

APPEAL FROM ORIGINAL CIVIL.

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

ABU MAHOMED

v.

S. C. CHUNDER.*

1909

January 13.

Assignment—Claim for damages for breach of contract—Right of assignee to sue—Transfer of Property Act (IV of 1882), ss. 3, 6 (e), 130—“Actionable claim”—“Mere right to sue.”

A claim for damages for breach of contract, after breach, is not an “actionable claim” within the meaning of section 3 of the Transfer of Property Act, but a “mere right to sue” within the meaning of section 6 (e) of the same Act, and therefore cannot be transferred. [Per Maclean C. J. and Harington J., Fletcher J. *dubitante*.]

APPEAL by the plaintiff Abu Mahomed, from the judgment of Stephen J.

By a contract, dated December 2nd, 1904, Messrs. Ebrahim Haji Sulaiman & Co. purchased from the respondent S. C. Chunder 225,000 gunny bags for delivery in equal portions during the months of January to May 1905, each month’s delivery to be considered a separate contract. Delivery was duly given of the January and February portions, but the respondent failed to give delivery of the March instalment to Messrs. Ebrahim Haji Sulaiman & Co., who thereby sustained damage to the extent of Rs. 1,112-8, being the difference between the contract price of the goods and the market price prevailing on March 31st, 1905.

The purchasers, Messrs. Ebrahim Haji Sulaiman & Co., subsequently became insolvent and the estate and credits of the firm vested in the Official Assignee of Bombay. By a deed of assignment, dated June 6th, 1906, the Official Assignee assigned “all actionable claims arising from the transactions of the Bombay and Calcutta firms, whether entered in the books

* Appeal from Original Civil No. 58 of 1903.

1909
ABU
 MAHOMED
 v.
 S. C.
 CHUNDER.

or not, and the benefits of all contracts entered into by the Bombay and Calcutta firms of Ebrahim Haji Sulaiman & Co.," to one Sulleman Cassim Peroo Mahomed, who again assigned the same to the appellant Abu Mahomed by a deed of assignment dated July 5th, 1906.

Abu Mahomed thereupon instituted this suit for the recovery of the sum of Rs. 1,112-8, the amount of damage which had resulted from the breach by the respondent of the contract of the 2nd December 1904. It was pleaded in defence that the plaintiff had no cause of action and that the suit was not maintainable. On the 6th August 1908, Stephen J. dismissed the suit holding that as the plaintiff was a transferee merely of a right to sue, he could not maintain the action. His Lordship's judgment was as follows :—

STEPHEN J. In this case Ebrahim Hajee Sulaiman in December 1904 entered into a contract with the defendant for the supply of a quantity of B. twills to be delivered in four monthly consignments. Pursuant to this contract two monthly consignments were delivered in January and February. The one of the 31st March 1905 was not delivered on which Ebrahim Hajee Sulaiman purchased goods in the market and as he says at the price of Rs. 1,112-8, above the contract price, Ebrahim Hajee Sulaiman then became insolvent and the Official Assignee conveyed his outstandings, assets and his interest in the execution of the contract to a purchaser, who assigned them on the 5th of July 1906 to the plaintiff. The plaintiff now sues for the Rs. 1,112-8, which are said in fact to be damages sustained by Ebrahim Hajee Sulaiman and which is the amount assessed as damages in the assignment to the plaintiff. It is objected on behalf of the defendant that the plaintiff shows no cause of action, that the claim for damages is not an actionable claim under section 3 of the Transfer of Property Act, that Ebrahim Hajee Sulaiman's claim as to damages was a mere right to sue so far as he was concerned and, if anything vested in the Official Assignee, it cannot be more than a mere right to sue with regard to the contract in question. Therefore it is argued nothing passed from the Official Assignee to the assignor of the plaintiff or consequently afterwards to the plaintiff. This contention seems to me to be sound. The claim in question cannot be an actionable claim because it is not a claim for liquidated damages, consequently there is no doubt it comes within the meaning of section 3 of the Transfer of Property Act and it also seems to me impossible that after the 31st March Ebrahim Hajee Sulaiman had anything except a mere right to sue. The contract, so far as the March delivery was concerned, was discharged by a breach on the 31st March and it then ceased to exist. Ebrahim Hajee Sulaiman then had a claim for damages and that claim is the same thing as the right to sue. I cannot

see how he or anybody deriving any right from him can have anything more than this.

