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a letter to all who had signed the memorandum of association for [657] the Rs. 10 deposit call, and he agreed." This was clearly an irregular proceeding which would not bind the company or its subscribers in such an important matter as the application for and acceptance of shares—*Howard's Case* (1). The directors did not act as a board, nor was the consent of a quorum obtained.

But it is not necessary to rest my decision on the irregularity and want of authority. The consent was not obtained to any application for shares, nor was there any acceptance of any particular offer to take shares. The letter itself does not amount to more than a request for the deposit on the shares applied for. That deposit is usually made before or at the time when the application is sent to the directors. But in this case there was no actual application—only a signature which became an application when the company was registered. So that the deposit had to be called in by the company. But it was only the ordinary deposit money required as a guarantee of the *bona fides* of an application for shares. The resolution of the Board, which is contained in the minutes of the meeting of the 25th September, puts the real meaning of the letter of the 3rd August beyond all doubt. The resolution is as follows:—Resolved that the shares *applied for* be allotted and *application* and allotment moneys be called in." It is quite clear that up to that date Mr. Lamb's application had not been made a binding agreement by acceptance. This repudiation, therefore, of the 5th August was in time, and he cannot be held liable as a shareholder of the company. The company must pay the costs, including the costs of the application for a re-hearing.

Attorneys for the plaintiffs:—Messrs. *Bomanji and Hormasji*.

Attorneys for the defendant:—Messrs. *Macfarlane, Edgelow, and Hemming*.

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Before Mr. Justice Farran.

HAJI FAKIR MAHOMED (*Plaintiff*) v. SHAIK ABDULLA
(*Defendant*).^{*} [24th June, 1887.]

Specific performance—Suit by vendee against vendor—Delay of vendee in completing—Rescission of contract by vendee—Time of the essence of the contract—Extension of the time stipulated for—Effect of such extension—Conditional waiver of performance within stipulated time—Notice to complete—Unreasonable notice.

On the 26th February, 1886, the defendant purchased a house from C. for Rs. 4,500 and paid C. a considerable portion of the purchase-money. Before the transaction was completed, and the conveyance executed, the defendant, on the 23rd June, 1886, by an agreement in writing, of that date, agreed to sell the house to the plaintiff at an advanced price of Rs. 4,800. The defendant was anxious that the sale should be completed in a short time, as the draft of the conveyance by C. to himself had been prepared, though not finally approved, and the house was in bad repair and in a somewhat dangerous condition. He had applied to the Municipality for leave to repair the house, and the monsoon season had begun. Ultimately it was agreed between him and the plaintiff that the plaintiff should complete the purchase within twelve days from the date of the agreement.

^{*} Suit No. 9 of 1887.

(1) L. R. 1 Ch. 561.

(23rd June 1886), and this was duly inserted in the agreement. During the twelve days the plaintiff took no steps to have his conveyance prepared, but asked the defendant for a month's time to complete, saying that he had not the money with him. After some hesitation the defendant extended the time to the 10th August. On the 21st July, at latest, the drafts of the conveyance from C. to the defendant were formally and finally approved, and the defendant was anxious to complete the sale to the plaintiff. On the 23rd July he wrote to the plaintiff, reminding him that the time to complete would expire on the 9th or 10th of August, and requesting him to be prepared then to complete the purchase; otherwise he would consider the agreement of the 23rd June to be null and void, and would himself begin to repair the house. The plaintiff sent no reply to this letter, but at an interview with the defendant told him that he was considering the matter. He, however, took no steps in the matter beyond getting a draft conveyance prepared. The deed of conveyance by C. to the defendant was ready for execution on the 3rd August. Matters remained in this state until September. On the 7th September the defendant through his solicitors served a notice on the plaintiff, requiring him to carry out the agreement of the 23rd June, and giving him notice, that in default of compliance within four days, he would consider the agreement at an end. The four days having expired without the plaintiff sending a reply or taking any steps to complete, the defendant considered his contract with the plaintiff to be at an end, and on the 13th September he completed his purchase from C. without reference to the plaintiff. If the plaintiff had been ready to complete the purchase, the conveyance to him by the [659] defendant and the conveyance by C. to the defendant would have been executed simultaneously. Immediately after taking the conveyance from C., the defendant began to repair the house. When the repairs were almost complete, the plaintiff on the 5th October, 1886, sent a notice to the defendant requiring him to specifically perform the agreement of the 23rd June, 1886. The defendant refused, and the plaintiff filed this suit for specific performance.

