makes a decree, then by the operation of section 13 of the Civil Procedure Code the High Court here may be debarred from proceeding with the suit. But to refuse to prevent the natural operation of the law in that way, is not to cause an ouster of the jurisdiction. Therefore I agree that the appeal should be dismissed with costs.

Solicitors for appellants: Messrs. *Bhaishankar, Kanga and Girdharlal.*

Solicitors for respondent: Messrs. *Edgelow, Gulabchand, Wadia & Co.*

Appeal dismissed.

G. G. N.

ORIGINAL CIVIL.

Before Mr. Justice Heaton and Mr. Justice Marten.

MULCHAND RAICHAND AND ANOTHER (DEFENDANTS), APPELLANTS *v.* GILL & Co. (PLAINTIFFS), RESPONDENTS.*

1919: *July* 31.

Civil Procedure Code (Act V of 1908), section 10—Application by defendant for stay of plaintiff's suit, defendant having filed an earlier suit in a mofussil Court—Plaintiff's application for injunction to restrain defendant from proceeding with his suit—Matter "directly and substantially in issue in a previously instituted suit", meaning of—Jurisdiction of High Court to order a party before it not to proceed with a suit in another Court—Practice of Court of Chancery to make an order in personam *against a party residing out of the Court's jurisdiction.*

On the 25th of March 1919, the plaintiffs, commission agents in Bombay, filed a suit in the High Court against the defendants, cotton merchants at Bijapur, claiming a sum of Rs. 82,372-1-0 as being due to them in respect of advances made to the defendants against cotton from time to time. The defendants had, however, on the 13th of March 1919, filed a suit in the Court

* O. C. J. Suit No. 944 of 1919: Appeal No. 36 of 1919.

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of First Class Subordinate Judge at Bijapur against the plaintiffs and seven other persons, praying *inter alia* that the accounts between them and the various defendants in that suit be taken after fixing the rate at which their cotton should have been sold in Bombay and that a decree be passed against the several defendants for such amounts as may legally and properly be found due from them respectively. On the 29th of April 1919, the defendants applied to the High Court for a stay of the plaintiffs' suit under section 10 of the Civil Procedure Code. The plaintiffs opposed this application and asked that an order *in personam* be made against the defendants restraining them from proceeding with their suit in the Bijapur Court. The trial Judge holding that section 10 of the Civil Procedure Code did not apply dismissed the defendants' application for stay of the plaintiffs' suit and made an order against the defendants restraining them from proceeding with their Bijapur suit as against the plaintiffs. The defendants appealed, contending (1) that the High Court suit ought to have been stayed as the matter in issue therein was involved in the earlier suit in the Bijapur Court and (2) that the High Court had no jurisdiction to restrain them from proceeding with their suit in Bijapur where they resided and carried on business.

Held, (1) that the High Court suit should not be stayed inasmuch as the matter in issue therein was not "directly and substantially in issue in the previously instituted suit" at Bijapur within the meaning of section 10 of the Civil Procedure Code; (2) that the High Court had jurisdiction to order a party contesting a suit before it to restrain him from prosecuting a suit filed by him in another Court.

Mungle Chand v. *Gopal Rau*[1], referred to; *Narayan Vithal Samant* v. *Jankibai*[2], distinguished.

APPEAL from the decision of Macleod J. dismissing defendants' application for stay of plaintiffs' suit and restraining defendants from proceeding with their suit against the plaintiffs in the mofussil Court.

The plaintiffs, Gill & Co., were a firm of cotton merchants and commission agents in Bombay and had for several years acted as commission agents for the defendants for the sale of cotton.

The defendants, cotton merchants at Bijapur, from time to time consigned cotton to the plaintiffs who made advances against the same on the terms that the

(1) (1906) 34 Cal. 101. (2) (1915) 39 Bom. 604.

plaintiffs should hold the defendants' cotton in their possession as security for the amount due to them and that the defendants should pay interest on such advances at the Bank of Bombay rate of interest. The accounts between the plaintiffs and the defendants were made up to the 31st October 1918 when there was a balance of Rs. 1,67,844-10-8 due to the plaintiffs against which they held as security 447 bales of cotton. On the 18th November 1918, the plaintiffs wrote to the defendants enclosing a copy of the said account and asking for margin money but the defendants did not provide the same.

