

Lord Bacon that there must be a constant and vigorous prosecution of the suit, still something must be done to keep it alive and in activity"—and again "there must be a continuous *litis contestatio*." The suit in which the decree of 1869 was passed cannot, therefore, in our opinion, affect the defendant's title as a *lis pendens*. The defendant was a purchaser for value without notice of the plaintiff's decree, which created the lien on the land from Apaya, who was in possession at the time, and he, therefore, takes unaffected by the plaintiff's equitable lien created by the decree.

We must, therefore, confirm the decree with costs.

Decree confirmed.

APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and
Mr. Justice Nánábhái Haridás.*

BHUNDAL PA'NDA' AND OTHERS, (ORIGINAL DEFENDANTS), APPLICANTS, *v.*
PANDOL POS PA'TIL AND OTHERS, (ORIGINAL PLAINTIFFS), OPONENTS.*

1887.
September 5.

Fishery—Immoveable property—Right of fishery—Possession—Dispossession—Specific Relief Act I of 1877, Sec. 9—Practice—Civil Procedure Code (Act XIV of 1882), Secs. 30 and 622—Objection under section 30 where suit is under section 9 of Specific Relief Act.

The plaintiffs were fishermen belonging to the village of N. They claimed in this suit for themselves and the other fishermen of their village the exclusive right of fishing in the Nágothna creek between high and low water mark, within certain limits set forth in the plaint, and, under section 9 of the Specific Relief Act I of 1877, they sought to recover possession of that right from the defendants, who, they alleged, had dispossessed them within six months before this suit was filed. The Subordinate Judge held that they had established their right, and made an order directing that possession should be restored to them. The defendant then applied to the High Court under its extraordinary jurisdiction, contending that the order made by the first Court was beyond its jurisdiction, the right of fishing not being immoveable property within the meaning of that section.

Held, that the first Court did not act without jurisdiction, the right claimed coming within the denomination of immoveable property.

It was contended by the defendants that the plaintiffs, who claimed on behalf of other fishermen of the village, should have proceeded under section 30 of the Civil Procedure Code (Act XIV of 1882).

* Extraordinary Application, No. 52 of 1887.

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Held, that the objection was a good one; but, inasmuch as it was still open to the defendants to establish their right by a regular suit, the irregularity in the present suit was not such as to call for the exercise of the powers of the High Court under section 622 of the Civil Procedure Code.

APPLICATION, under the extraordinary jurisdiction of the High Court, against an order by Rāv Sáheb A. K. Kotháre, Subordinate Judge of Pen, in the Thána District.

The plaintiffs were fishermen belonging to the village of Naoghar. They claimed in this suit, for themselves and the other fishermen of that village, the exclusive right of fishing in the Nágothna creek between high and low water mark, within certain limits mentioned in this plaint, and sought, under section 9 of the Specific Relief Act I of 1877, to recover possession of that right from the defendant, who, they alleged, had dispossessed them within six months before the filing of this suit. No notice of the institution of the suit was, however, given to the other fishermen joined as co-plaintiffs.

The Subordinate Judge made an order directing possession to be restored to the plaintiffs.

Against this order the defendants presented the present application to the High Court, and contended (*inter alia*) that the order of the Subordinate Judge was without jurisdiction, the right to fish not being immoveable property within the contemplation of section 9 of the Specific Relief Act, and that the suit had not been instituted in accordance with the provisions of section 30 of the Civil Procedure Code (Act XIV of 1882).

A *rule nisi* was granted on the 28th April, 1887.

The rule now came on for hearing.

Branson, (*Mahádev Chinnaji A'pte* with him), for the defendants in support of the rule:—From the plaint itself it appears that the plaintiffs were not in possession, and this suit does not lie under section 9 of the Specific Relief Act. For the purposes of that section there must be some tangible immoveable property of which the person suing is dispossessed—the property capable of physical possession. It has been held that immoveable property does not include incorporeal rights. A right to fish is of

that class : see *Haro Dyal Bose v. Kristo Gobind Sein*⁽¹⁾. That case was under section 15 of Act XIV of 1859, which is similar to section 9 of the Specific Relief Act. Further, the place, in which plaintiffs claim the right to fish, is Government property, to which the plaintiffs have no right, by prescription or otherwise : see *Viresa v. Tutayya*⁽²⁾. The right to fish is not a tangible right to immoveable property—*Krishna Dhone Dutt v. Troilokia Nith Biswas*⁽³⁾. The object of the Legislature in framing section 9 was simply to provide a summary remedy in cases of interference with the right to physical possession. The suit in the present case was instituted without the authority of the other fishermen of the plaintiffs' village, and without any notice of the institution of the suit, as required by section 30 of the Civil Procedure Code (Act XIV of 1882), and this is an irregularity which justifies the Court's interference under section 622 of the Code, the proceedings in the suit being without jurisdiction, and there being no appeal or review even given against an order under section 9 of the Specific Relief Act.

