Privy Council Appeal No. 139 *of* 1919.

Hussonally Sullemanji - - - - - - - *Appellant*

v.

Tribhowandas Mangaldas Nathubhai and others - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH AUGUST, 1920.

Present at the Hearing:

LORD BUCKMASTER.
LORD ATKINSON.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* MR. AMEER ALI.]

The plaintiffs, who are members of a joint undivided Hindu family, seek in this action to enforce the specific performance of a contract of sale in respect of certain lands situated in the Town of Bombay. The defence is that the contract was entered into upon a representation by the first plaintiff, who was the managing member of the family, that the area of land purported to be sold, was considerably more than was found after the agreement was made. The suit was instituted in the Bombay High Court in its ordinary original civil jurisdiction, and was heard, in the first instance, by one of the Judges, Mr. Justice Heaton, whose judgment in the case will be more fully referred to later on. For the present purpose it is sufficient to say that that learned Judge accepted the defendant's contention that the area which plaintiffs agreed to sell was considerably in excess of what they could sell, and actually sold.

He was accordingly of opinion that the plaintiffs' suit must be dismissed, but as the parties agreed that specific performance should be enforced with compensation in money for the deficiency

in the area, he sitting as an arbitrator fixed the compensation at Rs. 62,000 without prejudice to the right of the plaintiffs to appeal from the main judgment. On the plaintiffs' appeal the High Court of Bombay in its appellate jurisdiction came to a totally different conclusion; the learned Judges of the appellate court were of opinion that the contract was not entered into on the basis of the representation on which the defendant relied; and they accordingly reversed Mr. Justice Heaton's order and decreed the plaintiffs' claim subject to certain reservations in respect of small quantities of land to which the plaintiffs did not appear to show good title. In the result they awarded the defendant a certain sum in respect of this land. The defendant has appealed from the judgment of the High Court to His Majesty in Council, and there is also an appeal from the second order of the High Court in respect of the compensation. These two appeals have been consolidated.

The facts relating to the sale in question are fully set out in the judgments of the Courts in India, but in order to make the arguments before their Lordships perfectly clear, it is necessary to narrate them in some detail. The land in dispute formed originally a part of what has been called in these proceedings, the Jamnagiri property. It belonged to a gentleman of the name of Sir Mangaldas Nathubhai, and upon his death had devolved upon his two sons, viz., the first plaintiff and his brother Purshotamdas. In 1903 the first plaintiff representing his branch of the family came to a partition with his brother Purshotamdas. A deed of partition was executed which bears date the 16th July, 1903, and the lands which now form the subject of dispute, fell to the share of the first plaintiff and his two sons. Some time after, viz., on the 7th March, 1904, the plaintiff applied for the registration of his name in the Collector's register in respect of the land he had acquired on the partition. Both on the application for registration and the map or plan filed along with it (being No. 2 among the plans filed in this suit), the area given is 3,704 square yards. Registration, however, was refused on the ground that the area in the application was in excess of the land actually in the applicant's possession. A further application was thereupon made on behalf of the plaintiffs with an amended plan giving the area as stated by the Collector, viz., 2,962 square yards. The registration of the plaintiff's name was accordingly ordered on the 14th March, 1905. Some time in 1907 Tribhowandas appears to have instructed a surveyor named Hathe to prepare another map showing the area of his share to be 3,472 square yards. On what ground this was done is not clear on the evidence. A number of these new plans were given to brokers for the purpose of inviting purchasers. One of them came into the hands of a broker named Hargowan Manji, who subsequently brought about the transaction. This copy appears to have been handed to the defendant by Hargowan when he initiated the negotiations. It is attached to the defendant's written statement and is marked as Plan 2. It depicts the land divided into seven plots, and gives the area of

each plot and of the passages running through the land. The aggregate area given is 3,472 square yards. Later on plot No. 1 appears to have been sold by the plaintiffs to one Hakimji, less a quantity of land acquired by the Bombay Municipality, which reduced the area to 507 square yards.

