Privy Council Appeal No. 100 *of* 1926.

Ardeshir H. Mama - - - - - - - *Appellant*

v.

Flora Sassoon - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST MAY, 1928.

Present at the Hearing:

LORD PHILLIMORE.
LORD BLANESBURGH.
MR. AMEER ALI.

[*Delivered by* LORD BLANESBURGH.]

This suit, commenced on the 10th January, 1920, in the High Court of Judicature at Bombay was, in its inception, a simple action by a purchaser for the specific performance of a contract for the sale of certain valuable hereditaments on Malabar Hill in Bombay with claims for damages additional or alternative all in terms of Section 19 of the Specific Relief Act, 1877. The defences to the suit were that there never had been any concluded contract for the sale of the property; if there had been such a contract it had been entered into on behalf of the defendant by an agent with no authority to bind her to its terms. There is in the defendant's written statement no suggestion that the plaintiff's right was not a right to specific relief, if any existent contract binding upon the defendant was established. And the case, indeed, was one in which upon proof by the plaintiff of the facts alleged by him, he became entitled as of right under section 12 (c) of the Act to the specific relief which he sought.

But that right of the plaintiff would be dependant upon his having been himself up to the date of decree ready and willing to perform the contract on his part and in para. 9 of his plaint he alleged that he had throughout been so ready and willing:

an allegation which imports a continuous readiness and willingness up to the time of the hearing. *See* per Lord Selborne, in *Hipgrave* v. *Case*, 28 Ch., Div. 356, 361.

On the 19th March, 1924, nine months or more before the trial, the plaintiff's solicitors formally notified the defendant to the effect that the plaintiff had decided to abandon his claim for specific performance: that he would, instead, at the trial claim damages against the defendant for her breach of contract, and that he assessed these damages at Rs. 7 lacs. By that time, the plaintiff as explained to the Board by his counsel, had found it inconvenient any longer to retain in readiness for completion of the purchase the money payable under the contract, and this was the explanation of his decision to convert his claim against the defendant into one of a character which could be successfully maintained without further financial strain upon himself. Their Lordships do not doubt the correctness of this statement, but they are not convinced that the glittering prospect of very heavy damages claimable in the special circumstances of the case may not largely have influenced the plaintiff's decision.

He did not, before the trial, make any application to amend his pleadings. The view of his advisers apparently was that he could maintain his new claim for damages on his plaint as it stood. But, on objection taken at the trial that this was not possible, the plaintiff's counsel then sought, and in spite of opposition, was permitted by the learned Judge to make in his plaint an amendment presumably designed, whether effectively is another matter, to convert the suit into one for damages for breach of contract only. And it was upon that footing that the trial proceeded, and the learned Judge being ultimately of opinion that there did exist a concluded contract for sale duly authorised by, and accordingly binding upon the defendant, and that that contract had been repudiated by her, made a decree dated the 22nd January, 1925, by which he ordered the defendant to return the deposit paid by the plaintiff, and further awarded the plaintiff, according to a measure which he explained in his judgment, the sum of Rs.7 lacs as damages for the defendant's breach of contract.

The defendant appealed to the High Court in its appellate jurisdiction. The appeal was successful. That Court held that the defendant's agent had not been shown to have had authority to bind her by the contract alleged, and by decree dated the 5th of October, 1925, it discharged with the costs of appeal the order of the Trial Judge except as to the return of the deposit, leaving each party to bear his or her costs of suit in the Court of first instance.

It is from this decree that the plaintiff now appeals. In addition, however, to the ground just stated on which that decree was based, a point of great importance was broached by the Chief Justice of Bombay who presided. He posed the question whether even if the Court had agreed with the learned Trial Judge that there was in existence a binding contract for sale, his award of damages would not still have had to be set aside for the reason that

as the plaintiff had by his solicitor's letter of the 19th of March, 1924, in effect intimated that he was no longer either willing or ready to perform the contract on his part the plaintiff had not only thereby renounced, but as from that moment had disentitled himself to a decree for specific performance, and had thus brought upon himself the untoward consequence that there was under the statute in the circumstances of the case no power left in the Trial Judge to award him in the suit any damages at all.

In his argument before the Board counsel for the respondent placed this view of the matter in the forefront of his argument and it was fully dealt with by Mr. Upjohn in his reply for the appellant. In these circumstances their Lordships think, that whether or not this appeal can be disposed of without further reference to it, they ought to express their views upon so important a question of practice now that it has been raised and fully argued. In such a matter certainty is more important than anything else. A rule of practice, even if it be statutory, can when found to be inconvenient be altered by competent authority. Uncertainty in such a matter is at best an embarrassment and may at its worst be a source of injustice which, in some cases, may be beyond judicial remedy. Accordingly in this judgment, their Lordships will deal with all the matters in controversy to which they have referred, irrespective of the question whether the last of them of necessity now calls for determination at their hand.

