

Section 30 is not applicable, because the Court has not found that there are other necessary parties. We say that all the persons who were necessary parties have been joined in the suit. Our contention was that the lands in dispute were the joint property of the parties, and that contention has not been traversed. The defendants do not say that there are other persons interested in the lands. Their contention is that they are the exclusive owners. Under these circumstances, s. 30 of the Code can have no application—*Hira Lal v. Bhairon* (1). When property is joint, one member cannot act in such a manner as would exclude access of the other members to it. The defendants built a wall in the midst of the land, and have appropriated to their use a portion of the common ground.

*Manekshah J. Taleyarkhan*, for the respondents (defendants):—The frame of the suit is wrong. The suit as it is brought seems to be one with respect to a common family property. But the Courts below have found that the property is the joint property of the whole Mahomedan community of the village. Therefore, the Judge was right in dismissing the suit under s. 30 of the Civil Procedure Code.

#### JUDGMENT.

SARGENT, C. J.—The Courts below have found that the property belongs in common to all the Mahomedans of the village for the purpose of a burial ground. Section 30 of the Civil Procedure Code has, therefore, no application to the present suit, which, according to that finding, must be regarded as one in which the plaintiffs claim to restrain the defendants from violating the common interest they all have in the land—*Hira Lal v. Bhairon* (1).

[702] The suit, therefore, being maintainable, the only question which arises is, whether the wall in question which the defendants have erected so as to exclude the plaintiffs from a part of the common land, is a violation of the plaintiffs' rights. As to this there can be no doubt, on the finding, that as the land is held in common by all, the defendants' conduct amounts to such a violation.

We must, therefore, reverse the decree of the Court below and restore that of the Subordinate Judge. The appellants to have their costs here and in the lower appeal Court.

*Decree reversed.*

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*Before Mr. Justice Candy.*

CALLIANJI HARJIVAN (Plaintiff) v. NARSI TRICUM (Defendant).\*

[19th July, 1894.]

*Specific performance—Injunction—Negative agreement—Discretion of Court—Agreement not to work for a rival tradesman—Specific Relief Act (I of 1877), ss. 22, 56 and 57.*

The plaintiff was a milliner carrying on business in Bombay and the defendant was in his employment up to the year 1890. In that year he left the plaintiff's service, and the plaintiff alleged that at the time he left it he was indebted to the

\* Suit No. 537 of 1893.

(1) 5 A. 602.

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plaintiff for moneys not accounted for and also in respect of loans made to him. The plaintiff instituted criminal proceedings in the Police Court against the defendant for criminal breach of trust, and procured a warrant for his arrest. The defendant surrendered, and at the time of the agreement hereafter mentioned the proceedings in this matter were going on. The defendant was out on bail, and was then in the service of a rival milliner named Bhimji Jivan. On the 1st February, 1893, an agreement in writing was made between the plaintiff and the defendant, whereby the defendant agreed as follows:—(1) to pay the plaintiff Rs. 1,950 in full settlement of the plaintiff's claim; (2) to enter plaintiff's service as cutter and to serve him for ten years from the date of agreement; (3) to serve plaintiff honestly. (4) In case plaintiff was obliged to dismiss him for some "fault," then until the expiration of the said period of ten years the defendant should not carry on the business of a cutter or tailor, either directly or indirectly, on his own account or as partner or servant of another, and in case he should do so, the plaintiff should be at liberty to stop him.

On the 15th February, 1893, the charge of criminal breach of trust against the defendant was dismissed, the plaintiff offering no evidence in support of it. The plaintiff subsequently called upon the defendant to enter his employment in accordance with the agreement, but the defendant refused, and remained in the service of Bhimji [703] Jivan. The plaintiff, therefore, filed this suit praying for an injunction restraining the defendant from carrying on business as a cutter or tailor for ten years from the date of the agreement.

*Held*, dismissing the suit, that the parties were not really on equal terms, and that in the exercise of the discretion permitted to the Court by s. 22 of the Specific Relief Act (1 of 1877) the injunction should be refused.

[R.: 23 B. 103 (116); 5 Bom. L. R. 878 (881).]

SUIT for an injunction.

The plaintiff carried on business in Bombay as a milliner under the name of Callian Moti & Co. The defendant had been formerly a cutter in the plaintiff's service, but left the plaintiff's employment in 1890. The plaintiff stated that the defendant was then largely indebted to the plaintiff in respect of moneys not accounted for, and also in respect of loans made by the plaintiff to him.

