APPELLATE CIVIL

Before Gosain and Grover, JJ.

DINA NATH DUTT,—*Defendant-Appellant.*

versus

MAHA VIR GUPTA,—*Plaintiff-Respondent*

Civil Regular First Appeal No. 176 of 1950, with Cross-objections.

1958

March 4th

Code of Civil Procedure (V of 1908)—Section 21—"Objection as to place of suing"—When should be taken—Objection as to territorial jurisdiction not raised before first court—Whether can be raised at the appellate stage—Distinction between territorial jurisdiction and inherent jurisdiction—Condition in an agreement that Court A will have jurisdiction—Construction of—Section 21—Whether applies to such a case—Damages—Measure of, in cases where contracted property is sold to another.

Held, that an objection as regards territorial jurisdiction of a Court can be waived by a party and, if it is not raised at an earlier stage of case, it cannot be raised in a court of appeal in view of the provisions of section 21 and section 99 of the Code. The judgment or the decree of a Court having no territorial jurisdiction over the subject-matter of a suit is not a nullity, but is a judgment of a competent Court. In other words, if there is lack of inherent jurisdiction then the judgment would be a nullity, but if there is a lack of territorial jurisdiction the judgment does not become a nullity.

Held, that it is true that jurisdiction is one thing and right to exercise is another, but then it has to be seen what is the nature of the right created by an agreement to have disputes decided at one particular place. The nature of such a right is to restrict the forum by which the dispute between the parties is to be decided to the Courts at a particular place or in a particular territory, and in such a case all that a party can say is that Courts in territory 'A' cannot proceed with the trial because the parties had agreed to have the dispute decided by the Courts in territory 'B'. This simply means that whatever objection is raised to the trial of the suit by Courts in territory 'A' it relates to place of suing

and cannot be divorced from that expression the object and purpose of section 21 being not to allow objections as to the place of suing to be raised before the appellate Court unless there has been failure of justice and there seems to be no reason why section 21 will not apply when such an objection emerges out of an agreement between the parties of the nature mentioned above. An objection as to the place of suing can be based either on one of the several grounds arising out of infringement of the provisions of section 15 or 20 of the Code or on any other ground. Such an objection is essentially territorial in its nature and the plain grammatical meaning of the language employed in section 21 must be given effect to.

Held, that expression "objection as to place of suing" is used in generic sense and is not confined to objections based on the alleged infringement of the provisions of sections 16 to 18 of the Code only.

Held also, that where property contracted to be sold to plaintiff is sold by the owner to another, the measure of damages is the difference between actual price and the contracted price.

Musa Ji Lukman Ji v. *Durga Das* (1), *Continental Drug Co.* v. *Chemoids and Industries, Ltd.* (2), *Mehta and Co.* v. *Vijayam and Co.* (3), *Radha Kishan Kaul* v. *Shankar Das* (4), relied on and *Premadib Pictures* v. *New Sound Pictures* (5), dissented from.

First Appeal from the decree of the Court of Shri Rajinder Singh, Sub-Judge, 1st Class, Rohtak, dated the 19th day of July, 1950, granting the plaintiff a decree for Rs. 16,375 with half the costs against the defendant.

D. R. MANCHANDA and ROOP CHAND, for Appellant.

F. C. MITTAL and S. C. MITAL and R. C. BEKAS, for Respondent.

(1) A.I.R. 1946 Lah. 57.
(2) A.I.R. 1955 Cal. 161.
(3) A.I.R. 1925 Mad. 1145.
(4) A.I.R. 1927 Lah. 252.
(5) A.I.R. 1955 M.B. 193.

The Judgment of the Court was delivered by Grover, J.

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GROVER, J. This appeal arises out of a suit for recovery of Rs. 16,000 as damages apart from interest claimed on a sum of Rs. 5,000. It appears that the defendant got an advertisement published in the Daily Statesman, Delhi Edition, in the issues of 9th, 10th and 11th July, 1946, as follows:—

> "For sale one 15 ton ammonia ice-plant complete in working condition. Write for particulars to Bharat Engineering Works, Kanpur."

