
(1942) 07 BOM CK 0018
In the Bombay High Court
Case No : O.C.J. Suit No. 1507 of 1941

Ramchandra Lalbhai

APPELLANT

Vs

Chinubhai Lalbhai

RESPONDENT

Date of Decision : 17-07-1942

Acts Referred:

Contract Act, 1872 — Section 202

Citation : (1943) 45 BOMLR 1075

Hon'ble Judges : Chagla, J

Bench : Single Bench

Judgement

B.J. Desai, J.—The office of managing agents of a company is, distinguishable from the question of remuneration. Both are assignable : Section 87B of the Indian Companies Act, 1913. The defendant was a trustee for his brothers both for earning commission as also for management. You cannot divorce management from earning of commission.

2. I ask for specific performance of the agreement dated September 18, 1940, (exhibit N). It is an agreement to assign or transfer managing agency of the defendant to himself and his two brothers for a good consideration. The plaintiffs are large shareholders and can protect their interest by jointly managing with the defendants, and this is not measurable in terms of money. The plaintiffs seek specific performance in order to protect and perfect the right which they already had and which they have been enjoying. See Lindley on Partnership, 10th edn., p. 439. The contract to assign the office of management is not a contract of personal service or a contract to enter into a partnership. This is not a case of completed assignment but only an agreement to assign of which specific performance is sought.

3. Under Hindu law where the karta of a joint family contracts with a third party and obtains the right of managing the third party's business the other coparceners have a right to call upon the karta to associate them in the management of the business.

4. The Court can enforce voting in accordance with contract. It can also prevent a person from voting against his contract. See *Wise v. Lansdell* [1921] 1 Ch. 420.

5. *M.C. Setalvad*. The present is not a case of completed assignment. The agreement exhibit N is merely executory. There is no plea on the basis of completed assignment. There is no part performance of such assignment.

6. If the defendant is employed as a managing agent in his capacity of karta of a joint family, the other coparceners would have a right to go to the company and insist on their employment as managing agents along with the defendant while in fact the company has shown confidence only in the defendant. The promoters' shares were issued to the defendant personally, but he has made them available to the joint family because the joint family funds were utilised. The scheme of the documents incorporating the Lal Mills and Chinubhai Lalbhai and Brothers, Ltd., and the two managing agency agreements is that the management of both the company rests in the defendant individually and no remuneration is payable to him for his work. He only gets dividend on shares of Chinubhai Lalbhai and Brothers, Ltd. The documents give no right to the plaintiffs to manage the Lal Mills. The test is, could the company have gone against the joint family if Chinubhai Lalbhai had made defalcations. The plaintiffs could have filed a suit for partition of the managing agency, and if it was a joint family property they could have had a receiver appointed. It is not open to them to ask the Court to make a declaration that they are entitled to manage the mills along with the defendant. All the joint family assets invested in the two companies were partitioned in 1935. All that is left with the defendant is the contractual obligation to manage, and that cannot be partitioned. See *Gangayya v. Venkataramiah* ILR (1917) Mad. 454. The powers of the defendant are ancillary to his obligation to manage the mills without any remuneration or benefit whatever. This cannot be joint family property under Hindu law. A contractual obligation to manage cannot be partitioned.

7. Section 21 of the Specific Relief Act cannot apply, as no damages are proved or even suggested. There cannot be specific performance of an agreement breach of which causes no damage. Section 21(a) contemplates that there must be damages which are not assessable in money. The shares are marketable. The plaintiffs are not bound to continue to hold the shares if they have no confidence in the defendant's management. They can sell the shares at good prices. My case falls u/s 21(b). Persons who are not desirous of maintaining continuous personal relations with one another should not be compelled to do so. See *Fry on Specific Performance*, 6th edn., p. 50, &sec; 110; *Halsbury's Laws of England*, 2nd edn., Vol. XXXI, p. 334, Section 366. Co-agents have to maintain continuous personal relations : *De Francesco v. Barnum* (1890) 45 Ch. D. 430 and *Pickering v. The Bishop of Ely* (1843) 63 E.R. 109

8. The Court will not enforce specific performance of an agreement lacking in mutuality. If the plaintiffs refused to carry out exhibit N and refused to work as managing agents along with the defendant, the defendant could not have

compelled the plaintiffs to work as agents with him. A spirit of harmony and co-operation must exist between the parties as much between the principal and agent as between an agent and his co-agent: *Johnson v. Shrewsbury and Birmingham Ry. Co.* (1853) 43 E.R. 358 and *Nusserwanji Merwanji Panday v. Goraon* ILR (1881) 6 Bom. 266. There is no evidence that the Lal mills are willing to have plaintiffs as managing agents along with the defendant, and if a decree is passed as prayed for, the same may be rendered useless if the Lal Mills refuse to employ the plaintiffs as agents.

9. The case of exclusion of a partner from a subsisting partnership is entirely different. There is a right to partnership assets. Here the agency itself is sought to be created by exhibit N. An agreement to enter into a partnership is not specifically enforceable, because it would involve superintendence by the Court of mutual rights and obligations : see *Lindley on Partnership*, 10th edn., p. 568; *Byrne v. Reid* [1902] 2 Ch. 735 *Franklin and Swathling's Arbitration*, In re [1929] 1 Ch. 238 and *Rigby v. Connol* (1880) 14 Ch. D. 482. In the present case there is no right to property involved. There is no mutuality, which is an ingredient of specific performance : *Fry*, pp. 219, 220, 221; *Mir Sarwarjan v. Fakiruddin Mahomed Chowdhuri* ILR (1911) Cal. 232

10. The agreement exhibit N suffers from the vice of uncertainty. The duration of the agreement is not stated. The result would be ambiguous if the names of the three brothers are substituted in the place of defendant's names in the document of managing agency. There is no specification of the rights and obligations of the co-agents inter se. There will be an impasse if the three co-agents differed. They must act jointly, as no provision is made for carrying on management by majority of votes. Every time there is any dispute between the agents, the agents must go to the Court for decision, See *Halsbury*, Vol. I, p. 210. Greater certainty is required in the case of contracts for specific performance than in those for damages : see *Fry*, p. 179; *Halsbury*, Vol. XXXI, p. 348; *Kemble v. Kean* (1829) 58 E.R. 619, and *Cooper v. Hood* (1858) 53 E.R. 911. In the case of *Ramkumar Potdar Vs. The Sholapur Spinning and Weaving Co. Ltd.*, the clause about the appointment of managing agents was not among the object clause of the company.

11. As regards voting, injunctions, mandatory or otherwise, are granted in cases where the beneficial owner can compel the legal owner to vote in a particular manner. See *Halsbury*, Vol. v. p. 360, ? 589. Such injunctions are granted only where right to property is involved : *Greenwell v. Porter* [1902] 1 Ch. 530 *Puddephatt v. Leith* [1916] 1 Ch. 200 and *Wise v. Lansdell* [1921] 1 Ch. 420.

12. The nomination (exhibit H) of plaintiff No. 1 by defendant is revocable as it is not coupled with interest; Section 202 of the Indian Contract Act, 1872.

13. V.F. Taraporevala. Chinubhai Lalbhai & Bros., Ltd., was formed as a device to get capital and deposits for Lal Mills. As joint family funds were utilised in the concern, the members of the joint family have a right to look into its

management. It is no concern of the Lal Mills as to who managed the mills on behalf of Chinubhai Lalbhai & Bros., Ltd. Exhibit N was an executed contract. The right to manage had already been transferred by the defendant to the plaintiffs, and all that remained was to get consent of the Lal Mills to the transfer. Exhibit N created a partnership, the plaintiffs having joined with a view to safeguard their moneys and profit arising from good management of the mills. The plaintiffs are ousted from the partnership. Exhibit N should therefore be specifically enforced. The partnership firm has not yet come into existence. We are asking for specific performance of an executed contract where something remains to be done, viz. the execution of the document and the consent of the Lal Mills to the arrangement. This is not a case of an agreement of partnership where nothing has been done.

