REFERENCE UNDER STAMP ACT, s. 46.

This instrument under which Pitchu Ayyan is authorized to receive payment of the money to which the raiyats are entitled is a power on behalf of thirty-six persons jointly interested in a particular fund authorizing him to do a single act, and there is nothing before us to show that the persons entitled to the refund would be required to do more than appear in person or by a person duly authorized by them before the officers directed to refund the money and to receive it.

This decision in no way conflicts the decision of this Court in referred case No. 4 of 1885. *Reference under Stamp Act, s.* 46.(1)

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1886. February 26. March 19.

SIMSON AND OTHERS (PLAINTIFFS), APPELLANTS,

and

VÍRAYYA (DEFENDANT), RESPONDENT.*

Contract—Breach—Rescision—Reciprocal promises—Condition precedent—Damages—Measure of.

On 6th March 1883 V promised to sell 5,000 bags of gingelly seed at Rs. 7 As. 11 a bag to S. Two-thirds of the price was paid in advance. V agreed to deliver the 5,000 bags at the end of April and to give S notice as instalments of 1,000 bags were ready for delivery within the stipulated time, and S promised to pay V the balance of the contract price on each instalment when ready for delivery. There was neither delivery nor payment in terms of the contract.

3,000 bags were delivered by V, but S did not pay the balance of the price due, and 2,000 bags were never delivered. On 7th May V declined to deliver these bags, on the ground that S had not paid the balance of the contract price for the 3,000 bags delivered when ready for delivery, and, subsequently, repaid to S the balance due to him of the money advanced.

In a suit by S against V for damages for non-delivery of 2,000 bags:

Held, that V was not excused from performance of his promise by the failure of S to pay the balance due for the bags delivered, and that S was entitled to recover the difference between the market and the contract price on the day the contract was broken by V.

APPEAL from the decree of K. Krishnasámi Ráu, Subordinate Judge at Cocanáda, in suit 17 of 1883.

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(1) *Ante* p. 146.

* Appeal 12 of 1885.

SIMSON v. VIRAYYA.

The plaintiffs, Messrs. Simson Brothers, sued the defendant, Golla Virayya, for Rs. 6,821-13-0, damages for breach of a contract to supply 5,000 bags of gingelly seed.

The Subordinate Judge gave plaintiffs a decree for Rs. 500.

Plaintiffs appealed against this decree so far as it dismissed their claim for Rs. 6,321-13-0, and the defendant objected to the decree for Rs. 500.

The facts and arguments appear from the judgment of the Court (Collins, C.J., and Muttusámi Ayyar, J.).

The *Acting Advocate-General* (Mr. *Shephard*) for appellants.

Mr. *Shaw* for the respondent.

JUDGMENT.—The appellants and the respondent are merchants residing in Cocanáda, and on the 6th March 1883 the latter contracted to sell to the former 5,000 bags of white gingelly seed at Rs. 7 As. 11 per bag. The contract price amounted to Rs. 38,457-8-0, of which two-thirds, the sum of Rs. 25,625, was paid in advance. The respondent agreed to deliver the 5,000 bags on board the appellants' ship at the end of April 1883, and to give them notice as instalments of 1,000 bags each were made ready for delivery within the stipulated time; and the appellants engaged to pay him one-third of the contract price on each instalment when it was ready for delivery. There was neither delivery nor payment in the terms of the contract. But it is admitted that 2,995 bags were delivered at Masulipatam on board the *Macedonia* on the 15th May 1883, and that Rs. 125 were paid on account of the balance of price. No claim is, however, now made either by the appellants in respect of the bags so delivered with reference to the delay in their delivery, or by the respondent on account of the appellants' failure to pay the remainder of the proportionate price; and the present litigation is confined to the bags of gingelly seed which the appellants asserted were short delivered. Their case was that 2,995 bags were alone delivered on the 15th May; that the remainder was never delivered at all, though the time for delivery was extended to the 20th June in regard to 2,000 bags; that Rs. 11 a bag was the market price on that date, and that the respondent was further liable to pay a sum of Rs. 68-2-0, which represented the charges incurred on re-shipment of 342 bags. The respondent's contention was that 3,000 bags were delivered on the 15th May; that on the appellants' refusal to pay the balance of the

proportionate price on 2,000 bags, which were reported to be ready for delivery, he rescinded the rest of the contract, and that he was not responsible for the cost of re-shipment.

