then took the case to the Judge. That is not an appeal. They were entitled to have the opinion of the Judge." And Lord Justice Cotton follows up by the observation that the losing party has a right to *require* that the matter should be decided by the Judge himself.

Formerly all pauper investigations used to be put on the Board of a Judge hearing short causes and they were dealt with by the Judge. This duty is now under the Rules delegated to the Prothonotary and this has worked most satisfactorily and has saved a great deal of the Court's time. On the authorities however and under Rule 80 (*a 1*) it seems to be the right of a party dissatisfied with the Prothonotary's decision to apply to the Judge to have the matter adjourned to him and I take it that the Judge in chambers is bound to take up the matter and decide the matter for himself.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

RANCHHOD BHAWAN (PLAINTIFF) *v.* MANMOHANDAS RAMJI AND ANOTHER (DEFENDANTS).*

1907. *August* 26.

Indian Contract Act (IX of 1872), section 73—Vendor and purchaser—Contract to sell immoveable property—Damages for breach of such contract.

The rule in *Flureau* v. *Thornhill* (1) is not law in this country.

Section 73 of the Contract Act imposes no exception on the ordinary law as to damages, whatever the subject-matter of the contract. In cases of breach of contract for sale of immoveable property through inability on the vendor's part to make a good title the damages must be assessed in the usual way unless it can be shown that the parties to the contract expressly or impliedly contracted that this should not render the vendor liable to damages.

Pitamber Sundarji v. *Cassibai*(2) distinguished.

THE facts of this case are clearly set forth in the Judgment.

Robertson and *F. Sorabji Talyarkhan* for plaintiff.

Strangman and *Setalvad* for defendants.

* Original Suit No. 416 of 1906.

(1) (1776) 2 W. Bl. 1078. (2) (1886) 11 Bom. 272.

1907.

RANCHHOD v. MANMOHANDAS.

MACLEOD, J.:—One Ichchalal Pranjivandas died on the 1st April 1869 having executed a will dated the 20th January 1869 (Exhibit C) by which he appointed Vasudeo Krishnaji and Purbhudas Pranjivandas executors. Vasudeo renounced and Purbhudas died in 1890. In 1897, Suit No. 652 of 1897 was filed by Bai Jadav, the widow, and Bai Devkore, the daughter, of the testator for *inter alia* the construction of the will. Under a decree of the Appeal Court in that suit, dated the 13th day of October 1899, the Court declared that two trustees should be appointed to carry out the trust under the will of the testator, and it was referred to the Commissioner to enquire as to who were fit and proper persons to be appointed such trustees. By an order of the 17th April 1901 made in the said suit, Manmohandas Ramji and Kalliandas Keshavdas, the 1st and 2nd defendants in the present suit, were appointed trustees under the said will with power to sell in one or more lots the properties of the testator mentioned in the said will. Acting under the said power to sell, the trustees contracted to sell certain portion of the testator's property in 1902, and the plaintiffs, in Suit 652 of 1897, took out a notice of the 19th February 1902 to restrain them from selling. The application was refused with costs on the 25th February 1902 (Exhibit I). Again in 1903 the trustees contracted to sell certain other portions of the testator's property and Bai Jadav filed Suit No. 191 of 1903 against the trustees and others to prevent the sale being completed. By an order dated the 6th August 1903 (Exhibit T) made in that suit the trustees were ordered to complete the sales. The suit abated owing to the death of Bai Jadav. By an agreement dated the 21st September 1904 (Exhibt A), the trustees contracted to sell a certain portion of the testator's property to the plaintiff in this suit, but by another agreement dated the 24th September 1904 (Exhibit B) the trustees contracted to sell another portion to the plaintiff and it was understood that this agreement was to be in substitution of the agreement of the 21st September 1904, and the earnest-money of Rs. 500 paid under that agreement was to be taken as having been paid under this agreement. The important words in Exhibit B are these: "As to whatever objections and disputes there may be in connection with the land the same shall be cleared at your cost." Correspondence followed between

