

Bai Dosibai Vs. Bai Dhanbai

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Court : Mumbai

Decided On : Aug-05-1924

Reported in : AIR1925Bom85; (1924)26BOMLR1071; 85Ind.Cas.597

Judge : Marten and ;Kincaid, JJ.

Appeal No. : Suit No. 1808 of 1923 and O.C.J. Appeal No. 12 of 1924

Appellant : Bai Dosibai

Respondent : Bai Dhanbai

Disposition : Appeal allowed

Judgement :

Marten, J.

1. This is an appeal from the judgment of Mr. Justice Shah dismissing the plaintiffs' suit for specific performance, and allowing the counter claim of the purchaser, defendant No. 1, for the return of her deposit of Rs. 5,000. The litigation turns on a restrictive covenant contained in the conveyance of September 24, 1918 (Ex. G), from the then owners of the Forjett Street estate, and on a similar covenant in the subsequent conveyance of June 14, 1920 (Ex. C), to the original plaintiffs Nos. 1 and 2 and Pestonji Edulji Mistry since deceased. The latter is now represented by his administratrix Bai Dosibai, who is the original plaintiff No. 3 and the present

sole plaintiff. The original plaintiffs Nos. 1 and 2 have become insolvent, and are now represented by the Official Assignee, the present defendant No. 2.

2. I will refer to the above covenant as the 71/2 feet covenant, and it runs as follows:-

That no building or other structures whatsoever whether temporary or permanent and no tree or shrub shall at any time be built, erected or placed or planted or suffered to be or to grow on any part of the land and premises hereby granted conveyed and transferred within a distance of 71/2 feet from the south-western boundary line of the plot hereby granted, conveyed and transferred and dividing the said plot No, 12 on the vendor's said Forjett Street estate except with the consent of the vendor or others the owners for the time being of the said plot No. 12.

3. The suit property thereby conveyed and subsequently sold to the first defendant was plot No. 11 on the Forjett Street estate.

4. If one turns to the plan (Ex. H in this Court), the suit property is there shown as lying to the north or north-west of the double line coloured green and orange. Plot No. 12 which had the benefit of this restrictive covenant lies to the west or south-west of the suit property. The earlier conveyance of September 24, 1918 (Ex. G) had contained a similar covenant by the then owners of plot No. 12 as regards the land retained by them. The result of this mutual covenant was to ensure a strip of 15 feet of open space, viz., 71/2 feet on either side of the boundaries of plots Nos. 1,1 and 12.

5. In fact the 71/2 feet covenant was broken by the original plaintiffs, for in 1921 or thereabouts a building was erected on the suit land, which for a length of about 40 feet was only 21/2 feet instead of 71/2 feet from the boundary line of plots Nos. 11 and 12, and it is not shown that this was done with the consent of the owner of plot No. 12. This building is marked C on the above plan. The portion hatched red represents the portion built in breach of the 71/2 feet covenant, and represents an area of 40 feet by 5 feet or an aggregate of 22 square yards. I may here explain that the northernmost land coloured green represents hilly ground, and that the

adjoining open space coloured purple represents ground which was hilly, but which has since been levelled to the level of the first floor of the suit building, so we are told by counsel.

6. Now when the original plaintiffs came to sell the suit land to the purchaser for Rs. 66,000 under the suit contract of September 8, 1922 (Ex. B), they not only omitted to disclose to the purchaser the fact that this building was erected in breach of the 71/2 feet covenant, but they did not even disclose to the purchaser the existence of the covenant at all. This in the absence of any explanation was a serious breach of their duty as vendors, and might entitle the purchaser to repudiate the contract on discovering the true facts.

7. The English authorities are clear and emphatic as to the duty of a vendor to disclose material defects, and I need only refer to Nottingham Patent Brick and Tile Company v. Butler (1885) 15 Q.B.D. 261; on appeal (1886) 16 Q.B.D. 778, Carlish v. Salt [1906] 1 Ch. 335.; In re Jackson and Haden's Contract [1906] 1 Ch. 412 and Halkett v. Dudley (Earl) [1907] 1 Ch. 590. No Indian authorities were cited to us, but under Section 55(1)(a) of the Transfer of Property Act, the seller is bound to disclose to the buyer any material defect in the property of which the seller is and the buyer is not aware, and which the buyer could not with ordinary care discover, Under the concluding words of Section 55 an omission to make such a disclosure is fraudulent. Prima facie, therefore, such an omission may be also a 'fraud' as defined by Section 17(5) of the Indian Contract Act, and so render the contract voidable at the option of a purchaser under Section 19, if his consent to the agreement has been caused by the fraud. Or else a purchaser may sue for rescission under Section 35 of the Specific Relief Act. See ill. (a).

