

1868
 NANDA
 KUMAR BA-
 NERJEE
 v.
 ISHAN
 CHANDRA BA-
 NERJEE.

Baboo *Hem Chandra Banerjee* for appellant.—A Court of Small Causes has not jurisdiction to try a suit of this nature, and the Moonsiff's Court was not ousted of its jurisdiction merely by reason of the plaintiff's having also claimed compensation.

The nature of the decree which the Court may deem it proper to pass, cannot divest the Civil Court of its jurisdiction. In a suit of this nature, a decree may be made for specific performance.

Baboo *Srinath Banerjee* for respondent.

The judgment of the Court was delivered by

PEACOCK, C. J.—The plaint asks for one of two things, either that the defendant may be ordered to fill up the excavation at his expense, or that the plaintiff may have 25 rupees as damages. The latter alternative is one entirely within the jurisdiction of the Small Cause Court. The plaintiff is not, I think, entitled to a decree for performance of the specific act, but only to the alternative relief sought for by him. It is, therefore, a suit for damages, and the Small Cause Court cannot be ousted of its jurisdiction merely by asking for an alternative relief to what the plaintiff is not entitled. In this view the Principal Sudder Ameen was correct in saying that the suit is one which is cognizable by the Small Cause Court.

The decision of the lower appellate Court is affirmed with costs.

Before Mr. Justice Bayley and Mr. Justice Macpherson.

MANIKLAL BABOO v. RAMDAS MAZUMDAR.*

Written Statement—Admission—Bond—Onus Probandi.

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 July 9.
 See Also
 † B. L. R.
 (F. B.) 51.

A sued B. on a bond, in which it was recited that B. had received the amount. B. in his written statement admitted execution, but stated that he had received the amount mentioned therein not under the bond, but on the pledge of certain jewellery. *Held*, that on the admission of the execution of the bond which contained the recital of payment, the onus was upon B. to prove that payment had not been made under the bond.

* Special Appeal, No. 2691 of 1867, from a decree of the Principal Sudder Ameen of East Burdwan, reversing a decree of the Sudder Ameen of that district.

This was a suit for the recovery of Rupees 551-10, being the principal and interest due upon a bond dated 13th Aghram 1270 (November 1863), and executed by the defendant in favor of plaintiff's son, Manilal Baboo, since deceased.

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The following is a translation of the bond :

“To high in dignity Srijut Manilal Baboo.

“I, Ramdas Mazumdar, execute this bond. I, for the purpose of paying revenue of my mehal Jalkar Mawul, borrow from you the sum of Rupees 355, in cash and notes, as mentioned in the schedule written below. I shall pay interest at 2 Rs. per cent. I shall repay the same, with interest, in Falgun of this year. Whatever I shall pay in part, I shall get it endorsed on back of this. Any objection for the repayment of the amount will be null and void. To this effect having received the cash and notes from hand to hand, I execute this bond.”

The defendant in his written statement stated that he “being in want of funds asked Manilal Baboo for a loan on a bond who agreed thereto, and on the 13th of Aghran 1270 (November 1863) he executed a bond, in favor of Manilal Baboo, for Rupees 355. On being asked for the money, Manilal Baboo refused to pay until the bond was registered. The defendant then said that 14th Aghran was a Sunday, and that, consequently, no registration could take place, and if the money was not deposited by the 15th, his taluk would be sold; what was he to do? To this Manilal Baboo said, that he could advance money on pledge of gold and silver articles. On the same night, he (the defendant) pledged with the said Manilal Baboo certain gold and silver articles, who, crediting the same in his account books, prepared and gave him a memo, in Bengali paper, of the cash and notes (Rs. 355) mentioned in the bond; and he (the defendant) asked for the bond, but Manilal Baboo promised to return the same along with the pledge articles, as he had entered it in the furd. He (the defendant) has not yet redeemed the said articles. The money was not advanced on the bond.”

The Sudder Ameen gave a decree to the plaintiff on the

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admission of the defendant, with liberty to the defendant to sue for recovery of the pledged articles.

On appeal the Principal Sudder Ameen held, that the evidence as to passing of the money covered by the bond was not reliable, and that the lower Court was wrong to pass a decree on the strength of an admission by the defendant that he borrowed the money on pledge of certain ornaments.

Baboo Rup Nath Banerjee for appellant.—The defendant admits having executed the bond, the bond recites that the money has been paid, therefore the *onus* is on defendant to prove the contrary.

Baboo Baikantha Nath Pal for respondent.—If the statement in defendant's answer be taken as an admission, the whole of it should be read, and not the portion only which contains the admission. It must be taken as a whole. The latter portion explains away the former. There is a distinct denial of having received the money on the bond. There are several rulings of this Court that the whole statement must be taken together. *Sultan Ali v. Chand Bibi* (1) and *Radha Charan Chowdhry v. Chunder Mani Shikdar* (2).

The Judgment of the Court was delivered by

BAYLEY, J —This Special Appeal must be decreed with costs.

The plaintiff sued the defendant upon a bond, and alleged that the consideration had passed. The bond recited the fact of the consideration having passed when the bond was executed. The defendant admitted the execution of the bond, but at the same time pleaded that the consideration, as recited in the bond, had not been paid; that, on the contrary, as the plaintiff did not agree to give the money until the bond was registered, he (the defendant) raised money by pledge of jewels.

The first Court gave the plaintiff a decree. The lower appellate Court has dismissed the plaintiff's suit, on the ground

(1) 9 W. R., 130.

(2) 9 W. R., 290.

that the plaintiff failed to prove that the consideration had passed.

The plaintiff appeals specially, and urges that as the defendant admitted the execution of the bond in which the payment of the consideration was recited, the burden of proving that consideration had not been paid was on the defendant. On the other hand, the special respondent urges, that an admission made in a written statement must be taken as a whole, that is to say, it cannot be accepted as an admission of his execution of the bond; if the plea is rejected, that there was no consideration at all, and it is urged that in this view the burden of proof still lies on the plaintiff.

We are of opinion that when the defendant in his bond stated that the money had been received by him, and when he in his written statement admitted that the bond was executed by him, it was upon him to prove that the facts stated by him in the bond, were really different from what they were recited to be. This is an ordinary rule of law, and according to it, we think, the decision of the lower appellate Court, which threw the entire burden of proof on the plaintiff, when it ought to have been on defendant, ought to be reversed.

We, accordingly, reverse it, decree the special appeal with costs, and affirm the judgment of the first Court.

Before Mr. Justice Phear and Mr. Justice Hobhouse,

R. A. PUSHONG *v.* MUNIA HALWANI.*

Contract with Persons in position of Confidence or Trust—Legal Adviser and Client—Mookhtear—Presumption—Onus Probanda.

A contract of sale or conveyance entered into by any one with a person who stands relatively to him in a position of confidence or trust, is liable to be called in question by the vendor, and to be set aside at his instance, if it be found that the other party made an unfair use of his advantages. This rule of equity applies strongly in a case where any person, acting as an attorney, or as a legal adviser, enters into a contract with his client in respect of the subject of litigation or advice. Undue influence is presumed to have been exerted until the contrary is proved, and the purchaser is bound to show that all the terms and conditions of the contract are fair, adequate, and reasonable.

* Special Appeal, No. 163 of 1863, from a decree of the Judge of 24 Pergunna, affirming a decree of the Sudder Ameen of that district.

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