The plaintiff further stated that after the defendant had left the plaintiff's employment the plaintiff instituted criminal proceedings against him in the Police Court on a charge of criminal breach of trust, and that in February, 1893, the defendant, who had in the meantime entered the service of one Bhimji Jivan, a milliner in Bombay, came to the plaintiff and requested him to come to a settlement in regard to the claims made against him and also begged that the plaintiff would take him again into his employment. The plaintiff ultimately agreed to this, and an agreement dated 1st February, 1893, was made between them, which was reduced to writing. It contained the following terms:—

(1) The defendant was to pay the plaintiff Rs. 1,950 within eight days in full settlement of all the claims which the plaintiff had against him.

(2) The defendant was to enter into the plaintiff's service as a cutter and tailor and to serve as such for ten years from the date of the agreement, receiving Rs. 37 per month as remuneration.

(3) The defendant was to serve the plaintiff honestly and to be obedient to the plaintiff's order.

(4) Except for some "fault" of the defendant the plaintiff was not to dismiss him within the said period of ten years, and if [704] "by reason of a fault or ungratefulness" the plaintiff should be obliged to dismiss the defendant, "then until the aforesaid fixed period shall expire the defendant is not to do or carry on in Bombay the work or business of a cutter or a tailor, or the sewing business, either directly or indirectly, either on his own account or as a partner or servant of somebody else, and in

case he shall carry on the same, then the party of the second part (i. e. the plaintiff) shall be at liberty to stop him."

(5) The defendant bound himself to get a similar agreement executed by his brother Hari Tricum, and the plaintiff was to make a similar agreement and to pay him Rs. 31 per mensem.

On the 15th February, 1893, the charge of criminal breach of trust, which, as stated above, had been brought by the plaintiff against the defendant, was dismissed by the Magistrate, the plaintiff offering no evidence in support of it.

The plaintiff further stated that after the execution of the above agreement the plaintiff at the defendant's request consented to the latter remaining for a limited time in the service of Bhimji Jivan for the convenience of all parties, but that subsequently the plaintiff had called upon the defendant to enter into his employment in accordance with the said agreement, but the defendant refused to do so, and remained in the service of the said Bhimji Jivan.

The said Bhimji Jivan was a rival in the business of the plaintiff.

The last paragraph of the plaint was as follows:—

"9. The plaintiff says that the said agreement comprises a negative agreement by the defendant not to work as a cutter or tailor on his own account, or to serve any other milliner in either of those capacities, and the plaintiff brings this suit for an injunction ordering the defendant to perform the said negative agreement, the plaintiff having in no respect failed to perform the said agreement on his part."

The plaintiff prayed that the defendant should be restrained by injunction from carrying on business as a cutter or tailor on his own account, or as a servant or partner of any person other than the plaintiff, for a period of ten years from the date of the above agreement.

[705] In his written statement the defendant (*inter alia*) stated that he had been obliged to leave the plaintiff's service in consequence of the false prosecution which the plaintiff instituted against him in order to bring pressure upon him and thus prevent his entering into the service of a rival establishment, and that the plaintiff having issued a warrant against him compelled him by undue influence to enter into the above agreement. He pleaded that the agreement was, therefore, not binding upon him, and that the plaintiff was not entitled to the injunction prayed for.

At the hearing the following issues were raised:—

- (1) Whether the agreement was to any and what extent void?
- (2) Whether the plaintiff was entitled to the injunction prayed for?

*Inverarity* and *Raikes*, for the plaintiff:—They cited s. 57 of the Specific Relief Act (I of 1877); *The Brahmputra Tea Co. v. Scarth* (1).

The defendant appeared in person.

#### JUDGMENT.

CANDY, J.—Plaintiff is a milliner in Bombay carrying on business under the name and firm of Callian Moti & Co.

Defendant was formerly in the plaintiff's service, but left that service in 1890, being at that time indebted to the plaintiff. About the time that defendant left plaintiff's service, plaintiff instituted proceedings against

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him in the Police Court, Bombay; and a warrant was issued for his arrest. Defendant surrendered, and in January, 1893, the proceedings of a criminal case were actually going on between the parties in the Police Court. Defendant was on bail, and was at that time in the service of a rival milliner, Bhimji Jivan, having in November, 1892, taken a contract as cutter in that shop.