As a result of correspondence between the parties a contract was entered into between the plaintiff and the defendant. It was embodied in the form of an order and was as follows:—

"From Purchaser's Name ... Mr. Maha Vir Gupta
Village ... Anand Ashram.
P.O. ... Panipat.
District.

To

Messrs The Bharat Engineering Works,
Sole Makers of,
Bharat Oil, Crude and Gas Engines,
Bharat Building, Kalpi Road,
KANPUR.

Dear Sirs,

I/We hereby place with you, subject to your usual terms of business as (detailed on back hereof) order for goods as specified below delivered ex-site. Total price Rs.

Approximate time of delivery.

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Terms of payment, Rs. 5,000 as deposit against the order and balance against Railway Receipt payable at Kanpur.

Forwarding Instructions

SPECIFICATIONS

One second-hand 15 ton Ice Factory, complete with all the (torn) as working at Rohtak, under the name of Rajendra Ice Factory, as inspected and approved for the sum of rupees eighty-five thousand only (Rs. 85,000) nett., without building. Inventory of the plant will be made on Sunday at Rohtak. Coal and wood whatever is available at the Mill will be sold at the cost price to me. If required balance amount of the ice plant will be paid within 15 days from date and plant will be removed by the end of December. In case further time is required the seller will obtain the permission from the owner of the building and will pay the reasonable rent, if any."

On the back of this there were certain general conditions of business out of which some will be referred to in due course. On the 17th September, 1946, the defendant addressed a letter, Exhibit P. 11, to Messrs Anant Ram-Khem Chand, which seems to be the name of the joint family firm to which the plaintiff belonged. The aforesaid letter was as follows:—

> "In reply to your letter of 17th instant we in-from you that the Ice Plant is our property since we have purchased it and you are requested to make the payment to us under the contract and we will give you necessary removal instructions. Please note that payment be made within the promised time under contract."

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Another letter, Exhibit P. 4, was sent by the defendant on 18th September, 1946, saying that permission for removal of the plant had been obtained and the same would be delivered immediately the balance payment had been arranged. A request was made to make the necessary arrangements for payment of the balance amount so that the factory might be closed on 30th September, and its complete charge given. Yet another letter was sent on 21st September, 1946, saying that the balance amount of Rs. 80,000 be remitted as early as possible and it must reach the defendant by 27th of the month as per terms of the contract. This was followed by a telegram sent by the defendant, dated 25th/26th September, 1946. This telegram was as follows:—

> "Meet Delhi tomorrow with payment Imperial Ice Factory."

A letter was sent along with it in which the contents of the wire were repeated and the plaintiff was informed that Dina Nath would be reaching on 27th morning and a request was made that he should be contacted at the Imperial Ice Factory and the payment of the balance amount be made. There was some meeting on 27th September, but thereafter the parties entered into more correspondence and on the 9th October, 1946, the defendant sold the ice plant to another person by the name of Shubh Karan for a sum of Rs. 96,000. The present suit was instituted in March, 1949, for recovery of the sum of Rs. 5,000 paid as advance money and for Rs. 11,000 as damages resulting from the defendant's act in wrongly putting an end to the contract and selling it to Shubh Karan together with Rs. 750 on account of interest. The main pleas of the plaintiff were that the defendant had represented and had given assurances that he was the sole owner of the property in question and had full