On the 8th February 1919, the plaintiffs sold 100 bales out of the 447 bales by private treaty and the same realised Rs. 25,706-5-11, the plaintiffs sending an account to the defendants.

On the 20th February 1919, the plaintiffs wrote to the defendants giving them notice that they intended to sell the remaining 347 bales by public auction and enclosing copies of newspaper advertisements of such proposed sales. The said bales were sold by public auction on the 25th February 1919 and realized Rs. 62,131-7-3.

On the 25th March 1919, the plaintiffs filed the present suit against the defendants praying that the defendants might be decreed to pay to the plaintiffs the sum of Rs. 82,372-1-0 being the balance due in respect of the defendants' dealings with the plaintiffs as mentioned in the plaint together with interest thereon at 7 per cent. per annum from the 11th March 1919 till judgment, costs and interest on judgment at 6 per cent. per annum till payment.

Prior to the filing of the plaintiffs' suit, the defendants had on the 13th March 1919 filed a suit against the plaintiffs, Gill & Co., and seven other persons who were

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merchants of Bijapur, in the Court of the First Class Subordinate Judge at Bijapur. The defendants in their Bijapur plaint alleged that Gill & Co. kept 447 bales unsold for about 7 or 8 months though the market was rapidly falling and though Gill & Co. were expressly desired in writing and orally to sell away the bales at best price in the market. Out of 447 bales sent to Gill & Co. several belonged to the defendants and several others belonged to the seven merchants of Bijapur. The reason why these seven merchants were joined as co-defendants in the Bijapur suit was alleged to be that they purchased some of the bales belonging to the defendants and after paying some amounts to Gill & Co. agreed to pay whatever balance could be found due from them on the proceeds of sale of bales belonging to them being credited to their respective accounts.

The defendants in their Bijapur plaint prayed *inter alia* (1) that the accounts between them, Gill & Co., and the seven merchants of Bijapur be taken after determining the rate at which the bales should be valued for purposes of the accounts, (2) that the sales by auction or by private contracts that Gill & Co. might have made should be declared to be entirely at their own risk and responsibility, and (3) that a decree be passed against Gill & Co. and the seven merchants being the several defendants in that suit for such amounts as might properly and legally be found due from them respectively. On the 29th April 1919, the defendants applied to the High Court that all proceedings in the plaintiffs' suit in Bombay be stayed pending the hearing and final disposal of the Bijapur suit filed by the defendants. The second defendant in para. 2 of his affidavit in support of the application stated as follows :—

2. The matter in issue in this suit is also directly and substantially in issue in the said suit which has been filed in the Munsiff's Court at Bijapur, the said suit was previously instituted, having been filed on or before the 13th day

of March 1919 before the present suit was filed against my firm and nearly a month before the Writ of Summons was served upon me and my co-defendant, the Writ of Summons in the said suit has, I am informed, been served upon the plaintiffs herein and the said suit is now pending in the Munsiff's Court at Bijapur and the said suit has jurisdiction to grant the reliefs claimed by the plaintiffs herein, if they are found to be entitled to the same".

The plaintiffs in their affidavit in reply pointed out that the hearing of their suit in Bombay was fixed for 29th of April 1919, whereas the hearing of the defendants' suit at Bijapur was fixed for 4th of June 1919 according to the Writ of Summons served on the plaintiffs. The main ground on which they opposed the defendants' application for stay of the High Court suit was contained in para. 5 of the affidavit which ran as follows :—

"5. The defendants used to send cotton from Bijapur to the plaintiffs in Bombay for sale on their account against which they drew Hundis to the extent of 75 per cent. of the value of the cotton, which were paid by the plaintiffs in Bombay. The cotton was sold from time to time in Bombay by the plaintiffs and the proceeds were credited to the defendants' account with the plaintiffs. All the evidence relating to the various sale transactions is available in Bombay and under the circumstances the plaintiffs submit that the defendants should be restrained by an order and injunction of this Honourable Court from proceeding further with the suit filed by them in the Court of the First Class Sub-Judge at Bijapur."

