ORIGINAL CIVIL.

Before Mr. Justice Davar.

1910. *February* 22.

TREACHER & Co., LTD., PLAINTIFFS, *v.* MAHOMEDALLY ADAMJI PEERBHOY, DEFENDANT.*

Sale of immoveable property—Marketable title to the satisfaction of the purchaser's solicitors—Specific performance.

When a vendor of immoveable property desires to enforce a contract for sale with a condition that the title adduced should be to the satisfaction of the purchaser's solicitors, he must prove either that the solicitors did approve of the title or that there was such a title tendered as made it unreasonable not to approve of it.

Clack v. *Wood*(1) followed.

THIS was a suit for the specific performance of a contract for the purchase and sale of immoveable property situate in Byculla. By the contract, which was contained in correspondence that passed between the parties towards the end of the year 1907, the plaintiff Company agreed to sell and the defendant to purchase the property for the sum of Rs. 2,50,000 on certain conditions which were subsequently slightly modified. One of the terms, which was retained without modification, was that the vendors should deduce a marketable title to the satisfaction of the purchaser's solicitors.

In pursuance of the contract the defendant paid to the plaintiff Company a sum of Rs. 50,000 by way of earnest-money, and later, in consideration of a postponement of completion, a further sum of Rs. 50,000 towards the purchase-money. When, however, the defendant's solicitors came to investigate the title-deeds to the property and received answers to certain requisitions put by them to the plaintiffs, they contended that the title was not satisfactory in accordance with the terms of the contract, and, eventually, by a letter of 7th April 1909, purported finally to rescind the contract.

* Suit No. 527 of 1909.

(1) (1882) 9 Q. B. D. 276.

The plaintiffs therefore filed this suit to enforce the contract. The defendant in his written statement counterclaimed for a return, with interest, of the Rs. 1,00,000 already paid by him to the plaintiffs, and for a further sum by way of damages.

The chief points at issue and the arguments of counsel are clearly set forth by the learned Judge in his judgment.

Inverarity, with *Robertson* and *Chamier*, appeared for the plaintiffs.

Lowndes, with *Strangman*, Advocate-General, and *Jardine*, appeared for the defendant.

DAVAR, J. :—The plaintiffs in this suit are a limited liability Company which was incorporated in the early sixties. They acquired the business and the properties of certain individuals, who were, previous to the formation of this Company, carrying on business in Bombay in the name of Treacher & Co. The plaintiffs since their incorporation have continued to carry on their business in Bombay in the name of Treacher & Co., Ltd. Amongst the properties acquired by the Company, were certain lands and buildings thereon situated at Byculla at the corner of Duncan and Bellasis Junction roads. The property was conveyed to the plaintiff Company soon after its formation and the Company has been in occupation and possession of the lands and building thereon ever since. It appears that the Company were desirous of selling their Byculla property and they attempted to sell the same by public auction on the 18th of November 1907. As however there was no attendance of bidders, the property was not put up for sale. The defendant, who is a merchant and one of the sons of a well-known citizen of Bombay, Sir Adamji Peerbhoy, hearing of the desire of the plaintiffs to sell their property, opened negotiations with Mr. Knowles, the General Manager of the plaintiff Company, with a view to purchase this property. The negotiations culminated in a letter which the defendant addressed to the plaintiff Company on the 28th of November 1907. In that letter the defendant offered to purchase the Byculla property for a sum of Rs. 2,50,000, on certain terms and conditions mentioned by him therein. The principal terms with which we

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are concerned in this case are, first, that a portion of the plaintiffs' land which was Sanadi land should be converted by the plaintiffs and sold by them "as of quit and ground rent tenure free from all claims of Government or Municipality but subject to the payment of quit and ground rent and Municipal taxes as from the date on which the sale is completed;" and secondly, that the plaintiffs were "to deduce a marketable title to the premises to the satisfaction of the purchaser's solicitors." In this offer the defendant gave the plaintiffs option to complete the sale within three months or ten months from the date of the acceptance of his offer. After certain correspondence had taken place between the parties, the defendant's offer was eventually accepted by the plaintiffs. The defendant paid Rs. 50,000 by way of earnest-money and it was arranged that the sale should be completed at the end of ten months. Under this arrangement the defendant would have had to pay the balance of the purchase-money and complete the sale by the end of September 1908. The plaintiffs were ready and willing to complete the sale in September. The defendant, however, seems to have been in some difficulty about completing the sale at the end of September. By their letter of the 31st of August 1908 the plaintiffs intimated to the defendant that they were ready to complete at the end of September. On the 9th of September the defendant, addressing the plaintiffs' General Manager Mr. Knowles, says:—

"You will recollect that the writer had mentioned to you that the completion of the sale of the property should be allowed to stand over for about eight months from the 1st instant, the purchasers in the meantime paying interest on the balance of the purchase-money at 5 per cent. and all taxes and insurance."

