to the plaintiff-respondent entitling him to maintain this suit. Until his enjoyment of his own land is directly and immediately interfered with by the growth of the defendant-appellant's trees, he has no right to ask for their removal from the defendant's own land, who is entitled to have them there so long as he does not thereby injure the plaintiff.

1883

RAM LAL v. DALGANJAN.

The appeal is decreed with costs, and the suit of the plaintiff will stand dismissed.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Tyrrell.

PETMAN (DEFENDANT) *v.* BULL (PLAINTIFF).*

1883

February 23.

Patent—Suit for infringement—Jurisdiction—Transfer of suit—Civil Procedure Code, s. 25—Particulars of breaches—Act XV. of 1859, ss. 22, 34.

A suit for the infringement of certain inventions, instead of being instituted in the Court having, by virtue of s. 22 of Act XV. of 1859, jurisdiction to entertain it, was instituted in a Court subordinate to such Court not having such jurisdiction. The Court having jurisdiction to entertain such suit, at the joint request of the parties, transferred it for trial to itself under s. 25 of the Civil Procedure Code, and tried it.

The plaintiff did not, as required by s. 34 of Act XV, 1859, deliver with his plaint particulars of the breaches complained of in the suit. In his plaint, after describing his inventions, he alleged generally that the defendant had made and used them at a certain place without his license.

Held that, inasmuch as the parties had assented to the transfer of the suit, and its transfer brought it into the right Court, the fact that the suit had been originally instituted in the wrong Court did not render the transfer illegal, and the Court having jurisdiction had properly tried the suit.

Held also that, as required by s. 34 of Act. XV, of 1859, the plaintiff should have delivered with his plaint particulars of the breaches complained of, that the general allegation as to infringement contained in the plaint did not amount to such particulars; and that under these circumstances the plaintiff came into Court with a case which could not be tried.

THIS was a suit for Rs. 10,000, compensation for the infringement of a patent. In the first paragraph of the plaint the plaintiff stated as follows:—

"That early in June, 1872, the plaintiff invented a continuous flame kiln for burning bricks, in which the continuous action or draught is caused and maintained by the use of moveable iron chimneys, placed at intervals in such portions or parts of the kiln

* First Appeal No 53 of 1882, from a decree of A. Sells, Esq., Judge of Cawnpore, dated the 22nd May, 1882.

1883

PETMAN v BULL.

where the burning of the bricks is to be effected, and plaintiff also invented a particular method of loading and working such kiln, and that consisted of placing the green (or unburnt) bricks in the said kiln in concentric continuous walls or lines with parallel open spaces or draught passages between such walls or lines of bricks, and on the 28th June, 1872, the plaintiff, in pursuance of the provisions of Act XV of 1859, filed his specification of the said inventions, and on the 28th June, 1872, obtained the patent, or right to the sole and exclusive privilege of making, selling and using the said inventions in India, and of authorising others to do so, for the term of fourteen years, from the 28th of June, 1872."

In the 2nd paragraph the plaintiff stated:—"In working or using the patent kiln, described in the preceding paragraph, fuel was supplied through furnace mouths in the sides of the kiln, and the plaintiff, early in 1878, discovered, that by having or providing vertical holes (or open spaces) in the continuous concentric lines or walls of green or unburnt bricks, the fuel could, with greater advantage, be supplied from the top of the kiln, by being lowered, through the said open spaces or vertical holes into the furnaces below, where the combustion is effected, and plaintiff discovered other improvements described in the specification dated the 17th May, 1878, which was in pursuance of the said Act filed on the 20th May, 1878, and the plaintiff thereby became the patentee of the said inventions."

In the 3rd paragraph the plaintiff stated:—"In 1878, plaintiff also discovered, that by using the said patented methods of constructing, loading, and firing the kiln invented by him, it was possible to effect a great saving and profit, by substituting a kiln formed by a trench dug into the earth for the usual superstructure, which previously used to be erected at a great cost on or above the earth. On the 27th September, 1878, the plaintiff filed his specification of the said invention, and became the patentee thereof in accordance with the provisions of Act XV of 1859."