Held, on the evidence, that the delay in completing the purchase was the delay of the plaintiff, and not of the defendant.

Held, also, that, having regard to the circumstances under which the contract with the plaintiff was made and to the nature of the property, the time stipulated for the completion of the purchase was of the essence of the contract, and that the extension of time granted at the plaintiff's request to the 10th August operated only as a waiver to the extent of substituting the extended time for the original time, and did not destroy the essentiality of the time—*Barclay v. Messenger* (1). The defendant's letter of the 24th July was but a timely warning to the plaintiff that the contract would not be kept in suspense after the extended time had expired. The plaintiff though thus warned took no steps to complete, and was not, therefore, in a position to enforce performance from the defendant after the 10th August had gone by.

It was contended for the plaintiff that the letter of the 7th September, written by the defendant's solicitors, treated the contract as then still subsisting, and purported to put an end to it if not completed within four days; that the time so allowed was unreasonable; that the defendant, in fact, by that letter waived the plaintiff's previous default, and gave the plaintiff a fresh starting point.

Held, that such was not the effect of the letter. The letter was only a qualified and conditional waiver of the performance within the stipulated time, the condition being that the plaintiff should complete within four days. That condition not having been complied with, the waiver could not be relied on—*Barclay v. Messenger* (1); *Stewart v. Smith* (2).

Quære—Whether under all the circumstances of the case, and assuming time not to have been originally of the essence of the contract, the four days' time limited by that letter was unreasonable.

SUIT by vendee for specific performance.

The plaint stated that by a contract dated the 23rd June, 1886, the defendant agreed to sell to the plaintiff a certain house situate in Masjid Cross Lane, in Bombay, for Rs. 4,850, and that the defendant subsequently refused to carry out the contract. The plaintiff prayed for specific performance of the contract.

(1) 43 L. J. Ch. 449.

(2) 6 Hare 222.

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The material part of the contract was as follows :—

" There is one house situated in Masjid Cross Lane. * * * The said property has been from before up to this day in the occupation of Jamilabibi, the widow of [660] Mahomed Syed Chimkar, and her children and tenants. * * * By a writing, *i.e.*, the bargain paper dated the 25th February, 1886, I have contracted to purchase from the said Jamilabibi, the widow of Mahomed Syed Chimkar, Gulam Ahmed bin Mahomed Syed Chimkar, Abdul Kadar bin Mahomed Syed Chimkar, Gulam Mohidin bin Syed Chimkar, Fatmabibi, daughter of Mahomed Syed Chimkar, and Aminabibi, daughter of Mahomed Syed Chimkar, the said property, *i.e.*, the house together with the land bounded on the four sides as thus mentioned, for Rs. 4,500, namely four thousand and five hundred. I have this day made this bargain to sell to you the said house subject to the terms and conditions mentioned in the said bargain paper. The price thereof has been fixed at Rs. 4,850, namely four thousand eight hundred and fifty. Out of the same I have this day received from you Rs. 350, namely three hundred and fifty, in cash as earnest (money), and as to Rs. 4,500, namely four thousand and five hundred, which shall remain due out of the same Rs. 2,400, namely two thousand and four hundred, I am duly to receive at the time of the execution of the deed of sale in the Registry Office. And at that very time I am duly to get, according to the terms of the said bargain paper, the transfer in respect of the mortgage deed for Rs. 2,000, namely two thousand, settled, and as to balance of Rs. 100, namely one hundred, remaining due from you the same you shall duly pay on my behalf to the said Jamilabibi Gulam Ahmed, Abdul Kadar, Gulam Mohidin, Fatmabibi and Aminabibi after the said house shall have been transferred to your name in the assessment books of the Collector (of Land Revenue). As to the charges for writing the conveyance or assignment which you may get prepared in respect of the said sale and for stamps and for registration, whatever the same may amount to, all those are duly to be paid equally by me the vendor and you the purchaser half and half. And as to bills for the said house, releases, attorney's bills and whatever other papers relating to the same which I may receive from the said Jamilabibi and others, all those I shall duly give to you at the time of the execution of the deed of sale, and according to the condition (mentioned) in the said bargain (paper) I shall take possession of the said house on that very day and similarly I am duly to hand over the same accordingly to you. Agreeably to the terms of the said bargain (paper) I am duly to give possession of the said house (to you) after getting everything cleared. This bargain has been made through brokers Mahomed Husson Chinde, Abdul Guffur Ghansar, and Mahomed Husson Murke, I, *i.e.*, the vendor, am duly to pay their brokerage at the rate of one *per cent.*, and you, *i.e.*, the purchaser, shall duly pay the said brokers Rs. 21, namely twenty-one, in the lump. *The time fixed in respect of this bargain is 12, namely, twelve days.* Within that period I am duly to hand over the said house in the same state in which it is this day. I have of my free own will and pleasure and in sound mind written and delivered this bargain paper. It is duly agreed to and approved of by me, my guardian, heirs, and representatives. The 23rd of June, the English year 1886."