14. (M.C. Setalvad. See Section 19 of the Indian Partnership Act, 1932. The alleged partnership is not registered and the present suit is not maintainable. Moreover, partnership is not pleaded.)

15. There is no privity between the defendant and the Lal Mills. The defendant is merely a sub-agent. The promotion of the Lal Mills is by the defendant as the karta of the family and not in his individual capacity. The office of managing agents is transferable. Exhibit N is coupled with interest, the interest being (1) the shares of the Lal Mills subscribed by the joint family, (2) deposits made by the joint family, and (3) security of the joint family property given to the Bank for advances. Exhibit N constitutes nomination in favour of plaintiffs. The defendant having nominated plaintiffs has no right to exclude them from management. Plaintiff No. 1 becomes the managing agent by virtue of exhibits H and N. Section 194 of the Indian Contract Act applies to the nomination, and such nomination cannot be revoked without the consent of the principal, viz. the Lal Mills, u/s 201 of the Act. See *De Bussche v. Alt* (1877-78) 8 Ch. 286, 310, 311, 312.

16. The nomination under exhibit N is still good, as the defendant has no right to cancel the same. Plaintiff No. 1 is the managing agent of both the companies, and he managed them from 1934 to November 1941 without any objection from any company. On partition in 1935 the right of management which was vested in the defendant as karta vested in all the separated members, viz. the plaintiffs and the defendant. Not a single instance has been pointed out of difference of opinion between them. Under exhibit N the defendant agrees to give to the plaintiffs the same right of management as he had. The defendant admitted and acknowledged existing rights.

17. In their plaint the plaintiffs have only set out facts. No legal status arising from the pleadings is necessary to be stated. It may be one of agreement, or nomination, or partnership, or assignment. See *Lalta Prasad v. Gdjadhar Shukul* ILR (1932) All. 283 *Gaura Telin v. Shriram Bhoier* AIR [1936] Nag. 265, and *Konskier v. B. Goodman, Ltd.* [1928] 1 K.B. 421.

18. The new proviso to Section 10 of the Companies Act really gives statutory effect to the decision in Ramkumar Potdar Vs. The Sholapur Spinning and Weaving Co. Ltd., .

19. The ordinary law that you cannot transfer a burden of office does not apply to the office of managing agent, see Section 87B(c) of the Companies Act.

20. If exhibit N does not amount to nomination, I ask for specific performance of it. The plaintiffs have carried out their part of the agreement by joining in prorating loan from the Bank, giving guarantee, and keeping deposits. They have also carried on management from September 1940 to November 1941. The defendant, however, has failed to carry out his part of the contract. There are no damages. There may be future damage such as depreciation in price of shares, loss of profits, loss of deposits, etc. Such damage may be due to bad management of the defendant. Section 73 of the Contract Act applies only when damages are assessable. Here, it does not apply, I say that damage is there. I have been deprived of my right to manage and this is not assessable in money.

21. The Court should order the defendant to vote in favour of alterations and to obtain consent of the company to transfer the office of managing agents. This the Court can do. See *puddephatt v. Leith* [1916] 1 Ch. 200 and *British Murac Syndicate, Limited v. Alperston Rubber Company, Limited* [1915] 2 Ch. 186

22. The plaintiffs are willing to work with the defendant. The defendant cannot say I cannot work with them. The defendant having executed exhibit N cannot now say that the plaintiffs have no personal qualification requisite for working harmoniously with the defendant. The Lal Mills can drive us out.

23. u/s 21(g) of the Specific Relief Act the Court need not enforce specific performance of duties by the defendant or the plaintiffs. Section 22 (iii) applies. The right of the plaintiffs is to be associated with the defendant in the management of the Lal Mills. The other rights given to the defendant may continue. It is not necessary to alter the memorandum regarding those matters. See *Pickering v. The Bishop of Ely* (1843) 63 E.R. 109 and *Halsbury*, Vol. XXXI, p. 334, ? 366. The case of *De Francesco v. Barnum* (1890) 45 Ch. D. 438 has no application. The agreement is executed so far as I am concerned. See *O'Regan v. White* [1918] L.R. 2 Ir. 339, *Nusserwanji Merwanji Panday v. Gordon* ILR (1881) 6 Bom. 282. *England v. Curling* (1844) 8 Beav 129; *Scott v. Rayment* (1868) L.R. 7 Eq. C. 112 *Lindley*, pp. 568, 569.

24. There is part performance of the agreement exhibit N by us from September 18, 1940, to November 2, 1941, on which date we were ousted from management.

25. There is no uncertainty at all, for we are to have equal rights with the defendant. See *Fry*, pp. 179,181,383, 390; *Hope v. Hope* (1856) 22 Beav. 351; *Kemble v. Kean* (1829) 6 Sim. 333; *Cooper v. Hood* (1858) 26 Beav. 298 and *Wolverhampton and Walsall Railway Co. v. London and North-Western Railway*

Co. (1873) L.R. 16 Eq. Cas. 433.

26. The agreement exhibit N is either (1) a nomination, (2) a transfer in praesenti, or (3) an agreement to transfer. Here, all events are in our favour. The defendant's conduct should be looked into. He deserves no sympathy from the Court. Unless there is unsurmountable difficulty in law, specific performance should be granted in favour of the plaintiffs.

27. K.M. Munshi, in reply. A karta of a joint Hindu family is not an agent of the family, but he is only a quasi trustee for the benefit which he may receive from outsiders in respect of business in which the joint family assets are used : Annamalai Chetty v. Murugasa Chetty (1903) L.R. 30 IndAp 223 . In the present case, however, the plaintiffs ask the karta to divide the obligation to manage the mills. The karta is not an agent qua coparceners, much less is he so after partition.

28. The consideration which proceeded from the defendant in floating the Lal Mills was, (1) I promoted the Lal mills, (2) I promoted the Chinubhai Lalbhai & Bros., Ltd., and (3) I agree to act as the managing agent of the two companies, and in consideration of doing so I get 1050 promoters' shares from Chinubhai Lalbhai & Bros. Ltd. These 1050 shares were the only benefit which the defendant got from floating the two concerns, and these he has already accounted to the joint family. There is no other benefit which remains to be divided. The only thing that remains is the continuing of the obligation to act as the managing agent, and this obligation cannot be divided. This is a contract of personal service depending upon his personal qualifications.

29. There is no consideration for exhibit H. The defendant was the karta and he had a right to invest funds of the joint family. It is not pleaded by the plaintiffs that when exhibit H was executed it was a case of authority coupled with interest. They have also not pleaded that plaintiff No. 1 is a substituted agent or that he was accepted by the Lal Mills. The plaintiffs ought to have pleaded all these if they wanted to rely on these facts. See Riddell v. The Earl of Strathmore (1887) T.L.R. 329 Order VI, Rule 7, Mulla's Civil Procedure Code, 11th Edn., pp. 595, 597; and Konskier v. B. Goodman, Ltd. [1928] 1 K.B. 421.

30. In exhibit H the words "for and on my behalf" appear, which indicate that plaintiff No. 1 is to act for the respondent. The consequences of the writing are, therefore, (1) the defendant can act or sign, (2) the defendant and plaintiff No. 1 are not to act jointly, (3) the defendant is not an agent of plaintiff No. 1, and (4) plaintiff No. 1 cannot act independently of the nomination.

31. u/s 202 of the Indian Contract Act there must be the subject-matter of the agency and profit of agency. It can be one of the following : (1) liability of the principal to the agent (benefit to the donee), (2) or security for principal's debt. Both these elements are lacking here. After 1934 plaintiff No. 1 had the same benefit as he had before, viz. the dividend on shares in Chinubhai Lalbhai & Bros., Ltd., irrespective of nomination (exhibit H) in his favour.

