PRIVY COUNCIL.

RAMSARAN MANDAR

v.

MAHABIR SAHU.*

1926.

Nov., 29.

Amendment of plaint—change in nature of suit—suit for specific performance or damages—claim against heirs to recover earnest money—liability of Hindu son and grandson.

A suit was brought against the members of a Hindu joint family for specific performance of a written agreement for the sale of family property alleged to have been made by the karta, or for damages, namely, the earnest money with interest. The plaint did not allege, nor did the evidence show that the sale was for necessity. The trial judge found that the agreement was a forgery and dismissed the suit. Pending an appeal the karta died, and the cause title was amended by adding as his heirs, his son and grandsons, who were already parties. Upon the appeal the plaintiff, who abandoned his claim for specific performance, was given a decree for the earnest money with interest. It was contended on appeal to the Privy Council that the decree could be supported having regard to the liability of the son and grandsons for the debt of the deceased karta, the question whether they had assets of his being determined in execution proceedings.

Held that the decree should be set aside, as it was not permissible by amendment to change the suit into one for money had and received or to recover a debt.

Decree of the High Court reversed.

Appeal from a decree of the High Court (February 22, 1924) reversing a decree of the District Judge of Darbhanga (March 9, 1921).

The suit was brought by the respondent against the appellants, members of a joint Hindu family, including the karta, Ramsaran Mandar, who died pending the appeal to the High Court. The claim

*Present: Lord Sinha, Lord Blanesburgh, Mr. Ameer Ali and Lord Salvesen.

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was for the specific performance of an agreement alleged to have been made by the karta for the sale of certain family property, or for damages, namely the return of earnest money with interest.

The trial judge found that the alleged agreement was not proved. The High Court (Das and Ross, JJ.) found to the contrary and made a decree against the surviving members of the family for the return of the earnest money with interest.

The facts relevant to the present decision appear from the judgment of the Judicial Committee.

1926 Nov. 1, 2, 4. *Sir George Lowndes, K. C.* and *Abdul Majid* for the appellants.

DeGruyther, K. C. and *Dube* for the respondents.

The arguments were to a great extent devoted to the question of fact whether execution of the alleged agreement by thumb-mark was proved, also to the question of law whether the document required registration, which questions their Lordships found it unnecessary to decide. As to the liability of the son and grandsons of the karta, reference was made for the respondent to Mayne, paragraph 327 and *Masit Ullah* v. *Damodar Prashad* (1). For the appellant reference was made to *Ma Shwe Mya* v. *Maung Ho Hnaung* (2) it being contended that the nature of the suit could not be altered by amendment.

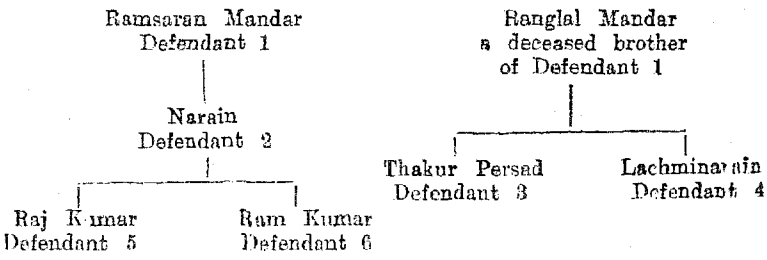
Nov. 29. The judgment of their Lordships was delivered by—

LORD SINHA.—This is an appeal from a judgment and decree dated the 22nd February, 1924, of the High Court of Judicature at Patna, which reversed a judgment and decree, dated 9th March, 1921, of the District Judge of Darbhanga and made in suit no. 835 of 1919.

(1) (1926) L. R. 53 I. A. 204; I. L. R. 48 All. 518.

(2) (1921) L. R. 48 I. A. 214; I. L. R. 48 Cal. 832.