The respondent is the widow of a Bombay merchant. She was at the time of the transaction in debate resident in England. She then owned a valuable property on Malabar Hill, Bombay, bounded on the north by Gibbs Road: on the east by Ridge Road: on the south by Nepean Road and on the west by the properties of a Mr. Dubash and His Exalted Highness the Nizam of Hyderabad. The property consisted of two residences—a large house and grounds in its north-east corner, known as "Il Palazzo": a smaller adjoining house or bungalow and grounds in its south-east corner known as "Nepean House," with vacant land to the west, in front of the curtileges of both houses, and separated from each by a wall built in a direct line across the property from Nepean Road on the south to Gibbs Road on the north. This vacant land, although separated from both residences, is apparently very conducive to amenity. It lies between the houses and the sea, and is, as the learned Trial Judge explains, in a situation which is of the coolest and most highly prized in Bombay for residential purposes.

No doubt has ever been cast upon the respondent's title to any part of the property as just described, but considerable difficulties in relation to it as a subject of sale arose by reason of the different tenures on which it is held. The greater portion is perpetually renewable leasehold, and as to this there is no trouble. But a very substantial part of the whole, including in it a considerable slice of the house "Il Palazzo" itself and a large part of its immediate compound, is held from Government upon a precarious tenure known as sanadi determinable at any time, if the land

be required for public purposes. There is along a part of the boundary, but not over its whole length, a line of physical demarcation between the leasehold and sanadi lands. But it seems to be the fact that until the actual line was ascertained by her nephew, Solomon Judah, and marked on a plan sent by him to the respondent on the 27th December, 1918, the actual boundaries were quite unknown to her.

For some time the respondent had ceased to be permanently resident in Bombay and Nepean House was all that she needed for her own use. She desired to dispose of "Il Palazzo," which had become too large for her requirements. The partition of the two properties, however, on a sale of "Il Palazzo" was apart from any difficulties of tenure by no means a simple matter, if, while preserving the amenity and convenience as a residence of Nepean House, the attractiveness of "Il Palazzo" as a subject of separate sale was to be maintained. It is quite clear that upon the question of the dividing line to be fixed between the two properties on partition, the respondent had in her own mind a very definite objective, which was that while the vacant land to the west directly in front of the curtilage of "Il Palazzo" might be sold with that house, the vacant land also to the west directly in front of the curtilage of Nepean House must be retained for enjoyment therewith.

The contract in suit does not fully respect that desire of the respondent and the main point to be determined upon the issue whether the defendant is, in any circumstances, bound by its terms, will be whether her agent is shown to have had any authority to bind her to a sale of hereditaments which include some of the last-mentioned land.

As that agent, Solomon Judah, himself at one stage of the correspondence, and, as counsel for the appellant before the Board, vouched his authority on this point by reference to a memorandum by the respondent, dated from London on the 19th of June, 1917, it is convenient here to set forth its terms so far as they are material. These are as follows :—

"32, Bruton Street,
"London, W.1.
"June 19th, 1917.

"*Re* 'Palazzo' and Vacant Land on Malabar Hill, Bombay.

"*Area.*—The area of the land on Malabar Hill on which the large building 'Palazzo' stands, and also the vacant land in front of it so far as the 'Nizam's, property' is about 30,000 (thirty thousand) square yards.

"*Tenure.*—Nearly all the land is leasehold for 99 years, renewable in perpetuity on exactly the same terms.

"*Price of Land.*—Price Rs. 20 (Rupees twenty) for the land on the Ridge Road and Little Gibbs Road, and for down below Rs. 12 (Rupees twelve) per square yard, both net prices.

"*Price of 'Palazzo.'*—My price for the house 'Palazzo,' the stables, coach house, etc., is Rs. 5,00,000 (Rupees Five lacs) net, exclusive of the land on which these buildings stand.

"The house 'Palazzo' is at present let to Government, and the agreement will expire on the 30th of September, 1918. Should the house be sold, six months' notice can be given to Government.

"To Mrs. I. E. Judah,

"Lansdown House,

"Apollo Bunder, Bombay."

Now with reference to this document there are some things which it is convenient at once to say. First of all there is no evidence at all as to the circumstances in which or the purpose for which it was sent by the respondent to Mrs. Judah. That Solomon Judah, her son, knew of its existence and was familiar with its terms is not now questioned, but whether he either did or could have relied upon it as expressing, two years and a half later, the respondent's views for any purpose whatever is, in the circumstances, a very different question to which their Lordships must return. Next, reading the document, as one in which the respondent is describing a property she desires to sell if she can, the vagueness of its terms, especially when the existence and situation of Nepean House and its surroundings are borne in mind, becomes at once apparent

"The land on which 'Il Palazzo' stands."

