

equivalent, nor any even in which specific performance of the preliminary agreement has been granted.

It may upon the cases perhaps be thought to be settled that a charter-party of a ship is a contract for breach of which compensation in money does not afford adequate relief ; but the decisions rest on special considerations, and the supposed principle may not admit of the extension I am asked to give to it. *Primá facie*, one would say that any purely mercantile contract was one admitting of compensation in money ; and that being, as I believe, the generally recognized and central principle, I do not feel warranted, without express authority, in carrying what must be regarded as an exception to it further than the actual decisions have gone. I am the more disposed to refuse the application here, because it might have been made three days ago, and is now made quite at the eleventh hour.

I must reject the application for an *interim* injunction, but I grant a *rule nisi* for injunction as prayed.

Attorneys for the plaintiff.—Messrs. *Tyabji and Dáyábhái*.

Attorneys for the defendants.—Messrs. *Prescot and Winter*.

APPELLATE CIVIL.

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Pinhey.

FAKIRAPA, PLAINTIFF, v. PA'NDURANGAPA, DEFENDANT.*

September 13.

Decree—Limitation—Suit on decree the execution of which is barred by limitation—Limitation Act XV of 1877, Schedule II, Article 122—Civil Procedure Code (Act X of 1877), Section 244—Suit in High Court on judgment of Small Cause Court—Practice—Averments in plaint—Evidence necessary in such suits.

A suit will not lie upon a decree the execution of which is barred by the provisions of the Limitation Act.

A suit may be brought in the High Court of Bombay upon a judgment obtained in the Court of Small Causes of Bombay. The execution of the decrees in such suits is rigorously confined to immoveable estate.

The ground of the interference of the High Court in such cases is that, practically, the judgment-creditor could not recover his debt except by process against the immoveable estate of the debtor.

* Small Cause Court Reference, No. 7 of 1881.

1881

HAJI ABDUL
ALLA'RAKHI
v.
HAJI ABDUL
BA'CHA.

1881
 FAKIRAPA
 v.
 PANDURANG-
 APA.

In such cases the plaint must contain an averment, and the plaintiff must establish to the satisfaction of the High Court that there is not any sufficient moveable property of the defendant against which the decree of the Court of Small Causes can be fully executed, and that he has immovable property situated within the original jurisdiction of the High Court against which execution can be had.

Moonshi Golam Arab v. Curreem Bux Shaikji (1) referred to.

UNDER section 617 of Act X of 1877, this case was referred for the decision of the High Court by Rao Bahadur Babáji Lakshman, First Class Subordinate Judge of Hubli, with powers of the Judge of a Small Cause Court.

The suit was brought by the plaintiff on an *ex-parte* money decree obtained by him against the defendant in the Subordinate Court of Dhárwár on the 14th June, 1878. The Subordinate Judge was of opinion that the suit was not maintainable.

There was no appearance of parties in the High Court.

The following is the judgment of the Court :—

WESTROPP, C.J.—The question put by the Subordinate Judge of Hubli is “ whether a suit will lie upon a decree ? ” The question actually arising upon the facts furnished by him is “ whether a suit upon a decree of his own Court for money (Rs. 18-15-0), the execution of which decree is barred by the Limitation Act XV of 1877, can be lawfully entertained by him ? ” To this question our answer must be in the negative, and for reasons which would dictate a similar answer to the larger question put by him. See section 244 (more especially clause c) of Act X of 1877, (which section was substituted for the nearly similar enactment in section 11 of Act XXIII of 1861, which replaced section 283 of Act VIII of 1859,) prohibiting a separate suit in matters relating to the execution of a decree ; *Kisan v. Anandram*⁽²⁾ ; *Sanjivayah v. Nanjayah*⁽³⁾ ; *Ranganasary v. Shapani*⁽⁴⁾ ; *Sayad Nasarudin v. Venkatesh*⁽⁵⁾ ; *Mirza Mahomed v. The widow of Balmukand*⁽⁶⁾ . The case of *Atermoney v. Hurry Doss*⁽⁷⁾ appears to have been heard *ex-parte*, and section 244 of Act X of 1877 does not seem to have been brought to the

(1) I. L. R., 5 Calc., 294.

(4) 5 Mad. H. C. Rep. 375.

(2) 10 Bom. H. C. Rep. 433.

(5) I. L. R. 5 Bom. 382.

(3) 4 Mad. H. C. Rep. 453.

(6) L. R. 3 Ind. App. 241.

(7) I L. R. 7 Calc. 74.

notice of the Court. No doubt article 122, Sched. II of Act XV of 1877, which prescribes twelve years as the period within which an action may be brought upon a judgment obtained in British India, is later legislation than Act X of 1877, which was sanctioned by the Governor General on the 30th March, 1877,—Act XV of 1877 not having been sanctioned until the 19th July, 1877. These enactments were, in fact, under the consideration of the Legislature much about the same time, and it is not probable that it was intended that there should be any inconsistency between them. Laying aside any possible argument as to a renewal of the force of Act X of 1877, sec. 244, by the amendment made in that section by section 31 of Act XII of 1879, there seems to be room for the operation of article 122 of Schedule II of Act XV of 1877, without holding that article to be inconsistent with section 244 of Act X of 1877: for instance, where a suit upon a decree would give a higher or better remedy than the decree-holder could otherwise obtain, or where such a suit would give him the only practicable remedy. See the observations of Couch, C.J., in *Mancharam v. Bakshi Saheb*⁽¹⁾.

