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Sundara Ayyar JJ., concludes with the following proposition: "Deformity and unfitness for social intercourse arising from the virulent and disgusting nature of the disease would appear to be what has been accepted in both the texts and the decisions as the most satisfactory test".

In the case of *Mohunt Bhagaban Ramanuj Das v. Mohunt Roghunundun Ramanuj Das*⁽¹⁾, Sir Richard Couch delivered a judgment of this Board which substantially agreed with that test. Sir Richard Couch was already deeply committed on the subject, for, so far back as the year 1868, in the case of *Janardhan Pandurang v. Gopal Pandurang*⁽²⁾, he had expressed himself in nearly similar terms.

The result is that their Lordships will humbly advise His Majesty that this appeal be disallowed with costs.

Solicitors for appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for respondents: Mr. *E. Dalgado.*

A. M. T.

(1) (1895) L. R. 22 I. A. 94.

(2) (1868) 5 Bom. H. C. (A. C. J.) 145.

ORIGINAL CIVIL.

Before Mr. Justice Fawcett.

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September 13.

SHAMSUDIN TAJBHAI (PLAINTIFF) v. DAHYABHAI MAGANLAL (RESPONDENT)².

Contract—Specific performance—Sale of immoveable property—Delay in answering requisitions—Time made of the essence—Failure to complete—Property put up to auction—Suit by vendor for specific performance or damages—Measure of damage—Indian Contract Act (IX of 1872), section 73—Conveyancing practice in Bombay—Recital in deeds over 20 years old—Costs of obtaining copies of orders and decrees to be borne by purchaser.

On the 23rd January 1920 the plaintiff agreed to sell certain immoveable property to the defendant for Rs. 46,000. Rs. 2,000 was paid as earnest

² O. C. J. Suit No. 2780 of 1921.

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money. The agreement for sale, without making time of the essence, provided for completion within 2 months. On the 20th April 1920 the defendant sent in his requisitions. These were not finally answered till the 23rd November 1920. On the 14th December 1920 answers to further requisitions were called for by the defendant and these the plaintiff sent on the 25th January 1921. On the same day the plaintiff wrote to the defendant making time of the essence of the contract, and informed him that unless he paid the balance of the purchase money within ten days the plaintiff would treat the contract as broken by the defendant and would put the property up for sale by auction on the defendant's account and at his risk. The defendant having failed to pay within the 10 days the property was put up to auction on the 11th March 1921 but as the highest bid offered (Rs. 31,000) did not reach the reserve which had been placed upon it the property was withdrawn. On the 19th March 1921 the defendant wrote to the plaintiff demanding the return of his earnest money on the ground that the plaintiff had failed to make out a marketable title whereupon the plaintiff filed the suit for specific performance of the contract of sale or in the alternative for damages for breach. The defendant counterclaimed for the return of his earnest money.

Held, (1) that the vendor had made out a good marketable title ;

(2) that he was entitled, having regard to the conduct of the purchaser, to give him the notice of the 25th January 1921 making time of the essence, and that the time, namely, 10 days, was ample ;

(3) that the vendor was not entitled to a decree for specific performance not only because of his delay in answering the requisitions but also because he had treated the contract as broken and had subsequently put the property up for auction ;

(4) that although a vendor would ordinarily be entitled to damages assessed at the excess of the contract price over the market value on the date of the breach, the plaintiff here had by his delay in answering the requisitions contributed to the resulting loss and was therefore only entitled to his taxed costs of and incidental to the agreement of sale *plus* the forfeiture of the defendant's earnest money.

Found that the Bombay Solicitors have adopted the practice of accepting recitals in deeds over 20 years old in the same way as is done in England, under the Vendor and Purchaser Act, 1874 ; also, that the purchaser must in the first instance bear the cost of obtaining certified copies of all orders and consent decrees asked for in his requisitions.