As to the five bags, this appeal is not pressed at the hearing, and as to Rs. 68-2-0, we consider that the decision of the Subordinate Judge is right. The learned Advocate-General drew our attention to the evidence of the respondent's witness Rámamurti, who deposed that some of the bags got wet when they were taken to the steamer and were consequently returned by the captain of the vessel. We cannot accept this evidence without more as sufficient to show that the seeds were materially damaged, or that there was any negligence on the part of the respondent in respect of those bags. The substantial claim we have to consider is that which relates to 2,000 bags, and the questions raised for our decision in connection with it are:— (1) whether the time for their delivery was extended to the 20th June, and, if so, whether the market price on that day was Rs. 11 a bag; (2) whether the appellants broke their part of the contract by refusing payment of the balance of price due on 2,000 bags; (3) whether the respondent became entitled by such breach to rescind the rest of the contract; and (4) whether any, and what, compensation was due to the appellants, if not the amount claimed by them. The correspondence which took place between the parties clears the way to a correct decision to a considerable extent, and we shall proceed to refer to such portions of it as are material. On the 25th March the respondent's brother sent him a telegram to the effect that gingelly seeds were not procurable at Jaggaiyapet, and it was desirable to settle, though at some loss (Exhibit A). This shows that so early as in March the respondent experienced difficulty in procuring the seeds, and that they were scarce in the market. On the 18th April, however, the respondent wrote to the appellants the letter marked D, stating that 2,000 bags were ready for delivery and that the rest were expected from Jaggaiyapet, and requesting that Rs. 125, the balance of price due for 2,000 bags, might be remitted to him. We may observe here that the balance really due was Rs. 5,125, and that Rs. 125 was mentioned instead by mistake. On the 20th April the appellants inquired by telegram whether the respondent was sure that 5,000 bags could be delivered on the 20th May, and he replied on the same day by his letter F that he was waiting for information from Jaggaiyapet. He also

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sent the telegram G that he would reply as soon as he got the information. On the 21st April the appellants acknowledged the receipt of letter D and forwarded a cheque for Rs. 125, which they also described as the balance due on 2,000 bags. They further inquired whether the remaining 3,000 bags would be delivered or not, as they desired to dispose them elsewhere if the respondent could not deliver them, and added that of course 3,000 bags at least would be ready, as he had bought that quantity (Exhibit IV). Thus, it appears that on the 21st April, 2,000 bags were ready for delivery, that 1,000 bags more were expected to be ready soon, and that the parties were in doubt whether the remaining 2,000 bags could be procured. On the 24th April 1883, the respondent pointed out that Rs. 125 was inserted in his letter D by mistake for Rs. 5,125, and that the appellants should remit the balance of Rs. 5,000 (Exhibit H). To this, however, the appellants did not send a reply, but Mr. Simson admitted in his evidence that he declined to pay. The reason which he gave for this refusal was by no means satisfactory. He said he did not know that a clause was inserted in the contract in regard to the payment of proportionate price as instalments 1,000 bags were made ready for delivery, and that the respondent never told him of it; but that when he discovered that it was part of the contract, he made no objection to it. He added that he told the respondent that he had no right to put in such a clause.

On the 26th April the respondent sent to the appellants letter E, in which he explained that 3,000 bags could be delivered on the 20th May, and that the remaining 2,000 bags might be delivered on the 20th June, and he earnestly requested that the time fixed for their delivery might be extended to the 20th June. The appellants' contention as to this part of the case was that they extended the time accordingly and sent a verbal message to that effect by one Venkata Reddi. It is strange that they did not call Venkata Reddi as a witness, though assuming that the message was sent, it may well be that it was never delivered to the respondent.

It is not denied for the appellants that, as observed by the Subordinate Judge, Exhibit E contains an endorsement that they received the letter on the 28th April, and sent a reply to it on the 1st May. Exhibit I is a letter from the appellants to the respondent of 1st May, and after acknowledging two letters from

the respondent, dated the 24th and 25th April, and referring to the telegram already sent that the steamer would arrive at Masulipatam on the 15th May, it proceeded to state as follows:— "You must borrow gingelly for the steamer, as we cannot fill her "without your seed, and the claim for dead freight, which we shall "have to pay if we leave space in her for 2,000 bags, will amount "to Rs. 6,000. Please, therefore, do your utmost to get the seed "somehow or other and avoid such disastrous loss. We note you "have already purchased 3,000 bags, but for the balance 2,000 bags "you must also arrange and ship them by the said steamer in time, "either by borrowing or by purchasing from other people." It is not possible to reconcile this letter with the appellants' contention that they extended the time for delivery to the 20th June; but it shows on the contrary that they were most anxious that the 2,000 bags should be delivered on the 15th May, and that they insisted on the respondent borrowing or purchasing them in time for shipping them on that date if he desired to avoid the penalty of paying Rs. 6,000 as dead freight. The letter of the 25th April, which is acknowledged in Exhibit I, was not produced by the appellants. They stated that that letter was mislaid, but beyond their statement, there was no other evidence. Seeing how inconsistent their account of the extension of time by a verbal message is with their own letter, we are not prepared to hold that the Subordinate Judge was in error in finding that, instead of extending the time, they refused all extension beyond the 15th May. In May the price began to rise, and one Mahomed Kasim wrote to the respondent on the 3rd idem that gingelly seed sold at Jaggaiyapet on 1st May at Rs. 803 per putti (Exhibit III). On the 1st May the appellants sent to the respondent a telegram requiring him to borrow 2,000 bags and to ship all the 5,000 bags on the 15th idem. The respondent stated in reply on the 3rd May, that the appellants did not fulfil their part of the contract in regard to payment of proportionate price on the bags which were ready for delivery; that he incurred a great loss in purchasing 3,000 bags; that in consequence of the breach of contract on their part to pay the balance of proportionate price he lost many opportunities of purchasing gingelly seed at once, and that therefore he was not to blame for it. On the 5th May he sent a reply (Exhibit VIII) to the appellants' letter I. In this he noted the contents of that letter and remarked, "Had you sent

