

1866.  
Feb. 17.

*Suit No. 728 of 1865.*

THE IMPERIAL BANKING AND TRADING COMPANY

*v.*

PRA'NJI'VANDA'S HARJI'VANDA'S *et al.*

*Sale of Shares for future delivery—Readiness and Willingness—  
Concurrent acts—Raising of Issues.*

Plaintiffs contracted with defendants to sell them two numbered shares, on payment of the price by defendants on or before the 1st of July 1865. Plaintiffs were in possession of the shares at the time of the contract, and continued so until they sold them after default made by defendants; and they were registered as holders of the shares on the 1st of July, when the share certificates with transfer deeds in blank were tendered to defendants, who refused to accept them, or to pay the purchase-money. On the issue whether plaintiffs were ready and willing to perform the contract on their part:—*Held* that the acts necessary to be done on the 1st of July were concurrent; and that plaintiffs, being able and willing on that day to make a valid transfer, if defendants had been ready to pay the price, plaintiffs were not bound to take any further step until the purchase-money was paid by defendants.

There is nothing in the Code of Civil Procedure which imposes upon the Judge the duty of allowing an issue to be raised on a point of law, which he considers to be perfectly clear.

THIS was a suit to recover the sum of Rs. 41,718-8-0, damage sustained by the plaintiffs, by reason of the non-acceptance by the defendants of certain shares, agreed to be purchased by the defendants from the plaintiffs by two written agreements, dated the 26th of October 1864, and the 5th of November 1864.

The case was heard before COUCH, Acting C. J., in a Division Court, on the 9th and 10th of February.

*The Honourable J. S. White* (with him *Marriott*) for the plaintiffs.

*Bayley* (with him *Mayhew*) for the defendants Harjívandás Pránjívandás and Dullabhchand Hukamchand.

The agreements were in the following form:—

• “*Due 1st July 1865.*

Memorandum of agreement made, this 26th day of

October 1864, between the Imperial Banking and Trading Company, incorporated under and by virtue of the Joint Stock Companies' Act, XIX. of 1857, of the Legislative Council of India (hereinafter referred to as the vendors), of the one part, and Pránjivandás Harjivandás and Company (hereinafter referred to as the purchaser) of the other part : Whereas the vendors, in consideration of the sum of Rs. 100 to them now paid by the purchaser, and of the further sum of Rs. 32,400 to be paid as hereinafter mentioned, agree to sell to the said purchaser, and the said purchaser agrees to buy from the vendors, one, No. 1188, share, of Rs. 10,000 (Rs. 5,000 paid up now) each, in the Bombay Reclamation Company, Limited, to be transferred as hereinafter mentioned, subject to the following conditions, namely :—

1866.  
 IMPERIAL  
 BANKING AND  
 TRADING CO.  
 v.  
 PRA'NJIVAN-  
 DA'S HARJI-  
 VANDA'S  
*et al.*

1st—That the purchaser shall pay the said sum of Rs. 32,400 to the vendors, on the 1st day of July next, or at such time before that day as the purchaser shall think fit.

2nd—That the purchaser shall, in addition to the said purchase-money, repay to the vendors all sums of money whatsoever they may, on or before the said 1st day of July next, pay for deposit or calls, or otherwise in respect of the said share, hereby agreed to be sold, upon or in respect of any second or other issue or allotment of new shares, which may be made on account of the said share, and become part and parcel thereof (whether the period limited for the payment of such sums, or any of them, shall have expired or not), with the interest on the amount of the second or other issue as aforesaid, at the rate of three quarters per cent. per mensem.

3rd—That on payment, at any time on or before the said 1st day of July next, of the said sum of Rs. 32,400, and of all such other sums (if any) and interest as aforesaid, the vendors will execute proper transfers, and do all such other things necessary on their part to transfer the share hereby agreed to be sold, and also all such new shares (if any), to the purchaser. All expenses attending the preparation, stamping, and execution of such transfers, and of getting the

1866.  
 IMPERIAL  
 BANKING AND  
 TRADING Co.

v.  
 PRA'NJI'VAN-  
 DA'S HARJI'-  
 VANDA'S  
*et al.*

said share transferred into the name of the purchaser in the books of the Bombay Reclamation Company, Limited, shall be borne by the vendors.