32. Agency coupled with interest is not specifically enforceable. In *Frith v. Frith* [1906] A.C. 254 the contract was executed and the manager was in possession for several years and yet specific performance was refused. In order to succeed on this ground the plaintiffs must prove (1) benefit to the donee as a result of the agency and (2) authority to last till such benefit has been obtained by the donee. Both these elements are lacking here. See *Stocker v. Brockelbank* (1851) 20 L.J. Ch. 401 and *Chinnock v. Sainsbury* (1860) 30 L.J. Ch. 409.

33. On the construction of exhibit H plaintiff No. 1 would become a sub-agent. A sub-agent cannot appoint another person to act as co-agent independently of himself. The defendant is given power to appoint somebody as his nominee, but he cannot appoint an agent for the Lal Mills. Under exhibit H plaintiff No. 1 was "my" nominee. See *Halsbury*, Vol. V, p. 300; *British Murac Syndicate, Limited v. Alpertons Rubber Company, Limited* [1915] 2 Ch. 186 *Bainbridge v. Smith* (1889) 41 Ch. D. 462 *De Bussche v. Alt* (1877-78) 8 Ch. D. 286 *Story on Agency*, 9th edn., p. 236, ? 207; and *Nensukhdas v. Birdichand* (1917) 19 Bom. L.R. 948. There is no difference whatever in the legal relationship between an agent and sub-agent and an agent and a substituted agent for work which he himself could not carry out. *Bowstead on Agency*, p. 113, Article 41.

34. If, as contended for by the other side, exhibit N is a nomination, there is no need to get the company's confirmation. If there was power to nominate in the defendant, there would have been no need for the words "notwithstanding memorandum etc." in exhibit N. If it be regarded as a contract to act jointly, then the burden of a contract cannot be assigned. *Halsbury*, Vol. V. p. 302. Section 87B of the Companies Act merely reproduces the general law u/s 6 of the Transfer of Property Act, 1882, that the burden of a contract cannot be assigned without the consent of the other party when in fact it amounts to novatio. This position was there even before the enactment of Section 87B(c). The section does not change the general law. The proviso only excludes firms. This is not a case of completed assignment, because that would violate the provisions of Section 87B.

35. u/s 29 of the Indian Contract Act assignment in favour of A or B or C is void. Similarly a promise to pay A is void. Therefore in this case all the agents have to act jointly. u/s 21 of the Specific Relief Act personal confidence and harmony are needed. If all the co-agents do not agree, then there would be a deadlock, because there is no question of majority or minority as there is no partnership and the rights are not defined. The agreement also lacks mutuality.

36. u/s 22(iii) of the Specific Relief Act part-performance must be of a contract capable of being specifically performed. Part-performance will not make contract specifically enforceable in law if it is otherwise not enforceable. See *Britain v. Rossiter* (1879) 11 Q.B.D. 123, *Halsbury*, Vol. V, pp. 300, 345.

37. Unless there is confidence amongst co-agents there can be no question of their acting jointly. Harmony is required amongst co-agents. See *Nusserwanji*

Merwanji Panday v. Gordon ILR (1881) 6 Bom. 266.

Chagla, J.

38. [After setting out the facts and the rival contentions of the parties, and after dealing with questions of fact arising in the case, the judgment proceeded :] It is a well-recognized principle of Hindu law that when a karta of a joint Hindu family contracts with a third party, he does so in his individual capacity, and the contractual relations established are between the third party and the karta and not between the third party and the joint family. This principle is enunciated in *P.K.P.S. Pichhappa Chettiar Vs. Chokalingam Pillai*, where their Lordships of the Privy Council laid down that when the managing member of a joint Hindu family enters into a partnership with a stranger, the other members of the family do not ipso facto become partners in the business so as to clothe them with all the rights and obligations of a partner as defined in the Indian Contract Act, 1872, and that in such a case the family as a unit does not become a partner but only such of its members as in fact enter into a contractual relation with the stranger. Therefore the only right that the coparceners have against their karta is to call upon him to account with reference to any business that he might do with joint family funds or to have a partition suit filed and to have a receiver appointed in that suit to wind up the business which the karta is doing with the third party. Therefore it is clear that in this case where you find the karta contracting with two companies and is given the right of managing the business of both the companies, the other coparceners have no right to call upon him to associate them in the management of the two companies. If the contention of the plaintiffs was sound that the defendant was appointed managing agent as the karta, then it would follow that all the members of the joint family would have the right to act as the managing agents of the two companies without any reference either to the defendant or to the two companies. That surely is not the position when one looks at the scheme of the four documents I have considered and their true construction and effect.

39. When the partition was effected in 1935, all the joint family properties including its assets in the Lal Mills and Chinubhai Lalbhai and Brothers, Limited, were partitioned, The only right left to the defendant was the right to manage the two companies. That really was a contractual obligation undertaken by the defendant to discharge certain duties and perform certain functions qux the two companies. According to the plaintiffs, although all the other joint family properties were partitioned, the right to management still continued to form an asset of the joint family. To my mind it is impossible to contend that the mere office of managing agent without any benefits attaching to it can ever be deemed to be joint family property. Further assuming it is joint family property, the only right that the coparceners can have against the defendant is to file a partition suit in respect of this particular property which still remains to be partitioned. But by no stretch of imagination can it be suggested that the plaintiffs as coparceners have the right to be associated in the management of the two

companies along with the defendant. Further it is not correct to contend, as was done by Mr. Bhulabhai Desai in his opening, that the defendant was a trustee for the members of the joint family. The position of a karta qux the other members of the joint family is neither that of a trustee nor of an agent. As pointed but by their Lordships of the Privy Council in 7 CWN 754 (Privy Council) the position of a karta is much more like that of a trustee and that of the members of the family like that of cestui que trust. Therefore the karta is only a quasi-trustee for any benefits which he might receive from an outsider in respect of a business in which joint family funds have been used. I therefore hold that the defendant was appointed the managing agent of the two companies in his individual capacity and not as the karta, and I also hold that he received the consideration of 1050 promoters' shares also in his individual capacity, although he later treated these shares as joint family property. I also hold that the right to management cannot be a joint family asset. On partition in 1935 all the benefits which accrued to the joint family whether in respect of Chinubhai Lalbhai and Brothers, Limited, and Lal Mills were partitioned, and there remained nothing in respect of which the plaintiffs can make a claim as coparceners of a family which was joint prior to 1935.

40. The second contention of the plaintiffs on which the suit is based is the rights that accrued to them under the agreement dated September 18, 1940. Although the validity of this agreement was disputed in the written statement on various grounds, these grounds have not been pressed before me by the Advocate General on behalf of his client. It is conceded by the defendant that the agreement is a valid and binding one. It is further conceded that there was good consideration for the agreement and the defendant committed a breach of it by ousting the plaintiffs from the management of the Lal Mills on November 4, 1941. The agreement is contained in a letter written by the defendant to the plaintiffs, by which the defendant agrees that notwithstanding the provisions of the memorandum of association of Chinubhai Lalbhai and Brothers, Limited, the right conferred upon Sheth Chinubhai Lalbhai by the agency contract between the Lal Mills and Chinubhai Lalbhai and Brothers, Limited, are from this date to be for the benefit of the defendant and the two plaintiffs, and the words "Sheth Chinubhai Lalbhai" in the memorandum of Chinubhai Lalbhai and Brothers, Limited, shall mean and include the two plaintiffs and the defendant. It is further agreed by the defendant that as soon as the present negotiations with the Bank of Baroda have been successfully put through, he would join in getting all the necessary changes, alterations and amendments made that are legally required in the memorandum of association of Chinubhai Lalbhai and Brothers, Limited, or any other deed in order that the plaintiffs may be invested with the same rights and privileges in the management of Lal Mills. The defendant goes on to say that it is understood that in the meanwhile both the plaintiffs have the same rights of management of the mills as the defendant himself. As I read this letter, it is an agreement by the defendant to transfer the managing agency of the two companies from the defendant to the defendant and plaintiffs jointly from the

date of the agreement, or in other words an agreement that the plaintiffs and the defendant shall be the co-agents of the Lal Mills and Chinubhai Lalbhai and Brothers, Limited. It is true that the consideration that proceeded from the plaintiffs for this agreement, namely, the signing of the promissory notes in favour of the Bank which was to advance moneys to the mills and the undertaking not to withdraw their deposits with the mills, has been executed by them. But the agreement stipulates that all the three have to act as co-agents of the two companies, and to that extent there are obligations to be discharged both by the defendant and the plaintiffs in futuro. The defendant also agrees by this writing to effectuate the transfer of the agency by all necessary means, and it is true that pending the transfer he recognizes the rights of the plaintiffs in the management of the mills. But that recognition is merely of such rights, if any, that the plaintiffs might have had before the agreement was executed. It does not by itself confer any new or fresh rights upon the plaintiffs. That the same view was taken of this agreement by the plaintiffs themselves is clear from paragraph 25 of the plaint where they aver :