Early in June negotiations began for the sale by the plaintiffs and the purchase by the defendant of the remainder of the property. As already stated, Hurgowan, the broker, brought one of Hathe's plans to the manager of the appellant. The correspondence starts with a letter written on the 6th June, 1908, at the instance of Hargowan, by a solicitor named Billimoria, who subsequently acted for the defendant. In this letter he requests the plaintiffs on behalf of the broker to send him the agreement entered into with Hakimji as he requires an inspection of the terms of the said agreement to be given to intending purchasers of the other plots. In this letter the solicitor evidently, at the instance of Hargowan, stated the area of the plot sold, and the price per yard at which it was sold.

On the 9th June, Billimoria writes again to the plaintiff in the following terms :—

> " With reference to the agreement for sale relating to your property in Jumna Gully received by me yesterday from you, I am instructed by Mr. Hurgowandas Monji, Estate Broker, to enquire from you the price per square yard of each of the plots of your property bearing Plot Nos. 2, 3, 4, 5, 6 and 7. Mr. Hurgowandas also requests me to enquire from you the price which you would charge per square yard, if there is a purchaser forthcoming of the whole of the property including all the plots Nos. 2, 3, 4, 5, 6 and 7. I am also requested by Mr. Hurgowandas to inquire from you as to how much per cent. of the price you would agree to take as earnest money for the bargain."

On the day following the plaintiff writes to Mr. Billimoria as follows :—

> " With reference to your letter of the 9th inst., I am to inform you that I have already informed Mr. Hargowandas Monji, Estate Broker, that the price per square yard of the number of square yards of the total of the plots Nos. 2, 3, 4, 5, 6 and 7, *i.e.*, at least 1,400 square yards, including side passage from the front road, would be Rs. 200 per square yard, while the price of the remaining half, *i.e.*, at least 1,400 square yards, including the passage in the rear of the former, will be Rs. 125 per square yard. With reference to the second paragraph of your letter, I may inform you that the price for whole of the plots Nos. 2, 3, 4, 5, 6 and 7 will be Rs. 175 per square yard. The earnest money for the bargain will be 33 per cent. of the whole purchase money."

On the 13th Billimoria writes again on behalf of the broker asking the plaintiff to inform him of " the least price possible for a square yard of the above property," and he goes on to say that if he gave the " least price " the broker, Hurgowandas, would state forthwith the name of the intending purchaser and arrange for the execution of the agreement for sale relating thereto." Thereupon the plaintiff on the 16th June writes as follows :—

> " As to the price per square yard of land in the several plots into which the property is divided, I am to observe that your client has been told the

plots are only to be sold in the order of priority, *i.e.*, No. 2 will be sold before No. 3, and so on. It is very little use quoting prices for other plots till No. 2 is sold. I sold No. 1, and I shall sell the other plots in the order above referred to. If your client does give an offer for the whole property, of course it will only be open for forty-eight hours, and I shall let you know if I approve of it."

On the 17th June Billimoria again requests the plaintiff to state "the lowest possible prices for the sale of the property in question." Matters seem to have taken shape in the course of the next three or four days and thus, on the 21st June, a memorandum was drawn up in respect of the earnest money which, leaving out the parts not material to this judgment, is in these terms :—

"Received from Mr. Harakchand Kapoorchand the sum of Rs. 30,000 (thirty thousand) only as part of the earnest money for the sale of plots Nos. 2, 3, 4, 5, 6 and 7, of the property situate at Jumna Gully for the price of Rs. 3,51,500 (Rupees three lacs fifty-one thousand and five hundred), only the said sale to take place under the same conditions and subject to the agreement of sale made with Borah Hakimji and another of plot No. 1 of the same property."