Negotiations were then entered into between the plaintiff and defendant. The proceedings in the Police Court were to be dropped, and on 1st February, 1893, an agreement was signed by both plaintiff and defendant, of which the following is a translation:—

[706] (This writing) is made this 1st day of February in the year 1893 between me Darji (*i.e.*, tailor) Narsi Tricum of the one part and Darji (*i.e.*, tailor) Callian Harjivan, trading under the name of Callian Moti, of the other part. The particulars thereof are as follows:—

1. The party of the first part and his father and brother (making in all) three persons have passed in writing under their (own) signatures a "mortgage" deed for Rs. 2,500 and interest in favour of the above-mentioned party of the second part. In respect of the same, and in respect of all other dealings, "Fargati" (*a*) has been made for Rs. 1,950, in letters one thousand nine hundred and fifty. On the said rupees being paid within eight days from this day, the said party of the second part is truly to make and deliver at the cost (and) in favour of the party of the first part a reconveyance in respect of the said mortgaged property.

2. The said party of the first part has agreed to work as a "cutter" and a tailor at (the shop of) the party of the second part. The particulars of the conditions in respect thereof (are as follows):—

3. The said party of the first part is to serve as a "cutter" and tailor for ten years from this day's date at (the shop of) the party of the second part. And his pay at the rate of Rs. 37, in letters thirty-seven, per each month is truly to be received and paid as the same shall accrue due.

4. The said party of the first part is to serve the party of the second part with honesty and is not to be partial (*i.e.*, wanting in the discharge of his duties) in any way whatever. And he is not to disregard all (any of) his legitimate work and orders. Also he is always truly to behave himself in obedience to his orders and directions.

5. Within the aforesaid fixed period I, the party of the first part, am never to leave the service of the party of the second part; and without my fault the party of the second part is not to dispense with my services (within that period). And if the party of the second part be obliged to dispense with the services of the above-mentioned party of the first part by reason of a fault or ungratefulness on his part, then until the aforesaid fixed period shall expire the party of the first part is not to do or carry on in Bombay the work (or) business of a "cutter," or a tailor or the sewing business, either directly or indirectly, either on his own account or as a partner or a servant of somebody else. And in case he should carry on (the same), then the party of the second part (shall) be at liberty to stop him from doing so.

6. The party of the first part binds himself to get a writing containing conditions similar to these made (executed) also by Hari Tricum, the brother of the above-mentioned party of the first part. And the party of

(a) "Fargati" literally means release, but here it is used probably to mean a settlement.

the second part also binds himself to give a similar instrument in writing and to fix the pay at Rs. 31, in letters thirty-one, per month.

In witness hereof, both the parties have executed this writing of their free will and pleasure. The same is agreed to and approved of by them and the respective heirs (and) representatives of each (of them).

DARJI NARSI TRICUM (his signature, his own hand-writing).

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[707] Defendant has continued to remain in Bhimji Jivan's service ; and, on plaintiff calling on him to carry out the contract and join his (plaintiff's) service, has refused to do so. Hence the plaintiff has brought this suit praying that defendant be restrained by injunction from carrying on business as cutter or tailor on his own account, or as servant or partner of any person other than the plaintiff, for a period of ten years from 1st February, 1893.

Defendant by his written statement pleaded that his indebtedness to the plaintiff was sufficiently secured by the mortgage referred to in the agreement, and that the plaintiff, taking advantage of the fact of having procured a warrant against him, compelled him by undue influence to enter into the agreement of 1st February, 1893, and, therefore, the agreement is void and not binding on him.

At the hearing of the suit defendant appeared in person and stated that he was unwilling to enter plaintiff's service. The Court raised the following issues:—

1. Whether the agreement is to any, and what extent, void?
2. Whether plaintiff is entitled to the injunction prayed for?

Defendant put himself into the witness-box, and admitted that he knew, before he signed the agreement, that the police case against him was to be dismissed. He said: "No one told me that unless I signed A (the agreement), the police case would not be withdrawn. Plaintiff once got a warrant out against me. I am afraid to go into his service again, lest he should again take out a warrant against me." He further admitted that plaintiff had asked him to leave Bhimji Jivan and join his shop according to the agreement, but he had declined, and that Mr. Bhaishankar had told him that in any case the criminal case was withdrawn. Mr. Bhaishankar (plaintiff's solicitor) also deposed that the withdrawal of the proceedings in the Police Court was no part of the consideration of the agreement A. "The abandonment of those proceedings had been determined independently of the agreement, and I told this to defendant before he signed the agreement."