8. It is argued by the plaintiff's counsel that though the defendant had not express notice, she had constructive notice of this covenant inasmuch as Clause 6 of the suit contract states that 'the property forms part of a building estate,' and Clause 17 states that the purchaser has to erect boundary walls 'in conformity with the covenant in that behalf contained in the conveyance in favour of the vendors dated June 14, 1920.' It is accordingly argued that the 71/2 feet covenant is a usual one to find in a building estate, and that the reference to the conveyance of June 14.

1920, gave notice of all its contents. In my judgment both these contentions are unsound. The recitals and clauses 1 and 10 make it clear that the sale was to be free from incumbrances. By Clause 7 the vendors were to make out a marketable title free from all reasonable doubts, claims and demands, subject to the special provisions of clauses 4, 5 and 6. Now Clause 4 related to a mortgage, which was to be reconveyed, Clause 5, to a disused water trough, and Clause 6, to the title-deeds being in the possession of the original owners of the building estate. So none of these clauses really affect the question, for I cannot accept the suggestion that the mere reference to a building estate would imply the existence of such a covenant as the 71/2 feet covenant.

9. Turning next to clauses 15, 16 and 17, Clause 15 deals with certain rights of way and drainage etc., for the benefit of the purchaser. Clause 16 refers to the strip marked 'open space' on the plan Ex. H which lies on the south or south-east of the suit building. It is agreed by counsel before us that the reference in Clause 16 to the "south-west" is an error. The effect of Clause 16 is that the whole of this open space is to be left unbuilt upon and open to the sky, and that the purchaser is to get the corresponding 5 feet on the other side of this southern boundary. So in all there would be an open space of 20 feet. It appears that there was a contemporaneous sale of this southern adjoining land to the father of the defendant's daughter-in-law, and it is said that Clause 16 embodied the mutual agreement of all parties, but nothing turns I think on this. The materiality of Clause 16 is that indirectly it would force the defendant to comply with the 71/2 feet covenant so far as regards this southern strip, except that she would not be prohibited from planting shrubs, or perhaps trees. Then Clause 17 dealt, as I have said, with the boundary walls on the northeast and west sides.

10. Accordingly the contract contained express reference to many special matters including some of a restrictive nature. In my judgment therefore a purchaser might fairly assume that every material fact had been disclosed. He would certainly never expect to find that a serious restriction, such as the 71/2 feet covenant was never even mentioned. Nor, I think, would the mere reference to the deed of June 14, 1920, in connection with another matter, viz., boundary walls, put him on his guard in this respect, or oblige him to look at this deed to see if it contained

anything beyond what the vendors said it contained. It must be clearly remembered that it was the duty of the vendors to disclose the existence of the covenant, for it was a material defect in their title. They knew their own title and the purchaser did not. The English cases of *Reeve v. Berridge* (1888) 20; *In re White and Smith's Contract* [1896] 1 Ch. 637 and *In re Haedicke and Lipski's Contract* [1901] 2 Ch. 666 illustrate the necessity of an express and full opportunity of inspection of a lease if a purchaser is to be bound by onerous and unusual covenants which are not specifically mentioned. A mere reference to the lease itself is insufficient. I may also refer to *Cox v. Coventon* (1862) 31 Beav. 378 and *In re Marsh Earl Granville* (1883) 24 Ch. D. 11. So, too, if one turns to the definition of 'notice' in Section 3 of the Transfer of Property Act, I think it cannot be said here that there was any wilful abstention from any enquiry or search which the purchaser ought to have made or any gross negligence on her part before she entered into the contract.

11. In my judgment, therefore, the suit contract did not give constructive notice of the 71/2 feet covenant to the purchaser. It follows, therefore, that, having regard to this covenant, the vendors were not in a position to carry out their contract, viz., to sell the property free from all incumbrances, unless at any rate they could procure a release of the 71/2 feet covenant and a waiver of all past breaches of it from the owners of plot No. 12.

12. The plaintiff, however, contends that the purchaser has waived her rights under the contract inasmuch as the purchaser's solicitors in their requisitions and correspondence only took objection to the covenant so far as regards the existing building 'C' and not as regards the rest of the land, and were content to ask for the consent of the owners of plot 12 to the erection of such building and that such consent was obtained in time, though not until after the defendant had purported to rescind.

13. Alternatively the plaintiff says that assuming the purchaser had a right of repudiation on discovering the true facts, she was bound to exercise that right promptly, and that by treating the contract as subsisting after the discovery of the defect she precluded herself from exercising the right of repudiation at a

subsequent time without first giving the vendors a reasonable time to cure the defect, which in fact she did not do.

