PRIVY COUNCIL.

RAMJI

v.

RAO KISHORESINGH.

P. C.*
1929

April 16,
May 9.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.]

Specific performance—Pecuniary compensation an adequate remedy—Assessment of compensation—Conclusiveness of findings in Second Appeal—Code of Civil Procedure (Act V of 1908), ss. 100, 101—Specific Relief Act (I of 1877), ss. 12 (c), 21 (a).

In consideration of Rs. 5,000 advanced by the appellant, to enable the respondent to prosecute an appeal to the Privy Council, the respondent agreed, in writing, that if the appeal were successful, he would sell a village to the appellant for the sum advanced. The appeal having succeeded, the appellant sued for specific performance. The District Judge found (reversing the trial court) that the bargain was not extortionate or harsh, and directed the execution of a sale deed. He found also, however, that Rs. 20,000 compensation would have been an adequate remedy. Upon a Second Appeal, the bargain was found to be unconscionable and a decree was made for Rs. 11,555. It was not contended in India that it was probable that pecuniary compensation could not be got.

Held that, there being evidence in support of the above findings of the District Judge, the Code of Civil Procedure, 1908, sections 100 and 101, made them binding in Second Appeal, and that, as he had found that pecuniary compensation would be an adequate remedy, the Specific Relief Act, 1877, sections 12 and 21 precluded a decree for specific performance; but that the decree should have been for Rs. 20,000, the amount at which he had assessed the compensation, with interest.

APPEAL (No. 82 of 1927) from a decree of the court of the Judicial Commissioner, Central Provinces (August 22, 1925), setting aside a decree of the District Judge, Nimar, which reversed a decree of the Subordinate Judge of Khandwa.

The suit was brought by the appellant against the respondent for specific performance of an agreement; he claimed an order that the respondent should execute a sale deed of a certain village, and alternatively repayment with interest of Rs. 5,000 advanced by him together with compensation.

**Present*: Lord Shaw, Lord Carson and Sir Lancelot Sanderson.

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The facts of the case sufficiently appear from the judgment of the Judicial Committee.

Dunne K. C. (with him *Parikh*), for the appellant. By the Code of Civil Procedure, sections 100 and 101, the finding of the District Judge that the agreement was not extortionate or even harsh was binding in the Second Appeal: *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (1). In any case, having regard to *Raghunath Prasad* v. *Sarju Prasad* (2), there was no ground for holding that the bargain was unconscionable. The decree for specific performance should have been affirmed. Under the explanation to section 12 of the Specific Relief Act, 1877, it is to be presumed that compensation would not be an adequate remedy. There was no ground for the District Judge's view that it would be. In any case, section 12 (*d*) gave him a discretion to decree specific performance, if he was of opinion that pecuniary compensation could not be got. It is to be assumed that he so found.

Kyffin, for the respondent. It is conceded that the finding of the District Judge as to the value of the property was binding in Second Appeal, but his finding that the bargain was not extortionate was wrong in law. In any case, as he found that pecuniary compensation would be an adequate remedy, sections 12 and 21 of the Specific Relief Act preclude a decree for specific performance, even as an alternative relief. It was not contended in India, nor is it the appellant's case in appeal, that pecuniary compensation could not be got.

Parikh, in reply. Under section 151 of the Code, a decree in the alternative form suggested can be made if necessary for the ends of justice.

The judgment of their Lordships was delivered by

SIR LANCELOT SANDERSON. This is an appeal by the plaintiff in the suit from a decree of the court of

(1) (1890) I. L. R. 18 Calc. 23 (30); L. R. 17 I. A. 122 (127).

(2) (1923) I. L. R. 3 Pat. 279; L. R. 51 I. A. 101.

the Judicial Commissioner, Central Provinces, setting aside a decree of the District Judge, Nimar. The date of the first-mentioned decree was 22nd August, 1925, and the date of the second-mentioned, namely, that of the District Judge, was the 8th May, 1924.