The trial Judge, Macleod J., dismissed the defendants' application for stay of the plaintiffs' suit in Bombay and made an order *in personam* against the defendants restraining them from proceeding with their suit in the Bijapur Court as against the plaintiffs.

MACLEOD, J. :—The plaintiffs are a firm carrying on business as merchants and commission agents in Bombay. The defendants carry on business as cotton merchants at Bijapur. They consigned cotton to the plaintiffs for sale in Bombay and obtained advances on the cotton so consigned. The market having fallen, the value of the cotton remaining in the hands of the

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plaintiffs was far less than the amounts due to them by the defendants. Accordingly, on the 25th of March 1919, they filed this suit against the defendants claiming a sum of Rs. 82,372-1-0 as being due to them.

The defendants now apply that this suit should be stayed under section 10 of the Civil Procedure Code, on the ground that they have filed a suit at an earlier date in the Subordinate Judge's Court at Bijapur against the plaintiffs, in which the matter in issue is identical with the matter in issue in the plaintiffs' suit filed in this Court. On reading the plaint filed in the Bijapur Court, I find there are, besides Messrs. Gill & Co., plaintiffs in this Court, seven other defendants and the plaintiff there prays *inter alia* as under: (*a*) that the accounts between the plaintiff and the defendants Nos. 1 to 8 respectively be taken after determining the rate at which the bales in suit should be valued for the purposes of the account; (*c*) that a decree be passed against the several defendants awarding the plaintiff such amounts as may legally and properly be found due from the several defendants respectively on the plaintiff paying the proper Court-fee stamp; (*e*) that the costs of the suit be awarded against the defendants or such of them as may be found liable.

It appears, on the face of it, that the previous suit is not between the same parties, and on that ground it would be sufficient to refuse the defendants' application. It has been mentioned to me that, as a matter of fact, these other seven defendants in the Bijapur suit are not necessary parties, and that the real dispute has to be fought out between Messrs. Gill & Co. and the plaintiff in the Bijapur suit. Then assuming that section 10 of the Civil Procedure Code does apply, Mr. Kanga for the plaintiffs has asked me to make an order *in personam* against the defendants here restraining them from proceeding with the suit in the Bijapur

Court. He refers to the decision of *Mungle Chand* v. *Gopal Ram*[1], where Mr. Justice Sale restrained the defendant from proceeding with the previously instituted suit in the Court of Barreily on the ground that justice required that step. Against that it has been urged that the effect of restraining the defendant from proceeding with the Bijapur suit would be to stay the proceedings, and, under section 56 of the Specific Relief Act, an injunction to stay proceedings can only be granted when such restraint is necessary to prevent a multiplicity of proceedings and the argument proceeds that if section 10 of the Civil Procedure Code applies then this suit will have to be stayed, and, therefore, there will be no multiplicity of proceedings.

I am prepared to hold that section 10 does not apply in this case from the nature of the suit which the plaintiff in the Bijapur Court has filed, and I am also prepared to hold that in the circumstances of this case justice requires that an order should go against the defendants in this Court *in personam* from proceeding with the suit in the Bijapur Court. All the evidence required for the purpose of deciding the dispute would be in Bombay, for the defendants' chief objection against the conduct of the plaintiffs is that he was urging the plaintiffs to sell and the plaintiffs declined to listen to his request for sale, so that in the falling market the cotton was not sold and a far greater loss has occurred than would otherwise have occurred. In fact I presume the defendants here will claim that if the plaintiffs had performed their duty the cotton would have been sold at a sufficient rate to cover all the advances made by them.

However that may be, it is quite clear that this case should be tried in Bombay. It would be a most undesirable precedent that commission agents in Bombay who

[1] (1906) 34 Cal. 101.