He asks Mr. Knowles to place this proposal before the directors and to request them to accept the same. On the 12th of September the plaintiffs acceded to the defendant's request to postpone completion of the same on certain terms which are set out in their Manager's letter to the defendant of that date. After some further correspondence, it was eventually agreed between the parties that the completion should be put off for eight months on certain terms, one of which was that the defendant

was to pay to the plaintiffs a further sum of Rs. 50,000 towards the purchase-money. The defendant accepted the plaintiffs' terms and ultimately on the 11th of November 1908 he paid in a further sum of Rs. 50,000 and the completion was postponed for eight months. It is not quite clear whether the eight months were to be calculated from the 1st of September or the 1st of October. The plaintiffs in their letter of the 12th of September say :

"The Board are prepared to allow you to defer the same (meaning completion of purchase) for eight months from the 1st instant."

In their letter of the 11th of November, their General Manager says :—

"I note that the balance of a lac and fifty thousand will be paid within eight months from the 1st of October last, according to the conditions laid down in my letter of the 12th of September last."

There is thus a small contradiction in the correspondence as to the date of completion. According to the terms as originally proposed by the plaintiffs and accepted by the defendant, the time for completion was extended for eight months from the 1st of September which would be the end of April. Possibly the plaintiffs' Manager was in error when in his letter of the 11th of November he talked of eight months from the 1st of October. For the purposes of this case, however, this small contradiction is of no importance, and I will assume that the contract between the parties was that the sale should be completed eight months from the 1st of September, that is, by the end of April 1909. One of the terms imposed by the plaintiffs in their letter of the 12th of September 1908 was that the defendant was to sign an agreement drawn up by their solicitors in which the terms mentioned in the letter together with those already settled between them should be embodied. In the course of correspondence in connection with that agreement, the defendant's solicitors, on the 12th of November 1908, asked the plaintiffs' solicitors to send them the title-deeds relating to the property to enable them to investigate the title. Such title-deeds as the plaintiffs had, were sent to the defendant's solicitors and the defendant's solicitors instituted a search in the Collector's office,

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the result of which is embodied in certain notes and a report of their clerk which collectively form Exhibit A-37. On the 26th of January 1909, the defendant's solicitors sent certain requisitions on title of the plaintiffs to the property contracted to be sold by them, and in the letter which accompanied the requisitions they say :—

"*Until the requisitions are satisfactorily answered and objections removed,* we are unable to advise our client to accept the title and to sign the proposed agreement."

The plaintiffs' solicitors answer the requisitions but refuse to answer some of them. After the requisitions were answered, the defendant's solicitors on the 8th of February 1909 write and say that the plaintiffs had not made out a marketable title to the property to their satisfaction in accordance with the terms of the contract and that the answers to the defendant's requisitions were *not at all satisfactory*. They intimate that their client declines to execute the agreement and they demand repayment of the one lac of rupees paid to the plaintiffs, adding that if the money was not immediately returned, their client would claim interest at the rate of 9 per cent. The plaintiffs' solicitors on receipt of this letter write and enquire in what respect the defendant's solicitors were dissatisfied with the title and what answers to their requisitions were unsatisfactory. They offer to furnish all further information in their power as to the title, provided the defendant's solicitors specified in what respect further information was required. On the 27th of February they again write and say :—

"You have not pointed out how our answers show that our clients' title is insufficient. We are unable to discover that any justification exists for the position taken up by your client."

They repeat their request for an explanation of the defendant's reasons for saying that their clients' title to the property was not a marketable title. The letters written by the plaintiffs' solicitors at this stage evince very clearly a desire to give every information in their power and to do all they could to remove any doubts as to their clients' title in the minds of the purchaser's solicitors. The defendant's solicitors, however, treat these

attempts in a very stand-offish manner. All they think fit to say to Messrs. Little & Co., in answer to their persistent enquiries, is in these terms :

"We have already stated to you that your clients have failed to make out a marketable title to our satisfaction and that your answers to our requisitions are not at all satisfactory."

The plaintiffs' solicitors, however, do not relax their efforts to induce the defendant to complete the sale, and on the 29th of March 1909 they address a long letter in which they answer several of the requisitions which they had previously declined to answer and which they still maintain they were not bound to answer. The defendant's solicitors, however, do not change their attitude and on the 7th of April 1909, they repeat that the plaintiffs had failed to make out a marketable title and to answer the defendant's requisitions to their satisfaction and they make that a ground for a final intimation that by that letter their client put an end to the contract between him and the plaintiffs. The defendant relies on this letter as the final rescission of the contract on his part and the case of the defendant has been argued before me on the basis that he formally and finally rescinded the contract on the 7th of April 1909.

