

ORIGINAL CIVIL.

1922.

December 22.

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.*KURPAL HEMRAJ, APPELLANTS AND DEFENDANTS v. SHAMRAO
RAGHUNATH RAVTE, RESPONDENT AND PLAINTIFF*.*Specific Relief Act (I of 1877), Sec. 35, cl. (c)—Meaning of "in the same case" in last paragraph of the section—Decree for specific performance of contract for sale of land—Vendor's remedies where decree not complied with by purchaser—Jurisdiction to make an order for rescission on motion—Practice—Procedure.*

The words "in the same case" in the last paragraph of section 35 of the Specific Relief Act, 1877, refer to the case mentioned in clause (c) of the section.

Held, accordingly, that the Court has jurisdiction to make an order on a motion in the suit in which a decree for specific performance of contract for sale of land has already been made but not complied with, to rescind the contract instead of relegating the opponent to another suit for rescission.

The English practice referred to and followed.

MOTION.

By a conveyance, dated 27th February 1918, the 4th defendant transferred his interest in an immoveable property to defendants Nos. 1, 2 and 3 for Rs. 12,000; but it was provided by a contemporaneous agreement that the defendants Nos. 1, 2 and 3 should transfer the property to such person as the 4th defendant might agree to sell it to within twelve months from the date of the agreement and to pay to the 4th defendant the balance of the purchase money received from such person, after deducting therefrom the sum of Rs. 12,000 with interest at the rate of 1 per cent. per mensem and the costs of the conveyance.

By a writing, dated 15th March 1918, the 4th defendant agreed to sell the said property to the

* O. C. J. Appeal No. 50 of 1921, Suit No. 2293 of 1919.

1922.

KURPAL
HEMRAJ

v.

SIAMRAO
RAGHUNATH.

plaintiff who undertook to pay to the defendants Nos. 1, 2 and 3 the sum of Rs. 12,000 together with interest and costs of conveyance.

Thereafter, on 27th February 1919, the plaintiff tendered Rs. 12,000 for principal and Rs. 1,440 for interest to the defendants Nos. 1, 2 and 3 but the latter declined to receive the money and to execute the necessary conveyance.

The plaintiff, thereupon, filed a suit against the defendants Nos. 1, 2 and 3 for specific performance of the contract to sell the property, making defendant No. 4 a *pro forma* party to the suit.

Marten J. decreed the plaintiff's suit and directed the defendants Nos. 1, 2 and 3 to specifically perform the agreement of 27th February 1918 and to execute a proper deed of transfer of the said property to the plaintiff on payment by him of the sum of Rs. 12,000 with interest and costs. No time was mentioned within which the purchase price was to be paid.

On appeal, the decree was confirmed.

The appellants, thereafter, gave notice to the plaintiff (respondent No. 1) to pay the amount directed in the decree, and on failure by the plaintiff to comply with the said requisition moved the appellate Court for an order that the decree passed by Marten J. and the decree passed by the Court of Appeal be vacated in so far as they directed the appellants to specifically perform the agreement of 27th February 1918 and to execute a deed of transfer of the said property, and that the said agreement be rescinded and that neither the plaintiff nor the 4th defendant (respondents Nos. 1 and 2, respectively) should have any rights thereunder.

It was urged on behalf of the plaintiff (respondent No. 1) that the Court had no jurisdiction to make such an order on motion and that the only remedy of the defendants Nos. 1, 2 and 3 (appellants) was to file a suit for rescission of the contract under clause (c) of section 35 of the Specific Relief Act.

Sir Thomas Strangman, for the appellants (defendants Nos. 1, 2 and 3) in support of the notice of motion.

Mirza, for the respondent No. 1 (plaintiff) opposing the motion.