"The vacant land in front of it so far as the Nizam's property."

"Nearly all leasehold."

"About 30,000 square yards."

And this vagueness was the quality which, apparently throughout, struck those who read the memorandum. One nephew, who busied himself in an attempt to secure a purchaser, regarded it as too indefinite for any useful purpose. Solomon Judah's own views of it will be found stated in correspondence of his to which reference must later be made. It is, however, the one description under the respondent's hand of the property for sale to which the appellant can refer, and if it be a document then operative at all he has under that description, vague as it is, to find an authority to sell an area which extended to as much as 31,714 square yards, and which included not only vacant land "in front of" "Il Palazzo," but vacant land as well, in front in a similar sense of Nepean House.

The introduction to the business of the respondent's nephew, Solomon Judah, is nowhere explained. It seems probable that being a solicitor and knowing from his mother of his aunt's, the respondent's, desire to sell "Il Palazzo" should a satisfactory price be obtainable he, in the hope of earning a commission, but without any direct instructions or authority from the respondent, busied himself in efforts to find a purchaser.

It was in a letter to Solomon Judah that, on the 4th December, 1918, the appellant made his first offer for the property.

This was an offer of nine lacs for

"Mrs. Sassoon's property at Malabar Hill known as 'Il Palazzo' (area 30,000 square yards or thereabouts), Mrs. Sassoon to make out a marketable title. Costs of agreement and of completing sale to be borne half and half by vendor and purchaser. If this offer is accepted I shall

deposit Rs. 50,000 as earnest money immediately on receipt of intimation of acceptance by the vendor to pay brokerage at 2 per cent. on purchase money. Sale to be completed within six months of acceptance of offer."

Their Lordships draw attention here to the appellant's then stipulation as to the date of completion—an important point in relation to the alleged contract in suit as will later appear.

This offer was on the same day cabled by Solomon Judah to the respondent. Their Lordships hope that the statement as to brokerage both in Judah's cable and accompanying letter was merely a mistake. If not so, it is very significant of his attitude in the matter. The cable is so far as material as follows :—

"Firm offer 'Il Palazzo' nine lacs brokerage 2½ per cent. half costs completion six months, deposit half lacs."

In his letter of even date, Judah says :

"If this offer is accepted the buyer will pay Rs. 50,000 as earnest money and complete the sale within six months from the acceptance of the offer. Brokerage at the rate of 2½ per cent. will be payable by you and also half the costs of completing the sale.

"We are now waiting for your reply."

The respondent did not wait for that letter. Her cabled reply on the 16th December to the cable of the 5th was curt enough : "Unaccepted." This cable Solomon answered by a letter of the 27th December, which is important as showing the unfavourable influence of the sanadi land upon any proposed sale, and also his own ignorance, notwithstanding the memorandum, of the respondent's real wishes as to the property to be sold.

"Before the receipt of your cable," he says, "I got Neaman Babaji to prepare a plan of the land. From this plan it appears (assuming the plan is correct) that the southern end of the main building stands on sanad land which is resumable by Government for a public purpose. The area of sanad land included in the compound of 'Il Palazzo' is about 2,200 square yards. Assuming this to be correct the situation is wholly changed and, as a matter of fact, the buyer's agent when he saw the plan said the offer was withdrawn."

Then after dealing with the prospects of sale elsewhere the letter proceeds :—

"You will see from the above that a lot of things will have to be arranged and I will have to devote a great deal of my time before a sale of any can be effected.

"I am very much handicapped in the absence of the necessary information and I feel as if I am groping in the dark. Can you send the title deeds to Bombay? If I can get any further offer in the meantime I shall meet you.

"Must also say that if any sale is effected you will be good enough to pay me Rs. 5,000, for my troubles exclusive of professional costs as usual as I cannot get anything from the other side."

Their Lordships pause here to observe that there is nothing in the evidence to show that Solomon Judah at the date of the alleged contract in suit was any better informed as to the respondent's wishes than he expressed himself to be at the date of that letter, which on this subject is in violent contrast with the statements in his letter of the 27th of February, 1926, to which attention will be called in its order of date.

The next offer sent on by Solomon Judah was also from the appellant. It is contained in a cable of the 21st April, 1919, in the following terms :—

> " Firm offer ' Il Palazzo ' Eleven lacs Fifty thousand nett. Subject to Tenure of whole land being Permanent Leasehold and Southern Boundary being line drawn through Back Wall of Hackham Schuas Quarters from Ridge to Nepean Road. Letter enclosing sketch follows. Telegraph acceptance."