The defendant by the said writing of September 18, 1940, admitted and acknowledged the said right of the plaintiffs and agreed for valuable consideration to join the plaintiffs in getting the necessary changes alterations and amendments made in the memorandum of association of Chinubhai Lalbhai and Brothers, Limited, and in such other documents as may be necessary in order that the plaintiffs may be invested with the same rights and privileges in the management of the Lalbhai Tricumlal Mills, Limited, under the managing agency agreement as were enjoyed by the defendant himself.

It is also clear that the agreement is to transfer the agency jointly to three agents and, therefore, an agency is to be constituted of three persons who are to act jointly in the work of the agency. In view of the writing of September 18, 1940, it is clear that by it the defendant agreed to associate the plaintiffs in the doing of acts which involved personal discretion, personal qualifications and confidence. It would be impossible to carry on the work of the agency unless there was mutual confidence and trust between the agents. Plaintiff No. 1 himself has admitted in his evidence that all important things relating to the management of the mills are attended to personally by the managing agent. Among these important things is purchasing cotton for the mills from time to time. The purchase of cotton both with regard to the time at which it was purchased and the rate at which it was purchased required the personal attention of the managing agent. Similarly the sale of cloth required the personal attention of the managing agent. The same is the case with the purchase of coal and stores for the mills. Similar is the case with the labour employed by the mills. Finance is another important subject which has to be attended to personally by the managing agent, and he has got to exercise his discretion with regard to the employment and dismissal of the staff. Plaintiff No. 1 admitted that if there was more than one managing agent, it was essential that the relations between them should be harmonious, and he admitted that the relations between him and

plaintiff No. 2 on the one hand and the defendant on the other were extremely strained. It is also clear that the carrying on of the agency business would depend upon the personal relations of all the three brothers. As they have to act jointly, it is only when they all agree that any work could be done at all. It would depend upon the personal volition of each one of these three whether to join the work or not, and if any one refused to do so, a complete impasse would result. Therefore if I were specifically to enforce this agreement, I should be compelling persons who are not desirous of maintaining continuous personal relations with one another to do so. As observed by Lord Justice Knight-Bruce in *Johnson v. Shrewsbury and Birmingham Ry. Co.* 3 (1853) De G.M. & G. 914, in a case where certain directors sued a railway company for breach of agreement to employ them (p. 926) :

We are asked to compel one person to employ against his will another as his confidential servant, for duties with respect to the due performance of which the utmost confidence is required, Let him be one of the best and most competent persons that ever lived, still if the two do not agree, and good people do not always agree, enormous mischief may be done.

What applies to the relations between master and servant or principal and agent equally well applies to the relations between an agent and his co-agent. The same Lord Justice when he was Vice-Chancellor was trying (in *Pickering v. The Bishop of Ely* (1843) 2 Y. & C. 249. a case where the plaintiff was appointed by the then Bishop of Ely to the office of receiver of all issues, profits and sums of money arising and issuing from the possessions of the see, and the successor to that Bishopric refused to admit the plaintiff's claim of right to perform the various acts which he was entitled to do under the agreement with the defendant's predecessor in office. The plaintiff filed the bill against the defendant for an injunction preventing the defendant from obstructing the plaintiff in the exercise of his rights. In dismissing the bill Sir J.L. Knight-Bruce, V.C., observed (p. 266) :

it is obvious that it is of the highest importance to the safety of the temporal interests of the Bishop for the time being, and his ordinary comfort, that the person invested with such powers should be a man not merely respected by him, not merely worthy of trust, but also personally acceptable to him. To force upon him in such characters a person however estimable, however professionally eminent, who is objectionable to him, or in whom he does not happen to confide, would, if legal, be surely hard : and sitting in a Court of Equity, I do not feel any inclination to do it.

The defendant in the case before me refuses to work with the plaintiffs, and I am being asked to force the plaintiffs upon the defendant and make them work together as the agents of the two companies.

41. In a case decided by Sir Charles Sargent sitting on the Original Side of our Court the nature of the work to be done by the managing agents of a mill

company was considered-Nusserwanji Merwanji Panday v. Gordon ILR (1881) 6 Bom. 266. In that case the plaintiffs filed a suit against the New Dhurumsey Poonjabhoy Spinning and Weaving Company, Limited, to enforce the managing agency agreement between him and the company. The Court held that it was not an agreement in respect of which the Court could grant specific relief. Sir Charles Sargent observed (p. 282) :

42. Now, I apprehend that the principle to be deduced from these cases is that the court will not compel one man to continue to employ another in services of a personal nature, by which I understand services of such a nature as to depend for their efficiency upon the personal qualities of those with whom the contract is entered into, and more especially when they are services of trust and confidence. It was said that the agency in this case was not a personal service, because it was vested by the company in a firm, whose members might be ever changing. But the efficiency of the agency will none the less depend upon the members of the firm for the time being, and the company may fairly be supposed (if, indeed, this company can be said to have had any share in the appointment of the plaintiffs under the circumstances of this case,) to have selected the firm as their agents from the confidence in the members of the firm and their successors. Applying this principle to the present case, is it possible to conceive any duties of a more confidential character than those of a manager of a spinning and weaving company, to whom the entire business of buying raw material, creating the manufactured articles, and selling the outcome of the mill is entrusted, together with the largest possible powers for the efficient discharge of those duties.

Therefore it is not merely that the relations between a mill company and its managing agent are of a confidential character, but the relations inter se the co-agents themselves are of an equally confidential character, and would entirely depend upon the personal qualifications of these agents whether the work of managing the mills is properly carried out or not.

43. To my mind this agreement also lacks mutuality, and one of the considerations that weighs with the Court when it is called upon to grant specific relief is whether the defendant in his turn could have specifically enforced the obligations cast upon the plaintiffs by the agreement. It is argued by Mr. Taraporevala that in this case the principle of mutuality would not apply inasmuch as the plaintiffs have carried out all their obligations under the agreement, viz. they have executed a promissory note in favour of the Bank and also given the necessary undertaking to it. But as I have already held in construing the agreement, the plaintiffs are as much under an obligation to act as the managing agents as the defendant himself and the test of mutuality would be this : whether if the plaintiffs declined to act as the managing agents, the defendant could have compelled them to do so. It is conceded by Mr. Taraporevala that such a suit by the defendant for specific enforcement of the plaintiffs' obligations would fail. If so, the agreement certainly lacks mutuality.

