APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Harington and Mr. Justice Brett.

1908
December 2.

BURN & Co.
v.
McDONALD.*

Contract—Injunction—Breach of contract—Contract of personal service—Agreement—Absence of negative agreement—Negative covenant implied—Specific Relief Act (I of 1877), s. 57, also illustration (d)—Restraint of trade—Damages—Contract Act (IX of 1872), s. 74—Codified law.

By an agreement made in England, M. was engaged by B. & Co. a firm of Engineers in Calcutta, as an assistant in their firm for a period of 5 years, and it was *inter alia* agreed that "he should diligently and to the best of his ability devote himself to the duties incumbent on him and should faithfully observe and comply with such instructions as he might from time to time receive from the firm." During the term of his engagement, M. left the employ of B. & Co. and entered that of another firm. On a suit, instituted by B. & Co., for an injunction to restrain M. from serving, working or being employed by any other person or persons and for damages.

Held, although there was no negative condition in terms in the agreement, a negative covenant could be properly implied, under section 57 of the Specific Relief Act, and illustration (*d*) thereto, which gave legislative sanction in India to the law as laid down by Selborne L. J. in *Wolverhampton and Walsall Railway Company* v. *London and North-Western Railway Co.* (1).

Charlesworth v. *MacDonald* (2) approved.

Lumley v. *Wagner* (3), *Whitwood Chemical Company* v. *Hardman* (4), *Ehrman* v. *Bartholomew* (5) referred to.

Where the law has been codified, it is of little avail to enquire what is the law apart from such codification: the Code itself must be looked to as the guide in the matter.

As the contract had been most deliberately broken the plaintiffs were entitled to an injunction according to the principles of equity, justice and good conscience.

APPEAL FROM ORIGINAL SUIT.

APPEAL by the plaintiffs, Burn and Co., from the judgment of Fletcher J.

* Appeal from Original Civil No. 460 of 1908 in Suit No. 241 of 1908.

(1) (1873) L. R. 16 Eq. 433, 440. (3) (1852) 5 De. G. and S. 485.
(2) (1898) I. L. R. 23 Bom. 103, 113. (4) [1891] 2 Ch. 416.
(5) [1898] 1 Ch. 671.

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This action was instituted by Messrs. Burn and Co., Ld., a firm of engineers carrying on business in Calcutta, and the neighbourhood, against the respondent, who was formerly one of the assistants employed in their firm, for an injunction and damages for breach of agreement.

By an agreement made in England, and dated the 27th July 1904, between the appellant Company and the respondent, the Company engaged Mr. McDonald as draughtsman and general assistant in its engineering works at Howrah near Calcutta or elsewhere for a period of 5 years from and after the date at which he should begin to work after his arrival at the engineering works at Howrah, it being agreed that he should forthwith proceed to Calcutta, the Company providing him with a second class passage. The respondent's remuneration was fixed at Rs. 250 per month for the first year of his service, with annual increments of Rs. 25, to be paid "monthly or as may be mutually arranged," with certain other allowances.

Certain other clauses in the memorandum of agreement, were as follows :—

(3). "On the arrival at Calcutta of the said Colin McDonald he shall at once report himself at the said engineering works at Howrah aforesaid and enter upon his duties aforesaid and during the said period of this agreement he shall diligently and to the best of his ability devote himself to the duties incumbent on him as aforesaid and shall faithfully observe and comply with such instructions as he may from time to time receive from the said Messrs. Burn & Co., Ld., or their authorised representative for the time being."

(6). "At any time during the said period of this agreement the said Messrs. Burn & Co., Ld., shall be entitled to terminate the said engagement and that without assigning any reason for so doing in which event they shall make payment of one month's salary to the said Colin McDonald and payment of a second class passage home to this country, provided always that the obligation to provide such passage shall not be binding or operative, unless the said Colin McDonald shall within one calendar month from the termination of his engagement depart from India with the intention of returning to this country. But in the event of the said dismissal being caused by the said Colin McDonald's (*a*) insobriety, (*b*) unpunctuality in attendance to business, (*c*) carelessness and inattention to or neglect of work or duties, (*d*) disobedience of orders given by the said Messrs. Burn & Co., Ld., or his immediate superior, (*e*) illness brought on or induced by misconduct or disobedience to the Doctor's orders, (*f*) breach of confidence with reference to any of the business secrets of the firm, (about any of which the said

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Messrs. Burn & Co., Ld., or their representative shall be the sole-judge), the said Colin McDonald shall have no claim for salary after having been duly warned on at least one occasion, further than up to the date of his dismissal or for a passage home as before provided for the said Colin McDonald."