14. This alternative point does not seem to have been argued in the Court below, and was only advanced before us at a late stage in the arguments. But as it seems to me to be the crux of the case, and to derive direct support from the equitable principles enunciated in *Halkett v. Dudley (Earl)* [1907] 1 Ch. 590., and several earlier authorities, I will proceed to deal with it at once.

15. Turning in the first place to the facts, it appears from the two letters of September 21, 1922, from the vendors' solicitors that the title-deeds or copies thereof were sent to the purchaser's solicitors on that day. This was in accordance with Clause 3 of the contract of September 8, 1922. Accordingly the purchaser's solicitors must have discovered the defect in the title somewhere between September 21 and November 1, when they sent in their requisitions, Ex. F. These requisitions were with reference to the adjoining Block 'B', but by agreement were treated as being repeated as regards the suit property block 'C', the title being a common one.

16. The material requisitions are Nos. 1 and 3 apart from certain general requisitions of a fishing nature such as Nos. 8 and 9. Requisition No. 1 asked if plot 12 had been sold, and whether the present owner of plot 12 was bound by the cross-covenant. Requisition No. 3 stated that the suit building was a breach of the 71/2 feet covenant, and asked if the consent of the owner of plot 12 had been obtained and registered. If so, it was to be handed over on completion. If not, it must be obtained and registered. A note at the foot stated that the requisitions were sent in 'subject to further requisitions arising from the papers not heretofore produced and to searches...and from the vendors' answers to these requisitions.'

17. On November 6, the vendors answered requisition No. 1 by stating that they were not aware whether plot No. 12 had been sold, but whoever might be the owner would be bound by the cross-covenant. As regards requisition No. 3, after explaining that an open space had been left on the south instead of the west, and the reason therefor, the vendors stated that it was not necessary to obtain the consent of the owner of plot No. 12, and that no objection had been taken by him

to the erection of the building.

18. I now turn to the correspondence, Ex. D. It is somewhat confusing that part of it (viz., Ex. C to the plaint) deals with the suit property, and the rest of it (viz., Exh. D to the plaint) with the adjoining block B, and that we have no single copy of the whole correspondence before us in order of date. But dealing first with Ex. C to the plaint, the purchaser's solicitors wrote an important letter on November 7. In it they said:-

As at present advised, our client will decline to complete the purchase unless your clients produce the written consent of the owners of the said plot to the present building having been built in contravention of the agreement, with his consent duly registered. Please let us know what your clients have to say about the same.

19. They also asked for the conveyance of September 24, 1918, (Ex. G) to consider the vendors' answers to requisitions, and they also required production of the original title deeds of the building estate under Clause 6 of the contract. The reference to Ex. G is explained by the local practice in Bombay to dispense with an abstract of title and to hand the deeds backwards and forwards according to whether requisitions have to be made or answered. The other reference may be explained by the inference that up to that time the purchaser had only seen certified copies of the earlier deeds, and not the originals, which under clauses 6 and 11 had to be produced by the vendors, but at the cost of the vendors and purchaser in equal shares.

20. Now stopping there, the purchaser up to this point did not exercise her right of repudiation, but on the contrary was treating the contract as subsisting, and calling on the vendors to take steps in pursuance thereof which would cause them expense.

21. In my opinion, therefore, it was unfair conduct on the purchaser's part to cancel the contract eleven days afterwards without any further warning, as she purported to do by her letter of November 18, and to call for the return of her deposit.

22. On November 20, the vendors' solicitors replied that the purchaser had no right to do this, and that they would write further after seeing their clients.

23. On December 4, the vendors' solicitors wrote saying that the vendors would produce the consent of the owner of plot 12 to the suit building, and asked for the draft conveyance to be sent.

24. Then followed on December 6 another important letter from the purchaser's solicitors, in which, after referring to their letters of November 7 and 18, they said it was useless to rely on the mere promise to produce the consent in question, and absurd to ask for the draft conveyance before such consent was produced. The letter ends:-

In the absence of such consent and having regard to our letter of the 18th ultimo, we have stopped further investigation of title in this matter, and our client declines to do anything further till the written consent is produced. We have again to call upon your client to return the earnest money with interest.

25. Despite the concluding sentence, I read this letter as meaning that the contract is still subsisting, but that nothing further will be done in it till the consent is produced.

26. This view is borne out by the next two letters. The vendors' solicitors at once replied on December 7, saying that their client was arranging to produce the consent, and that it would be produced before completion. They also held the purchaser to her agreement, and again asked for the draft conveyance.