During the course of the argument at the bar it was admitted that the allegation in the 6th paragraph of the plaint, that on the [708] date of the agreement the charge against defendant was dismissed by the Magistrate, was incorrect ; and that, as a fact, the proceedings in the Police Court were not closed till 15th February, 1893, when the complaint was dismissed, as complainant did not call his witnesses. It was stated that the object of this delay was in order that Bhimji Jivan should not at that time get an inkling of the agreement between plaintiff and his employee (defendant).

On the above facts I have to decide whether plaintiff is entitled to the injunction prayed for.

In the 9th paragraph of the plaint the claim for the injunction is based on the negative covenant in the agreement by the defendant not to

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work as a cutter or tailor on his own account, or to serve any other milliner in either of those capacities. But in the argument it was conceded by the learned counsel for the plaintiff that he could not directly rely on the latter portion of the fifth paragraph of the agreement, for the plaintiff had not dismissed the defendant, and, therefore, the state of things contemplated by the parties in that paragraph had not arisen; but he relied on the negative covenant in the fifth paragraph as indirectly showing the intention of the parties, and on illus. (d) of s. 57, Specific Relief Act (I of 1877). He also referred to the remarks of a Division Bench of the Calcutta High Court in the *Brahmaputra Tea Co., Limited v. Scarth* (1) as showing that the present agreement would not be void under s. 27 of the Contract Act.

I think that this last contention is sound. Whether, in the event of the plaintiff dismissing defendant after taking him into his employ, any question would arise as to the applicability of s. 27 of the Contract Act (IX of 1872) is another question. At present all that we are concerned with is the covenant on the part of the defendant that he would serve plaintiff *exclusively* for the period of ten years from 1st February, 1893. That is a lawful agreement. Specific Relief Act (I of 1877), s. 57, Illus. (d), shows that if B contracts with A<sup>2</sup> that he will serve him faithfully for twelve months as a clerk, A is entitled to an injunction restraining B from serving a rival house as [709] clerk. So here defendant contracted with plaintiff to serve him as cutter for ten years from 1st February, 1893: why should plaintiff not obtain an injunction restraining defendant from serving a rival milliner as cutter during that period?

It may be doubted whether in England the plaintiff would succeed. Thus to take the case of *Whitwood Chemical Co. v. Hardman* (2), defendant covenanted to be the plaintiff's manager for a term of years, and during that period to give the whole of his time to the plaintiff's business. Yet he was endeavouring to set up within the district a rival company to work the very same patent the plaintiffs were making, and was devoting part of his time to the business of that rival company. The Court of appeal held that plaintiff's remedy was not by injunction. Lindley, L.J., admitted that every agreement to do a particular thing in one sense involves a negative. He said (pp. 426—427):—

"It involves the negative of doing that which is inconsistent with the thing you are to do.....but it does not at all follow that because a person has agreed to do a particular thing, he is, therefore, to be restrained from doing everything else which is inconsistent with it. The Court has never gone that length, and I do not suppose that it ever will. We are dealing here with a contract of a particular class. It is a contract involving the performance of personal service, and, as a rule, the Court does not decree specific performance of such contracts. That is a general rule. There has been engrafted upon that rule an exception, which is explained more or less definitely in *Lumley v. Wagner* (3),—that is to say, where a person has engaged not to serve any other master.....the Court can lay hold of that and restrain him from so doing.....and the principle does not depend upon whether you have an actual negative clause, if you can say that the parties were contracting in the sense that one should not do this or the other—some specific thing on which you can put your finger.

"But there is this to be considered. What are we to say in this particular case? What injunction can be granted in this [710] particular

(1) 11 C. 545 (550). (2) L.R. (1891), 2 Ch. 416. (3) 1 DeG. M. and G. 604.

case which will not be, in substance and effect, a decree for specific performance of this agreement? It appears to me the difficulty of the plaintiffs is this, that they cannot suggest anything which, when examined, does not amount to this, that the man must either be idle, or specifically perform the agreement into which he has entered. Now there, it appears to me, the case goes beyond *Lumley v. Wagner*.....The principle is that the Court does not decree specific performance of contracts for personal service, and the question is, whether there is anything in this case which takes it out of that principle."

