Privy Council Appeal No. 4 *of* 1948

I

The Bank of India Ltd. and others - - - - - *Appellants*

v.

Jamsetji A. H. Chinoy and Messrs. Chinoy & Co. - - *Respondents*

II

Edulji F. E. Dinshaw and Bachubai F. E. Dinshaw - - *Appellants*

v.

Jamsetji A. H. Chinoy and Messrs. Chinoy & Co. - - *Respondents*

III

Jamsetji A. H. Chinoy and Messrs. Chinoy & Co. - - *Appellants*

v.

Edulji F. E. Dinshaw, Bachubai F. E. Dinshaw, The Bank of India Ltd. and others - - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH DECEMBER, 1949

Present at the Hearing:

LORD GREENE
LORD MACDERMOTT
SIR MADHAVAN NAIR

[*Delivered by* LORD MACDERMOTT]

These three consolidated appeals are from a decree, dated the 22nd September, 1947, of the High Court at Bombay (acting in its appellate jurisdiction) which reversed a decree, dated the 7th January, 1947, of the same Court (acting in its original civil jurisdiction) whereby a suit (No. 1086 of 1942) brought by the above named Jamsetji A. H. Chinoy and Messrs. Chinoy & Co. (respondents in the first and second appeals and appellants in the third) was dismissed.

This suit was instituted on the 24th August, 1942, against the above named Edulji F. E. Dinshaw and Bachubai F. E. Dinshaw (hereinafter referred to as "the Dinshaws") as sole defendants. The plaint alleged that the Dinshaws held between them 1,200 A and 1,200 B shares in an Indian company named F. E. Dinshaw Ltd. and had contracted on the 8th July, 1942, through their agent Shapoorji Pallonji Mistry (hereinafter called "Shapoorji") to sell these shares to the plaintiff Jamsetji A. H. Chinoy at the price of Rs.3,000 per collective share, *i.e.*, per 1 A and 1 B share. The plaint stated that the second plaintiffs, the firm of Chinoy & Co., claimed no interest in the contract and had been joined for greater caution and to avoid the contention that the contract had

been made by the Dinshaws with them. The principal claim was for specific performance of the contract, but further relief, alternative or ancillary in nature, was also sought.

Subsequent to the filing of the plaint the Dinshaws transferred the shares in question in various parcels to a number of persons. These transfers were completed by the 9th September, 1942, and on the 22nd October, 1942, the transferees—some 75 in number—were made additional defendants and the plaint was amended. Of the amendments then made it will, for present purposes, suffice to say that the claim as amended sought (*a*) an order for specific performance against the additional defendants as well as the Dinshaws and (*b*) an order for the payment of Rs.2,94,000 to the first plaintiff, being the amount of a dividend declared by the company on the 24th September, 1942, in respect of the said shares for the year ending 31st March, 1942.

Of the additional defendants so joined, four appear to have been struck off the record subsequently and one, Sir Cowasji Jehangir, defendant No. 77, did not appear and took no part in the proceedings. The remainder may be taken as in the main identical with the appellants in the first appeal. They will be referred to as " the additional appellants." The appellants in the second appeal are the Dinshaws and, as already stated, the plaintiffs, Jamsetji A. H. Chinoy and Chinoy & Co., are the appellants in the third appeal. It was common ground that Jamsetji had no interest in Chinoy & Co., which was a firm of stock brokers carried on by three of his grand-nephews in partnership. It was also common ground that the Dinshaws left India in 1941 and were resident in the United States of America and not in India at the beginning of 1942 and all material times thereafter.

In the court of first instance the learned trial judge (Tendolker J.) held that Shapoorji had authority from both the Dinshaws to enter into the contract alleged but that no such contract had been made. He therefore dismissed the suit. On appeal to the High Court in its appellate jurisdiction this decision was reversed. The Court (Chagla A.C.J. and Bhagwati J.) held that Shapoorji was duly authorised to enter into the contract and that in fact it had been made. As well as challenging Shapoorji's authority and the making of the contract the defendants had also raised certain other defences which need not now be stated in detail, but which included contentions to the effect that the contract was invalid or unenforceable by reason of failure to obtain the permission of the Reserve Bank of India as required by the Rules made under the Defence of India Act, 1939, particularly Rules 92 A (2) (*b*) and 93 (2) thereof, and, further, that the first plaintiff, Jamsetji A. H. Chinoy, was not at any material time ready and willing to perform his obligations under the contract and was not entitled to relief by way of specific performance. The Appellate Court over-ruled these contentions and by its decree of the 22nd September, 1947, ordered the defendants, other than defendant No. 77 (the said Sir Cowasji Jehangir), to perform the said contract specifically as respects 1,185 A and 1,195 B shares and to pay the first plaintiff the amount of the said dividend, declared as aforesaid by the company on the 24th September, 1942, on these 1,185 A and 1,195 B shares. The decree directed the defendants (other than No. 77) to execute the necessary transfers and hand them over with the relevant share certificates to the first plaintiff against payment of the price on or before the 27th October, 1947, and it declared the first plaintiff entitled to take credit for the said dividend against the price. The decree, having declared that the contract was " binding on the defendants other than the seventy-seventh defendant " made no order against him.

