
**1928 SCC OnLine PC 43 : (1927-28) 55 IA 360 : (1928) 30 Bom LR 1242 :
(1928) 55 Mad LJ 523 (PC) : ILR (1928) 52 Bom 597 : (1928) 28 LW 257 : AIR
1928 PC 208 : (1927-28) 32 CWN 953 : 1928 MWL 893**

Reported in Indian Appeals

Indian Appeals being Cases in the Privy Council in Appeal from The East Indies

JUDICIAL COMMITTEE:— LORD PHILLIMORE, LORD BLANESBURGH, AND MR. AMEER ALI.

ARDESHIR MAMA (PLAINTIFF) ... Appellant;

and

FLORA SASSOON (DEFENDANT) ... Respondent

On Appeal from the High Court at Bombay.

Decided on May 21, 1928

Specific Performance—Plaint claiming additional or alternative Damages—Abandonment of Claim to Specific Performance—Claim for Damages for Breach of Contract—Amendment of Plaintiff—Jurisdiction—Specific Relief Act (I. of 1877), s. 19.

If a plaintiff, who by his plaint has claimed, pursuant to s. 19 of the Specific Relief Act, 1877, specific performance of a contract and compensation in addition, or in substitution, subsequently gives notice abandoning his claim for compensation, he cannot recover damages for breach of the contract without amending his plaint, since relief under s. 19 can be decreed only where the plaintiff is ready and willing to perform the contract, and it is therefore still subsisting.

The Court, even at the trial, has power to allow the necessary amendment, but that power should be exercised most carefully and jealously, and with due regard to the position of both the plaintiff and the defendant. An amendment should not be allowed when the suit has been pending as one for specific performance for a long period, during which the defendant has been prevented by s. 27 (b) from dealing with the property. An amendment which leaves standing an averment that the plaintiff is ready and willing to perform the contract, and the claim to specific performance, does not make the plaint appropriate to a suit for damages for its breach.

Hipgrave v. Case (1885) 28 Ch. D. 356 applied.

Decree of the Appellate Court affirmed.

APPEAL (No. 100 of 1926) from a decree of the High Court in its appellate jurisdiction (October 5, 1925) reversing a decree of the Court in its original jurisdiction.

The suit was instituted by the appellant in the High Court on January 10, 1921, against the respondent. By his plaint



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the appellant alleged a contract made on December 29, 1919, by one Judah on behalf of the respondent for the sale to him of a residential property in Bombay together with grounds according to a plan for eighteen lakhs of rupees, of which one lakh had been paid as earnest money. He asserted by his plaint that he was always ready and willing to perform the contract, and claimed specific performance, also such damages as the Court should think fit in addition to, or in substitution for, specific performance.

The respondent by her written statement denied the authority of Judah to make the alleged contract on her behalf.

The respondent's solicitors in Bombay in July, 1920, repudiated the existence of a

contract and sent to the appellant a cheque for the earnest money, but he returned the cheque to them. In August, 1920, the property, with a slight variation of the boundary, was sold by the respondent to another purchaser for twenty-five lakhs, subject to the appellant abandoning or failing to enforce the contract sued on.

On March 19, 1924, the appellant by his solicitors gave notice that he would not claim specific performance but would claim damages, which he assessed at seven lakhs.

Issues were framed in January, 1925, of which those material on the present appeal were (1.) whether there was a concluded agreement as alleged, and (2.) whether the appellant was entitled to any, and if so what, damages.

At the trial objection was taken that the plaintiff could not recover damages without an amendment of the plaint. By leave the plaint was amended by a claim in the alternative for the return of the lakh of rupees with interest and seven lakhs as damages.

No oral evidence was called at the trial.

The trial judge (Mirza J.) held that there was a contract between the parties and assessed the damages at seven lakhs. He made a decree for that amount and for the one lakh earnest money with interest.

