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MA PU v. MAUNG NGO AND OTHERS.

BROWN, J.

substance restored, the costs of the defendant-appellant in this Court and in the District Court will be borne by the plaintiffs-respondents.

APPELLATE CIVIL.

Before Mr. Justice Pratt

1928

Jan. 31.

MAUNG CHIT SU
v.
MAUNG SAN GYAW.*

Small cause nature, suit of a—Addition of a claim for declaration—Declaration when essential—Money paid to compound a non-compoundable case whether recoverable.

Held, that a suit for a declaration that an award was void and for the return of money paid under the award is not a suit of a small cause nature.

Held, further, that a voluntary payment made to compound a non-compoundable case is not recoverable by suit.

Amjadennessa Bibi v. *Rahim Buksh Sikdar*, 42 Cal. 286 ; *Ramachendraiyar* v. *Noorulla Sahib*, 30 Mad. 101—*referred to.*

Sanyal for the appellant.

Day for the respondent.

PRATT, J.—Plaintiff Maung Chit Su sued for a declaration that an award made by arbitrators for repayment of Rs. 150 was void, and for recovery of that sum paid by him to compound the criminal proceedings against his son together with Rs. 12-8 being costs incurred in the previous suit to enforce the award, which was withdrawn.

The trial Court granted plaintiff a decree.

On appeal the District Court held that the money was paid under an illegal and void contract to

* Civil Second Appeal No. 131 of 1927 of Mandalay.

compound a non-compoundable offence and that both parties being *in pari delicto* section 23 of the Contract Act applied, and the money was irrecoverable.

On appeal the advocate for defendant has taken the preliminary point that the appeal does not lie since the claim for recovery of money is of a small cause nature.

It is contended that the defendant had never objected to the cancellation of the award and did not appeal on that ground, therefore in this appeal the only matter in issue is one of a small cause nature and no appeal lies.

A reference to the memorandum of appeal shows, however, that the whole decree was appealed against in the District Court.

It is argued further that plaintiff could have obtained all the relief he sought without asking for a declaratory decree and that therefore the addition of a prayer for a declaration did not take the suit out of the class of small cause suits.

The case of *Ramachendraiyar* v. *Noorulla Sahib* (1), where a Full Bench of the Madras High Court held that plaintiff could have obtained all the relief he sought without asking for a declaration and that therefore the addition of a prayer for a declaration did not prevent the suit from being of a Small Cause nature, was quoted as an authority.

In the present case however, the existence of the award made it impossible for plaintiff to sue for return of the money, which was the subject of the award, except by enforcement of the award or after setting it aside. So long as the award was in existence he could not sue for the return of the money and ignore the award.

(1) (1907) 30 Mad. 101.

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He first sued to enforce the award and when the validity of the award was challenged withdrew that suit with permission and filed a fresh suit to declare the award void and for recovery of the money which formed the subject of the award.

He could not have recovered his money without getting the award set aside, a fact which differentiates the present case from the Madras case cited.

The suit was not solely of a small cause nature. The appeal is based on grounds which bring it within the purview of section 100 of the Procedure Code, and I hold that it lies.

The facts are that plaintiff paid defendant a sum of Rs. 150 to obtain the release of his son who was in custody on a charge of kidnapping.

It is argued on behalf of plaintiff that the money was paid under coercion to prevent his (plaintiff's) son being convicted and that under section 72 of the Contract Act appellant was entitled to recover it.

The case therefore resolves simply into the question whether as a matter of fact the Rs. 150 was paid to defendant under coercion.

Plaintiff certainly stated in evidence that defendant told him in the presence of Maung Tha Hlwa to pay Rs. 150 for the release of his son and the settlement of the case. His son was at that time in custody.

None of his witnesses corroborated his statement as to defendant making the demand.

Maung Tha Hlwa examined as a witness for the defence stated that it was plaintiff, who took the initiative and asked him to arrange a settlement.

It is not proved that any pressure was put on plaintiff to make the payment with a view to procuring his son's release.

The fact that his son was in custody on a criminal charge and that he consequently made an attempt

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to settle a non-compoundable case out of Court by a money payment to defendant can by no manner of means be construed as coercion.

As laid down by a Bench of the Calcutta High Court in *Amjadennessa Bibi* v. *Rahimbuksh Shikdar* (1), mere fear of punishment in a criminal case does not amount to undue influence, much less to coercion.

All the circumstances indicate that the payment was quite voluntary and in all probability on plaintiff's own initiative.

Plaintiff was not entitled to recover money paid under an agreement which was opposed to public policy, nor is there any reason why he should obtain his costs in the previous suit.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Carr.

1928

Feb. 6.

A. SOWDAGAR

v.

B. SHI.*

Surety's liability to produce judgment debtor—Civil Procedure Code (Act V of 1908), O. 38, r. 3—Withdrawal of application by surety to be discharged, effect of—Insolvency of judgment-debtor, effect of on surety's liability.

A surety who had undertaken to produce the defendant whenever required by the Court until the decree was satisfied, applied to be discharged from his liability and produced the judgment-debtor, but ultimately withdrew his application. The decree-holder subsequently applied for execution against the surety who contended that as he had produced the judgment-debtor before and also as the judgment-debtor had been adjudicated insolvent, he was discharged from his obligation under the bond.

Held, that as the surety withdrew his application for discharge his production of the judgment-debtor on that occasion did not discharge him from his liability under the bond, and the judgment-debtor's insolvency did not cancel such liability.

(1) (1915) 42 Cal. 286.

* Civil Revision No. 374 of 1927.