44. It is further argued by the Advocate General that when the performance of a

contract is dependent upon the volition of a third party, the Court will not grant specific performance. It is urged that in order to carry out the terms of the agreement Chinubhai Lalbhai and Brothers, Limited, would have to alter its memorandum; and further even if the company altered its memorandum, the sanction of the Court would be required before the alteration became effective. Mr. Taraporevala points out that it is not difficult to get the consent of the company, because if the defendant was compelled to vote in favour of the alteration, between the plaintiffs and the defendant they hold sufficient shares to constitute a majority. As a matter of fact, if only a bare majority was necessary, the plaintiffs between themselves have the necessary shares to constitute that majority. I agree with Mr. Taraporevala that this is not a case where the sanction of the Court would be required u/s 12 of the Indian Companies Act. Section 10 which provides that a company shall not alter the conditions contained in its memorandum except in the cases and in the mode and to the extent for which express provision is made in the Act specifically exempts from its operation any provision in the memorandum relating to the appointment of a manager or managing agent and other matters of a like nature incidental or subsidiary to the main objects of the company. To the same effect is the decision in Ramkumar Potdar Vs. The Sholapur Spinning and Weaving Co. Ltd., , where an appellate bench of our Court consisting of Sir John Beaumont C.J. and Rangnekar J. held that the clause in the memorandum of association of the company imposing upon the company an obligation as to management was neither a vital part of the constitution of the company nor a condition of the memorandum. I do not think it makes any difference to the position even if such a clause is inserted among the objects of the company. The appointment of a managing agent is merely a detail of management for the purpose of carrying on the business of the company, and a company is entitled to regulate that detail in such manner as it likes without going to a Court for its sanction. But the difficulty I feel is that by compelling the defendant to vote in favour of the alteration of the memorandum of Chinubhai Lalbhai and Brothers, Limited, or restraining him from voting against it, I am indirectly compelling the company to consent to the appointment of the plaintiffs and the defendant as their managing agents. The company is not before me. I have not heard as to what it has got to say with regard to this appointment. Behind the back of the company I am being asked to appoint new managing agents for it who would manage all its business and carry out the work of a most confidential character. It is not enough for Mr. Taraporevala to say that the plaintiffs who are shareholders and who hold the majority of the shares are in favour of such amendments. The company is a legal entity entirely separate from and independent of the shareholders. I have got to hear not only the shareholders but the company in its corporate capacity.

45. It has been further urged that the writing dated September 18, 1940, constitutes an agreement to transfer a burden under a contract and not a benefit. Mr. Taraporevala concedes that under the ordinary law the burden of a contract cannot be transferred or assigned, but he contends that the ordinary law

is amended as far as the managing agency of a company is concerned by Section 87B(c) of the Indian Companies Act which contemplates the transfer of the office of a managing agent. The general law with regard to the transfer of a burden of a contract is stated in Halsbury, Volume VII (Hailsham Edition), p. 302 :

As a general rule a party to a contract cannot assign his liability thereunder without the other party's consent.

Under the Companies Act, too, the office of the managing agent cannot be transferred without the consent of the company, The Companies Act does nothing more than give statutory recognition to the general law. Here, then, we have an agreement to transfer a liability under a contract. And it is common ground that the consent of the other party, viz., the company, has not been taken.

46. The Advocate General has also argued that the terms of the agreement are uncertain. I do not agree with this contention of his, because the material terms of the agreement are clear and specific as I have pointed out when I was considering the writing of September 18, 1940. If certain details are not mentioned in the agreement which ought to be worked out, that can be easily done either by consent of parties, and if that consent is not forthcoming, the Court itself can settle those details.

47. It is further urged by the Advocate General that the plaintiffs have not proved any damages, and it is clear from the evidence that no damages have been suffered by them. The Advocate General's contention is that specific relief is only granted when damages have been incurred, but they are not assessable in terms of money. I do not agree with that contention. In this case bad management by the defendant may involve the plaintiffs in serious losses. True, the damages are hypothetical; but it is just in cases like this that the Court would grant specific relief provided other conditions necessary are present.

48. In *British Murac Syndicate, Limited v. Alpertan Rubber Company, Limited* [1915] 2 Ch. 186 the plaintiff syndicate was given the right of nominating two directors on the board of the defendant company under an agreement between the plaintiffs and the defendants. The plaintiff syndicate nominated two persons as directors. The defendant company objected to these persons as directors and refused to accept the nomination. The plaintiff syndicate filed a suit for an injunction restraining the defendants from summoning and holding a meeting or meetings of the defendant company for the purpose of preventing the two persons from acting as directors. It was argued in that case that instead of specifically enforcing the contract between the parties if necessary some damages might be awarded to the plaintiffs. Sargent J. deals with the argument and says (p. 196) : "It is also obvious that merely to award damages for the breach of such an agreement would be a wholly inadequate and illusory remedy." In that case also no damages were as a matter of fact proved.

49. It is further argued by Mr. Taraporevala that inasmuch as there is a part

performance of the contract and as damages cannot be awarded for the breach of the agreement, the Court was bound to grant specific performance of the agreement. It is obviously not so because what Section 22, Clause (iii), of the Specific Relief Act, lays down is that in the following case the Court may exercise its discretion to decree specific performance, namely, where the plaintiffs have done substantial acts or suffered losses in consequence of a contract capable of specific performance, Therefore it is only where a contract is otherwise capable of specific performance and the plaintiff; has done substantial acts pursuant to that contract that the Court would exercise its discretion in his favour. If the contract offends against any of the provisions of Section 21 of the Specific Relief Act even if it is partly performed, the Court will not decree specific performance.

50. Mr. Taraporevala has relied on the case of *England v. Curling* (1844) 8 Beav. 129. In that case the plaintiff and defendant and one other agreed in 1831 to become partners in the business of ship agents. A deed was prepared to carry into effect the terms of the agreement, which underwent some alterations, but was never executed. The parties, however, commenced and continued to carry on the business till 1842. In 1842 there were differences between the partners, and the defendant gave notice to determine partnership and started a new firm to do similar business. The plaintiff filed the suit for specific performance of the agreement of partnership. The Court passed a decree for specific performance. It is to be noticed that there was an actual partnership between the parties which had been in existence for eleven years. All that remained to be done was merely carrying out the formality of executing the deed. It was under these circumstances that the Court, somewhat reluctantly, granted specific performance of the agreement. The facts before me are very different. We have here an agreement to make the plaintiffs co-agents with the defendant. It is true that that agreement has been acted upon from September 1940 to November 1941, But what the defendant is asked to do is to get the consent of a third party to effectuate the agreement. Besides the considerations that apply to a partnership are very different from those applying to co-agents. In the case of a partnership there are rights as to assets of partnership etc. which have to be safeguarded. In the case before me it cannot be urged that there is any property belonging to the co-agents as co-agents which require to be safeguarded.

51. I, therefore, hold that this particular contract comes within the prohibition of Section 21 and is not specifically enforceable. Even assuming that the contract did not fall under any of the provisions of Section 21, the specific relief is a discretionary relief and a party cannot ask for it as a matter of right. Looking to all the circumstances of the case, I would certainly refuse to exercise my discretion in favour of the plaintiffs. I would certainly refuse to harness three unwilling and refractory persons together so that they should be compelled to act as managing agents, thus putting it in their power to make the working of the mills impossible. No Court of Equity would exercise a power which is purely discretionary which would be likely to perpetrate a situation of this character.

52. Mr. Taraporevala has made various submissions all very ingenious and subtle, as one always expects from him, on the construction of the agreement. But I must say that these submissions have been made by him with a cheerful and almost reckless disregard of the pleadings in the case. His first contention is that the agreement constitutes a partnership between the plaintiffs and the defendant and the suit is by two partners who have been excluded from the partnership and for an injunction restraining the other partner from excluding them from the business of the partnership. In the first place, partnership is nowhere pleaded in the plaint, and it would be giving a go by to all the rules of pleading to construe the plaint as a pleading in a partnership action. Further these three persons are not going to work for any benefit or gain. As I have already pointed out, the remuneration for the work of managing agent is to be paid to Chinubhai Lalbhai and Brothers, Limited. Mr. Taraporevala very wisely did not press this point when he was confronted with Section 69 of the Partnership Act, and he realised that in pressing his argument he was endangering his whole suit.

