Mrs. Flora Sassoon vs Ardeshir H. Mama on 5 October, 1925
Equivalent citations: (1926) 28 BOMLR 126
Author: K Norman Macleod
Bench: N Macleod, Kt., Coyajee

JUDGMENT Norman Macleod, Kt., C.J.

1. [His lordship first examined in detail the facts in the case and reached the conclusion that there was no concluded contract between the parties. The judgment then proceeded:] But even if we thought there was a concluded contract, we do not think the learned Judge has correctly interpreted the law regarding damages claimed in the alternative in a suit for specific performance of an agreement for the sale of immoveable property. And as the case may go to a higher tribunal I should like to express my views on the proper construction of Section 19 of the Specific Relief Act, which rune 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 circumstance that the contract has become incapable of specific performance does not preclude the Court from exercising the jurisdiction conferred by this section.

2. It is important to note that the word "compensation" is used and not "damages," and although a person suing for specific performance may ask for compensation in substitution for specific performance, this prayer is subsidiary to the claim for specific performance and not strictly speaking alternative. In my opinion the

second paragraph of the section shows that it is for the Court to decide whether specific performance should be granted, and, if not, what compensation should be awarded. The measure of compensation is entirely in the discretion of the Court and I think the word 'compensation' was used by intent to emphasize the fact that the Court in awarding compensation was not bound to follow the ordinary Rules with regard to damages for breach of contract. I do not think it was the intention of the legislature in framing Section19 of the Specific Relief Act to depart from the law as then existing in England after the passing of the Judicature Act, 1873, as set out by Fry on Specific Performance, 6th edition, page 604, para. 1306 :-

The Court therefore can now give damages in any of the following cases, viz :-

(i) In substitution for specific performance where there is a case for specific performance,-under Lord Cairns' Act.

(ii) Where there is no case for specific performance,-under the Judicature Acts.

(iii) In addition to specific performance in whole or in part,-under Lord Cairps', Act, and probably under the Judicature Acts.

Accordingly, a plaintiff may now come to the Court and say, Give me specific performance, and with it give me damages, or in substitution for it give me damages, or if I am not entitled to specific performance give me damages as at Common Law by reason of the breach of the agreement.

3. And para. 1307 :-

The Court's jurisdiction in damages is an apt and flexible instrument for doing exact justice under the diverse and complicated circumstances of many of the oases upon which the Court has from time to time to adjudicate.

4. No reference is made by the learned author to the possibility of a plaintiff, suing for specific performance or in the alternative for damages, deliberately at or before the hearing refusing to continue his prayer for specific performance. The words I have underlined seem to limit the claims for damages to those cases in which the Court thinks that specific performance should not be granted.

5. In para 1302 it is apprehended that where damages are awarded under Lord Cairns' Act in substitution for specific performance, the measure of damages would be the same as in an action at Common Law for breach of the contract, but under the Act the discretion was given to the Court to award damages if it should think

fit, and ordinarily speaking I do not think the Court of Chancery would have awarded damages to the plaintiff who deliberately refused the specific performance which the Court was prepared to decree in his favour.

6. The plaintiff appears to have abandoned his claim for specific performance on March 24, 1924, and the defendant argued therefrom that that date was the date for calculating the value of the property in order to fix the compensation to be awarded by the plaintiff, but the Judge held that under Section38 of the Indian Contract Act the plaintiff had not lost his right to claim compensation calculated on the date when the defendant broke her contract.

7. The illustrations to Section19 of the Specific Relief Act, referred to by the Judge, relate to the explanation to the section, which deals with cases in which the contract has become incapable of specific performance, and, therefore, compensation is the only remedy open to the aggrieved parties. In this respect a departure is made from the English law : see Ferguson v. Wilson (1866) L.R. 2 Ch. 77 and Lavery v. Pursell (1888) 39 Ch.D. 508. None of the illustrations refer to a case where a plaintiff deliberately abandons his claim to specific performance before the hearing. I think the defendant's contention was that in awarding compensation the Court should look at the question from an equitable point of view and that up to March 1924 the plaintiff was asking for specific performance, which would have been decreed him together with any compensation for any loss the Court might have thought he had suffered, owing to defendant's refusal to complete, The defendant could not dispose of the property in the meantime. If then the plaintiff gave up the claim to specific performance because it did not suit him to take a conveyance of the property he had originally consented to buy, what had he lost owing to defendant's refusal to sell. We have been referred to the case of Karsandas v. Chhotalal , where it was not until the hearing that the plaintiff elected to give up his prayer for specific performance and restrict his claim to one for compensation. The lower Court decreed repayment of the deposit and the costs of investigating the title, In appeal it was argued that the plaintiff kept the contract alive for his own purpose and therefore kept it alive for his opponent, so that if the plaintiff abandoned his claim to specific performance he was liable to have his deposit forfeited and his suit dismissed. But Fawcett J. in the Appeal Court held that the contention was incorrect on the following grounds :-

(1) Because it was within the discretion of the Court to grant a decree for specific performance.