To this brief summary of the proceedings in India there must be added a reference to an order made by the Appellate Court on the 9th October, 1947, which was only brought to the notice of their Lordships after the consolidated appeals had been at hearing for some time. This order was made on an application for a stay of execution pending the determination of the appeals to His Majesty in Council. A stay was not granted but, on the consent of the plaintiffs and the additional appellants, it was

ordered, *inter alia,* that the additional appellants should deposit with Messrs. Kanga & Co., the plaintiffs' attorneys, blank transfers duly executed, together with the relative share certificates, in respect of 1,185 A shares and 1,195 B shares in the company, Messrs. Kanga & Co. undertaking to hold the same pending the final disposal of the appeals to His Majesty in Council; and that upon such deposit being made the first plaintiff should pay to Messrs. Payne & Co., attorneys for the additional appellants, the price of these shares, less the amount of the dividend received by the additional appellants in respect thereof for the year ended the 31st March, 1942. This order has been carried out and the position now is that the first plaintiff has made payment for the 1,185 A and 1,195 B shares as directed and the additional appellants have, between them, lodged transfers and certificates for such shares with Messrs Kanga & Co., to abide the result of the present appeals. It further appears that the first plaintiff and the additional appellants are, and have been at all material times, resident in India.

In their appeals to the Board the Dinshaws and the additional appellants made what was, for all practical purposes, a common case. They sought to have the suit dismissed on several grounds and, failing that, to have the decree of the Appellate Court amended in several respects. The plaintiffs in their appeal claimed additional relief to that granted by the Appellate Court, it being contended that the first plaintiff was entitled to specific performance or damages in respect of the 5 A and 5 B shares which stood in the name of the 77th defendant, and also to payment of all dividends on the shares purchased which had been declared for the accounting periods subsequent to the 31st March, 1942. A further claim to damages in addition to specific performance was abandoned at the hearing.

The oral and documentary evidence in the case has already been discussed in detail and with much care in the Courts in India, and their Lordships do not find it necessary to embark again upon any general survey of the facts. The issues have narrowed considerably during the progress of the litigation and in view of this and as the contentions of the parties are to some extent inter-related, the most convenient course will be to state and consider *seriatim* the several questions which remain for decision. They are as follows:

(1) *Was Shapoorji authorisd by the Dinshaws to enter into the alleged contract?*

Both Courts in India answered this in the affirmative and in the face of their concurrent findings the contrary view was but faintly argued. There was ample and, indeed, cogent evidence to show that Shapoorji had the authority of both the Dinshaws to contract as alleged. The findings of the Indian Courts were, in the opinion of the Board, clearly right and must stand.

(2) *Was the contract alleged by the plaintiffs in fact made?*

On this question the Courts in India have, as already mentioned, differed, the learned trial Judge answering it in the negative and the Appellate Court taking the opposite view. The contract is pleaded in paragraph 4 of the Plaint as follows:

> "On the 8th of July 1942 the said Shapoorji Pallonji Mistry acting for and on behalf of the 1st and 2nd defendants and in exercise of the said authority conferred on him agreed to sell to the 1st Plaintiff and the 1st Plaintiff agreed to purchase 1,200 A and B collective shares of F. E. Dinshaw Ltd. at the price of Rs.3,000/- (three thousand) per collective share aggregating to Rs.36,00,000/-. No time was specified for the performance of the said contract and the said shares were to be delivered against cash payment immediately or within a reasonable time. Hereto annexed and marked 'B' collectively are copies of letters dated the 8th of July 1942 and the 9th of July 1942 exchanged between the 1st plaintiff and the said Shapoorji Pallonji Mistry, whereby the said agreement of sale and purchase was confirmed."

The letters referred to were proved by the first plaintiff. They are exhibits C.1 and C.2 and read thus:

C.1

" East & West Building,
Apollo Street, Fort.

Chinoy & Co.
Share & Stock Brokers.
Telephones—25748 office
22355—
20494 residence.

Bombay, 8th July 1942.

Shapoorji Pallonji Mistry Esq.
Bombay.