53. The next submission of Mr. Taraporevala is that the agreement of September 18, 1940, constitutes a nomination by the defendant of the plaintiffs as the managing agents of the two companies. This contention also does not find any place in the plaint. It is obvious on a careful reading of the agreement that the parties never intended that it should constitute a nomination, because the defendant expressly says in that writing that he was going to do certain things not with standing the memorandum of Chinubhai Lalbhai and Brothers, Limited. Now the right to nominate given to the defendant is under the memorandum of that company and, therefore, if he was nominating the plaintiffs by that writing, he would be doing so under the memorandum and not notwithstanding it.

54. It is further argued by Mr. Taraporevala that the writing of September 18, 1940, is not an agreement to transfer the managing agency, but the writing itself operates as a transfer or assignment in presentiae. This again is not pleaded. I cannot read the agreement to mean a transfer or assignment as contended for by Mr. Taraporevala. But even if it did operate as a transfer, it would be void u/s 87B of the Indian Companies Act, Section 87B(c), to which I have had occasion to refer before, provides that the transfer of the office of the managing agent shall be void unless approved by the company in a general meeting. It is common ground that no such consent of the company has been obtained. It would be useful to compare the language of Sub-clause (d) of Section 87B with that of Sub-clause (c). Under Sub-clause (d) when a managing agent charges or assigns his remuneration or any part thereof, it is void as against the company, whereas under Sub-clause (c) the transfer of the office of the managing agent is void against the whole world. Mr. Taraporevala argues that Sub-clause (c) does not apply when a transfer is by one managing agent to himself and two others, and he arrives at this result by reading into that sub-clause what he calls the spirit of the proviso to Sub-clause (c). The proviso lays down that when there is a change in the constitution of a managing agent's firm, such a change shall not be deemed to operate as a transfer. Therefore, it is clear that but for the proviso

even such a change in the managing agency's firm would constitute a transfer. It is only in that specific instance that Sub-clause (c) is not to be given effect to, It would be contrary to all canons of interpretation if I were to give to a proviso to a section a wider effect than the Legislature intended. I, therefore, hold that if the writing of September 18, 1940, effected a transfer, Sub-clause (c) would apply and it would be void.

55. On the question of pleadings Mr. Taraporevala has strenuously argued that all that is necessary for him to set out in his plaint is the writing of September 18, 1940, and it is for the Court to decide what is the result of that agreement and what is the legal relationship established between the plaintiffs and the defendant by that document. Mr. Taraporevala says that it is not necessary for him to allege that the writing constituted a nomination or a partnership or an assignment. If I am satisfied that in fact it does so, it is open to me to come to that conclusion.

56. I might add that no issues have been raised on any of these three contentions.

57. Mr. Taraporevala relies on a decision in *Konskier v. B. Goodman, Ltd.* [1928] 1 K.B. 421. In this case the Court came to the conclusion that although the plaintiff had filed a suit against the defendants on a plea of negligence and had failed to establish negligence, yet it was open to the Court to give relief to the plaintiff on the ground that the defendants were guilty of a trespass although it was not so expressly pleaded by the plaintiff. Lord Justice Scrutton in delivering the judgment says" (p. 427) :

But a plaintiff is not now bound to state the legal effect of the facts on which he relies; he is only bound to state the facts themselves, and we cannot see that the respondent has suffered any injustice in the way of being shut out from giving evidence which he might have given if the action had been treated as an action of trespass.

At p. 426 Lord Justice Scrutton says that the cause of action for trespass arose upon the undisputed facts of the case. Therefore it would be open to a Court to find in favour of a plaintiff on a different cause of action provided it arose from undisputed facts and also provided that the defendant was not shut out from giving evidence which he might have given if the cause of action had been differently pleaded. Now if the plaintiffs in this case had pleaded either partnership or nomination or assignment, the defendant might possibly have had several answers to those averments. By not pleading them the plaintiffs have deprived the defendant of giving such answer as he might have chosen to give and shutting him out from giving evidence on those contentions as well.

58. The last and final contention of the plaintiffs is that the nomination made by the defendant in favour of plaintiff. No. 1 on May 1, 1934, is irrevocable and, therefore, in any event the defendant was not justified in excluding plaintiff No. 1 from the management of the Mills and that he should be restrained by an

injunction from doing so. By the document of May 1, 1934, the defendant nominated plaintiff No. 1 to act and sign for him and on his behalf and on behalf of Chinubhai Lalbhai and Brothers, Limited, as secretaries, treasurers and agents of the Lal Mills. It is clear that plaintiff No. 1 was to act for the defendant and, therefore, in effect the defendant constituted plaintiff No. 1 his sub-agent. Mr. Taraporevala argues that plaintiff No. 1 was named by the defendant to act for the principal, namely, the Lal Mills, in the business of the agency and, therefore, he was constituted a substituted agent u/s 194 of the Indian Contract Act and a privity was established between him and the Lal Mills. Mr. Taraporevala further contends that if that is so, the defendant cannot revoke the nomination, and the only person who can do so would be the principal, namely, the Lal Mills. He says that the Indian Contract Act nowhere provides for the right of an agent to revoke the authority of a substituted agent. To my mind the contention of Mr. Taraporevala is clearly erroneous. Section 195 of the Indian Contract Act provides that in selecting a substituted agent u/s 194, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and if he does this, he is not responsible to the principal for the acts or negligence of the agent so selected. It cannot be suggested that as the agent is responsible to the principal for negligence in the selection of a substituted agent, his hands would be tied as soon as he made the nomination although he may later discover that the person appointed by him was unworthy of his choice. Section 195 itself implies the power of revocation in an agent in the case of a substituted agent.

59. Mr. Taraporevala has relied on a decision in *De Bussche v. Alt.* (1877-78) 8 Ch. D. 286. In that case the plaintiff consigned a ship to G. & Co. in China for sale G. & Company employed the defendant in Japan to sell the ship with the same instructions. This was done with the knowledge and consent of the plaintiff. The defendant bought the ship himself for the price stipulated and then re-sold it to a Japanese Prince for a much larger amount. The plaintiff filed a bill in Chancery to compel the defendant to account for the profit made by him in the re-sale of the ship. The Court held that the relation of agent and principal was established between the defendant and the plaintiff, and, therefore, he was liable to account to the plaintiff for the profit made by him in the transaction. All that this case establishes is that the privity of contract was established between the plaintiff and the defendant and that the plaintiff was entitled to sue the defendant. This case does not in any way suggest that G. and Company had no power to revoke the authority given to the defendant. On the contrary, Lord Justice Thesiger in his judgment at p. 312 considers the question whether G. and Company had assented to the termination of the defendant's employment as agent for the sale of the ship and comes to the conclusion that on the evidence such termination was not established. This clearly implies that G. and Company had the right to terminate the authority of the defendant. Even if the position of plaintiff No. 1 was that of a substituted agent u/s 194 of the Indian Contract Act, I hold that even so the defendant could revoke the nomination.

