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would be liable: *Butterbury* v. *Vyse*.(1) The case may be a hard one on the plaintiff in the result, but we cannot on that account uphold a decree against the arbitrators, if no sufficient ground exists for imposing on them legal liability.

The result is that as against the appellants, with whom alone we are concerned, the decree must be set aside and the claim rejected with costs throughout.

*Decree reversed.*

(1) (1863) 2 H. & C. 42.

## APPELLATE CIVIL.

*Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.*

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MAGANLAL PUNJASA (ORIGINAL PLAINTIFF), APPELLANT, *v.* CHHOTALAL GHELA AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

*Injunction—Suit to prevent erection of building—Building erected after suit filed, but before hearing—At hearing the Court may grant mandatory injunction directing removal of building although only preventive relief prayed for in plaint—Practice—Procedure.*

Plaintiff sued to restrain the defendants from erecting a certain door. The plaint also contained a prayer for "such other relief as the Court might think fit." After filing the plaint the plaintiff applied for an *interim* injunction pending the hearing of the suit, which, however, was refused. The defendants thereupon erected the door, and at the hearing contended that inasmuch as the plaint prayed only to prevent the erection of the door and not for its removal when erected, the plaintiff could not obtain the latter relief in this suit, but must file fresh suit. The lower Court dismissed the suit, holding that on the erection of the door a new and different cause of action had arisen for which a fresh suit must be filed. On appeal,

*Held* (reversing the decree and remanding the case), that on the suit as framed the Court could grant a mandatory injunction for the removal of the door. The suit was rightly framed in the light of the circumstances which existed when it was brought. It was the defendant's subsequent conduct which rendered it necessary that the plaintiff should be given, as prayed for in his plaint, such other relief as the Court might think fit.

SECOND appeal from the decision of Ráo Bahádur Thakordas M., Joint Judge of Ahmedabad, confirming the decree of Ráo Bahádur Chunilal D. Kavishvar, First Class Subordinate Judge.

* Second Appeal No. 18 of 1901.

The plaintiff sued to obtain an injunction restraining the defendants from erecting or causing to be erected a door to a *khadki*,[1] from raising the level of the door-way above its original level and from executing any building work there which might cause obstruction or difficulty to the passing of cattle, carriages, carts and fire engines through the door-way or over the land of the *khadki*. He alleged that the houses of the parties were situate in the *khadki*, that the entrance or door of the *khadki* had always been about six feet wide, that men, cattle and carriages passed and repassed through it without hindrance, that the door had been broken away for many years, that the defendants now intended putting up a new door and raising the level of the door-way so as to obstruct the passage of cattle, carriages and fire engines, and that the intended act of the defendants was likely to injure the plaintiff. The plaint also contained a prayer that the Court might pass any other order which was deemed just and proper.

Immediately after the plaint was filed the plaintiff applied for an *interim* injunction, which, however, was refused.

Before the suit came on for hearing the defendants did erect the door, and at the hearing they contended (*inter alia*) that inasmuch as the plaint did not pray for a mandatory injunction directing the removal of the door, the plaintiff could not obtain a decree for its removal. The plaint was filed to prevent the erection of the door, but not to procure its removal after it had been erected.

The plaintiff, at the hearing, applied to amend the plaint and insert the necessary prayer, but his application was rejected on the ground that the proposed amendment would alter the nature of the suit and would allege a new and different cause of action. The Subordinate Judge then dismissed the suit on the ground that it was brought to prevent the erection of the door, and not to obtain its removal.

On appeal by the plaintiff, the Judge confirmed the decree, holding that the Subordinate Judge was right in rejecting plaintiff's application for the amendment of the plaint; that the

(1) *Khadki* is a small street with a door at one end and containing five or six houses on each side.

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right to sue for a mandatory injunction had accrued to the plaintiff after the suit was filed; and that the plaintiff should therefore bring a fresh suit on this fresh cause of action.

The plaintiff appealed to the High Court.

*Lallubhai A. Shah* for the appellant (plaintiff) :—The cause of action for a mandatory injunction to remove the door was really the same as that for an injunction to prevent its erection, namely, the breach of our right to pass over the street and to drive carriages, cattle, &c., over it. The lower Courts should have taken evidence, and if the infringement of that right was proved, they should have granted a mandatory injunction. We contend that for both the reliefs the cause of action was really the same, and to admit a prayer for the removal of the door would not have altered the nature of the suit—*Daniel* v. *Ferguson*,[1] *Von Joel* v. *Hornsey*.[2] A mandatory injunction directing the removal of the door could have been granted in this suit.

*M. N. Mehta* for the respondents (defendants) :—A prayer for a mandatory injunction in this case would necessarily be based on a cause of action entirely different from that alleged in this plaint. That cause of action did not exist when this suit was filed. The Court cannot permit the plaint now to allege a state of things which did not exist when it was filed. The injunction formerly sought was not refused merely because we undertook to pull down the door in the event of the plaintiff's ultimately proving his right. It was refused because the plaintiff failed to make out a case for a temporary injunction. If the state of things has been altered, the plaintiff can seek redress by filing a fresh suit for a mandatory injunction. If in such suit the Court finds that the plaintiff can get adequate relief by monetary compensation, there would be nothing to prevent the Court from granting that relief.

CHANDAVARKAR, J. :—The plaintiff in this case sued for a permanent injunction to restrain the defendant from erecting or re-erecting a *khadki*. Almost immediately after the commencement of the suit in August, 1899, he applied for an *interim* injunction, which, however, he failed to obtain. At the time when

(1) (1891) 2 Ch. 27 (2) (1895) 2 Ch. 774.

the suit was filed the defendant had not proceeded with his building so far as to make it necessary for the plaintiff to ask in his plaint in specific terms for a mandatory injunction. But after the plaintiff's application for an *interim* injunction had been rejected, the defendant proceeded with the building, so that when the case came on for hearing the mischief which had been apprehended by the plaintiff was an accomplished fact and the building had been erected. On that ground both the lower Courts have held that the plaintiff's suit must be dismissed. They agree, in thinking that, under the circumstances which had come into existence when the suit was brought on for hearing, a preventive injunction would be of no avail to the plaintiff, as there was no longer any reason to prevent what had been done.

We cannot agree with that view which the lower Courts have taken of the plaintiff's claim. The suit was rightly framed in the light of the circumstances which existed when it was brought. But it was the defendant's subsequent conduct which rendered it necessary that the plaintiff should be given, as prayed for in his plaint, such other relief as the Court might think fit. The plaintiff was entitled under the circumstances to a mandatory injunction, if he proved the right alleged in his plaint.

We, therefore, reverse the decree and remand the case for a re-hearing and disposal on the merits by the Court of first instance. If the Court thinks that the plaintiff has made out a case for a mandatory injunction, it should grant it. In saying that, we do not intend to indicate any opinion as to the merits of the plaintiff's claim. If the first Court finds that no case is made out for a mandatory injunction, it is competent for it to award damages, if the plaintiff proves his right.

All costs hitherto incurred to abide the result.

*Decree reversed and case remanded.*