MACLEOD, C. J.:—A decree was passed in this suit granting specific performance to the plaintiff of the suit contract for the sale of certain land. The decree directed him to pay Rs. 12,000 as the purchase price, but unfortunately no time was mentioned within which the purchase price should be paid. As the plaintiff did not comply with the direction in the decree that he should pay the purchase price, an application was made to this Court for an order in the suit that the decree should be vacated as a consequence of such default on the part of the plaintiff. The plaintiff has now paid the money. So that the only question is whether the plaintiff should pay the costs of the motion. It is urged on his behalf that a wrong procedure has been followed, for under section 35 of the Specific Relief Act a suit ought to have been filed in order to secure the performance of the contract or its rescission. There can be no doubt that section 35 is somewhat obscurely drafted. First it directs that any person interested in a contract may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases:—

“(a) Where the contract is voidable or terminable by the plaintiff;

(b) Where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff;

1922.

KURPAL
HEMRAJ
v.
SHAMBAO
RAGHUNATH.

1922.

KURPAL
HEMRAJ
v.
SHAMRAO
RAGHUNATH.

(c) Where a decree for specific performance of a contract of sale, or of a contract to take a lease, has been made, and the purchaser or lessee makes default in payment of the purchase money or other sums which the Court has ordered him to pay."

Therefore in the last case where there has been a default in payment of the purchase money which the Court has ordered a party to pay in a decree for specific performance of the contract of sale, it is open to the opponent to file a suit for a rescission of the contract. Then by the last paragraph of the section it is stated :—

"In the same case, the Court may, by order in the suit in which the decree has been made and not complied with, rescind the contract, either so far as regards the party in default, or altogether, as the justice of the case may require."

It is not at all clear to what the words "in the same case" refer, but it appears to me that these words must refer to case (c) in the section, so that the Court is empowered to make an order in the suit in which a decree has already been made, to rescind the contract, instead of putting the opponent to file another suit for rescission. That is clearly the English practice as appears from Fry on Specific Performance, Sixth Edn., pp. 546, 547, paragraph 1171 :—

"There are two kinds of relief after judgment for specific performance of which either party to the contract may, in a proper case, avail himself."

Paragraph 1172 (i) :

"He may obtain (on motion in the action) an order appointing a definite time and place for the completion of the contract by payment of the unpaid purchase-money and delivery over of the executed conveyance and title-deeds, or a period within which the judgment is to be obeyed, and, if the other party fails to obey the order, may thereupon at once issue a writ of sequestration against the defaulting party's estate and effects."

And paragraph 1173 (ii) :

"He may apply to the Court (by motion in the action) for an order rescinding the contract. On an application of this kind, if it appears that the party

moved against has positively refused to complete the contract, its immediate rescission may be ordered: otherwise, the order will be for rescission in default of completion within a limited time."

In my opinion this is the practice which it has been directed should be permissible by the last paragraph of section 35 of the Specific Relief Act, and the argument urged by Mr. Mirza that this Court has no jurisdiction to make an order on a motion of this kind after specific performance has been decreed cannot be sustained. The opponents must, therefore, pay the costs of the motion, including costs reserved.

Solicitors for the applicants: Messrs. *Ardeshir, Hormusji, Dinshaw & Co.*

Solicitors for opponent No. 1: Messrs. *Kharas & Co.*

G. G. N.

ORIGINAL CIVIL.

Before Mr. Justice Mulla.

J. P. FERNANDEZ, PLAINTIFF v. P. D. RODRIGUES, DEFENDANT*.

1922.

Commissioner for taking accounts—Review by commissioner of his decision on a particular item—Party aggrieved can file exceptions after report is made—Practice—Procedure—Civil Procedure Code (Act V of 1908), section 151 and Order XLVII, Rule 1.

February 14.

Though the Commissioner for taking accounts has no power to "review" either under section 151 or Order XLVII, Rule 1 of the Civil Procedure Code, he may, on proper grounds, re-open the inquiry into any one or more of the items in the accounts directed to be taken before he has made his report which makes his decision final and conclusive.

If, however, he re-opens the inquiry into any item on grounds which are not proper, the party aggrieved can object only by way of exceptions to his report.

* O. C. J. Suit No. 1313 of 1922.