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make advances to up-country merchants on their cotton should be dragged to up-country Courts in cases of dispute which may occur between them on these transactions.

Therefore, in my opinion, the right order to make is that the defendants be restrained from proceeding with the suit in Bijapur Court as regards the first defendant. There is no objection to their proceeding against the other defendants. Defendants to put in their written statement within a month. Costs to be costs in the cause.

The defendants appealed.

Desai, for the appellants.

Coltman, for the respondents.

HEATON, J. :—A Bijapur firm filed a suit in the Court of the First Class Sub-Judge at Bijapur against Gill & Co. of Bombay. Shortly afterwards Gill & Co. filed a suit in the High Court against the Bijapur firm. The latter applied that the proceedings in the High Court suit should be stayed under section 10 of the Civil Procedure Code, and Gill & Co. retorted by asking for an injunction restraining the Bijapur firm from proceeding with the suit in the Bijapur Court. The Judge of the Court, who heard the matter, held that section 10 of the Civil Procedure Code did not apply and that an injunction should be issued as asked for by Gill & Co. He ordered accordingly and the Bijapur firm have appealed.

If section 10 of the Code of Civil Procedure applies then the Bijapur suit must proceed, for it was first filed, and the High Court suit must be stayed. Does section 10 apply? In order that it may apply there must be substantial identity between the matter in dispute in the second suit and the matter or some of

the matter in dispute in the first suit ; and there must be a similar substantial identity in the matter of parties. There will be found cases where it is clear that the section applies, and cases of doubt. This, I think, is a case of doubt, not a clear case. We have to decide the matter on a comparison of the two plaints, for there are no written statements on the record and no issues. The earlier suit is of a complicated character and may have to be greatly modified both as to parties and as to matter. The second suit is simple and undoubtedly the matter it relates to is involved in the earlier suit. But it is so involved that it will have to be disentangled before the Bijapur suit can proceed. It might be disentangled by separating the dispute between the Bijapur firm and Gill & Co. from numerous other claims which do not concern the dispute with Gill & Co. It might be disentangled by omitting the latter altogether and confining the Bijapur suit to the other disputes or some or one of them. We do not know how it will be disentangled, so at the present stage I am not prepared to say that section 10 does apply. I say this on a consideration of the circumstances of this particular dispute and not because I find any great difficulty in apprehending the general purpose of section 10.

That being so, we have to consider whether the Judge had power to direct that the Bijapur firm should refrain from proceeding with the Bijapur suit. It seems to me to matter very little whether the injunction remains or is dissolved, for, even in the latter event, I feel very little doubt that the suit in the High Court will be finished before the suit in the Bijapur Court comes to trial. That, however, savours of prophecy ; so we must consider the question whether the Judge had power to make the order. The point was not raised in the lower Court or in the memo of appeal

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but it has been argued. The appellants' counsel admits that the Judge has complete jurisdiction over the High Court suit; he can try it and dispose of it. If so, it seems to me the Judge has complete jurisdiction to make all orders appropriate to the trial and progress of the suit. I am unable to understand on what principle he can have only a partial jurisdiction for that purpose. The English law on the power of a Court of Equity to issue injunctions against persons outside the jurisdiction does not appear to limit the power, where it is to be used against a person who is properly a party to and freely contests the suit. The Calcutta cases to which we have been referred (*Mungle Chand* v. *Gopal Ram*[1]; *Vulcan Iron Works* v. *Bishumbhur Prosad*[2]; and *Jumna Dass* v. *Harcharan Dass*[3]), were decided by single Judges and the decisions were not uniform. The Bombay case, *Narayan Vithal Samant* v. *Jankibai*[4], only decides that a Judge sitting on the Original Side of the High Court cannot order a mofussil Court to stay proceedings; it leaves open the question whether he can order a party to the suit before him to refrain from prosecuting a suit in a mofussil Court.

Therefore it seems to me, we have to decide the point by reason and not by authority, for there is not a clear authority; though the general trend of the English cases shows that a Judge has full power over the parties properly before him.