In the 5th paragraph the plaintiff stated:—

"The defendant H. C. B. Petman has used, and is now using in Cawnpore, a kiln with two sets of operations, similar to that patented

in manner above described by the plaintiff, and in such kiln the various inventions patented by the plaintiff as aforesaid have been made and used without any license from the plaintiff, who therefore claims Rs. 10,000 as royalty and damages."

The suit was instituted on the 2nd February 1882, in the Court of the Subordinate Judge of Cawnpore. On the 15th February 1882, the parties made a joint application to the District Judge of Cawnpore to transfer the suit to his Court, and on the same day the application was granted, and the suit transferred accordingly. On the 2nd March 1882, which date had been fixed by the District Judge for the settlement of issues, the defendant objected to the hearing of the suit in the District Judge's Court on the following grounds:—

(i) "Because the order of the District Judge withdrawing the suit from the Court of the Subordinate Judge was bad in law, in that according to the provisions of s. 22 of Act XV. of 1859 (Patent Act), the suit could only be instituted in the "principal Court of original jurisdiction in civil cases, within the local limits of whose jurisdiction the cause of action shall accrue or the defendant shall reside as a fixed inhabitant;" and that the provisions of s. 25 of the Civil Procedure Code imply at least an appellate jurisdiction in the Court exercising the powers of withdrawal and transfer conferred therein, which the District Judge would not possess by law in respect of the money-value of the suit; and further, that the terms of the section distinctly contemplate the institution of a suit according to the provisions of s. 15 of the Code, and the valid pendency of a suit legally instituted in the proper Court": (ii) "Because no subsequent acts of the parties or order of the District Judge under s. 25 of the Civil Procedure Code, whether valid or invalid, could be held in law to cure or remedy so grave a contravention of the imperative provisions of law as those contained in ss. 15, 48, and 57 of the Code:" and (iii) "Because the plaint, instituted under the provisions of Act XV of 1859, was not accompanied by the 'particulars of the breaches complained of,' as required by s. 34 of that Act, and that therefore no valid plaint, as required by law, had been instituted in any Court to which the defendant could be called upon to answer."

1883

PETMAN v. BULL.

The District Judge (Mr. J. H. Prinsep) on the same day disallowed the defendant's objections, holding, on the question of the jurisdiction, that it was "not necessary to look to the manner in which the suit came before the Court;" "that there had been no such irregularity" in the proceedings which could be "deemed to act prejudicially to the interests of either party, and until that was found there was no call for pronouncing it to be such as vitiated the proceedings already taken;" and that the power conferred in s. 25 "must be held to embrace all suits, whether rightly or wrongly brought in the first instance:" and on the point whether the plaint contained the particulars of the breaches complained of, that it contained enough of such particulars to enable the defendant to answer to the suit. On the 17th April 1882, the defendant filed his written statement. In this he again objected to the competency of the District Judge to try the suit, and to the frame of the plaint, for the reasons contained in his petition of the 2nd March 1882. In the third and last paragraph of the statement he stated as follows:—"That so far as defendant is able to answer, in the absence of such particulars, defendant denies liability on every ground permitted by law, as defendant has in fact committed no infringement, inasmuch as defendant has burnt bricks on his own process." On the 22nd April 1882, the plaintiff was examined on his own behalf. At the beginning of his examination objection was taken on behalf of the defendant to the plaintiff giving evidence as to the manner in which the defendant had infringed his patent, on the ground that the particulars required by s. 34 of Act XV. of 1859 had not been given in the plaint. This objection was overruled, and the plaintiff was allowed to give evidence as to the manner in which his patent had been infringed. On the 27th April, the defendant applied for time to file a supplemental written statement, giving particulars of the grounds of his defence to the suit, and to be allowed to produce evidence in support of those grounds. The District Judge rejected this application.