In 1908, the defendant-respondent had instituted a suit against two widows to recover possession of an estate known as the Bhamgarh *Zemindari*, and, after having obtained a decree in his favour, that decree was reversed by the court of the Judicial Commissioner. He desired to prosecute an appeal to His Majesty in Council, and, to enable him to do so, he had to raise money. He entered into an agreement with the plaintiff on the 11th November, 1912, with regard to the advance of the sum of Rs. 5,000 by the plaintiff on the terms therein mentioned. The agreement was as follows:—

"I have brought from you Rs. 5,000, in words, five thousand, cash in order to file my appeal to the Privy Council, and at this time I am very badly in need of this amount, because if you do not pay me the amount now, it will be extremely difficult for me to file the appeal. Therefore, I lay down in writing and bind myself by this agreement that, when I may win my case in the Privy Council in England and a decree may be passed in my favour, I shall at once sell, in lieu of this amount, the full sixteen anna proprietary rights of *mouza* Khedi, out of my villages, Settlement No. 387, *tehsil* Harsud, district Nimar, area 3,630·87, Government demand Rs. 125, with all rights, under a duly registered sale-deed and put you in possession of the *mouza*. If I fail to do so, you may take possession of the *mouza* and get a sale-deed duly executed through a civil court. If, unfortunately, the decree be not passed in my favour and the case decided against me, I shall pay interest at eight annas per cent. per mensem on this amount from the date of the decision of appeal, and execute a separate bond for the same, agreeing to pay the amount by instalments. I shall not raise any objection. And on winning the case, I shall execute a sale-deed of *mouza* Khedi, *tehsil* Harsud, in lieu of this amount, without fail. Therefore, I have executed this deed of agreement with my free will and pleasure on receiving the amount in cash. It is true. It may remain as a record and be of use when necessary."

Shortly stated, the facts are that he won his case before the Judicial Committee of the Privy Council, which allowed his appeal; and that he refused to carry out the agreement above quoted, hence the present suit.

The remedy sought by the plaint was for a decree as follows:—

"(*a*) Ordering the defendant to execute properly a registered sale-deed conveying validly to the plaintiff his entire interest, consisting of 16 annas, in *mouza* Khedi as described in list A herewith attached, with all rights appurtenant thereto and to deliver possession of the same to the plaintiff.

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"(b) It is also prayed in the alternative that if the court does not think fit to grant the above relief to this plaintiff for any reason, the court be pleased to order the defendant to refund the sum of Rs. 5,000, with interest at 2 per cent. per month on it, from the date of agreement till realization, plus such amount by way of compensation to the plaintiff for the loss of the immoveable property which he will thus suffer.

"(c) The plaintiff prays for his costs of the suit and such other relief as the court thinks fit."

The defendant pleaded that the plaintiff was not entitled to a decree for specific performance for the following reasons :—

"(1) That the village Khedi yields a profit of nearly Rs. 1,100 a year, and is now, and was, at the time of the agreement, worth not less than Rs. 20,000.

"(2) The distress and distracted state of mind which the defendant was in at the time of the agreement gave the plaintiff an unfair advantage to secure the village for one-fourth of its value. The discretion to decree specific performance should not be exercised in plaintiff's favour under section 22, Specific Relief Act.

"(3) That there has been undue delay in bringing the suit.

"(4) That the plaintiff himself, after the decision of the Privy Council appeal, agreed to take the money with interest instead of the village, and thereby induced the defendant to deposit part of the money with Gopal Rao and his son, for payment to plaintiff, and to agree to the plaintiff's retaining Rs. 1,161 as stated above. The plaintiff is estopped from claiming specific performance."

The suit, on remand, was tried by the learned Subordinate Judge of Khandwa, who declined to make a decree for specific performance. He held that the village of Khedi was worth at least Rs. 20,000, that the agreement entered into was highly speculative, that it was unfair and extortionate, and he made a decree in favour of the plaintiff for Rs. 10,000, with interest at the rate of 6 per cent. per annum, as stated in the decree. The plaintiff appealed to the learned District Judge, who held that the defendant was in serious money difficulties and was distressed in mind at the time the agreement of the 11th November, 1912, was made, but that he was not overwhelmed by distress, that the value of the village Khedi at the date of the said agreement had not been proved to be more than was admitted by the plaintiff, *viz.*, Rs. 9,000, that the bargain was not extortionate, that the trial court was wrong in holding that the defendant had been imposed upon by the plaintiff and his supposed confederates, and that the trial court was wrong in refusing specific performance.

Accordingly, the learned District Judge made a decree for specific performance, and he directed that the defendant should execute a sale-deed conveying the village Khedi to the plaintiff.

It is necessary to refer to two other findings of the learned District Judge, *viz.*: (1) that damages would have been an adequate relief to the plaintiff and (2) that such damages should be Rs. 20,000.