On behalf of the plaintiffs it has been contended that they had a perfect title to their property, that before the date of the completion they had made out a marketable title to the property and that they were entitled to insist on the defendant performing his part of the contract and completing the purchase. It was further contended on behalf of the plaintiffs that the defendant had no right to rescind before the time for completion was up and it was pointed out on their behalf that if the defendant's solicitors had only chosen to make their doubts and difficulties clear to the plaintiffs' solicitors, no misunderstanding would have arisen and those doubts and difficulties would have been easily removed.

The main question to be considered in the suit is, whether the plaintiffs have a marketable title to the properties which they contracted to sell to the defendant. Incidentally other

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questions arise, such as, what effect should be given to the stipulation in the contract that the marketable title which the plaintiffs were to deduce was to be to the satisfaction of the defendant's solicitors, whether the defendant was entitled to rescind on the 7th of April as he purported to do, whether the plaintiffs had made out a marketable title before the alleged rescission, and lastly whether in any event the plaintiffs had not succeeded in making out a satisfactory marketable title at the hearing of the suit.

There is no doubt in this suit that the purchaser's solicitors, Messrs. Bicknell, Merwanji and Romer, have in clear and explicit terms intimated that the plaintiffs had *not* succeeded in deducing a marketable title to their satisfaction. It is necessary, therefore, at the outset to ascertain what is the exact legal effect to be given to the stipulation in the contract that the plaintiffs were to deduce a marketable title "to their satisfaction." Mr. Merwanji, who attended to this matter, on behalf of the defendant, is a solicitor of very large experience, and I have no doubt whatever that the doubts and difficulties he felt with reference to the title were genuine doubts that arose in his mind. In order to safeguard the position of his client and at the same time to save himself from any allegation of acting arbitrarily or capriciously, he submitted a case to counsel for his opinion, and a perusal of the case he submitted, together with the opinion thereon (Exhibit 7), clearly establishes that Mr. Merwanji placed the case before counsel very fairly and that the learned counsel, whom he consulted, shared his doubts and difficulties. Is that by itself sufficient to justify the defendant in putting an end to the contract? That I think necessitates a careful consideration of the question, what is the legal effect of such a clause in the contract? Mr. Inverarity for the plaintiffs contended that the clause in the contract meant that all the solicitors forming the firm of solicitors who attended to this matter should have considered the question and formed an opinion before the plaintiffs' title was pronounced not marketable. I doubt if Mr. Inverarity was serious in this contention, for a clause such as I am now considering is not uncommon in agreements for sale of properties, and if every member of a firm of

solicitors acting for purchasers of properties had to form an opinion before this clause could have any effect, it would obviously be a thoroughly useless provision in a contract, for in many firms all the partners are not always in this country, and it would be manifestly impracticable to expect that every partner in a firm of solicitors should independently investigate a title and form an opinion before the opinion contemplated in such a clause could be given effect to. In this case there is no doubt that the plaintiffs knew who the defendant's solicitors were before the contract was made. The senior partner of the firm Mr. Bicknell was on the Board of their Directorate and they knew that his firm were the purchaser's solicitors. They must, therefore, be taken to have agreed to the investigation of their title by some member of that firm.

The question as to what is the legal effect of a stipulation similar to the one I am now considering is discussed in the case of *Hussey* v. *Horne-Payne*[1]. The Court of Appeal in that case held that the words "subject to the title being approved by my solicitor" were not merely an expression of what would be implied by law, but constituted a new term. A careful perusal of the case, as it was before the Court of Appeal, shows that the main question the Court was considering was not exactly what is the legal effect of such a clause or what was the exact meaning to be attached to such a stipulation, but the real question before the Court was, whether there was a concluded contract between the parties, and the Court held that there being no specific acceptance of *this particular term*, there was no concluded contract between the parties. This appears to be clear from the judgment of Lord Justice Cotton, who says:

"That being so, these words introduce a new term, and the letter is not an acceptance pure and simple of the offer contained in the previous letter."

Of course incidentally Lord Justice Cotton does discuss the effect of such a clause and says:

"This stipulation would make the solicitor, provided he acted reasonably and *bonâ fide*, the sole and absolute judge as to whether there was or was not a good title."

(1) (1878) 8 Ch. D. 670.

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But the main question in the suit was, whether there was a concluded binding agreement between the parties, and it was held that "the insertion of this clause in the letter of acceptance by the purchaser was a new term and that the insertion of such a new term was not such an acceptance of the offer as would create a binding contract between the parties."

