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certainly have every protection which the Court should grant if the injunction is granted on these terms, and compensation given for the damage which has already accrued. The defendant, too, must be careful not to trifle with the order of the Court. The defendant should pay the costs.

KINDERSLEY, J: :—I concur in the decision of the Acting Chief Justice upon the case before us.

APPELLATE JURISDICTION (*a*)

Special Appeal No. 249 *of* 1870.

SHUNGUNY MENON and another.....*Special Appellants.*

KALAMPULLY VALIA NAIR.....*Special Respondent.*

Suit brought by plaintiff against the first three defendants as his tenants on kanom, and the 4th, the representative of a rival jenmi, to obtain a declaration of title as jenmi. Plaintiff had previously sued the first three defendants to establish the relation of jenmi and kanomkar and to recover the land. He failed and then brought the present suit.

Held, that this was a case of the employment of the device of a suit for a declaration of title in order to get back land by a crooked and not legal process after failure to recover by proper legal means. The intention being to cut off the defendants (the tenants) from the plea of res judicata.

The Court which had a discretion as to whether such a suit should be permitted, ought at once to have said that it should not.

Where there are no interest to be protected, there is no foundation for a suit for a declaratory decree.

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THIS was a Special Appeal against the decision of C. R. Pelly, the Civil Judge of Calicut, in Regular Appeal No. 69 of 1869, reversing the Decree of the Court of the Principal Sadr Amin of Calicut in Original Suit No. 1 of 1868.

Plaintiff sued to establish his jenm right over certain property. 1st and 2nd defendants allowed the suit to proceed *ex-parte*.

The 3rd defendant pleaded that the land was the jenm of the Cochin Pundáram. The 4th defendant, the Dewan of the Pundáram, represented his circar to be the jenmi, and pleaded that plaintiff was estopped, having already unsuccessfully sued 1st to 3rd defendants on an alleged kanom said to have been granted by his predecessor.

Original Suit No. 134 of 1865 (exhibit A) was instituted in the Temelprom Munsif's Court by present plaintiff, against defendants to 3, for recovery of a portion of the lands now in dispute with arrears of net rent, on the

(*a*) Present : Holloway, Ag. C. J. and Innes, J.

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ground that plaintiff's predecessor had assigned the lands in 1027 (1851-52) on kanom to 1st defendant and one Kali (deceased) under a kaichit, whereby they (1st defendant and Kali) engaged to pay a certain annual rent, and that 2nd and 3rd defendants held under 1st defendant. 1st and 3rd defendants denied plaintiff's right and the assignment sued on, and contended that they held on kanom obtained from the Cochin Pundáram, whom they represented to be the proprietor. 2nd defendant admitted the plaintiff's claim. The District Munsif dismissed the suit—this decree was confirmed by the then Civil Judge, in Appeal Suit 654 of 1866 (exhibit B), and plaintiff thereupon instituted the present action to establish his jenmi title to the whole land.

The Principal Sadr Amin dismissed the suit.

On appeal the Civil Court decreed for the plaintiff.

The 4th and 5th defendants appealed to the High Court on the following grounds :—

No declaratory decree ought to have been given, the defendants being in possession and claiming to hold adversely to the plaintiffs.

The plaintiff had already sued to establish his claim as kanomkar, and that claim had been decided against in Original Suit No. 134 of 1865.

The result of this decision is that the defendants had been holding adversely to the plaintiff since a period the date of which is not shown : and as a suit for possession would have been barred by lapse of time, no declaration of right ought to have been made.

Mayne for the special appellants, the 4th and 5th defendants.

O' Sullivan for the special respondent, the plaintiff.

The Court delivered the following judgments—

HOLLOWAY, Acting C. J :—This is a suit brought by plaintiff against the first three persons whom he alleges to be his tenants on kanom, and the 4th, the representative of a rival jenmi, to obtain a declaration of title as jenmi.

The Principal Sadr Amin considered his title not established, and the Civil Judge holding the contrary made the declaration asked.

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The plaintiff had previously sued the first three defendant's in Suit No. 134 of 1865, to establish the relation of jenmi and kanomkar and to recover the land. He failed, and the suit dismissing his claim was upheld in appeal.

The device of suits for declaration is usually resorted to for the purpose of cutting off an opponent from legal defences which would bar the claimant if the suit were brought for the relief actually wanted. This is a case of the employment of the device to get back land by some subsequent crooked and not legal process after failure to recover by proper legal means. The defence from which the tenants are to be cut off in the present case is the plea of *res judicata*, for it would, of course, be impossible to employ any such plea, unless, as rarely happens, an action based solely upon the right of property (*vindicatio*) has been brought against the now opposing claimant and failed.

Among all the contradictory decisions to which the section importing this mischievous device has led, I am not aware that any Court has supposed that it is to be tried for the stirring up, in the shape of purely historical and speculative questions, matters which have been already, for the purposes of practical life, determined by the Courts of Justice. In the former suit the title of the opposing jenmi was set up by the tenants. They were successful in establishing their denial that they held under the plaintiff, and the present suit has succeeded upon the same ground of fact as the last failed. Without seeking to add to the mischief already created by enunciating general propositions, I can entertain no doubt that the Court which had a discretion as to whether such a suit should be permitted ought at once to have said that it should not. The case seems to me to be clear enough for this Court to say so now. This is the antithesis of the case in which this Court declared a suit not permissible by one who said that he was entitled and had all to which he was entitled. Here it is—"I have lost all means of enforcing my rights. Whether I, or he under whom those in possession claim, is really jenmi is, however, a point which I should like you to decide. Of course, no Court which knew its duty would allow such a decree to be executed, but I am

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not at all without hope that this purely historical matter may by some device be rendered very practically useful to me."—To permit such a suit, would, indeed, be to render litigation eternal. I am of opinion that the decree of the Lower Court should be reversed and the original suit dismissed. There should, however, be no costs throughout.

INNES, J:—I hold to the opinion which I have already expressed in other cases (reported at pages 333 and 378, II M. H. C. Reps.) that where there are no interests to be protected, there is no foundation for a suit for a declaratory decree. Here what is alleged and proved is a bare right of property. The right of action for possession is barred, and the plaintiff has no interest, present or contingent, which the declaration of his bare title could fortify or conserve. In cases in which a declaratory decree might operate as a protection there are sometimes circumstances which should induce a Court to refrain in its discretion from passing such a decree, but, in a case like the present, I think there is no discretion, because in my opinion there was no ground for coming to the Court at all, and the suit should not have been entertained. I concur in reversing the decree passed in appeal.

Appeal allowed.

APPELLATE JURISDICTION (*a*)

Criminal Regular Appeal No. 358 *of* 1870.

SHRIRAM VENKATASÁMI...*Appellant* (*1st Prisoner.*)

In the trial of prisoners for the offence of belonging to a gang of persons associated for the purpose of habitually committing theft or robbery (Sec. 401, Penal Code), the Judge should, in his charge, put clearly to the jury—

1. The necessity of proof of association.

2. The need of proving that that association was for the purpose of habitual theft, and that habit is to be proved by an aggregate of acts.

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THIS was an appeal against the sentence of H. Morris, the Session Judge of Rajahmundry, in Case No. 58 of the Calendar for 1870.

(*a*) Present : Holloway, and Kindersley, JJ.