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instance, their right to a perpetual or *mirasi* tenancy, and he has cited cases which show that [394] he did not overlook the fact that long possession is a strong element in such proof. In holding, however, that long possession is not of itself in any case sufficient evidence, he is wrong. In the present case, if the defendants can prove that their tenancy was in existence previously to the grant of the *sanad* under which the plaintiff claims, then undoubtedly that tenancy would be of the nature they contend it is. It is only because the defendants cannot trace their possession back earlier than 1812, or possibly 1808, whereas the *sanad* is dated 1779-80, that the Assistant Judge comes to the conclusion that the defendants have not satisfied the *onus probandi* required of them. He has found, as a fact, that the defendants were in possession in 1808 or 1812, and it does not appear that they were put in possession first at that time. Under these circumstances the Assistant Judge should have borne in mind the presumption that arises from the proof that the defendants were in possession in 1808 or 1812. "When the state of possession for a long period of years has been satisfactorily proved, in the absence of evidence to the contrary, *præsumitur retro*" —*Anangamanjari Chowdhrani* v. *Tripura Sundari* (1). It is not, however, necessary to cite cases on this point. The second clause of s. 83 of the Bombay Land Revenue Code lays down the law on the subject, and distinctly applies to the present case. No satisfactory evidence of the commencement of this tenancy appears on the record, and there can be no doubt that this is by reason of the antiquity of that tenancy. There is no such other evidence as is referred to in the section. In such a state of things the Assistant Judge ought to have presumed the defendants' tenancy to be, as against the plaintiff, co-extensive with the duration of the tenure of the plaintiff, and thrown upon the plaintiff the burden of proving the reverse. This he has not done. We, therefore, reverse the decree, and remand the appeal for a re-hearing with reference to the above remarks. Costs to abide the result.

Decree reversed and case remanded.

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14 B. 395.

[395] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Candy.

SARDARSINGJI (*Original Plaintiff*), *Appellant v.* GANPATSINGJI (*Original Defendant*), *Respondent.** [20th December, 1889.]

Declaratory decree—Suit for a mere declaration of title without consequential relief—Specific Relief Act (I of 1877), s. 42—Injunction—Civil Procedure Code (Act XIV of 1887), s. 424—Notice—Practice—Amendment of plaint.

The plaintiff sued for a declaration that he was entitled to succeed, on his father's death, to a *talukdari* estate, to the exclusion of defendant No. 1, who, he alleged, was a supposititious child set up by his step-mother to defeat the plaintiff's right of inheritance. It appeared that the defendant No. 1 had obtained a decree against the plaintiff's father, establishing his legitimacy, and declaring him entitled to receive maintenance out of the estate in question. In accordance with this decree the Talukdari Settlement Officer, (defendant No. 2), who was in management of the estate under Bombay Act XXI of 1881, paid defendant No. 1

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* Appeal No. 93 of 1888.

(1) 14 C. 740 (748)=14 I. A. 101 (110).

an allowance of Rs. 200 a month on account of his maintenance. The plaintiff alleged that the payment to defendant No. 1 was illegal and wrongful, but he did not ask for an injunction restraining him from receiving the allowance.

The defendant contended that the suit was bad, (1) because notice had not been given to the Talukdari Settlement Officer as required by s. 424 of the Civil Procedure Code (Act XIV of 1882), and (2) because the plaintiff had sued for a mere declaration of title without asking for consequential relief.

Held, following *Shahebzadee* v. *Fergusson* (1) and *Bhau Balapa* v. *Nana* (2), that the suit was maintainable without giving the Talukdari Settlement Officer the notice required by s. 494 of the Code of Civil Procedure.

Held, also, (Candy, J., doubting) that the suit was barred under s. 42 of the Specific Relief Act (I of 1877), as the plaintiff had omitted to seek the relief of an injunction against defendant No. 1, restraining him from receiving future payment of maintenance.

Held, further, that plaintiff was at liberty to amend his plaint by praying for an injunction as against both defendants.

[R., 23 B. 486 (490); 25 C. 49=2 C.W.N. 76.]

APPEAL from the decree of J. B. Alcock, Assistant Judge of Broach, in suit No. 1 of 1887.

The plaintiff sued for a declaration that he was the sole heir and successor of his father Himmatsingji to the Sarod *wanta* estate. He alleged that the defendant No. 1 was a supposititious child set up by his step-mother to defeat the plaintiff's right of inheritance; that the estate was in the management of the Talukdari Settlement Officer, defendant No. 2, under Bombay [396] Act XXI of 1881; and that out of the revenues collected by that officer the defendant No. 1 was wrongfully and illegally paid a sum of Rs. 200 *per* month on account of his maintenance. The plaint was filed on a ten-rupee stamp.

