

ORIGINAL CIVIL.

Before the Honourable Mr. Farran, Chief Justice, and Mr. Justice Starling.

1895.
July 29.

CALLIANJI HARJIVAN (ORIGINAL PLAINTIFF), APPELLANT, *v.* NARSI
TRICUM (ORIGINAL DEFENDANT), RESPONDENT.*

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

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 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 the 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 on the defendant to enter his employment in accordance with the agreement, but the defendant refused, and remained in the service of Bhimji 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. The lower Court dismissed the suit.

Held, on appeal, that the lower Court was right in refusing either to grant specific performance of the agreement or an injunction against the defendant, but that in as much as it had refused an injunction on the ground that pecuniary compensation was the plaintiff's proper remedy, it ought not to have dismissed the suit, but ought either itself to have awarded damages or to have ordered an inquiry as to damages. The plaintiff being held to be entitled to a remedy, the appropriate remedy should be awarded.

The appellate Court accordingly passed a decree against the defendant and awarded the plaintiff Rs. 10 as damages, with costs of the appeal.

* Appeal No. 855; Suit No. 537 of 1893.

SUIT for an injunction⁽¹⁾.

The plaintiff carried on business in Bombay as a milliner under the name of Callián Moti & Co. The defendant had been formerly a cutter in the plaintiff's service, but left the plaintiff's employment in 1890. The plaint 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 plaint 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 "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

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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 plaint 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 the 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 these 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.

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 not, therefore, 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?

Candy, J., held⁽¹⁾ that the parties to the agreement were not on equal terms, and in the exercise of the discretion given to him by section 22 of the Specific Relief Act (I of 1872) he refused the injunction and dismissed the suit.

The plaintiff appealed.

Macpherson (Acting Advocate General) and *Inverarity* for the appellant.

The respondent did not appear.

Macpherson:—The Court below found the facts in our favour, but did not give us an injunction or even damages. There was an implied agreement that the defendant should not enter other employment. He has joined a rival trader, and that is damaging to the plaintiff. Counsel referred to section 57 of the Specific Relief Act (I of 1877); *Madras Railway Company v. Thomas Rust*⁽²⁾.

FARRAN, C. J.:—In this case the plaintiff sued for an injunction to restrain the defendant from carrying on the business of a tailor or cutter for the period of ten years from the 1st February, 1893, on which day an agreement was made between them which the plaintiff in this suit sought to enforce. By that agreement the defendant had contracted to enter into the plaintiff's employment and to serve him for ten years at a remuneration of Rs. 37 per month.

The Judge of the lower Court rightly held that although that contract could not be directly enforced against the defendant so as to compel him to work for the plaintiff, yet that the Court had power under section 54 of the Specific Relief Act (I of 1877) indirectly to enforce it, by restraining the defendant from working for any other person than the plaintiff during the period mentioned in the agreement. Illustration (c) to section 57 leaves no doubt as to the power of the Court to do this. The Judge,

(1) I. L. R., 18 Bom., 702.

(2) I. L. R., 14 Mad., 18.

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however, in his discretion has decided not to grant this injunction, and we have now to enquire whether that discretion was properly exercised.

In considering this question we must keep in mind that to grant an injunction in a case like the present amounts in substance, although not in form, to a decree for specific performance. It is obvious that to a man in the defendant's position there would be no alternative—in the event of his being prevented by order of the Court from taking other employment—than to enter the plaintiff's service, and to remain in it as long as the injunction remained in force. It would be practically impossible for him now to learn another trade or to find other employment. It is clear, therefore, that the same considerations which would prevent us from giving the plaintiff a decree for specific performance of the contract ought to prevent us from granting such an injunction.

The circumstances which we are required to take into consideration in granting specific performance are indicated in section 22 of the Specific Relief Act, and it, therefore, becomes necessary to state the facts of this case in order to see whether they bring it within that section.