It has been argued before me that clause (e) of section 6 of the Transfer of Property Act was enacted in order to prevent champertous suits, but I hold there is nothing at all in the Act to lead me to confine the operation of sub-section (e) to such suits and I must take the words as I find them. In taking this view of the case, I am considerably fortified by the judgment in *May v. Lane* (1). The question there depends on the construction of sections of the Judicature Act and the facts are not altogether similar to those of the present case. But applying the principles there laid down, I cannot hold that the present plaint does disclose any cause of action.

The suit is consequently dismissed with costs.

From this judgment, the plaintiff appealed.

Mr. Garth (*Mr. Sircar* with him) for the appellant. It is conceded that a mere right to sue cannot be assigned. But the claim in this suit is an "actionable claim" within the definition given in section 3 of the Transfer of Property Act, read with section 130, which includes within its purview "all the rights and remedies, whether by way of damages or otherwise." Section 130 of the Transfer of Property Act goes beyond section 25 of the Judicature Act and cannot be confined to debts only. At the date of the assignment the amount of damage had been ascertained. In *Jaffer Meher Ali v. Budge-Budge Jute Mills Co.* (2), Sale J. held that a contract for the purchase of gunny-bags was assignable, and this decision was not disturbed on appeal (3), and has been followed in *Nathu v. Hansraj* (4). See also *Torkington v. Magee* (5), although I submit that English authorities on this point have not much force in this country. The doctrine in *May v. Lane* (1) can have no application here. Moreover, the *dictum* in *May v. Lane* (1) has been considered in *Dawson v. Great Northern and City Railway* (6) and has been interpreted to mean that equity will not allow an assignment by way of champerty. This principle has no application in India. The last-mentioned case was the case of a claim to compensation under the Lands Clauses Act

1909
 ABU
 MAHOMED
 v.
 S. C.
 CHUNDER.

(1) [1894] 64 L. J. Q. B. 236.

(4) (1906) 9 Bom. L. R. 114.

(2) (1906) I. L. R. 33 Calc. 702.

(5) [1902] 2 K. B. 427.

(3) (1907) I. L. R. 34 Calc. 289.

(6) [1905] 1 K. B. 260, 270.

1909
 ABU
 MAHOMED
 v.
 S. C.
 CHUNDER.

and it was held such claim was assignable. There is no distinction between such a claim and a claim to damages under a contract as in the present case. [Fletcher J. referred to *William Brandt's Sons & Co. v. Dunlop Rubber Company* (1), and *Swan and Cleland's Graving Dock and Slipway Company v. Maritime Insurance Company and Croshaw* (2). The Judicature Act did not take away the rights of assignment that existed before the Act. If this is not an "actionable claim," you stand in the same position as you would have stood before the Transfer of Property Act. There is no section in the latter Act to cover the transfer of sums to become due in the future. Does that not shew that the Transfer of Property Act is not exhaustive?] My submission is that the claim was assignable under the Transfer of Property Act, and in the alternative, if the claim does not fall within the Act, it was assignable in equity. There is no distinction in principle between the assignability of a contract, and the assignability of a claim to damages under a contract.

Mr. Dunne (*Mr. A. N. Chaudhuri* with him) for the respondent. There can be no question here of adding parties. The case as made is on an absolute assignment, and, if the claim is not assignable, the appellant must fail.

The question in issue is whether a claim to damages resulting from a breach of contract, is assignable after breach, whether (i) under the Transfer of Property Act, or (ii) in Equity. I submit the Transfer of Property Act is exhaustive and deals with *all* the means of transfer in India. Section 3 defines an "actionable claim," which is assignable under section 130. These two sections contemplate the assignment of the benefit of a contract *before breach*. See *Jaffer Meher Ali v. Budge-Budge Jute Mills Co.* (3). The words "whether by way of damages or otherwise" in section 130, mean that the beneficial interest in a contract includes the right to recover damages for its breach. A debt or a beneficial interest in a contract is

(1) [1905] A. C. 454.