27. On December 8, the time fixed by Clause 8 for completion expired.

28. On December 18, the purchaser's solicitors wrote saying that their client had waited for eleven days more to see whether the consent would be produced, and did not propose to wait any longer. The letter then went on:

We therefore hereby give notice to your clients through you that if your clients fail to procure and produce such consent and make out a marketable title free from reasonable doubt within a fortnight from date hereof that is on or before January 2,

1923, our client will put an end to the contract and treat the same as cancelled.

29. I draw particular attention to the final words 'our client will put an end to the contract.' To my mind this letter clearly showed that up to this date the contract was subsisting, and no right of repudiation finally exercised.

30. The vendors replied on December 19 and January 2, pointing out the unfairness of their notice at Christmas time, and the practical difficulties thereby caused. On January 11, 1923, the purchaser's solicitors wrote calling for the return of the earnest money on the ground that, 'the contract for sale herein now stands cancelled by reason of your client's failure to comply with the requisitions contained in our letter of December 18 last within the time thereby appointed.' It will be observed that this final cancellation is based on non-compliance with the notice of December 18, and not on any alleged earlier cancellation which had only been conditionally waived.

31. On January 19, the vendors' solicitors wrote saying that they had arranged to obtain the consent, and they annexed the form of consent. On February 5, this consent (Ex. F) was signed by the owner of plot 12, and on February 9 it was sent to the purchaser's solicitors. It appears to have been registered on April 23, 1923. The vendors then instituted this suit on April 30, 1923.

32. As regards the other correspondence (Ex. D to the plaint) I need only refer to a second letter of November 18, 1922, from the purchaser's solicitors in which they refer to an interview between the respective solicitors. The precise date of that interview is not stated, and it appears from the vendors' reply of November 20 that they disputed the purchaser's version of that interview and also alleged that it was held 'expressly without prejudice.' So, as no oral evidence was given on the point, I leave it at that. Plaintiff's counsel relied on a letter of February 26, 1922, from the purchaser's solicitors, in which the letter said that the present position was due to the vendors' dilatoriness over the consent, inasmuch as the purchaser having insufficient monies of her own had originally arranged to raise part of the purchase-money on mortgage of the suit property, but that the intending mortgagee had got tired of waiting for the consent and declined to do anything further.

33. Now the view which the learned trial Judge took of the above correspondence over the suit property is this. He said:

My view of the correspondence is that though the defendant No. 1 was ready to accept the consent of the owner of plot No. 12 with regard to the breach of the covenant as sufficient to induce her to accept the agreement, I am not prepared to hold that there was in any sense a waiver on her part of the right which she had to put an end to the contract in virtue of the non-disclosure of this restrictive covenant. The facts which have been relied upon as constituting a waiver on her part are as stated in the letters of December 8 and 18, 1922. It is urged that she had been ready and willing to accept the consent of the owner of plot No. 12 to the existing breach of the covenant as sufficient. The correspondence disclosed that fact; But I am unable to read the correspondence as constituting a waiver on her part of the right which she had. The letter of November 18 is definite and is clearly indicative of a desire to exercise her right to rescind the contract. I do not read the subsequent letters of December 8 and 18 as waiving that right in any sense, but as giving a further opportunity to the plaintiff if the consent was obtained within fifteen days from the date of the letter of December 18 to induce her to give up her right of rescinding the contract; but as that was not done, I do not think that it could be maintained that she gave up that right

34. Then further on the judgment proceeds:-

My finding, however, on issue No. 9 is that the contract was properly put an end to by the letter of November 18, and also by the letter of January 11.

35. I understand the learned Judge thus to hold that there was never any waiver either absolute or conditional of the right of rescission; that the purchaser only gave the vendors a chance to induce her to change her mind by procuring the consent; that it always remained optional for her to insist on rescission whether or no the consent was obtained in due time; and that accordingly the contract was validly rescinded by her. With great respect I am unable to agree with that view of the correspondence. I read the purchaser's requisitions and letters as treating the breach of the 71/2 feet covenant as a defect in title, but one which the vendors were required to remove by obtaining the consent in question. This is, I think, clear

as regards the original requisitions and the letter of November 7.

36. But even if a different construction was placed on the subsequent letters, what right had the purchaser suddenly to rescind the contract on November 18 in the face of her previous requisitions and letters? It cannot be justified on the ground of agreement or even acquiescence for the vendors promptly and persistently repudiated her alleged right. What right then had she in law? Now here the judgment of Lord Parker (then Parker J.) in *Halkett v. Dudley (Earl)* [1907] 1 Oh. 590. is, I think, of great value. The main portion of the head-note runs:

A purchaser's right to repudiate the contract is an equitable right arising from want of mutuality, and may be a defence to an action for specific performance; but in order to avail himself of that defence he must repudiate the contract as soon as he finds that the vendor cannot make a good title.