DEAR SIR,

We confirm our conversation with you that we have agreed to purchase from you 1,200 twelve hundred A & B collective shares of F. E. Dinshaw Ltd. at the price of Rs.3000 (rupees three thousand) per collective share aggregating rupees thirty-six lacs. You have informed us that the shares belong to Mr. Edulji Dinshaw and Miss Bachubai Dinshaw and that you have been authorised to sell the shares on their behalf.

Please arrange for delivery of the shares against cash payment at at early date.

Yours faithfully,
(Sd.) Jamshedji A. H. Chinoy."

C.2.

" 70 Medows Street,
Fort,
Bombay 9th July 1942.

Shapurji Pallonji Mistry
Building Contractor,
to
Government and Railways.
Telegraphic Address: GINFRAME
Residence Tele. No. 35783
Office — No. 24634

Jamshedji A. H. Chinoy Esq.

DEAR SIR,

I acknowledge receipt of your letter of the 8th instant.

I confirm my having agreed to sell to you on behalf of Mr. Edulji Dinshaw and Miss Bachubai Dinshaw their 1200 (one thousand and two hundred) collective shares of F. E. Dinshaw Ltd. at Rs.3000 (three thousand) per share.

As regards delivery and payment I am cabling to Mr. Edulji Dinshaw for necessary instructions.

Yours faithfully,
(Sd.) Shapoorji Pallonji Mistry."

On the date of this last letter Shapoorji sent a cable to the defendant Edulji Dinshaw which was received in New York on the 12th July, 1942, and is in these terms:

" According to your cable confirmation dated fourth July sold F. E. Dinshaw Ltd. 1200 A and B collective shares of yours and Bachubai at Rupees three thousand collective shares A and B AAA total value of 1200 A and B collective shares is rupees thirty six lacs AAA partys name Chinoy and Company AAA cable further for arrangements of taking delivery of shares and payment AAA with kindest regards to both.

Shapoorji Pallonji Mistry."

In considering the issue under discussion the learned trial Judge dwelt at some length upon the conduct of Jamsetji and Shapoorji prior to the alleged sale, the circumstances in which the letters of the 8th and 9th July, 1942, saw "the light of day" and the events subsequent to the alleged agreement. He found Jamsetji an unsatisfactory witness and thought his conduct inconsistent with his being a genuine purchaser. He regretted that Shapoorji had not been called as a witness and appears to have come to the conclusion that he was out to secure the shares for himself. He commented pointedly that Jamsetji's testimony as to the sending of the letter of the 8th July and the receipt of that of the following day was not supported by any documentary or other evidence and he saw considerable significance in the circumstances that these letters had not been revealed to anyone other than the correspondents before the 27th July, 1942; that Shapoorji had for some time kept all news of the alleged sale from the Dinshaws' local agents; and that he had informed the Dinshaws first that the purchasers were Chinoy & Co., and eventually, on the 24th July, 1942, that they were "Jamsetji A. H. Chinoy Company". The suggestion that Shapoorji might have been misled as to the proper description of the purchaser by reason of the letter dated the 8th July having been written by Jamsetji on the letter paper of Chinoy & Co., with the word "we" in the body of it, was not accepted by the learned Judge who regarded it as far-fetched and not in accord with Shapoorji's subsequent conduct, although he found as a fact that on the 23rd July, 1942, Shapoorji had introduced Jamsetji to William R. Rumbold, then the holder of a power of attorney from the Dinshaws, as the purchaser and "the proprietor of Chinoy & Co." After referring to these and other points of a like nature, which it is unnecessary to detail, the learned Judge stated his conclusions on this aspect of the case in the following passage in his judgment:

> "Having regard to all the matters that I have discussed above I am not prepared to hold that Jamshedji agreed to purchase these shares or that the letters Ex. C are proved to have been exchanged on the dates which they bear.
>
> It is, however, argued that quite apart from these letters there was an oral agreement to sell. Paragraph 4 of the plaint pleads that there was such an agreement on the 8th of July. None such was deposed to by Jamshedji in his evidence-in-chief, but in his cross-examination by Mr. Maneksha he stated as follows:—
>
> > 'An oral agreement to purchase the shares was concluded on the 7th of July 1942. It was at about 4 p.m. in the office of Shapurji. No one other than myself and Shapurji was present when the contract was concluded. His staff was in the room when we had this conversation. They were not within hearing.'
>
> Quite apart from the fact that there is a slight discrepancy as to the date of the alleged agreement, I cannot accept or act upon that evidence because, if Jamshedji is capable of being a party to bringing into existence Ex. C, I cannot trust his word. I therefore hold that no agreement to sell between Shapurji and Jamshedji has been proved."

The Appellate Court took a different view of the evidence and held that it proved a concluded contract between Jamsetji, the first plaintiff, and Shapoorji as agent for the Dinshaws. It also held that the conclusion of the trial Judge was tantamount to a finding that Shapoorji and Jamsetji had fabricated the letters of the 8th and 9th July in fraudulent collusion and that such a finding was not open to the Judge.