60. It was further argued by Mr. Taraporevala that in any event the authority given to plaintiff No. 1 was coupled with an interest and, therefore, that authority is irrevocable. The interest suggested by Mr. Taraporevala is (1) the shares of the Lal Mills subscribed to by the joint family; (2) moneys deposited by the joint family with the Lal Mills; and (3) the security of the joint family property given to the Banks u/s 202 of the Indian Contract Act, where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest. Now the subject-matter of the agency is the management of the Mills, and I cannot understand what pecuniary or beneficial interest the plaintiffs have in the management of the mills. In English law some specific connection must be shown between the authority and the interest, and there must also be an agreement, express or implied, whereby the authority is given to secure some benefit which the donee is to obtain by reason of the authority. As pointed out by Sir Dinshah Mulla although the language of Section 202 is wider, the Legislature did not intend by this section to make any departure from the English law on the subject. In this case, as I have already observed, no benefit was to be obtained by the donee from the managing agency nor do I read anything in the nomination to suggest that the authority was given to the donee as security for some benefit or other. I, therefore, hold that the nomination in favour of plaintiff No. 1 is not an authority coupled with any interest. Even assuming that it was an authority coupled with interest, the next question that will arise is whether plaintiff No. 1 would be entitled to an injunction which in effect would be granting him specific performance of an agreement to continue him as an agent of the defendant. Now in view of what I have already held it is clear that such a contract would not be specifically enforceable. In *Frith v. Frith* [1906] A.C. 254 the plaintiff filed a suit for ejectment and the defence was that the defendant was in possession of a power-of-attorney coupled with an interest. The defendant resisted the ejectment on the ground that the power-of-attorney was irrevocable. Lord Atkinson, delivering the judgment of their Lordships of the Privy Council, observed (p. 261) :-

However that may be, it is clear, their Lordships think, that even if the authority conferred upon the appellant had been irrevocable, he has not a good equitable defence to the action of ejectment, inasmuch as the contract made with him being one entire thing incapable of being divided into independent parts, he would not, upon the authorities cited, be entitled to an injunction to restrain the respondent from suing in ejectment. That is, as the appellant's counsel admits, the test, A suit for such an injunction would, in this case, amount in effect to a suit for specific performance of a contract for hiring and service, a suit which cannot be maintained.

I, therefore, hold that the defendant's nomination of plaintiff No. 1 was not irrevocable and that the defendant was entitled to revoke it as he did on November 2, 1941.

61. In the result the plaintiffs have failed in all their contentions.

62. THE matter was further argued on the question of damages on July 22, 1942.

63. V.F. Taraporevala cited Lane v. Newdigate (1804) 10 Ves. Jr. 192.

64. On the question of damages, Section 73 of the Indian Contract Act has no application, but Section 19 of the Specific Relief Act applies. See Halsbury, Vol. X, pp. 90, 91, 85 (? 105); Elmore v. Pirrie (1887) 57 L.T.N.S. 333 Leeds Industrial Co-operative Society, Ltd. v. Slack [1924] A.C. 851 Marzetti v. Williams (1830) 1 B. & Ad. 415 Callianji Harjivan v. Narsi Tricum ILR (1895) 19 Bom. 764. There is a clear breach of the agreement, and I am entitled to substantial damages, but nominal damages must in any event be awarded to the plaintiffs for the breach. See Mayne on Damages, 10th edn., p. 5; and Chaplin v. Hicks [1911] 2 K.B. 786. The breach of the agreement has resulted in my losing the right of management and the safeguarding of my moneys.

65. There is no question of disharmony. Plaintiff No. 1 worked with the defendant for eight years. There is no valid reason for the deliberate breach on November 2, 1941. The textile trade is going up day by day. I am entitled to substantial damages.

66. M.C. Setalvad. The case of Erie County Natural Gas and Fuel Company v. Carroll [1911] A.C. 105 goes on the measure of damages : there was injury in that case.

67. There must be damage actual or prospective. The Court can award damages, but every breach of contract does not necessarily result in damages, otherwise the words " entitled to compensation" in Section 19 of the Specific Relief Act are superfluous. Section 19 is in terms on the same lines as Section 73 of the Indian Contract Act. The principle is the same. See Marzetti v. William (1830) 1 B. & Ad. 415 Cole v. Christie (1910) 26 T.L.R. 469 and Admiralty Commissioners v. S.S. Susquehanna [1926] A.C. 655. In Chaplin v. Hicks [1911] 2 K.B. 786 the plaintiff had by contract a right to belong to a limited class of competitors for a prize and the breach of the contract took away from him the chance of winning the prize. There is no evidence of damage here.

Chagla, J.

68. After I had delivered my judgment in this case, Mr. Taraporevala wanted me to postpone my passing the final orders as he wanted to contend that although I had held that the agreement on which the plaintiffs were relying was not specifically enforceable inasmuch as I had also held that the agreement was valid and binding between the parties and that as the defendant had committed a breach of that agreement, the plaintiffs were entitled to damages. Mr. Taraporevala's contention is that if there is a contract and the breach is established, the plaintiffs suing on the contract are entitled to damages even though they might not succeed in proving any loss or damage, and that the mere fact of the breach entitled the plaintiffs to claim damages from the Court.

69. The jurisdiction of the Court to grant damages in suits for specific performance is regulated by Section 19 of the Specific Relief Act which lays down :

Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance. If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

In this case the plaintiffs undoubtedly have prayed for damages in substitution of specific relief, and it is clear on reading Section 19 that when the Court comes to the conclusion that specific performance ought not to be granted and also comes to the conclusion that the contract between the parties is broken, the Court would grant compensation to the wronged party provided he is entitled to compensation for the breach. Therefore it is not enough for a plaintiff in a suit for specific performance merely to establish that the contract has been broken. He must go further and establish that he is entitled to compensation. If Mr. Taraporevala's contentions were correct, the words in the section "and that the plaintiff is entitled to compensation for that breach" would have been superfluous and should not have found a place in that section at all. The whole question, therefore, is whether in this case on the facts established the plaintiffs are entitled to compensation. Now in deciding whether the plaintiffs are entitled to compensation, the principle that the Court must adopt is the same that underlies Section 73 of the Indian Contract Act. Under that section the Court is empowered to award damages when there is a breach of contract for any loss or damage caused to the party complaining of the breach of contract. Therefore, before a party would be entitled to damages u/s 73 of the Indian Contract Act, he would be bound to prove some loss or damage. Now, you may have cases where it would not be possible for a party to prove actual damages. A party may suffer some injury which may not be assessable in terms of money. In cases like this, Courts both here and in England have laid down that a party who has suffered an injury should not go without any relief merely because that injury is not assessable in terms of money, and under these circumstances the Courts have awarded nominal damages.

70. Mr. Taraporevala has cited several cases and to some of which I shall presently refer-,but the clear principle that is deducible from all these cases is that in every one of these an injury was definitely proved by the plaintiff, and the Court came to the conclusion that as no actual damages were proved, the Court must proceed to award some nominal damages to the plaintiff. The principle of law is enunciated in Halsbury, Vol. X, (Hailsham edn.), p. 90, para. 109 :

But it is not always necessary that actual damage should be proved in order that damages may be awarded. Thus in actions for breach of contract nominal damages are recoverable although no actual damage can be proved.

It will be observed that the emphasis placed by the learned author is on the fact that no actual damage can be proved. The learned author does not say that the mere breach of the contract by itself affords the plaintiff a cause of action for recovering damages. Then at p. 85, para. 105, in the same Volume " nominal damages" are defined and they are set down in three categories :

Where (1) a plaintiff against whom a breach of duty has been committed has not in fact sustained any actual damage therefrom, or fails to prove that he has; or (2) although the plaintiff has sustained actual damage, such damage arises not from the defendant's wrongful act, but from the conduct of the plaintiff himself; or (3) the plaintiff is not concerned to raise the question of actual loss, but brings his action simply with the view of establishing his right, the damages which he is entitled to receive are called nominal.

71. Mr. Taraporevala has relied on a decision of our Court in *Callianji Harjivan v. Narsi Tricum* ILR (1895) 19 Bom. 764. In that case the plaintiff was a milliner carrying on business in Bombay, and the defendant was in his employment up to the year 1890. In that year the defendant left the plaintiff's service. The plaintiff filed a suit praying for an injunction restraining the defendant from carrying on business as a cutter or tailor for ten years from the date of the agreement. The trial Court dismissed the suit. On appeal it was held that the lower Court was right in refusing either to grant specific performance of the agreement or an injunction against the defendant, but that inasmuch as it had refused an injunction on the ground that pecuniary compensation was the plaintiff's proper remedy, it ought not to have dismissed the suit but ought either itself to have awarded damages or to have ordered an inquiry as to damages. Now, in that case, there can be no doubt that Farran C.J. in delivering his judgment proceeded on the assumption that the plaintiff in being deprived of the services, of the defendant did suffer some injury. What is more the learned Chief Justice actually thought of ordering an inquiry as to what the damages would be; but realizing that such an inquiry would be costly, the suit being of a trumpety character, he awarded Rs. 10 as nominal damages. This decision certainly does not support the contention of Mr. Taraporevala.