In that case in January 1905, there was a consent decree for specific performance and a reference to title. In February the abstract was delivered, and in April requisitions were delivered, one of which related to a restrictive covenant on a small part of the property. These requisitions were answered, and further requisitions sent and answered and repeated. On December 8, 1905, the vendor contracted for the release of the restrictive covenant. On December 22, the purchaser repudiated the sale contract for want of title. On January 4, 1906, the restrictive covenant was released. The matter afterwards came before the Judge on two summonses by the purchaser, the one to be discharged from his purchase and the other to vary the Master's Certificate of November 14, 1906, finding that a good title had been made, and that it was first shown on December 8, 1905.

37. Turning to the judgment, Parker J. said (p. 596):-

The purchaser puts his case in this way. He says, first, that a purchaser discovering a fatal defect in the vendor's title has a right to repudiate the contract; secondly, that this right is unaffected by the decree for specific performance; thirdly, that he did repudiate the contract on July 11, 1905, or at any rate on December 22, 1905, before the objection as to the restrictive covenants had been removed;...Now I think it is reasonably clear on the authorities quoted to me that,

before decree, a purchaser who becomes aware of a defect in the vendor's title, which defect cannot be removed without the concurrence of a third party whose concurrence the vendor has no power to require, may (except possibly in the case of trifling matters which the Court would at the vendor's instance treat as matters of compensation or abatement of purchase-money) repudiate his contract, and that such repudiation will be a bar to any relief being subsequently given by way of specific performance at the vendor's instance, even though the defect has been removed before trial. I do not think that this right is more than an equitable right affecting the equitable remedy by way of specific performance. If a vendor contracts that he will, at a future date, convey to a purchaser land which does not at the date of the contract belong to him, but to which he acquires title before the day upon which, according to the contract, the purchase is to be completed. I do not see why, in principle, he should not be able to recover damages for breach of contract if the purchaser fail to complete at the date fixed for completion. If this be so, the right of repudiation in question must be distinguished from the common law right of rescission, and arises out of that want of mutuality which, unless waived, is generally fatal to relief by way of specific performance. The point is touched on, though it is left open, in the case of *Bellamy v. Debenham* [1891] 1 Ch. 412.; and the case of *Salisbury v. Hatcher* (1842) 2 Y. & C. Ch. 54., to which I will refer presently, is further material on the point; but it is in my opinion equally clear that this right of repudiation, whatever be its true nature, must be exercised, if it is to be exercised at all, as soon as the defect is ascertained. If, after ascertaining the defect, the purchaser still treats the contract as subsisting he does not retain the right to repudiate at any subsequent moment he may choose. That is, I think, the effect of the cases which were quoted to me by Mr. Upjohn, namely, *Hoggart v. Scott* (1830) 1 RUBS. & My. 293., *Eyston v. Simonds* (1842) 1 Y. & C. Ch. 608., *Salisbury v. Hatcher* (1842) 2 Y. & C. Ch. 54, and *Murrell v. Goodyear* (1860) 1 G, F. & J. 432.

38. Then after dealing with the first two of these cases, and citing part of the judgment in the third case, the learned Judge says at p. 599):-

I read that passage primarily because it appears to me to be relevant on the point as to what is the nature of this right of repudiation on which the purchaser in the

present case relies, and it really points to the fact that it has nothing to do with the legal right of rescission; it is merely an equitable right arising out of want of mutuality, such as may possibly form the ground of a defence to the peculiar relief given by Courts of Equity, namely, relief by way of specific performance.

39. He then quotes (p. 599) the Vice-Chancellor as saying (p. 66):-

In this state of things I am asked, on the ground of want of mutuality, to say that the plaintiff is not entitled to any relief. I should be trampling on all principle and authority, if I were to accede to such an argument. Even if the rule of mutuality, as it has been called, could be carried so far as it has been attempted to be carried in a case of this description, which I do not say, still the conduct of the purchaser has been amply sufficient to exclude him from the benefit of any such argument. With full notice of the state of the title, he pursues the investigation of it, and obtains the fulfilment of a requisition made by himself, and founded on the very state of the title. In my opinion, therefore, to relieve him from the contract would, as I have already said, be contrary to all principle and authority, and discreditable to a Court of justice.

40. Mr. Justice Parker then adds (p 599):-

It will be seen that the decision in the case, or rather the principle of the decision, rests really upon a waiver of the want of mutuality in the contract.

41. The learned Judge then goes on (p. 600):-

Now assuming here that the defect of title due to the existence of the restrictive covenants was such a defect as to give rise to the right of repudiation which I have been describing, was such right exercised, or did the purchaser still continue to treat the contract as in operation? I am of opinion that no such prompt repudiation as was required on the part of the purchaser has been proved, but that, on the contrary, he continued after notice of the defect to treat the contract as subsisting, and to make requisitions and objections with a view to an inquiry as to the vendor's title which was proceeding in chambers, an inquiry which would, of course, have been wholly useless if the contract had been effectually repudiated.

