

1903.

VINAYAK
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Their Lordships agree with the conclusion arrived at by the High Court,⁽¹⁾ that "neither..... by the terms of the original grant nor of the subsequent orders of the ruling power, nor by family custom, nor by adverse possession (if such there could be in a case like this), has Chinto's branch of the family..... acquired a right to perpetual management of the village of Ahire or in consequence to resist its partition."

It may be worth while to refer to a case *Adrishappa v. Gurusaidappa* ⁽²⁾ the head note of which is that "*Deshgat watan* or property held as appertaining to the office of Desai is not to be assumed *prima facie* to be impartible. The burden of proving impartibility lies upon the Desai; and on his failing to prove a special tenure, or a family or district or local custom to that effect, the ordinary law of succession applies."

Their Lordships will, therefore, humbly advise His Majesty that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors for the appellant—*Messrs. T. L. Wilson & Co.*

(1) 1896; 21 Bom. 455 at p. 462.

(2) (1880) L. R. 7 I. A. 162

ORIGINAL CIVIL.

Before Mr. Justice Russell.

JAIRAMDAS GANESHIDAS AND ANOTHER, PLAINTIFFS, v.
ZAMONLAL KISSORILAI, DEFENDANT.*

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February 10.

Injunction—Temporary injunction to restrain suit brought by defendant in the Small Causes Court—Civil Procedure Code (XIV of 1882), sections 492, 493—Specific Relief Act (I of 1877), sections 53, 54 and 56.

In a suit by plaintiffs in the High Court to recover damages for breach of contract, they sought to obtain an interlocutory injunction restraining the defendant from proceeding with a suit filed by the defendant against the plaintiffs in the Small Causes Court in respect of the same contract until the hearing of the High Court suit.

* Suit No. 25 of 1903.

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Held, that an application to restrain a suit in the Small Causes Court does not come within the provisions of sections 492 and 493 of the Civil Procedure Code.

The provisions of the Civil Procedure Code as to temporary or interlocutory injunctions are not the same as those under the Judicature Act, 1873, section 25, sub-clause 8. As the injunction asked for is a perpetual one, it can, under the Specific Relief Act, only be granted by the decree made at the hearing.

THE plaintiffs sued to recover from the defendant Rs. 1,730 and interest thereon at 9 per cent. from the 22nd June, 1900, till payment, alleging that the defendant had purchased from them one hundred bales of cotton deliverable between the 15th and 20th May, 1900, but had failed to take delivery. The plaintiffs thereupon sold the cotton by auction and now sued for the loss incurred by such sale.

The plaint further stated as follows :

The defendant on the other hand falsely claimed from the plaintiffs Rs. 779-6-0, being the amount of difference between the contract rate and the market rate on the 25th May, 1900, and has filed a suit, being Suit No. 21205 of 1902, against plaintiffs in the Court of Small Causes at Bombay.

The plaintiffs deny their liability to the defendant, but on the other hand claim from the defendant Rs. 1,730-5-0 as stated above.

The plaint prayed for judgment for the said sum of Rs. 1,730, and further prayed that in the meantime and until the hearing of this suit the defendant might be restrained by injunction from proceeding with the said suit, No. 21205 of 1902, in the Court of Small Causes at Bombay.

On the presentation of the plaint on the 21st January, 1903, the plaintiffs obtained a rule *nisi* for an injunction restraining the defendant from proceeding with his suit in the Small Cause Court. The rule now came on for hearing.

Inverarity for the defendant showed cause:—The Court has no power to grant the injunction asked for. The plaintiffs ask for a temporary injunction restraining the defendant from proceeding with his suit in the Small Cause Court until this suit is heard. Temporary injunctions, however, can only be granted under sections 492 and 493 of the Civil Procedure Code (Act XIV of 1882) and such an injunction as the plaintiffs seek does not fall within these sections. Such an injunction as they desire can only be granted by the final decree

made at the hearing of this suit: see sections 53, 54 and 56 of the Specific Relief Act (I of 1877). He also cited clause 13 of the Letters Patent, 1865, and sections 12 and 25 of the Civil Procedure Code (Act XIV of 1882).

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Davar for the plaintiffs in support of the rule cited *Nusserwanji M. Panday v. Gordon*.⁽¹⁾

RUSSELL, J.:—The plaintiffs herein, Jairamdas Ganeshdas and another, sue the defendant Zamonlal Kissorilal for damages for the non-acceptance of one hundred bales of cotton and ask to restrain the defendant from proceeding with Suit No. 21205 of 1902 in the Bombay Small Causes Court. Paragraph 6 of the plaint herein sets out the nature of that suit. (His Lordship read the paragraph and continued:)

Mr. Inverarity for the defendant herein has raised an important question, viz., that this Court has no jurisdiction to restrain the defendant from carrying on his suit in the Small Cause Court. I take it to be an important question, for points of this kind are repeatedly raised in this Court and all questions involving jurisdiction are important.

The plaintiffs in their affidavit in support of the rule, which has not been replied to, state that they were induced by a threat on the defendant's part not to file this suit, and so the defendant was enabled to file his suit in the Small Cause Court first.