The Judge must have that amount of power over the parties which is essential to a prompt and complete disposal of the suit before him. If one of the parties can obtain the production of the accounts, documents, &c., in the Bijapur Court, that will greatly hamper and embarrass the trial of the Bombay suit. Therefore, the

(1) (1906) 34 Cal. 101.
(2) (1908) 36 Cal. 233.
(3) (1911) 38 Cal. 405.
(4) (1915) 39 Bom. 604.

Judge must have power to prevent this. The simplest and most complete method of preventing it is by an injunction against the party. But it should, I think, be in a slightly modified form and should only restrain the defendant from proceeding with the Bijapur suit in such a way as to delay or embarrass the trial of the Bombay suit.

Since we heard the arguments it has, in another appeal, been decided that an appeal does not lie against an order refusing an injunction. It was not argued that an appeal does not lie in this case and as we are dismissing the appeal it does not greatly matter whether it does or does not lie.

Substantially the appeal is dismissed and with costs.

I agree with my learned brother's suggestion as to the date on which the suit should be restored to the Board.

MARTEN, J. :—On the first point I am of opinion, after comparing the plaints in the two suits, that the matters in issue in this suit are not "directly and substantially in issue in the previously instituted suit" within the meaning of section 10 of the Civil Procedure Code. I leave open the question whether under section 10 the words "the same parties" mean that the parties in the two suits must be the same, namely, no more and no less. If it had been necessary for me to arrive at a conclusion on this question, I should have had to take into consideration the similar words which are used in section 11 with reference to *res judicata*.

The second point taken by the appellants is that there was no jurisdiction to order them not to proceed with the Bijapur suit as against the respondents. In my opinion that point is not now open to the appellants. It was not raised in the Court below, nor is it raised in the memo of appeal ; and on the merits of the case—so far as they are at present before us—I see no sufficient

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reason why the appellants should be granted any indulgence. I would, therefore, decide this point against them on this preliminary ground alone.

I cannot, however, entirely ignore the proposition which was urged at considerable length by their counsel, namely, that the Court of Chancery had no jurisdiction to grant an injunction, unless the defendant either resided or carried on business within the jurisdiction. One short answer to this proposition is that it cannot apply where, as here, the defendants have been served and have appeared in the suit without protest. Thus, in Halsbury's Laws of England, Vol. XVII, p. 263, Note (*g*), it is said :—

"A foreigner who has appeared to an action in an English Court gives jurisdiction to the English Court to restrain him from proceeding to litigate the same subject-matter in the Courts of his own country."

The authority cited in support of that proposition is *Dawkins* v. *Simonetti*[a], a decision of the Court of Appeal in England. That was a case where there were two suits pending for probate of the will of a deceased lady, one in England and the other in Italy. The applicant in the Italian suit was the defendant in the English suit ; and in the course of his judgment the Master of the Rolls, Sir George Jessel, said as follows :—

"The defendant, after the commencement of this action in England, has begun a litigation in Naples for the purpose (so to speak) of obtaining probate in solemn form of the will of 1872. The plaintiff has, under those circumstances, moved to restrain the defendant from proceeding with his action in the foreign Court.

"The question arises whether there is any jurisdiction at all to do so. I am far from saying that where a man has appeared in an English suit he has not thereby given the Court jurisdiction to grant any proper application against him. Therefore, although it might be improper in other circumstances, it may not be improper in this suit. To what sort of cases then is this jurisdiction

[a] (1880) 29 W. R. 228.

applicable? Certainly, I think, in a case of 'double vexation.' Under the old practice, when a man was sued in equity as well as at law, the plaintiff was put to his election; and it was just the same where one suit was in an English Court and the other suit in a foreign Court. The practice was to move to stay the proceeding either in the foreign Court or in the English Court. In dealing with such a question the Court prevented double vexation, but it always exercised a discretion. Where there appeared to be good ground for continuing two actions the Court did not interfere.....It comes to this, then, that it is a matter of discretion, even assuming that we have jurisdiction."

Then, after considering the matter of convenience, the Court came to the conclusion that the Italian suit ought not to be stayed.