The defendant admitted the making of the agreement, but contended that in consequence of the plaintiff's conduct he (the defendant) had become entitled to rescind, and that he had done [661] so, and that the

plaintiff was not now, therefore, entitled to have the contract enforced against him.

The defendant's case was that on the 26th February, 1886, he had himself agreed to purchase the house in question from the Chimkar family for Rs. 4,500; and that on the 23rd June, 1886, he entered into the agreement to sell it to the plaintiff for the advanced price of Rs. 4,850. At the time of this last agreement the conveyance to himself had not been executed, but was nearly ready for execution. As the house was in bad repair, and the monsoon season had begun, he stipulated with the plaintiff that the purchase should be completed within twelve days from the date of the agreement (23rd June, 1886), the arrangement being that the conveyance of the house by the Chimkars to him and the conveyance by him to the plaintiff were to be executed at one and the same time.

Before the expiration of the twelve days mentioned in the agreement it was agreed that the time for the completion of the purchase by the plaintiff should be extended for a month, *viz.*, to the 10th August.

On the 24th July, 1886, the defendant wrote the following letter to the plaintiff :—

“After compliments be it known to you that I made a contract on the 26th February with the heirs of the late Mahomed Syed Chimkar with certain conditions to purchase from them the house situate in what is now called Nizampura. On the 23rd June, 1886, you made a contract with me for the purchase of the said house on the same terms for Rs. 4,850. Before the expiration of the time mentioned in your contract for the completion of the purchase a further extension, for which you had applied to me for completion of the purchase, was granted to you which will expire on the 9th or 10th August. There being no walls on either side of the said house it is now in a very dilapidated state, and it is necessary that immediate repairs should be made to it. And the heirs of Mahomed Syed Chimkar are pressing very hard. I, therefore, write to you that you should prepare your necessary documents and get them approved by me, and complete the purchase in the said time. If you do not, I will, after the said period, consider your contract of the 23rd June as cancelled, and will proceed with the repairs, and under the circumstances the earnest-money paid by you will not be returned to you. On the contrary you will be responsible for the damage which will be sustained (by me).”

[662] To that letter the plaintiff sent no reply, but at an interview he subsequently had with the defendant he stated (as the defendant alleged) that he could not complete for want of money. On the 7th September, 1886, the defendant caused his solicitor to write the following letter to the plaintiff :—

“We are informed by our client Shaik Abdulla bin Mahomed Chabuk Sowar that by an agreement made between you and our said client in the Gujarati language, dated the 23rd day of June last, you agreed to purchase from our said client the house in 8 Nizampura Street in terms of the agreement under which he has agreed to purchase the same from the representatives of the late Mahomed Syed Chimkar of the 23rd February, 1886, for the price or sum of Rs. 4,850. That although the time within which you were under your aforesaid agreement bound to get the necessary documents in respect of the said purchase prepared and executed expired long ago, and notwithstanding his application to you in writing on the 24th day of July last you have failed to carry out the said agreement of the 23rd June last.

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We are informed that, owing to your neglect to carry out your part of the said agreement of the 23rd June, our client has sustained heavy loss, and his vendors threaten our client with proceedings for the performance specifically of his agreement of purchase with them. Our client, therefore, requires you to specifically carry out your part of the said agreement of the 23rd June last and to make good the damages which our client has already sustained, and we have to give you notice that should you fail to comply with the above requests within four days from the service hereof our client will consider the said agreement of the 23rd June at an end, and you will forfeit the earnest money paid by you at the execution of the agreement, and he (our client) will take such steps against you as he may be advised to require from you the damage and loss that he (our client) has already sustained and may hereafter sustain.

"Yours truly,
 TYABJI AND DAYABHAI."

