ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E. Chief Justice, and Mr. Justice Batchelor.

S. B. FRASER AND COMPANY (ORIGINAL DEFENDANTS), APPELLANTS, *v.* THE BOMBAY ICE MANUFACTURING COMPANY, LIMITED, AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.* 1904. *December 9.*

Agreement—Restraint of Trade—Sections 23 and 27, Indian Contract Act (IX of 1872)—Continuous cause of action—Damages—Transfer of business to a limited Company—Effect.

In March, 1902, certain Ice Manufacturing Companies in Bombay entered into an agreement relating to the manufacture and sale by them of ice. The agreement fixed, *inter alia*, the minimum price at which ice was to be sold by the parties, the proportion of the manufacture which each was to bear, and the proportion of the profits which each was to receive. It further created a monthly obligation to pay into, and a corresponding right to receive from, a general common fund the difference, if any, between the profits actually received by the parties and those to which they were, under the agreement, entitled. On a suit being instituted for breach of the agreement, in which damages, sustained prior to and pending the hearing of the suit, were claimed,

Held, the fact that an agreement, if carried out, would limit competition and keep up prices, did not necessarily bring it within the terms of section 27 of the Indian Contract Act (IX of 1872): to succeed in the defence under that section it was necessary to establish that the agreement was one whereby a person was restrained from exercising a lawful profession, trade, or business of any kind.

Held, further, that whether or not a High Court in India could award damages, in respect of a continuing cause of action, up to the date of its decree, subsequent successive accruals of an obligation to contribute to a fund could not be treated as falling within that description, and could not be awarded in a suit where they had accrued due subsequently to its institution.

An order directing a Company to furnish an account will not extend beyond, or include contributions which accrued later than, the date when the business of such Company was transferred to a limited Company.

APPEAL from Russell, J.

On the 15th of March, 1902, the Bombay Ice Manufacturing Company, Limited, Messrs. J. and J. Moir, Messrs. S. B. Fraser and Company, and Chubildas Lulloobhoy entered into an agreement relating to the manufacture and sale by them of ice, which contained, *inter alia*, the following provisions:—

* Suit No. 411 of 1902; Appeals Nos. 1331 and 1361.

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3. Subject as hereinafter mentioned the said parties shall not respectively during the continuance of this agreement sell ice for less than the prices that are mutually agreed to and fixed by the said parties. The manner in which ice shall be sold and all matters appertaining to the sale of ice shall be agreed to and fixed by the said parties. All rules and regulations regarding prices and manner of sales shall be inserted in a book kept for such purpose and shall be from time to time signed by all the parties hereto.

7. Subject as hereinafter mentioned the said parties hereto shall respectively during the continuance of this agreement bring into a General Fund for the benefit of all the said parties hereto such sum in respect of every ton of ice sold by the said parties as shall be the difference between the selling price mutually fixed and the cost allowed for manufacture which for the present shall be fixed at Rs. 17-8 per ton.

9. Messrs. C. H. B. Forbes and Company shall make up and adjust a General Common Fund Account for each month not later than the seventh day of the month next following: provided all parties hereto have sent in their returns and shall thereupon furnish to each of the parties hereto a statement showing the moneys due by or to each of the parties hereto in the proportions hereinafter mentioned and such money shall within two days after such statements shall have been delivered to the said parties be paid by them into an account to be opened with the firm of Messrs. C. H. B. Forbes and Company, which firm shall forthwith pay such moneys to the parties respectively entitled to receive the same as shown in the general monthly statement furnished.

11. The manufacture and sale of ice shall be distributed between the four parties hereto in the following proportions:—

The Bombay Ice Manufacturing Company, Limited ...	43%
Messrs. J. and J. Moir	15%
Messrs. S. B. Fraser and Company	30%
Mr. Chubildas Lulloobhoy	12%
	100%

13. No party to this agreement shall in any way add to the ice-making plant or machinery of his or their factory or factories without the consent of the other parties hereto.

By a sub-agreement of the same date it was agreed that the sale of ice should be conducted as follows:—

(*a*) The several contractors of the aforesaid Factories or their successors taking 2 tons or more of ice in a day of 24 hours shall be charged at the rate of Rs. 58 per ton.

(*b*) Any other person taking ice in quantities of 100 lbs. and upwards shall be charged at Rs. 64-7-6 per ton or Rs. 2-14-0 per 100 lbs.

(*c*) The 2nd, 3rd and 4th parties hereto agree to exempt the proceeds of the ice sent to Poona by the first party from the general fund and also undertake not to sell ice for the Poona market during the currency of this agreement.

(*d*) The sale of ice to steamers is excluded from this agreement in accordance with paragraph 5 of Agreement A of even date hereto, but the 1st, 2nd and 3rd parties hereto may make a separate agreement for such steamer sales.

(*e*) All parties hereto shall be at liberty to sell ice at their Factory Depôt at half an anna a pound retail and Rs. 66-8-0 per ton or 5 per cent. discount to approved monthly customers. Clubs, Messes, Hotels and Restaurants may be supplied at Rs. 63 per ton or 10 per cent. discount.

