1902.

MAHADEV v. BABI.

barred by a provision of the Limitation Act, the difficulty cannot be evaded by proceeding as if that obstacle did not exist, and by having recourse to another article of the schedule providing for circumstances in which the obstacle to be removed is not included. It is clear in this case that article 136 could not apply. For that article applies to cases in which a time has arrived when the plaintiff can assert that his vendor has become entitled to possession, and that assertion it is impossible for the plaintiff to make as long as an order under section 335 is in operation declaring that the vendor is not entitled to possession.

On these grounds the decree of the lower Court is confirmed, and the appeal is rejected with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Aston.

APAJI PATIL (ORIGINAL PLAINTIFF), APPELLANT, *v.* APA (ORIGINAL DEFENDANT), RESPONDENT.*

1902. *July* 22.

Practice—Procedure—Fact alleged by plaintiff and not denied in defendant's written statement or at hearing—Presumption—Injunction—Repeated violation of legal right—Damages—Adequate remedy—Specific Relief Act (I of 1887), section 54.

In a suit praying for an injunction restraining the defendant from interfering with the plaintiff's possession of certain land, the plaintiff in the plaint alleged obstruction by the defendant. It was not denied by the defendant in his written statement or put in issue at the hearing.

Held, that it might be presumed that the defendant did not deny the fact of obstruction.

Repeated violation of an established legal right cannot in ordinary cases be adequately met by damages, nor can these damages be satisfactorily ascertained.

SECOND appeal from the decision of J. C. Gloster, Acting District Judge of Belgaum, reversing the decree of Ráo Sáheb V. V. Kalyanpurkar, Subordinate Judge of Chikodi.

* Second Appeal No. 645 of 1901.

1902.

APAJI v. APA.

Suit for injunction restraining the defendants from obstructing the plaintiff in the enjoyment of certain land.

The plaintiff alleged that he had purchased the land from its owner, one Raghu, about fifteen years before suit, and had been in possession ever since. He complained that the defendant interfered with his enjoyment of the land, and prayed for an injunction against him.

The defendant disputed the validity of the plaintiff's purchase from Raghu, and denied that the plaintiff had been in possession. He alleged that he (the defendant) had been in possession.

The Subordinate Judge found that the plaintiff's purchase was valid and that the plaintiff had been in possession, and he granted the plaintiff an injunction as prayed.

On appeal the District Judge reversed the decree and dismissed the suit, holding that it was not a case for injunction; that it had not been proved that the defendant had interfered with the plaintiff's possession; and that, if he had done so, it had not been shown that pecuniary compensation would not afford adequate relief.

Kisanlal R. Daftari for the appellant:—The District Judge finds that the obstruction complained of is not proved. But it is not denied by the defendant in his written statement, nor was any issue raised on the point at the hearing. The defence was justification. The Judge was wrong in requiring that the plaintiff should prove the obstruction which was not denied: *Ahmedee Begum* v. *Dabee Persaud.*[1] The defendant alleges that he is in possession. His trespass, therefore, of which we complain is a trespass under colour of title, and we are entitled to an injunction: *Lowndes* v. *Bettle.*[2]

Dattaram V. Pilgaonkar for respondent (defendant):—This is not a case for injunction; see section 54 of Specific Relief Act (I of 1877). The points to be decided are (1) whether the plaintiff has a right to the property; (2) whether the defendant invaded that right; (3) whether pecuniary compensation is not adequate relief. The Judge considered these points although no issue was raised on them. It was for the plaintiff to prove his case and

(1) (1872) 18 Cal. W. R. 287. (2) (1864) 33 L. J. (Ch.) 451.

right to injunction. We rely on *Natha Singh* v. *Jodha Singh* [1]; *Mulji Bechar* v. *Anupram*.[2]

JENKINS, C.J. :—By this suit the plaintiff seeks to restrain the defendant from obstructing him in the enjoyment of a piece of land, alleging that he has been in possession for the last fifteen years and more as purchaser from Raghu.

The defendant by his written statement disputes the validity of the purchase from Raghu, denies the plaintiff's enjoyment of the land, and avers that it has been in his (the defendant's) possession.

The issues framed were the following :—(1) Was Raghu the exclusive owner of the land in dispute? (2) Is plaintiff in possession of the land in dispute? (3) Is the suit in time? (4) Is the sale-deed of plaintiff a hollow transaction? (5) Is plaintiff entitled to the injunction sought for?

Neither party sought more. The first Court found on the fourth issue in the negative and on the rest in the affirmative, and granted the injunction sought.