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rights to transfer the same, but that before 27th September, 1946, the plaintiff came to know that the defendant was not at all the owner and had only a contract of sale with the real owner in his favour, and, on 27th September, 1946; when the parties met at Delhi, the plaintiff was ready and willing to pay the balance money provided the defendant could give satisfaction about his clear title which he failed to do, and that although the plaintiff remained ready and willing to perform his part on the defendant's completing his title to convey the property, the defendant rescinded the contract by means of his letter, dated 2nd October, 1946, which he was not entitled to do and thus the defendant made himself liable to refund the advance money and pay the damages. The defendant raised a preliminary plea that there was a condition in the agreement that if any dispute arose between the parties it would be decided by a Court at Kanpur and, therefore, the Court at Rohtak had no jurisdiction to try this suit. On the merits it was pleaded that the condition of 15 days within which the balance of the payment was to be made was such that time was of the essence of the contract and as the plaintiff failed to make the balance payment in time the defendant was perfectly entitled to sell the property to another person. It was averred that a sum of Rs. 50,000 had been paid to Basheshar Nath, the original owner of the ice plant, on 27th September, 1946, and the defendant's title was quite clear on that date, but that the plaintiff and his father made excuses on 27th September, and were not ready to pay the remaining amount on that day. For these reasons, it was submitted that the suit was liable to dismissal. In the replication the plaintiff stated quite clearly that the defendant was already in correspondence with Shubh Karan and as the latter had offered a higher price the defendant deliberately committed

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breach of the agreement in order to derive an illegal benefit. On the pleadings of the parties the following issues were raised:—

1. Has not this Court jurisdiction to try this suit?

2. Had the plaintiff performed or duly offered to perform his part of the contract? If so, to what effect?

3. Was the defendant not able or in a position or had incapacitated himself to perform his part of the contract? If so, when and to what effect on the suit?

4. Was the defendant the owner of the goods in dispute on the date of the agreement, in question, i.e., dated 12th September, 1946; or dated 27th September, 1946, the date when the contract was to be performed and was the defendant in a position to deliver the contracted goods to the purchaser on 27th September, 1946?

5. To what damages, if any, is the plaintiff entitled?

6. Was the time not of the essence of the contract of sale? If so, how and to what effect?

7. Was the defendant legally entitled to rescind the contract and resell the goods in dispute?

8. Relief.

The trial Court decided issue No. 1 in favour of the plaintiff and held that the Rohtak Courts had jurisdiction. Issue No. 2 was decided in favour of the

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plaintiff and Issue No. 3 against the defendant. Issue No. 4 was also decided in favour of the plaintiff. On issue No. 6 it was held that the time for payment was not of the essence of the contract in dispute. On issue No. 7 it was held that the defendant was not entitled to rescind the bargain as there was no default on the part of the plaintiff. Issue No. 5 was also found in favour of the plaintiff and a decree was consequently granted for Rs. 16,375 against the defendant. Curiously, towards the conclusion of the judgment the learned Sub-Judge stated as follows:—

> "Having regard to all the circumstances of the case and the fact that plaintiff succeeds simply on the strength of his evidence, i.e. his claim has not been convincingly proved beyond all doubts, defendant is burdened with only half the costs."

The defendant being dissatisfied with the judgment of the trial Court has preferred this appeal.

The first point that has been raised by Mr. D. R. Manchanda on behalf of the defendant is with regard to issue No. 1. He submits that there was a clear printed condition in the contract (No. 12) in the following terms:—

> "All orders are accepted subject to our conditions of business and are treated as placed at Kanpur. In case of any dispute Kanpur Court will have jurisdiction to try the case."

It is contended that according to this condition the suit was triable only by the Kanpur Courts. For this purpose reliance is placed on the Full Bench