This same case went to the House of Lords[1]. Lord Chancellor Lord Cairns in the course of his judgment discusses the question rather more fully with reference to what is the exact legal meaning and effect of such a clause in the contract. He says:—

"I am disposed to look upon the words as meaning nothing more than a guard against its being supposed that the title was to be accepted without investigation, as meaning in fact the title must be investigated and approved of in the usual way, which would be by the solicitor of the purchaser. Of course that would be subject to any objection which the solicitors made being submitted to decision by a proper Court, if the objection was not agreed to."

Mr. Justice Wilson in *Sreegopal Mullick* v. *Ram Churn Nuskur*[2] follows the decision of the Appeal Court in *Hussey* v. *Horne-Payne*[3], observing that the views expressed by the Lord Chancellor in the House of Lords, though they were sufficient to raise doubts in every mind, were still not grounds of decision and therefore he felt it his duty to follow the decision of the Appeal Court. It seems to me that in spite of the fact that the views of Lord Cairns were not the grounds of decision, the reasons which he gives for the views he expresses are absolutely convincing in favour of those views. Even the Court of Appeal are constrained to read a proviso in these terms while giving legal effect to its meaning. For Lord Justice Cotton in holding that this clause introduces a new term in a contract, observes that this stipulation would make the solicitor "*provided he acted reasonably and bonâ fide*, the sole and absolute judge as to whether there was or was not a good title." Ordinarily in a contract for the sale and purchase of immoveable property, in the absence of a special stipulation such as I am discussing, the title previous to completion would necessarily

(1) (1879) 4 App. Cas. 311. (2) (1882) 8 Cal. 856.
(3) (1878) 8 Ch. D. 670.

have to be investigated, and the proper person to investigate a title would naturally be the solicitor employed by the purchaser. And I take it no purchaser would complete if his solicitor advised him that the vendor had not succeeded in making out a marketable title. If in such a case the vendor insisted that he had made out such a title, the question would naturally be adjudicated by a Court of law. It could, I think, hardly be contended that it is open to a purchaser, in whose contract such a clause is inserted, merely to say "the title is not made out to the satisfaction of my solicitors and therefore I refuse to complete." Such a construction would, as observed by Lord Cairns, "reduce the agreement to that which is illusory" and would leave a vendor absolutely at the mercy of the purchaser. It seems to me, however, that although there was a difference of opinion between the Court of Appeal and the Lord Chancellor in *Hussey* v. *Horne-Payne*[1], so far as the question of what is the true effect of such a stipulation, there is no real difference between the views expressed by the Appeal Court and the Lord Chancellor. For even the Appeal Court, although it was of opinion that the clause in question introduces substantially a new term, the meaning they give to that term by reading into it a proviso that the solicitor acted reasonably and *bonâ fide*, safeguards the vendors of properties from many difficulties which the Lord Chancellor foresaw, if such a clause was construed as giving an arbitrary and absolute power to the purchaser's solicitors to reject a title made out by the vendor, however good such a title may be. The true view I think of this clause is taken by Lord Justice Lindley in *Clack* v. *Wood*[2]. In the course of his judgment his Lordship observes:

> "The plaintiff sues on a written agreement which contains the words 'subject to the title being approved by my solicitor.' What had the plaintiff to do at the trial? He ought either to have proved that the title was approved or that there was such a title tendered as made it unreasonable not to approve it."

Having regard to these authorities, I am of opinion that it is not sufficient for the defendant in this case to avoid his obligations under the contract to complete the sale by merely showing that his solicitors were not satisfied that the title made

(1) (1878) 8 Ch. D. 670. (2) (1882) 9 Q. B. D. 276.

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out by the plaintiff was a marketable one. As observed by Lord Justice Cotton, in the Court of Appeal in *Hussey* v. *Horne-Payne*[1], he must also satisfy the Court that his solicitors acted reasonably and *bonâ fide*.

Now in this case there is no question about Mr. Merwanji's *bonâ fides*. There is no doubt in my mind that Mr. Merwanji acted with the most scrupulous good faith. He did not trust to his unaided opinion, but submitted a straightforward case to an eminent member of our Bar, and it was only when his doubts were confirmed that he adopted the attitude he did. The question then is, did he act reasonably? Lord Justice Lindley's language in *Clack* v. *Wood* makes it quite clear as to what would be under similar circumstances reasonable conduct. Of the two things that a vendor has to establish, when he desires to enforce a contract for sale with a condition that the title adduced should be to the satisfaction of the purchaser's solicitors, would be either to prove that the solicitors did approve of the title or that there was such a title tendered as made it unreasonable not to approve of it. The effect of all this is that the plaintiffs, before they can succeed in compelling the defendant to perform his part of the contract, have to establish that they adduced and tendered such a title to the defendant that the rejection of it by the defendant's solicitors was unreasonable. It would, therefore, be necessary now to examine what was the title made out and tendered by the plaintiffs to Mr. Merwanji. Was it such a title as would induce the Court to hold that its rejection by Mr. Merwanji was unreasonable?