(8.) "The said Colin McDonald shall be bound, if and when required by the said Messrs. Burn & Co., Ld., to assist them in any other department of their business and, if required, to go to any other place in the East in connection with their business."

(10.) "The said Colin McDonald shall be bound, if required, on his arrival at Calcutta to confirm this engagement in conformity with the laws of the place to the effect that the same may be capable of enforcement there."

(12.) "Both parties bind and oblige themselves to perform their respective parts of the premises to each other under the penalty of one hundred pounds to be paid by the party failing to the party performing or willing to perform over and above performance."

It is to be observed there was no express negative covenant in the agreement restraining the respondent from taking service under any other firm, during the term of his employment by Messrs. Burn & Co.

The respondent arrived in Calcutta on the 13th October 1904 and immediately entered upon his duties under the agreement as an assistant of Messrs. Burn and Co. at Howrah, and continued to perform his duties and to be so employed till the 3rd March 1908.

It appears that on the 18th February 1908, Mr. McDonald having secured a post under the firm of Raja Sreenath Roy and Bros., wrote to Messrs. Burn and Co. tendering his resignation and proposing to leave their employment from the 15th March following. On the 19th February 1908, Messrs. Burn and Co., replied declining to accept the resignation and giving Mr. McDonald notice that "they would take legal steps to enforce the terms of his agreement with them." Some further correspondence passed and on the 3rd March 1908, on the respondent's request for his salary for the month of February, he was informed that the office had instructions to withhold his salary for the present. Thereupon, on the 4th March 1908, Mr. McDonald left the service of Messrs. Burn & Co., upon the pretext of the firm's refusal to pay him his

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salary for February. On the 17th March 1908, the respondent entered the service of Raja Sreenath Roy & Bros.

On the 21st March 1908, Messrs. Burn & Co. instituted this suit, asking for Rs. 2,000 as damages and for an injunction "to restrain the defendant from serving, working or being employed by the said Raja Sreenath Roy & Bros. or any person or persons other than the plaintiff company, until the said agreement dated the 27th July 1904 should have been determined by effluxion of time, that is, until the 13th October 1909."

The defendant denied breach of the agreement on his part, and alleged that the company had committed breach of the agreement by compelling the defendant to do various works not contemplated by the agreement, and by their refusal to pay his salary for February 1908 on the 3rd March 1908, and submitted that in any event the company were not entitled to the injunction sought.

The rule *nisi* for an *interim* injunction was discharged by Chitty J. on the 10th April 1908, but an order was obtained expediting the hearing of the suit.

The suit came on for hearing before Fletcher J., who on the 14th May 1908 refused to grant an injunction and gave a decree for Rs. 30 by way of damages, observing—

FLETCHER J. This is a suit brought by Burn & Co., Ld., against one Colin McDonald, who was formerly one of the assistants employed in their firm, for an injunction and damages for breach of agreement.

The defendant entered into the service of the plaintiffs' firm under an agreement, dated the 27th July 1904, and made in England between one of their authorised agents of the one part and the defendant of the other part. The term of the agreement is for five years commencing from and after the date at which the defendant should begin to work under the agreement after his arrival at the engineering works of the plaintiffs at Howrah.

By the third clause of the agreement it is provided that on arrival of the defendant in Calcutta he shall at once report himself at the said engineering works at Howrah and enter upon his duties and shall diligently and to the best of his ability devote himself to the duties incumbent on him and shall faithfully observe and comply with such instructions as he may from time to time receive from the plaintiffs' firm.

No obligation under the contract is imposed on the plaintiffs to employ the defendant for the period of five years. The contract provides that, if

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the defendant breaks this agreement he shall be liable to a penalty of £100 to be paid to the plaintiffs.

