

1887  
 JULY 19.  
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 APPEL-  
 LATE  
 CIVIL.  
 ———  
 12 B. 416.

We reverse the decree in execution of the Subordinate Judge. Each party is to bear his own costs of these proceedings throughout. Moneys recovered under the order of the Subordinate Judge must be refunded.

*Order reversed.*

12 B. 419.

[419] APPELLATE CIVIL.

*Before Mr. Justice West and Mr. Justice Birdwood*

DESAI MALABHAI BAPUBHAI (*Original Defendant*), *Appellant v.*  
 KESHAVBHAI KUBERBHAI (*Original Plaintiff*), *Opponent.\**  
 [20th July, 1887.]

*Mamlatdars' Courts Act (Bombay Act III of 1876), s. 4, cl. II—Jurisdiction to grant an injunction—Possession—Physical possession—Disturbance of possession.*

Under s. 4, cl. II of the Mamlatdars' Act (Bombay Act III of 1876) (1) a Mamlatdar can grant an injunction in those cases only in which an interruption of physical possession or enjoyment is sought to be removed.

[F., 15 B. 177 (179); 18 B. 46 (47).]

THIS was an application under s. 622 of the Code of Civil Procedure (Act XIV of 1882). The village of Sachana was originally granted in *inam* to the common ancestor of the parties concerned in the present application. The lands in the village were in the occupation of tenants who paid the *vaze* and the *vero* (the annual rent and cesses), partly in cash and partly in kind. The revenues of the village thus obtained were distributed among the descendants of the original grantee according to their respective shares; one moiety was enjoyed by the petitioner Malabhai and his branch of the family; a fourth share belonged to one Laldas' branch, and the remainder to one Baldev.

[420] Baldev died in 1881, leaving behind him two childless widows Bai Divali and Bai Parsan.

In 1883, Keshavbhai filed a suit against Bai Divali for a declaration of his right to receive and enjoy the deceased Baldev's share of the revenues of the village to the exclusion of his widows, who, he alleged, were only entitled to maintenance. In this suit Malabhai sought to intervene, but was successfully resisted by Keshavbhai. The suit was

\* Application under Extraordinary Jurisdiction, No. 83 of 1886.

(1) Section 4, cls. I and II, of Bombay Act III of 1876 provides as follows:—

(1) Every Mamlatdar shall preside over a Court, which shall be called a Mamlatdar's Court, and which shall have power within such territorial limits as may from time to time be fixed by the Governor in Council to give immediate possession of lands, premises, trees, crops, or fisheries, or of any profits of the same, or to restore the use of water from wells, tanks, canals or water-courses to any person who shall have been dispossessed or deprived thereof otherwise than by due course of law, or who shall have become entitled to the possession or restoration thereof by reason of the determination of any tenancy, or other right of any other person in respect thereof.

(2) The said Court shall also have power within the said limits when any person is disturbed or obstructed, or when an attempt has been made to disturb or obstruct any person, in the possession of any lands, premises, crops, trees, or fisheries, or in the use of water from any well, tank, canal or water-course, or of the use of roads or customary ways to fields, to issue an injunction to the person causing, or who has attempted to cause, such disturbance or obstruction, requiring him to refrain from causing or attempting to cause any such further disturbance or obstruction.

eventually compromised, and a consent-decree was passed, declaring Keshavbhai's exclusive right to manage and enjoy the deceased Baldev's share.

Keshavbhai, however, did not appear to have enforced his rights under the decree. He did not enter into possession, either actual or constructive, of Baldev's share. The tenants did not attorn to him or even to Bai Divali. They were served with notices by Malabhai forbidding them to pay any rent to Keshavbhai, or to Baldev's widows,

Thereupon Keshavbhai filed a suit in the Mamlatdar's Court at Viramgam, praying for an injunction restraining Malabhai and others from interfering with his management and enjoyment of the deceased Baldev's share. The Mamlatdar granted the injunction prayed for. He ordered Malabhai and others not to obstruct Keshavbhai in receiving the profits of the deceased Baldev's share, and not to disturb his management and enjoyment thereof.

Against this order Malabhai applied to the High Court, under s. 622 of the Code of Civil Procedure (XIV of 1882) on the ground that the Mamlatdar had no jurisdiction to grant the injunction prayed for.

A rule *nisi* was granted by West and Nanabhai, JJ., on the 6th May, 1886, calling upon Keshavbhai to show cause why the Mamlatdar's order should not be set aside as illegal and *ultra vires*.