Mr. Inverarity's contention put shortly is this: that this injunction can only be granted by final decree in this suit and not on an interlocutory application. This depends on the effect of sections 53, 54 (e) and 56 (a) of the Specific Relief Act (I of 1877). (His Lordship read the sections⁽²⁾ and continued:)

In the first place, it is to be observed that the framers of the Civil Procedure Code have apparently expressly refrained from putting temporary or interlocutory injunctions on the

(1) (1881) 6 Bom. 266.

(2) Specific Relief Act (I of 1877), sections 53, 54 (e) and 56 (a) & (b): .

53. Temporary injunctions are such as are to continue until a specified time, or until the further order of the Court. They may be granted at any period of a suit, and are regulated by the Code of Civil Procedure.

A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit. * * * * *

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same footing as they are put by the English Judicature Act, 1873 section 25, sub-clause 8. (His Lordship read the section.⁽¹⁾)

Section 53 of the Specific Relief Act (I of 1877) moreover says that temporary injunctions are to be regulated by the Civil Procedure Code: see *Amir Duhin v. Administrator-General of Bengal*.⁽²⁾ Sections 492 and 493 of the Civil Procedure Code, however, provide as follows. (His Lordship then read the sections.⁽³⁾)

54. * * * * *

When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following cases:

(e) Where the injunction is necessary to prevent a multiplicity of judicial proceedings.

56. An injunction cannot be granted—

(a) to stay a proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent multiplicity of suits;

(b) to stay proceedings in a Court not subordinate to that from which the injunction is sought.

(1) English Judicature Act, 1873, section 25, clause 8:

25 (8). [So far as relevant.] An injunction may be granted by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just.

(2) (1896) 23 Cal. 351.

(3) Civil Procedure Code (XIV of 1832), sections 492, 493, paragraphs 1 and 2:

492. If in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors,

the Court may by order grant a perpetual injunction to restrain such act, or give such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, or refuse such injunction or other order.

493. In any suit for restraining the defendant from committing a breach of the peace or other injury, whether compensation be claimed in the suit or not, the plaintiff may at any time after the commencement of the suit, and either before or after judgment, apply to the Court for temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of like kind arising out of the same contract or relating to the same property or right.

The Court may by order grant such injunction on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit, or refuse the same.

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It is obvious that an application to restrain a suit in the Small Cause Court does not come within these provisions. I take it that *expressio unius est exclusio alterius*, and if the framers of the Civil Procedure Code had intended to put interlocutory applications for injunction on the same footing as they were under the Judicature Act, they would have done so. I must assume, therefore, that they deliberately intended to limit such applications to the matters enumerated in sections 492 and 493 of the Civil Procedure Code only. Moreover it is under the head of perpetual injunctions only in the Specific Relief Act that the present application comes, and as that can only be granted by the decree made at the hearing, this application must be refused.

At the same time, it appears to me that the plaintiffs are not without another remedy. It would be a manifest injustice if they were. For their position is this. They are entitled by law to bring this suit in this Court, although it is within the jurisdiction of the Small Cause Court. Their object in doing so is, I am told, to enable them to get discovery and inspection which they cannot get in the Small Cause Court. If the defendant herein gets his decree in the Small Cause Court, the matter will be *res judicata* and the plaintiffs will be without any remedy. Now of course they might file a cross-suit in the Small Cause Court, which they do not wish and are not obliged to do. I am of opinion then that their proper course would be to apply to this Court to remove the defendant's suit from the Small Cause Court to this Court under clause 13 of the Letters Patent. The Extraordinary Jurisdiction of this Court is that which the Court exercises on special occasions and in a special manner: see *Narivahoo v. Turner*.⁽¹⁾ Clause 13 of the Letters Patent applies to the exercise of the Extraordinary Original Jurisdiction of the Court. The Extraordinary Jurisdiction of the High Court is derived from Regulation II of 1827, section 5, clause 2, the powers conferred by which upon the Sadar Diwani Adalat were by section 9 of 24 and 25 Vict., cap. 15, transferred to the High Court: see *Mahadaji v. Sonu*.⁽²⁾ By section 6 of the

(1) (1889) L. R. 16 Ind. Ap. 156 at p. 162; 13 Bom. 520.

(2) (1872) 9 Bom. H. C. R. 249.

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Small Cause Courts Act (XV of 1882), the Small Cause Court shall be deemed to be under the superintendence of the High Court. (His Lordship read the section.⁽¹⁾)

Rule 62 of the High Court Rules enables me to exercise any part of the jurisdiction vested in the High Court on its Original Side. But as the point has not been argued I merely throw this out for the consideration of the parties to save them further costs; for it may be that Mr. Inverarity might convince me that an application, such as I have suggested, should be made to the High Court on its Appellate Side.

I must discharge this rule with costs. Order that the sum deposited by the plaintiffs before applying for the rule be returned to them or their Attorneys.

Rule discharged.

Attorneys for the plaintiffs—*Messrs. Tyabji, Dayabhai and Company.*

Attorneys for the defendant—*Messrs. Malvi, Hiralal and Mody.*

(1) Presidency Small Cause Courts Act (XV of 1882), section 6 :

6. The Small Cause Court shall be deemed to be a Court subject to the superintendence of the High Court of Judicature at Bombay.....within the meaning of the Letters Patentdated the 28th day of December, 1865, for such High Court, and within the meaning of the Code of Civil Procedure,and the High Court shall have, in respect of the Small Cause Court, the same powers as it has under 24 & 25 Vict., chapter 104, section 15, in respect of Courts subject to its appellate jurisdiction.