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UNIVERSITY OF LONDON  
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INSTITUTE OF ADVANCED  
LEGAL STUDIES

IN THE PRIVY COUNCIL

No. 29 of 1957

O N A P P E A L

50909

FROM HER MAJESTY'S COURT OF APPEAL FOR  
EASTERN AFRICA

B E T W E E N :

KHATIJBABI JIWA HASHAM  
(Defendant) ... Appellant

- and -

10 ZENAB D/O CHANDU NANSI, Widow  
and Executrix of Haji  
Gulamhussein Harji,  
deceased as Legal  
Representative  
(Plaintiff) ... Respondent

CASE FOR THE RESPONDENT

RECORD.

20 1. This appeal is from a Judgment and Order of the Court of Appeal for Eastern Africa dated the 15th March, 1957, dismissing an appeal from a Judgment of the Supreme Court of Kenya dated the 13th January, 1956, and a Decree thereon dated the 28th July, 1956, whereby it was ordered that a contract for the sale by the Defendant to the Plaintiff of certain land in Nairobi should be specifically performed and that the Defendant should pay damages for delay, interest and costs. pp. 343-375.  
pp. 268-289.

30 2. The principal issue which arises for determination on the appeal is whether the Courts below were right in holding that the Plaintiff was entitled to claim specific performance of the said contract for the sale

RECORD

of land notwithstanding that the action was commenced before the expiration of the period within which it was agreed that the transfer should be completed, or whether (as contended by the Defendant) the action was premature.

pp. 1-4.

3. The action was commenced by a Plaint in the Supreme Court of Kenya dated the 2nd July, 1954. The Plaintiff's case as set out in the Plaint was in outline as follows :-

p. 1, 1.17.  
p.1, 1.25.

(a) The Plaintiff was a land and estate agent. On or about the 18th February, 1954, the Defendant in consideration of the sum of Shs. 5/- gave to the Plaintiff a binding option, valid until 1 p.m. on the 22nd February, 1954, to purchase Plot No. 209/53/1 Sclaters Road, Nairobi, at the price of Shs. 100,000/-. The option recited the property as being over 2 acres.

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p. 377.

p. 1, 1.34.

p. 2, 1.6.

(b) On the strength of the said option the Plaintiff entered into an agreement with Hasham Brothers, Limited, a limited liability company, on the 19th February, 1954, for the re-sale of the said property to them for the price of Shs. 107,000/-.

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p. 2, 1.4.

(c) The necessity for exercising the said option was dispensed with, however, on the signing of a formal agreement for the sale of the said property by the Defendant to the Plaintiff at the price of Shs. 100,000/- on the 19th February, 1954, at the offices of one G.K. Ishani, Advocate.

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p. 2, 1.22.  
p. 378.

(d) The agreement, wherein the property was described as "Plot No. 209/58/1 measuring 2.04 acres or thereabouts together with all the buildings situate on Sclaters Road, Nairobi, in complete vacant possession", provided for payment of Shs. 15,000/- against the purchase price of Shs. 100,000/- on or before the execution of the agreement, and for the sale to be completed within six months of the date of the agreement, and for payment of Shs.85,000/- against presentation of documents of transfer, either by the taking over of the mortgage for Shs.81,000/- and payment of Shs. 4,000/- on completion of transfer, or if so required, free from incumbrances.

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(e) On the signing of the agreement a cheque for Shs.15,000/- was made out in the Defendant's favour by the Plaintiff and proffered to the Defendant.

p.2, l.32.

10 (f) After signing the agreement, the Defendant changed her mind and tore up the signed and stamped agreement and repudiated the same before the time fixed for its completion and refused to be bound by it and declined to go through with the completion on the due date or at all and has despite repeated requests continued so to decline.

p.2, l.46.  
p.3, l.5.

20 4. The prayer of the Plaint was for specific performance of the agreement made on the 19th February, 1954, damages for delay from the said date to the date of judgment or actual specific performance, alternatively rescission and damages, a declaration that the Defendant is bound to indemnify the Plaintiff against any claim by Hasham Brothers Limited, as damages, interest, costs and other relief.

p.3, l.23.