The plaintiff sent no reply to that letter, and (according to the defendant) took no steps to complete the sale. When four days had expired, the defendant, considering his contract with the plaintiff to be at an end, completed his purchase from the Chimkars without reference to the plaintiff, and at once began to repair the house. He alleged that he spent upwards of Rs. 1,200 on the repairs, and he claimed to be repaid the said sum in case the Court should decree specific performance of the contract with the plaintiff.

On the 6th October, 1886, when the repairs were almost complete, the plaintiff through his attorneys called upon the defendant [663] to execute a conveyance of the house, and to perform the contract of the 23rd June, and on the 7th January, 1887, he filed this suit.

In his evidence the plaintiff swore that he was always ready and willing to complete the purchase, and that the delay was wholly due to the defendant. He denied that he had ever received the above letters of the 24th July and the 7th September.

Macpherson and Inverarity, for the plaintiff.—They cited *Green v. Sevin* (1); *Crawford v. Toogood* (2).

Lang and Kirkpatrick, for the defendant:—They cited *Nott v. Riccard* (3); *Macbryde v. Weekes* (4); *Barclay v. Messenger* (5); *Howe v. Smith* (6); Fry on Specific Performance (2nd ed.), pp. 466, 469.

JUDGMENT.

24th June, 1887. FARRAN, J.—The plaintiff in this case seeks to enforce against the defendant specific performance of a contract dated the 23rd June, 1886, by which the defendant agreed to sell to the plaintiff a house No. 8, in Masjid Cross Lane which the defendant had contracted to purchase from Jamilabibi, the representative of the Chimkar family. The defence is that the defendant is entitled to rescind and did rescind this contract, and that the plaintiff is, therefore, not now entitled to have the same enforced. There is a subsidiary question whether, assuming the plaintiff to be entitled to enforce the contract, he can do so without allowing to the defendant the sums expended by the latter on the repairs of the house.

(1) L.R. 13 Ch. Div. 589.

(2) L.R., 13 Ch. Div. 153.

(3) 22 Beav. 307.

(4) 22 Beav. 533.

(5) 43 L. J. Ch. 449.

(6) L.R. 27 Ch. Div. 89.

The main issues raised were:—

1. Whether the plaintiff was ready and willing to carry out the agreement in the plaint mentioned within the time fixed by the parties for the completion thereof.

2. Whether the defendant was entitled to rescind the said agreement, and whether he lawfully rescinded the same.

Under the defendant's contract with the Chimkars he was to pay Rs. 2,500 in cash and was to execute a mortgage of the premises in their favour for the balance of Rs. 2,000 payable in two [664] years. This contract has not been put in evidence. The contract sued upon (Ex. B) addressed by the defendant to the plaintiff is, in effect, as follows, the portions immaterial to the questions at issue being omitted.

"There is one house, No. 8, in Masjid Cross Lane. By a bargain paper dated the 25th of February, 1886, I have contracted to purchase the said property from Jamilabibi, Gulam Ahmad Chimkar (and the other members of Chimkar family naming them) for Rs. 4,500. I have this day made this bargain to sell to you the said house subject to the terms, &c., conditions mentioned in the said bargain paper. The price thereof has been fixed at Rs. 4,850. Out of the same I have this day received from you Rs. 350 as earnest, and as to Rs. 4,500, which shall remain due out of the same Rs. 2,400, I am duly to receive at the time of the execution of the deed of sale in the Registry Office, and at that very time I am duly to get according to the terms of the said bargain paper the transfer in respect of the mortgage-deed for Rs. 2,000 settled. And as to the balance of Rs. 100, the same you shall duly pay on my behalf to the said Jamilabibi, &c., after the house shall have been transferred to your name in the assessment books of the Collector. As to the charges for writing the conveyance or assignment which you may get prepared in respect of the said sale, &c., for stamps, &c., for registration, whatever the same may come to, all these are duly to be paid equally by me the vendor and you the purchaser half and half. And as to the bills and papers relating to the said house which I may receive from Jamilabibi and others, all those I shall duly give to you at the time of the execution of the deed of sale. And according to the condition mentioned in the said bargain paper, I shall take possession of the said house on that very day, and similarly I am duly to hand over the same accordingly to you. I am duly to give possession of the said house to you after getting everything cleared. This bargain paper has been made through brokers Mahomed Huson Murke, Abdul Guffur Ghausar and Mahomed Huson Coinde. *The time fixed in respect of this bargain is 12, viz., twelve days.* Within that period I am duly to hand over the said house in the same state in which it is this day."