It will be noticed that on the 21st June when this memorandum was executed, the position was this : The plaintiff had a quantity of lands to sell, divided into seven plots ; one plot was sold ; six had remained. The aggregate area of all the plots given on the map was 3,472 square yards. He had been repeatedly asked to state his lowest price per yard and he had done so. Although no area is mentioned in the memorandum, there can be little doubt upon the correspondence that up to that time the negotiations had proceeded on the basis of yardage and that the bargain was struck on that basis. On the 22nd Billimoria writes as follows :—

"I beg to put it on record that out of your property situate at Jumna Gully and admeasuring 3,472·4 square yards or thereabouts you have agreed to sell a portion, being plot No. 1, to Borah HakimjiAmiji and Samsudin Amiji, and that all the remaining portions of the said property you have agreed to sell to my client. My client paid you yesterday in my presence Rs. 30,000, being part of the earnest money for the said agreement for sale with my client, and a document acknowledging receipt thereof has been executed by you, and the terms relating thereto have been settled by you and my client in my presence yesterday."

The plaintiffs' reply of the 23rd is confined to the statement that the leases referred to will be sent to Billimoria by his clerk. On the 24th Billimoria writes again for the leases in order to investigate title. Apparently receiving no acknowledgment he writes on the 27th June as follows :—

"I am very sorry that though I wrote to you on the 22nd inst. to send me the leases relating to your property with Nathalal Bhagwan and Borah Abdullalli Dawoodji, I have not as yet received the said leases, nor have I as yet received the title deeds relating to your property in order to enable me to investigate the title relating thereto. . . . The plan relating to your property shows the plot No. 1 to be of the area of 586 square yards, while

the agreement with the Borah Hakimji and Sullemanji, relating to the said plot No. 1, describes the said plot to be of the area of 507 square yards, so please explain this great discrepancy in the plan and the agreement."

The plaintiff Tribhowandas now seems to have taken alarm. Replying on the 28th June to Billimoria's remarks, he says as follows :—

"There may be a discrepancy in the area of plot No. 1, but the property is sold to your clients by plots, and any mention of the area by square yards was expressly avoided, so the question of area has nothing to do with the agreement to sell my Jamnagiri property."

On the 2nd July, Billimoria sends to the plaintiff a draft of the agreement, and insists that he, the plaintiff, must make a good title to the lands which he has purported to convey, and on the 4th July, Tribhowandas writes as follows :—

"I approve of the draft. If measurement by square yards must be entered into the agreement, please get the land measured accurately by some engineer. I have already informed you, your clients and the broker that I am not sure of the measurement, as the land has not been recently measured, and the property was sold by plots and not by area. Please do not delay the matter on account of this."

On the 6th July there is a further letter from Billimoria repeating his contention that the sale was by area in square yards, and saying that as Tribhowandas had struck out the area in the draft sent by him for approval, he had again re-inserted it.

On the 7th the plaintiff writes *inter alia* to Billimoria as follows :—

"I may also mention that unless you give up your contention against claiming the property by area we cannot allow you to make any alterations in the property. It must therefore be distinctly understood that whatever claims you have to set forth will have to be done only on the basis of the previous agreement, and nothing can be added which in any way modifies it."

In his letter of the 9th July, Billimoria adheres on behalf of his client, the defendant, to his assertion that the bargain was entered into on the basis of area in square yards shown in the plan handed to him at the time of the payment of the earnest money.

The plaintiff on the morning of the 10th July repudiates that assertion, and says :—

"I again draw your and your client's attention to the fact that the property is sold by plots only and that this was made quite clear to you when you drew up the memorandum of the conditions of sale on behalf of your client. Mr. Harakchand Kapurchand had paid Rs. 30,000 as part of the earnest money. . . . You and your client, Mr. Harakchand, were expressly asked to get the area measured by your client's engineer, in order that the area by square yards only be entered in the agreement."