*Macpherson*, Acting Advocate General (with him Rav Sahab *Vasudev Jagannath*), showed cause:—The Mamlatdar finds that Keshavbhai has been in possession down to this day. He has passed a *habulayat* to the Government for the village. The actual occupation of the soil is in the rayats, but the co-sharers receive [421] their respective shares of the produce through a common manager. His possession is the possession of all. The consent-decree establishes Keshavbhai's exclusive right to receive Baldev's share of the profits. Malabhai interfered with our right by issuing notices to the tenants forbidding them to pay us any rent. The Mamlatdar has jurisdiction to remove such interference.

*Jardine* (with him *Gokuldas Kahandas Parekh*) *contra*.—The consent-decree gives Keshavbhai only a right to recover the profits falling to Baldev's share. It does not put him in possession. All that he acquires is a right to sue. There was neither attornment nor payment of rent by the tenants to Keshavbhai. We have not ousted him from physical possession. We have given the tenants a notice, claiming rent for ourselves. That does not entitle the plaintiff to sue for an injunction in the Mamlatdar's Court. Under cl. 2, s. 4 of Bombay Act III of 1876, a Mamlatdar has no power to grant an injunction in a case like this, where no disturbance is caused or attempted to be caused to physical possession.

#### JUDGMENT.

WEST, J.—The plaintiff Keshavbhai had not, so far as the evidence shows, possession of land within the meaning of s. 4, cl. 2, of the Mamlatdars' Act in such wise that he could claim an injunction from the Mamlatdar. When this clause is compared with the first of the same section, we may gather, from the omission from it of the words "profits of the same" (that is of lands), that only an interruption of physical possession or enjoyment was intended to be removed by the injunction for which the clause provides. Such possession the plaintiff Keshavbhai had not acquired; nor, so far as the evidence shows, is it clear that he had ever acquired a complete constructive possession through an attornment of

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—  
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tenants, who having previously paid rent to Divali and so created a *de facto* possession as of a landlord in her would thus complete a transfer from her to Keshavbhai.

We, therefore, make the rule absolute, and reverse the Mamlatdar's order. Costs of these proceedings to be borne by the opponent.

*Rule made absolute.*

12 B. 422.

[422] APPELLATE CIVIL.

*Before Mr. Justice West and Mr. Justice Birdwood.*

HORMASJI MOTABHAI (*Original Plaintiff*), Appellant v. PESTANJI DHANJIBHAI (*Original Defendant*), Respondent.\*  
[27th July, 1887.]

*Contract—Illegal contract—Contract entered into in violation of the law—Partnership—Illegal partnership—Right of partner to sue for a share—Contract Act (IX of 1872), ss. 23, 24—Abkari Act (Bombay Act V of 1878), s. 45—Breach of license—Penalty.*

A contract entered into for the purpose, or with the necessary effect, of defeating a statute will not be enforced or recognized by the Courts, at any rate where both parties stand *in pari delicto*.

A. and B. took a liquor contract from the Government. By the terms of their license they were forbidden to take a partner, and under s. 45 of the Bombay Abkari Act (V of 1878) they were liable to a penalty of Rs. 100 for a breach of their license. C. entered into partnership with A. and B. with full knowledge of the conditions of the license, and afterwards filed a suit for an account of the partnership transactions.

*Held*, that C. was not entitled to any relief, having entered into the partnership in direct violation of the law.

[Diss., 14 C.P.L.R. 67 (69); F., 3 Bom. L.R. 164 (166); R., 19 B. 626 (630), 24 B. 622 (628); 33 B. 636=11 Bom. L.R. 748 (758); 37 B. 320=15 Bom. L.R. 227 =19 Ind. Cas. 442; 8 C.W.N. 635 (636); 10 Ind. Cas. 126=21 M.L.J. 425=9 M.L.T. 459=(1911) 1 M.W.N. 371; 17 P.L.R. 1903.]

APPEAL from the decision of Khan Bahadur B. E. Modi, First Class Subordinate Judge of Surat, in suit No. 3 of 1883.

This was a suit for an account and for the winding up of a dissolved partnership. It was alleged in the plaint that the defendants 3 and 4 had taken up a liquor farm from the Collector of Surat for the year 1881-82, and had subsequently admitted the plaintiff and the other parties to the suit as partners in the business. The plaintiff demanded an account, but was refused. He claimed Rs. 5,025 as his share of the profits of the business.

The defendants pleaded (*inter alia*) that according to the terms of the license granted by the Collector they were forbidden to sub-let the farm or admit any partner in the business; that under the Abkari Act (Bombay Act V of 1878) they were liable to a penalty of Rs. 100 for doing any act in contravention of the terms of the license; that the partnership entered into with the plaintiff was illegal and that, therefore, the suit would not lie.

[423] The Subordinate Judge found that the partnership agreement was opposed to the terms of the license issued by the Government, and,

\* Appeal, No. 115 of 1884.