An appeal was heard by Macleod C.J. and Coyajee J, and was allowed save as to the earnest money. The learned



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Chief Justice held on the documents that Judah had not authority to make the contract alleged, and held further that even if there was a contract the Court could not, upon the true construction of s. 19 of the Specific Relief Act, 1877, award damages seeing that the appellant had abandoned his claim to specific performance.

Coyajee J. differed as to the true construction of s. 19.

1928. Feb. 13, 14, 16. *Upjohn K.C.* and *Beebee* for the appellant. The documents established that Judah had authority to make the contract sued on. The plaint claimed specific performance, and in the alternative damages for breach of contract. The appellant by his notice of March 19, 1924, abandoned his claim to specific performance; he was entitled so to do under Order XXIII., r. 1 (1.). Although the claim to specific performance treated the contract as subsisting, the plaintiff could claim damages instead. That was definitely held in *Karsandas v. Chhotalal*.¹ Sect. 29 of the Specific Relief Act authorizes an alternative claim for compensation for breach of contract. That compensation is to be assessed just as under s. 73 of the Indian Contract Act, 1872, which also uses the word "compensation." Damages can be given even if not asked for; therefore no amendment of the plaint was needed: *Callianji Harjiwan v. Narsi Tricum*.² The measure of damages was the difference between the value at the date of the breach and the contract price: *Ranchod v. Manmohandas*³; *Nabinchandra Saha Paramanick v. Krishna Barana Dasi*⁴; *Adikesavan Naidu v. Gurunatha Chetti*⁵; *Jamal v. Moolla Dawood Sons & Co.*⁶ The price at which the defendant contracted to sell to Dubash was clear evidence of the market value: *Godwin v. Francis*⁷; *Wilson v. Northampton, etc., Ry. Co.*⁸ Procedure under the Specific Relief Act differs from that in a suit for specific performance in England: Therefore, *Hipgrave v. Case*⁹ relied on



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by the Appellate Court, does not apply. [Reference was made also to *Engel v. Fitch*¹⁰ and *Tamplin v. James*.¹¹]

Maugham K.C., Sir George Lowndes K.C. and E.B. Raikes for the respondent. By suing for specific performance the plaintiff elected to treat the contract as subsisting and one which he was willing to perform. Upon the true construction of the Specific Relief Act he had no option to claim damages or compensation in lieu of specific performance. Under s. 19 it is only the Court which has the option to award compensation in substitution for specific performance. By ss. 24 and 29 a suit for specific performance and a suit for damages are treated as being distinct. After his notice of March, 1924, the plaintiff was entitled to no relief under his plaint. The plaintiff had declined to accept the repudiation, and could not obtain damages: *Fraser & Co. v. Bombay Ice Co.*¹² Order XXIII., r. 1 (1.), does not apply, because a claim for damages was not open to the plaintiff on his plaint. It would be unjust if a plaintiff had the option to obtain either the property itself or damages, whichever at the trial was the more advantageous to him. Also it is apparent that s. 19 was intended to make the provisions of Lord Cairns' Act apply in India, subject to one exception not material to this case. *Hipgrave v. Case*¹³ is therefore directly in point. No amendment of the plaint should have been allowed. To make the suit into one for damages for breach of contract was completely to change its nature, and that is not permissible: *Ramsaran Mandar v. Mahabir Sahu*.¹⁴ Secondly, because under s. 27 (c) the defendant for four years had been prevented by the suit from dealing with the property, and she was entitled to have it dismissed with costs. The amendment made was wholly inadequate to make the plaint one apt to a suit for damages for breach of contract. Further, damages, if claimable, had to be assessed as at the date when the plaintiff first accepted the repudiation, but that was not until March, 1924, and there was no



evidence whatever as to the value of the property at that date.

But in any event the suit fails, because the evidence did not establish that Judah had authority to sell with the parcels mentioned in the document relied on. Further, he admitted that he had no authority to introduce the term that payment of fifteen lakhs should be deferred until a year after completion. That was a vital term, and the want of authority as to it vitiated the whole contract.