SHAMSUDIN (plaintiff) sued for specific performance of an agreement, dated the 23rd January 1920, under which Dahyabhai (defendant) agreed to buy certain

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immoveable property from the plaintiff for Rs. 46,000 on the terms mentioned therein, or in the alternative to recover Rs. 15,000 as damages and Rs. 900, the costs incurred by the plaintiff and incidental to the agreement for sale. The defendant pleaded that the plaintiff had failed to make out a marketable title and counter-claimed for return of Rs. 2,000, the earnest money he had paid, with interest and for the costs incurred by him in connection with the sale. The agreement for sale contemplated completion of the contract within two months. The negotiations for completion went on for over a year and time was not of the essence of the contract. The requisitions on the vendor's title were sent by the defendant's attorneys to the plaintiff's on the 20th April 1920 but were not returned answered till the 21st September 1920. One of the requisitions remained unanswered till the 23rd November 1920. The defendant's attorneys made six further requisitions in their letter of 14th December 1920. On 25th January 1921 plaintiff's attorneys answered these and gave notice on that day to defendant's attorneys that unless the balance of the purchase moneys were received within ten days, time being of the essence of the contract, their client would treat the contract as broken by defendant, and would resell the property on defendant's account and hold him liable for damages, if any. As the defendant failed to comply, the plaintiff put the property up to auction on the 11th March 1921, but it was withdrawn as the highest bid, viz., Rs. 31,000 did not come up to the reserved price. On the 19th March 1921 defendant's attorneys gave notice that, as plaintiff had failed to make out a marketable title and to produce the documents he had been called upon to produce, so as to clear defects of title, defendant treated the contract as broken by plaintiff; and demanded back the earnest money at once. Thereupon the suit was

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brought by the plaintiff on the 12th July 1921 for specific performance of the contract or in the alternative to recover Rs. 15,000 as damages together with costs. The defendant counterclaimed for the earnest money.

Bahadurji, with *Kania*, for the plaintiff.

Desai, with *Amin*, for the defendant.

FAWCETT, J.:—[His Lordship first set forth the facts of the case and dealt with the requisitions one by one:] I next take various requisitions relating to heirs as mentioned in various documents.

Nos. 1 to 5 relate to recitals in the conveyance of 1863 (Exhibit L). That was a document about forty-seven years old, and the recitals contained therein should have been accepted, in the absence of anything throwing suspicion on their character. Mr. Rustamji, plaintiff's solicitor, has given uncontradicted evidence of the practice of Bombay solicitors to accept recitals in deeds over twenty years old, in the same way as is done in England under the Vendor and Purchaser Act, 1874 (Williams, Vol. I, p. 136)...

In requisition No. 15 the vendor was required to furnish to the purchaser certified copies of the orders and consent decrees mentioned in the conveyance, dated October 21, 1914, and the answer was "the vendor will do so at the purchaser's costs". I accept Mr. Rustamji's uncontradicted evidence that this answer accords with the practice of Bombay solicitors in the matter. This follows the practice in England under the Conveyancing Act, 1881 (Williams, Vol. I, p. 121). It might be the case that under the agreement of sale defendant might eventually be able to claim that half of such costs should be borne by plaintiff. What it apparently contemplates is that the bills of the two sets of solicitors should be pooled and shared half and half. But that does not affect the propriety

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of the answer to the requisition. In the first place the defendant had to bear the cost of getting the copies asked for. [His Lordship next dealt with the question whether the plaintiff had made out a marketable title.] I find that plaintiff had made out a marketable title at the time he gave his notice of January 25, 1921. It seems to me that his title is really an exceptionally strong one, considering that the title deeds date back to 1808 and that it is supported by various consent decrees, as well as by very well-drawn documents like Exhibits I and J.