The defendant in his written statement denies that he has committed any breach of the agreement. As I am of opinion that the defendant by leaving the plaintiffs' employ committed a breach of his agreement, I have first to decide whether or not the plaintiffs are entitled to an injunction.

Now, by section 57 of the Specific Relief Act, it is provided that when a contract comprises an affirmative agreement to do a certain act coupled with a negative agreement express or implied not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement.

From this section it appears first, that there must be in this contract a negative agreement express or implied and, secondly, the jurisdiction conferred on the Court is a discretionary jurisdiction.

Then, first, does the contract contain a negative agreement express or implied ?

" Every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do, but it does not at all follow that, because a person has agreed to do a particular thing, he is therefore to be restrained from doing every thing else, which is inconsistent with it " (*per* Lindley L. J. in *Whitwood Chemical Company* v. *Hardman* (1).

In my opinion, it is impossible to infer from the contract in question a negative agreement by which the defendant undertook that, whether the plaintiffs should or should not continue to employ him, he would not during the period of five years from the commencement of the agreement work for any one else in the world.

But even if I had come to the conclusion that such a negative agreement should be implied I should have held such agreement to be void as being in restraint of trade and being wider than what was necessary for the reasonable protection of the plaintiffs.

The defendant has, however, raised a defence which I had better deal with before I come to the question of damages.

This defence is that the punctual payment of the defendant's salary under the agreement on the first of every month is a condition precedent to his continuing to serve under the plaintiff company. Clause 4 of the agreement provides for payment monthly or as may be mutually arranged, of salary to the defendant at certain rates with allowances during the several years of his employment.

Now what are the facts ?

From October 1904 to the 3rd March 1908 the defendant continued to serve in the plaintiffs' firm. Having replied to an advertisement in the papers he secured a post under another firm.

On the 18th February, he gave notice to the plaintiffs that he intended to leave their firm on the 15th March following.

(1) [1891] 2 Ch. 416.

He did not actually join the other firm until the 17th March though he absented himself from the plaintiffs' firm from the 4th March. During the period of that notice at the end of February his pay for February became due, but the plaintiffs stopped his pay to see whether the defendant carried out what he stated to be his intention in his letter of the 18th February.

Considering all the circumstances, I think the plaintiffs were justified in withholding the defendants' pay during the currency of the notice by which the defendant intended to commit a breach of his agreement.

That being so, the suit resolves itself into a question of damages.

Now, what is the measure of damages that the plaintiffs are entitled to ?

The plaintiffs' witness says that it costs about Rs. 550 to bring out a new man from England, that Rs. 100 has to be paid to him on the voyage out and about Rs. 350 for advertisement charges, and the agent's fees have to be paid in England. In the present case no special damages can be made out because the plaintiffs' own case is that immediately the defendant left their firm, they employed one Mr. Gilfilan in his place, though he is not a permanent hand. He is not drawing a bigger salary than the defendant. It is probable that, if the defendant had performed his agreement, the plaintiffs would, at the end of about another year and a half, have had to bring out another man from England to fill the defendant's place.

The plaintiffs are therefore entitled by way of damages to the interest they will lose by having to lay out this sum earlier than they would otherwise have had to have done. I accordingly award to the plaintiffs Rs. 30 as damages for the defendant's breach of his agreement.

I make no order as to the costs of this suit.

There remains only the question of costs of the plaintiffs having obtained an *ex parte* injunction restraining the defendant from joining and working for the firm of Raja Sreenath Roy. The injunction was subsequently discharged, but the costs were reserved. From the facts disclosed, it appears that the plaintiffs were wrong in obtaining the injunction and they must pay to the defendant his costs of having that injunction discharged.

From this judgment, the plaintiff company Burn & Co., Ld., appealed.

Mr. Buckland for the appellant company. The facts of this case are entirely covered by section 57 of the Specific Relief Act. The Court can import the negative covenant by the respondent, not to take service under any other firm during the period of his agreement, and has power to grant an injunction restraining him from doing so. See *Madras Railway Company* v. *Thomas Rust* (1). Illustration 4 to section 57 is to the point. See *Callianji Harjivan* v. *Narsi Tricum* (2)

(1) (1890) I. L. R. 14 Mad. 18. (2) (1894) I. L. R. 18 Bom. 702, 708.