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decision of the Lahore High Court in *Musa Ji-Lukman Ji* v. *Durga Das* (1). According to the decision of the Full Bench, an agreement between the parties to a contract to the effect that a suit concerning disputes arising between them on the basis of that contract should be instituted in one only out of two competent Courts having territorial jurisdiction over the subject-matter of that suit is valid and enforceable. Mr. Manchanda submits that the mere fact that the word "only" was not mentioned in condition No. 12 did not take away the effect of the agreement contained in that condition that in case of any dispute Kanpur Courts would have jurisdiction, which impliedly meant that the suit could be instituted only at Kanpur. Reliance has been placed for this purpose on *Continental Drug Co.* v. *Chemoids and Industries, Ltd.* (2). In that case the agreement was in the following terms: "Any dispute arising between the parties, settlement of same legally or otherwise, will be decided in Bombay." It was held in this case that the suit was triable by the Courts at Bombay only. In *Mehta and Co.* v. *Vijayam and Co.* (3), there was a clause in the agreement as follows: "In all legal disputes arising out of this contract Ahmedabad will be understood as the place where the cause of action arose." Madhavan Nair, J., held that the agreement was valid and it was not open to the Madras Courts to entertain the suit. The absence of the word "only" thus does not seem in any way to materially affect the position. But the principal hurdle in the way of Mr. Manchanda's argument is section 21 of the Code of Civil Procedure which runs thus: "No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity

(1) A.I.R. 1946 Lah. 57.
(2) A.I.R. 1955 Cal. 161.
(3) A.I.R. 1925 Mad. 1145.

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and in all cases where issues are settled at or before such settlement and unless there has been a consequent failure of justice". It is indeed true that the objection was raised at the earliest possible opportunity but the defendant never pressed for the decision of the issue relating to jurisdiction as a preliminary issue and, therefore, the question is whether this Court in appeal can entertain that objection when there has been no failure of justice. According to Mr. Manchanda section 21 will have no application to the present case as the objection is not based on any of the grounds with regard to place of suing with reference to sections 15 to 20 of the Code, but the defendant is only seeking an adjudication from this Court with regard to his right to have the dispute litigated or settled at Kanpur and not at Rohtak. He has based his arguments largely on the reasoning of Shinde, C.J., in *Premadib Pictures* v. *New Sound Pictures,* (1) on difference between Dixit, J., and Chaturvedi, J. In that case this very point came up for consideration. Chaturvedi, J., after deciding that such a clause restricting the right of the parties to institute suits for settlement of their disputes at a particular place was perfectly valid and enforceable, proceeded to decide whether the decree passed by the Court at Ujjain should be set aside. He held that the Bombay Courts only could try the suit and he set aside the decree passed by the Ujjain Court. Dixit, J., after coming to the conclusion that both the Ujjain and Bombay Courts had jurisdiction, held that by virtue of the clause in the agreement the suit was triable at Bombay, but it did not follow that the proceedings at Ujjain were invalid, and the decision of the Ujjain Court, a nullity. It is one thing to say that by reason of the agreement between the parties the Ujjain Court could not entertain the suit. It is

(1) A.I.R. 1955 M.B. 193.

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quite different to say that it had no jurisdiction to try the suit. He adopted the observations of Mahajan, J., as he then was, in the Lahore Full Bench case pointing out the distinction between "a question of territorial Jurisdiction" and "a question of inherent jurisdiction." An objection as regards the territorial jurisdiction could be waived, but an objection as regards the inherent jurisdiction could not be waived. He considered that section 21 was fully applicable and as the defendants in that case had without any demur allowed the proceedings to be carried to completion, without the question of place of suing being decided, it was no longer open to them to agitate it in the Court of appeal. When the matter was considered by Shinde, C.J., he was of the view that the interpretation that can be put on the expression "objection as to the place of suing" used in section 21, was that an objection based on the alleged infringement of any of the provisions of sections 16 to 20 of the Code alone was covered by that expression. He referred to certain decisions of the Madras High Court according to which the provisions of section 21 applied to all objections based on the alleged infringement of the provisions of sections 16 to 18 as regards the institution of suits relating to immovable property. He further went on to observe—"If the expression be construed in a comprehensive manner then all objections regarding the place of suing are to be governed by the provisions of section 21. Objection on the ground that the Court had no jurisdiction over the subject-matter of the suit is also an objection as to the place of suing in a sense. Similarly, an objection on the ground of want of *pecuniary jurisdiction* is also an objection as to the place of suing. But it is not suggested that such objections are governed by section 21 of the Civil Procedure Code." According to the learned Chief