5. The Defendant by a Written Statement of Defence dated the 26th October, 1954, answered the Plaintiff's claim as follows :-

pp. 4-6.

30 (a) The Defendant alleged that in February, 1954, she verbally employed the Plaintiff to act for her as a land and estate agent for the purpose of negotiating the sale of a portion of the land referred to in the Plaint, consisting of 0.513 acres or thereabouts together with the dwelling-house and other buildings thereon, and instructed the Plaintiff that she required the price of Shs.100,000/- for the said portion.

p.4, l.21.

40 (b) On or about the 18th February, 1954, the Plaintiff verbally represented to the Defendant that he had a prospective purchaser for the said portion of land and that in order to complete negotiations it was necessary for the Defendant to give him an option to purchase the same for Shs. 100,000/- and he produced a document written in the English language which he represented to be the said option.

p.4, l.33.

RECORD

p.5, 1.3.

(c) The Defendant signed the option without the same having been translated or explained to her, and without receiving or being promised any payment therefor.

(d) With regard to the agreement signed on the 19th February, 1954, the Defendant pleaded in the following terms :

p.5, 1.9.

"On or about the 19th day of February, 1954, the Defendant at the request of the Plaintiff attended at the office of G.K. Ishani, Esquire, then Advocate for the Plaintiff in order to sign certain documents which the Plaintiff represented verbally to her were necessary for the sale of the said portion of land and were in pursuance of the said option. The Defendant admits that she affixed her signature to the agreement of sale referred to in paragraph 5 of the Plaintiff but states that the same was not prior to her signing translated or explained to her, that she affixed her signature thereto upon the strength of the representations by the Plaintiff hereinbefore averred, and that while she was signing the said Agreement she came to learn for the first time from one, Sultan, who was present at the same time, that the said agreement referred to the sale of the whole of Plot 58/1 L.R.209, whereupon the Defendant refused to accept the terms of the said Agreement and tore up the same. The Defendant denies that any cheque for the purchase price was proffered to her."

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(e) The Defendant, on the basis of her version of the facts as set out above, put forward the following contentions :-

p.5, 1.36.

(i) That the agreement was not an exercise of the option but a counter-offer which the Defendant never accepted.

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p.5, 1.44.

(ii) Alternatively, that the Defendant was induced to grant the option and make the agreement by the fraud or misrepresentation of the Plaintiff.

p.6, 1.4.

(iii) In the further alternative, that the Defendant was induced to grant the option and make the agreement

by undue influence of the Plaintiff.

(iv) In the further alternative, that the agreement was entered into by mistake in that the terms thereof were drawn up so as to contravene the intention of the parties by purporting to refer to the whole of the Plot whereas it should have referred to the said portion only. p.6, 1.21.

10 (v) The Plaintiff has dealt with the Defendant in an unfair and unjust manner and is thereby disentitled from having specific performance of the agreement of sale. p.6, 1.28.

(f) The Defendant further alleged that the parties verbally agreed at the office of G.K. Ishani, Esquire, on the 19th February, 1954, to rescind the option and the agreement. p.6, 1.32.

20 (g) The Defendant pleaded that the damages claimed in respect of liability of the Plaintiff to Hasham Brothers Limited are too remote. p.6, 1.36.

6. The case was heard in the Supreme Court (cor. Harley Ag.J.) on 10 days between the 2nd May, 1955, and the 2nd December, 1955. It was agreed between the parties that the onus of proof was upon the Defendant and her case was opened first. Both parties adduced evidence. pp. 7-267.

It was agreed between the parties that the onus of proof was upon the Defendant and her case was opened first. Both parties adduced evidence. p.21, 1.35.

30 7. The evidence of the Plaintiff is conveniently summarised in the Judgment of Sinclair V.P. in the Court of Appeal as follows :- pp.219-258.  
- pp.261-264.