The plaintiffs have tendered to the Court evidence of their title to the property in question which is mainly documentary evidence produced from the records to the Collector of Bombay and from other sources. The Collector's Head Surveyor, Mr. Vaidya, has given very useful evidence in the case and has produced many documents from his office, tracing the history of the different pieces of land which go to make up the property now contracted to be sold by the plaintiffs. The history of the different plots making up the land on which the defendant's

(1) (1878) 8 Ch. D. 670.

building stands, is traced by Mr. Vaidya from as early a date as 1821. It is true that some of the documents produced on the plaintiffs' behalf were not discovered till after the hearing commenced. They, no doubt, help the Court to a certain extent. I think, however, that it would be but fair to the defendant to confine the consideration of the question to such evidence as was available in support of the plaintiffs' title, before the defendant's solicitors finally pronounced their decision and rescinded the contract. Were the materials that were at the disposal of the defendant's solicitors *and available to him* sufficient to establish a title the rejection of which would be considered by the Court to be unreasonable? Exhibit A-37 shows that the search taken by the clerk of the defendant's solicitors was a fairly thorough and exhaustive search and was intelligently conducted. I feel perfectly certain that if the records in the Collector's office were personally inspected by Mr. Merwanji himself, if he had seen what his clerk seems to have seen, if the various entries and documents produced from the Collector's office had been before Mr. Merwanji's own eye, many of his doubts would undoubtedly have disappeared. There is no doubt that certain inaccuracies crept into the answers given by the plaintiffs' solicitors to his requisitions. Those mistakes were due to a difference in alphabetical marking of certain plots of land on different plans, with the result that they aggravated the doubts which had already been engendered in Mr. Merwanji's mind. The discovery of other documents, more especially of the agreement of the 17th of June 1870, Exhibit A-29, explains away some of these mistakes. When, however, one carefully scrutinizes Exhibit A-37, which shows what materials were at the disposal of the defendant's solicitors, no doubt is left in my mind that what was in the Collector's office and in the documents furnished to the defendant's solicitors by the plaintiffs' solicitors, afforded ample materials to establish that the plaintiffs had in them more than a marketable title to the property which they contracted to sell. It was said on the defendant's behalf that the services of Mr. Vaidya were not at their disposal and that the explanations which he gave to the Court when producing the various documents before it, were not available to the defend-

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ant's solicitors. There is no doubt that Mr. Vaidya's evidence has materially assisted the Court in understanding the various documents tracing the history of the different plots of land in question. Mr. Vaidya seems to have studied the history of this land some time ago for other purposes and I have no doubt in my mind that if he had been asked to give any information or furnish any explanation of any particular entry in the Collector's books or of the documents in the files of the Collector's office, Mr. Vaidya would have done so. Mr. Merwanji had not before him the original entries and the documents inspected by his clerk. If he had, I think many of his doubts would have been dissipated. I cannot help thinking that if Mr. Merwanji, instead of treating the advances and overtures of the plaintiffs' solicitors in the stand-offish manner in which he did, had responded to them and met them in another spirit by explaining to them his doubts and difficulties, he would have been in a very much better position to form his opinion and would have formed a more correct opinion as to the plaintiffs' title than he did. He may have been strictly within his rights in refusing to say more than he did say in his correspondence. But as the evidence proceeded before me and the title was traced and explained to me, I could not resist a conclusion growing in my mind that Mr. Merwanji would have understood a great deal better the effect of what his clerk had seen, if he had those materials under his own observation. That Mr. Merwanji's studied silence and refusal to divulge the nature of his objections were in a great measure responsible for the error into which he fell and the error into which he led his counsel, is clear from the incident with reference to the form of the deed of enfranchisement of Sanadi land. In the agreement between the parties it was provided that the portion of the plaintiffs' land which was originally acquired under sanads and which is spoken of as Sanadi land was to be by them converted into quit and ground rent tenure and sold as such. The plaintiffs entered into negotiations with the Collector for the necessary conversion and it was eventually agreed that in consideration of a payment of Rs. 50,000 to Government, the Sanadi land was to be converted into land of quit and ground rent tenure. The defendant wanting inform-