In dealing with this question, the learned Judge referred to the ninth ground of the appeal in his court, which was as follows:—

"That it should have been held that, under the circumstances of the case, damages was not an adequate relief to the plaintiff, and that at any rate the damages awarded by the lower court are grossly inadequate."

The learned District Judge in this respect said as follows:—

"No special damages have been proved by the plaintiff. He simply invested money, and a return of money should normally be sufficient. It is not shown that he had any pressing need for land. On the contrary, from the very nature of the contract, it is evident that there was no hurry at all, and that not only might plaintiff fail to get the land, but in any case he could not expect to get it for several years. Indeed, the only reason for insisting upon specific performance is that the value of the village now is probably more than the money advanced *plus* reasonable interest. Plaintiff can certainly say that he took a risk and that he should be compensated for such risk. But compensation could be given in money. This ground of appeal must fail."

In their Lordships' opinion, the learned District Judge came to a clear finding that compensation in money was an adequate relief to the plaintiff, and, having regard to the provisions contained in the material sections of the Specific Relief Act (I of 1877), to which reference will presently be made, it is difficult to understand how the learned Judge came to make a decree for specific performance of the contract in view of the abovementioned finding.

On the hearing of the appeal before this Board, it was admitted by the learned counsel for the plaintiff that he was bound by the above-mentioned finding unless he could show that there was no evidence in support thereof, and he argued that there was no such evidence.

It will be convenient to dispose of this question at once.

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Their Lordships are of opinion that there was evidence; the nature of the transaction, the terms of the agreement itself, and the other matters mentioned by the learned District Judge in the passage of his judgment, already cited, are sufficient to show that there was evidence on which the learned District Judge could properly arrive at the above-mentioned finding. In their Lordships' opinion, therefore, it must be taken for the purposes of this appeal that compensation in money was an adequate relief to the plaintiff for the non-performance of the contract by the defendant, and that the amount of such compensation should be Rs. 20,000.

The defendant appealed to the court of the Judicial Commissioner, and the appeal was heard by the Judicial Commissioner and the Additional Judicial Commissioner.

The learned Judicial Commissioners on the hearing of the appeal entered into the consideration of questions which were not open to them, having regard to the provisions of sections 100 and 101 of the Civil Procedure Code (Act V of 1908).

The sections are as follows:—

"100. (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to a High Court, on any of the following grounds, namely:—

(*a*) the decision being contrary to law or to some usage having the force of law;

(*b*) the decision having failed to determine some material issue of law or usage having the force of law;

(*c*) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

"(2) An appeal may lie under this section from an appellate decree passed *ex parte*.

"101. No Second Appeal shall lie except on the grounds mentioned in section 100."

With reference to these sections, their Lordships find it necessary once more to refer to the well-known passage in the judgment of Lord Macnaghten in *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (1), which dealt with the material sections relating to

(1) (1890) I. L. R. 18 Calc. 23 (30); L. R. 17 I. A. 122 (127).

Second Appeals in the Code of Civil Procedure, 1882. The passage is as follows :—

"..... It is enough in the present case to say that an erroneous finding of fact is a different thing from an error or defect in procedure, and that there is no jurisdiction to entertain a Second Appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first appellate court upon a question of fact is final, if that court had before it evidence proper for its consideration in support of the finding."

The provisions of the above-mentioned sections of the Code of 1908 and the above-mentioned ruling, which is applicable to the present Code, were disregarded in the present case.

As, for instance, the first appellate court held that the value of the property at the time of the agreement in 1912 was not more than was admitted by the plaintiff, *viz.*, Rs. 9,000. The Judicial Commissioners did not accept this finding of fact, but they held, on the evidence, that, in 1912, the value of the village was not far below Rs. 20,000.

Again, the first appellate court held that the bargain was not extortionate, that it was not even harsh, but that it was fair. The Judicial Commissioners held that it was a hard and unconscionable bargain, of which specific performance should be refused.

It was not open to the court of the Judicial Commissioner to interfere with either of the above-mentioned findings of fact of the first appellate court, inasmuch as there was ample evidence in support of the findings of the first appellate court which was proper for its consideration.

For these reasons alone, the judgment of the court of the Judicial Commissioner cannot be supported.

There is, however, a further difficulty in the way of supporting the judgment of the court of the Judicial Commissioner. The Judicial Commissioners agreed with the first appellate court in the finding that compensation in money was an adequate relief to the plaintiff, and they further held that the value of the village was not far below Rs. 20,000 in 1912, the date of the agreement. Yet the decree of the court of

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the Judicial Commissioner was not for Rs. 20,000, as would have been expected, but a sum of Rs. 11,555-13-4 only was awarded.