40 " According to the respondent, whose evidence the learned Judge accepted, he met the appellant by chance in an Indian bazaar on the 17th February 1954. She was alone. She stopped him and said "I have got a plot about two acres with a building thereupon and I want to sell it off - in Sclaters Road". She told him that the land was over two acres, and that it was vacant and that she wanted Sh.100,000/- for the land and building. In answer to his enquiry, she said that the land was sub-divided and that beacons had been fixed. She agreed to give him p.358, 1.12  
- p.359, 1.29.

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"an option for three days and it was arranged that he should meet her on the following day at the house of Mrs. Valli Hasham. The next day, the 18th February, he wrote out the option in English and took it to the appellant who was alone in the dining room. He read over and explained the option to the appellant in Gujarati which is the language of both of them. When he was translating the document she asked that the word "net" should be inserted after "sh.100,000/-" and that the words "and Beacons is already been put" which appeared after the words "the above property is over 2 acres and subdivision is completed" should be deleted, as she was not sure whether beacons had been fixed. He made the addition and deletion requested. He had written that the option was good up to the 20th February, but she agreed to extend it to the 22nd February. He accordingly crossed out the "20th" and put "22nd". These alterations appear in the option Ex. A. The appellant then called Amina Hasham who read over and explained the option to the appellant. Thereupon the appellant signed it and Amina Hasham also signed it as a witness. On the 19th February, when he brought the appellant to Mr. Ishani's office Mr. Ishani produced the agreement of sale between the appellant and the respondent, told the appellant that he had prepared it on the strength of the option given by her to the respondent, and read over and explained the contents to the appellant. The agreement as originally drafted provided for a deposit of Sh.10,000/-. When Mr. Ishani reached the reference to Sh.10,000/- deposit, the appellant said she was in need of Sh. 20,000/- and must have it. Mr. Ishani explained that as there was a mortgage of Sh. 81,000/- on the property, the balance was only Sh. 19,000/- and she could not demand a deposit of Sh. 20,000/-. She said "Thats all right, give me Sh. 15,000/-". Mr. Ishani made the necessary amendments to the agreement and he, the respondent, signed a cheque for Sh. 15,000/- which was handed to the Appellant. Mr. Ishani read over the remainder of the agreement which the appellant then signed, the original

10 "first and then the duplicate. In examination-in-chief the respondent said immediately after signing, the appellant asked him if he had sold the property to Hashambhai. He agreed that he had sold it to Hashambhai, whereupon the appellant sprang up from her chair, tore up the agreement and left the office. He said that the appellant made no mention of intending to sell only half an acre. He maintained the same story in cross-examination, but in re-examination, in answer to a leading question, he agreed that after tearing up the agreement the appellant said that she intended to sell only a portion of the land and not the whole."

8. The option Exhibit A1 is in the following terms :-

20 " Mr.Haji C. Harji,   Nairobi   p.377  
Nairobi.   18.2.54.

Dear Sir,

Re my House on Slater Road  
adjoining Mayfair Hotel, Nairobi.

In consideration of Shs.5/- five I hereby giving you option to purchase the above property for Shs. 100,000/- net one hundred thousand.

30 The above property is over 2 two acres and sub-division is completed. ~~And~~  
~~beacons is already been put.~~ (Sgd.)?

The house of above property will be given in vacant possession with all vacant land contain.

22nd (Sgd) ?

This option is good up to 20th February 1954 up to 1 p.m. to you or to your nominis.

40 Yours sincerely,  
Khatifa Jiwa Hasham  
in Gujarati  
18.2.54.

Witness:  
Amina V. Hasham   "

RECORD

The Agreement signed on the 19th February, 1954, Exhibit A2, is in the following terms :-

pp.378-379.

" MEMORANDUM OF AGREEMENT OF SALE

MEMORANDUM OF AGREEMENT OF SALE OF PLOT  
NO. 209/58/1 Slatters Road Nairobi.

Vendor:- Khatijabai Jiva Hasham P.O.  
Box 309, Mombasa.

Purchaser: Haji Gulamhussein Harji of  
P.O. Box No.977, Nairobi.