The defendant No. 1 pleaded (*inter alia*) that the plaint was insufficiently stamped; that the suit would not lie under s. 42 of the Specific Relief Act, as the plaintiff had omitted to ask for consequential relief; that he, (the defendant), was the legitimate son of Himmatsingji; that his legitimacy had been established in a suit brought by him against Himmatsingji, in which the High Court had passed a decree declaring his right, as the legitimate son of Himmatsingji, to be maintained out of the estate in question; that, in accordance with this decree, he received, and had a right to receive, from the income, in the hands of the Talukdari Settlement Officer, a monthly allowance of Rs. 200 for his maintenance; and that he alone was entitled to succeed to the estate by the law of primogeniture.

Defendant No. 2, the Talukdari Settlement Officer, contended that the suit would not lie, in as much as no notice had been given to him, as required by s. 424 of the Civil Procedure Code (Act XIV of 1882); that the suit was barred as *res judicata*; and that defendant No. 1 was the sole owner of the estate, according to the law of primogeniture.

The Assistant Judge held that s. 424 of the Code of Civil Procedure did not apply to the present case, as it was not a suit arising out of acts done by a public officer in his official capacity. He was, however, of opinion, that the suit was barred under s. 42 of the Specific Relief Act (I of 1877), as the plaintiff had omitted to ask for possession, as well as for other relief than a mere declaration of title.

He was, also, of opinion that the suit would not lie on a stamp of Rs. 10. He, therefore, rejected the plaintiff's claim.

Against this decision the plaintiff appealed to the High Court.

(1) 7 C. 499. (2) 13 B. 343.

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Rav Saheb *Vasudev J. Kirtikar*, for appellant.—The Talukdari Settlement Officer is not a necessary party. The plaintiff cannot [397] get any consequential relief as against him. His management cannot be divested by the decree of a Civil Court. He is brought on the record under s. 37 of Act XXI of 1881. He holds the estate in trust for the rightful owner. He has no interest, direct or indirect, in the subject-matter of this suit. As to defendant No. 1, he is not in possession; and we cannot ask for any further relief, as against him, than a mere declaration of title. Our suit is, therefore, not barred under s. 42 of the Specific Relief Act—*Sadut Ali Khan* v. *Khajeh Abdool Gunney* (1); *Sheo Singh Rai* v. *Dakho* (2); *Dadaji* v. *Bhaskarrav* (3); *Ramchandra Balkrishna Kulkarni* v. *Radhabai* (4).

Shantaram Narayan (Government Pleader), for respondent (defendant No. 2):—The Talukdari Settlement Officer is entitled to a notice, as required by s. 424 of the Code of Civil Procedure. The plaintiff alleges in his plaint that the payment by the Talukdari Settlement Officer to defendant No. 1 is illegal and wrongful. He has, therefore, a substantial cause of action as against the Talukdari Settlement. Officer. He is forced to sue, because of the alleged wrongful act of that officer. Section 424 of the Code, therefore, applies—*Bhau Balāpa* v. *Nana* (5). The suit is, moreover, defective, in as much as plaintiff does not ask for consequential relief. He ought to have prayed for an injunction against both defendants, restraining one from making any payment to the other of future maintenance. His omission to do so is fatal to the suit, under s. 42 of the Specific Relief Act.

Manekshah Jehangirshah, for respondent (defendant No. 1):—I adopt Mr. Shantaram's argument, and I would add that, if it is necessary for the plaintiff to ask for an injunction as against defendant No. 2, *a fortiori* it is necessary as against defendant No. 1, who, if the plaintiff's case be true, is receiving a portion of the income of the estate without any right whatsoever. The plaintiff is bound to ask for an injunction restraining him from doing so.

[398] Rav Saheb *Vasudev J. Kirtikar* in reply:—The case of *Bhau Balapa* v. *Nana* (5) is a clear authority showing that notice under s. 424 of the Civil Procedure Code is not necessary in a case like the present, which does not arise out of any wrongful act done by a public officer in the discharge of his public duties. As to s. 42 of the Specific Relief Act, it is doubtful whether a Court of Equity will grant any relief, by way of injunction, as against defendant No. 2. He is not acting on his own responsibility, but in obedience to the directions of a higher authority. And, assuming that we ought to have asked for an injunction as against both defendants, the suit ought not to have been dismissed for our omission to do so. We should be given an opportunity to amend the plaint.