In the opinion of their Lordships the Appellate Court was clearly right in these views. After a careful consideration of the entire evidence they are satisfied that the finding of the learned trial Judge can mean nothing less than that the first plaintiff had actively participated in a fraudulent conspiracy with Shapoorji in order to set up a sale which had never taken place. Nothing short of such conduct could, in the circumstances, rob the letters of the 8th and 9th July of their probative value in establishing the

contract. This was not, indeed, disputed before the Board. On the contrary it was contended by counsel for the Dinshaws that Shapoorji was dishonest throughout and that Jamsetji was a party to the fraud after the 7th July, his letter of the 8th July being described as " reeking with trickery and fraud ".

Their Lordships are not unmindful of the great weight to be attached to the findings of fact of a judge of first instance who sees and hears the witnesses and is in a position to assess their credibility from his own observation. For this reason they would be reluctant to differ from the learned Judge in this instance if his conclusion on the issue under consideration had turned on the impression made by Jamsetji in the witness-box. That, however, was not the case. It is plain that the learned Judge based his finding—and his opinion of Jamsetji—on a theory of conspiracy derived from the documents and a series of inferences and assumptions founded on a variety of facts and circumstances which, in themselves, offer no direct or positive support for the conclusion reached. The right of the Appellate Court to review this inferential process cannot be denied, nor, in the opinion of the Board, can the correctness of the view it took of that process be doubted. Despite the ingenious attempts made at their Lordships' Bar to marshall the facts so as to manifest a pattern of fraud, they, in common with the Appellate Court, find the evidence altogether insufficient to establish the grave charges of fraudulent and dishonourable conduct made against the first plaintiff. In their opinion the learned trial Judge placed a sinister meaning on much that was, at least, equally compatible with honest dealing. Shapoorji's description of the purchaser as Chinoy & Co., for example, may well have been nothing more than an innocent mistake. It was certainly a strange badge of fraud and the learned trial Judge was only able to treat it as such by assumptions as to Shapoorji's state of mind and knowledge which were entirely conjectural. Again, far too much was made of the fact that the letters of the 8th and 9th July were not shown to those acting on behalf of the Dinshaws until the 27th July. On the assumption that this reticence was deliberate it falls far short, even when taken in conjunction with all the other features of the case, of showing that either of these letters was a forgery. The letters may have been withheld, rightly or wrongly, as a matter of caution in a situation already indicating that there were competitive interests in the field, or the fact may simply be that their importance was not appreciated as early as it might have been. The true explanation must remain a matter of speculation as Shapoorji was not called as a witness—a circumstance for which, as will appear later, the plaintiffs cannot be blamed—and speculation is not enough to bring home a charge of fraudulent conspiracy. It also seems to their Lordships, as it did to the Appellate Court. that the learned trial Judge failed to give due weight to the cable sent by Shapoorji to the Dinshaws on the 9th July, 1942, and that when it and the rest of the evidence is fairly assessed the case for conspiracy falls to the ground and the existence of the contract is established beyond all reasonable doubt.

The matter, however, does not end there. Their Lordships think it right to add that, having regard to the pleadings and the course of the trial, the learned Judge was wrong in embracing, as he undoubtedly did, an issue of fraudulent collusion. At the beginning of the trial the position stood thus. The making of the contract was denied or not admitted by all the defendants who pleaded. The written statement of the first defendant, which was adopted in all material respects by the second defendant, alleged (paragraph 7) with reference to the letters of the 8th and 9th July that " This defendant has reason to believe that the said letters were not written on the dates which they purport to bear ". It also alleged (paragraph 10) that if Shapoorji had authority to sell he had obtained it by making fraudulent misrepresentations " as this defendant believes in collusion with the 1st plaintiff ". This was followed by the allegation (the first sentence of paragraph 11) that " This defendant further submits that the 1st plaintiff was at all material times acting in collusion

with the said Mistry and was aware that the said Shapoorji Pallonji Mistry was not giving correct information to this defendant and was misleading him". That was as far as the pleadings went in attributing fraud of any kind to the first plaintiff. Of the issues framed by the Court only the following are now material in this connection:—

> "8. Whether Shapoorji Pallonji Mistry obtained the authority from the 1st defendant by misrepresentations as stated in para. 10 of the Written Statement of the 1st defendant.
>
> 9. Whether the 1st plaintiff was at all material times acting in collusion with the said Shapoorji Pallonji Mistry as alleged in para. 11 of the Written Statement of the 1st defendant.
>
> 10. Whether the 1st plaintiff was at all material times aware that the said Shapoorji Pallonji Mistry was not giving correct information to the 1st defendant and was misleading him."