It will be seen that at this time the parties were at complete variance regarding the basis on which the bargain was made. However, the same afternoon on the 10th July, there was a conference at Mr. Billimoria's office at which were present Tribhowandas and his son Kissondas on one side accompanied by a friend named Parekh, a pleader by profession ; and on the other, the

defendant and his manager, Jey Chand, with Hurgowan, the broker. The plaintiffs were subsequently joined by a solicitor named Madan. A long discussion followed which is said to have lasted over three hours. In the end a conclusion was reached which seems to have satisfied both parties; and the agreement for sale on which the present action is brought was executed. The plan handed to Hurgowan is made part of the agreement, but the memorandum at the top giving the specific areas of the seven plots in pink together with the aggregate area is struck out. But this area of 3,472·4 square yards is retained in the schedule. As the whole dispute turns upon the meaning and intent of this retention, it is necessary to set out here the first clause of the agreement and the schedule.

The first clause is as follows :—

> "1. The Vendors shall sell and the Purchaser shall purchase the land being plots Nos. 2, 3, 4, 5, 6 and 7, with the privy and passages shown in red colour in the plan hereto annexed and signed by the respective parties hereto together with the buildings standing thereon being the major portion of the hereditaments and premises described in the schedule hereunder written except the plot No. 1 bearing Ward Nos. 754–755 and Street Nos. 82–100 at the price of Rs. 3,51,500 (Rupees three lacs fifty-one thousand and five hundred)."

The schedule is in these terms :—

> "All those pieces or parcels of Pension and tax and quit and ground rent, land or ground together with the messuage, tenements and buildings standing thereon situate lying and being at Masjid Bunder Road. Dhobi Street and Bibi Jan Lane in the City and registration sub-district of Bombay fronting the said Masjid Bunder Road on the south side thereof containing, according to the recent admeasurement, 3,472·4 square yards or thereabouts be the same little more or less registered by the Collector of Land Revenue under the following Nos. :— "

Then, after reciting the municipal numbers of the holdings, it goes on to say as follows :—

> "and which said pieces or parcels are particularly delineated on the plan annexed hereto and marked A and coloured red thereon and are together bounded as follows, that is to say, on or towards the south partly by a passage and partly by the property of Haji Abdul Sattar Haji Umar, on or towards the east by the Dhobi Street, on or towards the north; and on or towards the west partly by the property of Purshotamdas Mangaldas Nathubhai, partly by a passage, and partly by the property belonging to the Juckeria Musjid Trust and which said premises are at present in the occupation of the several tenants of the Vendors."

The sale was not to be completed until two years later, after the vendors had discharged a mortgage held by a third party over the property. The defendant was, however, put in possession, and has remained in possession ever since. The mortgage was discharged in October, 1910, and on the 20th of that month the plaintiffs' solicitor wrote to the defendant calling on him in the terms of the agreement to complete the purchase. On the 27th October the defendant's solicitor writes to the vendors that whereas they had agreed to sell to his client 3,472 square yards, less the area conveyed to Hakimji, it is now found that the area of the land sold to the defendant was 500 yards less than what

he purported to buy. Upon this a considerable correspondence followed. On one side there is a complete repudiation of the allegation that there was any representation as to area or that the plaintiffs sold by area; on the other it is energetically asserted that throughout the negotiations, the sale was by area, and that on the 10th July, 1908, the bargain was concluded on the representation that the aggregate area was 3,472 square yards, which was sold to the defendant less the land that was conveyed to Hakimji. Their Lordships will refer only to two or three letters which show the attitude taken up by the parties.

On the 5th November, 1910, the purchaser's solicitors write *inter alia* to the vendors' advisors, as follows :—

> "Under the circumstances our client says that the discrepancy in area, being as large as about 500 square yards, our client is entitled to rescind the contract altogether and to recover the part purchase moneys paid by him, but in order to avoid any unpleasantness, our client will be willing to complete the contract on your client's agreeing to allow a proportionate abatement in price according to the deficient area. We may add that if there is any difference of opinion as to the exact deficiency in quantity, the same may be readily arranged by holding a joint survey."

