APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

MANGALDAS (ORIGINAL PLAINTIFF), APPLICANT *v.* JEWANRAM AND OTHERS (ORIGINAL DEFENDANTS), OPPONENTS.* 1899. *March* 2.

Specific Relief Act (I of 1877), Sec. 9—Right of way—Immoveable property—Right of way is not immoveable property within the meaning of section 9 of the Act.

A right of way is not "immoveable property" within the meaning of section 9 of the Specific Relief Act (I of 1877).

APPLICATION under section 622 of the Civil Procedure Code (Act XIV of 1882) against the decision of Ráo Sáheb S. B. Gadgil, Subordinate Judge at Bassein.

The applicant filed a suit under section 9 of the Specific Relief Act (I of 1877) to be restored to the possession of a right of way, which, he alleged, was obstructed by the defendant's erecting a wall across the way in dispute.

The Subordinate Judge of Bassein dismissed the suit, holding that a right of way was not included in the term "immoveable property" in section 9 of Act I of 1877.

Against this decision plaintiff applied to the High Court under its Revisional Jurisdiction.

A rule *nisi* having been granted,

Inverarity (with him *Manekshah Jehangirshah*) showed cause.

Macpherson (with him *R. R. Desai* and *B. F. Dastur*) *contra.*

CANDY, J.:—The question is whether a right of way is "immoveable property" within the meaning of section 9 of the Specific Relief Act according to the definition in the General Clauses Act. I agree with the Subordinate Judge that a right of way is not a "benefit to arise out of land," but it does not, therefore, follow that a right of way is not immoveable property. The word 'include' in section 2 of the General Clauses Act is enumerative, not exhaustive. A right of way would certainly seem to be an interest in immoveable property. But whether an easement proper (such as is the right of way claimed in this case) can be strictly said to come within the definition of immoveable

* Application, No. 209 of 1898.

1899.

MANGALDAS v. JEWANRAM.

property or not, there is, in my opinion, something repugnant in the subject or context of section 9 of the Specific Relief Act which prevents such an effect being given to the definition. The repugnancy arises because it appears that the nature of the relief provided by the Act is repugnant to the character of the property in question. The nature of the relief here must be by injunction. In a case like the present one, if the suit will lie, and if the Subordinate Judge finds that the plaintiff has been dispossessed of his property (his right of way) within six months, then the Subordinate Judge is bound to give a decree awarding him possession of the property, that is, the Subordinate Judge is bound to grant an injunction, *viz.*, by preventing defendant from obstructing the right of way. But the granting of an injunction is, under Part III of the Act, subject to certain restrictions. It is subject to the discretion of the Court (section 52). It can only be granted where the invasion of the right is such that pecuniary compensation would not afford adequate relief. It is possible to imagine a case where a right of way has been obstructed, but there still exists a right of passage for plaintiff, though over a longer way, and the Court may deem it proper to allow the obstruction to remain and to award pecuniary compensation for the diversion. In the case of another easement, *viz.*, right of light and air, there is a course of decisions holding that, if possible, pecuniary compensation should be awarded instead of an injunction to remove the obstruction. But the only decree available under section 9 is a decree for recovery of possession, that is, the Court has no option but to grant an injunction. This difficulty does not arise in the case of a right of fishing. In the case of such an incorporeal right, possession, though given by means of an injunction, is, in practice, habitually awarded to a successful plaintiff (see remarks of Pigot, J., at bottom of p. 559 of I. L. R., 19 Calc.). Admitting, therefore, that a right of way is, speaking generally, immoveable property, I hold that it is not such within the terms of section 9 of the Specific Relief Act. Rule discharged with costs.