It was suggested that the purchaser repudiated the contract as early as July 11, 1905, at an interview or appointment before the Master; but even as late as November 8, 1905, we find him delivering observations on replies to the requisitions, and such observations are not expressed to be made without prejudice to some alleged prior repudiation. The first real attempt to repudiate the contract was, I think, made before the Master on December 22, 1900, when the plaintiff was in a position to compel release of the restrictive covenants, and after that the defendant took no step to give affect to the repudiation until the very end of March, 1906, long before which the covenants had been released.

It is not necessary for me to go so far as to hold that, by not repudiating promptly, the purchaser lost his right of repudiation altogether; but it seems to me that by treating the contract as subsisting after the discovery of the defect he did preclude himself from exercising a right of repudiation at a subsequent time before giving the vendor a reasonable time to cure the defect, and that thereafter his only safe course was to limit the time within which the defect must be removed and a title made out, if the contract was to go Through. There is no trace of any such course having been attempted in the present case. As I have said before, as late as November 8 the objection was insisted upon without repudiation, and the defect was in effect cured before the attempted repudiation on December 22 in the same year.

Now hitherto I have assumed that the decree for specific performance did not affect the purchaser's right of repudiation; but I have come to the conclusion that, after a decree of specific performance, a defendant purchaser cannot repudiate the title or the contract without the leave of the Court.

42. Now no doubt that case is distinguishable on the facts because there the defect in the title was cured or agreed so to be before the purchaser repudiated: and also the purchaser could not repudiate without the leave of the Court having regard to the consent decree for specific performance. But the principles enunciated are closely in point here: they are stated by an Equity Judge of particular eminence: and they are traced back to earlier decisions by Knight-Bruce and Turner L. JJ.

43. I need not I think go through all these earlier decisions. But I may cite from the judgment in *Murrell v. Goodyear* (1860) 11 G.F. & J. 432., which was decided in 1860. There the contract of sale was made on August 26, 1858, and in his requisitions on title the purchaser required the concurrence of an heir-at-law. There at pp. 449-451 Turner L.J. said as follows:-

But then it is said, that upon October 27, 1858, notice was given to determine this contract, and that it must be treated as null and void. Now it is to be observed that, with a full knowledge of this objection to the title, the Defendant did not, in the requisitions which he made, take the objection, if he was entitled to take it, that the contract was void, upon the ground that the assignees had sold that to which they had no title. All that he said was, ' Procure me the concurrence of the heir-at-law '. He treated the contract, therefore, as a subsisting contract. I do not enter into the question whether he was or was not entitled to say that he would put an end to the contract. I am not by any means satisfied that he was. But supposing him to have been so, he treated the contract as a subsisting contract at the time when he made the requisitions upon the title; and not only so, but after discussions between the solicitors with respect to the title down to as late as October 19, 1858, this contract was treated by the defendant as a subsisting contract, and the concurrence of the heir-at law required...Then comes this question: having treated the contract as a subsisting contract down to October 19, can the Defendant, on October 23, four days afterwards, turn round and say, ' I determine this contract, and require payment back of the deposit which I have paid. ' I think that every principle, and I may add, every authority, is against the existence of any such right on the part of a purchaser. The Defendant was bound to afford to the vendors a reasonable time to enable them to clear the title of this difficulty which existed upon it. I think that by the effect of the letters, and by the dealing upon the contract, the Defendant had put the case in the position of an ordinary case between vendor and purchaser Mr. Langworthy, who argued this case very ably and very clearly, put the case thus:-He said, the purchaser is entitled to rescind the contract at once, upon the ground that there has been, not a fraudulent dealing by the assignees in putting up the property for sale, but an attempt by them to sell that to which they must be taken to have known they had no title-the entire fee. Well, as I said before, the Defendant might, if he pleased, have set up that at the

time when he sent these requisitions as to the title; but he did not do so. I do not mean to say he could have done so with success. I do not go the length Mr. Langworthy carried his argument upon that point;...But I say, without any hesitation, that if a purchaser has any such right as has been contended for and insisted upon on the part of this Defendant, it is a right he is bound to insist upon at the first moment; he cannot play fast and loose, and say, ' I treat this as a subsisting contract,' and then afterwards suddenly turn round and say, ' I have a right to revert to my original position. I have a right to destroy that contract, which for months and months, during the whole treaty of negotiation upon the title, I have treated as a subsisting contract.'