At the trial Jamsetji, the first plaintiff, gave evidence and was cross-examined at some length. It was put to him and he denied that the letters of the 8th and 9th July were not in existence at the date of his interview with Rumbold—the 23rd July, 1942. While this question no doubt challenged the honesty of the witness and was so intended, there is nothing in the learned Judge's note of his evidence, which has all the appearance of being carefully and fully recorded, to suggest that the course of fraudulent conduct now so definitely charged against Jamsetji was put to him plainly and adequately and so as to afford him a fair opportunity of explaining or denying the various matters from which, it is said, collusion of a dishonest and, indeed, of a criminal nature may properly be inferred against him.

In the course of his evidence Jamsetji had stated that Shapoorji was at hand to give evidence if required. On the conclusion of his case the Court recorded the following note:—

> "Subject to the right of the plaintiffs to call evidence in rebuttal on issues Nos. 8, 9 and 10, the burden of which is on defendants 1 and 2 [the Dinshaws], Mr. Coltman closes his case."

That Shapoorji was a likely witness for this purpose must have been appreciated by all including the learned Judge. Evidence was then led for the defence and during the examination of the first witness counsel for the defendants stated that they were not pressing issues 8, 9 and 10. There was nothing conditional about this announcement which meant and was understood by the Judge to mean that these issues were abandoned; and with them went the right to adduce evidence in rebuttal which had been reserved to the plaintiffs.

Their Lordships find difficulty in thinking that counsel for the defendants in India would have taken this course at the trial with regard to these issues—particularly No. 9—if any sound ground had then appeared to exist for charging Jamsetji with fabricating the letters of the 8th and 9th July in collusion with Shapoorji. It was, however, urged upon their Lordships that the abandonment of these issues only withdrew the charge of collusion against Jamsetji in respect of the alleged misrepresentations by which Shapoorji was said to have obtained authority to sell, and that it remained open to the learned Judge to proceed to a finding of collusion in respect of the fabrication of the letters. In the opinion of the Board this contention is untenable. Of the many issues framed in the case the only one raising collusion on the part of Jamsetji was No. 9 and, even when read in conjunction with paragraph 11 of the first defendant's written statement, it cannot properly be regarded as directed to less than the whole range of collusive conduct alleged by the Dinshaws. If, then, the allegation in paragraph 7 of this written statement that "This defendant has reason to believe that the said letters were not written on the dates which they purport to bear" could be read as charging Jamsetji with fraudulent collusion, the charge so made was abandoned with issue No. 9. Their Lordships would add, however, that they cannot construe paragraph 7 as fairly raising such a charge. The rules in India as to pleading

fraud do not differ in any material respect from the English rules on the same subject. Fraud must be pleaded in a plain and unequivocal manner and cannot be set up by way of implication from the terms of a statement so vague and ambiguous as that just quoted.

For these reasons their Lordships think that the finding of the learned trial Judge as to the existence of the contract alleged was wrong and that that of the Appellate Court was right. It follows, as the confusion between Chinoy & Co. and Jamsetji was a matter of description and not of the identity of the purchaser, that the question under consideration must be answered in the affirmative.

(3) *Was the contract void on account of illegality*?

This question turns on whether the agreement for sale, which was, admittedly, made without the permission of the Reserve Bank of India, contravened Rule 93 of the Rules made under the Defence of India Act, 1939, either when read alone or in conjunction with Rule 121. The material parts of these Rules are as follows :—

> "*Rule* 93 (1). For the purposes of this rule . . . (i) the expression "securities" includes shares. . . .
>
> (2) No person shall, except with the permission of the Reserve Bank of India or in the performance of a contract made before the 3rd September, 1939, acquire any securities from a person not resident in India or Burma.
>
> . . . . . .
>
> *Rule* 121. Any person . . . who does any act preparatory to a contravention of any of the provisions of these Rules . . . shall be deemed to have contravened that provision. . . ."

For the defendants it was contended that to agree to purchase was to "acquire" within the meaning of Rule 93 (2). Both Courts in India were of opinion that this submission was ill-founded and their Lordships agree with that view. It was conceded that in India a contract for the sale of shares does not, of itself and in the ordinary course of events, create an equitable interest in the purchaser, and that no question arose as to the acquisition of such an interest. The point is therefore solely one of construction. In the opinion of the Board the natural meaning of the expression "acquire any securities" in relation to a sale of shares points to the completion of the contract, in the sense of the acquisition by the purchaser of the documents necessary to procure his registration, rather than to the contract itself. There is nothing in the context to point away from this construction. On the contrary, the words "or in the performance of a contract" appear to recognise the distinction on which this interpretation is based. Once this conclusion has been reached little need be said of Rule 121. It was not suggested that the first plaintiff purchased with a view to contravening the Rules and there is therefore no ground for saying that he did an act preparatory to contravention.