(2) In exercising its discretion the Court could take into account the abandonment by plaintiff of part of his claim as he was entitled to do under Order XXIII, Rule 1, of the Civil Procedure Code;

(3) The Court could consider that the proper remedy of the plaintiff was a decree for specific performance and if he refused to take such a decree he was liable to have his suit dismissed, but the Court would not adopt that course with the plaintiff before them as the defendant's failure to perform before suit and his desire to perform during suit were due entirely to fluctuations in the property market.

(4) The lower Court had in those circumstances exercised its discretion in not granting the plaintiff a decree for specific performance and the Appeal Court would not interfere.

(5) Hipgrave v. Case (1885) 28 Ch.D. 356, relied upon by the defendant, has no application, as in that case the plaintiff vendor had disentitled himself to a decree for specific performance by selling the property after action to a third person and was therefore held not entitled to a decree for damages.

(6) When the plaintiff was entitled to alternative reliefs, he could choose at the hearing which he would ask for, (7) Defendant's ability to give a good title arose after Suit.

(8) With regard to the return of the deposit the plaintiff's right arose from the breach of contract.

(9) The contention made that the defendant was precluded from selling the property until the plaintiff made his election would have been of considerable force if his conduct had been free from blame.

8. As the defendant before us has her contract with Dubash she cannot urge ground (9) in mitigation of damages. It would appear from ground (3) that in spite of plaintiff's election to restrict his claim, Fawcett J. considered that the Court might still in the exercise of its discretion compel him to take a decree for specific performance, or risk having his suit dismissed with costs. With all due respect that would appear to be in conflict with ground (6) that the plaintiff as dominus litis was entitled to choose which of two alternative reliefs claimed he would ask the Court to give him.

9. It may well have been, in the special circumstances of that case, that the Court decreed a return of the deposit made by plaintiff, who apparently did not persist in

his claim for special damages. At any rate, the question of awarding special damages was not considered by the Court. Mr. Justice Mirza, after considering this case, appears to have held that plaintiff had an option and exercised it wisely by claiming damages only. But if the plaintiff has an option then there is no question of the Court having a discretion to decree specific performance, and, on a refusal by the plaintiff to take such a decree, to dismiss his suit. It cannot be said, therefore, that we have a clear decision of the Appeal Court which is binding upon us. On general principles it does not seem desirable in a suit for specific performance that the plaintiff should be allowed, when seeking alternative reliefs, to let his alternate choice, assuming the choice rests with him, be determined by fluctuations in the market, and the reverse holds equally good, as in Karsandas v. Chhotalal , where it was held to be a point against the defendant when refusing his prayer that the plaintiff should be offered a decree for specific performance or risk having his suit dismissed, that defendant's attitude was entirely influenced by fluctuations in the market since the suit was filed, Assuming there was a contract there was no particular reason in this case why the Court should not have decreed specific performance in the exercise of its discretion, even if the plaintiff had elected not to ask for specific performance after the hearing commenced, and it would not appear to affect the discretion vested in the Court in a suit of this nature that the plaintiff made his election before the commencement of the hearing. It is not suggested that there are any flaws in the title and the defendant is still in a position to obey the order of the Court to convey to the plaintiff.

10. On the other hand, if plaintiff had sued originally for damages for breach of contract he would have been entitled, if he proved the breach, to damages according to the usual measure.

11. I think the true view is that if a party sues for specific performance and in the alternative for damages the alternative claim is only good in the event of the Court holding that it is not a case for decreeing specific performance. As pointed out by Mr. Harnam Singh in his Law of Specific Belief in India, the words "may also ask for compensation" in Section19 have to be taken with paras 2 and 3 of the section. The Court has a discretion to decree specific performance, and if the plaintiff will not take that, to refuse him damages, and the Court cannot be deprived of its discretion by the plaintiff electing, either before or after the hearing commences, not to ask for specific performance.