(2) [1907] 1 K. B. 116.

(3) (1907) I. L. R. 34 Calc. 289.

moveable property, but in the present case, there was no assignment of any contract : the contract was exhausted and discharged by breach, and all that was left, was a mere right to sue for damages. See Leake on Contracts, 5th edition, page 616. A right to recover damages for breach of contract is not assignable. See *May v. Lane* (1), in which the *dictum* though *obiter* has the authority of such eminent lawyers as Esher M. R. and Rigby L. J. *Torkington v. Magee* (2) did not overrule *May v. Lane* (1), but was distinguished. The decision in *Dawson v. Great Northern and City Railway* (3) was on a totally different ground, and nowhere was any doubt cast on the doctrine as laid down in *May v. Lane* (1). In *William Brandt's Sons & Co. v. Dunlop Rubber Company* (4) the assignment was one of a debt, which is obviously a chose in action and would fall within section 3 of the Transfer of Property Act. All that *Swan and Cleland's Graving Dock and Slipway Company v. Maritime Insurance Company and Croshaw* (5) held was that the doctrine in *May v. Lane* (1) did not apply to a policy of maritime insurance. [Fletcher J. referred to *King v. Victoria Insurance Company* (6).] That case did not turn on the question of assignment : the Insurance Co. were subrogated to the rights of the assured. Cases which have considered *May v. Lane* (1) and distinguished it, have pointed out that the doctrine in that case must not be interpreted too widely so as to cover cases of the assignment of the benefit of contracts *including the right to sue thereunder*, but no case has challenged the proposition that after breach of contract, the right to sue for damages for such breach cannot be assigned.

Mr. Garth, in reply. The assignment in the present case was not merely of the right to recover damages as in *May v. Lane* (1), but of the benefits of a contract, in respect of which the assignor had certain rights to recover damages. Breach discharges a contract only in a certain sense : the con-

(1) (1894) 64 L. J. Q. B. 236.

(2) [1902] 2 K. B. 427.

(3) [1905] 1 K. B. 260.

(4) [1905] A. C. 454.

(5) [1907] 1 K. B. 116, 123.

(6) [1886] A. C. 250.

1909
 ABU
 MAHOMED
 v.
 S. C.
 CRUNDER.
 MACLEAN
 C. J.

tractual rights still obtain for certain purposes, *e.g.*, founding a right of action on the contract.

MACLEAN C. J. The facts of this case lie within a very narrow compass : It appears that by a contract dated the 2nd of December 1904, Messrs. Ebrahim Hajee Sulaiman & Co. purchased from the defendant a certain quantity of B. twills,—so many hundred bags ; delivery from January 1905, so many bags a month. Certain of those bags were delivered in pursuance of the terms of the contract, but in March 1905 the defendant did not deliver the bags deliverable for that month, and loss, as the plaintiff says, resulted to the purchasers from that default on the part of the vendor. The purchasers, Messrs. Ebrahim Hajee Sulaiman & Co., eventually became insolvent, and the Official Assignee of Bombay conveyed the outstanding assets and their interests in the executory contracts to one Sulaiman Cassim Peroo Mahomed, who again assigned his interest in those contracts to the plaintiff by an assignment deed, dated the 5th of July 1906. The Official Assignee by his assignment, which is dated the 6th of June 1906, assigned “ all actionable claims arising from the transactions of the Bombay and Calcutta firms, whether entered in the books or not, and the benefits of all contracts entered into by the Bombay and Calcutta firms of Ebrahim Hajee Sulaiman and Company,” to Sulaiman Cassim Peroo Mahomed ; and he assigned the same over to the plaintiff. The plaintiff then brought this action : and the first point taken and successfully taken by the defendant is that the plaintiff cannot maintain the suit : and Mr. Justice Stephen held that, as the plaintiff was a transferee merely of a right to sue, he could not maintain the action.