Property: Plot No. 209/58/1 measuring 2.04 acres or thereabouts together with all the buildings situate on Slatters Road, Nairobi in complete vacant possession. 10

Purchase Price:- Shs.100,000/- (Shillings One hundred thousand) payable in the following manner -

Shs. 15,000/- to be paid in cash as a deposit on or before the execution of these presents (the receipt of which the Vendor doth hereby acknowledge) 20

Shs. 85,000/- to be paid on presentation of documents of transfer which shall be executed by both the parties within six months from the date of this Agreement. The Purchaser shall arrange to take over the present mortgage of Shs. 81,000/- on the said property of The Diamond Jubilee Investment Trust Limited, Mombasa or transfer the same with the property to his nominee at his own expense and pay the balance sum of Shs. 4,000/- on completion of transfer. 30 40



"OTHER CONDITIONS

(1) The Vendor hereby gives complete vacant possession of all the buildings on the above property and the purchaser acknowledges the receipt of vacant possession duly received by him.

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(2) The Site Value Tax shall be apportioned between the parties. The Vendor to pay Site Value tax from 1.1.54 to 19.2.54 and the Purchaser to pay from 19.2.54 onwards. Same shall apply to apportion Insurance Fire premium of the said property.

(3) The Vendor undertakes to transfer the said property to the Purchaser or his nominee or nominees free from encumbrances.

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(4) The Vendor undertakes to pay all the dues owed on the said property up to and including 19.2.54 and give a clearance Certificate of the Municipality to the Purchaser or his nominee or nominees.

DATED AT NAIROBI this            day of  
1954.

Sgd. Khatijabai Jiwa Hasham  
in Gujarati  
Shs. 1/- stamps. "

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9. The Defendant's evidence regarding the two occasions on which she met the Plaintiff prior to the date on which the agreement was signed, is summarised in the same Judgment as follows:-

pp.22-27.  
pp.31-42.

p.359, 11.30-54.

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"The appellant in her evidence said that when she met the respondent on the first occasion, her son Sadru Din was with her. She told the respondent that she wanted to sell a half-acre plot together with a house on it for Sh. 100,000/- that the land was sub-divided into four half-acre plots and that it was the plot with the house on it which she wished to sell. The respondent told her that he would try

RECORD

"to find a buyer for her at the price she wanted. Two or three days later the respondent called to see her at her uncle's house where she was staying. She was on a visit from Mombasa where she lived. The respondent suggested that she should accept Sh.80,000/- or Sh. 85,000/-. She insisted on Sh. 100,000/-. The respondent then wrote something on a piece of paper which she signed. He did not read it over to her, but said only that she "was bound for three days to sell for Sh. 100,000/-". She saw no alterations or corrections on the paper and none were made at her request. She signed the paper, having called Amina Hasham to witness her signature. Nothing was explained to Amina Hasham, nor did Amina Hasham explain the contents of the document to her. The document she signed is the option, Exhibit A. "

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pp.92-105  
pp.118-124.  
p.93, l.21-  
p.94, l.37.  
p.97; p.94

10. The Defendant's son Sadru Din Nanji gave evidence in support of her case. He stated that he was present on the first occasion on which the Plaintiff met the Defendant, which he appeared to say was on the 15th February, 1954, and not on the 17th February, 1954, as stated by the Plaintiff.

p.97, ll.1-31.

p.118, l.19.  
p.122, l.13.  
p.123, l.1.  
pp.169-172  
p.194.  
pp.259-261.  
p.170, l.6.

Sadru Din stated that this first meeting between the Plaintiff and the Defendant took place while he was spending 4 or 5 days in Nairobi and that during that period he stayed at the Garden Hotel. By agreement between the parties, the manager of the Garden Hotel, K.I. Samji, was called by the Plaintiff and stated that Sadru Din did not stay at the Hotel in February 1954.

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pp. 86-91.

11. Amina Hasham gave evidence in support of the Defendant's assertion that on the occasion when she signed the option Amina did not read or explain the document to her but merely signed it as a witness.

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p.28, l.32  
p.29, l.45.