12. In my opinion, the provisions of Order XXIII, Rule 1, do not apply to alternative claims.

13. Sub-rule 1. "At any time after the institution of a suit the plaintiff, may, as against all or any one of the'defendsnts withdraw his suit or abandon part of his claim." That rule can hardly apply to a case where on the same cause of action a plaintiff asks for alternative reliefs,

14. Sub-rules 2, 3 and 4 make it clear that the abandonment of part of the claim means the abandonment of a claim which may with leave granted form the subject matter of another suit, but if a plaintiff asks for alternative reliefs and elects which he will ask the Court to grant him, he could not possibly ask for leave to file another suit for the other relief.

15. There is, however, no need to refer to Order 23, Rule 1, because the mere fact that a plaintiff is permitted by Section19 of the Specific Relief Act to sue for alternative reliefs entitles him to ask the Court to give him one or the other.

16. The real point is that a suit for specific performance is a suit of peculiar nature, which under the old practice in England, would not have been entertained except by the Court of Chancery, and a plaintiff once having sued for specific performance of a contract for the sale of immoveable property, the Court as a rule will only assess damages as an alternative relief if it finds that specific performance cannot be granted or considers in the circumstances of the case it should not be granted. If the plaintiff refuses specific per-formance, which otherwise, the Court should have decreed, the Court, in my opinion, is entitled to take such refusal into consideration when assessing damages and even to dismiss the suit, since it is not always easy to see what damages a plaintiff has suffered when he is offered a completion of the bargain he has made. In Karsandas v. Chhotalal . 1921, decided by Macleod C.J., the chief dispute was over the question whether the plaintiff having refused to take a decree for specific performance was entitled to the return of his deposit.

17. In this case the plaintiff wished to purchase the suit property for eighteen lakhs, and he asked the Court to decree him specific performance, or, if the Court would not grant him that relief, damages. It was held in Bombay Cycle & Motor Agency Ltd. v. Rustomji Dossabhai Wadia (1921) O.C.J. Appeal No. 7 of Shah J. on June 20, 1921 (Unrepk.) that a plaintiff suing for specific performance may ask the Court to hold that in the circumstances of the case it ought not to grant the prayer for specific performance but to grant the alternative prayer for damages. But if the Court accedes to that request it is entitled, in assessing the damages, to take those very circumstances into consideration on which it exercised its discretion in not directing specific performance.

18. If the plaintiff has had the opportunity of getting the property at the price he was prepared to give for it, and has refused it, what damages has he suffered by the defendant's breach. Mr. Desai contends that if the plaintiff had obtained a conveyance of the property he might have sold it for the same price that Dubash was offering to pay to the defendant; on the other hand, there is no reason why a person should be considered as buying residential property for the purpose of selling it again. On the contrary he might have retained it and found, as apparently the plaintiff has now found, that its value had dropped below what he gave for it.

19. In Bain v. Fothergill (1874) L.R. 7 H.L. 158 it was held that the rule laid down in Flureau v. Thornhill (1866) 2 W. Bl. 1078, as to the limits within which damages might be recovered upon the breach of a contract for the sale of real estate, must be taken to be without exception; and the difference between a contract for the sale of real estate and contract for the sale of a chattel was pointed out. Lord Chelmsford, at p. 202, referred to the case of Engel v. Fitch (1868) L.R. 3 Q.B. 314 in which Lord Chief Justice Cockburn expressed the opinion that the case of Flureau v. Thornhill was unsatisfactory-In Engell v. Fitch it was held that on the breach of a contract for the sale of real property if an increase in value had taken place between the contract and the breach, such an increase might be taken to have been in the contemplation of the parties, within the meaning of the case of Hadley v. Baxendale (1854) 9 Ex. 341.

20. But Lord Chelmsford remarked (p. 203): "It must be borne in mind that this question as to damages depends, as Baron Alderson said in Hadley v. Baxendale, upon what 'may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.' Now, although the purchaser in Engel v. Fitch, when he entered into the contract, may have contemplated a re-sale at an advance, it is not at all likely that the loss of this profit should have occurred to the vendor as the probable result of the breach of his contract. The Judges were no doubt influenced by the fact of the profitable re-sale having actually taken place, and were, in consequence, drawn aside from considering what must have been in the minds of both parties at the precise time when they made the contract," and his lordship concluded his judgment by saying (p, 207): " If a person enters into a contract for the sale of & real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of she contract; he can only obtain other damages by an action for deceit.

21. In my opinion, therefore, in a suit for specific performance of a contract for sale of immoveable property or in the alternative for damages, the measure of

damages, if there is a breach and specific performance is not decreed, is not necessarily the same as in a suit for damages for breach of contract. In a suit for specific performance if the plaintiff disregards the breach and asks the Court to compel the defendant to fulfil his contract, the Court may say it will not compel the defendant to convey, but will order him to restore any advantages he has secured under the contract and pay such damages as it may think fit. Assuming there was a contract in this case, it may be pointed out that if the defendant is able to sell her property at a higher price than the contract price, that would not be due to her breach of the contract with the plaintiff, but would be due to the fact that the plaintiff deliberately refrained from asking the Court to sell him the property at the price he agreed to pay for it.