[665] The material facts in the case I hold to be proved as follows:— When the contract was being settled, there was some discussion as to the time to be fixed for its performance. The defendant suggested four or five days; the plaintiff wanted a month; twelve days were ultimately settled and inserted in the contract. The defendant was anxious to fix a short time, as the drafts of the documents to be executed by the Chimkars, had all been prepared; and though they had not been formally approved by the Chimkars, there was no difficulty raised by them about the terms and because the house was in very bad repair and in a somewhat dangerous condition. The defendant had shortly before applied to the Municipality for leave to repair the house, and on the 31st May had been informed

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that no leave was necessary (Ex. No. 2). The plaintiff during the twelve days agreed upon for performance took no steps to have his conveyance prepared, but during their currency asked the defendant for a month's time to complete, saying that he had not the money with him. The defendant after demurring for some time allowed an extension, which expired on the 9th or 10th of August following. On the 21st July at latest, the drafts of the documents which were to pass between the defendant and the Chimkars were all formally and finally approved, and the defendant was then in a position and anxious to complete with the plaintiff, and accordingly on the 24th July he got his son to write in his name to the plaintiff a letter of that date of which Ex. No. 3 is a copy. The letter after referring to the contracts of the 26th February and of the 23rd June proceeds thus:—

“And before the expiration of the time fixed in your said agreement for completing the said agreement I at your request gave you further time to complete the sale of the said house, which further time will expire on the 9th or 10th of the month of August next. And as the said house is now in a ruinous state there being no walls on both the sides, and as it is necessary to repair the same quickly, and as the heirs of Mahomed Syed Chimkar are making a pressing demand, I therefore request you to cause to be prepared within the fixed time such of your documents as are to be prepared and to have the same approved by [666] me and to complete the sale. Otherwise after the expiration of the said time I will consider your said agreement of the 23rd June to be null and void and I will commence to repair the said house, and in this case the earnest-money paid by you will not be repaid to you. Nay, whatever damages may be sustained in consequence thereof will be recovered from you.”

This letter was duly delivered to the plaintiff. He sent no reply to it, but a few days afterwards the defendant met him and asked him whether he had received the letter, and urged him to be quick. The plaintiff then told the defendant that he was considering the matter. He also told the defendant at the same or subsequent interview that he (the defendant) need not be afraid that he had spoken to the Chimkars, but that in effect he could not complete at once, as his money was with other merchants.

After receiving this letter of the 24th July, and no doubt in consequence of it, the plaintiff got the Chimkars' drafts, which were then approved, and he and the brokers M. H. Murke and Abdul Guffur took them to the pleader Mr. Shamrav Maneckji and got him to prepare a draft conveyance, Ex. P. The plaintiff, however, took no further steps beyond getting the draft conveyance drawn (or possibly engrossed Ex. G.); he did not even send it to the defendant for his approval. The Chimkars' drafts were apparently engrossed on the 3rd August.

Nothing thus remained to be done by the defendant but to execute the Chimkars' documents and those of the plaintiff, and thus to wash his hands of the whole transaction, upon which he would have made after paying his share of the expenses, but a very small profit. There is no reliable proof to show that the Chimkars were, in fact, pressing the defendant to complete. They knew of the defendant's contract with the plaintiff, and probably for that reason were not in a hurry. They had received a considerable portion of their purchase-money from the defendant, and I am inclined to think rather played into the plaintiff's hands.

Matters remained in this state until September. On the 7th of that month the defendant served a notice, through Messrs. Tyabji and Dayabhai, on the plaintiff of which Ex. No. 6 is [667] the press copy. That letter, after referring to the contract of the 23rd June and to the defendant's letter of the 24th of July, complains that the plaintiff had failed to carry out the agreement, and continues thus:—

"We are informed that, owing to your neglect to carry out your part of the said agreement, of the 23rd June, our client has sustained heavy loss, and his vendors threaten our client with proceedings for the performance specifically of his agreement of purchase with them. Our client, therefore, requires you to specifically carry out your part of the said agreement of the 23rd June last, and to make good the damage which our client has already sustained. And we have to give you notice that, should you fail to comply with the above request within four days from the service hereof, our client will consider the said agreement of the 23rd June last at an end, and you will forfeit the earnest-money paid by you at the execution of the agreement, and our client will take such steps against you as he may be advised to recover from you the damage and loss that he or our client has already sustained or may hereafter sustain."

