

1864. chaser must sue for the penalty under the agreement, and cannot obtain a specific performance of the contract.

LA'SANKIA  
v.  
JABAJI B.  
KULKARNI.

A decree in accordance with the opinion of Mr. Justice Tucker would be, in our opinion, to make for the parties, and to force upon them, a different contract from that which they entered into. Neither party appears to have desired or intended that there should be a sale of half only of the field; and neither now by his plaint makes any such claim.

PER CURIAM (*Tucker, J., dissentiente*):—The Court order that the special appellant be allowed a further period of three months from this day, within which to pay to the respondent the remaining moiety of the purchase-money, with interest at nine per cent. per annum, on payment of which within the said period, the special appellant is to be put into possession of the remaining moiety of the estate, and the decrees of both the lower courts in Special Appeals 59 and 509 are to be reversed; but in the event of his failing to make such payment within the said period, the decrees of the Assistant Judge in Special Appeals 59 and 509 are to be confirmed: costs to be in proportion in either case.



Jan. 6.

*Special Appeal No. 511 of 1863.*

LA'LI' RATANJI ..... *Appellant.*  
GANGA'RA'M TULJA'RA'M..... *Respondent.*

*Ownership—Easement—Relief sought.*

In a suit brought to establish a right of ownership over certain land:—  
*Held* that it was not competent to the Court to enter into and decide upon the plaintiff's right to an easement over the same.

A question not raised by the plaint ought not to be decided by the Court.

THIS was a special appeal from the decision of C. Gonne, Acting Judge of the Konkan District.

Gangarám brought the original suit on the 4th of July 1862, in the Court of the Principal Şadr Amín of Tháná, to establish his ownership over a strip of ground adjoining his house on the north side.

The defendant, Lálji, answered that the ground was a portion of the premises of his house, and belonged to him by purchase from a former owner.

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The Principal Şadr Amín found, that in the deed of sale, by which the defendant had become possessed of the house a yard was entered as sold along with it; that there was no evidence in support of the plaintiff's claim; that the witnesses said the ground in dispute was Government property; and that, if the Government had a right to the land, it was for it to sue to oust the defendant. He, therefore, decreed against the plaintiff.

In appeal, the Acting Judge found that the precise object of the suit was not clearly stated in the plaint; but that it seemed to him to be either to establish a right of ownership over the disputed ground, or, failing that, a right to use that ground, as public property. With regard to the right of ownership, the Judge agreed with the Principal Şadr Amín in finding that the plaintiff's case was entirely unsupported by proof. With regard to the right to use the ground, he observed that in the investigation of a criminal charge against the defendant's predecessor in 1841, the Magistrate had decided that the plaintiff had a right of way across the ground; and he (the Judge) considered that decision was in point of fact "a settlement of the question now in dispute."

He, therefore, on the 15th of July 1863, amended the decree of the Principal Şadr Amín: and decided that the plaintiff had "a right to use the ground, as being public, though he had no right of ownership either on the ground, or the well, which, on the evidence, [belonged] to the defendant: each party bearing his own costs."

The case was heard before ERSKINE and TUCKER, JJ.

*Vishvanáth Náráyañ Mandlik* (with him *Mádhavrác K. Khárkar*), for the appellant:—The lower court, in deciding that the plaintiff had a right to use the ground as being public, travelled out of the plaint, and pronounced a judgment on what was not in demand; and its decree was, there-

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 LA'LJI in it.  
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 GANGA'RA'M Dádúbhái Frámji for the respondent.  
 TULJA'RA'M.

PER CURIAM:—The Court find that as the special respondent sued to establish his ownership, and not for any limited right of use; and as the District Judge found that the special respondent's claim to ownership was entirely unsupported by proof, he should have decreed against the special respondent, without entering on any question as to the special respondent's right, if any, to an easement over the said ground, or any part of it: since no such question is raised by the plaint, or ought to have been decided in this suit.

The Court, therefore, reverse the decision of the District Judge, and affirm that of the Principal Şadr Amín: all costs on the special respondent.

*Appeal allowed.*

NOTE.—“In suits under the Civil Procedure Code, the Court is certainly bound to take into consideration all the rights of the parties to the suit, whether legal or equitable, and by its decree to give effect to those rights as far as possible; but we think that the Court should confine itself to granting such relief as is prayed by the plaint:” *Per Scotland, C.J., and Bittleston, J., in Virasvámí Grámani Agyasvámí Grámani*, 1 Mad. H. C. Rep. 477.—Ed.

Feb. 12.

*Special Appeal No. 633 of 1863.*

RA'MDA'S SA'KHARLA'L ..... *Appellant.*  
 GANGA'DHAR R. DONGRE ..... *Respondent.*

*Remand—Point for Decision—Positive Finding.*

The District Judge not having come to any positive finding on the point for decision laid down by himself in an appeal; the High Court reversed his decree, and remanded the suit for a re-trial on the merits.

THIS was a special appeal from the decision of C. Gonne, Acting Judge of the Konkan, in Appeal Suit No. 314 of 1862.