44. So, too, in Halsbury, Vol. XXV, at p. 403, it is stated in para 692:-

The purchaser's right of repudiation arises as soon as the vendor's defect of title is definitely ascertained either from the abstract, or from his replies to the purchaser's requisitions....The right, however, must be exercised immediately the defect is so ascertained. If the purchaser continues in negotiation as to the title, and thus treats the contract as subsisting, he cannot repudiate at any subsequent moment he may choose, but must give the vendor a reasonable time to remedy the defect.

45. The English authorities on the point being then clear, is there any reason why we should adopt different principles in India? No such reason has been shown to us. On the contrary these principles seem to me to be principles of fairness and common sense. As the lawyer may say: 'One cannot approve and reprobate-at any rate at the same time.' The business man may say: 'You cannot sit on the fence and ask me to incur expenditure which may at your pleasure prove useless. Either rescind, or else give me a reasonable time to cure the defect.'

46. In saying this, I do not mean that the difference that used to exist in England between remedies at law and remedies in equity are to be introduced here. But the purchaser had at least two possible remedies, viz., she could exercise her option of avoiding the contract under Section 19 of the Indian Contract Act, or have it rescinded under Section 35 of the Specific Relief Act. But Section 19 of the Indian Contract Act also provides that instead she may insist that the contract be

performed, and she be put in the position in which she would have been if the representation made had been true. This, in my opinion, she in effect did by her requisitions Nos. 1 and 3, and her letter of November 7. Further it is only fair to the vendors here to point out that the word 'fraud' is not expressly mentioned anywhere except in the written statement. There is no express issue on it, nor does the learned Judge use that word anywhere. Nor did the purchaser give any evidence to the effect that her consent to the suit contract was caused by any fraud as is contemplated by Section 19. But for the sake of argument I have assumed here that she might have been entitled to avoid the contract under Section 19, if she had acted differently.

47. Accordingly in my judgment the purchaser's notice of rescission of November 18, 1922, was invalid, having regard to her previous requisitions and her letter of November 7.

48. This brings me to the next point, viz., whether she ever gave the vendors a reasonable time to cure the defect, and in particular was the fourteen days' notice given by her letter of December 18 a reasonable one? On this point the learned trial Judge has found in favour of the vendors. He has held that the vendors obtained this consent within a reasonable time, and that the time limited by the purchaser's letter of December 18 was unreasonable. I respectfully agree with these findings. A release or waiver of a restrictive covenant is not usually an easy concession to obtain. In the present case the vendors did not at first know who the then owner was. So the title would have to be traced and verified, to say nothing of negotiations and possibly a pecuniary compensation. Further the Christmas and New Year holidays intervened, and according to the letter of January 2, 1923, the intermediary employed in the negotiations was out of Bombay till January 8. So, on the whole, I think the vendors did reasonably well to arrange by January 19 to obtain the consent, and to get it actually signed by February 5. It must be remembered that in Bombay six months is a more usual time for completion than the three months under the suit contract; and also that the purchaser had originally taken some five weeks to send in her requisitions.

49. In any event I am clearly of opinion that the time fixed by the letter of December 18 was quite unreasonable even having regard to the time which had already elapsed since November 1. To fix such a time in Bombay during the Christmas and the New Year holidays was really illusory. Even the High Court has then its one closed holiday of the year, when all offices are shut for a fortnight. The Government offices and Banks, etc., are also closed for many days, and it is perhaps the most difficult time of the year to get any legal work done.

50. It follows, therefore, that in my opinion the notice of rescission of January 11, 1923, was also bad, and that issue No. 9 ought to have been answered in the negative instead of in the affirmative.

51. On the other hand, I agree with the learned Judge in thinking that the purchaser did not lose her right of repudiation altogether. I need not repeat the correspondence, or the observations of Lord Parker in *Halkett v. Dudley (Earl)* [1907] 1 Ch. 590. on this point. It seems to me clear that she insisted on the consent to the building being obtained, or otherwise she would not complete the purchase. Waiver must be an intentional act with knowledge (see *Earl of Darnley v. Proprietors, etc., of London, Chatham, and Dover Railway* (1867) L.R. 2 H.L. 43.) and I think she never waived her right to get a good title to the building in accordance with the suit contract.

52. A more difficult question arises whether she did not impliedly waive her right to a release of the 7 1/2 feet covenant as regards any future building and the strips of land to the north and south of the existing building. I cannot find that in the requisitions or the correspondence or the pleadings she ever expressly raised this point. Her sole objection up to then was as regards the existing building. This may be because she thought it of no practical importance, having regard to the lay of the land to take any objection as regards the remaining land. Nor is it at all clear whether this point was raised at the trial, although the issues are broadly framed. On the other hand, the learned Judge refers to it at the end of his judgment. Further the suit contract contains no clause obliging the purchaser to send in her requisitions within a specified time, or to accept the title subject to such requisitions.