That suit was instituted by the plaintiff, Mahabir Sahu, against six defendants, all members of a joint Hindu family, constituted as shown in the pedigree below :—



Defendants 4, 5 and 6 were all minors at the time the suit was filed, but defendant 4 attained majority before judgment. Defendant 3 died before filing any written statement.

The plaint alleged that Ramsaran (defendant 1), as head and karta of the above joint family, entered into an agreement with the plaintiff to sell certain houses and lands belonging to the said family for Rs. 11,000, and on the 20th August, 1919, executed an agreement for such sale (Exhibit 5 in the case) on receipt of Rs. 9,000 as earnest money,

" affixing a stamp with his signature and thumb impression thereon,"

and stipulating to execute and register a regular conveyance within three weeks on receipt of the balance of the consideration. Ramsaran failed to execute the conveyance though called upon to do so, and the plaintiff prayed for specific performance of that agreement on payment of Rs. 2,000, or

" if for any reason a decree for specific performance be not possible in the opinion of the Court, Rs. 9,000, the principal amount of the earnest money, with interest thereon, at Rs. 2 per month by way of damages may be awarded to the plaintiff against the defendants."

By his written statement Ramsaran denied that he entered into any such agreement, or that he executed the document (Exhibit 5) as alleged or " received a single farthing as earnest money ". He asserted that

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it was a false case altogether, put forward by one Kisorilal, in the name of his father-in-law, the nominal plaintiff, with a view wrongfully to obtain the properties in suit which he had unsuccessfully claimed in previous litigation; that the value of the properties was at least Rs. 21,000, and the story of an agreement to sell them for Rs. 11,000 was false and fraudulent.

Written statements were put in, on behalf of the defendants 2 and 4, and of the minor defendants 5 and 6, by which they also denied the truth of the plaintiff's story, and further pleaded that even if defendant 1 entered into any such transaction, "he had no right to make any contract to execute a sale deed in respect of the said properties, nor were these defendants at all benefited by the said Act".

The two chief issues raised on these pleadings were numbered 4 and 6 respectively in the trial court, and were as follows:—

Issue 4.—Is the letter of agreement dated 20th August, 1919, genuine and for consideration? Did the defendant (1) enter into any agreement for the sale of the properties in suit and receive Rs. 9,000 as earnest money as alleged in the plaint?

Issue 6.—Are the other defendants bound by the agreement entered into by defendant no. 1?

On the fourth issue the District Judge held that the agreement (Exhibit 5) was not proved to be genuine, and that even if genuine there was no consideration for the same.

On the sixth issue he held that the contract was not binding on the other defendants, as the plaint did not allege, nor was any evidence adduced by the plaintiff, to show that the contract was entered into for the benefit of the defendant's family, or that it was necessary as an act of prudent management.

The District Judge accordingly dismissed the suit with costs.

The plaintiff appealed to the High Court of Patna. Pending appeal Ramsaran (defendant 1)

died, and by an order dated 19th December, 1922, the cause title was amended as follows:—

Mahabir Sahu—Plaintiff appellant,

versus

Ramsaran Mandar and, after his death, respondents 2, 4 and 5 are his heirs (*vide* Order dated 19th December, 1922)—2, Narayan Mandar; 3, Lachminarain Mandar; 4, Raj Kumar Mandar; 5, Ram Kumar Mandar (nos. 4 and 5 minors), through Babu Soney Lal Choudhury, defendants respondents.

At the hearing of the appeal in the High Court, counsel on behalf of the plaintiff (appellant) gave up his claim for specific performance, but contended that plaintiff was entitled to recover the earnest money paid (Rs. 9,000), with reasonable interest.