It is difficult to understand how an offer making such stipulations as to title was, with his then knowledge, even forwarded by Judah. This is one of the many matters on which no information has been vouchsafed. The respondent, however, without waiting for the letter or the plan at once rejected the offer. " Unable accept " she cabled on the 24th April. The plan which was subsequently received and returned by her to Solomon Judah becomes very important at the next stage.

This was a cable of the 11th December, which substituting the word " practicable " for the word " unpracticable " apparently, in the appendix, a misprint, reads as follows :—

> " Your letter stating your price ' Palazzo ' received." [This letter is not produced.] " Consider practicable provided willing give southern boundary as in the plan you returned, will exert on receiving your telegram making firm offer, your final price to be accepted within eight days from receipt here must pay brokerage half costs."

The southern boundary marked in the plan referred to was a boundary which crossed diagonally that which might fairly perhaps be regarded as the compound of Nepean House to the junction between the Nepean Road and the wall, already referred to as separating the curtilege of the two houses from the vacant land to the west. That southern boundary accordingly also took away from Nepean House every part of that vacant land.

To this cable, the respondent's reply of the 19th December is of first importance. It was as follows: " Southern Boundary not acceptable. Price eighteen lacs clear."

Now it seems to their Lordships reasonably plain that the meaning of that cable is that for " Il Palazzo " sold with a southern boundary that was acceptable to her the respondent would be willing to accept eighteen lacs clear—that is free of costs or brokerage—but the cable gave no authority whatever to Solomon Judah on her behalf to fix that boundary if it had not already been fixed by herself.

What view Solomon Judah took of the cable we may not know, for, as later to be stated, he did not appear in the witness box. What he did was to go to Karachi with the appellant's attorney and there, purporting to act on the respondent's behalf but without further communication with her, to enter into a transaction in the terms of a receipt dated the 20th December, 1919, which their Lordships here transcribe at length :—

> " Received from Mr. Ardeshir H. Mama of Karachi a cheque bearing No. B005564 dated 29th December 1919 on the Central Bank of India Ltd.

Bombay favouring Mrs. Flora Sassoon for payment into her account in the Chartered Bank of India Australia and China Ltd. Rs. 1,00,000 (Rupees One lac) only as earnest money towards and in part payment of Rs. 18,00,000 (Rupees Eighteen lacs) net free of all costs and brokerage, being the sum or price at which the said Mr. Ardeshir H. Mama of Karachi has accepted her firm offer made through me *vide* telegrams exchanged between me and her, viz., my telegram dated Bombay 11th December, 1919, her wire dated London 19th December 1919 received in Bombay on the 24th December 1919 (and my telegram dated Karachi 29th December 1919), for the sale of her property known as 'Il Palazzo,' and the land appurtenant thereto situated on the Ridge, Malabar Hill, Bombay, bearing Survey Nos. 1/7165 5/7165 and 6/7165 admeasuring about 31,714 square yards of Government leasehold land and about 2,000 to 3,000 square yards of sanad land being portion of Survey No. 7176 as per copy plan attached and shown therein by boundary line coloured red.

"It is agreed that a further sum of Rupees 2,00,000 (Two Lacs) will be paid in part payment within three months from this date and the balance of Rupees 15,00,000 (Rupees Fifteen lacs) within one year from date upon the completion of the conveyance of the property.

"Dated Karachi this 29th day of December 1919.

"SOLOMON JUDAH.

"29/12/19."

Now the outstanding points with regard to that receipt are these. First, the southern boundary of the lands sold, as there described, follow, except in one particular, an existing wall dividing the vacant land to the north from the vacant land to the south. In one respect even, as so described, the division goes more against Nepean House than it need have done. For a boundary wall to the south is at one point taken as the boundary instead of a second wall further to the north. The result is to cut off from Nepean House a portion of the vacant land "in front,"—land with an access to Nepean Road which would have been reserved if only the land strictly "in front" of "Il Palazzo" had been included in the sale. What however is perhaps a more general criticism upon the parcels is that they are fixed upon a basis which so far as the evidence goes had not before been suggested by anyone and it is only accidental if they chance to square with any previous suggestion or instruction. The next point to be observed is this. The receipt is careful to express the source of Solomon Judah's authority. It is, as stated, to be found in the cables already set forth of the 11th December and the 19th of December. There is no reference it will be noted to the memorandum of the 19th of June, 1917, although that memorandum was subsequently alleged to be the basis of the whole. The third point to be noted is, that just as in his offer of the 4th December, 1918, the appellant stipulates for a fixed date for completion: so in the receipt now, the stipulation being expressed as an agreement, very exceptional provisions for payment of the purchase price and as to the date of completion are inserted, and by these Solomon Judah, as he himself has agreed, had no authority to bind the respondent.

Proceeding now with the narrative, Solomon Judah on the same day cabled the respondent as follows :—

> " Your telegram received 24th. Your terms and price Eighteen Lacs accepted to-day by Ardeshin Mama of Karachi. Earnest money one Lac received. Paying Chartered Bank. Letter follows."