Pándurang Balibhadra, contra :—A right to fish is immoveable property within the contemplation of section 9 of the Specific Relief Act. The General Clauses Act I of 1868 defines by section 2 what is included in the term "immoveable property". The right to fish is a benefit arising out of land within the definition.

The Registration Act III of 1877 includes "fisheries" in the definition of immoveable property. As the right to fish is immoveable property, it is capable of possession. If the Legislature intended that section 9 of the Specific Act should relate only to immoveable property capable of physical possession, the word "tangible", which has been used in the Criminal Procedure Code, (Act X of 1882), sec. 145, would have been inserted before the word "immoveable" property in that section. The Subordinate Judge has properly exercised his jurisdiction, and his decision cannot be interfered with under the extraordinary jurisdiction of the High Court. If the defendants are dissatisfied with the finding of the Subordinate Judge under the section, which is the

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(1) 17 Calc. W. R. Civ. Rul., 70.

(2) I. L. R., 8 Mad., 467.

(3) I. L. R., 12 Calc., 539.

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same as section 15 of Act XIV of 1859, their remedy is by a separate suit, and not by application under the extraordinary jurisdiction. See *Doorga Soonduree Debia v. Káshee Kant Chuckerbutty*⁽¹⁾. The suit was rightly constituted, and the omission to give notice under section 30 of the Civil Procedure Code (Act XIV of 1882) does not of itself constitute such an irregularity as to justify interference under the extraordinary jurisdiction of this Court.

SARGENT, C.J.:—The plaintiffs in this suit, who are some of the fishermen of the village of Naoghar, claim for the fishermen of that village the exclusive right of fishing in the Nágothna creek between high and low water, within certain limits mentioned in their plaint, and seek, under section 9 of the Specific Relief Act, to recover possession of that right from the defendants, who, they allege, had dispossessed them within six months before the filing of the suit. The Subordinate Judge made an order that possession should be given to the plaintiffs. It has been contended that this was beyond his jurisdiction, the right of fishing not being immoveable property within the contemplation of the above section. The right claimed is the right of excluding the public from a particular part of the sea, and would constitute what is technically termed a “common of fishery,” and, being a private right of fishery as distinguished from the right of the general public to fish in the sea and navigable rivers, would, as pointed out by Sir Michael Westropp in his very learned judgment in *Baban Mayacha v. Nagu Shravucha*⁽²⁾, come under the denomination of immoveable property.

It has been urged, however, that immoveable property in the above section does not include incorporeal rights, and the case of *Haro Dyal Bose v. Kristo Gobind Sein*⁽³⁾ was referred to in support of that contention. The Court in that case expressed an opinion that a “suit to enforce a right of way did not fall under the provisions of section 15, Act XIV of 1859”; on the ground that “ordering an obstruction to be removed was not giving possession, as is contemplated by the section.” Assuming, although it is by no means clear, that the Court intended to lay down

(1) 14 Calc. W. R. Civ. Ral., 212.

(2) I. L. R., 2 Ben., 19.

(3) 17 Calc. W. R. Civ. Ral., p. 70.

that incorporeal rights were not included in the section, we are not disposed to follow that ruling. A man is said to be in possession of a right when he can exercise it, and he recovers possession of an incorporeal right when the obstruction which interfered with its exercise is removed. The form of the order by which possession is restored, must depend upon the nature of the right and the circumstances of the case. Had it been the intention of the Legislature to exclude incorporeal rights, we might expect that it would have been done by express terms or by confining the operation of the section to "tangible immoveable property", as is done in section 145 of the Criminal Procedure Code of 1882. Upon the whole, therefore, we think that the Subordinate Judge did not act without jurisdiction.

As to the objection that the suit should have been instituted in accordance with the provisions of section 30 of the Civil Procedure Code, we think it is well-founded, as the right of fishery was claimed as one belonging to all the fishermen of the village of Naoghar; but we do not think that in a case like the present, where it is still open to the applicants to establish their right by suit, the irregularity was such as to call for the exercise of the powers of this Court, under section 622 of the Civil Procedure Code.

Lastly, the Court has decided, whether rightly or wrongly, that the plaintiffs had been in exclusive possession of the fishery within the limits claimed, and in so doing, acted within its powers.

We must, therefore, refuse the application with costs.

APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and
Mr. Justice Nanábhái Haridás.*

MEHTÁ JETHA'LÁ'L, (ORIGINAL PLAINTIFF), APPELLANT, *v.* JAMIAT-
RA'M LALUBHÁ'I, (ORIGINAL DEFENDANT), RESPONDENT.*

1887
September 13.

Jurisdiction—Caste question—Secession from a caste—Property purchased by seceding section during period of secession—Reunion of section with the caste—Suit by caste to recover from a seceding member property purchased by seceding section.

The plaintiff and the defendant belonged to the caste of Visnagra Bráhmans, which in 1841 divided into two sections, known as the big and little sections.

* Second Appeal, No. 540 of 1885.