JUDGMENT.

JARDINE, J.—Several intricate questions of law have been argued in this appeal, which we have to determine in their order.

The pleaders for respondents support the decree dismissing the suit, on the ground, among others, that notice under s. 424 of the Code of Civil Procedure to the second defendant, the Talukdari Settlement Officer, was requisite. I am unable to say that the contrary ruling of the Assistant Judge, F. P., was wrong. Besides the authority which he

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(1) 11 B. L. R. P. C. 203 (226). (2) 1 A. 688.
(3) Printed Judgments for 1878, 1 p. 64.
(4) Printed Judgments for 1880, p. 160. (5) 13 B. 343.

gives, *Shahebzadee* v. *Fergusson* (1), it appears to be in accordance with the recent ruling of this Court in *Bhau Balapa* v. *Nana* (2).

The Assistant Judge, F. P., dismissed the suit after finding on two issues only, *viz.*, that the plaint was insufficiently stamped, and that as the plaintiff might have sued for an account as well as for a declaration of his title to the estate, the suit was barred by s. 42 of the Specific Relief Act. On the question of stamp, he recorded that he followed *Ganpatgir Guru Bholagir* v. *Ganpatgir* (3).

With regard to s. 42 of the Specific Relief Act, it has not been contended that plaintiff could sue for the possession of the estate, as it is admittedly under the management of the Talukdari [399] Settlement Officer, which management cannot terminate, except as provided by Act XXI of 1881. The plaint does not charge the Talukdari Settlement Officer with any tortious act or breach of trust; and it has been stated by plaintiff's pleader here that he does not claim any relief against him. The plaint does, however, in paras. 10, 13 and 15 allege payments heretofore made by him to defendant No. 1, which, it has been assumed in the arguments here, have been made, under the authority conferred by cl. 4 of s. 11, as maintenance for defendant No. 1, whom the Commissioner has held to be a member of the family. It has not been denied that the Talukdari Settlement Officer will continue to make these payments; and in his answer that Officer pleads that defendant No. 1 is the sole owner, having been so adjudicated by the High Court. But plaintiff is seeking for a declaration that defendant No. 1 has no interest in the estate. Defendant No. 1 in his answer deals specifically with the allegations in the plaint about these payments. The Act XXI of 1881, s. 37, requires that the Talukdari Settlement Officer shall be a party to this suit; he is thus made responsible to the Court, as regards all reliefs and remedies in which the jurisdiction is not taken away. *Cf. Gurushidgavda* v. *Rudragavda* (4) with *Babaji Hari* v. *Rajaram Ballal* (5). I am of opinion that the averments in the plaint show an intention, on plaintiff's part, to exclude defendant No. 1 from all future payments of money as maintenance. But he has omitted to seek that relief by injunction; the question argued before us was whether he is able to seek it as against the Talukdari Settlement Officer. The inclination of my opinion is in the affirmative. In the absence of any clear bar by Statute, I incline to think that a Court of Equity would interfere by injunction, not only upon the irremediable nature of the mischief, but also upon the allegation of the payment being contrary to the trust which cl. 4 of s. 11 of the Act XXI of 1881 limits in respect of maintenance to members of the family. I base this opinion upon the case cited in Kerr on Injunctions, (3rd ed.), pp. 518 and 519, chap. 16; and in Lewin on Trusts, (8th ed.), p. 855, chap. 29. As this is the point which has been argued, I [400] think it right to deliver my opinion upon it. At the same time it is to be noted that as plaintiff does not ask for the relief by injunction against the Talukdari Settlement Officer, the point comes before us in an inconveniently abstract form, and I do not wish the opinion I deliver now to preclude consideration on trial of the merits of the concrete question, whether, under all circumstances that may be found to exist, an injunction ought to issue against him. The right to ask for the relief as

(1) 7 C. 499. (2) 13 B. 343. (3) 3 B. 230.
(4) 1 B. 531. (5) 1 B. 75.