4th—That the vendors shall and will allow to the purchaser interest on the said sum of Rs. 100, at the rate of half per cent. per mensem, from the day of the date hereof, until the said share shall be transferred to the said purchaser, under the provisions of these presents.

5th—If the purchaser shall fail to comply with the above conditions, the sum of Rs. 100, the deposit, and all interest which may have accrued due thereon, shall be forfeited; and the vendors shall be at liberty to resell the share hereby agreed to be sold, and all such new shares as aforesaid (if any), at such time and in such manner as they shall think fit; and any deficiency in price which may happen on such resale, together with such sums of money as shall be paid in pursuance of the second clause of these presents, and interest on the amount of the new issue at the rate aforesaid, shall immediately afterwards be paid by the purchaser to the vendors, and, in case of non-payment, shall be recoverable by the vendors as liquidated damages.

6th—That if default shall be made by the vendors in transferring the said share to the purchaser, at the time and in the manner aforesaid, it shall be lawful for the purchaser to purchase, at the market rate of the day on which such default was made, on account and at the risk of the said vendors, an equal number of such shares, with an equal number of any new shares which may, at the time of the making of such default, have been issued or allotted in respect thereof; and the said vendors shall, immediately after such purchase, pay to the said purchaser the difference in price between the rate at which the said share is hereby agreed to be sold, and the market rate of the day on which such default was made, together with all costs and charges which the said purchaser may have incurred, in consequence of such default; and in case of non-payment, the same

shall be recoverable by the said purchaser as liquidated damages.

1866.  
 IMPERIAL  
 BANKING AND  
 TRADING CO.  
 v.  
 PRÁNJIVAN-  
 DÁS HARJÍ-  
 VANDÁS  
*et al.*

In witness, &c.



Pránjivandás Harjivandás & Co.,

By Nálchand Mánikchand."

The plaint averred performance of conditions precedent generally; and stated the resale of the shares by auction pursuant to clause 5 in the agreements, a loss on such resale, a demand from the defendants of the amount of such loss, and a refusal by the defendants to pay the same. The plaint also claimed interest on the sum of Rs. 41,718-8-0, at nine per cent. per annum, from the 1st of July 1865 until payment.

Two of the defendants, namely, Harjivandás Pránjivandás and Dullabhchand Hukamchand, filed a written statement, in which they alleged: (1) That the contracts, in the plaint mentioned were wagering contracts, within the meaning of Act XXI. of 1848; (2) That the said contracts were entered into by the plaintiffs, on behalf of other persons; and were entered into, in the form in which they appear, in order to screen the real nature of the said contracts as wagering contracts; and that the plaintiffs were not authorised to enter into the said contracts in any other way, than as contracts for the payment of differences, and as wagering contracts; (3) That the said contracts were not partnership contracts of the said firm of Pránjivandás Harjivandás and Company; (4) That the said plaintiffs were not ready and willing to deliver the said shares to the defendants; and that no offer of the said shares was made to the defendants, or either of them, or to any person on their behalf.

The other defendants did not appear at the trial.

The following issues were settled:—

1866.  
 IMPERIAL  
 BANKING AND  
 TRADING CO.  
 v.  
 PRA'NJI'VAN-  
 DA'S HARI-  
 VANDA'S  
*et al.*

(1) Whether the plaintiffs were ready and willing to perform the contracts on their part; (2) whether the contracts, or either of them, are wagering contracts within the meaning of Act XXI. of 1848. And the Judge refused, on the application of *Bayley*, the counsel for the above two defendants, to frame the issue "whether the defendants were bound by the contracts."

It was proved that the plaintiffs, at the time they entered into the contracts, were in possession of the shares mentioned therein respectively; that they continued in possession of them, until they sold them, after default made by the defendants; that on the 1st of July they were registered in the books of the company, as holders of these shares; that they became so on the 28th of October and 5th of November respectively; that on the 1st of July the share certificates, with transfer deeds in blank, were tendered to the defendants, and that the defendants refused to accept them or to pay the purchase-money.