The respondent on the 6th January replied :—

> " Your wire of the 29th December 1919 came to hand. . . . I am very much obliged for all your trouble and as soon as I receive your letter I will communicate with you further on this subject."

Solomon Judah's promised letter was sent on the 31st December and it contains the following passage :—

> " Enclosed is a copy of the receipt passed by me for the earnest money and of the plan. Mr. Mama proposes to pay a further sum of Rupees, two lacs, within three months and the full balance within twelve months. Informed him that I had no authority or instruction on this point and that six months would be a reasonable period for completion. He however asks you to agree to the period of 12 months as the amount is very large and no one can be expected to keep such a large amount free. The boundary of the land sold with ' Il Palazzo ' has been shown by a red line . . . . total 31,714 square yards, the area of the sanad land is taken roughly at between two and three thousand square yards. . . .
>
> " I have to congratulate you on the completion of this sale and I assure you that you have received a very good price, the extra piece of land on the southern boundary was a great stumbling block and as far as Bombay buyers were concerned they absolutely declined to go in for the property at all without the extra land on the south side. Mr. Mama also wanted the extra land, but as you have definitely refused to give the same he has accepted your terms."

To this letter the respondent's reply was by cable on the 26th January as follows :—

> " Yours Thirty-first December. Boundary incorrect. Payment arrangements unacceptable."

On the 1st February Solomon Judah replied :—

> " Send corrected plan. Payment no difficulty."

to which on the 5th February the defendant sent her final personal letter:—

> " Your telegram of 1st inst. . . . reached me this afternoon and needs no answer as you will hear everything from Messrs. Neadhia Shandy & Company."

There is only one further letter to which their Lordships in this connection need refer.

On the 27th February, 1920, Solomon Judah anxious to induce the respondent to homologate his contract wrote :—

> " I also enclose copy of your memorandum dated 25th June, 1917, which you sent us giving particulars of the property you desired to sell. I showed this memorandum to Mr. Mama at Karachi and he accepted your terms as mentioned in that memorandum. On the basis of that memorandum I drew the red boundary line on the plan I sent you."

Now these are the materials by which the Courts have been asked to determine whether there ever existed a contract binding upon the respondent.

The events which immediately followed the respondent's cable of the 19th December, 1919, were that she received from Mr. Dubash, whose name has already been mentioned, an offer to purchase "Il Palazzo" for Rs. 25 lacs, and on the advice of her solicitors whose view after all the facts were known to them was that the alleged contract with the appellant was not binding upon her, the respondent entered into a contract to sell the property to Mr. Dubash at that high price, the purchase to be completed if the appellant either abandoned or failed to enforce his contract. It is fair to the respondent to say that she hesitated to risk this definite step, and thus put herself in the position of having to escape from the contract alleged by the appellant, if she could. However, on advice, she took it, and her attitude at once alienated Solomon Judah, who at the outset became solicitor for the appellant to enforce his contract, but ended apparently by being estranged from both parties.

One further result was that no effective evidence was called on either side. The appellant did not go into the box. It would have been useful to hear from him whether he at Karachi either heard of or saw the memorandum of June, 1917, which is not mentioned in the receipt. He might also have explained how that memorandum so useless at an earlier stage even to Solomon Judah had then become so clear to them both. Nor did the respondent give evidence although every relevant fact was within her knowledge. And neither side ventured to call Solomon Judah. In the result, both appellant and respondent united in leaving the Court to determine their dispute on the barest economy of material, each of them for interested reasons withholding useful information which they were well in a position to supply. If the final decision bears hardly on the unsuccessful party, the blame does not rest with the Courts.

On the materials provided and on them alone their Lordships must now determine this question of authority. They begin by observing that the burden of proving that the contract sued on is binding upon the respondent rests with the appellant. And the Board, in agreement with the Appellate Court, are of opinion that that burden has not been discharged. The appellant has not proved that the terms of the alleged contract so far as parcels are concerned were ever authorised by the respondent. No such authority is or can be found in the telegrams mentioned in the receipt. In view of all that had happened since the memorandum of the 19th of June, 1917, was written, and in view of Solomon Judah's statement in his letter of the 27th December, 1918, that in the absence of necessary information he was groping in the dark, in view of the intimation thereby implied that the memorandum was of little use to him and in view further of the absence of any reference to it in the receipt their Lordships cannot accept as otherwise than a desperate attempt on Solomon

Judah's part to find authority for what he had done, the statement as to this memorandum made in his letter of the 27th February, 1920, already quoted. In the absence of evidence in support of it their Lordships must treat that statement as extravagant and quite unreliable. But, further, even if authority can properly be looked for in the memorandum of 1917, their Lordships are of opinion that there is contained in it no description of the property which could justify the southern boundary as fixed by the receipt of the 29th December, 1919.