On appeal the case was heard by the District Judge, who said :

> The first question which arises is whether a fit case was made out for the granting of an injunction. I am clearly of opinion that this must be answered in the negative. There is not a particle of evidence to show that the plaintiff's possession was invaded by defendant. Nor is it shown that it was a case in which, had there been invasion, pecuniary compensation would not afford adequate relief.

We will dispose first of the remark that "there is not a particle of evidence to show that the plaintiff's possession was invaded by defendant." It is true that the District Judge does not make this the only basis of his decision, but it is right to point out that the allegation of obstruction was not denied in the written statement or put in issue at the hearing. It is therefore fair to presume that the defendant did not deny the obstruction (cf. *Ahmedee Begum* v. *Dabee Persaud* [3]), and that this is the true view becomes the more apparent from the character of the written statement and the fact that before us his pleader declined to give any under-

(1) (1884) 6 All. 406. (2) (1870) 7 Bom. H. C. R. 136.
(3) (1872) 18 Cal. W. R. 287.

1902.

APAJI v. APA.

taking against obstruction. The truth is, the defendant justified under colour of title. If the Subordinate Judge really thought there was anything in this point, he should have made enquiry of the parties or the pleaders as to what the fact was, and, if necessary, have framed an issue and given the parties an opportunity of adducing evidence.

We now pass on to consider the determination that a fit case has not been made out for the granting of an injunction; and in this connection it must be assumed that the findings of the Subordinate Judge on the first four issues are correct. Section 54 of the Specific Relief Act provides, that when the defendant invades, or threatens to invade, the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual injunction, when there exists no standard for ascertaining the actual damage caused or likely to be caused by the invasion, or where the invasion is such that pecuniary compensation would not afford adequate relief. It appears to us that where a legal right, violated by another under colour of title, is established, the recurrence of violation cannot in ordinary cases be adequately met by damages, nor can those damages be satisfactorily ascertained. How, for example, can damages be an adequate relief to one who has established his right to the possession of land, if his possession be subjected to repeated obstruction by another, or how can those damages be ascertained? The inappropriateness of damages in such cases is recognized in the English Courts, where too the inadequacy of the remedy by damages is a condition of relief by injunction. Thus in *Lowndes* v. *Bettle* [1] a person not being in possession of an estate claimed it as heir at law, entered upon it, cut down trees and cut sods, and threatened to repeat his conduct in order to establish his alleged title as against the possessor. Thereupon an injunction suit was brought to restrain these acts. Kindersley, V.C., in granting an injunction said: "Where the person in possession seeks to restrain one who claims by adverse title, the tendency of the Court will be to grant the injunction, at least when the acts done either do or may tend to the destruction of the estate."

(1) (1864) 33 L. J.Ch. at p. 457.

1902.

APAJI v. APA.

It appears to us that if the plaintiff establishes his right, this is eminently a case for an injunction. If this relief be not granted, there is the danger of a multiplicity of legal proceedings, or worse still, that the parties will take the law into their own hands, and in our opinion the Court should be ready as far as possible to grant such relief as will tend to prevent the risk of these evils.

We may further point out that even had damages been the proper remedy, it would have been incumbent on the District Judge, according to the authority of *Callianji* v. *Narsi Tricum*,[1] to have decided the first four issues for the purpose of determining whether damages should be awarded.

The decree must be reversed, and the case remanded for retrial on the merits. Costs will abide the result.

Decree reversed, case remanded.

(1) (1895) 19 Bom. 764.

APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Batty.

1902. *July* 23.

KASHINATH KEDARI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* GANESH HARI NARKAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Partnership — Two firms — Common partners — Advances by one firm to the other — Suit to recover such advances — Partnership account necessary — Practice — Procedure.

The two plaintiffs were the owners and sole partners of the firm of Apaji Kashinath. They were also partners in the defendant firm of Ganesh Hari Narkar, in which there were three other partners besides themselves. Between 1891 and 1896 the firm of Apaji Kashinath advanced money to the firm of Ganesh Hari Narkar, which latter firm ceased to do any business in 1897, although the partnership was not formally dissolved. In 1899 the plaintiffs brought this suit against the firm of Ganesh Hari Narkar to recover their advance. Being partners in the firm, the plaintiffs appeared also as defendants (Nos. 3 and 4) in the suit, the real object of the suit being to recover from the other partners (defendants 1, 2 and 5) their share of the amount alleged to be due by the firm to the plaintiffs.

* First Appeal No. 106 of 1901.