ation applied to the Collector for the form of the proposed enfranchisement deed and that form was sent to him. When the form was taken to the defendant's solicitors, he felt that the words in it "or other the quit and ground rent for the time being payable" were objectionable. He seems to have formed a notion that if his client accepted the enfranchisement deed in that form, he might be taken to have acquiesced in the contention of Government that they were entitled at any time to raise the quit and ground rent payable for the land. Having formed this notion, he studiously keeps it to himself, never informs the plaintiffs' solicitors that one of his main objections was the presence of those words in the deed and it is not till the written statement is declared on the 28th of August 1909 that the plaintiffs' solicitors come to know that one of the defendant's contentions was that "he was not bound to accept a document of enfranchisement in the form submitted by the plaintiffs' solicitors with their answer to the said requisition, inasmuch as under the said form of document the defendant, by reason of the covenants therein contained, would be precluded from resisting any future increase of the amount of the quit or ground rent which Government might seek to impose but would be liable to pay such increased quit or ground rent". This objection is formulated for the first time in the written statement. It is no doubt true that those words objected to by Mr. Merwanji appear in the form annexed to the answers to requisitions and also appear in the form sent to the defendant by the Collector. Now the true facts, as deposed to by Mr. Vaidya, are that this form was in the first instance put forward and adopted by Government on the 2nd of March 1907, as will appear from the endorsement on Exhibit A-5. On the 4th of December 1908, however, Government altered the form and omitted the words that were objectionable in Mr. Merwanji's opinion, as will appear from the endorsement on Exhibit A-6. If Mr. Merwanji had only drawn the attention of the plaintiffs' solicitors to this objection on his part, I have no doubt enquiries or representations would have been made in the Collector's office and it would have been discovered without any difficulty that the form had been altered and that by some oversight or mistake, the Collector's

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office had sent to the defendant the old form which had been abandoned. In fact, Mr. Merwanji had the new form before him on the 16th or 17th of August 1909 before the defendant's written statement was declared. His attention seems to have been actually drawn to the omission of the objectionable clause and yet he sits absolutely silent and never gives the plaintiffs a chance of rectifying the mistake and removing the misunderstanding. As a matter of fact, the plaintiffs have obtained enfranchisement of their Sanadi land in the form that does not contain the clause objected to by the defendant's solicitors. It is true they obtained this on the 14th of December 1909 but it is clearly established that the plaintiffs, after the 4th of December 1908, were in a position to obtain the form in which they eventually did obtain it, without any difficulty at any time that the defendant was ready to complete. It has been urged on behalf of the defendant that the plaintiffs' solicitors were wrong in refusing to answer certain requisitions. I think the plaintiffs' solicitors, strictly speaking, were within their rights, in refusing, as they did, to answer some of these requisitions.

In *In re Ford and Hill*(1) the Court of Appeal held referring to similar requisitions as were made in this case that "such questions by the purchaser's solicitors were not proper questions to be put in requisitions to title". Lord Justice James says: "I am of opinion that the question put by the purchaser is anything but a requisition. It is a searching interrogatory put to the vendors and their solicitors," and it was held in this case that neither the vendors nor their solicitors were bound to answer any part of the requisition.

Whether the plaintiffs' solicitors were wise in refusing to answer the requisition, is another question, but the fact remains that in their desire to avoid conflict, they eventually did most fully answer the requisitions in their letter of the 29th of March 1909. As I observed before, the plaintiffs' solicitors were undoubtedly in error in the explanation they give with reference to certain small plots of land which go to make up the whole of the land contracted to be sold. How this mistake arose would

(1) (1879) 10 Ch. D. 365.

become quite clear at a glance by putting the two plans, one annexed to Exhibit A-19 and another annexed to Exhibit A-29, side by side. The plot marked B in Exhibit A-19 happens to be marked C in Exhibit 29. The plot which is marked C in Exhibit A-19 is marked D in Exhibit A-29, and the plot which is marked D in A-19 is marked B in A-29. At the time when this misunderstanding arose, unfortunately Exhibit 29 had not been discovered, and hence the difficulties in identifying the plots by letters and making the measurements of these plots fit in with the plots described by alphabetical lettering. I do not think, however, that that mistake has any real effect on the question between the parties. As I have observed above, if Mr. Merwanji had been less reserved, if he had not held Messrs. Little & Co. at arm's length, if there had been interviews between the respective solicitors, if Mr. Merwanji himself had inspected the records in the Collector's office and seen the entries and the documents there for himself, I have no doubt that all his doubts would have vanished.