(*f*) The price of ice sent up-country shall be at the rate of Rs. 58 per ton, and any party to this agreement may sell ice for up-country on producing the rail receipts to the said Inspector or other parties hereto. Ice sent with fish shall be charged at local rate, namely, Rs. 58 per ton.

On the 24th of April, 1902, C. H. B. Forbes & Co. addressed a letter to the signatories of the agreement, which was as follows:—

We circulate herewith a statement of ice sold during the last week received from Messrs. S. B. Fraser & Co., and have to draw your attention that 5 tons of ice (marked in red) which they call frosty ice have been sold by them to their own contractors at half price without first obtaining the consent or permission of the other signatories.

This appears to be in direct violation of the agreement.

On the 23rd of May, 1902, S. B. Fraser & Co. replied as follows:—

It is now manifest to us, that the Company you represent cannot manufacture the quantity of ice, which in the course of negotiations you asserted it could.

We have now taken legal opinion on the subject, and are advised that any agreement limiting our right to sell our manufacture as we deem fit even is void (sic).

We find it will be to our interest, as well as that of the public, to sell ice below the stipulated rates, and we hereby inform you that from and after the 1st of June next we shall commence to sell ice at Rs. 22-8-0 a ton.

S. B. Fraser & Co. continued to furnish statements of ice sold by them in May and June, 1902. On the basis of such statements there was due from them to the common fund the sums of Rs. 4,903-6-10 and Rs. 3,358-5-3.

In July, 1902, the other parties to the agreement commenced a suit against S. B. Fraser & Co., praying, *inter alia*, for an injunction, pending the hearing of the suit restraining the defendants, their servants and agents from selling ice at a lower rate than that provided by the sub-agreement of the 15th March, 1902, for damages sustained or hereafter sustained by reason of

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the defendants' conduct in selling ice at a lower rate, for an account, and for an order directing the defendant to pay the plaintiffs the sums of Rs. 4,903-6-10 and Rs. 3,358-5-3 together with interest thereon.

In August, 1902, S. B. Fraser & Co. transferred their business to a Limited Company, *viz.*, to Fraser and Company, Limited.

On the 17th December, 1903, Russell, J., delivered judgment on the 2 preliminary issues, (*a*) whether the agreement and sub-agreement dated 15th March, 1902, were void under section 27 of the Indian Contract Act, (*b*) whether the object of the said agreement was opposed to public policy.

The judgment contained the following passages :—

In Pollock on Contracts[1], the following remarks are made on section 27 : "In British India, the language of the Contract Act has been literally construed by the Courts, so as to make the rule (as to contract in restraint of trade) much more stringent than in England, and agreements not to compete with the former employers or the like . . . have been upheld at common law : *Madhub Chunder* v. *Rajcoomar Doss*[2], *Brahmaputra Tea Company, Limited*, v. *Scarth*[3]. It seems very doubtful whether any such result was contemplated by the framers of the Act." Whether this be so or not, in construing this section, I must have regard to the well known words of *Lord Herschell* in *Bank of England* v. *Vagliano Brothers*[4], at page 144.

The next question to consider is, do any and if so, which of the clauses of the said agreement "restrain anyone from exercising a trade or business ?" Special attention must be paid to these words ; they are "restrain from exercising" not "restrain in the exercise or in respect of a trade or business," which are two very different things. That this is so is, I think, clear from the exceptions set out in the section, which I have above read and the passage in the judgment of the P. C. in *Municipal Corporation of City of Toronto* v. *Virgo*[5], at page 93.

It is not necessary for me to go through the sections of the agreement in detail and discuss whether each of them does or does not violate the provisions of section 27 of the Contract Act. For I may safely rely on Mr. Fraser's limiting his objections to clauses 11 and 13 and (*c*), (*d*) and (*f*).

But before doing so I must presume —

1. That there is no objection to an agreement whereby the parties to it agree to divide profits : *Haribhai* v. *Sharafali*[6], a case with which I have to deal more fully hereafter.

(1) 6 Ed., p. 348.
(2) (1874) 14 B. L. R. 76.
(3) (1885) 11 Cal. 545.
(4) (1891) A. C. 107 at p. 144.
(5) (1896) A. C. 88 at p. 93.
(6) (1897) 22 Bom. 861.

2. That part of the agreement may be void while other parts of it may be enforceable at law: *Haribhai* v. *Sharafali*(1) and *Collins* v. *Locke*(2) there cited.

Does clause 11 therefore come within section 27? Now in the first place that clause does not *limit* the manufacture and sale to the proportions therein specified. It merely says the manufacture and sale shall be distributed according to those proportions. There is nothing here to prevent the defendant from manufacturing more than their 30 per cent. if he chose to do so except that if he did so he could not sell the excess. No doubt it was a bad bargain for the defendant if he manufactured 30 per cent. and got only 19 per cent. of the profits, whereas Moir and Chubildas were to get 19 per cent. and 12 per cent. of profits on a manufacture of 15 per cent. and 12 per cent. only, respectively. But a bad bargain does not make good law.