12. As regards the meeting in the offices of Mr. Ishani which the Plaintiff said was on the 19th February, 1954, the Defendant admitted that she signed the agreement but stated that

it was not read over to her before she signed it. Her evidence in chief as to the circumstances in which she tore up the document was as follows :-

p.29, 11.19-  
42.

"Q. When was it first mentioned that Shs. 81,000 was due on mortgage in respect of this property?

A. When I demanded Shs. 25,000.

MR.O'DONOVAN: Mr.Sultan was there?

10 A. At that moment when we were discussing this Mr.Sultan said "Oh two acres are mentioned here". I was struck with horror.

Q. What did you do?

20 A. I snatched the paper on which I had put my signature and threw it away. I said, "What is all this nonsense"? Then Mr.Ishani said there was some misunderstanding, and that Mr.Harji admitted this misunderstanding. Mr. Harji lowered his head and then Mr. Ishani said that the matter was over and that the bargain was cancelled.

Q. At the time when you were surprised and tore up the agreement you signed, did Mr.Harji give you any explanation about the option or agreement?

30 A. Yes. Mr.Ishani said, "Don't you get puzzled. There is some misunderstanding and Mr.Harji admits this misunderstanding" - and, as if in consent, Harji lowered his head.

JUDGE: He lowered it or nodded it?  
(Witness demonstrates). "

40 Mr.Ishani and one Sultan, a friend of the Defendant's family who at her request was present at the meeting on the 19th February, 1954, both gave evidence in support of the Defendant's case.

pp.61-96.

pp.145-164.

13. After the meeting on the 19th February, 1954, certain correspondence took place,

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including :-

pp.382-383.

(i) A letter dated the 19th February, 1954, from the Plaintiff's Solicitors to the Defendant, Exhibit 7, which included the following passages -

"After signing the agreement it appears you changed your mind, putting forward the excuse that you were only selling the house and part of the land and not the whole of the 2.04 acres, and tore up the stamped and signed agreement and went away, declining to go through with the completion of the transaction. 10

The agreement is quite explicit on the extent of the land sold, and there is absolutely no justification for your trying to recede out of it, and should you persist in your refusal, we regret our instructions would leave us no alternative but to sue for specific performance. " 20

p. 385.

(ii) A letter of the same date from the Defendant's Solicitors to the Plaintiff which contained the statement -

"I am instructed to say that the whole transaction was fraudulent and she (i.e. the Defendant) hereby cancels any paper signed by her in respect of the above property."

pp.105, 164  
173, 182,  
186, 195.  
p.31, 1.30

14. Evidence as to the value of the property comprised in Plot No.209/58/1 was adduced by both parties. The Defendant was disposed to put a high valuation upon the property in support of her case that what she was willing to sell for Shs. 100,000/- was only a half-acre portion and not the whole Plot. 30

p.19, 1.31.

15. On the evidence, counsel for the Defendant abandoned the allegation of undue influence.

pp.268-289.

16. The learned trial Judge in his Judgment dated the 13th January, 1956, decided the issues of fact in favour of the Plaintiff. The Judgment contains the following specific findings :- 40

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- (i) The learned judge accepts the Plaintiff's account of the conversation between the parties on the 17th February, 1954. He finds that the Defendant's son Sadru Din Nanji was not in Nairobi in February, 1954, and that the Defendant has fabricated his presence in order to bolster up her own case. p.268, 1.23.  
p.272, 1.42
- 10 (ii) With regard to the option, the learned judge is satisfied that by the Defendant's agreement with the Plaintiff, she was to get Shs.100,000/- "net" for the 2 acres, and he was to be allowed to keep any profit he might make by re-selling at a higher price. p.272, 1.3.
- 20 (iii) The learned judge accepts the Plaintiff's word that the option was twice read to the Defendant before she signed it, on the morning of the 18th February, 1954. p.273, 1.3.
- (iv) As regards the meeting at the office of Mr.Ishani on the 19th February, 1954, the learned judge finds that he cannot trust any account of what took place except that of the Plaintiff. (He mentions the fact that the Plaintiff in his evidence contradicted himself as to what the Defendant said when she tore up the agreement, but accepts the evidence which the Plaintiff gave in re-examination that she said that she intended to sell a portion of the land and not the whole.) p.274, 1.32.  
p.275, 1.10.  
p.279, 1.22.
- 30
- 40 (v) The learned judge finds that the Defendant, although "objecting and grumbling", signed the agreement dated the 19th February, 1954, then she got irritated, regretted her signature, lost her temper (politically perhaps), tore the agreement and tried to back out of it, protecting her retreat by a barrage of excuses and accusations. p.281, 11.7-21.
- (vi) The learned judge concludes, on the evidence -
- (a) That the Defendant read the agreement and accepted it, even if reluctantly. p.284, 1.27.