The Lord Justice held that plaintiffs failed to show that there was some recognised exception in the particular case, and after expressing agreement with Jessel, M.R., about there being no very definite line, and with Fry, L.J., that cases of this kind are not to be extended, he proceeded (p. 428):—

"I confess I look upon *Lumley v. Wagner* rather as an anomaly to be followed in cases like it, but an anomaly which it would be very dangerous to extend. I make that observation for this reason that I think the Court, looking at the matter broadly, will generally do much more harm by attempting to decree specific performance in cases of personal service than by leaving them alone; and whether it is attempted to enforce these contracts directly by a decree for specific performance, or indirectly by an injunction, appears to me to be immaterial. It is on the ground that mischief will be done to one at all events of the parties that the Court declines in cases of this kind to grant an injunction, and leaves the aggrieved party to such remedy as he may have apart from the extraordinary remedy of an injunction."

Now in the present case before me the object of the agreement was to detach the defendant from the rival shop of Bhimji Jivan and to engage his services for the plaintiff's shop for ten years. Plaintiff asks for an injunction which will amount to this, either defendant must be idle for the remaining period of ten years, or else he must specifically perform his agreement to serve the plaintiff at a fixed salary till 1st February, 1903. I: [711] think I have said enough to show that, according to the principle guiding the Courts in England, plaintiff would not be entitled to the extraordinary remedy of an injunction.

But in India we must follow the words of the Statute. No doubt under s. 56, cl. (f), of the Specific Relief Act an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced; and under s. 21 (b) and (g) a contract of personal service cannot be specifically enforced, nor can a contract the performance of which involves the performance of a continuous duty, extending over a longer period than three years from its date. But s. 57 specifically provides for this difficulty. It runs:—"Notwithstanding s. 56, cl. (f), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement; provided that the applicant has not failed to perform the contract so far as it is binding on him." Here the plaintiff can say, "I was quite willing to receive the Rs. 1,950, and to reconvey to defendant the mortgaged property. I have always been willing to receive defendant into my service and give him the salary agreed upon. The circumstance that the Court is unable to

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directly compel specific performance of the affirmative agreement by defendant that he shall serve me as cutter for ten years from 1st February, 1893, does not preclude it from indirectly compelling specific performance of that agreement by granting an injunction to defendant to perform the implied negative agreement that he will not during that period serve any body else as cutter."

The contention seems sound. I agree with Handley, J., (*Madras Railway Company v. Rust* (1)) that to hold the contrary would make s. 57 of the Act a nullity. The Court, therefore, is not on account of the above considerations precluded from granting the injunction prayed for. But the question still remains whether the Court is bound to grant the injunction.

[712] Now *Doherty v. Allman* (2) was the case of a lessee for a long term of years who had covenanted to maintain certain store-houses. It became necessary to repair them, and he thought it would be beneficial to convert them into dwelling-houses, which would much increase their value, and was proceeding to do so, when the lessor filed a bill to restrain him alleging waste. The Vice-Chancellor of Ireland granted the perpetual injunction. This was reversed on appeal, and the House of Lords sustained the decision of reversal. Lord Cairns, after assuming in the lessor's favour that the covenant ought to be read literally as a covenant to maintain the stores as stores, proceeded to show the distinction between the case in which there is a negative covenant and the Court has no discretion to exercise, and the case in which there is only an affirmative covenant of such a character that a Court of Equity, although it could not enforce affirmatively the performance of the covenant, may in special cases interpose to prevent that being done which would be a departure from, and violation of, the covenant. But he showed that in that case there come in considerations which do not occur in the case of a negative covenant, and there are different matters which the Court of Equity will, under these circumstances, take into its view. "It will consider, for example, whether the injury which it is asked to restrain, is an injury which if done cannot be remedied. It will consider whether, if done, it can or cannot be sufficiently atoned for by the payment of a sum of money in damages. It will ask also this question,—Suppose the act to be done, would the right to damages for it to be decided exhaustively, once and for all, by one action, or would there necessarily be a repetition of actions for the purpose of recovering damages from time to time? Those are matters which a Court of Equity would well look to, and on the other hand a Court of Equity would look to this: If we interfere and say, in aid of this affirmative covenant, that something shall not be done which would be a departure from it, no doubt we shall succour and help the plaintiff who comes for our assistance. But shall we do that? Will the effect of our doing that be to cause possible damage to the defendant very much greater than any possible advantage we can give to the plaintiff? [713] Now in a case of that kind, where there is an amount of discretion which the Court must exercise, those are all considerations which the Court will carefully entertain before it decides how it will exercise its discretion" (p. 720—1).