The next clause Mr. Fraser objects to is 13. This clause merely provides for the manufacturing capacity of each factory remaining in the *status quo*. There is nothing in this restraining them from carrying on business.

Clause (*c*) of the sub-agreement is the only one that can, in my opinion, come within the words of section 27. By this the parties 2, 3 and 4 are restrained from carrying on their business as regards selling ice *qua* the Poona market. But it may be argued on the other hand that even this clause does not prohibit them from *manufacturing* ice for the Poona market, and they might have to manufacture it to supply the wants of the first party. But this clause may be bad and the rest of the agreement good, and this clause is not in question in this suit. Clause (*d*) does not, as it seems to me, come within the section. The clause does not restrain the defendant from making ice—it only provides the rate at which ice, if and when made, shall be sold. As to clause (*f*) the same remark applies.

A certain amount of evidence was given on the part of the defendants, but it does not help much in coming to a conclusion on the points I have to decide. It is quite possible that the defendants' factory was closed for 173 days in the year, but this fact does not make the agreement obnoxious to section 27 if my reading thereof is correct. One thing I think is proved and that is, that a combination of ice factories was desirable in the interests of the factories themselves to prevent a ruinous competition. I do not propose to go through the numerous cases which might be cited with reference to this matter. They are all both English and Indian to be found in *Haribhai* v. *Sharafali*(1). I have however referred to the case there cited and agree with the view of Candy, J., in that case rather than that of Farran, C. J., who expressly says he had not critically examined the cases and in fact the *dicta* of both these learned Judges in that case were *dicta* as to the point before them.

As regards the law applicable to this question in England there will be found many passages bearing on the subject in the well known cases of *Mogul Steam-*

(1) (1897) 22 Bom. 861. (2) (1879) 4 Ap. Cas. 674.

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ship Company(1) and *re Nordenfelt*(2), but it is in the American cases that the principles are more frequently to be found. Under the heading "Trust" in American Law in the Encyclopædia of English Law(3), are to be found extracts from various judgments which, as the American Reports are not to be had here, and the Encyclopædia of English Law is not yet universally in use, I transcribe at length as they express my own opinion. In *Leslie* v. *Lorillard*(4) the Court of Appeals of New York say: "they do not think that competition is invariably a public benefaction, for it may be carried on to such a degree as to be an evil" and in the *Sugar Trust* case, the Supreme Court of New York held that "excessive competition may sometimes result in actual injury to the public, and competitive contracts to avert personal ruin may be perfectly reasonable. It is only when such contracts are publicly oppressive that they become unreasonable and are condemned as against public policy": *People* v. *North River Sugar Refining Company*(5). Again "Public welfare is first considered and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained; the question is, whether under the particular circumstances of the case, and the nature of the particular contract involved in it, the contract is or is not reasonable": *Gibbs* v. *Baltimore Gas Company*(6). What is the policy of the public at one time may not be a sound public policy at another time: *Griswold* v. *Illinois Central R. R. Company*(7); the application of this rule is more difficult than a clear understanding of it: *Oregon Steamship Company* v. *Winsor*(8). Lastly, in the *National Benefit Company* v. *Union Hospital Company*(9) it was said "Modern investigations have much modified the views of Courts, as well as political economists, as to the effect of contracts intended to reduce the number of competitors in any particular line of business. Excessive competition is not now accepted as necessarily conducive to the public good. The fact is that the early common law doctrine in regard to contracts in restraint of trade largely grew out of a state of society and of business which has ceased to exist, and hence the doctrine has been much modified, as will be seen by comparison of the early English cases with modern decisions both English and American." Ice in India is a luxury, it is only a necessity to the better classes of society. It has for several years been manufactured at remarkably cheap rates. Excessive competition amongst the producers of it would probably result in their liquidation as well as that of the product. I cannot hold that either the consideration or the object of this agreement are opposed to public policy.

On the 19th of July, 1904, a decree was passed in the suit, which ordered, *inter alia*, that an account should be taken of all

(1) (1892) A. C. 25 and 21 Q. B. D. 544.
(2) (1894) A. C. 535.
(3) Vol. XII, pp. 297-298.
(4) 110 N. Y. 519.
(5) 54 Hun. 354 Affd. 112 N. Y. 1.
(6) 130 U. S. 396.
(7) 90 Iowa 265.
(8) 20 Wall. 64.
(9) 45 Min. 272.

the ice manufactured and sold by the Bombay Ice Company, Chubildas Lalloobhoy, the defendants Fraser & Co., and Boyd's Factory (J. J. Moir & Co.) from the 15th March, 1902, to the 31st December, 1903.