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Justice it is clear that the expression "objection as to the place of suing" cannot be construed in a comprehensive manner. Section 21 refers to what is generally known as territorial or local jurisdiction. According to his reasoning the defendant in that case did not object to the jurisdiction of the Court at Ujjain to try the suit. His objection was that the plaintiff was debarred from filing the suit at Ujjain on account of a valid agreement entered into between the parties. All that he wanted was to enforce the agreement which was a perfectly valid agreement. In these circumstances section 21 could have no application. Mr. F. C. Mital, who has appeared on behalf of the plaintiff-respondent, has not been able to refer to any other case in which this point was directly raised and decided. His argument is that very wide and comprehensive language is employed in section 21 and although section 21 occurs under the heading "Place of suing" and is placed after sections 15 to 20, there is no justification for confining its operation only to the infringement of the provisions of the sections which preceded it. He further contends that essentially the defendant in the present case is raising an objection as to the place of suing although he is raising it not on any ground covered by sections 15 to 20 but on the ground of a contract embodied in condition No. 12 of the agreement. therefore, section 21 will fully apply as it is intended to cover all kinds of objections with regard to the place of suing on whatever reasons they may be founded. It seems to me that the real solution is to be found in the distinction between lack of territorial jurisdiction and lack of inherent jurisdiction. This distinction was brought out very clearly in the Lahore Full Bench case by Mahajan, J. (as he then was), and it was emphasised that the question of territorial jurisdiction of a Court was not a question of inherent jurisdiction.

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An objection as regards the territorial jurisdiction of a Court can be waived by a party and, if it is not raised at an earlier stage of a case, it cannot be raised in a court of appeal in view of the provisions of section 21 and section 99 of the Code. The judgment or the decree of a Court having no territorial jurisdiction over the subject-matter of a suit is not a nullity, but is a judgment of a competent Court. In other words, if there is lack of inherent jurisdiction then the judgment would be a nullity, but if there is lack of territorial jurisdiction the judgment does not become a nullity. The agreement which has been made in the present case that the suit is to be triable by the Courts at Kanpur simply restricts the forum to the Courts in a particular territory and does not make that Court incompetent for want of inherent jurisdiction. In other words, it cannot be said that in the present case the Courts at Rohtak have no jurisdiction because of lack of any inherent jurisdiction but all that can be said is that according to the agreement between the parties out of the two Courts, namely at Kanpur and Rohtak, where the suit could be tried, the parties restricted the forum of trial to Kanpur Courts only. The principle, therefore, of section 99 would come into play and that supports the principle incorporated in section 21 that in the absence of miscarriage of justice a party cannot be heard to raise such an objection in a Court of appeal. It stands to reason that if the Rohtak Courts would have had jurisdiction to try the suit in the absence of an agreement of the nature incorporated in condition No. 12 of the present agreement, its decree would be perfectly valid and it will not be a nullity merely because a right was given to the parties to have the dispute decided by Kanpur Courts only when the trial was allowed to proceed and there has been no miscarriage of justice. It is true that jurisdiction is one thing and