Of course the circumstances of the above case are not on all fours with the circumstances of the present case, but the principles laid down

(1) 14 M. 18. (2) 3 Ap. Ca. 709.

show how very careful the Court should be in the special case of an injunction to prevent the violation of an affirmative contract by restraining the breach of an implied negative covenant. This was brought out by Sir W. Page-Wood, V. C., in *Peto v. Brighton and Uckfield, &c., Railway Company* (1). He said (p. 486): "If there was a distinct negative contract in this agreement.....the Court might fasten upon that, and separating that from the rest of the agreement, might enforce specific performance of that contract; but when a plaintiff comes into this Court upon an agreement, which does not contain any such direct negative clause, and where you must infer the negative from the necessity of the case, the instances in which the Court has found it possible to act are very few and special." As was said by Wilson, J., in *The Shamnugger Jute Factory Company v. Ram Narain* (2) "the granting of injunctions is now regulated by ss. 54 and 55 of the Specific Relief Act (I of 1877). But those sections have never been understood as introducing new principles of law into India, but rather as an attempt to express in general terms the rules acted upon by Courts of Equity in England, and long since introduced in this country, not because they were English law, but because they were in accordance with equity and good conscience. It is necessary, therefore, to enquire on what principle the Courts have acted in England and in India.....The principle is well settled that in granting or withholding an injunction, the Courts exercise a judicial discretion, and weigh the amount of substantial mischief done or threatened to the plaintiff and compare it with that which the injunction, if granted, would inflict upon the defendant. The doctrine is very clearly explained in *Doherty v. Allman* (3)."

[714] As I have already shown, s. 57 of the Specific Relief Act (I of 1877) does in some respects apparently depart from principles which guide Courts of Equity in England. But the general principle remains that in granting an injunction the Court must exercise its discretion. Section 22 of the Specific Relief Act provides that "the jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary, but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal." The same holds good for injunctions (s. 52); and this is particularly so in the special case where specific performance is indirectly sought by the enforcement of an implied negative covenant. Even in *Lumley v. Wagner* (4), where there was held to be a direct negative covenant, the plaintiff was only held to be entitled to the benefit of the principle of law, because looking at the merits and the circumstances of the case he was in the right.

Now what are the circumstances here? These have to be considered independently of the legal considerations. In *Nusserwanji Merwanji Panday v. Gordon* (5), Sargent, J., doubted much whether the merits of the case would not preclude the interference of the Court on behalf of the plaintiffs. "This contract" (he said) "is certainly not one which, to use the language of Lord Cairns in *Eley v. Positive Government Security Life Assurance Company* (6), ought to receive any special favour from the Court." In the present case the contract was an arrangement made to deprive Bhimji Jivan of defendant's services and transfer them to plaintiff

(1) 1 H. and M. 463.

(2) 14 C. 189, (199, 200).

(3) 3 Ap. Ca. 709.

(4) 1 DeG. M. and G. 633.

(5) 6 B. 266 (284).

(6) 1 Exch. Div. 20.

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for ten years at a salary of Rs. 37 a month, no provision being made for any increase of salary during all those years. It was a dodge of Callian Moti to injure a rival milliner, and to keep that rival in the dark as long as possible. The proceedings in the Police Court were not formally withdrawn when the complainant had fully determined to withdraw them. I doubt, to use the language of Lord Eldon in *Smith v. Fromont* (1), whether I would not be degrading the dignity of this Court by interfering in the way that plaintiff asks, and [715] by compelling defendant to leave Bhimji Jivan and sit idle or else work in plaintiff's shop. I see no reason why the plaintiff should not have had resort to the ordinary remedy of damages. The assessment thereof would not be impossible. Defendant had previously served in plaintiff's shop. Plaintiff can calculate the difference in his profits owing to defendant's absence, and there would be no difficulty with regard to the damages for future years up to 1903 (see judgment of Kay, L. J., in *Ryan v. Mutual Tontine Westminster Chambers Association* (2)).