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- p.284, 1.29. (b) That the allegation of fraud is quite unjustified.
- p.284, 1.36. (c) That the issue of mistake can carry no weight in view of the facts as he finds them.
- p.285, 1.3. (d) That the allegation that the parties agreed to rescind the agreement dated the 19th February, 1954, is not proved and is quite untrue.
- p.285, 1.20  
p.20, 1.24. 17. Having found the facts in favour of the Plaintiff the learned trial judge then dealt with an argument put forward on behalf of the Defendant that the action is not maintainable in any event because it is premature. This argument is based upon the facts that under the agreement dated the 19th February, 1954, it was provided that completion of the transfer should be within a period of 6 months from the date of the agreement and the Plaint in the action was filed on the 2nd July, 1954, i.e. before the expiration of the said period. The learned judge rejected this argument on the following grounds, namely :- 10
- p.378.
- p.285, 1.28. (i) That under the first of the "Other Conditions" the Plaintiff gave complete vacant possession and the Defendant acknowledged receipt of vacant possession duly received by him, that the effect was that at least part of the contract was to come into immediate operation and that breach of that part constituted an immediate breach of the whole contract. 30
- p.285, 1.45. (ii) That even if the contract was not due for performance until after the lapse of 6 months, nevertheless there had been a breach by anticipation, and also Section 39 of the Indian Contract Act would apply.
- p.285, 1.49. (iii) That in any case, if there was no breach, there are no grounds upon which to refuse specific performance. 40

18. Judgment was accordingly given for specific performance of the agreement dated the 19th February, 1954, damages for delay, agreed at £75, interest and costs, and a Decree in the appropriate terms was given on the 28th July, 1956.

pp.286-287.

pp.287-289.

19. The Defendant's grounds of appeal were as follows :-

- 10
1. That no cause of action at the date of institution of the suit is disclosed by the Plaintiff or the evidence. pp.291-292.
  2. That, if the Plaintiff had any legal right of action on the contract, the subject matter of the suit, he was not in equity entitled to specific performance.
  3. The judgment is against the weight of evidence.

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20. In the Court of Appeal (Sinclair V.P., Briggs J.A. and Connell J.) the principal judgment was delivered by Sinclair V.P. The learned Vice-President dealt first with the Defendant's argument that no cause of action for specific performance existed at the date of the institution of suit. He referred to Section 39 of the Indian Contract Act, which reads :-

p.347, l.1.

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"When a party to a contract has refused to perform, or disabled himself from performing his promise, in its entirety, the promisee may put an end to the contract, unless he has signified by words or conduct, his acquiescence in its continuance."

This section, he said, is in substance a codification of the English law and it should be read in the light of the English decisions.

p.347, l.45.

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The learned Vice-President rejected the Defendant's argument and held that the Plaintiff had a complete cause of action for specific performance when the suit was instituted. The Judgment contained the following passages :-

p.358, l.6.

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p.348, l.40

"At common law therefore if the injured party accepts the repudiation by the other party, he may at once bring an action for damages as on a breach of the contract; but, if he does not accept the repudiation, he must wait until the time for performance of the contract has arrived. The question for decision in this appeal is whether if the injured party does not accept the repudiation, he may, nevertheless, treat such repudiation as a breach of the contract entitling him to sue at once for specific performance. ....

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.....

p.353, l.34.