The real conclusion, however, to which their Lordships are led by a careful consideration of the documents placed before them is that Solomon Judah in signing that receipt on behalf of the respondent never stopped to consider whether he had authority to bind her by the parcels on which the appellant insisted. Judah obtained from the appellant the price which the respondent required: he arranged with him a boundary line not inconvenient and he was content to run the risk, which probably he did not regard as serious, of the respondent with her other conditions satisfied seriously objecting to the parcels. But the respondent being entitled, if it was to her interest, to reject the boundary arranged, she chose to reject it. The result is, that the so-called agreement of the 29th December, 1919, is not binding upon her.

But there is in their Lordships' judgment perhaps even a more certain road by which the same conclusion may be reached.

The appellant does not seek to controvert Solomon Judah's statement in his letter of the 17th March, 1920, to the effect that the paragraph of the receipt as to payment of the price and completion was therein inserted by him without authority. In point of law therefore, for their Lordships cannot read its last paragraph as other than an integral part of the document, the receipt taken as a whole was never more than a counter offer by the appellant, which not having been accepted by the respondent did not mature into a contract. The receipt was merely a step in a negotiation never concluded. On this ground also, their Lordships reach the same conclusion as the Appellate Tribunal.

And but for the special circumstances set forth at the commencement of this judgment, their Lordships would be content to leave the case there.

But they go on for the reasons already given to consider the very important question of practice discussed by the learned Chief Justice in his judgment.

If there had been a contract binding upon the respondent would it have been permissible in the circumstances to restore the learned Judge's award of damages against her?

The answer to this question depends upon the true construction and effect of the Specific Relief Act, 1877, and, in particular, of its Part II, Ch. 2, which deals with the Specific Performance of Contracts. The Act, like the Indian Contract Act, 1872, is a code. The chapter in question is a codification, with modifications

deemed to be called for by Indian conditions and procedure of the then existing Rules and Practice of the English Law in relation to the doctrine of specific performance. In the present case, it will aid the interpretation of the relevant sections to have in mind what the English system on which the Act is based was in its origin and in its fullness at the date of codification. Even a summary account of that system—necessarily incomplete and quite elementary, will serve, as their Lordships believe, to throw a light upon certain provisions of the Specific Relief Act, from lack of which a full appreciation of their meaning has not consistently been manifested.

According to the common law of England, the only legal right which arose upon the non-performance of a contract in favour of the party injured by its breach was a claim for damages. The inadequacy in many cases of that remedy for the purposes of justice supplied the incentive to a Court of Conscience, as the Chancellor's Court has been called, to decree, when applied to in particular cases, the more complete remedy of specific performance. As a result of a long course of decisions by Chancellors and other equity Judges, there was gradually evolved in England a body of settled principles and rules governing the exercise of that jurisdiction, so that in course of time its limits were settled almost as definitely as if they had been embodied in a statute. By 1877, and in most respects long before, this stage had been reached. It need hardly be recalled that amongst the contracts to which an order for specific performance was always regarded as peculiarly appropriate were contracts relating to land or an interest therein, such, for instance, as the contract alleged in the present case. It is, however, interesting to note that this appropriateness is reaffirmed in s. 12 of the Indian Act, so closely does it follow the parent system.

All this is, historically, the explanation of the fact, that in relation to a contract to which the equitable form of relief was applicable, a party thereto had two remedies open to him in the event of the other party refusing or omitting to perform his part of the bargain. He might either institute a Suit in equity for specific performance, or he might bring an action at law for the breach. But—and this is the basic fact to be remembered throughout the present discussion—his attitude towards the contract and towards the defendant differed fundamentally according to his choice.

Where the injured party sued at law for a breach, going, as in the present case, to the root of the contract, he thereby elected to treat the contract as at an end and himself as discharged from its obligations. No further performance by him was either contemplated or had to be tendered.

In a suit for specific performance on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that Suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness,

from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his Suit. Thus it was that the commencement of an action for damages being, on the principle of such cases as *Clough* v. *L. & N.W.R.*, L.R. 7 Exch. 26, and *Law* v. *Law*, 1904, 1 Ch. 140, a definite election to treat the contract as at an end, no Suit for specific performance, whatever happened to the action, could thereafter be maintained by the aggrieved plaintiff. He had by his election, precluded himself even from making the averment just referred to proof of which was essential to the success of his Suit. The effect upon an action for damages for breach of a previous Suit for specific performance, will be apparent after the question of the competence of the Court itself to award damages in such a Suit has been touched upon.