FULTON, J.:—I concur with my learned colleague in thinking that section 9 of the Specific Relief Act is not applicable to the removal of an obstruction to the enjoyment of a mere easement

such as a right of way. It is unnecessary for the purpose of deciding this case to express any opinion as to its applicability where a person entitled to a right of fishery has been deprived of its use, for there seems to be little analogy between such a right, which can be enjoyed independently of other property, and an easement which is appurtenant to other property. The phraseology of Indian legislation and decisions has for a long time sanctioned the use of the words "possession" and "dispossession" in connection with incorporeal rights capable of independent enjoyment, and it may, therefore, fairly be argued that such rights come within the scope of section 9. But it seems to me that when a person is obstructed in his right of access to his property or in the enjoyment of light and air or of other amenity connected with that property, it would be an abuse of language to say that he was dispossessed of immoveable property. Such a right, which cannot be transferred apart from the dominant heritage, does not appear to come within the term "property" as used in section 9. It was argued that this right of way, which is described as an easement, was an interest in land, but, if so, it is an interest entirely dependent on the possession of the property to which it appertains, and cannot be possessed apart from it. It is a right appurtenant to property, but, taken by itself, does not seem to me to come within the term property which, under the section, must be property capable of separate enjoyment as an independent right. It has never, so far as I am aware, been held that the enjoyment of such a right can be enforced by a suit under section 15 of Act XIV of 1859 or under section 9 of the Specific Relief Act, and I agree with Mr. Justice Pigot's remarks in *Fadu Jhala* v. *Gour Mohun Jhala*[1], that the decision in *Haro Dyal Bose* v. *Kristo Gobind Sein*[2] is correct, and that the section is inapplicable to easements. In Gujarát, by the custom of the country, a right of privacy can be acquired by a house-owner, and if some one opened a window in his wall and thereby in violation of that right overlooked his neighbour's premises, it would hardly be argued that that neighbour had been dispossessed of property. But if the phrase be clearly inapplicable to a negative easement of this kind, it is difficult to see why it should be more applicable to a positive easement such

(1) (1892) 19 Cal. 544 at p. 559. (2) (1872) 17 Cal. W. R., 70.

1899.

MANGALDAS v. JEWANRAM.

as a right of way. In the one case as in the other a right affecting another person's property exists, and the fact that section 9 cannot be used for the vindication of one kind of easement leads to the belief that it was not intended to apply to any easement. Had there been such intention, language more suited for the purpose would, I think, have been used.

I would discharge the rule with costs.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

1899. *March* 13.

BHIMBHAT GOTKHANDI (ORIGINAL DEFENDANT), APPELLANT, *v.* BHIKAMBHAT AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Pensions Act (XXIII of 1871), *Secs.* 6 *and* 14(1)—*Rule* (6)(2) *framed under the Act—Suit for recovery of varshâsan allowance—Collector's certificate—Cancellation of certificate by Revenue Commissioner.*

When a certificate is granted by the Collector under section 6 of the Pensions Act (XXIII of 1871), the presumption is, until the contrary is shown,

* Second Appeal, No. 396 of 1898.

(1) Sections 6 and 14 of the Pensions Act (XXIII of 1871) :—

6. A Civil Court, otherwise competent to try the same (suits relating to pensions or grants), shall take cognizance of any such claim upon receiving a certificate from such Collector, Deputy Commissioner, or other officer authorized in that behalf that the case may be so tried, but shall not make any order or decree in any suit whatever by which the liability of Government to pay any such pension or grant as aforesaid is affected directly or indirectly.

14. The Chief Controlling Revenue Authority may, with the consent of the Local Government, from time to time make rules consistent with this Act respecting all or any of the following matters :—(1) The place and times at which, and the person to whom, any pension shall be paid, (2) inquiries into the identity of claimants, (3) records to be kept on the subject of pensions, (4) transmission of such records, (5) correction of such records, (6) delivery of certificates to pensioners, (7) registers of such certificates, (8) reference to the Civil Court under section six, of persons claiming a right of succession to, or participation in, pensions or grants of money or land revenue payable by Government, and generally for the guidance of officers under this Act.

All such rules shall be published in the local official gazette, and shall thereupon have the force of law.

(2) Rule (6) framed under the Pensions Act :—

(6) Any claim preferred to a Collector under section 5 of the (Pensions) Act may be