1951

Feb. 9

SRINIVAS RAM KUMAR

v.

MAHABIR PRASAD AND OTHERS.

[PATANJALI SASTRI, MEHR CHAND MAHAJAN and MUKHERJEA JJ.]

Pleadings—Inconsistent pleas—Plaintiff suing for specific performance alleging that money was paid as price—Defendant pleading that money was received as loan—Plaintiff's case not proved—Whether decree can be given for recovery of money as loan on defendant's plea.

Though the court would not grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had no opportunity to meet, yet, when the alternative case which the plaintiff could have made was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. In such circumstances, when no injustice can possibly result to the defendant, it may not be proper to drive the plaintiff to a separate suit.

The plaintiff brought a suit for specific performance of an agreement to sell a house alleging that he had paid Rs. 30,000 towards the price and had been put in possession in part performance of the contract, but the defendant pleaded that the amount of Rs. 30,000 was received as a loan and the plaintiff was put in possession only to facilitate payment of interest, and the court found that the defendant's plea was true : *Held*, that a decree could be passed in favour of the plaintiff for recovery of the sum of Rs. 30,000 and interest remaining due under the agreement of loan pleaded by the defendant, even though the plaintiff had not set up such a case and it was even inconsistent with the allegations in the plaint.

Babu Raja Mohan Manucha v. *Babu Manzoor* (70 I.A. 1) referred to.

CIVIL APPELLATE JURISDICTION : Appeal from a judgment and decree of the High Court of Judicature at Patna dated 29th August, 1947, in First Appeal No. 13 of 1945, modifying a decree of the Subordinate Court of Gaya in O.S. No. 59 of 1943 : Civil Appeal No. 82 of 1949.

1951

Srinivas Ramkumar v. *Mahabir Prasad and Others.*

S. P. Sinha (*C. R. Pattabhi Raman* and *B. K. Saran* with him) for the appellant.

Udai Bhan Chaudhry for respondents Nos. 1 and 2.

Haris Chandra (*N. C. Sen,* with him) for respondents Nos. 3 to 7.

1951. February 9. The judgment of the Court was delivered by

Mukherjea J.

MUKHERJEA J.—This appeal is on behalf of the plaintiff and it arises out of a suit for specific performance of a contract to sell a house in the town of Gaya, belonging to the defendants second party who, it is alleged, agreed to sell the house to the plaintiff but subsequently resiled from the agreement and sold the same to the defendants first party who purchased it with notice of the contract.

The plaintiff's case, in substance, is that in September, 1941, the defendants second party, who owned a house at Gaya, entered into a negotiations for sale of the same, with one Jadu Ram, and the title deeds of the property were actually handed over to the latter. These negotiations failed and the second party defendants thereupon approached the plaintiff firm and a contract was entered into by and between them sometime towards the end of October, 1945, under which the former agreed to sell to the latter their house at Gaya for a consideration of Rs. 34,000. Out of this consideration, a sum of Rs. 30,000 was paid by the plaintiff firm on behalf of the vendors to a creditor of the latter on 28th October, 1941. The vendors in their turn put the plaintiff in possession of the house agreed to be sold in part performance of the contract and promised to execute a conveyance as soon as the title deeds were returned to them by Jadu Ram and the balance of consideration money amounting to Rs. 4,000 was paid by the plaintiff. The second party defendants, however, went back on their promise and did not execute the conveyance in favour of the plaintiff even after they got back their title deeds from Jadu Ram; and on the other hand, they sold the house to the defendants first

party on August 13, 1943. The plaintiff was thus obliged to bring this suit, claiming specific performance of the contract of sale.

The suit was contested by both sets of defendants. The second party defendants contended *inter alia* that they never agreed to sell their house at Gaya to the plaintiff, and the story of a contract of sale as set up by the plaintiff was entirely false. They admitted that they were in need of money and hence approached the plaintiff for a loan and the plaintiff did advance to them a sum of Rs. 30,000 carrying interest at 6% per annum. It was entirely for facilitating payment of interest due on this loan and not in part performance of the contract of sale that the plaintiff was put in possession of the same.

This defence was reiterated by the first party defendants who further pleaded that they were *bona fide* purchasers for value having no notice of any contract of sale with the plaintiff.