Upjohn K. C. in reply. The term deferring payment was one in favour of the plaintiff, he could therefore waive it: *Hawksley v. Outram*.¹⁵ He did so in that he said he was willing to pay at once. It was open to the plaintiff in March, 1924, to accept the repudiation previously made.

May 21. The judgment of their Lordships was delivered by

LORD BLANESBURGH. This suit, commenced on January 10, 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 s. 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 s. 12 (c) of the Act to the specific relief which he sought.

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



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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*.¹⁶

On March 19, 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 lakhs. 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 authorized by, and accordingly binding upon the defendant, and that that contract had been repudiated by her, made a decree dated January 22, 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



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judgment, the sum of Rs.7 lakhs 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 October 5, 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 March 19, 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 disintitiled 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



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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 in 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 curtilages 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



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that until the actual line was ascertained by her nephew, Solomon Judah, and marked on a plan sent by him to the respondent on December 27, 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.

[The judgment set out and considered a memorandum, dated June 19, 1917, sent by the respondent to her sister, the mother of Solomon Judah, and letters and cables passing between the respondent and Solomon Judah both before and after December 29, 1919 (the date of the receipt given by Solomon Judah to the appellant), which was relied on as containing the terms of the contract; the judgment proceeded as follows:]

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 December 19, 1919, were that she received from Mr. Dubash, whose name has already been mentioned, an offer to purchase "Il Palazzo" for Rs. 25 lakhs, 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



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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 authorized 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 June 19, 1917, was written, and in view of Solomon Judah's statement in his letter of December 27, 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 February 27, 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 December 29, 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 to accept 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 December 29, 1919, is not binding upon her.



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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 March 17, 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 Appellate tribunal.

But for the special circumstances set forth at the commencement of this judgment, their Lordships would be content to leave the case there. They go on, however, 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., c. 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 Specific Relief 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



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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. London and North Western Ry. Co.*¹⁷ and *Law v. Law*¹⁸, 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 s. 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



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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*.¹⁹ 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 March 19, 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*²⁰, nor the principles upon which the systems now combined were before the Act separately administered.



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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 s. 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 Act.

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 s. 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 s. 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 (s. 24 (b) is the nearest), it seems invariably to have been recognized, 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*.²¹ And, with this fact in view, s. 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



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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 circumstance 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 s. 2 of Lord Cairns' Act, coupled with the presence in the Act of s. 24 (c) and s. 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*²²—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 debarred himself by his own action from asking for a specific decree.

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 s. 19, 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 March 19, 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 recognize 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 recognize 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. Sect. 29 of the Act, 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,



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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 s. 27 (b) of the Act 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 salutary 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*.²³ 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



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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 the 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.

Solicitors for appellant: *Ranken Ford & Chester*.

Solicitors for respondent: *Sanderson, Lee & Co*.

¹ (1923) I.L.R. 25 B. 1037.

² (1895) I.L.R. 19 B. 764.

³ (1907) I.L.R. 32 B. 165.

⁴ (1911) I.L.R. 38 C. 458.

⁵ (1916) I.L.R. 40 M. 338.

⁶ (1915) L.R. 43 I.A. 6.

⁷ (1870) L.R. 5 C.P. 295.

⁸ (1874) L.R. 9 Ch. 279.

⁹ (1885) 28 Ch. D. 356.

¹⁰ (1868) L.R. 3 Q.B. 181.

¹¹ (1880) 15 Ch. D. 215, 223.

¹² (1904) I.L.R. 29 B. 107, 125, 126.

¹³ (1885) 28 Ch. D. 356.

¹⁴ (1926) 54 I.A. 55.

¹⁵ [1892] 3 Ch. 359.

¹⁶ 28 Ch.D. 356, 361.

¹⁷ (1871) L.R. 7 Ex. 26.

¹⁸ [1904] 1 Ch. 140.

¹⁹ 28 Ch. D. 356, 362.

²⁰ 28 Ch. D. 356, 361.

²¹ 25 Bom. L.R. 1037, 1050.

²² (1866) L.R. 2 Ch. 77.

²³ [1897] W.N. 52.

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