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right to exercise it another, but then it has to be seen what is the nature of that right. To my mind the nature of such a right is to restrict the forum by which the dispute between the parties is to be decided to the Courts at a particular place or in a particular territory, and in such a case all that a party can say is that Courts in territory 'A' cannot proceed with the trial because the parties had agreed to have the dispute decided by the Courts in territory 'B'. This simply means that whatever objection is raised to the trial of the suit by Courts in territory 'A', it relates to place of suing and cannot be divorced from that expression, the object and purpose of section 21 being not to allow objections as to the place of suing to be raised before the appellate Court unless there has been failure of justice and there seems to be no reason why section 21 will not apply when such an objection emerges out of an agreement between the parties. An objection as to the place of suing can be based either on one of the several grounds arising out of infringement of the provisions of sections 15 to 20 of the Code or on any other ground. Such an objection is essentially territorial in its nature and the plain grammatical meaning of the language employed in section 21 must be given effect to. With all respect I am unable to accept the view of Shinde, C. J. and Chaturvedi, J., that section 21 will not be applicable in such cases. In fact Shinde, C. J., seemed to consider that an objection on the ground of want of pecuniary jurisdiction was also an objection as to the place of suing. This, however, with respect, is based on an erroneous impression with regard to the nature of an objection on the ground of want of pecuniary jurisdiction. That also shows that the distinction laid down in the Lahore Full Bench case between a question of territorial jurisdiction and a question of inherent jurisdiction was

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not clearly present to the mind of the learned Chief Justice. As a matter of fact Shinde, C. J., observed that with the exception of observations made by Mahajan, J. (as he then was) no other authority had been cited in support of the view that the expression "objection as to the place of suing" is used in a generic sense and not in a specific sense. With all respect I prefer to follow the view expressed by Mahajan, J. (as he then was) in the Full Bench case and hold that the expression "objection as to the place of suing" is used in a generic sense and is not confined to objections based on the alleged infringement of the provisions of sections 16 to 18 only. There is no suggestion by Mr. Manchanda that there has been any failure of justice by reason of the suit having been tried at Rohtak. His contention, therefore, on this point must be repelled.

On the merits Mr. Manchanda's principal argument has centred round the question whether there was any default on the part of the defendant with regard to carrying out his part of the contract or whether it was the plaintiff who himself was to blame for the non-performance thereof.

The learned Judge then considered the evidence of the parties and continued.

A reference was made to the meeting of 27th September, and it was alleged that there had been a failure to make payment on the part of the plaintiff and as the same had not been made within the stipulated time, therefore, the earnest money paid by the plaintiff stood forfeited. It is to be remembered that in the meantime on 9th October, the defendant had sold the ice plant to Shubh Karan for a sum of Rs. 96,000. The suggestion on behalf of the plaintiff is that it was only on 9th October, that Basheshar Nath was paid the sum of Rs. 50,000

and reference is invited to Exhibit P. W. 9/2 which shows that the draft for Rs. 40,000 was cleared on 9th October, and it is suggested that the balance of Rs. 10,000 was paid from out of the amount received from Shubh Karan on that day. Whether this suggestion should be accepted or not, there seems to be no doubt that the title of the defendant was not perfected on 27th September, 1946.

The next contention of Mr. Manchanda is that time was of the essence of the contract and since the plaintiff did not pay the sum of Rs. 80,000 on 27th September, he was guilty of the breach of the contract. This argument loses all force in face of the finding that the title of the defendant was imperfect on 27th Septmber, 1946, and therefore, even if time was of the essence, it cannot be said that the plaintiff was guilty of breach of the contract, as he was not bound to pay the sum of Rs. 80,000 until the defendant was in a position to convey a clear title.

The other contention of Mr. Manchanda is that the plaintiff is not shown to have been ready and willing to perform the contract. It is pointed out that the plaintiff did not have enough money in his account (Exhibit P.W. 2/1)—on the 27th September and that according to the evidence produced he could operate on one account only, namely of Messrs Anant Ram-Khem Chand, Exhibit P.W. 2/1, in which the credit balance on 28th September was Rs. 10,209-10-0. The plaintiff has, however, produced copies of relevant entries of bank accounts maintained in the name of his father, Amar Nath, in which the credit balance up to 10th October was Rs. 55,000 and another account of Shri Khem Chand the grand-uncle of the plaintiff, who had a credit balance of Rs. 40,000 odd (*vide* Exhibit P.W. 1/1). On the 27th September the father of the plaintiff, namely, Amar Nath, is