Messrs. Motilal and Co. on behalf of the vendor and Messrs. Ardeshir Hormasji and Dinshaw for the trustees regarding the completion of the contract. But on the 1st December 1904 Mr. Hiralal Dayabhai, solicitor for Bai Devkore, wrote to Messrs. Motilal and Co. (Exhibit F) objecting to the sale on various grounds and giving notice that she was about to file a suit against the trustees. On the 3rd December 1904, Messrs. Motilal and Co. wrote to Messrs. Ardeshir Hormasji and Dinshaw calling on them to clear the objection. On the 22nd December 1904, Bai Devkore filed the threatened suit No. 882 of 1904. The plaint is Exhibit H. On the 7th February 1905, Messrs. Ardeshir Hormasji and Dinshaw wrote to Messrs. Motilal and Co. as follows: "We are taking steps to obtain an order from the Court to complete the sale herein and have already given notice of same to Bai Devkore." I may mention here that the whole of the correspondence annexed to the plaint has been put in as Exhibit E. The notice of motion (Exhibit J) was actually dated the 6th February 1905. On the 17th April 1905, the motion was brought on and was adjourned to the hearing of the suit, Bai Devkore undertaking to indemnify the trustees against any damages they might have to pay owing to the delay in hearing the motion and to pay within four days Rs. 500 as security for such damages. The order is Exhibit V. On the 26th August 1905, the suit came on for hearing but meanwhile negotiations had been going on for a settlement and a consent decree was taken (Exhibit L), the effect of which, as far as the trustees were concerned, was that they were relieved of their trusteeship on being fully indemnified by Bai Devkore *inter alia* against any claims that might be made against them by the present plaintiff. The notice of motion of the 6th February 1905 was by intention not referred to in the consent decree but was brought on on the 28th August and of course discharged by an order of that date (Exhibit Q). Correspondence followed between the plaintiff's and the trustees' solicitors to which it is not necessary to refer in detail, and eventually the earnest-money was returned on the 15th June 1906. The plaintiff then filed this suit, on the 19th July 1906, against the trustees praying for interest on the earnest-money, all costs, charges and expenses

1907.

RANCHHOD v. MANMOHANDAS.

which he had been put to, and for damages for the loss of his bargain. On the 24th September 1906, the defendants issued a third party notice (Exhibit R) against Bai Devkore. By an order of the 16th October 1906 (Exhibit S) Bai Devkore was given leave to defend the suit but this order was amended by a further order of the 27th June 1907 by which Bai Devkore was given liberty to conduct the defence of the suit in the name of the defendants and her written statement was struck off.

The defence, therefore, has been conducted by Bai Devkore but she is only entitled to raise such defences as could have been raised by the trustee defendants. On the facts as above stated I shall now deal with the issues raised by Mr. Strangman for the defendants. On the first and second issues, whether the defendants were not bound to consent to the decree of the 26th August and whether the plaintiff has any right against the defendants in view of the said decree, I am clearly of opinion they were not bound to consent so as to prejudice the rights of parties with whom they had contracted. They were entitled to ask the Court to sanction the sale to which Bai Devkore objected and the plaintiff's right against them could in no wise be affected by the consent decree. On the third issue, whether the plaintiff was entitled to impose upon the defendants the condition contained in his letter of the 28th January 1905, the defendants by taking steps to clear the objection have debarred themselves from raising this question. However, apart from that, it is quite clear that under the circumstances mentioned above the plaintiff was entitled under the agreement of the 24th September 1904 to impose the condition. The threat to treat the agreement as cancelled if an order was not obtained within ten days was never acted upon by either side and cannot be considered seriously. Issues 5, 6 and 7 raise the most important questions in the suit. Mr. Strangman has argued that the defendants did everything in their power to clear the title, that they did not disable themselves from carrying out the contract, that as the condition imposed by the plaintiff had become impossible through no wilful default on their part they were absolved from liability under the agreement,

and that in any event the rule in *Flureau* v. *Thornhill*[1] applied.