"My conclusion from the authorities is that, although the repudiation of a contract by one party before the time for performance has arrived, is perhaps, not an actual breach of the contract, it may be treated by the other party, if he thinks fit, as an immediate breach of the contract giving him the right to bring an action for damages or for specific performance ...."

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.....

p.354, l.6.

"If the injured party sues for damages, he must treat the contract as having been brought to an end by the breach except for the purposes of the action, since he clearly cannot recover damages for the total breach of the contract and still treat it as subsisting for all other purposes. But the same considerations do not apply if he sues for specific performance; if the injured party does not accept the repudiation, the contract subsists for all purposes, but he may treat the repudiation as a breach for the purposes of an action for specific performance. "

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p.362, l.11.

21. With regard to the facts, the learned Vice-President expressed the view that the learned trial judge, in accepting the evidence of the Plaintiff, did not give sufficient consideration to the Plaintiff's repeated denials in his examination-in-chief and

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cross-examination that the Defendant made any mention in Mr. Ishani's office of intending to sell only half an acre. He decided that the Plaintiff had definitely lied on this material point and therefore held that the issues of fact were at large for the Court of Appeal and that a fresh evaluation of the evidence was necessary.

p.363, l.9.  
p.363, l.35.

10 On a fresh evaluation of the evidence, the learned Vice-President expressed his agreement with the learned trial judge in rejecting the evidence of the Defendant and that of the other witnesses for the defence and stated his conclusion in the following terms :-

pp.363-365.

20 "Taking all these factors into consideration, I think that on a balance of probabilities the evidence of the respondent should be accepted in preference to the evidence of the appellant and the other witnesses for the defence. Once the evidence of the respondent is accepted, the defences raised by the appellant must fail. "

p.366, l.4.

30 The learned Vice-President gave particular consideration to the issues of mistake and fraud and rejected the Defendant's case on both issues. He further decided that there was no sufficient grounds for refusing to grant specific performance.

p.366, l.34.  
p.366, l.24.

p.368.

40 22. The second Judgment in the Court of Appeal, that of Briggs, J.A., expressed entire agreement with the reasoning and conclusions of the learned Vice-President; on the basis of the authorities, which he considered, the learned Justice of Appeal stated his opinion that the suit could properly be brought although at the date of institution of the suit the date of completion remained in futuro, and that the decree of specific performance was rightly made. Connell J. expressed his entire agreement with the judgments of the learned Vice-President and Briggs, J.A. and indicated his acceptance in substance of the evidence of the Defendant.

pp.369-373.  
p.369, l.2.

p.373, l.34.

p.374, l.4.

p.374, l.43.

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pp.375-376.

23. Final leave to appeal to the Privy Council was granted on the 7th December, 1957.

24. The Respondent, the widow and executrix and legal representative of the Plaintiff, now deceased, submits that this appeal should be dismissed with costs for the following, among other,

R E A S O N S

1. BECAUSE the Courts below were right in law in deciding that the claim for specific performance was not premature. 10
2. BECAUSE on the facts specific performance was an appropriate and proper form of relief, and there were no grounds for refusing such relief.
3. BECAUSE there are concurrent findings on all the principal issues of fact in the suit. 20
4. BECAUSE the findings of the Courts below in favour of the Plaintiff on the issues of fact raised in the suit were right having regard to the evidence.
5. BECAUSE the Appellant failed to prove any of the defences raised by her.

GEOFFREY CROSS

RALPH MILLNER

No. 29 of 1957.

IN THE PRIVY COUNCIL

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O N A P P E A L

FROM HER MAJESTY'S COURT  
OF APPEAL FOR  
EASTERN AFRICA.

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B E T W E E N :

KHATIJABAI JIWA  
HASHAM  
(Defendant) Appellant

- and -

ZENAB D/O CHANDU  
NANSI Widow and  
Executrix of  
Haji Gulamhussein  
Harji, deceased  
as Legal  
Representative  
(Plaintiff) Respondent

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CASE FOR THE RESPONDENT

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HERBERT OPPENHEIMER, NATHAN  
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