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and the observations of Farran C. J. on appeal (1). It is true the present tendency of the English Courts is to limit the application of *Lumley* v. *Wagner* (2), but the Specific Relief Act has adopted the principle and contains the law to be applied in India, and even in England "when the importation of a negative quality into an affirmative agreement is not against the meaning of the agreement, the Court will import the negative quality and restrain the doing of acts inconsistent with the agreement." See Kerr on Injunctions, 4th edition, page 394. See also *Webster* v. *Dillon* (3), *Montague* v. *Flockton* (4), *Wolverhampton and Walsall Railway Co.* v. *London and North-Western Railway Co.* (5) and *DeMattos* v. *Gibson* (6), which was followed in *Haji Abdul Allarakhi* v. *Haji Abdul Bacha* (7). The negative covenant, if imported, would not be in restraint of trade within the meaning of section 27 of the Contract Act. See *Charlesworth* v. *MacDonald* (8) and *The Brahmaputra Tea Co. Ld.* v. *Scarth* (9). The jurisdiction to grant an injunction is discretionary with the Court, and on this question the Court will consider the great disadvantage employers of skilled labour are at, in this country, and the great trouble and expense they would be put to, to replace competent employees, who choose to break their contracts of service. In the alternative, if the injunction prayed for be refused, it is submitted the damages awarded by the Court of first instance are inadequate and not "reasonable compensation" within the meaning of section 74 of the Contract Act. See *The Brahmaputra Tea Co. Ld.* v. *Scarth* (9).

Mr. Avetoom (*Mr. Stokes* with him) for the respondent. It is conceded that the Court has the *power* to grant the injunction, but it is submitted that the jurisdiction is discretionary, and that this is not a proper case where an injunction should be granted. The agreement was unfair, one-sided and want-

(1) (1895) I. L. R. 19 Bom. 764, 767.
(2) (1852) 5 De. G. and S. 485.
(3) (1857) 3 Jur. N. S. 432.
(4) (1873) L. R. 16 Eq. 189.
(5) (1873) L. R. 16 Eq. 433.
(6) (1858) 4 De. G. and J. 276.
(7) (1881) I. L. R. 6 Bom. 5.
(8) (1898) I. L. R. 23 Bom. 103.
(9) (1885) I. L. R. 11 Calc. 544, 545. 550.

ing in mutuality. To grant an injunction in a case like the present would amount in substance to a decree for specific performance. See *Callianji Harjivan* v. *Narsi Tricum* (1). [Maclean C. J. How do you reconcile this with the judgment of Farran C. J. in *Charlesworth* v. *MacDonald* (2) ?] In the absence of any negative stipulation in the agreement, the company are not entitled to an injunction to restrain their employee from entering the service of another firm. See *Whitwood Chemical Company* v. *Hardman* (3). An agreement for personal service cannot be enforced otherwise than by an action for damages, though it may possibly be enforced in certain exceptional cases, not to be extended, where there is a strictly negative stipulation. See *Davis* v. *Foreman* (4).

At the conclusion of the argument it was mentioned by Counsel that the respondent was now willing to return to the service of the appellant company, and the latter were willing to take him back.

MACLEAN C. J. The plaintiffs in this case are a firm of Engineers in the neighbourhood of Calcutta, and the defendant entered into a contract with them to act as a draughtsman and general assistant in their business at Howrah. That agreement was reduced into writing. It is dated the 27th of July 1904, and was made in England; the defendant was then in England, and he came out here, the plaintiffs paying the expenses of his passage out. By that agreement he covenanted that on his arrival at Calcutta he should "at once report himself at the said Engineering Works at Howrah aforesaid and enter upon his duties aforesaid and during the said period of this agreement he should diligently and to the best of his abililty devote himself to the duties incumbent on him as aforesaid and should faithfully observe and comply with such instructions as he might from time to time receive from the said Messrs. Burn & Co., Ld., or their authorised representative

(1) (1895) I. L. R. 19 Bom. 754, 768.
(2) (1898) I. L. R. 23 Bom. 103, 112, 113.
(3) [1891] A. C. 416.
(4) [1894] 3 Ch. 654, 657.