Their Lordships understand that this sum was arrived at on the basis that the agreement was a hard and unconscionable bargain, and that the plaintiff was entitled to no more than a return of the money advanced by him, together with interest thereon.

It has already been mentioned that it was not open to the court of the Judicial Commissioner to disturb the finding of the first appellate court that the agreement was not harsh or extortionate, and that it was a fair bargain.

It is obvious, therefore, that the judgment and decree of the court of the Judicial Commissioner should not be allowed to stand.

It remains to consider what is the proper decree on the facts of this case.

In view of the finding of the first appellate court, it must be taken that the agreement of the 11th November, 1912, was not extortionate, harsh or unconscionable, and that it was a valid and binding agreement. It is clear that the defendant committed a breach of the agreement by his failure to carry out the terms thereof, when his appeal to the Judicial Committee of the Privy Council, referred to in the agreement, was successful. The only other question is to what relief was the plaintiff entitled in the suit.

It was found, as already mentioned by the learned District Judge, that compensation in money was an adequate relief to the plaintiff, and this finding was affirmed by the court of the Judicial Commissioner.

Their Lordships have already stated that there was evidence before the learned District Judge, who was the first appellate court, which would entitle him to arrive at such a finding.

Consequently, it must be taken, for the purpose of this appeal, that the above-mentioned finding stands. Their Lordships desire to add that they see no reason for thinking that the finding of the courts in India, in this respect, was in any way incorrect.

The material provisions of the Specific Relief Act (I of 1877) are section 12 (*c*) (*d*) and the explanation thereto, 19, 21 (*a*) and 22 and are as follows :—

"12. Except as otherwise provided in this chapter, the specific performance of any contract may in the discretion of the court be enforced—

"(*c*) When the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief ; or

"(*d*) when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.

"EXPLANATION. Unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfér moveable property can be thus relieved."

"19. Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.

"If in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

" If in any such suit the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

"21. The following contracts cannot be specifically enforced :—

(*a*) A contract for the non-performance of which compensation in money is an adequate relief.

"22. 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 following are cases in which the court may properly exercise a discretion not to decree specific perfomance :—

I. Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part."

Reliance was placed by the learned counsel for the plaintiff on the explanation to section 12, and urged that the learned District Judge was right in making a decree for specific performance.

The obvious answer is that, in this case, the presumption referred to in the explanation was rebutted, because it was proved and found that the breach of the contract could be adequately relieved by compensation in money.

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It was further argued that it was probable that pecuniary compensation could not be got for the non-performance of the act agreed to be done, and that consequently the case fell within section 12 (*d*).

This point, as far as their Lordships can discover, was not taken in the courts in India, nor was it mentioned in the reasons set out in the plaintiff-appellant's case on appeal to this Board.

The learned counsel for the plaintiff was not able to draw their Lordships' attention to any evidence which would justify them in holding that there is a probability that pecuniary compensation, if awarded, cannot be recovered. If there were any substance in this point, it would undoubtedly have been relied on by the plaintiff, because, if proved, it would have afforded a good ground for obtaining the decree for specific performance which he desired.

In view of the finding that compensation in money is an adequate relief to the plaintiff and in view of the express provisions contained in sections 12 (*c*) and 21 (*a*), their Lordships are of opinion that a decree for specific performance of the contract should not be made.

The decree, therefore, must be for compensation in money, and the only remaining question is one of amount.

There is no difficulty in this respect. It is clear that, at the date of the breach of the contract, the value of the village was about Rs. 20,000, and the learned District Judge held that the amount of the "damages," which he thought would have been an adequate relief, was Rs. 20,000.

The proper order, therefore, is that a decree in favour of the plaintiff should be made for Rs. 20,000, with interest thereon at the rate of 6 per cent. per annum until realization.

Consequently, their Lordships are of opinion that the plaintiff's appeal should be allowed, and that the decrees of the courts in India should be set aside except in so far as the said decrees relate to the

payment of costs, that a decree should be made in favour of the plaintiff as above-mentioned, that the defendant should pay the costs of this appeal, and that the order of the court of the Judicial Commissioner as to payment of costs contained in the decree of the 22nd August, 1925, should stand, and they will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondent: *Valpy, Peckham, & Chaplin.*