Now the situation, as far as the defendants were concerned, on the 17th April 1905 when the notice of motion was adjourned to the hearing and on the 26th August 1905 when the consent decree was passed, is to my mind quite clear from the evidence of the first defendant and Mr. Framroze the defendants' solicitor. The trustees were naturally anxious to be free of the burden of their trusteeship which had proved to be unexpectedly onerous owing to the attitude taken up by Bai Jadav and Bai Devkore, and they were quite willing to be freed from that burden provided they were fully indemnified. They must have known that the result of their action would be that the objection to the sale to the plaintiff could not be cleared and that they would be unable to perform their part of the agreement.

But rather than run the risk of the consent decree not being passed they preferred to disable themselves from clearing the objection, and in consequence there was a breach of the contract of the 24th September 1904. After the breach the defendants treated the plaintiff in the most off-hand fashion. No notice was given to the plaintiff that the contract could no longer be completed and after the plaintiff had had inspection of the drafts of the consent decree and the order of the 28th August, Messrs. Ardeshir Hormusji and Dinshaw on the 15th September 1905 sent Rs. 500 to the plaintiff's solicitor, without a word of regret or explanation and without saying anything about the costs and expenses the plaintift had been put to since the contract was made. Plaintiff's solicitor having no instructions to receive the money could not then accept it, but on the 19th September 1905 they wrote to Messrs. Ardeshir Hormusji and Dinshaw, that they had instructions to receive it without prejudice. The money was not sent till the 15th June 1906. Meanwhile the plaintiff's solicitor had been corresponding with Mr. Hiralal Dayabhai, solicitor for Bai Devkore, and in

(1) (1776) 2 W. Bl. 1078.

1907.

RANCHHOD v. MANMOHANDAS.

Mr. Hiralal's letters of the 21st and 25th April 1906 the defence now set up was foreshadowed.

The plaintiff is, therefore, entitled to damages under section 73 of the Contract Act. But Mr. Strangman has argued that the rule in *Flureau* v. *Thornhill*(1), followed in *Bain* v. *Fothergill*(2), applies, namely that a purchaser of real estate cannot recover damages for the loss of his bargain but only his deposit and expenses, and that that rule has been held by this Court to be the law of British India: *Pitamber Sundarji* v. *Cassibai*(3). But that rule does not apply to cases of wilful default: *Engell* v. *Fitch*(4). Nor, it seems, to unreasonable omission to complete the title by taking some definite steps in the vendor's power: *Day* v. *Singleton*(5). In that case the vendor failed to obtain the lessor's consent which was necessary to the sale. Lindley M. R. observes at p. 329 : "If Dunn's representatives had tried to obtain the lessor's consent and had failed, Day could have obtained no more damages than those he has recovered...... why, then, should he obtain more damages if no attempt is made to obtain the lessor's consent than he would be entitled to if a proper effort to obtain such consent had been made and had failed ? The only reason which can be assigned for deciding that he is entitled to more is that the rule which limits his damages in the first case is itself an anomalous rule based upon and justified by difficulties in showing a good title to real property in this country, but one which ought not to be extended to cases in which the reasons on which it is based do not apply." If he had had the facts of this case before him I think the Master of Rolls would have expressed himself in exactly similar terms. Since if the motion of the 6th February 1905 had been heard on its merits and discharged, the same result would have followed as if Singleton had failed in a proper attempt to obtain the lessor's consent. It is quite clear the motion was not heard on its merits. Sir Francis Jeune says at p. 332 : " The present action is not, I think, to be regarded as an action for

(1) (1776) 2 W. Bl. 1078.
(2) (1874) L. R. 7 H. L. 158.
(3) (1886) 11 Bom. 272.
(4) (1869) L. R. 4 Q. B. 659.
(5) [1899] 2 Ch. 320.

1907.