Their Lordships accordingly answer this question in the negative.

(4) *Was the first plaintiff entitled to relief by way of specific performance as ordered by the Appellate Court*?

The matters raised by this question have narrowed considerably during the course of proceedings. Specific performance was sought against the additional appellants under section 27 (*b*) of the Specific Relief Act, 1877. As it was admitted that they took their transfers of the shares in question with notice of the contract sued upon, the applicability of this enactment is not in doubt. It is also the opinion of the Board that, having regard to the nature of the company and the limited market for its shares, damages would not be an adequate remedy. This leaves as the matter for decision under this head whether the first plaintiff was ready and willing to perform his obligations under the contract. On this aspect of the case the defendants, up to a point, followed two lines of attack. In the first place they said that Jamsetji had taken no step to procure the permission of the Reserve Bank to payment under Rule

92A (2) or to acquisition under Rule 93 (2) and was thus never in a position to implement the contract, and secondly they urged that on his own showing he was financially incapable of finding the price. The first of these contentions no longer raises a live issue. The learned trial Judge found, and at their Lordships' Bar counsel for the parties agreed, that if the contract was made a reasonable period for its completion would be two months. That would have made the date for completion the 9th September, 1942. But the Dinshaws had repudiated long before that and the course of events thereafter produced a situation which enabled the parties consenting to the Order of the 9th October, 1947, to take the steps directed thereby without reference to the Reserve Bank. The second contention, however, remains to be considered. The learned trial Judge upheld it. His views thereon were *obiter* for he had already found that Jamsetji had not agreed to purchase; and for the same reason and on account of the theory of conspiracy which he had formed he would obviously have experienced difficulty in holding otherwise. The Appellate Court found on the evidence that Jamsetji was ready and willing to fulfil his financial obligations under the sale. Their Lordships agree with this conclusion and the grounds on which it was based. It is true that the first plaintiff stated that he was buying for himself, that he had not sufficient ready money to meet the price and that no definite arrangements had been made for finding it at the time of repudiation. But in order to prove himself ready and willing a purchaser has not necessarily to produce the money or to vouch a concluded scheme for financing the transaction. The question is one of fact and in the present case the Appellate Court had ample material on which to found the view it reached. Their Lordships would only add in this connection that they fully concur with Chagla A.C.J. when he says:—

> "In my opinion, on the evidence already on record it was sufficient for the Court to come to the conclusion that the first plaintiff was ready and willing to perform his part of the contract. It was not necessary for him to work out actual figures and satisfy the Court what specific amount a bank would have advanced on the mortgage of his property and the pledge of these shares. I do not think that any jury—if the matter was left to the jury in England —would have come to the conclusion that a man, in the position in which the plaintiff was, was not ready and willing to pay the purchase price of the shares which he had bought from defendants Nos. 1 and 2."

For the foregoing reasons their Lordships answer question (4) in the affirmative.

(5) *Should the Appellate Court have ordered the defendants, other than the 77th defendant, to pay the first plaintiff the dividends declared and paid on the* 1,185 *A and* 1,195 *B shares by the company between the 9th September,* 1942 *and the 27th October,* 1947?

This question raises a point common to all three appeals, each group of appellants being dissatisfied with the order made by the Appellate Court as to dividends. The plaintiffs contended that this order should have directed payment in the terms of the question instead of dealing only, as it did, with the dividend declared on the 24th September 1942 in respect of the year ending the 31st March 1942; the defendant-appellants, on the other hand, contended that the first plaintiff was not entitled to relief in respect of any dividend declared after the contract. It was conceded by counsel for all the appellants that no distinction could be drawn for the purposes of this issue between the dividend declared on the 24th September, 1942, and those declared subsequently. The question therefore comes to this—was the purchaser entitled to receive the dividends on the shares purchased which were declared between the date of the contract and the date for completion as ultimately fixed by the court?

The Appellate Court appears to have differentiated between the dividend declared on the 24th September, 1942, and those declared subsequently on the grounds that the former was declared in respect of a