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for the time being." There are other provisions in the contract, namely, as to the conditions upon which the defendant might be dismissed by Messrs. Burn & Co., but they are not material. In the 12th paragraph both parties "bound and obliged themselves to perform their respective parts of the premises to each other under the penalty of one hundred pounds to be paid by the party failing to the party performing or willing to perform over and above performance." In accordance with the terms of that agreement, the defendant came out from England and entered upon his duties as an assistant with Burn & Co. and he seems to have discharged those duties very satisfactorily, I find nothing to the contrary, for some three and a half years. But on the 18th of February 1908, he wrote to his employers a letter, the effect of which was that he proposed to resign and leave that employment on the 15th of March next. To that Messrs. Burn and Co. replied that "they declined to accept the resignation and gave him notice that they would take legal steps to enforce the terms of his agreement with them." We need not refer further to the correspondence in detail. It is sufficient to say that early in March, on the pretext that the plaintiffs had refused to pay him his February salary, the defendant left the firm's service and took employment with the firm of Raja Sreenath Roy and Brothers. The plaintiffs then instituted this suit, and asked for damages and "for an injunction to restrain the defendant from serving, working or being employed by the said Raja Sreenath Roy and Brothers or any person or persons other than the plaintiff company." I ought to have said that the agreement was to last for five years, which expired on the 13th of October 1909.

The matter was tried before Mr. Justice Fletcher, and he refused to grant an injunction; he gave the plaintiffs Rs. 30 by way of damages and no costs of the suit. In fact he ordered the plaintiffs to pay the costs of an application for an interlocutory injunction. The plaintiffs have appealed.

There is no dispute as to the facts; and I will deal as shortly as I can with the legal points which have been raised. It is suggested that in a case of this sort, the Court ought not to

grant an injunction, that the question of granting or refusing an injunction is one which lies in the exercise of the judicial discretion of the Court, and that in a case such as the present it ought not to be granted. We have been referred to the law in England on the subject. The law of England no doubt is that a mandatory injunction will not be granted for the specific performance of a personal service—but ever since the day of *Lumley* v. *Wagner* (1), which is a decision now some 50 to 60 years old, it has been laid down that, although the Court cannot grant a mandatory injunction to that effect, yet where in the agreement there is a negative clause, that is to say, a clause to the effect that the contracting party will not serve anybody else, effect can be given to that and an injunction granted. In the present contract there is no such negative condition in terms. But, although I do not think that authorities in England are very useful to us, in dealing with questions codified by the law of India, I should like to call attention to the observations of Lord Selborne, then Lord Chancellor sitting as Master of the Rolls in the case of *Wolverhampton and Walsall Railway Co.* v. *London and North-Western Railway Company* (2). The passage I propose to read is at page 440. This is what this great Judge says :—"With regard to the case of *Lumley* v. *Wagner* (1), to which reference was made, really when it comes to be examined, it is not a case which tends in any way to limit the ordinary jurisdiction of this Court to do justice between parties by way of injunction. It was sought in that case to enlarge the jurisdiction on a highly artificial and technical ground and to extend it to an ordinary case of hiring and service, which is not properly a case of specific performance, the technical distinction being made, that if you find the word "not" in an agreement "I will not do a thing" as well as the words "I will," even although the negative term might have been implied from the positive, yet the Court, refusing to act on an implication of the negative will act on the expression of it. I can only say, that I should think it was the safer and the better rule, if it should eventually be adopted by this Court, to look

(1) (1852) 5 De. G. & S. 485. (2) (1873) L. R. 16 Eq. 433, 440.

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in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise, whether this is the Court to come to for a remedy. If it is, I cannot think that ought to depend on the use of the negative rather than an affirmative form of expression. If, on the other hand, the substance of the thing is such that the remedy ought to be sought elsewhere, then I do not think that the form ought to be changed by the use of a negative rather than an affirmative."