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against defendant No. 1 is more distinct on plaintiff's pleadings, and I do not doubt that equity would, on its being proved that defendant No. 1 was not a member of the family, restrain him from receiving payment of maintenance in future; the fact that plaintiff might afterwards sue him for repayment of any sum received after he had been declared not to be a member of the family, is not, on these authorities, a reason sufficient for refusing an injunction. The position of the Talukdari Settlement Officer in respect to a decree of Court is, in regard to this maintenance, different to that of a Collector in such suits as *Ningangavda* v. *Satyangavda* (1), *Dadaji* v. *Bhaskarrav* (2). If he is willing to accept the decision of the Court as binding, an injunction will cause no inconvenience to his duty of management. If, which has not been contended, he considers that he is not bound to act on the basis of a declaratory decree, then the relief by injunction is the more effectual remedy. As regards the first defendant, that relief has also the advantage of preventing the necessity of fresh suit.

For these reasons, I would uphold the finding of the Assistant Judge, F. P., as to s. 42 of the Specific Relief Act, on the ground that plaintiff had omitted to seek the relief of an injunction against defendant No. 1, restraining him from receiving future payment of maintenance.

On the issue as to stamp, I am of opinion that, although the question of an additional Court-fee on the valuation of the relief by injunction may now arise, the Assistant Judge, F.P., in his rather curt statement of reasons has erred in failing to distinguish [401] the present claim from those dealt with in *Ganpatgir Guru Bholagir* v. *Ganpatgir* (3) and in *Chokalingapeshana Naicker* v. *Achiyar* (4) which the Bombay decision approves. In those cases the plaintiff might have sued for the actual possession, and the omission so to do was treated by the Courts as an attempt to evade the stamp laws, or to eject under colour of a mere declaration of title. In the present case, as already remarked, the plaintiff cannot sue for the possession of the estate as it is under management, in pursuance of an order under the special Statute, and there is no contention that the Talukdari Settlement Officer has acted without *bona fides*. There is no apparent intention to evade the Court Fees Act. The authority which, in my opinion, the Assistant Judge, F. P., ought to have applied was *Bai Anope* v. *Mulchand Girdhar* (5). We must, therefore, reverse the decree of the Court below, and remand the case, with liberty to the plaintiff to amend his plaint, within four months from to-day, by praying for an injunction as against defendant No. 1, to restrain his receipt of future payments. We also allow plaintiff liberty, if so advised, to add a prayer asking for the relief by injunction as regards future payments of maintenance against defendant No. 2, the Talukdari Settlement Officer. In default of his amending the plaint, as above indicated, by praying for an injunction against the defendant No. 1, it must stand dismissed. In the event of his amending the plaint as aforesaid, the Assistant Judge, F. P., will, as regards the question of stamp, deal with the plaint in the amended form, and try the case *de novo*. Costs to follow the result.

CANDY, J.—The Assistant Judge found that the suit could be maintained against defendant No. 2 without giving him the notice required by s. 424, Civil Procedure Code; but he rejected the claim on

(1) 11 B.H.C.R. 232. (2) Printed Judgments for 1878, p. 64.
(3) 3 B. 230. (4) 1 M. 40. (5) 9 B. 355.

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the grounds that, as plaintiff was suing to establish title by inheritance, he could not get relief on a stamp of Rs. 10, and that, as he could seek for other relief than a mere declaration of title (*e. g.*, a suit for an account), the suit was barred by the provisions of the Specific Relief Act, s. 42.

[402] On the first point the respondent-defendant before us has attempted to support the decree of the Assistant Judge by arguing that notice under s. 424 was necessary. It has not been disputed that the Talukdari Settlement officer is a "public officer" when acting as "manager" under Act XXI of 1881; but I concur with the opinion expressed by Mr. Justice Cunningham in *Shahebzadee* v. *Fergusson* (1) that the actions covered by the provisions of s. 424 differ essentially from those in which the public officer is joined, often formally, often as a friendly party, for the purpose of deciding what his duty is in some particular, or of arming him with the necessary authority to do some act which he cannot do on his own responsibility.

