APPEAL FROM ORIGINAL CIVIL.

Before Costello and Panckridge JJ.

BAIDYA NATH SEN

v.

KUMUD CHANDRA PAL.*

1935

Nov. 14, 15, 19.

Appeal—Appellate court, Powers of—Findings of fact—Credibility of witnesses.

On an appeal against a judgment of a Judge sitting alone, the Court of appeal will not set aside the judgment unless the appellant satisfies the Court that the Judge was wrong and that his decision ought to have been the other way. Where there has been a conflict of evidence, the Court of appeal will have special regard to the fact that the Judge saw the witnesses.

Powell v. *Streatham Manor Nursing Home* (1) followed.

If a trial judge's estimate of a witness forms any substantial part of his reasons for his judgment, his conclusions of fact should be let alone.

S. S. Hontestroom v. *S. S. Sagaporack* (2) followed.

But where the finding of the trial court is based on an inference from undisputed facts or documents, and also where the judge, through inadvertence, misdirects himself, or his findings are falsified by some determinant and indisputable objective fact, a judge of first instance is in no better position than an appellate court.

Where a judge of first instance had stated unequivocally that the evidence of the plaintiff, notwithstanding the improbabilities, struck him as true, while the defendant's evidence did not satisfy him for many reasons,

held that the appellate court was precluded from questioning the findings of fact arrived at by him, based as they were on the opinion he had formed of the credibility of witnesses, who gave evidence before him.

APPEAL from a judgment of Ameer Ali J. by the defendant.

*Appeal from Original Decree, No. 5 of 1935, in Original Suit, No. 1350 of 1933.

(1) [1935] A. C. 243. (2) [1927] A. C. 37.

1935

Baidya Nath Sen v. *Kumud Chandra Pal.*

The facts of the case and the arguments in the appeal appear sufficiently in the judgment.

Page and *S. R. Das Gupta* for the appellant.

Surita and *D. N. Sen* for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by

PANCKRIDGE J. This is an appeal from the decision of Ameer Ali J., who passed a decree in the respondent's favour for Rs. 2,400 with interest and costs.

The suit was for the sum decreed, which was claimed on the footing that the respondent had paid it as the guarantor of the appellant, from whom, as principal debtor, the respondent was entitled to recover it under s. 145 of the Indian Contract Act. The defence was that, in fact, the appellant was the guarantor, the respondent being the principal debtor.

On October 3, 1928, the respondent and one Pran Dhan Kundu, who was the second defendant in the suit, executed a promissory note for Rs. 3,000 in favour of one Shankar Lal Datta. The numbers of the currency notes, that made up the consideration, were set out in the note, which was witnessed by the appellant, who is an attorney of this Court. Subsequently on the same day the appellant executed a second promissory note in Datta's favour for Rs. 3,000, the consideration being described as the sum mentioned in the former note. Each note carried interest at 12 *per cent. per annum*.

In October, 1929, and October, 1930, there were certain payments on account. These payments were endorsed on the first note and they bear the initials of the appellant, who, however, denies that the initials are in his handwriting. On September 8, 1931, Datta brought a suit on the Original Side on

both the notes. Prandhan, the respondent, and the appellant, were the defendants, and Datta's case, as set out in the plaint, is that the money was lent to Prandhan and the respondent, and that the appellant guaranteed its repayment. None of the defendants entered appearance and a decree for Rs. 1,944 with interest and costs was made by Lort-Williams J. on December 18, 1931. The decree-holder sought to execute the decree against the respondent by arrest and imprisonment, and the respondent was eventually, on September 4, 1932, compelled to pay the sum, for which the present suit was brought. On March 23, 1933, the appellant received an attorney's letter written on behalf of the respondent, alleging that the respondent was guarantor, and demanding immediate payment of the amount paid by him in satisfaction of Datta's decree. The appellant replied the same day repudiating liability and stating that he, and not the respondent, was the guarantor. The respondent, thereupon, instituted this suit on March 27, 1933. The plaint repeats the allegations contained in the attorney's letter and claims Rs. 2,400 from the appellant and Prandhan as principal debtors.

There is also a somewhat inconsistent alternative prayer for a decree for Rs. 1,200 against Prandhan as contribution.