On the 9th November, 1910, the plaintiffs' solicitor denies these statements :—

> "Your client knew all along what he was buying, and knew the plots that he was offered to buy; there was no misdescription or misrepresentation intentional or otherwise on my client's part, and the whole of the property offered for sale was seen and properly examined by your client from time to time before he entered into the agreement, and he entered into the possession of the property with full knowledge of what he was getting and what my clients intended to give to him."

On the 23rd November he writes again as follows :—

> "My clients adhere to the statements already made by them, and once more repeat the fact that no representation as to area was made while the negotiations for sale were going on, and they never guaranteed the property as of a particular area, and they are not bound to give any particular area to your clients. The different plots shown on the plan were sold to your client as they stood without any reference or representation as to area, and my clients are not in any way liable for deficiency in area, if any."

Again on the 24th December, 1910, he wrote as follows :—

> "Referring to the previous correspondence herein, I am now instructed by my clients to state that without prejudice to their contention that they did not guarantee any area or represent the property as of a particular area, and that they are not bound to give any particular area, the properties which your client has taken possession of from my clients under the agreement of sale is about 2,816 square yards. If your client wishes to be satisfied about this, my clients' engineer will be prepared to convince your client or his engineer about the said area on payment of my client's engineer's fees."

This was answered by the defendant's solicitors on the 30th December with a flat contradiction in these terms :—

> "Your client is bound to convey to our client about 2,900 square yards of land, but the area of the land which your client can actually convey is nothing like it. It is also certainly not 2,816 square yards, but hundreds of square yards less."

This controversy went on until the 13th October, 1911. On the 16th November the plaintiffs filed their suit in the High Court of Bombay to enforce specific performance of the agreement of the 10th July, 1908. The material allegations in the plaint relating to the dispute are contained in paragraph 6, which is in these terms :—

> " The plaintiffs say that before the said agreement was executed, the defendant inspected the said property. They further say that at the time of the execution of the said agreement in answer to a question put by Mr. Madan, the defendant's solicitor, they stated that they did not know what the area of the said property was, and that they would not guarantee any area, and that to avoid all possibility of dispute, the areas of the various plots making up the said property given in the plan annexed to the said agreement were struck off by the parties.
>
> " The plaintiffs say that the defendant entered into the said agreement on the express understanding that the price fixed therein was to be paid no matter what the actual area of the said property might turn out to be on actual measurement, and that he entered into possession and remained in possession of the said property on the said understanding. The plaintiffs deny that the defendant has any right whatsoever to rescind the said agreement or that he is entitled to make any deduction from the purchase moneys."

The defendant's case is substantially set forth in paragraphs Nos. 3, 5, 7, 14 and 16 of his written statement. In paragraph 3 he says as follows :—

> " The area of the said premises coloured pink is shown on the said plan as 3,472·4 square yards. A copy of the said plan was given to this defendant when negotiations were opened with him for the sale of the said premises through the first plaintiff's broker, Hargowan Manji. Plot No. 1 on the said plan the first plaintiff had already agreed to sell to someone else, and was not included in the negotiations with this defendant. It was represented to this defendant that the said plot No. 1 measured about 500 square yards. It was represented that about 70 square yards had been taken by the Municipality, leaving about 2,900 square yards which the first plaintiff desired to sell to this defendant."

In paragraph 5 he refers to the representation on which he entered into the transaction ; and in paragraph 7 he states that it was only in October, 1910, that he became aware that " the area of the plaintiff's land was not 3,472 square yards " as was represented to him, but was only 2,902 square yards—

> " That the area of plot No. 1 and the land taken up by the Municipality which was excluded from the sale to this defendant was 592 square yards and not 570 square yards as represented. The area actually sold to the defendant was 2,370 square yards only instead of 2,900 square yards, which had been agreed to be sold and for which this defendant had agreed to pay."

In paragraph 12 he contends that he is entitled to the specific performance of the agreement with a proportionate abatement or in the alternative to a refund of the monies paid by him with damages " as may be just."

