

THE
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APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

FARDUNJI EDALJI (ORIGINAL DEFENDANT), APPELLANT, v. JAMSEDJI EDALJI (ORIGINAL PLAINTIFF), RESPONDENT.*

1903.
July 21.

Specific Relief Act (I of 1877), sections 21 and 30—Suit to recover money due on an award—Specific performance—Damages.

In a suit for the recovery of a certain sum of money with interest due on an award and on the failure of the defendant to pay, for the recovery of the same from the defendant's property, it was contended that the plaintiff was not entitled to the relief sought, having regard to sections 21 and 30 of the Specific Relief Act (I of 1877).

Held, disallowing the contention, that the suit was not for specific performance. It was a suit for the recovery of money and for relief incidental thereto.

APPEAL from the decision of Krishnamukhram A. Mehta, Acting First Class Subordinate Judge of Surat, in Original Civil Suit No. 173 of 1893.

The facts material for the purpose of this report were as follows.

The plaintiff and the defendant were brothers. Some disputes having arisen between them with respect to their father's estate, they referred those disputes to an arbitrator, who after inquiry passed an award. Afterwards the plaintiff made an application to the Court under section 525 of the Civil Procedure Code (Act XIV of 1882) for a decree in the terms of the award stating that though he was willing to abide by and carry out the terms of the award, the defendant was unwilling to do so, the

* Appeal No. 82 of 1900.

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Court referred the plaintiff to a regular suit. The plaintiff, thereupon, in the year 1898, filed the present suit to recover from the defendant, on the strength of the award, the sum of Rs. 4,355-7-9 for principal and Rs. 841 for interest thereon at 9 per cent. per annum from the 1st July, 1896, till the date of suit, in all Rs. 5,196-7-9, with further interest at that rate till the date of payment, and in default of payment of the amount by the defendant to recover the same from the property that went to his share and for a declaration of the plaintiff's lien on the said property.

The defendant contended, *inter alia*, that the arbitrator's award was void; that the arbitrator omitted to decide matters entrusted to him and decided matters not so entrusted; that the plaintiff obtained the award by fraudulently concealing many properties and by misleading the arbitrator; that the arbitrator gave undue advantage to plaintiff; and that the award was, on its face, not supported by evidence and was full of inequity, injustice and partiality.

The Subordinate Judge found that the award was not inoperative; that the arbitrator had not exceeded his power and therefore the award was valid, and that the award was not bad on the ground of misconduct or partiality of the arbitrator or on any other valid ground. He therefore passed a decree for the plaintiff in the following terms:—

Under all these circumstances I order that the plaintiff do recover from the defendant Rs. 4,938-5-9 and that the plaintiff do pay into Court Rs. 550, with which promissory notes of 3½ per cent. should be purchased in the joint names of the plaintiff and the defendant and the same to be handed over to Jamsedji, plaintiff, for custody, and the balance, if any, out of these Rs. 350 after the purchase of the promissory notes, should be divided equally between the plaintiff and the defendant. I decline to award any further interest after the date of the suit. The moveables awarded to the plaintiff are already given to him by the defendant and so there is no claim for that. The rest of the claim is rejected. Costs to be paid by the parties in proportion.

The defendant preferred an appeal.

Raikes and Hardevram (with *G. S. Rao, Motabhai Motilal and Manubhai Nanabhai*), for the appellant (defendant):—The award does not finally settle the disputes between the parties. It creates a kind of trust and there is no mutuality of rights and liabilities.

Such a transaction cannot be given effect to: sections 21 and 30 of the Specific Relief Act—*Blackett v. Bates*.⁽¹⁾ The parties being not on good terms, the provisions of the award will give rise to continuous difficulties and will lead to disastrous results. We submit that this is not a case in which damages can be awarded, because damages will not afford adequate compensation. Further, the plaintiff has not performed his part of the award. The award provides for payment to us on account of our mother who has been staying with us; but nothing has been paid to us on that account. We have got nothing out of the cash of Rs. 6,000 which the deceased has left. We have not obtained the whole of our share in immoveable property.

Scott (Advocate General, with *H. C. Coyaji*), for the respondent (plaintiff) was not called upon.

JENKINS, C. J.:—First, Mr. Raikes contends that having regard to sections 21 and 30 of the Specific Relief Act, the plaintiff is not entitled to the relief he seeks; secondly, he argues that the plaintiff fraudulently concealed from the arbitrator that which should have been disclosed; and thirdly, he asks us to hold that the arbitrator has been guilty of such misconduct as that effect should not be given to the award.

The first of these objections proceeds on the assumption that the suit is one for specific performance, but in our opinion it clearly is not; it is a suit for the recovery of money and for relief incidental thereto. Mansfield, C. J., it is true, has said that pecuniary damages upon a contract for payment of money are from the nature of the thing a specific performance (see *Johnson v. Bland*, 2 Burr. 1083), but on this Sir Edward Fry, in his work on Specific Performance, has made the following comment:—“The remark seems hardly accurate. No doubt the sum agreed to be paid will be the measure of damages, and the amount paid will be same whether the contract be performed or broken. But in the former case the money is paid in performance of the contract: in the latter case it is paid as satisfaction for its non-performance. It is obvious that the consequences of the two payments would therefore be different.” This statement of Sir

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Edward Fry's should, in our opinion, be accepted by us as affording the true answer to Mr. Raikes' argument, and we therefore hold that the first objection cannot prevail.

The Court held that the other two objections raised by Mr. Raikes were also not sustainable.

Decree confirmed.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Jacob.

1903

July 23.

RAMCHANDRA PANDURANG SATHE (ORIGINAL PLAINTIFF), APPELLANT, v. KRISHNAJI VITHAL JOSHI (ORIGINAL DEFENDANT), RESPONDENT.*

Second appeal—Discovery of fresh evidence—Withdrawal of second appeal—Review petition—Practice.

When on coming to the High Court under second appeal it is discovered that there is evidence which ought to have been placed before the lower Courts, the proper practice to pursue is to allow the second appeal to be withdrawn in order that a review petition may be presented to the lower Appellate Court. But this course cannot be pursued when the review petition has been already presented to and rejected by the lower Court.

SECOND appeal from the decision of J. E. Modi, Additional First Class Subordinate Judge of Thána, with Appellate Powers, confirming the decree of G. L. Chandorkar, Subordinate Judge of Pen.

The plaintiff sued to recover from the defendant Rs. 1,139-0-9, the balance of principal, including interest due, under two *razu khátas* (Exhibits 5 and 6), both of the same date, namely, the 4th November, 1899. The suit was filed on the 28th January, 1901.

The defendant admitted the *razu khátas*, but pleaded that the claim with respect to Exhibit 6 was barred by limitation.

The Subordinate Judge found that the plaintiff was entitled to recover Rs. 714-14-3 with proportionate costs and that the claim

* Second Appeal No. 719 of 1902.