Whether or not the Court of Chancery ever assumed jurisdiction in the matter it was not in accordance with its practice to award damages for breach of contract. That was, as Lord Eldon said, " purely at law." But experience showed that cases from time to time occurred in which, although the contract was one of which specific performance might, quite consistently with principle be decreed, damages were the more adequate remedy, and it became obviously expedient that in such a case the Court should not be compelled to send the plaintiff to law, but should be permitted itself to dispose of the case.

Accordingly, in 1858, Lord Cairns' Act was passed. It is convenient to cite its second section, for it is important to note the correspondence of the words of that section as judicially interpreted with the provisions of Section 19 of the Specific Relief Act upon which so much now turns. The words, so far as here relevant, are these :

> " In all cases in which the Court of Chancery has jurisdiction to entertain an application for . . . the specific performance of any covenant, contract or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such . . . . specific performance, and such damages may be assessed as the Court shall direct."

The limited effect of the section was not long left in doubt, wide as are apparently its terms. In a series of decisions it was consistently held that just as its power to give damages *additional* was to be exercised in a Suit in which the Court *had* granted specific performance, so the power to give damages as an *alternative* to specific performance did not extend to a case in which the plaintiff had debarred himself from claiming that form of relief, nor to a case in which that relief had become impossible. In the present instance, their Lordships are disposing of a case in which the plaintiff had debarred himself from asking at the hearing for specific performance, and in such circumstances, notwithstanding Lord Cairns' Act, the result still was that with no award of damages—the Court could award none—the order would be one dismissing the Suit with no reservation of any liberty to proceed at law for damages. See per Lord Selborne, *Hipgrave* v. *Case* 28 Ch.

Div. 356, 362. In other words, the plaintiff's rights in respect of the contract were at an end.

From all of which it appears that in England in a Suit like the present, after the appellant had written his letter of the 19th March, 1924, if that letter is to be interpreted as their Lordships think it should be, he could neither have obtained a decree in the Suit nor damages anywhere else.

The change in this matter effected in England by the Judicature Act was one in procedure only. It enabled every Division of the High Court to give both legal and equitable remedies, but it did not alter the construction or effect of a claim framed under Lord Cairns' Act—see *Hipgrave* v. *Case*, *ibid.* at p. 36, nor the principles upon which the systems now combined were before the Act, separately administered. Accordingly, an order dismissing an action for specific performance which before the Act would have been unqualified, remained after the Act a decree which excluded the possibility of legal relief. And here their Lordships would draw attention for convenience sake, to the definiteness with which that position is retained for India by Section 29 of the Specific Relief Act.

Bearing in mind this statement of the existing operation of the English system at the time of the passing of the Specific Relief Act, their Lordships now proceed to an examination of the relevant provisions of that Statute.

And, first, very notable is the fact that in the Act, the distinction between the two kinds of action is maintained, a distinction obvious in England where originally they had to be brought in different Courts, but not so necessarily called for, when, as in India, both legal and equitable relief may be obtained in one. The distinction however, is clearly indicated in Section 24 (*c*), which enacts that specific performance of a contract cannot be enforced in favour of a person " who has already chosen his remedy and obtained satisfaction for the alleged breach of contract " : and even more directly is it manifested in Section 29 already referred to which enacts that the dismissal of a Suit for specific performance of a contract . . . . " shall bar the plaintiff's right to sue for compensation for the breach of such contract".

Although so far as the Act is concerned, there is no express statement that the averment of readiness and willingness is in an Indian Suit for specific performance as necessary as it always was in England (Section 24 (*b*)) is the nearest), it seems invariably to have been recognised, and, on principle, their Lordships think rightly, that the Indian and the English requirements in this matter are the same. See *e.g.*, *Karsandas* v. *Chhotalal*, 25 Bomb. L.R., 1037, 1050. And, with this fact in view, Section 19 of the Act becomes in the present investigation all important. The section is as follows :

> " Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to or in substitution for such performance.

If in any such Suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly. If in any such Suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

Compensation awarded under this section may be assessed in such manner as the Court may direct.

EXPLANATION.—The circumstances that the contract has become incapable of specific performance does not preclude the Court from exercising the jurisdiction conferred by this section."

Now the close correspondence of the terms of this section with those of Section 2 of Lord Cairns' Act, coupled with the presence in the Act of Section 24 (*c*) and Section 29 already noted, indicating that the old distinction in case of breach of contract between the equitable and the legal form of remedy is still maintained and that the old conditions under which each could be asked for are being preserved, lead their Lordships to the conclusion that, except as to the case provided for in the explanation—as to which there is introduced an express divergence from Lord Cairns' Act, as expounded in England—see *Ferguson* v. *Wilson*, 2 *Ch.* 77—the section embodies the same principle as Lord Cairns' Act, and does not any more than did the English Statute enable the Court in a specific performance Suit to award " compensation for its breach " where at the hearing the plaintiff has bebarred himself by his own action from asking for a specific decree.