The plaintiff's counsel elected not to proceed against the defendants, Nálchand Hukamchand and Devchand Hari-chand; and ultimately also against the defendant Gopálráv Balvantráv, the Court being of opinion that there was no evidence against him.

*Our. adv. vult.*

COUCH, C.J.:—In this case, the defendants not having offered any evidence on the issue, whether the contracts were gaming or wagering contracts, the only question is, how the issue, whether the plaintiffs were ready and willing to perform the contracts on their part, ought to be found.

In considering this question, it is most important, I think, to look at the precise terms of the contract, which are in writing and in English. It appears to me that cases have been occasionally cited, in the course of this and similar cases tried in the High Court, which are not precisely applicable; because the words of the contracts in the cases cited were not the same as those which occur in the case now before the Court. [His Lordship here read the material portions of the contract.]

Now, when I examine the terms of this contract, I find that it provides, that the purchaser may, at any time between the making of the contract and the 1st of July, pay the purchase-money, and call on the vendors to transfer the shares to the purchaser. Certainly, with regard to the period previous to the 1st of July the purchaser is bound to take the first step, by giving notice to the vendor, that he is ready to pay the money, and requires to have the shares transferred. Then, as to the 1st of July itself, I find, on looking at the actual terms of the contract, that it is provided, that, on payment on that day, of Rs. 32,400, the vendors shall execute transfers of the shares. Here again, in strictness, the first step should be taken by the purchaser, namely, the payment of the purchase-money. However, I should say the proper way to regard the acts necessary to be done on the 1st of July by both parties, is to treat them as concurrent acts.

Then treating them as concurrent acts, let us see what the plaintiffs would be bound to do, in order to show that they were ready and willing to perform the contracts on their part. In considering this, it is very important to observe that no particular place is fixed for making the transfer.

And this appears to distinguish the present case from those cases which have been cited relating to contracts for the sale of South Sea stock. In those cases the transfer was to be made at the office of the company; and then, no doubt, on an issue of readiness and willingness, it would be necessary for the vendor to prove that he actually went to the office of the company, and was there ready to have transferred the stock, if the purchaser had been there, and would have accepted it. There is no such provision in the present contracts; and I am inclined to think that this circumstance makes many of the old cases on this subject inapplicable to the present case, where the instrument of transfer may be executed at any place, and it is only necessary to have it registered at the office of the company.

There being no evidence to show that the plaintiffs demanded a performance of the contract before the 1st of July,

1866.

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 IMPERIAL  
BANKING AND  
TRADING Co.

 v.  
PRA'NJIVA-  
DA'S HAJJI'-  
VANDA'S  
et al.

1866.  
 IMPERIAL  
 BANKING AND  
 TRADING Co.  
 v.  
 PRA'NJI'VAN-  
 DA'S HAJI'-  
 VANDA'S  
 et al.

I must treat the contract as one to be performed on that day. Now, the rule of law applicable to such a case appears to be very clearly laid down, in the notes to *Cutter v. Powell* in Smith's Leading Cases. (a): "When two acts are to be done *at the same time*, as where A covenants to convey an estate to B on such a day, and in consideration thereof B covenants to pay A a sum of money *on the same day*, neither can maintain an action, without averring a performance, or an offer to perform, on his own part, though it is not certain which of them is obliged to do the first act; and this particularly applies to cases of sale." \* \* \*

Mr. Smith goes on to say, "The authorities on which these rules depend will be found cited and discussed in the notes by Serjeant Williams above referred to (b). It is proper to add that, when it is laid down that *performance of a concurrent act must be averred*, the meaning of that is, that the plaintiff must aver in his declaration that he was *ready and willing* to perform his part of the contract; and this averment will be proved by showing that he called on the defendant to accomplish his: *Wilks v. Atkinson* (c), *Levy v. Lord Herbert*." (d)

Considering the high authority which Mr. Smith was on such matters, it appears unnecessary to consider the cases upon which this passage is founded. That of *Levy v. Lord Herbert*, however, is a very strong case on the point; because it was one in which the Judges would have been disposed to hold the party most strictly bound by any rule of law. *Dallas*, C. J., says:—In *Wilks v. Atkinson*, *Gibbs*, C. J., held it too clear to bear question, that an averment that the plaintiff was ready and willing to accept and pay for the oil, without averring an offer, was good, and that no evidence either of an offer or readiness was necessary. This is a contract of a most immoral tendency: and we should be very glad to help the defendant against it, if we could; but we cannot."