22. We notice that the delivery of the judgment extended over three days. We cannot interfere with the discretion of the Judge in such matters, but we feel constrained to point out that it was hardly fair to put t he parties to the expense occasioned thereby, apart from the expenditure of time against the public.

23. We allow the appeal and dismiss the plaintiff's suit except as regards the repayment of the earnest money.

Coyajee, J.

1. I agree with the learned Chief Justice in holding that in this case there is no concluded agreement between the plaintiff and the defendant; we are not satisfied that the parties had agreed on the same terms and mutually signified to one another their assent to those terms. I also agree generally with the view expressed by the learned Chief Justice on the question of damages. I will only add a word as regards the decision in Karsandas v. Chhotalal (1924) 25 Bom. L.R. 1037 to which reference has been made and to which I was a party. I am still of the opinion, for the reasons given there, that a person suing for specific performance of a contract and also for compensation in substitution for such performance, is entitled to abandon his claim to specific performance. The consequences of his abandoning such claim are, however, another matter. For, in considering the question of compensation, the Court is entitled, in those circumstances, to take into consideration the plaintiff's abandonment of his claim to specific performance. That was the opinion expressed by Fawcett J. in Karsandas v. Chhotalal. At page 1052 the learned Judge said : "The Court can take into consideration the plaintiff's abandonment of his claim to specific performance, a position he is entitled to take up under Order XXIII, Rule 1, of the Civil Procedure Code." I respectfully think that view is correct.

2. The parties were heard on the question of costs.

Norman Macleod, Kt., C.J.

1. The question arises now whether the costs should follow the event, or whether, as contended for by the plaintiff, the conduct of the defendant is sufficient to prevent the ordinary Rule prevailing. Mr. Desai has referred us to the case of May v. Thomson (1882) 20 Ch.D. 705, which was a dispute between medical practitioners, and the question was one of the same nature as in this case, whether in the correspondence relied upon by the plaintiff a concluded agreement had been arrived at. It was held that inasmuch as the time for the commencement of the purchase was left uncertain, and the stipulation as to the three months' introduction was not agreed to, and as the parties contemplated a formal agreement, there was no binding contract between the parties, and the action was dismissed. Vice Chancellor Bacon, delivering the judgment in the trial Court, said (p. 713):-

When I come to consider the question of costs, and the terms on which the action should be dismissed, it is not possible for me to follow the general rule in this case Although in general the result of a case governs the costs, it is impossible that I can give the defendant any costs in this action. He has by subterfuges and afterthoughts raised what is called a defence, which I think quite unworthy of the defendant in such a case I allude to the quibble about the covenants in the lease, the difficulty about making the valuation, and so on These are all 1 say subterfuges here, although the defendant might have the right to rely on them at law.

2. He then referred to certain charges of fraud against the plaintiff contained in the statement of defence and to some extent, though not with very good grace, retracted or at all events not persisted in, and said (p, 714):-

All I can do with this moat uncomfortable and unsatisfactory case is to say that the law compels me to dismiss the action, but that at the same time the circumstances require me and the law empowers me to say that in all justice and honesty it must be dismissed without costs.

3. It cannot be said that the conduct of the defendant has been quite as blameworthy as the conduct of the defendant appears to have been in May v. Thomson. But the fact remains, as we have pointed out in the judgment, that there would have been no difficulty whatever in the defendant concluding the negotiations commenced with the plaintiff, if the defendant had not had a higher offer before her for her consideration, and we have clearly pointed out how her mind varied from time to time till eventually she decided that it would be more

profitable to break with the plaintiff, as she had an agreement with Dubash. She then took the risk, as she must have known, of having a suit filed against her by the present plaintiff. She was entitled then to resist the suit on the ground that there was no concluded agreement, But considering the whole of the record, which we have reviewed in the judgment, we do think that this is a case in which the ordinary rule should not be followed. The plaintiff's suit is dismissed without costs. The appellant will have the costs of the appeal.

4. With regard to the summons, which was decided by Mr. Justice Crump, that was not adjourned to the hearing, but was. heard before Mr. Justice Crump because the suit happened to be on his board on that day, and the summons, according to the practice prevailing on the Original Side, could not be heard by the Chamber Judge. Mr. Justice Crump made a specific order with regard to the costs of the summons, and there is nothing to show that that order with regard to costs was wrong.