And on looking at the plaint in this Suit, their Lordships can have no doubt, any more than the English Court of Appeal had with reference to the Statement of Claim in *Hipgrave* v. *Case*, that it is framed with reference to the 19th Section, and that the alternative claim for damages thereby made is in the plaint conditioned just as it is conditioned in the section. It follows that in their Lordships' judgment there was after the letter of 19th March, 1924, no power left in the Trial Judge, without an apt and sufficient amendment of the plaint to award the plaintiff at the hearing any relief at all. And they are further of opinion, that the amendment in the plaint, as actually then made, did not, on its true construction, make any difference in this respect. For that amendment properly construed, did not, as it should have done to be effective, operate to convert the Suit into one for the recovery of damages for breach of contract. The retention of paragraph 9 of the original plaint, with its allegation that the plaintiff " is as he has been throughout ready and willing to perform his said contract," coupled with the retention also of the claim for specific performance seems to their Lordships to involve that conclusion. Accordingly, even on the claim, as actually amended, there was, in their view, no power left in the Trial Judge to award damages.

But their Lordships recognise that it was the intention of the appellant, by the amendment which he asked for, to convert his Suit into one for damages *simpliciter*. They recognise also, that it was the intention of the learned Trial Judge that the amendment he allowed should actually have that result. Their Lordships therefore, proceed to inquire whether the learned Judge had at the stage in the Suit, when he allowed the amendment, any power to make such an order.

Upon this, their Lordships are of opinion that he had the power. Whether it was one to be exercised in the circumstances is another matter. But that the learned Judge had the power is deducible from this consideration. Section 29 of the Statute as already shown, makes the dismissal of a Suit for specific performance of a contract a bar to a right to sue for compensation for breach. That enactment implies that prior to such dismissal the right is not barred. Here when the amendment was allowed, the Suit had not been dismissed, and in their Lordships' view there was thus power in the Judge to allow to be made by amendment of the pending Suit, a claim that might have been brought forward in a new Suit then commenced.

But their Lordships are of opinion that the intended amendment in the present case—whether rightly allowed or not—was allowed without any proper appreciation of its serious effect upon the position of the parties to the Suit. For four years that Suit had been pending as a specific performance action : the rights in these circumstances given to the plaintiff by Section 27 (*b*) of the Statute, had made it impossible for the defendant by unconditional sale to deal with the property in suit. In other words, the plaintiff had, in effect, for four years and without any undertaking in damages on his part, held an effective injunction against the defendant's dealing with that property in derogation of his claim thereto as purchaser. An amendment which deprived the Court of the power to compel him to accept a decree, on pain of having his action dismissed if he did not, was not one lightly to be granted.

In other words, that the Court should have the power of granting such an amendment in a proper case is salutory and indeed necessary. The possibility that the power will be exercised may, in certain cases, be the only effective check upon a defendant to a specific performance Suit, who by delay, expensive appeals and other devices, sets himself to starve a relatively impecunious plaintiff into submission by making continued performance of the contract on his part, beyond his power. And such a power is possessed by the Court in England, and in a proper case and under suitable conditions it may be used, see *Nicholson* v. *Brown*, 1897 W.N. 52. But it is one to be most carefully and jealously exercised in all the circumstances of each individual case and with due regard to its effect upon the position both of the plaintiff and the defendant. If the defendant is to be prevented by the possible exercise of the power from starving a plaintiff

out of his rights, the plaintiff must not by its ill-considered exercise, be permitted to turn his Suit into a gamble for himself at the defendant's expense. Indeed, so serious in many cases is the exercise of this power that to their Lordships it would appear to be a wise precaution for a Judge before allowing any such amendment in a contested case to require the plaint to be actually remodelled in a form appropriate to an action seeking compensation for breach of contract and nothing else. The extent and propriety of what is asked for will thus be made apparent, and the amendment will be allowed or refused with a due appreciation of the position.

Their Lordships have said enough to show how difficult would have been the task had it been necessary for them in the present case to pronounce definitely whether or not the award of the learned Trial Judge as to damages could stand either in whole or in part. Further serious questions as to the measure of damage chosen by him—to which they have not alluded—would have also been involved.

It is however, unnecessary for them to go further than they have done in the discussion of the question for the reason that they have discussed it on principle and the propriety of the order of the learned Judge no longer effectively arises by reason of the conclusion reached by their Lordships on the other part of the case.

Returning accordingly to the opinion expressed by them as to the non-existence of any contract between the parties, their Lordships, for the reasons given in support of that opinion, will humbly advise His Majesty that this appeal should be dismissed and with costs.

In the Privy Council.

ARDESHIR H. MAMA

v.

FLORA SASSOON.

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