The learned judges of the High Court proceeded upon the view that the only issue which the Court below had to try was forgery or no forgery. They were of opinion that the expert evidence to the effect that the thumb-mark on Exhibit 5 was identical with the thumb-mark of defendant 1 taken in Court was conclusive as to the genuineness of the mark, and so strongly supported the plaintiff's case that the improbabilities, contradictions and suspicious circumstances relied upon by the District Judge were not sufficient to displace the evidence on the plaintiff's side with regard to the execution of the agreement and the receipt of Rs. 9,000 by the defendant Ramsaran. On this basis the High Court set aside the decree of the lower Court and decreed that the plaintiff was entitled to Rs. 9,000 with interest at 1 per cent. per year from 20th August, 1919, to date of decree, and at 6 per cent. on decree, as against all the defendants.

The learned judges do not appear to have considered either issue no. 6 or the District Judge's finding thereupon.

At the hearing of the appeal before this Board there was considerable argument at the Bar on the question of the genuineness of the agreement Exhibit 5

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and the receipt of the Rs. 9,000, as to which the two Courts in India have differed. Their Lordships are, however, relieved from the necessity of pronouncing any opinion on these questions of fact, inasmuch as the decree of the High Court cannot be sustained *in law*, even if their conclusions of fact were well founded.

The suit was framed as an ordinary suit for specific performance of an agreement, with an alternative claim for damages for breach thereof, such damages being assessed at Rs. 9,000 (the earnest money paid), with interest at 2 per cent. from date of agreement to date of realisation. The amendment of the cause title in the appeal before the High Court on the death of defendant 1, above referred to, did not alter the nature of the suit. Nor did the abandonment of the claim for specific performance at the hearing of that appeal alter the suit as framed into an action for money had and received, or for the recovery of a debt. Even so the suit was bound to be dismissed as against Lachminarain, defendant 3, who was not an heir of Ramsaran, defendant 1, and against whom the liability of sons and grandsons to pay their ancestor's debts under the doctrines of Hindu law could not be invoked. Mr. De Gruyther, on behalf of the plaintiff respondent, conceded that point, but relied on that very doctrine in order to support the decree as against defendants 2, 5 and 6, the son and grandsons of defendant 1, who are now on the record in a dual capacity. It was urged by Mr. De Gruyther that the decree of the High Court should stand, as against defendants 2, 5 and 6, and the question whether they had in their hands any assets of Ramsaran against which such decree could be enforced might be left to be determined in proceedings for execution of that decree; and that, if necessary, the plaint might be amended even at this stage, under the wide discretionary powers of this Board and the somewhat elastic provisions of the Code of Civil Procedure in that behalf.

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Their Lordships cannot accede to these arguments. It is not permissible by amendment to change the nature of the suit as framed; and even if it were, the defendants affected by such amendment must have an opportunity to rebut such new cause of action, a course which would involve fresh written statements and a fresh trial. Their Lordships are unable to permit such a course at this stage.

The result is that no decree can be made against the surviving defendants in this suit. The decree of the High Court must be set aside and the suit dismissed, with costs in all Courts, including the costs of this appeal, and their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Chapman, Walker and Shephard.*

Solicitors for respondents: *Pugh and Co.*

REVISIONAL CRIMINAL.

Before Jwala Prasad and Macpherson, JJ.

SAADAT MIAN

v.

KING-EMPEROR.*

1926.

Nov., 25; Dec., 1.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 162, 208 *and* 215—*Magistrate, order of, to furnish copies of statements to accused—Section* 162(1), *meaning of—Enquiry prior to commitment—Right of accused to cross-examine after copies of statements are furnished—section* 208 (2), *failure to comply with, whether vitiates commitment—Section* 215—*Magistrate, refusal of, to issue process on defence witness—Legality of—Section* 208(3) *scope of.*

In an inquiry into an offence triable by a Court of Session, the accused has no right to reserve cross-examination.

Re Mohamed Kasim (1), followed.

*Criminal Revision no. 671 of 1926, from an order of Lala Ashutosh, Magistrate, 1st Class, Arrah, dated the 2nd October, 1926.

(1) (1914) 22 Ind. Cas. 29.