The evidence as to the plaintiffs' title consists mainly, as I have observed above, of documents which come from the Collector's custody and other sources. Since the hearing, I have carefully gone through the documentary evidence recorded in this case by the light of the oral evidence given by Mr. Vaidya, and I have come to the conclusion that the plaintiffs have made out a much better title to their property than a great many people in Bombay would be able to make out with respect to a great many properties. I do not propose to go into a detailed discussion of the various documents that go to prove the plaintiffs' title to the property they contracted to sell. It seems to me that the discussion before me as to whether the plaintiffs were bound to make out a 60 years' title, as contended by Mr. Jardine, or whether the defendant was bound to accept a 20 years' title, as contended by Mr. Inverarity for the plaintiffs, is of no real importance in this case. The plaintiffs in this instance have been able to make out a satisfactory title which extends to a period considerably over 60 years, and many of the objections that were urged on behalf of the defendant seem to me to be without any substance. For instance, Mr. Jardine contended that there

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was a discrepancy of somewhere about 45 square yards. He said, the plaintiffs purport to sell 4,116 square yards and they have proved title to only 4,071 square yards. Now it must be remembered that the plaintiffs never contracted to sell so many square yards of land. All they contracted to sell was their Byculla property and therefore the question of the discrepancy of a few yards in measurement, even if real, is to my mind of no consequence. The defendant presumably knew the plaintiffs' property and knew what he was buying and there was no question between them of the actual area of the property. Both the parties understood perfectly well what they were selling and buying. Equally unsubstantial, I think, was the contention on the part of the defendant that he was entitled to rescind and repudiate because there might possibly be some incumbrance created between the years 1859 and 1865. Mr. Jardine contended that the absence of the original deed-poll was compatible with the firm of Treacher & Co. having mortgaged the property between 1859 and 1865. It seems to me that this apprehension is identically the peril which was pleaded in *Moulton* v. *Edmonds* (1) and which the Lord Chancellor stigmatized as "imaginary and chimerical" and the observations of the Court at page 252 of the report are, I think, a complete answer to the apprehension expressed on behalf of the defendant. When the title of the defendant is traced by the light of the documents before the Court, it seems to me that the title is one that any Court would accept as a perfectly *good* title.

I propose now to trace very shortly the history of the different parcels of land which go to make up the whole piece of land on which the plaintiffs' buildings at present stand. In referring to the different plots of land, I propose to refer to them as they appear on the plan annexed to Exhibit A-19. It appears that as early as 1821 one Kazi Shaik Dawood bin Mahomed Salia owned a portion of this land. In 1824 he acquired two more pieces of land by two different sanads and he was from that date the owner of the whole of the land in question in this suit. From 1824 up to 1830 all plots of land

(1) (1859) 1 De G. F. & J. 243.

were in the possession of Kazi Shaik Dawood. In 1839 he seems to have made a default in paying the Government dues and the land was sold and purchased by the late Mr. Manekji Cursetji, who, during his life-time, was a prominent citizen of Bombay. Mr. Manekji Cursetji held the land from 1839 to 1849 and during his occupancy he used a portion of the land for quarrying stone, with the result that the quarry was converted into a tank. In 1849 Manekji Cursetji made over this tank to Government for public purposes, as the supply of water was scarce in that locality. The tank was given for the use of the public as a memorial to his late father. It was subsequently exempted from the payment of the ground rent, and by orders of Government rent to the extent of Rs. 46-13-2 being the proportionate rent of the land given up, was remitted by Government. The land so given up by Mr. Manekji Cursetji is designated as tank land and appears on the plan attached to Exhibit A-19 marked with the word 'Tank'. After he gave up the tank land for the use of the public in the year 1859 by a deed-poll bearing date the 14th of December 1859, he conveyed two plots marked A and D to the firm of Treacher & Co. These two plots A and D remained in the possession of the firm till they were conveyed to the limited liability Company, the present plaintiffs. So that so far as plots A and D are concerned, we have the fact that they were from 1824 to 1839 in the possession of Kazi Shaik Dawood; from 1839 to 1859 they were in the possession of Mr. Manekji Cursetji; from 1859 to 1867 they were in the possession of Treacher & Co.; and from 1867 up to date they have been in the possession of the plaintiffs. Then we have two small plots B and C. These plots in the first instance formed a portion of the tank land and got into the possession of the Municipality. The major portion of the tank land eventually came back to Mr. Manekji Cursetji but these two small portions never came to his possession and remained with the Municipality. The firm of Treacher & Co. acquired these plots in the early sixties, one I think in 1860 and another in 1863 from the Municipality. The Municipal authorities do not appear to have obtained the previous sanction of Government to the sale of these and other plots of land in Bombay but

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Government acquiesced in the said sales and waived all objections to these sales on their part by re-assessing and re-imposing the usual quit and ground rent assessment on these plots. The firm of Treacher & Co. held these plots till 1867 and from that time the present plaintiffs have been in possession. The only flaw in the title to these plots that can possibly be urged, is that the Municipality were not entitled to sell without Government sanction. Government condoned this informality in the sales and practically assented to them when they re-imposed quit and ground rent tax, and I think any apprehension that the title of the plaintiffs would be imperilled after so many years of uninterrupted and undisputed possession merely because of this informality or defect in the sale would, I think, come well under the category of perils that were stigmatized as "imaginary and chimerical."