Raikes and *Davar*, for appellant:—The agreement was not binding, because there was misrepresentation. Even if it was, there is no allegation made of a sale below the agreed rates. The only allegation is that such a sale was threatened. This might justify a suit for an injunction; it could not give a right to damages. In any event the Court could only assess damages up to the date of the suit. Where there is no breach, but a repudiation of an agreement, a party cannot affirm the agreement as subsisting, ask for an injunction and at the same time sue for damages for future breaches if committed: *Mansuk Das* v. *Rangayya*[1].

Apart from this the agreement of March 15th was void by virtue of sections 23 and 27 of the Indian Contract Act[2]. See *Oakes & Co.* v. *Jackson*[3], *Brahmaputra Tea Company, Limited* v. *Scarth*[4], *Mackenzie* v. *Striramiah*[5], *Sadagopa* v. *Mackenzie*[6], *Nur Ali Dubash* v. *Abdul Ali*[7], *Haribhai* v. *Sharafali*[8].

Lowndes, *Binning* and *Aston* with the Advocate General, for the respondents:—In England a rule allows for relief not specifically asked for. In India it is usual to insert a clause asking for "further and other relief." But in *Callianji* v. *Narsi Tricum*[9] such relief was granted though not specifically asked for.

The breaches by S. B. Fraser & Co. gave rise to continuing damages. These damages could be assessed up to the date of the decree: *Hole* v. *Chard Union*[10]; see also *Read* v. *Wotton*[11]; *Nives* v. *Nives*[12]. As regards *Lloyd* v. *Dimmack*[13] there is no reason to suppose that damages would not have been granted up to the date of the decree.

(1) (1863) 1 Mad. H. C. R. 162.
(2) IX of 1872.
(3) (1876) 1 Mad. 134.
(4) (1885) 11 Cal. 545.
(5) (1890) 13 Mad. 472.
(6) (1891) 15 Mad. 79.
(7) (1892) 19 Cal. 765.
(8) (1897) 22 Bom. 861.
(9) (1895) 19 Bom. 764.
(10) (1894) 1 Ch. 293.
(11) (1893) 2 Ch. 171.
(12) (1880) 15 Ch. D. 649.
(13) (1877) 7 Ch. D. 398.

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Then as to section 27, all contracts of personal service, of sale, and monopoly are in a sense in restraint of trade, but they do not come within the provisions of the section: see *Brahmaputra Tea Co., Ld.*, v. *Scarth*(1); *Charlesworth* v. *MacDonald*(2) at p. 116; *Mackenzie* v. *Striramiah*(3); *Carlisles* v. *Ricknauth*(4). A partial restraint does not invalidate an agreement, if such restraint is necessary for the protection of the parties: see Tindal, C. J., in *Horner* v. *Graves*(5) adopted in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Company*(6).

That this agreement was necessary for the protection of the parties is admitted on all sides.

Lastly with reference to section 23, it is impossible to suggest that public policy requires that all commodities should be sold as cheaply as possible: see *Mogul Steamship Company* v. *McGregor Gow & Co.*(7).

JENKINS, C. J.:—On the 15th of March, 1902, the present litigants, who then were manufacturers and sellers of ice in Bombay, entered into the combination agreement, on which this suit is brought.

It was thereby provided (1) that they should carry on business in concert until the 31st December, 1903: (2) that after that date the agreement should be determinable on notice: (3) that their sales should not be below certain minimum prices: (4) that the starting of an opposition factory should, from the commencement of manufacture and sale of ice by it, terminate the agreement: (5) for the regulation of sales to steamers: (6) for the furnishing of accounts: (7) for contributions to a general fund: (8) for the keeping of proper accounts: (9) that the general common fund account should be made up and adjusted by Messrs. Forbes & Co.: (10) for the distribution of the common fund: (11) for the distribution of the manufacture and sale of ice: (12) for the continuance and cesser of the title of the parties to participate in the benefits of the agreement: (13) that except as mentioned no additions should be made to the plant of the factories: (14) that

(1) (1885) 11 Cal. 545.
(2) (1898) 23 Bom. 103.
(3) (1890) 13 Mad. 472.
(4) (1882) 8 Cal. 809.
(5) (1831) 7 Bing. 735.
(6) (1894) A. C. 535 at p. 549.
(7) (1892) A. C. 25 at p. 45.

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the benefits of the agreement should go to successors and assigns: and (15) for the alteration, modification or renewal of the agreement by mutual consent.

By an agreement between the same parties of even date, the prices for sales were fixed at Rs. 58 per ton to certain named contractors and their successors, Rs. 64-7-6 to another class of purchasers, Rs. 66-8-0 to smaller purchasers, and Rs. 63 to clubs, messes, hotels and restaurants. Very shortly after this date differences arose between Messrs. S. B. Fraser & Co. and the other contracting parties: for complaint was made that Frasers had sold *frosted ice* in breach of the agreement.

On the 23rd of May, 1902, Frasers wrote that they had been advised that any agreement limiting their right to sell their manufacture as they deemed fit was void, and they stated that from and after the 1st of June next they would commence to sell ice at Rs. 22-8-0 a ton; this was below the agreed rate.