Upon the first and second issues framed in the suit the District Judge (Mr. A. Sells) held as follows:—

"Could the original error in the institution of the suit in the Subordinate Judge's Court be cured by the order of transfer,

1883

PETMAN v. BULL.

under s. 25, Act X. of 1877, issued by Mr. Prinsep, on the 2nd March, or in the exact words of the issue as recorded, 'under the circumstances of the civil suit having been originally preferred in a Court not having jurisdiction, can the transfer to this Court, under its own orders, and with the consent of the parties, correct the original error, and be accepted as legally equivalent to original institution in this Court'? The defendant's counsel contends that there could be no legal order of transfer, under s. 25 of Act X, because the plaint having been filed illegally in the Court of the Subordinate Judge, there could be no case actually 'pending' in that Court. This interpretation of the word 'pending' seems to me somewhat strained. The case, it is urged, was not pending at all in the Subordinate Judge's Court: because, under s. 25, no suit regarding infringement of patent will lie in any Court below the District Court. The wording of s. 22 is, that no suit will be 'maintainable' in any other than the District Court, and by this term I understand that no relief can be granted, unless the suit is heard and determined in the District Court. But if it is held that the very plaint is in itself a nullity, and all proceedings are absolutely void, then the same might be said of such causes as are barred by the Statute of Limitations. These cases also are not maintainable, no relief can be granted, and so far all proceedings are infructuous, but if the very pendency of such suits is to be denied, then the conclusion follows, that no order of dismissal even can be passed; such order would itself be a nullity. The cases seem to me so far analogous, that in both the condition of jurisdiction would be ordinarily governed by Act X. of 1877, and such jurisdiction (in the one case, in all Courts; in the other, in all Courts below the District Court) is barred only by special laws. Further, in the present case, the action taken with the consent of both parties resulted in bringing the case into the Court that actually has jurisdiction, and though the proceeding, by which this end was gained, was unquestionably irregular, the case may, it appears to me, be regarded as falling within the principal laid down in the case of *Sadasiva Pillai* v. *Ramalinga Pillai* (1) that where the parties have agreed to certain proceedings

(1) 15 B. L. R., 383.

1883

PETMAN v. BULL.

which may have been quite contrary to the ordinary *cursus curiæ*, those proceedings should, in cases where the Court had a general jurisdiction over the subject-matter, not be pronounced infructuous. The defendant's counsel quotes the case of *Piarey Lall Mozoomdar* v. *Kamal Kishor Dassia* (1). But in that case the Court in which the appeal, the transfer of which was sought, was filed, had no jurisdiction even ordinarily. But in the present instance the plaint was filed in a Court, which, under Act X. would have had full jurisdiction, had it not been for a special provision under Act XV. of 1859. The cases therefore are not altogether analogous. A nearer approach to the present conditions is furnished by the case of *Grose* v. *Amirtamayi Dasi* (2). In this case suit had been brought against the two defendants, appellants, in the Hooghly Court, which really had no jurisdiction over the latter defendant. He joined in an application to have the case tried by the High Court, and the application was granted. Subsequently, the question of jurisdiction was raised. Phear, J., held, that all that took place in the Hooghly Court was certainly without jurisdiction, but held also that the 'suit must be treated exactly as if the plaint had been originally filed in the High Court, and that all irregularity of proceeding which had occurred was rendered unimportant, because the parties had all appeared in the Court, ready to go to trial, and no one had in fact been misled, or put to any disadvantage by the course pursued,' and on appeal, Macpherson, J., held that 'the original want of jurisdiction was cured,' and no question as to it could any longer 'be raised.' This ruling may, I am of opinion, be fairly applied to the present case. No one has been misled, or in any way prejudiced by the procedure, irregular though it has been, while the rejection of the suit would involve to the parties further delay and greater expense. For the above reasons, I hold that there is no prejudice to the jurisdiction of this Court in the present case."

