ of possession, unless by consent of the person holding ". These *dicta* embody a principle, which it is very important to uphold in this country, and which will effectually prevent a judgment-creditor even with a decree for possession reaping any advantage from a possession acquired by force or by any misuse of process of execution. But then it is to be observed the injured party did not affect to treat the process as a nullity. He sought the aid of the Court, first to get it set aside and then to obtain restitution. This, on the state of facts asserted for Anpurnábái, is what she ought to have done. It does not appear, on the face of the proceedings, whether Mr. Gopál Rávi Hari, the Acting Assistant Judge, who issued the warrant for execution of the Principal Sadar Amin's decree, had been regularly appointed to act as Subordinate Judge or not. From the circumstance that the application for execution was at first merely dated and sent to be recorded in the Principal Sadar Amin's Court, because, as the District Judge wrote, Government had not yet appointed any one to take charge of the Principal Sadar Amin's "duties," and was afterwards taken up and disposed of on an intimation from the District Judge that the Assistant Judge was to deal with urgent business of the

(1) 6 N.-W. P. Rep., 137. (2) 3 T. R. at p. 295.

(3) 7 A. & E. at p. 613 and 614.

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Principal Sadar Amin's Court, it might be inferred with some probability that a regular appointment had been made; but this is not distinctly set forth, and the warrant is signed by the Assistant Judge simply as such. It seems not impossible, therefore, that Anpurnábái might have got the order set aside by an application for that purpose. Instead of this, she applied to the Principal Sadar Amin for restitution on the ground that there had been an execution, but an execution made wrongful and liable to be set aside on account of the agreement into which the judgment-debtor had entered. When the Principal Sadar Amin refused to set aside the execution, she appealed to the District Judge, insisting that the decree was to be considered as having been executed by the Principal Sadar Amin, that the Principal Sadar Amin had erroneously denied this, and that the District Judge ought to rectify the error, and for the special reason arising out of Náro's agreement, set the execution aside. In any aspect of the case, when the record was thus brought into the Court of the District Judge, it was placed before a competent tribunal. Under such circumstances as these, every intendment is to be made in favour of a legal jurisdiction—see *The King* v. *Clayton* (1) compared with *The King* v. *Inhabitants of Hulcott*(2). In *Wilson* v. *Hobday* (3) a declaration on a replevin bond was specially demurred to, on the ground that it did not show a custom for the mayor to take replevin; but Lord Ellenborough, as the mayor had replevied on the application of the defendant's principal, said: "We think we are bound, as against this defendant, to presume, at least till the contrary is shown, that these goods were duly and legally replevied by the mayor, if under any circumstances he could duly and legally replevy them.....As the Mayor of Canterbury might by legal possibility have had full power to do all he did, we think we are not at liberty, upon the facts stated, to presume in favour of this defendant that he had not." If, therefore, on any reasonable hypothesis, the Courts can be supposed to have acted with authority, Anpurnábái, who in all the later stages of their proceedings was the active party, is debarred from afterwards questioning their jurisdiction. In the recent case of *Hurdeo Náráin* v. *Gridharisingh* (4), a judgment-creditor who had taken a rule, which set aside an order annulling a sale, but which also confirmed the sale, an order, which should regularly have been made only in appeal from the lower Court's order on the same point, was forced to accept the order as if made on appeal when further proceedings were taken by his opponent. The action of the Court, which he had invited, was held to operate for him as if the preliminary steps usually requisite had been regularly taken. If Anpurnábái wished to rely on the incompetency of Mr. Gopál Rávi Hari to order execution, she might have relied on that ground in her prayer to have the order set aside, and the District Judge would have been competent, the Principal Sadar Amin having refused to set aside the order, to deal with the question thus raised. She did not take this ground, but invited a decision on a point which could not arise, unless the execution had in itself been formally regular. From the District Judge's refusal to interfere, because the execution had been completed, she did not make a special appeal to this Court, nor did she ask for an exercise of the Court's extraordinary jurisdiction, by which

(1) 3 East., 58.
(2) 6 T. R., 583.
(3) 4 M. & S., 120, at pp. 127, 129, 130.
(4) 13 Beng. L. R., 103.

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acts done without authority may be set aside. Section 350 of the Code of Civil Procedure makes it plain that the law intends that an error as to jurisdiction shall be corrected in appeal, and if such an error is made to appear to the Court, it will be taken notice of at any stage of the case. In this case, there was a Court of further resort beyond the District Court to correct any error into which that Court might fall, and by a special appeal, Anpurnábái could obtain any relief which the law allowed. In the case of *Ex parte Manohar Bhivrav* (1), an application was made to this Court to set aside an order in execution passed by a District Judge as having been made without jurisdiction. It appeared that the ordinary Courts had not jurisdiction over the applicant, who was a *sardár*; but the judgment of this Court delivered by Westropp, J., was: "Before the Munsif, the applicant either did or did not raise the objection of want of jurisdiction. If he raised it, and the Munsif wrongly disallowed it, he ought to have appealed to the Judge; and there would have been a special appeal to this Court. But if he did not raise it, he must be taken to have waived it; and it is certainly too late for him to raise it now, when the Munsif's decree is sought to be executed. The application is, therefore, rejected with costs."(2)

Here it is clearly shown what course ought to be taken by a party who questions the jurisdiction. If that course is not taken, it is too late to raise the question when the proceeding has been carried to completion.