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"the balance as soon as I informed you that gingelly seed had "been made ready in obedience to the terms of the contract, I would "have completely fulfilled my contract in due time, as I did for the "money you had given me in advance. But you did not act up to "the terms of the contract. So it is evident that it is not at all a "fault of mine, and so I am not responsible to make arrangements "for the delivery of the remaining bags." On the 7th May the appellants wrote to the respondent to the effect that, though they were most anxious to help the respondent, they could not do more than what they had already done. They then proceeded to state in justification of non-payment of proportionate price that the amount already advanced was Rs. 10,375 in excess of the full value of 2,000 bags, and that the dead freight and the penalty they might have to pay for short shipment was Rs. 10,000. In this letter only 2,000 bags are spoken of as ready for delivery, though it had previously been intimated to them that 3,000 bags were ready; but it must be borne in mind that this letter was written in answer to the respondent's complaint that the balance of proportionate price on 2,000 bags was not paid as required by him. In their letter the appellants further said, "You "say you will deliver the remaining 2,000 bags by the 20th June. "Is this quite certain, and can we rely on your doing so without "doubt? It is most important to know this positively so that we "may arrange matters for the best," (Exhibit V). Mr. Simson states in his evidence that the respondent declined on the 7th May to undertake to deliver 2,000 bags on the 20th June. Again, the appellants addressed to the respondent letter II on the 12th May and inquired, after stating that he had no cause for complaint in regard to payment of balances, whether he would ship 2,000 bags of castor seed instead of gingelly seed to save dead freight, and whether he would make ready for shipment the remaining 2,000 bags of gingelly seed by the 20th June if the balance of price were paid. The respondent did not accede to the appellants' suggestion, and intimated to them on the 19th May that he would neither lend them 2,000 castor bags nor supply the remaining 2,000 gingelly bags by the 20th June (Exhibit IX). In advertence to this letter, the appellants sent letter VI on the 24th May, stating that the respondent had got into the hands of some unscrupulous person who was trying to stir up a difference of opinion between them, and that if he saw their agent, Mr. Hay,

the latter would point out that he took an erroneous view of his liability as a contractor. Though a hope was expressed that the difference might thus be settled, no further correspondence took place until the 25th June. When the respondent made up an account of what was due to him in respect of 3,000 bags delivered out of 5,000 bags, and remitted to the appellants the balance due to them out of the money advanced and of the subsequent payment of Rs. 125 (Exhibit K) on the 27th June, the appellants wrote to the respondent letter VII in which they acknowledged receipt of letter K and said "we are sending a steamer to Masulipatam, "due there about the 15th July next, for the balance of 5,000 "bags gingelly seed you sold us. We trust, having given you so "long a time to deliver and assist you in completing your contract, "that you will have no difficulty in effecting a shipment under "Mr. Hay's instructions. Please telegraph us as soon as you "receive the present, whether you will be ready to ship by that "time."

As already observed, the appellants' contention, that they extended the time for delivery from 30th April to 20th June in regard to 2,000 bags, cannot be supported. The oral evidence is not only incomplete, but it is also inconsistent with their letters of the 1st, the 7th, and the 12th May, and with Simson's evidence as to what the respondent said on the 7th May. In the first they told the respondent that he must deliver all the 5,000 bags on the 15th May, and in the other two they inquired whether he would be able to deliver the 2,000 bags by the 20th June.

The respondent repudiated his liability to deliver them at all on the 3rd, the 7th, and the 19th May; we must accept the Subordinate Judge's finding on this point. It is argued for the appellants that the time for delivery must then be taken to have been extended at least to the 15th May. The appellants were no doubt inclined to extend the time until the day on which the steamer chartered by them was expected to arrive at Masulipatam. It was probably for that purpose they inquired on the 20th April whether 5,000 bags could be delivered on the 20th May, and the respondent's reply, dated the 26th April, was that he could get them ready if they extended the time to the 20th June. On the 1st May they refused such extension, and told him to get the 2,000 bags ready by the 15th May, on which day they had information that the steamer would touch at Masulipatam. On the 3rd May the respondent

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charged them with breach of contract in regard to the payment of balances, and on the 5th May he distinctly repudiated his liability for future performance, and he since continued to do so whenever he was asked to deliver the 2,000 bags. The evidence discloses no trace of mutual understanding that 2,000 bags were to have been delivered on the 15th May, and on this ground we are unable to hold that there was an extension of time as a matter of mutual agreement up to 15th May either.