The question we have to decide depends upon two or three short considerations. As I have noticed the contract had been broken and the right to damages had accrued before anything was vested in the Official Assignee under the insolvency : that of course is a very material feature in the case.

The first question is whether, as regards the particular case we are dealing with, that which the plaintiff purchased was a mere right to sue, or if it were not that, what it was. Under section 6 of the Transfer of Property Act, the Statute enacts that "a mere right to sue cannot be transferred" and, it is noticeable that the language of that section is much wider than was the language of the corresponding section in the Transfer of Property Act, which was thereby repealed. If this was a mere right to sue, it cannot be transferred. Now what can be transferred under the Act? Any actionable claim can be transferred: and section 130 points out how it may be transferred. What is an actionable claim? If we look at section 3 'an "actionable claim" means a claim to any debt': but this is not a claim to any debt; this is a claim to damages of an unascertained amount resulting from a breach of contract on the part of one of the parties to that contract. Is it then a "claim to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional, or contingent?" I do not think that we can properly bring a mere claim for damages for breach of contract within those words. Now, if it does not fall within the definition of "actionable claim," what is it except a mere right to sue, a mere right to sue for damages resulting from an alleged breach of contract. It seems to me that it is not anything more or less than that; and if so, that cannot be transferred.

It is clear, whatever the principle may be underlying it, that according to the English law an assignment of damages for an alleged breach of contract would not entitle the assignee to sue; and, if one may speculate, the words, "a mere right to sue cannot be transferred" in the Transfer of Property Act are based upon the same principle. However in these cases we must ascertain what the law in India and not in England here enjoins. I have referred to the sections of the Transfer of Property Act, which deal with the matter. In

1909
 ABU
 MAROMED
 v.
 S. C.
 CHUNDER.
 —
 MACLEAN
 C. J.

1909
 ABU
 MAHOMED
 v.
 S. C.
 CHUNDER.
 HARRINGTON
 J.

this view it does not seem necessary to discuss the English authorities, which have been cited, though several of them appear to be in accord with the view I have stated.

For these reasons Mr. Justice Stephen's view seems to be right and the appeal must be dismissed with costs.

HARRINGTON J. I agree, and I think the position of the seller and the buyer at the expiration of the month of March was this—the seller had to deliver certain goods and he had failed to do so. The result was that the benefit with regard to the contract for delivery during the month of March was at an end; and all that the buyer was to do was to sue the seller for damages for breach of the contract, which the seller had failed to perform. Some months after the breach of this contract, the present plaintiff became, under a deed of assignment, entitled *inter alia* to the actionable claims to which the original buyer was entitled. The question really resolves itself into this: was this right to recover damages for the breach of contract, which could no longer be fulfilled, an actionable claim or merely a right to sue. In my opinion, it was merely a right in the buyer to sue for such damages as he might be able to prove he had sustained. Those damages might merely be nominal or, on the other hand, they might be substantial. If that were so, then that right could not be passed under the assignment, by virtue of the provisions of section 6 of the Transfer of Property Act, clause (e) and, moreover, the assignment does not purport to pass anything more from the buyer than the actionable claims to which he was entitled. Then, if the definition of 'actionable claim,' given in the Transfer of Property Act is looked at, it is clear, I think, that a right to sue for damages—unascertained damages, consequent upon a breach of contract, does not fall within that definition.

The result is that I agree that the judgment of the learned Judge in the Court of first instance was right and that this appeal should be dismissed.

FLETCHER J. I do not dissent : but I feel very considerable doubt that the Statute meant to limit the right of a person to assign his right under a contract by the fact that the other party to the contract had broken it.

Appeal dismissed.

Attorneys for the appellant : *Manuel & Agarwalla.*

Attorney for the respondent : *N. G. Roy.*

J. C.

1909
ABU
MAHOMED
v
S. C.
CHUNDER.
FLETCHER J.