This seems to be a suitable opportunity of noticing *Moonshi Golam Arab v. Curreem Bux Shaikji*⁽²⁾, where it was held by the High Court of Calcutta, contrary to its previous practice, that an action would not lie in that Court upon a judgment of the Calcutta Court of Small Causes. It is not stated in the report of that case whether the plaint contained an allegation that the defendant had not any moveable property sufficient to satisfy the decree. A Bombay case (*Manekji Mehervanji v. Mahamad Abdulla*)—unreported—was there relied upon in which it was decided on the 8th of June, 1858, by the late Supreme Court on demurrer that an action would not lie in that Court upon a judgment of the Bombay Court of Small Causes. We have examined the record in that case, and also the notes of it in the book of Sir M. Sausse, C.J. Although counsel in support of the plaint in his argument drew the attention of the Court to the impossibility of obtaining, in the Small Cause Court, execution against immoveable property, yet the plaint itself did not contain an averment that there was not any sufficient moveable

(1) 6 Bom. H. C. Rep. 231, 235, A.C.J.

(2) I. L. R. 5 Calc. 294.

1881

FAKIRAPA
v.
PANDURANG-
APA-

property of the defendant to satisfy the judgment. Our friend Mr. Justice White, late an eminent member of the Bombay Bar, and who argued in support of the demurrer in the Bombay case, seems in the Calcutta case to have been under the impression that, ever since the decision in *Mánékji Mehervanji v. Mahamad Abdulla*, suits upon decrees of the Bombay Court of Small Causes have not been entertained here. We find, however, that from 1862 to the end of 1880 there have been sixty such suits at the Original Jurisdiction Side of the High Court, in forty-eight of which there have been decrees for the plaintiffs. The others, with one exception (*Hemráj v. Virji*), were dismissed for non-appearance of parties, the suits having probably been compromised. In the first of the forty-eight suits the decree for the plaintiff was made by Couch, J., in 1862. The plaint must contain an averment, and the plaintiff must establish to the satisfaction of the High Court that there is not any sufficient moveable property of the defendant against which the decree of the Court of Small Causes can be fully executed, and that he has immoveable property situated within the Original Jurisdiction of the High Court against which execution can be had. In *Hemráj v. Virji*—above mentioned—the Judge, who heard the case at the Original Jurisdiction Side of this Court, dismissed a suit upon a judgment of the Bombay Court of Small Causes, being of opinion that section 223 of Act X of 1877, when taken in conjunction with section 8 of the same Act, was inconsistent with such a suit. But, on appeal, that decree was reversed by the Appellate Court, and a decree was made on the 28th September, 1878, for the plaintiff for the amount of the judgment and costs. The Appellate Court was of opinion that section 223 had not the effect attributed to it; that section 223 (see section 8) does not apply to the Court of Small Causes at Bombay, and that the practice of the High Court of Bombay to entertain such suits was too long settled to be disturbed except by legislation or by Her Majesty's Privy Council, although it might have been better if such a practice had never been initiated. It may be mentioned here that, with a few unimportant exceptions, the Code of Civil Procedure has not hitherto, I believe, been applied to the Bombay Court of Small Causes. The difficulties referred to by

Garth, C.J., in *Moonshi Golam Arab v. Curreem Bux Shaikji* (1) have been surmounted by rigorously confining the execution of the High Court decrees in such suits to immoveable estate. If in any instance (and at present we are not aware that there has been one) execution of the High Court decree in such cases has issued against the person or freshly discovered moveable property of the judgment-debtor, it must have been inadvertently so issued, and, if brought to the notice of the Court, would have been quashed. The ground of the interference of the High Court is that, practically, the judgment-creditor could not recover his debt except by process against the immoveable estate of the debtor.

(1) I. L. R. 5 Calc. 294, 298.

APPELLATE CIVIL.

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Pinhey.

DA'MODAR DEVCHAND (ORIGINAL PLAINTIFF), APPELLANT, *v.* NA'RO MAHADEV KELKAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

September 13.

*Mortgage—Rights and liabilities of prior and subsequent mortgagees—Redemption—
Suit by second mortgagee—Form of decree.*

S mortgaged a house and site to R on the 4th January, 1870; and on the 21st February, 1870, he (S) mortgaged the same property to D. On the 3rd January, 1874, R brought a suit against S on the mortgage, and obtained a decree which directed the satisfaction of the mortgage debt by the sale of the mortgaged property. R did not make D a party to that suit. The property was sold by the Court and purchased by N in his own name, but as trustee for R. At the Court sale, D, the puisne mortgagee, gave notice of his claim to R and N. D sued N, R, and S for the amount due on his mortgage. In his evidence R admitted that he, subsequently to the sale to N, pulled down the house and sold portion of the materials. The lower Courts dismissed the suit, holding that N (defendant No. 1), the purchaser at the auction sale, was not liable for the plaintiff's claim. On appeal to the High Court,

Held that D being puisne mortgagee, and, as such, representing the equity of redemption to the extent of his mortgage, should have had an opportunity of redeeming the mortgaged premises from R's mortgage, and should have been made a party to R's suit. He could not be deprived of his right by proceedings to which he was not a party, and was, therefore, entitled to a decree framed on the basis of such right of redemption.

*Second Appeal, No. 508 of 1880.