I may also refer to Dicey's Conflict of Laws (1908 Edn.), p. 44, where the learned author considers the following general principle to be sound, although he says "its truth cannot be dogmatically laid down" (p. 45), viz.:—

"The sovereign of a country, acting through the Courts thereof, has a right to exercise jurisdiction over any person who voluntarily submits to his jurisdiction, or, in other words, the Courts of a country are Courts of competent jurisdiction over any person who voluntarily submits to their jurisdiction."

Then, at p. 48, speaking of actions *in personam* where the defendant is not in England, he says:—

"The Courts of Common Law and of Equity have further always exercised jurisdiction over a defendant who appeared to, or a plaintiff who brought, an action or suit. This again is in strict conformity with the principle or test of submission."

So, too, the Civil Procedure Code refers in section 20 (*b*) to the acquiescence of a defendant to the institution of a suit, although he may not reside or carry on business within the local limits of the Court's jurisdiction.

It seems to me, therefore, that it is erroneous to argue this case on the same lines as if the defendant had not appeared in this action, or, on the other hand, had appeared under protest and moved to set aside the service of the summons upon him.

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The appellant based his argument on *The Carron Iron Company* v. *Maclaren*[1], but there the Scottish respondents were not parties to the English action, nor had they come in and claimed the benefit of the English administration decree. They had only been served with a notice of motion in the English action just as any third party might be, who, for instance, interfered with a receiver appointed in an administration action. As to proceeding in this way by motion in the suit instead of by a separate suit, the Lord Chancellor said at p. 441: "The practice is fully established: its origin is matter rather of curious speculation than of practical importance."

What Professor Dicey has said as to submission must of course be read with his warning at p. 212 that "submission cannot give the Court jurisdiction to entertain an action or other proceeding which in itself lies beyond the competence or authority of the Court." It is jurisdiction in this sense to which the Court refers when it considers whether it has any power to authorise a departure from the trusts of a trust deed, and if so, under what circumstances and to what extent (see *In re New*[2]). But that warning does not apply to the Bombay suit itself, for that is an ordinary suit brought by commission agents with leave under clause 12 of the Letters Patent. Nor does that warning apply, I think, to the particular relief now under discussion, viz., an injunction (in effect) to prevent interference with the speedy prosecution of the Bombay suit.

Even, therefore, if I had considered the point as to jurisdiction was still open to the appellants, I should have decided it against them in this particular case.

The third and the last point is whether the jurisdiction has, as a matter of discretion, been properly exercised

(1) (1855) 5 H. L. C. 416. (2) [1901] 2 Ch. 534.

here. As to this, I see no reason to interfere, except that I agree in the variation of the form of the injunction which my brother Heaton has stated. The Bombay case came on for hearing as a Short Cause in the vacation. The defendant did not put in his affidavit till the day of the hearing; and his Bijapur suit with its eight defendants and vague allegations would seem to offer good opportunities for vexation and delay. Under these circumstances, I can well understand an injunction being granted to restrain that vexation and delay so far as practicable.

The Bombay suit was directed to be replaced on Board on 9th June after the defendant had filed his written statement. We can now direct the Prothonotary to effect this for the 5th or 12th August.

In the result, I agree that this appeal should be dismissed with costs.

Solicitors for the appellants: Messrs. *Captain & Vaidya.*

Solicitors for the respondents: Messrs. *Crawford, Bailey & Co.*

Appeal dismissed.

G. G. N.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

MALLAPPA ADOPTIVE FATHER BHARMAPPA NATURAL FATHER MALLAPPA KENCHI-RADI MINOR BY HIS GUARDIAN APPELLANT No. 2 SHIVALINGAWA KOM BHARMAPPA AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS *v.* HANMAPPA BIN MARDEPPA KENCHI-RADDIAWAR, NATURAL HEIR OF THE DECEASED MARDEPPA BIN HANMAPPA AND OTHERS (ORIGINAL DEFENDANTS NOS. 2, 3, 4), RESPONDENTS.*

* Second Appeal No. 565 of 1917.