"The 2nd issue is—Have the provisions of s. 34 of the Patent Act been sufficiently complied with, in regard to 'particulars of the breaches' complained of.' For the defendant, it is contended that the plaintiff has failed to observe the conditions of

(1) I. L. R., 6 Calc., 30. (2) 4 B. L. R., O. C., 1; 13 W. R., O. J., 12.

the law, and that the particulars required have not been furnished. Now it does not appear from the section referred to, I think, that it is necessary, that there should be any separate statement of these particulars. The simple object of the law is, I presume, that the Court shall know exactly the specific points in regard to which the infringement of patent is alleged, and that the defendant may be made distinctly aware of the breaches of the patent with which he is charged, in order that he may be in a position to answer to them. The 'particulars' required may, I hold, be contained in the plaint itself, and there is this advantage in the incorporation, that the defendant is made distinctly cognizant of the particulars, as under the existing laws a copy of the plaint itself is delivered to the defendant, unless specially ordered by the Court. The question is simply, are the required 'particulars of breaches' stated in the plaint in the present case? Now looking at paragraphs (1), (2) and (3) of the plaint, we find a concise statement of the various inventions patented by the plaintiff, as consise almost as could be, without detailing the whole of the specification. In paragraph (1) the continuous flame kiln, as patented in 1872, is concisely described, the manner of maintaining the continuous draught by means of moveable chimneys, placed at intervals over the various portions of the kiln, where the burning of the bricks is to be effected, and the method of loading by means of concentric walls of green bricks with air passages between them, are clearly stated. In paragraph (2) also, the salient points in the second patent of 1878 are given, consisting of the providing of vertical holes in the continuous concentric walls of green bricks for the introduction of fuel, while in paragraph (3) again, the patent for the trench kiln (of 1878), as a substitute for the previous structure above ground, is described. Then in paragraph (5) it is stated that the defendant is using at the present time, in Cawnpore, a kiln, in which 'the various inventions patented by the plaintiff, as aforesaid, have been made and used without any license' from the latter. The defendant's counsel lays great stress upon the remarks of the High Court in the case of *Sheen* v. *Johnson* (1). That judgment simply insists upon the necessity of the particulars of infringement being given, and upon the inadmissibility of any

(1) I. L. R., 2 All., 381.

1883

PETMAN v. BULL.

evidence to infringement, if such particulars have not been given. In reality, this is simply a reiteration of the clear provisions of the law itself. But there is nothing in that judgment, upon which to base an argument, that in the present case the required particulars have not been given. As to the absolute necessity of the statement of particulars of infringement, the law is undoubtedly peremptory. Whether the particulars have or have not been furnished, and whether the particulars that have been furnished are or are not sufficient to meet the requirements of the law, is a matter for the decision of the Court in each particular case: and looking at what appears to me to have been the object of that special provision of s. 34, as noted above, I cannot see that in the present case there has been any failure on the part of plaintiff to comply with the law. The salient points of the various patents have been concisely described, and the time and place of the infringement are also given. The defendant, says the plaint, has at the present time working in Cawnpore a kiln, in which the various inventions patented by the plaintiff, as already described in this plaint, are in use. Nothing can well be plainer than this, and the defendant could scarcely have been more clearly apprised of the distinct points in the construction and working of his kiln, to which exception was taken, and in regard to which he would have to adduce rebutting evidence. Indeed, I have failed to understand the persistence with which, on the defendant's side, it has been contended that the 'particulars' have not been supplied. There is no special form laid down in the law in which the particulars are to be given. The form is presumed, therefore, to be immaterial, so long as the special points of infringement are clearly recorded and in the present case I fail altogether to see that the requirements of the law have not been fully met. I may here note that one point in the patent of 1872 has certainly not been entered in the plaint, *viz.*, the iron dampers to prevent back draught. In this, respect, therefore, no infringement can be alleged. Upon the 2nd issue, then, I find, for the reasons given above, that the particulars of breaches as required by law have been furnished by the plaintiff." Upon the 3rd issue the Judge held that, in the construction of the working of the kiln referred to in paragraph (5) of the plaint, the defendant had infringed the plaintiff's patent as described in

paragraphs (1), (2) and (3) of the plaint; and upon the 4th issue that the plaintiff was entitled to the damages claimed.

1883

PETMAN v. BULL.