In the *English* reports, there are many cases in which the acts and orders of Courts of limited jurisdiction have been allowed to be treated as void by a party concerned, where the circumstances necessary to give jurisdiction did not exist. The cases of *Welch* v. *Nash*(3) and *Davidson* v. *Gill*(4) may be taken as examples, where, though orders made by Justices had been confirmed by the Sessions, they were held no answer to actions of trespass, when it appeared that the orders had been made without jurisdiction. The Quarter Sessions could dispose finally of the appeal, but their authority being essentially limited, an order going beyond it was void. But in these and similar instances, it must be borne in mind that the case could not be carried up in a regular course of appeal to a Court having general jurisdiction. Unless a prohibition should be granted, or the proceedings should be quashed on *a certiorari*, there was no other way to try the jurisdiction than by an action against those who made or acted on the order. An action of trespass is suggested by Martin, B., as the proper way of trying the validity of an order of a County Court in *Denton* v. *Marshall*(5). Special jurisdictions, according to the English law, are circumscribed, (1) with respect to place, (2) with respect to persons, (3) with respect to the subject-matter of their jurisdiction—*Perkin* v. *Proctor and Green*(6), and it is said in that case that, if there is a defect in any of these respects,

(1) 2 Bom. H. C. Rep., 375.

(2) NOTE.—Similarly the Roman Law says—"*Est receptum et hoc jure utimur ut si quis major vel æqualis subjiciat se jurisdictioni possit ei et adversus eum jus dici.* Poth. Pand., Lib. II, Tit I, § 26.

(3) 8 East., 394.
(4) 1 East., 64
(5) 32 L. J. Ex., 89.
(6) Wils., 382.

"all is void and *coram non judice;*" yet, as we have seen, there may be a submission to the jurisdiction by a person not subject to it, which is conclusive on the party. As to place, no question arises here. As to subject-matter, there seems to be no reason, on principle, why, in India and for a Court having general jurisdiction, a question of jurisdiction arising on this point should not, at least as regards the party on whom the jurisdiction immediately bears, be concluded by submission or by failure to take the steps, which the law prescribes for getting rid of an erroneous order just as much as a question of personal jurisdiction. Every decree is a command to a person, and whether his possible ground of objection is that the Court has no jurisdiction to command him at all, or none to command him in the particular case and as to the particular subject-matter, seems to make no difference in principle. The public interest is, no doubt, concerned in Courts of inferior jurisdiction, such as Small Cause Courts, being restrained to the subjects placed by the law within their cognizance, but a District Court is a Court of general civil jurisdiction. All persons and all property within the district are subject to it. If after a matter has come before it in appeal, and been disposed of, its order can in a subsequent proceeding be treated as a nullity on account of the defective jurisdiction of the Court, from which the appeal was made, or the original nullity of the order, against which relief was sought, there is no reason why the same thing should not be done after a further order in special appeal by the High Court. The order of the one Court as of the other binds a person generally subject to the jurisdiction until it is reversed or set aside, and can be questioned only in the ways provided by the law. In a recent case, the Master of the Rolls thought it a good answer to an application founded on the Court's having sold property without jurisdiction that there was a decree standing unreversed, and directing the sale, *Steed* v. *Preece*(1). The order, which if beyond the jurisdiction might have been got rid of by proceedings directed to that object, was not allowed to be canvassed in a collateral inquiry.

We have thought it not out of place to make these observations, though they were not absolutely necessary for the disposal of the appeal, because very vague and incorrect notions prevail on the subject, to which they relate. The superior Courts in England long looked with extreme jealousy upon the particular jurisdictions, by which their own powers might be encroached on, and expressed themselves in language, which is not to be applied without caution to our system of Courts organized in a regular gradation of dependence on the High Court. The rough method of treating the order of a Court as no order at all, or of seeking by a suit to expel a person, whom that order has definitively placed in possession, has no proper application where no provision is made for such a proceeding, and where the order itself may be brought under review by precisely the same authorities, who will have to dispose of the suit brought to test its validity. By providing the one method of redress, the Legislature has tacitly excluded the other. It is commonly said that "a question of jurisdiction may be raised at any time;" where proceedings are laid down for determining the question, it should be "any time in the course of those proceedings." He, who, having an appeal and a special appeal on a question of jurisdiction, has not availed himself of those

(1) L. R., 18 Eq. Ca., at p. 196.

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remedies, "*renunciavit juri pro se introducto.*" The public interest is not concerned when the matter has once been placed before a Court having full jurisdiction over the person and the cause, and an omission to urge objections there is to be treated when the proceedings have been completed as conclusive.

We annul the decree of the Subordinate Judge with costs.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

1886. *August* 5.

DAULAT AND JAGJIVAN, SONS OF LAKHMIDA'S, *v.* BHUKANDA'S MANEKCHAND.*

Practice—Decree—Execution of mortgage—Decree for redemption directing payment of mortgage-debt within a specified time—Computation of time allowed for payment when the decree is affirmed in appeal.

Where, in a suit by a mortgagee on a mortgage, the decree of the Court of first instance directed payment of the mortgage-debt within two months from the date of the decree from which the defendants appealed, but which was confirmed by the Appellate Court,

Held, under the circumstances of the case, that it was the intention of the Appellate Court that the term of two months allowed for payment should be counted from the date of its own decision, and not from the date of the original decree.

THIS was a second appeal from the decision of Shripat Bábáji Thákur, Acting Assistant Judge of Surat, in Appeal No. 29 of 1883.

The facts of this case were as follows:—The plaintiff, Bhukan Manekchand, brought a suit against one Daulat Lakhmidás and his brother Jagjivan to recover the principal and interest due under a mortgage-bond. The Assistant Judge of Surat passed a decree in appeal, directing that the defendants should pay Rs. 200 to the plaintiff in satisfaction of the mortgage-debt within two months from the date of the decree (*i. e.* the Assistant Judge's decree). The defendants preferred a second appeal to the High Court, which confirmed the decree of the Assistant Judge.

Thereupon the defendants made an application to be allowed to pay Rs. 200 within two months of the date of the High Court's decree.

* Second Appeal, No. 747 of 1884.