The Subordinate Judge, who heard the suit, came to the conclusion, on the evidence adduced by the parties, that the story of a contract of sale, as alleged by the plaintiff, was not established and it was not in pursuance of any such contract that the plaintiff was put in possession of the house. It was held that the defendants' story was true and that the plaintiff did advance a sum of Rs. 30,000 to the defendants second party, but this was by way of a loan and not as part payment of the consideration money. So far as the first party defendants were concerned, it was held that they were *bona fide* purchasers for value without notice. In view of these findings, the Subordinate Judge dismissed the plaintiff's claim for specific performance but as the second party defendants admitted that they had taken an advance of Rs. 30,000 from the plaintiff, a money decree was given to the plaintiff for this sum against these defendants with interest at 6% per annum from the date of the suit till realisation.

Against this decision, the plaintiff took an appeal to the High Court at Patna, and the second party

1951

Srinivas Ramkumar v. *Mahabir Prasad and Others.*

Mukherjea J.

defendants also filed cross-objections challenging the propriety of the money decree that was passed against them. The appeal was heard by a Division Bench of the Patna High Court who, by their judgment dated August 29, 1947, dismissed the appeal of the plaintiff and allowed the cross-objections preferred by the second party defendants. The learned Judges held, concurring with the trial court, that no case of concluded contract between the parties was established by the evidence adduced in the case, and the fact of the plaintiff being put in possession of the house could not be regarded as an act of part performance of any such contract. The High Court agreed with the trial judge in holding that the sum of Rs. 30,000 was advanced as a loan by the plaintiff to the second party defendants, though the evidence was not very clear regarding payment of interest upon it, and that the first party defendants were purchasers for value without notice. The High Court held further that even if there was a contract, its terms were vague and indefinite, and as one of the vendors was a minor, no relief in equity by way of specific performance of the contract should be given in this case as it would substantially prejudice the interest of the minor. In the opinion of the High Court, the money decree granted against the second party defendants was not warranted in law as no case of a loan was made by the plaintiff in the plaint and no relief was claimed on that basis. The result was that the suit was dismissed in its entirety and the decree for recovery of money that was made in favour of the plaintiff by the trial court was set aside. It is against this judgment that the plaintiff has come up on appeal to this court.

The learned counsel appearing for the appellant contends before us that the findings upon which the courts below disbelieved the story of the plaintiff and dismissed the claim for specific performance are not proper findings of fact which could be legitimately inferred from the evidence adduced in this case. In the alternative it is argued that the High Court was wrong in setting aside the decree for money which was given

against the second party defendants by the trial judge.

The first contention put foward by the learned counsel appears to us to be plainly unsustainable. When the courts below have given concurrent findings on pure questions of fact, this court would not ordinarily interfere with these findings and review the evidence for the third time unless there are exceptional circumstances justifying departure from this normal practice. The position may undoubtedly be different if the inference is one of law from facts admitted and proved or where the finding of fact is materially affected by violation of any rule of law or procedure. The practice adopted by this court is similar to what has always been acted upon by the Judicial Committee. To quote the words of Lord Thankerton in *Bibhabati* v. *Ramendra Narayan*(1), "it is not by any means a cast iron practice"; there may occur cases of unusual nature which might constrain us to interfere with the concurrent findings of fact to avoid miscarriage of justice. The case before us however, has nothing unusual in it and involves a pure question of fact. There is no document in writing in proof of the agreement upon which the plaintiff's case is based and the decision hinges primarily upon appreciation of the oral evidence that has been adduced by the parties. The trial judge, who had the witnesses before him, was the best person to weigh and appraise their credibility and the conclusions which he arrived at, have been affirmed in their entirety by the High Court on appeal. In these circumstances, we see no reason whatsoever to go beyond the facts which have been found against the appellant by both the courts below.

As regards the other point, however, we are of the opinion that the decision of the trial court was right and that the High Court took an undoubtedly rigid and technical view in reversing this part of the decree of the Subordinate Judge. It is true that it was no part of the plaintiff's case as made in the plaint that

(1) 51 C. W. N. 98.