period antecedent to the contract and was therefore carried by an implied term thereof, whereas the right to the latter would only pass to the purchaser when the beneficial interest in the shares passed which, in India, was when the sale was completed and not before. Their Lordships do not desire to cast doubt on the proposition that in India a purchaser of shares (which under the Indian Sale of Goods Act come within the definition of "goods") does not acquire an equitable interest by virtue of the contract of sale. But they cannot agree with the application of this proposition which commended itself to the Appellate Court. No doubt as between a company and a purchaser of shares therein the date of completion is all important. But as between vendor and purchaser, where the contract does not otherwise provide, the term to be implied as to dividends is not confined to dividends still to be declared in respect of a period or periods prior to the contract. It includes such dividends but that is not because the period in which they were *earned* is crucial; what is crucial is the date or dates of declaration. It may be that the facts in *Black* v. *Homersham*, 4 Ex. D. 24, mislead the Appellate Court in this respect for there the report gives some prominence to the circumstance that the dividend in question was declared in respect of a period antecedent to sale. Their Lordships cannot, however, regard that case or the decision of Morton J. (as he then was) in *In Re Wimbush* (1940) Ch. 92, as intending to curtail the principle just stated. That principle is, in the opinion of the Board, correctly expressed so far as the law of England is concerned in the passage in Palmer on Company Law, 17 Edn. 212, which reads:—

> "as between a buyer and seller of shares, the buyer is entitled to all dividends declared after the date of the contract for sale, unless otherwise arranged."

It may be arguable that this statement of the law would be more accurately expressed as respects India if for the date of the contract there was substituted a reference to the date agreed for completion or, as the case may be, the reasonable date for completion. The point does not arise here as the first dividend in question was declared after what has been accepted as the due date for completion, and their Lordships do not, therefore, express any view upon it. But subject to such modification (if any) as may be warranted in this respect they are of opinion that the statement just quoted is applicable to India and that the contractual obligation in the present case must be determined accordingly.

That being so and the first plaintiff having been declared entitled to relief by way of specific performance of the contract, the order against the other contracting parties, the Dinshaws, should have included a direction to pay all the dividends under discussion. The additional appellants are in the same position. They acquired the shares with notice of the contract prior to the 24th September, 1942, and under section 91 of the Indian Trusts Act, 1882, "must hold the property for the benefit of" the first plaintiff "to the extent necessary to give effect to the contract." In view of this and of section 27 (*b*) of the Specific Relief Act, 1877, the liability of these defendants in respect of the dividends in dispute cannot be doubted.

For these reasons question (5) must be answered in the affirmative.

(6) *Should the Appellate Court have directed the first plaintiff to pay interest on the purchase price from the 9th September, 1942 (the due date for completion) until it was paid?*

It would appear from the supplementary judgment delivered by the learned Acting Chief Justice on the 19th September, 1947, that he associated this question with that discussed at (5) above and regarded the circumstance that the contract did not create an equitable interest as in point on both. These questions are indeed closely related and their Lordships think that, on the facts of the present case, the liability of the first plaintiff to pay interest follows from his right to receive dividends as stated above. The matter does not hinge on the creation of an equitable

estate or interest, but on the nature of equitable remedies and the broad principles of equity and fair dealing which underly them. In this respect there is, in the opinion of the Board, no relevant distinction between the law of India and that of England. If the first plaintiff succeeds in his claim that the contract should be specifically performed not only as to the shares but also as to the fruit they have borne while the price remained unpaid, he cannot claim to retain a fair measure of the profit earned or the expense saved by reason of the price being unpaid without denying the vendors a correlative equity and ignoring the quality and character of the relief which he has sought.

This question will therefore be answered in the affirmative. To avoid difficulty and delay the parties have agreed that such interest, if payable, should be at the rate of 4½ per centum per annum.

(7) *Ought the Appellate Court to have awarded the first plaintiff damages for breach of the contract in respect of the 5A and 5B shares in the company which stood in the name of Sir Cowasji Jehangir, the 77th defendant?*

It would seem that this defendant was a trustee or nominee of the Dinshaws. As stated earlier he did not appear. He wrote to the plaintiffs' attorneys submitting himself to the order of the Court. On the 8th February, 1943, his holding of five collective shares was transferred to Sir Jamsetji Duggan and Lady Duggan. They have not been joined as parties to the suit. The Appellate Court made no order in respect of these shares which are excluded from the holdings of 1,185 A and 1,195 B shares mentioned in the decree appealed from.

It is clear that in the circumstances no satisfactory order for specific performance could have been made concerning the 77th defendant's shares. But as a transferee with notice he was not in a position to avoid all responsibility by transferring to others. In their Lordships' view he and the Dinshaws were clearly liable in damages in respect of these shares. It was agreed by counsel that such damages, if payable, should be measured at Rs.1,725.

Question (7) will be answered accordingly.