On the evening of the same day the plaintiff came to the defendant's house and said to the defendant, "Why did you send me a notice? I am trying to pay you." He asked for further time—a fortnight or twenty days, when he said he would complete. The defendant refused to give any further time, but told the plaintiff that if he wanted any further time, to send a written reply stating what time he wanted, meaning that he would only consider the application if made in the formal manner. The plaintiff to that said nothing, and left. Chinde giving an account of the same interview says, "The plaintiff said you have sent me a notice which I have received. Why did you send it? I will settle it all in a few days if you give me time." The defendant said, "I have sent a notice through a *vakil*. I don't want further to discuss the matter. If you want to say anything you should do it through your *vakil*." Nur Mahomed Kashmiri, who says he also was present at this interview; says that the defendant refused to give any further time, saying to the witness that the house was in danger. Before the expiration of the four days [668] mentioned in the notice, *i.e.*, of the 7th September, the plaintiff took no steps to complete the contract, and sent no reply to the defendant's notice. When the four days expired without the plaintiff sending a reply, or taking any steps to complete, the defendant considered his contract with the plaintiff to be at an end, and on the 13th of September completed his purchase from the Chimkars without further reference to the plaintiff. The reason why the plaintiff did not complete at the time was, I consider, because his money was locked up in his business. If he had been ready to complete, his documents and the Chimkars' documents would all have been executed simultaneously.

Almost immediately after the completion of his contract with the Chimkars—probably on the 14th, 15th, or 16th of September, the defendant began to repair the house, and for that purpose to dig the foundations for a side wall. The plaintiff is the owner of the immediately adjoining house, and it was for this reason that he was anxious to buy the house in question, so that he might alter his own house without objections from the occupants of the adjoining house. While the defendant was digging the foundations for the side wall, the plaintiff came and complained that his land

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had been encroached upon. A boundary line was eventually drawn by the defendant's builder, which satisfied him, and the work of building the wall proceeded. I shall consider presently the evidence as to whether at this time the plaintiff insisted on his agreement for purchase being in existence, and whether he required the defendant to desist from proceeding with the repairs. He did not tender any conveyance to the defendant, or offer to pay him the purchase-money.

When the main portion of the repairs had been completed, the plaintiff on the 5th October, 1886, sent a solicitor's notice to the defendant requiring him to specifically perform his contract with the plaintiff. The defendant under the above circumstances refused to do so. A correspondence ensued, and this suit was filed on the 7th January, 1887.

It will be observed that the above statement of facts is based upon the evidence given by and on behalf of the defendant, supplemented by the endorsements and the documents put in by [669] the plaintiff and by the evidence of the pleader whom he has called. The account given by the plaintiff is wholly different. I am quite unable to accept his version as trustworthy, or to regard the witnesses whom he has called as witnesses of truth, other than the witness Shamray and those who have given but formal evidence. The plaintiff in the first place denies that the notice of the 7th September was ever served upon him, and that he ever received the defendant's letter of 24th July; it was not and could not have been disputed that the notice of the 7th September was written on that day by the defendant's instructions in the office of Messrs. Tyabji and Dayabhai. Its press-copy appears in its proper place in the press-copy letter book of that firm, and the defendant and Mahomed Husson Chinde both affirm that it was written on that day. The defendant says that it was sent out for service on this same day by a clerk of the firm accompanied by Mahomed Husson Chinde. The clerk, Abdul Rahman Chimkar, was called, who swears that he served the notice on the plaintiff near his shop. The clerk next day made an endorsement of service, in the usual course, in the press-copy letter book. It appears there in proper form. This witness is quite independent. It is almost impossible to believe that he gave false evidence and forged an endorsement without at least some object, and none is suggested. He is corroborated by Chinde. They were cross-examined skilfully as to details, and no discrepancy between their statements was brought out. Chinde, though an intimate friend of the defendant, seemed to be a respectable witness. The improbability of the defendant getting such a notice written and not serving it is very great. If the writing of and the not serving this notice was an elaborate scheme, the sending of it would have been prominently brought out in the first letter the defendant got written in answer to the plaintiff's demand. It is not so, but is only noticed in the latter correspondence. Gulabchand proves that it and the letter of 24th July were both brought to his notice when he drafted Ex. D.