RANCHHOD v. MANMOHANDAS.

breach of contract to sell the lease of the hotel in question. It is really an action against Mr. Singleton for failing in his duty to obtain, if he could, the consent of the Charterhouse to a transfer." In this case the defendants agreed to clear objections in connection with the land and they failed to do so. I have already stated that in my opinion the defendants were not bound to consent to the consent decree of the 26th August 1905 without having the notice of motion heard on its merits, and whichever way one looks at it I cannot imagine a clearer case of wilful default. But further I am not prepared to hold that the rule in *Flureau* v. *Thornhill*[1] is law in this country. See Pollock and Mulla's Indian Contract Act at p. 263, and the dictum of Farran, C. J., in *Nagardas Saubhagyadas* v. *Ahmedkhan*[2]. "The legislature has not prescribed a different measure of damages in the case of contracts dealing with land from that laid down in the case of contracts relating to commodities." In *Pitamber Sundarji* v. *Cassibai*[3] no reference was made to the Contract Act, and therefore that case cannot be taken as holding that the rule must be read into section 73 by which I am bound. When the Contract Act was passed *Bain* v. *Fothergill*[4] had not been decided, and the rule in *Flureau* v. *Thornhill*[1] had already been limited by subsequent decisions. As section 73 imposes no exception on the ordinary law as to damages whatever the subject-matter of the contract, it seems to me that in cases of breach of contract for sale of immoveable property through inability on the vendor's part to make a good title the damages must be assessed in the usual way, unless it can be shown that the parties to the contract expressly or impliedly contracted that this should not render the vendor liable to damages. Each case should be dealt with on its own merits. To apply a rule of law which can only be extracted from a series of English decisions, instead of the law especially enacted for British India by the Legislature, would be to disregard the numerous rulings of this Court on that point. In this case the damages will be the difference, if any, between the contract price and the market value at the

(1) (1776) 2 W. Bl. 1078.
(2) (1895) 21 Bom. 175 at p. 185.
(3) (1886) 11 Bom. 272.
(4) (1874) L. R. 7 H. L. 158.

1907.

RANCHHOD v. MANMOHANDAS.

date of breach, and the plaintiff is entitled in addition to interest on Rs. 500 from the 24th September 1904 until the 15th June 1906 and the costs and expenses he was put to owing to the breach. There must be an inquiry into the damages.

Attorneys for the plaintiff:—*Messrs. Malvi, Hiralal, Mody and Ranchhoddas.*

Attorneys for the defendant:—*Messrs. Ardeshir, Hormasji, Dinsha & Co.* and *Messrs. Hiralal & Co.*

B. N. L.

ORIGINAL CIVIL.

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

1907. *September 27.*

BANOO BEGUM AND OTHERS, APPELLANTS AND OPPONENTS, *v.* MIR ABED ALI AND OTHERS,* RESPONDENTS AND APPLICANTS; AND MIR ABED ALI AND OTHERS, APPELLANTS AND APPLICANTS, *v.* MIR AUN ALI AND OTHERS,* RESPONDENTS AND OPPONENTS.

Mahomedan law—Creation of vested remainder by a Mahomedan—Spes successionis—*Creation of life-interest amongst Shias allowed.*

It is possible for a Mahomedan to create a definite interest like what would be called in English law a vested remainder, and such a remainder, though liable to be displaced, is not a mere expectancy in succession by survivorship or other merely contingent or possible right or interest, but an interest that could be attached and sold.

Umes Chunder Sircar v. *Mussummat Zahoor Fatima*(1) followed.

Amongst Shias the creation of a life-interest is allowed, and it appears according to Shia authorities that during the period of the life-interest the deferred interest can be dealt with by way of sale, gift, and otherwise, provided that there is no interference with the particular estate, and it would seem to follow that the purchaser or donee could deal with the interest so acquired by him.

APPEAL from the judgment of Russell, J.

* Original Suit No. 565 of 1891, Appeals Nos. 1479 and 1484.

(1) (1890) L. R. 17 I. A. 201.