If it had been necessary I should have applied that principle to the present case, but here we have to deal with the law in India. The law in India on this subject is codified and, it has been laid down in the House of Lords, by the Judicial Committee and in several cases in this Court, to some of which I myself was a party, that where the law has been codified it is of little avail to enquire what is the law apart from such codification, but we must look to the Code itself as our guide in the matter. The law here is codified by section 57 of the Specific Relief Act. That seems to me to make the case reasonably clear. That section runs as follows :—"Notwithstanding section 56, clause (*f*) "—clause (*f*) says that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced—"Where a contract comprises an affirmative agreement to do a certain act coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement, shall not preclude it from granting an injunction to perform the negative agreement; provided that the applicant has not failed to perform the contract so far as it is binding on him." The language of that section is reasonably clear, and it appears to give legislative sanction in India to the view expressed by Lord Selborne in the passage I have read. If there had been any doubt as to the meaning of the language of the section, illustration (*d*) is conclusive upon the subject. It runs :—"B contracts with A that he will serve him faithfully

for twelve months as a clerk. A is not entitled to a decree for specific performance of this contract. But he is entitled to an injunction restraining B from serving a rival house as clerk." The view I entertain coincides with that of the late Chief Justice Farran in the case of *Charlesworth* v. *MacDonald* (1). In that case the Court thought that there was a negative covenant, although the terms of the agreement were not very clear. After dealing with the case of *Lumley* v. *Wagner* (2) Farran C. J. says: "In my opinion it would be most unfair to gentlemen in the position of the plaintiff not to protect them in such cases. It would virtually debar them from engaging an assistant at all. An action for damages would afford them no protection, certainly no adequate protection;" and, in a previous part of his judgment he refers to section 57 of the Specific Relief Act and speaks of it "as a legislative decision to the same effect." Now, can we in the present case properly say that a negative covenant is implied?

I feel no doubt about it. Here the covenant is that the defendant will diligently and to the best of his ability *devote* himself to the duties as a draftsman and general assistant. Surely when a man says that he will *devote* himself during a period of years to the business of a particular firm, it does imply that he will not give his services during that period to any other firm. It would be dangerous to hold the contrary. Here to my mind, an injunction is not only the most effective but the only remedy according to the principles of equity, justice and good conscience. To give damages in a case of this sort—damages, which perhaps will never be recovered—will be a very small consolation to the plaintiffs. It is said that if we grant an injunction the defendant will starve. We have nothing to do with that; he ought to have thought of that, before he deliberately broke his contract;—as a matter of fact there is no vista in that direction as the defendant is willing to go back and the appellants are willing to take him back into their service. It is important in this country that

(1) (1898) I. L. R. 23 Bom. 103, 113. (2) (1852) 5 De. G. & S. 485.

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assistants should know when they enter into contracts of this nature, when they are brought out to India at considerable expense by their employers, that they cannot treat their employers in this high-handed fashion. They must honestly and faithfully perform their contracts. If the defendant's argument was well-founded he might have left Burn & Co., at the end of a week instead of at the end of three years. Here we have a case in which the contract is deliberately entered into and most deliberately broken. In my opinion, the plaintiffs are entitled to that special remedy, which the principles of equity, justice and good conscience demand, of an injunction to prevent the defendant from breaking his contract. There is no suggestion in the pleadings—there is not one word in the evidence, that Burn & Co. have not treated him properly. In fact they are willing to take him back.

It is not necessary, as we are asked for and are granting an injunction, to go into the question of damages; but I do not desire to be understood as agreeing with the principle upon which the Court of first instance has given Rs. 30 as damages. I can scarcely think that the learned Judge would have done this, had his attention been attracted to section 74 of the Indian Contract Act.

The result, therefore, is that the decision of Fletcher J. is reversed and that a decree must be made for an injunction in terms of the prayer and that the defendant must pay the costs of the suit and the appeal, including those of the interlocutory injunction.

HARINGTON J. I agree: but, inasmuch as we are differing from the learned Judge in the Court of first instance, I propose to add a few words.

The agreement between the plaintiffs and the defendant was that the plaintiffs should employ the defendant for a period of five years and that the defendant should serve the plaintiffs during that period, and there was a stipulation that, if either the plaintiffs failed to perform their part of the agreement

or the defendant failed to perform his part; a sum of £100 should be payable by the party in default to the one who was ready to carry out the agreement. Now, while the defendant was employed under that contract of service he appears to have seen an advertisement, which attracted him, he desired therefore to quit the services of the plaintiffs. It appears that he first spoke to the plaintiffs' manager about his desire to leave and the result of that conversation was a letter declining to forego, on behalf of the firm, any part of the agreement and pointing out to the defendant that, if he desired to quit the services of the firm, he could do so, at a month's notice, on paying the amount stipulated in the agreement. In reply to that the defendant wrote declining to pay the sum of money stipulated under the agreement, because, he said, he was not in a position to do so, and asking the firm to accept his resignation. That the firm declined to do and subsequently, against the wishes of the plaintiffs, the defendant quitted their services and thereby broke the agreement, which he had entered into with them. Now, the plaintiffs ask for an injunction to prevent the defendant from entering into the service of a rival firm and giving them the advantages of his skill.