53. On the whole, therefore, I think she can still force the vendors to carry out their original contract, viz., to sell the property free from incumbrances, other than those expressly specified, and that accordingly the vendors must obtain, if they can, a complete release of the 71/2 feet covenant. The appellant asks that a reasonable time be given for this purpose. Under all the circumstances I think a period of three months from today would be a fair time to fix.

54. Next comes the question what precise order we should make, and in particular whether there should be a general reference to title, or whether the objections to title at any further hearing should be confined to the 71/2 feet covenant. I have already stated that there are no conditions binding the purchaser to furnish the requisitions within any particular time. Accordingly her counsel has cited *Lesturgeon v. Martin*(1) to show that although at one stage of the negotiations a purchaser may be willing to accept the title if a particular objection is removed, yet if there is to be a reference to the Master on title, it should be in general terms and not be confined to the particular objections. There Sir John Leach said (p. 256):-

That objection, however, was never removed, and the voluntary assurance, given at that particular time, would not create a legal obligation upon him to relinquish in all future proceedings his original right to a marketable title. It may turn out, upon inquiry before the Master, that he had been ill-advised as to the effect of some of the objections originally taken to the abstract, or it may turn out that there is matter destructive of the title of the plaintiff (purchaser) which did not appear upon the abstract, and the reference to the Master must therefore be general as to the title of the plaintiff.

55. On the other hand the requisitions here were delivered as long ago as November 1, 1922. They are mainly requisitions asking for general information, and there appears to be no objection to the title other than the one before us. In a written statement of twenty-one paragraphs there is no suggestion of any defect in the title other than this restrictive covenant. Nor are there any in the eleven issues raised at the trial, although issue No. 7 is in general terms. As to that the learned Judge says: 'Apart from the defect arising out of the restrictive covenant it is clear that the marketable title of the plaintiff's is made out.

56. There is also a marked distinction between our practice and that prevailing in the Chancery Courts. A reference to title in the Chancery Courts is almost a matter of course in a contested specific performance action. The Court then gets the advantage of the opinion on title of one of the conveyancing counsel to the Court. Here we have no such counsel to assist the Court. The practice which has generally prevailed here up to now is I think for the question of title to be fought out at the trial. I have at times protested at that, and suggested to the parties that a preliminary reference to the Commissioner on title would probably save much time. But it not unfrequently happens that the question of title is only one of various (1834) 3 My. & K. 255. points in a specific performance action, and the Court is anxious to assist the parties by determining all points in dispute once and for all without a reference to the Commissioner. If, in the present case, we were to send the case to the Commissioner for report on the title, it would probably only result in an additional hearing and additional delay, for one side or the other would take the matter to the Judge on objections to the report.

57. On the whole, therefore, I think the proper order will be to allow the appeal, and discharge the order made in the Court below, and to remand the suit for a further hearing. Our order had better be prefaced by a declaration to the effect that the restrictive covenant in the pleadings mentioned is a material defect in the plaintiff's title, but that in the events which have happened, the defendant No. 1 has not validly rescinded the suit contract, and that the plaintiff ought to be allowed a period of three months from the date of our order in which to obtain a release of the said covenant, and that in that event she will be entitled to a decree for specific performance, but that in default of such release being so obtained the defendant will be entitled to be discharged from the suit contract, and to a return of her deposit with interest. The order should direct the suit on remand to be on board on December 1 next, and that there shall be a new issue No. 12, viz., whether the plaintiff has obtained a release of the restrictive covenant in the pleadings referred to, and if so at what date. The remand will be heard on the footing that issues Nos. 4, 7, 8, 9 and 11 have been answered in the negative, and issues Nos. 2, 3 and 6 in the affirmative. Issues Nos. 5, 10 and 12 will then remain for final determination, and it will be for the trial Judge to decide what decree should then be passed. That *prima facie* will depend upon the answer to this additional issue No. 12. We might,

as in the Chancery Court, pass now a decree for specific performance, but I think this might be open to misconstruction in this Court, and that accordingly the order I propose is better suited to local practice.

58. As regards the present ownership of plot 12, it must be taken that S.D. Davar, named in the consent Ex. F dated February 5, 1928, was the owner of plot 12 at the date of Ex. F. This was pleaded in para 12 of the plaint and not disputed in the written statement or at the trial.

59. As regards costs, I think on the whole that the costs up to date of each party, including the costs of this appeal, should be costs in the cause. Minutes of this order are to be shown to us within ten days.

Kincaid, J.

60. I agree.

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