The defendant appealed to the High Court, the 1st and 2nd grounds in his memorandum of appeal being (1) that the District Judge was not competent to try the suit, as brought before him, and nothing done by the parties cured the defect; and (2) that the Judge had erred in law in holding that the plaintiff was not compellable to file particulars of breaches.

Messrs. *Howard* and *Hill*, for the appellant.

Messrs. *Conlan*, *Ross*, and *Jackson*, for the respondent.

The Court (STUART, C. J., and TYRRELL, J.) delivered the following:—

JUDGMENT.—We unhesitatingly disallow the first reason of appeal. The argument based upon it cannot for a moment be listened to. The filing of the suit at first in the Court of the Subordinate Judge was a mere mistake on the part of the plaintiff's pleader, and it would be absurd to contend that the transfer to the Judge's Court was made in contravention of the provisions of the Code of Civil Procedure, both parties being agreed as to the necessity of the transfer, and the Patent Act XV of 1859, s. 22, expressly providing that "no such action (for the infringement of the patent) shall be maintained in any Court other than the principal Court of original jurisdiction in civil cases within the local limits of whose jurisdiction the cause of action shall accrue."

The objection raised by the second reason of appeal is a much more serious matter, going as it does, to the relevancy of the suit as brought. By s. 34 of Act XV. of 1859, it is distinctly provided that "in any action for the infringement of such exclusive privilege the plaintiff shall deliver with his plaint particulars of the breaches complained of in the said action." This provision has not been complied with in the present case. What is stated on the subject is nothing more than the general allegation contained in the 5th paragraph of the plaint that "the defendant, H. C B. Petman, has used, and is now using in Cawnpore a kiln, with two sets of operations, similar to that patented, in manner above described, by the plaintiff, and in such kiln the various inventions patented by

1883

PETMAN v. BULL.

the plaintiff, as aforesaid, have been made and used without any license from the plaintiff." The same s. 34 further provides that "at the trial of any such action or issue no evidence shall be allowed to be given in support of any alleged infringement, or of any objection impeaching the validity of such exclusive privilege, which shall not be contained in the particulars delivered as aforesaid." So that the plaintiff came into Court without any case which could possibly be tried. The attempt made at the hearing to show that the statement in the 5th paragraph of the plaint amounted to notice of particulars as required by the Act, was only supported by going into matters which were outside the plaint altogether.

How, in the face of such very plain and distinct directions as those contained in s. 34 of the Act, the plaint should have been framed in its present form it is difficult to understand. The second reason for appeal must therefore prevail, but we will allow the plaintiff another opportunity of a hearing on the merits, and for that purpose we direct that the plaint be amended and presented in the proper Court, *viz.*, the principal Court of original jurisdiction in civil cases at Cawnpore, and that with the plaint the particulars required by s. 34 be duly delivered. As to costs, these, under the circumstances, had better be reckoned as costs in the cause, and we order accordingly.

Appeal allowed.

1883.
February 23.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

SIRAJ-UL-HAQ AND ANOTHER (DEFENDANTS) *v.* KHADIM HUSAIN AND ANOTHER (PLAINTIFFS.)*

Appeal—Security for costs—Practice—Notice to show cause—Rejection of appeal—Civil Procedure Code, ss. 2, 549—"Decree"

An order under s. 549 of the Civil Procedure Code rejecting an appeal because security has not been furnished, as directed under that section, is a "decree" within the meaning of s. 2, from which an appeal will lie.

The discretion conferred on an appellate Court by s. 549 to demand security for costs must be properly exercised; and such discretion is not so exercised when the order requiring such security is made without notice to the appellant to show cause why the order should not be made.

No order affecting a party should be made without notice to him calling upon to show cause why the order should not be made.

* Second Appeal No. 946 of 1882, from a decree of Maulvi Maqsud Ali Khan, Subordinate Judge of Saharanpur, dated the 27th May, 1882, affirming a decree of Maulvi Nasr-ul-lah Khan, Munsif of Saharanpur, dated the 31st March, 1882.