This was repeated in a letter of the 27th May, 1902, and Messrs. Frasers called on the other contracting parties to commence proceedings against them to have the matter tested.

Notwithstanding this Frasers furnished statements of ice sold by them during May and June, and on the basis of them it would seem that under the terms of the agreement if binding, there became due from them to the general common fund, at the date of the suit, the sums of Rs. 4,903-6-10 and Rs. 3,358-5-3. No payment, however, has been made.

Under these circumstances the present suit was commenced by the other contracting parties against Frasers.

The plaint sets forth the agreements of 15th March, 1902, the sale of frosted ice, and the correspondence, in the course of which Frasers intimated their intention to sell under the fixed prices.

In the 14th paragraph it is alleged that the plaintiffs say that the said agreement and sub-agreement are lawful and are binding on the defendants, and that the effect of the defendants S. B. Fraser and Co. selling ice below the rates agreed upon, will cause great damage to the plaintiffs.

In the 15th paragraph it is alleged that the accounts furnished show Rs. 4,903-6-10 and Rs. 3,358-5-3 to be due, and that the same are unpaid. And in the 16th paragraph it is alleged that

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the plaintiffs have throughout observed, and are now observing the terms of the said agreement and sub-agreement, and the defendants have had the benefit thereof up till the present time.

Then the plaintiffs pray for the following and such further and other relief as may under the circumstances of this case seem fit to the Court:—

(*a*) That the defendants S. B. Fraser and Company, their agents, and servants may be restrained by the order and injunction of this Honourable Court from selling ice to any person at any lower rate than that provided by the said sub-agreement of the 15th of March, 1902, as the minimum rate for sale to such person or such other rate as may from time to time be agreed to and mutually fixed under the said agreement and sub-agreement by the parties thereto in such behalf.

(*b*) That pending the hearing and final decision of this suit or further order, the defendants S. B. Fraser and Company, their agents and servants, may be restrained by like order and injunction as aforesaid.

(*c*) That the defendants S. B. Fraser and Company may be decreed to pay to the plaintiffs such sum as to this Court may seem fit by way of compensation for the damage sustained or hereafter sustained by the plaintiffs by reason of the said defendants' conduct in selling ice at any lower rate than that provided as aforesaid.

(*d*) That for the purpose of estimating the amount of compensation to be awarded to the plaintiffs as aforesaid all necessary accounts may be taken and enquiries made.

(*e*) That the defendants S. B. Fraser and Company be decreed to pay to the Pool fund, mentioned in the said agreement, in accordance with the terms thereof the sums of Rs. 4,903-6-10 and Rs. 3,358-5-3 in paragraph 15 hereof mentioned, together with interest on the said sums of Rs. 4,903-6-10 at 9 per cent. from the 16th June, 1902, and on the said sum of Rs. 3,358-5-3 at the same rate from the 10th day of July instant till payment.

(*f*) That the defendants S. B. Fraser and Company be decreed to pay the plaintiffs' costs of this suit.

The defendants put in a written statement denying their liability on the grounds therein appearing, and ultimately the case

came on for hearing before Russell, J., when the following issues were raised :—

1. Whether the agreement in A and B to plaint was ever an agreement binding on the plaintiffs and the defendants?

2. Whether the defendants were not induced to sign the said A and B to plaint by the representations of the plaintiffs or their agents respecting as alleged in paragraphs 2—6 of written statement or any of them?

3. Whether the said representations or any of them were true in fact?

4. Whether, if last two issues are decided in defendants' favour, the defendants are bound by the agreement?

5. Whether the agreement in A and B is a valid agreement in law and binding on defendants?

6. If not, whether the plaintiffs are entitled to maintain this suit on the said agreement?

7. Whether the plaintiffs have performed their part of the agreement as alleged?

8. Whether the plaintiffs are in any event entitled to specific performance of the said agreement?

9. Whether the allegations in paragraphs 4—6 of plaint are relevant to this suit and, if so, whether they are correct?

10. Whether the allegations in paragraphs 7—9 of plaint are relevant to this suit and, if so, whether they are correct?

11. Whether the defendants are not to be entitled to have removed from the appendices to plaint and from the files of the Court all documents written without prejudice as in paragraph 14 of written statement submitted?

12. Whether the defendants are not entitled to have paragraph 13 of plaint struck out and that it cannot be deciphered?

13. Whether allegations of plaint so far as they are inconsistent with those in written statement are correct?

14. Whether plaintiffs are entitled to any damages?

15. General issue.

16. Whether the agreement, if otherwise binding, did not come to an end on the date and under the circumstances stated in the supplemental written statement or at any other and what date?

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17. Whether the plaintiffs or any of them have failed to perform the agreement in that they have sold ice at less than the agreed rates?

18. Whether the 2nd and 3rd defendants declared to the 1st plaintiff and 1st defendants at or immediately after the agreement of 15th March 1902 the contract between them and Namdar Ardeshir made in August 1901.