72. The other case on which Mr. Taraporevala has relied is *Erie County Natural Gas and Fuel Company v. Carroll* [1911] A.C. 105 In that case the plaintiff company filed a suit against the defendants for damages because of the plaintiffs not having been permitted to take natural gas for the supply of their works, which they had reserved to themselves in a contract which they had entered into with the defendants for the sale of gas leases and wells belonging to the plaintiffs. The Courts in Ontario awarded heavy damages to the plaintiffs, and they did set adopting a certain measure of damages. The only point that arose before their Lordships of the Privy Council was whether the measure of damages adopted by the Courts in Ontario was the correct measure. In their judgment they came to the conclusion that the measure adopted was not the correct one and that the damages awarded were excessive, and upon that, they proceeded

to award nominal damages to the plaintiffs. In this case, too, it is clear that an undoubted injury was suffered by the plaintiffs. They had been deprived of their gas supply and they had actually to obtain their supply from works which they themselves put up for the purpose. Afterwards they sold these works at a profit. In discussing the measure of damages their Lordships observed (p. 119) :

The works having admittedly been sold, something must have been obtained for them. It is clear that if the defendants are to pay for the cost of making those works and of thereby supplying the plaintiffs with the gas the works produced they must get credit for the sum for which these works, after having supplied the gas, were sold, otherwise the plaintiffs would make by the defendants' breach of contract a profit equal to the price obtained on sale. It was therefore the business of the plaintiffs to shew how much that something was.

And their Lordships came to the conclusion that the plaintiffs had failed to prove what that something was.

73. The other case relied on by Mr. Taraporevala is the case of *Marzetti v. Williams* (1830) 1 B. & Ad. 415. In that case a customer sued his banker for failing to honour his cheque although there were sufficient funds in the Bank to his credit; and although the customer failed to prove any actual damage, the Court awarded nominal damages. If one looks at the judgment in that case, it is clear that what weighed with the Court was that by the conduct of the Bank the credit of the customer had been affected. As a matter of fact, one of the counts that was left to the jury for their decision was whether by the conduct of the Bank the customer had suffered any damage, and the jury found as a fact that he had suffered damage, Lord Tenterden, Chief Justice, in his judgment observed (p. 423) :

I think that the plaintiff is entitled to have a verdict lot nominal damages, although he did not prove any actual damage at the trial.

Then he went on to say (p. 424) :

At the same time I cannot forbear to observe that it is a discredit to a person, and therefore injurious in fact, to have a draft refused payment for so small a sum, for it shews that the banker had very little confidence in the customer. It is an act particularly calculated to be injurious to a person in trade.

Mr. Justice Taunton in his judgment observed (p. 426);

There are many instances where a wrong, by which the right of a party may be injured, is a good cause of action although no actual damage be sustained.

Then further on he says (p. 427) :

Here, independently of other considerations, the credit of the plaintiff was likely to be injured by the refusal of the defendants to pay the cheque; and as it was the duty of the defendants to pay the cheque when it was presented, and that duty was not performed, I think the plaintiff, who had a right to its being

performed, is entitled to recover nominal damages.

74. Then there is a further decision in *Chaplin v. Hicks* [1911] 2 K.B. 786. In that case the defendant advertised that he would employ actresses from persons for whom the readers of certain newspapers voted and who secured a certain number of votes. The plaintiff was one of the persons who entered the competition and she secured the requisite number of votes. Then by the conduct of the defendant she was prevented from being present at the interview which was held where the various candidates were interviewed, and she filed a suit complaining that by the conduct of the defendant she was prevented from having a chance of succeeding in being employed by the defendant as an actress. The Court awarded damages to the plaintiff. In considering the question Lord Justice Vaughan Williams says (p. 791) :

It was said that the plaintiff's chance of winning a prize turned on such a number of contingencies that it was impossible for any one, even after arriving at the conclusion that the plaintiff had lost her opportunity by the breach, to say that there was any assessable value of that loss. It is said that in a case which involves so many contingencies it is impossible to say what was the plaintiff's pecuniary loss.

75. Therefore, the principle on which that case was decided was that the plaintiff had suffered a loss which was not assessable and that loss was that she was deprived of the chance of winning a prize in the competition in which she had entered. The injury to the plaintiff was clear and undisputed.

76. Therefore, on these decisions it is clear that unless the plaintiffs establish some injury, the Court will not award damages. They may have failed to prove actual damages; but notwithstanding that, if there is some injury, the Court will not deprive them of their remedy.

77. Then there is another class of cases to which I might also refer where the plaintiff fails to prove any damages at the hearing but satisfies the Court that there may be damages which he might suffer in future. These are, what Halsbury calls, prospective damages. This is how Halsbury, Vol. X, (Hailsham Edition), p. 87, defines it. The term "prospective damages" is applied not as compensation for the ascertained loss at the time of commencing his action but in respect of loss which it may reasonably be anticipated he will suffer thereafter in consequence of the defendant's acts or omissions.

78. Now the principles of law being clear, let us see what the facts before me in this case are. In this case there is no averment in the plaint that the plaintiffs have suffered any loss or damage by reason of the defendant's act. No attempt has been made in the course of the hearing to prove any damages, and I have as a matter of fact held in my judgment: "It is clear from the evidence that no damages have been suffered by the plaintiffs." In view of this state of the record, I must hold that the plaintiffs have not proved any injury or loss or damage suffered by them and that they are not entitled to any damages. Mr.

Taraporevala has further contended that in view of the fact that the defendant is going to be in management, the plaintiffs may suffer losses by reason of the defendant's management and that I might take that into consideration and award to the plaintiffs what I have described as prospective damages. But as I have pointed out, the Court only awards prospective damages when the Court may reasonably anticipate that the plaintiffs would suffer damages in future in consequence of the defendant's acts or omissions. I have nothing before me in this case to anticipate reasonably that the defendant in future would so manage the mills that he would cause loss to the plaintiffs. On the contrary, it is in evidence that the defendant is as vitally interested in the good management of the mills as the plaintiffs themselves, and I see no reason why I should anticipate very foolish conduct on the part of the defendant so that in deliberately injuring "the plaintiffs, he should injure himself as well.

79. On the question of costs, Mr. Taraporevala has rightly contended that the defendant has failed on some of the issues. Issues Nos. 10, 11, 12 and 13 were raised on the factum and validity of the agreement of September 1940. The plaintiffs' counsel actually opened the case on these allegations in the written statement and Me. Taraporevala, when he called his client, put to him questions to establish the validity of the agreement and to prove the consideration which had been denied. It was only when the Advocate General got up to cross-examine plaintiff No. 1 that he indicated to me that he was not going to press these four issues. Under these circumstances I think the defendant is bound to pay the costs of these four issues. My order, therefore, will be : suit dismissed with costs. Defendant to pay to the plaintiffs costs of Issues Nos. 10, 11, 12 and 13. These costs to be set off.

80. By a consent order dated November 27, 1941, both the parties have given certain undertakings pending the hearing and final disposal of the suit. Mr. Taraporevala tells me that his clients are proposing to appeal from my decision and he wants me not to dissolve the undertakings pending any interim order they might obtain from the Court of Appeal. I would, therefore, allow the plaintiffs a fortnight's time within which to file their appeal and get. the necessary interim order from the Court. If no such order is obtained by the plaintiffs within the fortnight, the undertakings given by both the parties would be dissolved.