Against all this I have to weigh the bare denial of the plaintiff. I have no hesitation in disbelieving it. The notice of the 7th [670] September refers to the defendant's Hindustani letter of the 24th July. This alone goes a long way towards proving that that letter was sent. That it was delivered to the plaintiff, is proved by the defendant, who says that he gave it to his son Mahomed accompanied by Chinde to take to the plaintiff and by Mahomed and Chinde who say they took it. The boy Mahomed impressed me very favourably, and Chinde's being sent with

him and with the subsequent letter of the 7th September is accounted for by the fact that he was defendant's broker in this transaction, Abdul Guffur being the plaintiff's. The date of this letter dovetails neatly with two other dates relied on by the plaintiff, the final approval of the drafts by the Chimkars on the 21st July and the plaintiff giving instructions for the draft conveyance to Shamrav at the end of that month. The defendant is probably in error that the drafts had been approved by the Chimkars when he made the contract with the plaintiff. He was not positive on the point. The drafts were, no doubt, then ready for approval. The defendant is more probably skilled in training horses than in the intricacies of legal conveyancing.

The fact of these two letters being sent to the plaintiff and not replied to, cuts the ground, so to speak, from under the plaintiff's whole case. There are, moreover, other reasons for distrusting it. That case is that the plaintiff was very anxious to purchase this house; that the Chimkars were on hostile terms with him, and would not sell to him; that when he agreed to purchase the house from the defendant he had the purchase-money lying idle by him, and continued so to put off until he filed this suit. His case further is that after his contract he was constantly pressing the defendant to complete, but that the defendant put him off from time to time, at first saying that the Chimkars delayed approving the drafts and that they had to be kept in ignorance of the plaintiff's purchase from him, and subsequently that the Chimkars had heard of the plaintiff's contract and for that reason refused to complete, and that he was not informed when the Chimkars did in fact complete, but when he heard of it he at once sent the notice of the 6th October to the defendant. That the plaintiff was anxious to purchase the house, is no doubt true, and probably for the [671] reason he has stated. That the Chimkars were on hostile terms with him, and did not wish that he should become the owner of their house, is not supported by evidence. No doubt they wrote to him in June, 1885, complaining that he was interfering with their ancient lights, &c., but he desisted and nothing more was done in the matter. The plaintiff says that the Chimkars were unfriendly to him. The defendant and Chinde say that there is no ground for that allegation, and point in proof to the fact that the contract between the defendant and the Chimkars, which was executed in their house, was attested by the plaintiff. This is not explained by the plaintiff. That it was intended to keep the plaintiff's contract concealed from the Chimkars, I believe to be quite untrue. The terms of the contract itself and its general tenor show this not to be so. The defendant says that the Chimkars were informed throughout. If it had been intended to conceal it from them, a Chimkar would hardly have been selected to serve the notice of the 7th September on the plaintiff. It is true that the plaintiff had a sum by him in February sufficient to purchase the house, but that he continued to keep it ready, rests on his own assertion. About the time when he was called on to carry out the contract, he opened a second piece-goods shop. This may possibly account for his statement to the defendant that his money was locked up. It is unaccountable, if his case as to the money be true, that from June to October he should not have hastened the defendant's action by a single written request to complete, and should have rested content with the silly pretexts for delay he puts in the mouth of the defendant. The plaintiff's evidence is certainly not strengthened by calling such a witness as Fukrudin. Abdul Guffur, who is put forward as an independent witness, turns out to be the plaintiff's

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quondam partner and present hanger-on. The plaintiff's evidence as to his not having had a partner is suspicious when it is contrasted with that of his witness Fukrudin. Mahomed Husson Murke, the real broker in the transaction, is not forthcoming to give evidence though he has been summoned. Why, I know not. The plaintiff has not asked that further steps should be taken to compel his appearance. Altogether the plaintiff's case is wholly unsatisfactory. It is, on the other hand, [672] inconceivable that the defendant would have proceeded to repair his house, unless he *bona fide* believed the plaintiff's contract to be at an end. For the above reasons I accept his account and proceed to consider whether it affords a good defence, in law, to the plaintiff's claim.