1951

Srinivas Ramkumar v. *Mahabir Prasad and Others.*

Mukherjea J.

the sum of Rs. 30,000 was advanced by way of loan to the defendants second party. But it was certainly open to the plaintiff to make an alternative case to that effect and make a prayer in the alternative for a decree for money even if the allegations of the money being paid in pursuance of a contract of sale could not be established by evidence. The fact that such a prayer would have been inconsistent with the other prayer is not really material. A plaintiff may rely upon different rights alternatively and there is nothing in the Civil Procedure Code to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative. The question, however, arises whether, in the absence of any such alternative case in the plaint it is open to the court to give him relief on that basis. The rule undoubtedly is that the court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. In such circumstances, when no injustice can possibly result to the defendant, it may not be proper to drive the plaintiff to a separate suit. As an illustration of this principle, reference may be made to the pronouncement of the Judicial Committee in *Babu Raja Mohan Manucha* v. *Babu Manzoor* (1). This appeal arose out of a suit commenced by the plaintiff appellant to enforce, a mortgage security. The plea of the defendant was that the mortgage was void. This

(7) (70) I. A. 1.

plea was given effect to by both the lower courts as well as by the Privy Council. But the Privy Council held that it was open in such circumstances to the plaintiff to repudiate the transaction altogether and claim a relief outside it in the form of restitution under section 65 of the Indian Contract Act. Although no such alternative claim was made in the plaint, the Privy Council allowed it to be advanced and gave a decree on the ground that the respondent could not be prejudiced by such a claim at all and the matter ought not to be left to a separate suit. It may be noted that this relief was allowed to the appellant even though the appeal was heard *ex parte* in the absence of the respondent.

Mr. Harish Chandra appearing for the second party defendants raised the question of interest in connection with the plaintiff's claim for a money decree. His contention is that the plaintiff could not claim any interest so long as he was in possession of the house and he could not also claim any interest after that, as his clients made a tender of the sum of Rs. 30,000 by sending a hundi for that amount to the plaintiff by registered post on July 12, 1943, which the plaintiff refused to accept. The first part of the contention is undoubtedly correct and is not disputed on behalf of the plaintiff. We feel difficulty, however, in accepting the second part of the contention raised by Mr. Harish Chandra. The receipt of this hundi was totally denied by the plaintiff both in the plaint as well as in the evidence and it is doubtful whether even if the story was true, it could constitute a valid tender in law. The defendants undoubtedly had the use of this money all this time and in our opinion the plaintiff is entitled to some interest. The learned counsel appearing for both the parties, at the close of their arguments, left this question of interest to be determined by us and we think that it would be quite fair if we allow interest on the sum of Rs. 30,000 at the rate of 4% per annum from the beginning of September, 1943. It is admitted that the plaintiff's possession of the house ceased by the end of August, 1943.

1951

Srinivas Ramkumar v. *Mahabir Prasad and Others.*

Mukherjea J.

The result is that we allow the appeal in part; the decree made by the High Court is affirmed in so far as it dismissed the claim for specific performance. The plaintiff, however, will be entitled to a money decree for the sum of Rs. 30,000 against the defendants second party with interest at 4% per annum from the 1st of September, 1943, to the date of realisation. Each party to this appeal will bear his own costs.

Appeal allowed in part.

Agent for the appellant : *R. C. Prasad.*

Agent for respondents : *Tarachand Brij Mohan Lal.*

1951

March 2

D. STEPHENS

v.

NOSIBOLLA.

[SAIYID FAZL ALI, MEHR CHAND MAHAJAN, MUKHERJEA and CHANDRASEKHARA AYYAR JJ.]

Criminal Procedure Code, 1898, *ss.* 417, 439—*Revision against order of acquittal—Interference—Guiding principles—Indian Merchant Shipping Act, XXI of* 1923, *ss.* 25, 26—*Supply of seamen—Constitution of Board by owners of ships and seamen for recruitment of seamen—Levy of one rupee from each seaman towards expenses of Board—Whether contravenes ss.* 25, 26—*Giving of muster card permitting appearance at muster—Whether amounts to "engaging or supplying" seamen.*

The revisional jurisdiction conferred on the High Court under s. 439 of the Code of Criminal Procedure is not to be lightly exercised when it is invoked by a private complainant against an order of acquittal, against which the Government has a right of appeal under s. 417. It could be exercised only in exceptional cases where the interests of public justice require interference for the correction of a manifest illegality or the prevention of a gross miscarriage of justice. This jurisdiction is not ordinarily invoked or used merely because the lower Court has taken a wrong view of the law or misappreciated the evidence on the record.

Shipowners had an organisation in Calcutta called the Calcutta Liners' Confrence and the seamen had an organisation