Prandhan has not entered appearence, and the appellant's case in his written statement is a repetition of what he had already set out in the correspondence. The only issue to be tried was, therefore, whether the respondent was speaking the truth, when he said that the true nature of the transaction of October 3, 1928, was that Datta advanced the consideration money for the notes to Prandhan and the appellant, and that the role of the respondent was that of guarantor. The learned Judge, after hearing the evidence of the respondent and the appellant, neither of whom called any other witness, found that the statements made by the respondent were true and on that basis he decreed the

1935

Baidya Nath Sen v. *Kumud Chandra Pal.*

suit. He also found that the appellant's allegation, that he was the guarantor, the respondent being one of the principal debtors, was false. These are the findings, that the appellant seeks to reverse. The principles, which should guide an appellate court in dealing with findings of fact arrived at by a judge of first instance, have recently been considered at some length by the House of Lords in *Powell* v. *Streatham Manor Nursing Home* (1). In that case Horridge J., sitting without a jury, found negligence, and awarded damages. The Court of Appeal reversed the decree, and dismissed the suit. The House of Lords unanimously restored the decree. In the course of his speech, the Lord Chancellor observed at p. 249—

> On an appeal against a judgment of a judge sitting alone, the court of appeal will not set aside the judgment unless the appellant satisfies the court that the judge was wrong and that his decision ought to have been the other way. Where there has been a conflict of evidence the court of appeal will have special regard to the fact that the judge saw the witnesses. See *Clarke* v. *Edinburgh Tramways Co.* (2), per Lord Shaw, where he says: 'When a judge hears and sees witnesses and makes a conclusion or inference 'with regard to what is the weight on balance of their evidence, that judgment 'is entitled to great respect, and that quite irrespective of whether the judge 'makes any observation with regard to credibility or not. I can of course 'quite understand a court of appeal that says that it will not interfere in a 'case in which the judge has announced as part of his judgment that he believes 'one set of witnesses, having seen them and heard them, and does not believe 'another.'

Lord Atkin stated at page 254—

> The case resolved itself into an issue between the credibility of the patient and the surgeon on the one hand, and nurses on the other. The judge who saw the witnesses believed the former.
>
> I venture to think that such a finding in such a case precluded any successful appeal.

Lord Wright referred to the striking words used by Lord Sumner in disposing of an admiralty case—*S. S. Hontestroom* v. *S. S. Sagaporack* (3):—

> None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless

(1) [1935] A. C. 243, 249, 254.

(2) [1919] S. C. (H. L.) 35, 36.

(3) [1927] A. C. 37, 47.

it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone.

It is of course true that, in many cases, the finding of the trial court is based on an inference from undisputed facts or documents, and in such cases a judge of first instance is in no better position than an appellate court. Again there are cases, where the judge through inadvertence misdirects himself, or, in the words of Lord Wright, his findings are falsified by some determinant and indisputable objective fact. We are, however, of opinion that the present case is clearly in the same class as *Powell* v. *Streatham Manor Nursing Home* (1). The learned Judge states unequivocally :—

The evidence of the plaintiff, notwithstanding the improbabilities, to which I have referred, struck me as true. The defendant's evidence did not satisfy me for many reasons.

Though we consider that in the circumstances, we are precluded from questioning the findings of the learned Judge, we may deal briefly with some of the criticisms advanced on the appellant's behalf.

We do not think that the inconsistent alternative prayer for contribution necessarily indicates that the respondent had no confidence in his own case. He was not cross-examined on the point, and the probabilities are that the prayer is something, for which the draftsman, and not the respondent, is responsible.

Towards the beginning of his judgment, the learned Judge observed that, had he considered the evidence of the respondent and the appellant to be of

(1) [1935] A. C. 243.

1935

Baidya Nath Sen v. *Kumud Chandra Pal.*

anything like equal evidentiary value, he would have decided the suit against the respondent. It is suggested that these words show that his decision was based on the weakness of the appellant's evidence and not on the strength of the respondent's evidence. We do not agree. The learned Judge clearly means that, if the appellant had been a witness, whom he saw no reason to distrust, he would have been compelled to hold that the respondent, in spite of the favourable impression made by his evidence, had not discharged the burden of proof.

It must be remembered that both sides were setting up a case, which was at variance with the terms of documents, and the learned Judge had to decide between them. It is true that, on the documents, as they stood, the appellant's case was the more probable, but this the learned Judge fully realized, and for it he made adequate allowance.

Moreover, we think that there is considerable force in many of the observations made by the learned Judge with regard to the appellant's case. For example, the payments on account were to a large extent effected by cheques drawn by the appellant. If, as the appellant states, the money was in fact the money of the respondent or Prandhan, we think that some documentary evidence of this would be available.

The respondent could hardly be expected to call Datta as a witness, having regard to the allegation in the latter's plaint. Datta's absense from the box, if it tells against either party, tells against the appellant.

The day book entry, which only found a place on the record owing to a tactical slip on the part of the respondent's counsel, appears to us of little value. According to the appellant it represents what was dictated by his managing clerk to a junior clerk. If it is in any sense evidence of the truth of the statements contained therein, which we are inclined to doubt, its probative force is in our opinion very small.

1935

Baidya Nath Sen v. *Kumud Chandra Pal.*

We consider, therefore, there is nothing, which would justify us in disturbing the findings of fact arrived at by the learned Judge, based, as they were, on the opinion he formed of the credibility of the witnesses, who gave evidence before him. The appeal is, accordingly, dismissed with costs.

Appeal dismissed.

Attorney for appellant: *P. Mallik.*

Attorneys for respondent: *S. K. Ganguli & Co.*

G. S.