Again, I take it that though s. 57 includes the words "notwithstanding s. 56, cl. (f), (that is "an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced") still the discretion of the Court, which must always be exercised before granting an injunction (s. 52), must be the discretion set forth in s. 22, which recites cases in which the Court may properly exercise a discretion not to decree specific performance. It is true that s. 56, cl. (f), speaks of contracts the performance of which *would not* be specifically enforced, but s. 57 says that "the circumstance that the Court is *unable* to compel specific performance of the affirmative agreement, &c." This apparently relates to s. 21, which treats of contracts which "*cannot* be specifically enforced." Section 57 can hardly mean that though the Court would not in the proper exercise of its discretion (as explained in s. 22) decree specific performance of a contract, though it would be lawful to do so (as explained in s. 21), yet when indirectly decreeing specific performance by granting an injunction under s. 57, and exercising its discretion as provided by s. 52, the Court must not be guided by the rules laid down in s. 22 as to the exercise of its discretion.

Now the very first case given in s. 22 as one in which the Court may properly exercise a discretion not to decree specific performance is "where the circumstances under which the contract is made are such as to give the plaintiff an [716] unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part." Here no doubt defendant was informed, before he signed the agreement, that the proceedings in the Police Court were to be withdrawn. But as a fact they were not withdrawn till at least fifteen days afterwards. The parties were not really on equal terms. Defendant was heavily in debt to the plaintiff and he was also on bail under a serious criminal charge. He was told that it had been determined to withdraw the criminal charge (which as a fact was kept pending for fifteen days), and that this would be no part of the consideration of the proposed agreement, which was that if he within eight days paid Rs. 1,950 for his mortgage-debt of Rs. 2,500, the mortgaged property would be reconveyed to him, and he on his part was to covenant to serve plaintiff as a cutter for ten years on a fixed salary

(1) 2 Swan, 332.

(2) L. R. (1893) 1 Ch. 116.

of Rs. 37 a month. It is not asserted that defendant was provided with funds, or that there was any likelihood of his producing Rs. 1,950 within eight days. It is admitted that defendant has not paid the money, and plaintiff is thus relegated to his original remedy under the mortgage bond. Plaintiff is thus not damnified. It is not a case in which the Court, while refusing to take any action, is unable to leave the parties in their original position. I should be doing more mischief by forcing defendant to remain idle till 1st February, 1903, or to join plaintiff's shop, than by leaving the parties alone.

For these reasons, I hold that the contract is not void; and though the Court is not precluded from granting the injunction prayed for, still in the exercise of a sound discretion I should refuse to grant it; and I accordingly do so refuse, and dismiss the suit with costs.

Attorneys for the plaintiff:—Messrs. *Bhaishankar and Kanga*.

Attorney for the defendant:—Mr. *Balkrishna V. N. Kirtikar*.

18 B. 717.

[717] ORIGINAL CIVIL.

Before Mr. Justice Starling.

ROULET (*Plaintiff*) v. FETTERLE. (*Defendant*)\* [21st July, 1894.]

*Civil Procedure Code (XIV of 1882), s. 491—Claim made by defendant for compensation for arrest—Claim for compensation made by defendant in a summary suit when defendant has not got leave to appear and defend—Cross claim when allowed—Set-off—Practice—Procedure—Summary suit—Civil Procedure Code (XIV of 1882), ss. 532, 533.*

In a summary suit, if a defendant has been arrested before judgment and claim compensation for such arrest under s. 491, he is entitled on that ground to apply for leave to defend the suit, and, if a *prima facie* case is made out, leave to defend should be given.

Under the Civil Procedure Code (XIV of 1882) a cross claim made by a defendant against a plaintiff cannot, in ordinary cases, be set up as a defence, except when it arises out of the very transaction sued upon and is in the nature of a set-off, but the special cross claim provided for by s. 491 of the Code, *v. z.*, a claim for compensation for arrest on insufficient grounds, may under that section be taken into account in any suit, and the amount awarded as compensation be awarded in the decree and thus *pro tanto* be a defence to the plaintiff's claim in the suit.

SUMMARY suit under chap. XXXIX of the Civil Procedure Code (Act XIV of 1882).

The plaintiff sued the defendant to recover Rs. 5,874-5-6 due upon a promissory note passed by him on the 2nd October, 1893. The plaint was filed on the 30th May, 1894, and on the same day the plaintiff applied for arrest before judgment against the defendant. The application was granted, and the defendant was arrested on the 31st May, 1894. He remained in jail for ten days, and on the 11th June he showed cause against the arrest, and was set at liberty.

On the 13th June the summons in this suit was served upon the defendant requiring him to obtain leave to appear and defend within ten days from the summons. On the 23rd instant he applied in chambers for

\* Suit No. 253 of 1894.