(a) Vol. II., p. 14, 5th Edn.

(b) 1 Wms. Saund., 320, n. 4, and 2 Wms. Saund. 352, n. 3.

(c) 1 Marsh. 412.

(d) 7 Taunt. 341; 1 B. M. 56, by Dallas, L.C.J.

This shows how very strongly the Judges felt bound by the rule of law, that it is not necessary to aver or prove anything more than readiness and willingness on the part of the plaintiff to perform the contract; and that an actual offer to pay the money is unnecessary.

As also illustrating what is necessary to be done by a party to a contract of this description, the case of *Rawson v. Johnson* (e) may be referred to. It was there held that, in an action for the non-delivery of malt, which the defendant had undertaken to deliver, on request, at a certain price, it is sufficient for the plaintiff, in his declaration, to aver such request, and that he was ready and willing to receive the malt, and pay for it according to the terms of the sale, but that the defendant refused to deliver it; without averring an actual tender of the price. *Le Blanc, J.*, in his judgment says: "According to the cases which have been determined on this question, neither of the parties was bound to do the first act, or to perform his part of the agreement before the other. If so, then neither can be bound to state that in pleading which is equivalent to performance. Now a tender and refusal has always been deemed to be equivalent to performance; therefore, as performance in this case was not necessary, neither was it necessary to aver that which was equivalent to it. But all that is required of the plaintiffs to show is, that they did everything which they were bound in fact to do. Then if they show that they were ready to pay the price, provided the defendant were ready to deliver the malt, that is all that was necessary for them to do; and consequently their pleading a readiness to perform is equivalent to everything that they were bound to perform, where the defendant refused to perform his part."

Now, to apply this principle to the present case. The plaintiffs are bound to show that they were ready and willing to transfer the shares to the defendants on the 1st of July, and to do all other things specified in the contract to be done by them. They were not bound to make an actual tender of the transfer deed, but only to prove that, during the time they were liable to be called upon to perform the

(e) 1 East 203.

1866.  
 IMPERIAL  
 BANKING AND  
 TRADING CO.  
 v.  
 PRA'NJI'VAN-  
 DA'S HARJI'  
 VANDA'S  
 et al.

contract, they were able and willing to make the transfer, and do all things necessary to complete it.

The evidence shows that the plaintiffs were on the 1st of July, the registered holders of the shares, and were perfectly able and willing, on that day, to make a valid transfer, if the defendants had been ready to pay the price. They appear to me, therefore, to have done everything that it was necessary for them to do on that day; and they were not bound to take any further step, until the purchase-money was paid by the defendants; and I am of opinion that the issue of readiness and willingness must be found in their favour.

There was another point raised in the case, namely, as to the defendants being only agents in making the contract. I refused to raise an issue on that; because the contract was reduced to writing, and was made by the defendants, in their own names. This is not any question as to the operation of the Statute of Frauds (argued by the defendants' counsel) on such contracts. It is merely a case of parties contracting in writing; and in such a case, the written instrument must be taken to be the actual contract. The defendants have by writing contracted as principals. No doubt, if a party contracting as a principal, should turn out to be an agent, it is possible that the party, for whom he is agent, may be liable on the contract; but that does not lessen the liability of the person who has actually entered into the contract.

The law on this point is so clearly laid down in Story on Agency, Sec. 269, that it is unnecessary for me to dwell further on the point; and I shall merely say, with reference to my refusal to raise the issue as to agency, that I do not consider there is anything in the Code of Civil Procedure which imposes upon me the duty of allowing an issue to be raised on a point of law which I consider to be perfectly clear.

I, therefore, find the issue as to readiness and willingness in favour of the plaintiffs, against the three defendants, who have been retained in the case; and I give judgment against them for the amount claimed.

*Judgment for plaintiffs with costs.*