19. Whether, if such contract was declared to the 1st plaintiff, they communicated the same to the 1st defendants?

20. Whether the plaintiffs are entitled to recover in this suit from the 1st defendant any contribution of the Pool fund which may be ultimately payable to the 2nd and 3rd defendants?

21. Whether the 1st defendants were not aware of the agreement between Namdar Iranee and Nowroji Bomanji Idawala before the agreement of 15th March?

In the course of the hearing it came out that Messrs. J. and J. Moir had committed a breach of the agreement, and on the application of the plaintiffs they were made defendants instead of plaintiffs.

The result of the hearing was that Russell, J., passed in favour of the plaintiffs the decree, from which the present appeal is preferred.

Mr. Lowndes intimated in the first instance that he proposed to take the objection that no decree had been passed, from which an appeal would lie, but it was ultimately agreed that we should proceed with the case and decide it on the merits.

The first point therefore with which I will deal is whether the agreement is void under section 23 or section 27 of the Indian Contract Act, and it will be convenient to consider the agreement in relation to section 27 first.

That section provides that every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

The scheme of the agreements was no doubt to limit competition and keep up prices; but that does not necessarily bring them within the terms of section 27: to succeed in the defence under that section Frasers must establish that the present suit is one to enforce an agreement, whereby some one is restrained from

exercising a lawful profession, trade or business of any kind. It is necessary therefore to see how the agreements carry out their scheme: they do this (*a*) by forbidding underselling; (*b*) by establishing a scale of manufacture and sale; and (*c*) by imposing an obligation to contribute to a common fund. The present suit is concerned only with (*a*) and (*c*): no complaint is made of any infringement of (*b*). Now let us see how far we are concerned with (*a*), or in other words how far, as matters have developed, is underselling an affective basis of claim in the suit.

The first prayer directed to it is that for an injunction; but before decree, that relief had ceased to be appropriate, as the period of the agreements had expired. The remaining and only other prayer under this head is for damages and Mr. Lowndes has argued that these damages fall under two heads, (1) the loss resulting from the filching away of customers and (2) that flowing from the failure to contribute to the general common fund.

The difficulty of establishing the first head of damages is obvious, and it has been admitted before us that no attempt has been made to prove it; so we only have to consider the second.

But that obviously is not a consequence of any breach of the prohibition on underselling, the loss arises (if at all) from the failure to perform the obligation of contribution imposed by clause 7 of the agreement.

But by clause 7 none of the contracting parties can be said to be restrained from exercising a lawful business, so that, even if it could be argued that any of the provisions in the agreements come within section 27, it is clear that clause 7 is free from this vice, and the agreement to the extent of the obligations thereby imposed is not void.

Therefore section 27 affords no answer to the suit so far as it is based on Frasers' failure to contribute to the common fund.

I do not say that the agreement does in any respect come within the mischief at which section 21 is aimed. It is unnecessary to decide that point, for even if it be assumed for the sake of argument that some of the clauses of the agreement are avoided by that section, still clause 7 is not so connected with them as of necessity to follow their fate; and that a clause may

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in such circumstances be treated as good, notwithstanding its surroundings is shewn by *Collins* v. *Locke*[1].

Nor do I think Frasers' position is bettered by section 23 of the Contract Act. What is there relied on is the provision that every agreement of which the object or consideration is opposed to public policy is void. So far as restraint of trade is an infringement of public policy, its limits are defined by section 27, and apart from that I see no ground on which Frasers can invoke the aid of this rule of law. "Public policy," it has been said, "is always an unsafe and treacherous ground for legal decision" per Lord Davey, *Janson* v. *Driefontein*[2], and Sir George Jessel remarked in *Printing and Numerical Registering Company* v. *Sampson*[3] "it must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice."

It lies on Frasers in this case to show the Court that the suit is based on an agreement opposed to public policy, and, in my opinion, they have completely failed to discharge this burden.

But then it is contended by Frasers that the combination agreement has been rightly avoided by them, and they rest their claim to so avoid it first on breaches of the agreement by the other contracting parties, and secondly on misrepresentation.

The only breach that has been established is on the part of Moirs, and as soon as that came to light, Moirs were made defendants, instead of plaintiffs. No breach by either of the present plaintiffs has been proved.

I know of no authority which supports the argument that Moir's breach of contract furnishes Frasers with an answer to the present plaintiffs' claim: no case or section of the Contract Act has been cited to us as even lending any colour to this view, and I need hardly point out that there is no affinity between

(1) (1879) 4 App. Cas. 674. (2) (1902) A. C. 484 at p. 500.
(3) (1875) L. R. 19 Eq. 462 at p. 465.

this argument and the proposition, that if two persons execute a deed on the faith that a third person will do so, and that is known to other parties to the deed, the deed does not bind in equity if the third refuses to re-execute (*Luke* v. *South Kensington Hotel Company*[1]). Therefore I hold that Moir's breach of the agreement did not entitle Frasers to avoid it as against the plaintiffs. And now I will consider whether Frasers have made good their plea of misrepresentation as set forth in paragraphs 2, 3, 4, 5, and 7 of the written statement.