In paragraph 14 he sets out more fully the representation on

which he entered into the transaction ; " that it was made not only by the plaintiff's broker but by the first plaintiff himself on the day the bargain was completed ; and that it was also represented that the land had been recently measured and contained 3,472 square yards, all of which representations the defendant believed and acted on as aforesaid."

The case, as already stated, was tried in the first instance before Mr. Justice Heaton on the original side of the High Court of Bombay. In view of the conflicting statements as to the circumstances leading up to the execution of the agreement, and of the difficulty of reconciling the different statements regarding the property sold, that learned Judge admitted—in their Lordships' opinion rightly—extrinsic evidence to explain the facts.

It is obvious that without such explanation it would have been impossible to reconcile the statement in the body of the agreement on which the plaintiffs rested their case, with the recital in the schedule on which the defendant relied as amounting to an assurance in respect of the area that was intended to be conveyed to him, and which he in fact purported to buy. And this explanation depended almost entirely on what happened at the conference, on the 10th July, 1908, just before the signing of the agreement.

A considerable body of evidence was produced on both sides in support of their respective allegations ; the plaintiffs stoutly contended that the land was sold by plots irrespective of area, and that the reference to area in the schedule was left there by mistake ; the defendant on the other hand equally stoutly contended that it was retained as the representation in respect of the area and was an essential part of the contract. Although Mr. Justice Heaton in one part of his judgment appears to discount the oral evidence on both sides as biassed and coloured by prejudice, it is clear from the general trend of his observations that he accepted the defendant's version as to what happened at the conference on the 10th July, 1908. He entirely disbelieved the plaintiffs' story that the retention of the area in the schedule was due to oversight or mistake. He accordingly dismissedthe claim for specific performance. His conclusion is expressed in the following words :—

> " It now remains to consider what is the precise effect of the conclusions of fact at which I have arrived. The plaintiff represented that he was selling and agreed to sell a property, including plot No. 1, according to recent " admeasurement 3,472·4 square yards or thereabouts, be the same little more or less." The defendant, on the faith of this representation and statement, agreed to buy that property at a price of Rs. 3,51,500. As a matter of fact, the plaintiffs cannot sell anything like that area, and therefore the contract written cannot be specifically performed ; consequently the plaintiff's suit must be dismissed with costs."

By agreement of parties the learned Judge acting as arbitrator awarded to the defendant Rs. 62,000 for compensation for deficiency of area without prejudice to the plaintiffs' right of appeal from the main judgment.

An appeal was preferred, and the Appellate Court differing from Mr. Justice Heaton held in substance that the allegation as

to representation was not established, and that the land was sold by plots depicted in the plan irrespective of area. They accordingly reversed Mr. Justice Heaton's order, and decreed the claim for specific performance subject to certain deductions in respect of lands to which the plaintiffs were not able to show title.

This part of the case has not been argued before their Lordships ; the main appeal is from the decree for specific performance.

Having regard to the difference of opinion in the two Courts in India, their Lordships have carefully examined the evidence, both documentary and oral. It is quite clear upon the correspondence that up to the 21st June, 1908, when the receipt for the first instalment of the earnest money was paid, the negotiations for the sale and purchase had proceeded on the basis of area per square yard. It was after the 21st June, when Billimoria began to lay stress on this fact that the plaintiff Tribhowandas repudiated the suggestion of sale by area. His idea clearly was that it would not be safe to entangle himself in a representation or guarantee as to area, and with this idea in his mind he suggested on the 4th July that if it was desired that the area should be inserted in the agreement, the land should be measured. The defendant's legal adviser relied on the previous negotiations, and ignored the suggestions. Up to the morning of the 10th July, the parties were in absolute variance with each other, each stoutly maintaining his point of view. The question then arises what happened at the conference that afternoon which led to the execution of the document in the shape in which it now stands. Though, as pointed out in *Hill* v. *Buckley*, 17 Ves., p. 394, "the presumption is that in fixing the price, regard was had on both sides to the quantity which both supposed the estate to consist of," yet there may be considerations which may rebut or weaken the presumption. Here the plaintiff was stoutly repudiating the idea of sale by quantity or area. Is it likely that on the afternoon of the 10th July, at the conference he abandoned his opposition, and agreed to renew the representations which he had expressly repudiated. Their Lordships entirely concur with Mr. Justice Heaton in disbelieving the story told by the plaintiffs that the area was left in the schedule by an oversight on their part. These statements, in their Lordships' opinion, are mere subterfuges in order to escape from a position of difficulty in which they had placed themselves by allowing the retention of the aggregate area in the schedule. Had they taken up an honest attitude the difficulties in the right determination of the main issue would have been considerably lessened. Mr. Justice Heaton's view has been influenced in a great measure by the falsehood of the plaintiff's statements. He says :—