The only other plot that remains to be considered is the tank land. This plot was in Shaik Dawood's possession between 1823 and 1839. In 1839 Mr. Manekji Cursetji acquired it at the Collector's sale. He held it till 1849. The Municipality remained in possession of it from 1849 to about 1865: Mr. Manekji re-acquired this land under certain terms which it is unnecessary to set out here and he eventually sold the land to the present plaintiffs by a conveyance dated the 1st of August 1870, Exhibit A-20, and the plaintiffs have retained possession of the land ever since.

This shortly is the history of the different plots of land which go to make up the property contracted to be sold. There can, I think, be no doubt that the title, such as the plaintiffs have made out to their property, is, to put it at the very lowest, certainly a marketable title. As I observed above, it is a better title than many owners in Bombay could make out to their property. It extends to a period considerably beyond sixty years and to my mind it is an unimpeachable title that the plaintiffs have succeeded in making out to their property. To reject such a title is to my mind unreasonable, and I find that Mr. Merwanji was not right when he decided that the plaintiffs had failed to make out a marketable title. The opinion, no

doubt, was honestly formed in the light of what was before Mr. Merwanji, but in my opinion he failed correctly to appreciate the materials, reference to which his investigating clerk had placed before him. The learned counsel, to whom the case was submitted, shared Mr. Merwanji's doubts and difficulties because he really had not before him everything that should have been placed for his consideration. Mr. Merwanji was content to place before counsel all that was before him, but all that was before him was not all that he could have had, if he had either personally investigated the Collector's records and inspected all the entries and documents referred to by his clerk in Exhibit A-37 and if he had been a little more open and communicative to the vendor's solicitors. In spite of all his doubts, Mr. Lowndes does in his opinion say that "the title is a fair holding one and might be accepted without much risk, if the vendor Company would give an indemnity bond. They are a substantial Company whose indemnity would, I imagine, be a fair security." Mr. Merwanji seems to have ignored this portion of counsel's opinion altogether and never suggested the plaintiffs giving the defendant an indemnity bond.

Having regard, therefore, to all the circumstances of this case, I have come to the conclusion not only that the plaintiffs have a marketable title to their property and have established it to the satisfaction of the Court but that they had made out a marketable title before the same was rejected by the purchaser's solicitors.

I further hold that to reject a title such as was tendered, was under the circumstances unreasonable and that the consequent attempt to rescind the contract on the part of the defendant was wholly unjustifiable.

[After finding on the various issues his Lordship proceeded—]

I hold that the plaintiffs are entitled to specific performance of the contract, and decree that the defendant do pay to the plaintiffs the sum of Rs. 1,50,000 with interest thereon at 5 per cent. per annum from the 1st of October 1908 till payment—the plaintiffs in their turn to convey the premises contracted to be sold and give vacant possession thereof to the defendant.

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I have considered the question of costs and have come to the conclusion that the defendant must pay to the plaintiffs their whole costs of this suit. Even after the plaintiffs had led their evidence and proved their title, the defendant up to the very last persisted in maintaining that they had no marketable title to their property. I do not think this is a case in which any portion of the plaintiffs' costs should be disallowed.

Attorneys for the plaintiffs: Messrs. *Little & Co.*

Attorneys for the defendant: Messrs. *Bicknell, Merwanji & Romer.*

K. MCI. K.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1910. *August* 18.

PURSHOTUMDAS RAMGOPAL, PLAINTIFF AND APPELLANT, *v.* RAMGOPAL HIRALAL AND OTHERS, DEFENDANTS AND RESPONDENTS.*

Arbitration—Statement of special case for opinion of Court—Appeal from order of Court—Civil Procedure Code (Act V of 1908), section 104, and Schedule II, rule 11—Indian Arbitration Act (IX of 1899), section 10.

In a suit filed for partition of joint family property, the parties agreed to refer the matter to arbitration, and a consent order of reference was taken. A similar agreement referred to the same arbitrators questions as to the partition of such immoveable property as was outside the jurisdiction of the Court in the suit.

The arbitrators disagreed on certain points, but, instead of referring their differences (as the agreements of reference authorised them to do) to an umpire, they submitted their own opinions in the form of a special case for the opinion of the Court. In doing so they purported to act under the provisions of the

* Original Suit No. 781 of 1908.
Appeal No. 19 of 1910.