It will be seen that misrepresentations are here alleged to have been made by Mr. Forbes and Mr. Hamilton as to the output capacity of the Bombay Ice Manufacturing Company, by Mr. Thompson as to Moir's output capacity, and by Mr. Chabildas as to his, but the argument before us has been limited to Thompson's alleged misrepresentations as being typical of the others, and so it is with his alleged misrepresentations alone that I need deal.

According to section 18 of the Indian Contract Act misrepresentation means and includes the positive assertion in a manner not warranted by the information of the person making it of that which is not true, though he believes it to be true.

And section 19 provides that when consent to an agreement is caused by misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused; but the contract is not voidable, if the person whose consent was so caused had the means of discovering the truth with ordinary deligence. It is explained that a misrepresentation which did not cause the consent to a contract of the party to whom it was made does not render the contract voidable. Section 14 provides that consent is said to be caused by misrepresentation, when it would not have been given but for the existence of such misrepresentation.

Therefore Frasers must among other things show (1) that there was a positive assertion by Thompson; (2) that it was not true; (3) that the assertion was in a manner not warranted by Thompson's information; (4) that but for the existence of the misrepresentation Frasers' consent to the contract would not

(1) (1879) 11 Ch. D. 121 at p. 125.

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have been given; and (5) that his principals are affected by Thompson's assertion.

The representation ascribed by the written statement to Thompson is that Moir's machines were capable of producing an average output of 17 tons per diem. The first difficulty with which we are confronted in connection with this statement is to define its meaning.

Mr. Lowndes has pertinently asked over what period is the average to be taken. It is not suggested that it should be for a whole year; but if not for the whole year, then for what part of the year; for that the capacity varies with the season seems clear. Mr. Burkitt, an independent witness, says "the actual output depends according to a number of circumstances, temperature of the condensing water, the density of the brine, the amount of ammonia in your receiver, the quality of the chemicals. Quality of chemicals is the most important factor. What we could make in 48 hours in February would take another 12 hours to make in May. The output depends on the way the machine is looked after decidedly. An old machine would turn out much less than a new one. This would be owing to the state of the parts. After a few years the parts get worn out and must be renewed. The clearance of the compressor is an important point—that is one of the most important points—it must be kept at the least possible amount. This depends on the machine. The engineers must see it is kept so."

So we see that not only is the working dependent on the season of the year, but on a number of other circumstances, and we are thus left in doubt as to the basis on which the alleged representation was accepted by Frasers.

But apart from this I am of opinion that the onus of proving the falsity of the representation has been in no way discharged.

Frasers say that Moir's machinery did not during the combination agreement turn out 17 tons a day, though on one occasion the demand for ice was in excess of the supply, and coupling this with section 103 of the Evidence Act they contend that they have made out a *primâ facie* case, which casts on the other side the obligation of proving affirmatively that Moir's factory has an output capacity of 17 tons a day.

But this contention cannot stand; the mere circumstances that Moirs have not turned out 17 tons a day during the combination agreement, in my opinion, proves nothing: as a matter of fact we find that during the same period Frasers did not turn out the quantity represented by them to be their output capacity, and they do not for that reason suggest that their output capacity was overstated.

At the same time we have Thompson's emphatic statement that Moir's machines have an output capacity of 17 tons a day.

I see no reason to distrust this statement, and I certainly do not think that Frasers can successfully claim that in the absence of an actual test substantiating this statement, it should be held that the representation made by Thompson was not true.

In this connection it is to be noticed that both Moirs and Mr. Chabildas were in favour of a test being made: it was only the Bombay Ice Manufacturing Company that declined, and so far as they were concerned the evidence is clear that Mr. Forbes throughout rejected the suggestion of output being the governing factor in defining the terms of the combination agreement.

Even if the assertion made had not been true, that would not have sufficed for Frasers' purpose, unless it was also made in a manner not warranted by Thompson's information. Now what was the information on which the assertion was based? It was the past working in the ordinary course of business.

This must have been known to Frasers: it was the warrant for their own assertion as to their output capacity: and there is no suggestion that any one supposed that the assertions were meant to represent actual results over any larger period of continuous and unbroken working than would occur in the ordinary course of business.

In the view I have expressed it is not necessary to consider whether Frasers' consent would or would not have been given but for the representations alleged; it is however significant that throughout the preceding combination agreement between Frasers and Moirs, the former never took the trouble to ascertain the latter's output capacity and that in their letter of the 15th May, 1902, Frasers distinctly say they disbelieved Hamilton's assertion as to the capacity of his Company's machines, a dis-

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belief to which Mr. Dayal Mulji deposes when in the witness box.

I refrain however from discussing this matter further, as it relates more to the representations attributed to the Bombay Ice Manufacturing Company, than those made by Thompson, with which alone we are in the circumstances concerned, and I hold that Frasers have not established any misrepresentation entitling them to avoid the combination agreement.