The defendant was formerly in the plaintiff's service. He had left it, and it was alleged that when he left it the plaintiff had large claims against him in respect of moneys for which he had not accounted. The plaintiff instituted criminal proceedings in the Police Court against him, and those proceedings were pending in January, 1893. The defendant, however, was out on bail and had obtained employment in another milliner's shop in Bombay carried on by one Bhimji Jivan, in which service he has remained ever since.

This was the position of the parties when the negotiations between them began in January, 1893. It appears that in the course of these negotiations the defendant was told that the Police Court proceedings against him would be abandoned. It is said, however, that the abandonment of these proceedings was quite independent of the agreement with the defendant, who indeed himself says that Mr. Bháishankar, the plaintiff's solicitor, told

him that in any case the criminal case was to be withdrawn. The case was postponed for a fortnight and ultimately, *viz.*, on the 15th February 1893, it was dismissed.

The defendant, as I have stated, was then in the service of Bhimji Jivan. Subsequently the plaintiff called upon him to leave it and to enter his employment, as he had undertaken to do by the agreement of the 1st February, 1893, and the defendant refused.

Now we think it is impossible to believe that in entering into this agreement with the plaintiff the defendant was not influenced by the idea that by doing so he was getting rid of the criminal charge against him. It is surely much more likely that this was his object than that he should have been led to do so by a desire to re-enter the plaintiff's service. The case was pending against him and might be proceeded with, and it was no doubt a matter of great importance to him that it should be withdrawn. If that was so, it is clear that the parties at the time of making the agreement cannot be said to have been on equal terms. The defendant was at a disadvantage. He was to some extent in the power of the plaintiff, and he was apparently without any legal advice. Thus situated, and without taking any time for consideration, he signed the agreement. If we look at the terms of the agreement, we find it to be one which we think it is unlikely that a man would sign unless under some pressure of circumstances, for by it the defendant bound himself to serve the plaintiff for a long period of time, and during all that time his remuneration was to remain the same.

Having regard to these circumstances, we think that the parties to the agreement of the 1st February were not on equal terms, and that the Judge of the lower Court was right in refusing either to grant specific performance of the agreement or an injunction against the defendant.

The lower Court was also of opinion that pecuniary compensation was sufficient to satisfy the plaintiff's claim against the defendant. Speaking for myself, I question whether compensation can be regarded as an equivalent for the defendant's agreement to work for him for ten years. There is always a

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difficulty in proving damages with any accuracy in such a case. It is, indeed, almost impossible, and I confess that this fact has caused me to feel much doubt as to whether an injunction is not the proper remedy for the plaintiff, but on the whole think that the considerations which I have mentioned should prevail.

The lower Court, however, while holding in its discretion that pecuniary compensation was the plaintiff's remedy, has dismissed his suit with costs. We think it ought either itself to have awarded damages to the plaintiff, or to have ordered an inquiry as to damages. The reason why an injunction was not given was because the Court considered damages to be the proper remedy. That being so, damages ought to have been awarded. In England, no doubt, a bill in equity would have been dismissed, but then the plaintiff would have his suit at law for damages. Here, however, a new suit would not lie, and consequently when the plaintiff is held entitled to a remedy, the appropriate remedy should be awarded.

An inquiry as to damages would be costly, and in any case a decree for damages against the defendant would not be of much value. We think a decree for Rs. 10 as nominal damages will be the proper decree in this case and without costs.

As to the costs of the appeal, we must award them to the plaintiff. It is a hard case, but he was no doubt entitled to appeal, and he has obtained a decree.

Order accordingly.

Attorneys for appellant:—Messrs. *Bháishankar and Kánga.*

ORIGINAL CIVIL.

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August 3.

BECHAR AKHA AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, v. P. DE CRUZ AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Will—Construction—Absolute gift—Gift over to widow or issue of donee—Life-interest—Costs.

Anna Maria Bocarro, a Portuguese inhabitant of Bombay, died in April, 1884, leaving three sons, Michael, Silveiro and Joaquim (defendant No. 3) and two daughters, Rose and Caroline. By her will she directed that her daughter Rose should enjoy

* Suit No. 57 of 1894.