It is said that no injunction ought to be granted on two substantial grounds. One is that the agreement contained no negative stipulation under which the defendant undertook not to serve any rival firm of Engineers; and, secondly, on the ground that the granting of an injuction is an indirect means of enforcing a covenant, of which the specific performance would not be granted, that is to say, a covenant to perform a personal service.

Now, no doubt, these two grounds influenced the learned Lord Justices in England, who decided the case of *Whitwood Chemical Co.* v. *Hardman* (1): and they were further influenced by the danger, which they considered there was, in a country like England, of extending the case of *Lumley* v. *Wagner* (2). The case of *Whitwood Chemical Co.* v. *Hardman* (1)

(1) [1891] 2 Ch. 416.
(2) (1852) 5 De G. & S. 485.

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was afterwards followed by Mr. Justice Romer in the later case of *Ehrman* v. *Bartholomew* (1), in which, in refusing an injuction, the learned Judge adopted and assented to the observations of the Lord Justices in *Whitwod Chemical Co.* v. *Hardman* (2) as to the danger of extending the case of *Lumley* v. *Wagner* (3). So if those cases represented what was the law here, there might be, at any rate, a good deal to be said on behalf of the respondent. But the answer is that the law here is expressed in section 57 of the Specific Relief Act, which provides that an injunction may be granted for a negative agreement, either express or implied, notwithstanding the fact that the specific performance of the positive agreement cannot be enforced under the law. So, that diposes at once of one of the grounds on which the respondent must rely.

Then, with regard to the other ground, that it is an indirect way of enforcing a covenant for personal service, that is met by Illustration (*d*) to section 57: that gives an instance of a case in which the plaintiffs would be entitled to an injunction—a case which is on all fours with the present case. The result is that section 57 as illustrated by Illustration (*d*) shows that the two grounds, which have been relied upon by the respondent, do not represent what is the law in this country, and I therefore think that there are no grounds for refusing an injunction in the present case.

Then, as regards another point, the learned Judge in his judgment expressed the opinion that, if it had been necessary to decide, he should have held that this agreement was void as being an agreement in restraint of trade (4). With very great deference to the learned Judge, speaking for myself, I should have thought that an agreement to serve Messrs. Burn & Co. in the course of their trade was not an agreement in restraint of trade, because by it the defendant stipulated that he would ply his trade, and that distinguishes the case

(1) [1898] 1 Ch. 671.
(2) [1891] 2 Ch. 416.
(3) (1852) 5 De G. & S. 485.
(4) See p. 358.

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from that familiar class of cases in which an employee covenants that after the expiration of his service he will not ply his trade within some specified distance of his late employer's place of business. In the one case, he agrees to ply his trade, in the other case he specifically agrees not to ply his trade. But, whether that distinction be sound or not, it is really not necessary in the present case, because, in my opinion, illustration (*d*) affords the answer to the argument that this contract is void as in restraint of trade. Illustration (*d*), as I pointed out, deals with a case which is on all fours with the present and says that the plaintiffs are entitled in such a case to an injunction. Under those circumstances, it cannot be said that a similar stipulation in this case is void, being in restraint of trade. If so, illustration (*d*) would provide that an injunction could not be granted, because the agreement was void. In my opinion, illustration (*d*) to section 57 meets the point as to the contract being void as being in restraint of trade and that disposes of that point in favour of the plaintiffs. For these reasons I agree that this appeal should be allowed.

BRETT J. I agree with the learned Chief Justice and have nothing to add.

Appeal allowed.

Attorneys for the appellant Company: *Orr, Dignam & Co.*

Attorneys for the respondent: *Leslie & Hinds.*

J. C.