As by arrangement the issue of misrepresentation is determined by our findings on the case alleged against Thompson, I refrain from expressing any opinion as to Mr. Justice Russell's view in relation to the alleged fabrication of books.

The next point urged on the part of Frasers is that Russell, J., wrongly allowed the plaint to be amended by making Moirs defendants instead of plaintiffs, but, in my opinion, he was within the limits of his discretion in making that order and I therefore think we ought not to interfere.

The next question for discussion is the propriety of the decree passed by Russell, J.

I have already pointed out that the termination of the agreement during the pendency of the suit made the relief of injunction at the hearing inappropriate, and that no case for damages by way of compensation for undersales by Frasers had been made out. So the only relief claimable was in respect of the failure by Frasers to contribute to the general common fund as stipulated in clause 7 of the combination agreement.

At the institution of the suit only two monthly contributions had accrued due, and they are the subject of prayer (*e*) of the plaint. No specific prayer is made with regard to any other instalments.

From Mr. Justice Russell's judgment however it would appear that he thought subsequent contributions could be included in this suit, though his decree is so worded as to limit the account to contributions arising on sales by the defendants, Fraser and Company. But Frasers transferred their business in August 1902 to a limited Company, so that the account directed by the decree would not extend beyond, or include contribution accrued later than that date; for the

limited Company to whom the transfer was made is a distinct legal person and the sales by it would not be sales by Frasers. Though the plaintiffs contend that they are entitled to relief in some form or another in respect of the non-payment of all contributions that accrued, or ought to have accrued, up to the end of the agreement, no appeal has been presented by them from this part of the decree, so that the only question at issue between the parties is whether the plaintiffs can claim in this suit in respect of contributions that accrued up to the date of the transfer in August, or, whether they are limited to those that accrued before suit brought.

Mr. Lowndes endeavoured to justify the account directed by Russell, J., by arguing that the relief was appropriate to the prayer in respect of "the damage sustained, or hereafter sustained, by the plaintiffs by reason of the said defendants' conduct in selling ice at any lower rate than that provided as aforesaid" in paragraph (*c*) of the prayer to the plaint and that the damages awarded after the institution of the suit were in respect of a continuous cause of action and so properly included in the decree.

But this alleged damage by reason of Frasers' failure to contribute to the General Fund, flows, not from any under-sales, but from a breach of that part of the agreement which imposed on them an obligation to contribute to that fund, so that even if (as has been argued) damages can in this Court be awarded in respect of a continuing cause of action up to the decree (a point on which I express no opinion), it is impossible to treat subsequent successive accruals of an obligation to contribute as falling within that description. They are, in the circumstances of this case, all as distinct from each other as successive instalments of rent and these clearly cannot be awarded in a suit where they have accrued due subsequently to its institution: (see *Balaji Sitaram Salgavkar* v. *Bhikaji Soyare Kanolekar*[1] and *Sheo Shunkur Sahoy* v. *Hridoy Narain*[2].

It might have been otherwise had the plaintiffs treated Frasers' refusal to perform the agreement as entitling them to put an end

(1) (1881) 8 Bom. 164 at p. 167. (2) (1882) 9 Cal. 143.

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to it: but so far from their having adopted that line, the plaintiffs insisted on the continuance of the agreement and of this they have furnished the strongest testimony by their praying for a permanent injunction, and obtaining an *interim* order, restraining the defendants from underselling.

I therefore am of opinion that so far as contributions are concerned relief must be restricted to those that accrued before suit, and I further hold that no claim can be made in respect of the sale of frosted ice. The plaintiffs cannot recover the whole of each instalment, but only damages for the non-payment.

In the view I take it is unnecessary to discuss the effect of the transfer by Frasers to the limited Company and the development by the P. & O. Company of their ice business, as both are subsequent to the suit.

From the course which the case took before Russell, J., we have no evidence of these damages, so that unless the parties can come to some agreement an enquiry must be directed.

Attorneys for the appellants: *Messrs. Payne and Co.*

Attorneys for the respondents: *Messrs. Craigie, Lynch and Owen and Messrs. Smetham, Byrne and Noble.*

A. H. S. A.

PRIVY COUNCIL.

P. C.*
1904.
Nov. 17, 18.
December 19.

BOMBAY-BURMA TRADING CORPORATION (PETITIONERS) *v.* DORABJI CURSETJI SHROFF (OPPONENT).

[On appeal from the High Court of Judicature at Bombay.]

Company—Articles of Association—Proxy, qualification of—Meeting of shareholders to alter Memorandum of Association—Validity of votes given by proxy—Act XII of 1895.

By a power of attorney dated 14th October, 1881, some of the shareholders in the appellant Company appointed and authorized certain specified persons, "and all persons who at any time during the continuance of these powers of attorney may be partners in the firm of Messrs. Wallace & Co., of Bombay, however that firm may be constituted . . . . . and in the absence from Bombay" of

* *Present:*—LORD MACNAGHTEN, LORD LINDLEY, SIR ANDREW SCOBLE, AND SIR ARTHUR WILSON.