Privy Council Appeal No. 156 *of* 1923.

Bengal Appeal No. 86 *of* 1923.

William Graham - - - - - - - - *Appellant*

v.

Krishna Chandra Dey - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 21ST NOVEMBER, 1924.

Present at the Hearing:

LORD SUMNER.
SIR JOHN EDGE.
SIR LAWRENCE JENKINS.

[*Delivered by* LORD SUMNER.]

This was a purchaser's suit to enforce under the Specific Relief Act, 1877, a contract for the sale of two plots of land for one sum of Rs. 1,53,000 in the Tollygunj District of Calcutta. The contract required the vendor to make out a marketable title and, in case of failure to do so, bound him to refund the deposit on demand. It also stipulated that, in case of any deficiency in the area or quantity of land, no compensation should be payable by the vendor on actual measurement. There was no general condition either providing for compensation or excluding it. The vendor proved to be unable to make a title to the second plot and the Trial Judge, having offered the plaintiff a decree for the conveyance of the other plot on the terms of Section 15, which offer was refused, dismissed the suit without costs. On the issue of damages for breach of the contract no evidence of material damage was given.

On appeal the High Court, considering that the case fell

within the terms of Section 16, allowed the appeal but, having before them no evidence of the value or character of the plots beyond the particulars given in the contract, remitted the case to the Trial Judge, in order that he might take evidence and assess the abatement of price to be allowed in respect of the failure to make title to one of the plots.

Sections 14 to 17 inclusive of the Specific Relief Act, 1877, are both positive and negative in their form. Taken together they constitute a complete code, within the terms of which relief of the character in question must be brought, if it is to be granted at all. Although assistance may be derived from a consideration of cases upon this branch of English jurisprudence, the language of the sections must ultimately prevail.

Section 17 prescribes that there shall be no grant of specific performance except in cases coming within one or other of the three previous sections. It was not proved that the part of the contract which was left unperformed bore only a small proportion in value to the whole within Section 14, and the purchaser had declined to accept relief on the terms of Section 15. Accordingly, Section 16 (which appears to be novel in the width of the power which it confers) afforded the only ground on which the Court could help him. To make this section applicable it had to be shown that there was a part of the contract, to wit, that relating to plot B, which (*a*) "taken by itself could and ought to be specifically performed," and (*b*) "stood on a separate and independent footing" from the other part of the contract, which admittedly could not be performed.

Their Lordships think (1) that before a Court can exercise the power given by Section 16 it must have before it some material tending to establish these propositions, and cannot apply the section on a mere surmise that, if opportunity were given for further enquiry, such material might be forthcoming and possibly might be found to be sufficient; and (2) that the words of the section, wide as they are, do not authorise the Court to take action otherwise than judicially, and in particular do not permit it to make for the parties or to enforce upon them a contract which in substance they have not already made for themselves.

When the whole contract is enforced in one way or another, as to the greater part by the remedy of specific performance and as to a small residue by compensation it is not necessarily making a new contract to select from among the remedies, which the Court can grant, one for the major and another for the minor part of the contract. For this jurisdiction Section 14 specifically provides and Section 17 forbids any extension beyond it. Hence Section 16, both because it must be something not covered by Section 14 and because no Court can act unjudicially without either statutory warrant or consensual authority, must be limited and the expression "stands on a separate and independent footing" points to a limitation, which would exclude any new bargain, that cannot be said to be contained in the old one.

In the present case the contract states that the plots are in the same district, are of about the same area, are both equipped with tanks but otherwise are without specific description, and are both so delimited that they can be said to be bounded by such and such roads or properties on the north, south, east and west. The price, however, is a price for both together and, in describing the steps to be taken as to making title, granting an assurance, and receiving rents and profits, both plots are dealt with together as a whole, and there is nothing by which to separate them or to place one on a footing independent of the other. In fact, if it were not for the statement of their areas, which are cautiously stated not to be guaranteed, and of their boundaries and locality, no separate and independent footing could be suggested or alleged to distinguish either from the other. It may be that in the estimation of the parties at the time of the agreement one was more valuable than the other, bigha for bigha, or one was made more valuable than it would otherwise have been by the simultaneous acquisition of the other, apart from their respective areas. Nothing is stated about the quality or amenities of the land. It may be that, because both were sold together, the total price was less than the aggregate prices would have been, if both had been sold apart. To call the parties to give further evidence now is to try to make them agree on a new price, subject to settlement by the Trial Judge, if they differ ; it is, in fact, to impose on them an arbitration, to which they have not submitted. To resort to expert evidence is to inquire what they ought to have agreed upon, though the fact is that, left to themselves, they did not choose to do so. To remand the case to the Trial Judge is to delegate to him a discretionary decision, which rested with the High Court itself in the view which it took of the appeal. Their Lordships are, therefore, of opinion that the judgment of the High Court cannot stand and that the judgment dismissing the suit should be restored.

The Trial Judge gave the successful defendant no costs. The defence was singularly devoid of merit. The vendor, a barrister-at-law, owned only one of the two plots, which he agreed to sell, the other, as he must have known, belonging to his wife, and the assurance, which he subsequently gave upon a requisition on title, that his wife would concur, was somehow falsified. He then set up an affirmative defence, that time was of the essence of the contract, which failed at the trial, and has since been abandoned. Their Lordships accordingly think that there ought to be no costs now on either side, either of the appeal or of the proceedings in the Courts below, and they will humbly advise His Majesty to the above effect.

In the Privy Council.

WILLIAM GRAHAM

v.

KRISHNA CHANDRA DEY.

DELIVERED BY LORD SUMNER.

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