Having regard to the circumstances under which the plaintiff's contract was made and to the nature of the property sold by the defendant, I find it impossible to hold that the time stipulated for its performance was merely a "formal term and immaterial to the contract." The defendant, when the contract was made, had not had the property conveyed to him, but had paid a considerable portion of the purchase-money, and was in *quasi* possession. The house was in a ruinous, if not a dangerous, condition; it was at the setting in of the S.-W. monsoon. The defendant's object in re-selling was to get rid of all responsibility and liability to repair; accordingly we find that the time for performance was discussed between the parties. The defendant wanted to fix the shortest possible time for completion. The plaintiff sought for a month. Twelve days were finally fixed on as a reasonable time. The condition of the house brings the case, I think, within the principle of the authorities referred to in Fry on Specific Performance (2nd ed.), ss. 1049-1052, 1056 and 1059 (see pp. 466 to 469).

The extension of time granted, at the plaintiff's request, to the 10th August operated, I consider, only as a waiver to the extent of substituting the extended time for the original time, and did not effect a destruction of the essentiality of the time—*Barclay v. Messenger* (1).

If I am correct in this view, the defendant's letter of the 24th July was but a timely warning to the plaintiff that the defendant would insist on his strict right, and would not allow the plaintiff to keep the contract in suspense after the extended time fixed for its performance had expired. The plaintiff, however, took no steps to complete though thus warned of the defendant's intention, and was not, therefore, in a position to enforce performance from the defendant after the 10th August had gone by.

[673] Such was, I think, the legal position of the parties on the 7th September, when the defendant through his solicitors sent his letter of that date. It is contended that that letter treats the contract as then still subsisting, and purports to put an end to it if not completed within an unreasonably short time, *viz.*, four days; that the defendant in fact by that letter waived all the plaintiff's previous default, and that the letter gave the plaintiff a fresh starting point. The letter may not be judiciously worded, but I do not think that its effect is as contended for by the plaintiff. The letter is only a qualified and conditional waiver of the performance within the stipulated time, the condition being that the plaintiff should complete within four days. That condition not having been complied with, the waiver cannot be relied on: see *Barclay v. Messenger* (1); *Stewart v. Smith* (2). I am not, however, prepared to hold that under all

(1) 43 L.J. Ch. 449.

(2) 6 Hare 222.

the circumstances of this case, and assuming time not to have originally been of the essence of the contract, the four days' time limited by that letter was unreasonable. English cases, in which there have been lengthy negotiations and complicated questions of title, do not afford a useful guide in a simple case of this sort where the plaintiff had actually got his deed ready, and the only difficulty arose from his not being ready and willing to pay the price. *Nott v. Riccard* (1) shows that, in considering the reasonableness of time, what has previously been done in the matter must be taken into account. "What constitutes reasonable notice and a reasonable time to be fixed on it must depend upon the contract and the circumstances of each case"—*Macbryde v. Weekes* (2). The speed with which the defendant after the 11th September completed with the Chinkars and set about the repairs, shows the urgency of the matter, in his opinion.

A great mass of evidence has been given in relation to the repairs and what was said by the plaintiff when they were begun, without, I think, much consideration being given to its bearing upon the points the Court had to decide. That the defendant at some expense repaired the premises, was not disputed. That he acted *bona fide* in doing so, I do not think was open to doubt, but [674] what is the legal result? I have not been referred to any authority to show that a vendor executing repairs to property which he has contracted to sell ought to be recouped for such repairs by his vendee if they have not been done at the request of the latter, or that the latter is not entitled to specific performance except upon conditions of making payment for such repairs to his vendor. I know myself of no authority for either proposition; such authority may perhaps exist, I only say I do not know of it. There can be no question of estoppel in the matter; the facts of the case were equally well known to both parties; perhaps, if the balance were carefully looked to, they were better known to the defendant than to the plaintiff. It is not pretended that the plaintiff said anything when the repairs were begun which determined his legal right to specific performance of his contract if he then had any. The utmost attempted to be established was that, without referring to his contract, the plaintiff agreed to a line defining the boundary between the two properties. How could his doing so affect his legal right to enforce performance if he then had that right? On the other hand, if the plaintiff then insisted that his contract was enforceable, his then so insisting would not even tend to make it so. On the 6th of October he clearly did so insist. The evidence seems to me to be wholly irrelevant, and I regret that the parties should have been put to the expense of having it recorded.

I find on the issues as follows (His Lordship stated his findings), and dismiss the suit with costs.

The plaintiff appealed. The appeal was heard on July 13th, 1888, by Sargent, C.J. and Bayley, J., who confirmed the decree.

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Attorneys for the defendant :—Messrs. *Tyabji and Dayabhai.*

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(1) 22 Beav. 307.

(2) 22 Beav. 533.