This completes the consideration of the several matters calling for determination by the Board. It remains to see what effect the answers given must have on the decree of the Appellate Court. As the hearing of the appeals drew to a conclusion their Lordships received from counsel for the parties an agreed document indicating, on certain assumptions as to the views of the Board but without prejudice to any of the submissions advanced in argument, how the matter might be worked out. Their Lordships, no less than counsel and the parties, appreciate the desirability of bringing this litigation to an end as speedily and conveniently as possible, and are much obliged for the assistance so given. With its aid they will now proceed to indicate the nature of the amendments of the decree of the 22nd September, 1947, required to give effect to the views they have already set forth. They are:—

After the words "AND DOTH DISMISS the Cross-objections of the Respondents" there should be substituted for the then following words down to and inclusive of the words "against the price payable by him as hereinbefore provided" the words following, that is to say:—

> "AND DOTH DECLARE that the agreement recorded and put in as Exhibit 'C' at the hearing of the suit was duly entered into with the first Plaintiff by Shapoorji Pallonji Mistry as the duly authorised agent of the first and second Defendants and is binding on the Defendants and that the same ought to be specifically performed AND THIS APPELLATE COURT DOTH ORDER that the Defendants other than seventy-seventh Defendant do specifically perform the said agreement to sell to the first Plaintiff one thousand one hundred and eighty-five A shares and one thousand one hundred and ninety-five B shares of F.E. Dinshaw Limited and hand over the share Certificates

together with the relative transfer forms duly executed by them in favour of the first Plaintiff or his nominee or nominees on the first Plaintiff paying the sum of Rs.35,67,857 with interest thereon as hereinafter mentioned less the sum for which he is entitled to take credit as hereinafter provided in respect of the said shares AND THIS APPELLATE COURT DOTH FURTHER ORDER that the Defendants other than the seventy-seventh Defendant do execute the said transfer forms and hand over the share certificates together with the said transfer forms to the first Plaintiff on or before the twenty-seventh day of October one thousand nine hundred and forty-seven time being of the essence against payment of the sum of Rs.35,67,857 together with interest thereon at the rate of 4½ per cent. per annum from the ninth day of September one thousand nine hundred and forty-two to the twenty-seventh day of October one thousand nine hundred and forty-seven less the amount for which the first Plaintiff is entitled to take credit as hereinafter mentioned AND THIS APPELLATE COURT DOTH FURTHER ORDER that the Defendants other than the seventy-seventh Defendant do pay to the first Plaintiff the net amount of the dividends on one thousand one hundred and eighty-five A and one thousand one hundred and ninety-five B shares of F. E. Dinshaw Ltd. declared and paid between the ninth day of September one thousand nine hundred and forty-two and the twenty-seventh day of October one thousand nine hundred and forty-seven with interest thereon at the rate aforesaid from the respective dates on which they were paid up to the twenty-seventh day of October one thousand nine hundred and forty-seven AND THIS APPELLATE COURT DOTH FURTHER DECLARE that the first Plaintiff is entitled to take credit for the dividends aforesaid on the said shares of F. E. Dinshaw Ltd. with interest thereon as aforesaid against the sum of Rs.35,67,857 with interest payable by him as hereinbefore provided AND THIS APPELLATE COURT DOTH FURTHER ORDER that the first second and seventy-seventh Defendants do pay to the first Plaintiff the sum of Rs.1,725 as compensation in lieu of specific performance in respect of the five A and five B shares in F. E. Dinshaw Ltd. mentioned in the statement marked K which is referred to in paragraph twenty-nine of the amended plaint as standing in the name of the seventy-seventh Defendant but have been transferred by him to other persons not parties to the suit."

Their Lordships have humbly advised His Majesty that the appeal of the plaintiffs in suit No. 1086 be allowed to the extent and subject as aforesaid, that the other appeals be dismissed and that the decree of the Appellate Court be modified accordingly and affirmed subject to such modification. Anything done by any party in pursuance of the order of the 9th October, 1947, shall be regarded as having been done in execution *pro tanto* of the said decree as so modified with the proviso that any over-payment made by the first plaintiff to the defendants other than the first, second and seventy-seventh defendants over and above what he is liable to pay under the said decree as so modified as aforesaid shall be refunded to him by the said defendants with interest thereon at the rate aforesaid as from the 27th day of October, 1947, until payment.

The plaintiffs have succeeded on the major issues and the other appellants must pay their costs of these consolidated appeals.

(67396) Wt. 8084—42 220 1/50 D.L.

In the Privy Council

I

THE BANK OF INDIA LTD. AND OTHERS

v.

JAMSETJI A. H. CHINOY AND MESSRS. CHINOY & CO.

II

EDULJI F. E. DINSHAW AND BACHUBAI F. E. DINSHAW

v.

JAMSETJI A. H. CHINOY AND MESSRS. CHINOY & CO.

III

JAMSETJI A. H. CHINOY AND MESSRS. CHINOY & CO.

v.

EDULJI F. E. DINSHAW, BACHUBAI F. E. DINSHAW, THE BANK OF INDIA LTD. AND OTHERS

[DELIVERED BY LORD MACDERMOTT]

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