

Special appeal No. 99 of 1870.

1870.
July 27

BALÁVÁ kom BASANGOUDÁ *Appellant.*
SHIDGOUDÁ valad KADÁPÁ *Respondent.*
*Civ. Proc. Code, Sec. 32—Cause of Action—Dismissal of Claim—
Declaratory Decree.*

Whenever in the progress of a cause it appears that no cause of action has accrued to the plaintiff, his claim must be dismissed.

A declaratory decree will not be passed in favour of a plaintiff unless the defendant has done some act which interferes with the enjoyment by the plaintiff of the subject-matter in respect of which the suit is brought.

THIS was a special appeal from the decision of J. R. Naylor Acting Senior Assistant Judge, Full Powers, at Kaládgi, in Appeal Suit No. 112 of 1869, reversing the decree of the Munsif of Mudebehál.

The plaintiff sued to obtain a declaration of her right to the enjoyment of certain honorary privileges as second in rank of the pátils of the village of Bágiwádi, alleging that she was obstructed in her enjoyment by the defendant.

The defendant answered that the claim was barred by the statute of limitations.

The Munsif was of opinion that although the suit was barred by the law of limitation the defendant had waived that objection in his examination; and, going into the merits of the case, gave a decree declaring the rights of the litigants as between themselves and the head pátil and kulkarni of the village.

The plaintiff appealed from the Munsif's decree, and sought to have it amended.

The defendant neither preferred a cross-appeal nor took any objections.

The court of appeal raised three issues for determination, namely: (1) Is the suit barred by limitation; (2) Has the plaintiff proved any cause of action; and (3) Has the plaintiff proved satisfactorily the rights and privileges claimed.

1870.
 Ba lava
 Basangouda
 v.
 Shidgouda
 Kadapa.

On the first issue the finding of the court was in favour of the plaintiff; on the second and third it was against her. The Assistant Judge said "my object in raising the second issue was to ascertain whether the plaintiff is entitled to a declaratory decree at all. The suit refers to ten different rights and privileges, each to be exercised at different seasons of the year, and one of them can only be exercised every two or three years, when there happen to be five Mondays in the month of Shravan. I was, therefore, astonished to find the plaintiff fixing the date of her cause of action for the 8th of October 1867, as if the defendant had obstructed her on that one day in the exercise of all her privileges; and it struck me that with regard to most of the privileges claimed the defendant had probably never interfered with the plaintiff; and that, therefore, the plaintiff would not be entitled to a declaratory decree. That in order to obtain a declaratory decree 'the parties must be at arm's length and that there must be a contest between them,' is clearly shown by the general tenor of the decisions collected in the note to Sec. 15 of Broughton's Code of Civil Procedure, 3rd edition, 1869, in one of which Justice Phear used the very words which I have quoted. In a case of this sort, therefore, I have no doubt that a suit for a declaratory decree should be rejected, unless it is shown to the court's satisfaction that the plaintiff and defendant have had actual disputes leading to continued misunderstanding with respect to these rights."

Mr. Naylor then found that the defendant had not obstructed the plaintiff's enjoyment, and was, therefore, of opinion that the plaintiff's claim should be thrown out. He said:—

"The difficulty which besets me, however, is that I am only trying an appeal brought by the plaintiff for the amendment of the decree. The defendant has put in no cross-appeal; therefore, unless for the plaintiff's appeal, the lower court's decree would have remained unaltered. The question is whether on the plaintiff's own appeal the court can, or should, reverse the decree as far as it is in her favour.

In accordance with the ruling in Special Appeal No. 665 of 1863 (2 Bom. H. C. Rep. p. 169), I am bound, I think, to raise and determine the issues necessary for the proper decision of the suit, although the parties may not raise them by their pleadings ; and as the decree is not one that I can in any way amend without passing such a decision as I think ought not to be given, I see no other resource but I reverse the Munsif's decree and throw out the plaintiff's claim."

1870.
Balava
Basangouda
Shidgouda
Kadapa.

The special appeal was argued before GIBBS and KEMBALL, JJ.²

Dhirajlal Mathuradas for the special appellant.

Nanabhai Haridas for the special respondent.

GIBBS, J., in delivering judgment, after recapitulating the facts of the case, said :—The Senior Assistant Judge finds distinctly that no opposition or obstruction was at any time caused by the defendant, and that, therefore, there is no cause of action. in the words of Mr Justice Phear, " the parties must be at arm's length, and there must be a consent between them." Mr. Nanabhai quoted Sec. 350 of the Code of Civil Procedure to show that an appellate court could either confirm, reverse, or modify a decree ; that the decree being bad, could not be confirmed ; that, there being no cause of action, it did not admit of any modification, and that, therefore, there was no resource left but to reverse it. This section, we think does not apply, but another section namely, Sec. 32, and the case of *Saluji Kesraji v. Rajsangji Jalamsangji (a)*, do apply. Couch, C. J., there says : " Sec 32 directs that if upon the face of the plaint, or after questioning the plaintiff, it shall appear to the court that the subject-matter of the suit does not constitute a cause of action, or that the right of action is barred by lapse of time, the court shall reject the plaint. The words are imperative, and appear to impose upon the court, before the defendant is called upon to state his defence, the duty of taking any objection that may exist in point of law to the

(a) 2 Bom. H. C. Rep. 162 (2nd edn.).

1870
Balava
Basangouda
v.
Shidgauda
Kadapa.

plaintiff's claim, not merely apparent on the plaint, but which may be elicited by questioning the plaintiff."

We are, therefore, equally bound to dismiss the claim whenever it appears either that there is no cause of action or that it is barred by limitation.

We therefore, confirm the decree of the court below, with costs on the special appellant.

Decree confirmed.

Miscellaneous Civil application.

KASHINATH VITHAL Vakil v. DAJI GOVIND First Class Subordinate Judge Dhulia.

July 28.

*Contempt of Court—Procedure—Crim. Proc. Code, Sec. 163—
Act I. of 1846.*

When a Civil Court omitted (as directed by Sec. 163 of the Code of Criminal Procedure) to call upon a person who was charged with contempt of court to make any statement he might wish to make in his defence, it was held that this irregularity was fatal to the order, and that the High Court would exercise its extraordinary jurisdiction, and reverse an order so made.

THIS was an application for the exercise of this court's extraordinary civil jurisdiction.

The facts appear from the judgment of the court.

The application was heard by GIBBS and MELVILL, JJ. on the 14th of July 1870.

Nanabhai Haridas and Bhairavath Mangesh appeared for the petitioner.

No one appeared on the other side.

GIBBS, J., said :—In this case Kashinath Vithal, a Pleader duly authorised to practice in the courts of the Khandesh district, appeals to us, under the extraordinary jurisdiction of this court, to set aside an order or sentence of the First Class Subordinate Judge of Dhulia, Daji Govind, who fined him Rs. 5, and which sentence or order was confirmed in appeal by the District Judge. The ground on which the case comes before us is that the First Class Subordinate