> "Had the contest between the parties taken a different line, it might have been maintained by the plaintiffs that the area in the schedule was merely a description of the land and nothing more, because it is the same as the description which occurs in Hakimji's Deed and might be regarded possibly as a common and recognised description of Tribhowandas's portion of the Jamnagiry estate. This, however, is not the view of either party. The plaintiffs have definitely committed themselves to the assertion that the

area was entered in and remained in the schedule without their knowledge, and that had they known of it they would not have signed the deed. The defendant, on the other hand, maintains that the area was entered because the bargain between the parties was that approximately the area stated was sold. It is therefore unnecessary to consider the question as it would have had to be considered were it seriously represented that the area was entered merely as a description of the land."

After a careful consideration of the evidence, their Lordships are led to the conclusion that at the conference neither party was willing to resile from the position taken up in the correspondence between the 27th June and the 10th July; that the plaintiffs did not intend to guarantee the area sold or to make a representation in respect thereof as would amount to an assurance; but designedly or undesignedly they left the defendant under the impression that the deficiency in area, if any, would not be great. With this the defendant was willing, perhaps too willing to remain content, for no steps were taken to have a measurement made until nearly two years later. Their Lordships share Mr. Justice Heaton's doubts as to the truth of the plaintiffs' statement that the defendant had the land measured shortly after the execution of the agreement. That such was the trend and final result of the discussion is confirmed by the statement contained in the letter of the plaintiffs' solicitor, dated the 24th December, 1910, already referred to. In the circumstances the words in the schedule cannot be regarded as anything more than words of description.

This point is dealt with by the Chief Justice in the following passage :—

"A question upon which I have found it very difficult to arrive at a conclusion remains upon the evidence recorded, namely, whether although the alleged misrepresentation of an area of 2,900 square yards is not made out, the defendant did not, owing to a mistake of fact to which the plaintiffs contributed, enter into the contract under a reasonable misapprehension that he would get not less than 2,800 square yards, and whether under Section 26 (*b*) of the Specific Relief Act he is not entitled to some abatement in the purchase money due under the contract or to the conveyance of more land bringing up his holding to 2,800 square yards."

And at the end he adds as follows :—

"My difficulty in deciding this question has been increased by the plaintiff's allegations in his plaint that the property sold contains more than 2,800 square yards and his admission in cross-examination that that figure includes some passage land of which he obtained a conveyance from his brother after suit. On the whole I think that as the plaintiff is willing to include this land in the conveyance to the defendant, he is entitled to a decree for the purchase money on the execution of such conveyance subject to showing a good title."

Although the plaintiffs by their false statements in Court added considerably to the difficulty of determining this case, it is clear to their Lordships that the retention of the area in the schedule was not by way of an assurance; that it amounted to no more than a misdescription.

On the whole their Lordships are of opinion that the judgment of the Appellate Court in India should be maintained, and that this appeal should be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

HUSSONALLY SULLEMANJI

v.

TRIBHOWANDAS MANGALDAS NATHUBHAI AND OTHERS.

DELIVERED BY MR. AMEER ALI.

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