The present suit relates to the succession to the talukdari estate of Sarod, which has been brought under the operation of Act XXI of 1881. Therefore, the manager (defendant No. 2) has, under s. 37 of that Act, been made a party to this suit. For the disposal of the real issue raised between the parties to this suit (plaintiff and defendant No. 1) he need not really be a party at all, and in any case it is impossible to regard such a suit as in any sense brought for damages, or even one in which there could even be a prayer for damages. By a decree of this Court—*Himmatsingji Biharsingji* v. *Ganpatsingji* (2)—it was declared that Ganpatsing (now defendant No. 2) was the son of Himmatsing, (father of present plaintiff), and entitled to maintenance according to the provisions of the Talukdari Act then in force (Act XV of 1871). In accordance with that decree the manager paid maintenance to Ganpatsing, and on Himmatsing's death, in 1881, he continued the payment. It is clear that under s. 11, cl. 4, of the present Act, XXI of 1881, the manager is bound to pay such periodical allowance as the Commissioner may from time to time fix for the maintenance and other necessary expenses of the debtor and of such members of his family as the Commissioner directs. Whether Ganpatsing has succeeded to the position of debtor on Himmatsing's death, or whether merely as one of Himmatsing's sons he is a member of the indebted [403] *talukdar's* family, it is evident that the amount of maintenance, &c., to be paid by the manager to Ganpatsing or to be received by Ganpatsing is one solely for the decision of the Commissioner. As long as the decree of 1875 is in force, there is a statutory duty imposed upon the manager to pay to Ganpatsing such allowances as may be fixed by the Commissioner. It is true that in the plaint the date of the cause of action is given as 7th February, 1881," the date of death of plaintiff's father, when Ganpatsing styled himself as the successor of the deceased Himmatsingji, and the Talukdari Settlement Officer, defendant No. 2, fixed the allowance of Ganpatsing as the eldest son of the Thakor." But there is in this allegation no distinct act of the manager which is complained of by the plaintiff (see remark of this Court in *Bhau Baalpa* v. *Nana*(3)); indeed it was admitted before us that the manager had acted with perfect good faith throughout. It is clear, therefore, that no notice is required under s. 424. The objections regarding the stamp and s. 42 of the Specific Relief Act may be considered together. The idea that the plaintiff in this case could sue for an account, was abandoned at

(1) 7 C. 499. (2) Printed Judgments for 1875, p. 93. (3) 13 B. 343 (347).

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once before us as untenable. It follows, from the remarks made above, that I am inclined to hold that no relief by injunction could be sought for against defendant No. 2 in this case. He is now acting in accordance with the decree of 1875; if the result of the present suit should be to render that decree void, there is nothing to show that the manager will not respect the second decree. He has all through this dispute acted in accordance with the statutory obligations. I doubt, therefore, whether the plaintiff is entitled to ask for an injunction against him. For similar reasons I doubt whether an injunction can, in the present suit, be granted against defendant No. 1. Even if plaintiff succeeds in obtaining a declaration that defendant Ganpatsing is not a member of the family, it does not follow that plaintiff can obtain an injunction restraining Ganpatsing from receiving maintenance in future; for, there is no reason to suppose that, in such a case, Ganpatsing would ever get the chance of receiving maintenance in future from this estate. But as my learned colleague is [404] strongly of opinion that even in the present circumstances an injunction against defendant No. 1, and perhaps against defendant No. 2 also, can be asked for in this plaint, I withdraw my objections, in order that we may at once concur in the order of remand, the only difference between us being as to the necessity of plaintiff being given the opportunity of amendment by adding a prayer for injunction. As such addition cannot prejudice the plaintiff's claim on the merits, I concur with the terms of the orders of remand.

Decree reversed and case remanded.

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14 B. 404.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Telang.

NARAYAN KHANDU KULKARNI (*Original Plaintiff*), *Appellant v.* KALGAUNDA BIRDAR PATEL (*Original Defendant*), *Respondent.**
[21st December, 1889.]

Vatandars' Act III of 1874, *s.* 5—*Alienation of service* vatan *land by the holder of it—Impeachment of such alienation by the alienor—Estoppel—Construction.*

The plaintiff, who was a *vatandar kulkarni*, sued to recover from the defendant possession of certain land with mesne profits, alleging that it was his service *vatan* land wrongfully taken possession of by the defendant in 1880. The defendant set up a mortgage of the land alleged to have been executed to the defendant by the plaintiff's mother in the plaintiff's name during his minority. Both the lower Courts found that the land was the plaintiff's *kulkarni vatan* land; that it had been mortgaged by the plaintiff's mother to the defendant for good consideration; and that the mortgage was binding on the plaintiff. On appeal by the plaintiff to the High Court.

Held, confirming the decree of the lower Court, that the plaintiff was estopped from denying his title to mortgage the field. The general rule being that the grantor cannot dispute with his grantee his right to alienate the land to him, the circumstances in the case did not justify a departure from the rule. The plaintiff, although an hereditary public officer, was not a trustee for the purposes of the Vatan Act, and it could not be presumed that the grantee knew that the plaintiff's guardian had not obtained the previous sanction of Government to

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* Second Appeal, No. 319 of 1888.