The correspondence and other circumstances leave no doubt in my mind that defendant through his attorneys was deliberately trying to get out of his agreement, owing to the fall in the market for immoveable properties, which occurred towards the end of 1920, as the Court is well aware from other litigation before it. The intention to take advantage of all possible objections and requisitions in order to delay and prevent completion of the purchase is quite clear. I, therefore, hold that there was such conduct on the part of the defendant as entitled the plaintiff to give the notice of January 25, 1921. The time allowed for completion, viz., ten days, was ample for preparing and executing and registering the necessary conveyance, if due expedition was used. I, therefore, answer issues Nos. 1 to 2B as follows :—

Issues.	Answers.
(1) Whether the plaintiff or the defendant committed breach of contract?	(1) The defendant on February 5, 1921, when the time limit of ten days expired.
(2) Whether the plaintiff has made out a marketable title?	(2) Yes.
(2A) Whether the plaintiff was entitled to give the notice contained in his letter of January 25, 1921?	(2A) Yes.
(2B) Whether the time of ten days there specified was reasonable?	(2B) Yes.

The third issue is whether the plaintiff is entitled to specific relief. I answer this in the negative. Not only is the delay on his part of the investigation of title against him, but he also treated the contract as broken in accordance with the notice given by his attorneys' letter of January 25, 1921, and by subsequently putting up the property for auction. It is not a fact that, as pleaded in para. 7 of the plaint, he has been always ready and willing to perform his part of the contract.

Issues Nos. 4 and 5 are as to the damages, if any, to which plaintiff is entitled. In the plaint Rs. 15,000 are claimed on the basis of the highest bid (Rs. 31,000) obtained at the auction in March 1921. As I have already remarked this latter fact has not been proved: but this seems to have been due to oversight and I would be disposed to allow plaintiff another opportunity of proving it, but for the fact that I do not think he is in any case entitled to damages on that basis. Firstly, the actual damages are to be assessed at the excess of the contract price over the market value on February 5, 1921 [*cf.* illustration (d) to section 73, Indian Contract Act], and not its market value in March 1921, which may have been considerably lower. And, secondly, the plaintiff's delay from April to September in answering the requisitions and making the inquiry of Exhibit N materially contributed to the resulting loss, through the fall of the market. Had the requisitions been answered in May or June 1920, as they might otherwise have been, it seems not improbable that the defendant would have been willing to push through completion, and the contract would have been carried out. In the circumstances, I think plaintiff is not entitled to any more damages than his taxed costs of and incidental to the agreement for sale plus the forfeiture of defendant's earnest money, Rs. 2,000. I answer issues Nos. 4 and 5 accordingly.

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On issue No. 6 I hold the defendant's counter-claim for recovery of earnest money, &c., should be dismissed.

Solicitors for plaintiff: Messrs. *Jamshedji, Rustamji and Devidas*.

Solicitors for defendant: Messrs. *Khandvalla & Co.*

Suit decreed.

V. G. R.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

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THE BANK OF MORVI LTD., APPELLANTS (ORIGINAL DEFENDANTS) v.
BAERLEIN BROTHERS, RESPONDENTS (ORIGINAL PLAINTIFFS)².

December 4.

Contract—c. i. f.—June-July shipment—Agreement to extend time—No period fixed—Delivery within reasonable time—Buyer cannot reject—Conditions requisite to pass property—Suit for the price—Damages.

The defendants placed an order for 50 bales of yarn, with the plaintiffs on c. i. f. terms; June-July shipment. The plaintiffs accepted the order but intimated that it was not possible to guarantee delivery within the stipulated time and that if there was a little delay there must be no claim for late delivery. To this the defendants agreed. By August 20 the last of the bales had been shipped. The bills of lading together with the drafts were forwarded by the plaintiffs to a Bank in Bombay with instructions not to hand over the shipping documents to the defendants until they accepted and paid the drafts. The defendants refused to pay on the ground that the goods were not shipped, within the contract time. The plaintiffs having sued to recover the price,

Held, (1) that the defendants were not justified in refusing to accept the goods inasmuch as they had agreed to an extension of time and the plaintiffs had shipped the goods within a reasonable time;

(2) that as the plaintiffs had reserved to themselves the right of disposal of the goods after shipment the property in the goods had remained with them and they could not sue for the price;

O. C. J. Appeal No. 51 of 1923; Suit No. 842 of 1921.