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stated to have actually accompanied him along with the cheque-book and Khem Chand, the grand uncle of the plaintiff, as P.W. 6 has stated that they formed an undivided Hindu family, the name of the firm being Anant Ram-Khem Chand and that he had given a blank cheque signed by him to the plaintiff and Amar Nath when they had gone to Delhi and they could have made the payment by making use of that cheque from the account which stood in his name. According to his evidence he along with Amar Nath and Khem Chand formed a joint Hindu family and they had accounts in banks in the various names. It is significant that all the correspondence which was being done by the defendant with the plaintiff was being addressed to this joint family firm—Messrs Anant Ram-Khem Chand. There is no reason to disbelieve the statement of Khem Chand that they formed a joint Hindu family and it is clearly shown that the family as such possessed more than Rs. 80,000 on the material date and there is further no reason why the plaintiff and Amar Nath should not have made full arrangements for making payment of this amount if the defendant had been able to satisfy them with regard to his title on 27th September. Our attention was invited to *Firm Ganesh Das-Ishar Das* v. *Ram Nath and others* (1), where it has been laid down that in a suit for damages on non-delivery of goods it is the duty of the plaintiffs to satisfy the Court that they were ready and willing with the money, that they had capacity to pay, or, at any rate, they had made proper and reasonable preparations and arrangements for securing the purchase money and that they demanded the goods on the due date from the defendants. All these tests were fully satisfied in the present case and it must be held that the plaintiff was ready and willing to perform his part of the contract.

(1) A.I.R. 1928 Lah. 20.

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Next it is urged that the plaintiff had failed to prove what was the proper measure of damages to be awarded even if there had been default on the part of the defendant. Reference is invited to Mayne on Damages, Eleventh Edition, P. 191, where it is stated as follows: "When the subject-matter of the contract is not procurable at all in the market, or not at or about the time of breach, the damages are to be taken at the value of the article at the time of breach. But the mode of estimating this value is different, for there is no market price which can be quoted". It is contended that the value of the ice plant on the date of breach, which would be 27th September in the present case, had not been shown to be Rs. 96,000. Mr. F. C. Mital on behalf of the plaintiff has invited attention to *Radha Kishan Kaul* v. *Shankar Das*, (1). In that case it was held that where property contracted to be sold to plaintiff is sold by owner to another, the measure of damages is the difference between actual price and the contracted price. In that case the following observations are pertinent: "We think that the principle laid down in *Nabinchandra Saha Paramanick* v. *Krishan Barana Dasi* (2), and several other cases is perfectly correct and the measure of damages in a case like the present is the difference between the price, Rs. 9,000 agreed upon between the parties and the price at which the defendant actually sold the house to Gokal Chand on the 21st March, 1917. On a perusal of the whole record we have come to the conclusion that it was the defendant who was guilty of the breach of contract. He received the offer of a larger sum of money from Gokal Chand and succumbed to the temptation with the result that he broke his contract with the plaintiff." These observations are quite apposite in the present case and it is apparent

(1) A.I.R. 1927 Lah. 252.
(2) I.L.R. (1911) 38 Cal. 458.

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that the defendant had also succumbed to the temptation of getting a higher price from Shudh Karan.

Lastly, Mr. Manchanda submitted that no interest should have been awarded on the sum of Rs. 5,000 which had been paid by way of earnest money by the plaintiff. The trial Court awarded interest at the rate of 3 per cent per annum from 27th September, 1946, to the date of the suit. It has not been shown how this was illegal.

In the result, this appeal is dismissed with costs.

The respondent has filed certain cross-objections on the question of full costs not having been awarded by the trial Court and also with regard to interest. The reason given by the trial Court for awarding half the costs is not at all intelligible and there seems to be no reason why only half the costs should have been allowed. The cross-objections will, therefore, be allowed only to this extent that the plaintiff will be entitled to full costs in the trial Court as well. In all other respects the cross-objections are dismissed. There will be no order as to costs with regard to the cross-objections.

R. S.