Though the time fixed by the contract was the 30th April, it was considered by neither party as of its essence; and when the contract time expired, the respondent's application for an extension was pending. Though the extension which the respondent sought was refused on the 1st May, a fresh extension was offered instead, till the 15th May. The appellants demurred to it on the 3rd and 5th May, and it was finally known on the 7th May that it was the respondent's fixed resolution to stand upon the right asserted by him to rescind the contract. It would therefore be fair to assess the damages, if any, with reference to the market price on that day, for, the appellants could not reasonably be expected to go into the market to buy the bags of gingelly seed which the respondent refused to deliver until the negotiations for an extension were finally at an end. As to the market price, the Subordinate Judge takes it to have been Rs. 7-15-0 on the day of the breach. The evidence is conflicting and vague as to the quality of the gingelly seed to which the witnesses referred. We should ordinarily hesitate to come to a different finding, but in the present case the Subordinate Judge has overlooked the respondent's admission contained in his written statement, viz., that the market price was Rs. 8-2-0 a bag on 3rd May. It is also in evidence that the price was steadily rising in the month of May, and we must therefore find that the difference between the contract and the market price on the day the contract was broken was 7 instead of 4 annas per bag. It remains for us to decide the question whether the respondent was entitled to rescind the contract on the ground that the appellants failed to pay the proportionate price on the 3,000 bags which were ready for delivery. There is no doubt that the proportionate price was not paid, and that such non-payment was in contravention of the terms of the contract. It is argued by the learned counsel for the respondent that the promise to prepare for delivery instalments of 1,000 bags

and the promise to pay the balance of price due for each of those instalments, are reciprocal promises, and that the refusal by one party to perform his promise gives a right to the other to put an end to the rest of the contract. In dealing with cases like the present, it is necessary to keep in view the rule stated by Coleridge, C.J., in *Freeth* v. *Burr*,(1) and the rules of law applicable to conditions precedent. We cannot adopt the argument for the respondent that the payment for each instalment of bags which were made ready for delivery, was a condition precedent to the preparation of the remainder for delivery. If it were so, there would be an end of the case. The contract was for the purchase of 5,000 bags of gingelly seed, and upon its true construction there was but one contract for that quantity. It was in this view that two-thirds of the price fixed for 5,000 bags was paid in advance, and the receipt E contains a distinct recital that the advance was on the entire contract. The words in this document are "Rs. 25,625, being the advance due for the 5,000 bags of "white gingelly which was contracted with you this day to be deli- "vered on board the ship at Masulipatam at the rate of Rs. 7-11-0 "per bag, was paid by you and received by me." They contemplate one entire contract and one delivery, and a part-payment in advance in respect of the whole. It appears to us to be plain that the primary or general intention was that the contract should be single and indivisible. A default in payment of the balance of proportionate price in respect of one or more instalments cannot, and does not, go to the whole root of the contract. Nor is this a contract which, like the one in *Withers* v. *Reynolds*,(2) is capable of being divided into as many independent contracts as there are instalments to be prepared for delivery; such a division would be at variance with the primary intention of the contracting parties. According to general principles we think that whenever the primary or general intention is unmistakably clear from the terms of a contract, the subsidiary provisions which it contains must be construed with reference and in subordination to that intention. There is therefore no foundation for the argument that the payment of the balance of price for each instalment was a condition precedent with respect to any part of the obligation to deliver 5,000 bags. Nor does this case fall under the rule that

(1) L.R., 9 C.P., 208. (2) 2 B. & Ad., 882.

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where one party refuses to perform his part of the contract, such refusal may be treated by the other party as setting him free or releasing him from the future performance of his part of the contract. It is argued that in connection with this rule the fact that there was a part-payment made in advance is immaterial, since a party may refuse to perform his part of the agreement either in its entirety or in respect of so much of it as may still remain to be performed. However this may be, we do not consider it necessary to decide this question for the purposes of this appeal. Adverting to the rule, Coleridge, C.J., said, in *Freeth* v. *Burr*,(1) "It is in "substance, as we understand it, that you must look at all the "circumstances of the case in order to see whether the one party to "the contract is relieved from its future performance by the other; "you must examine what that conduct is so as to see whether it "amounts to a renunciation, to an absolute refusal to perform the "contract such as would amount to a rescision if he had the power "to rescind, and whether the other party may accept it as a reason "for not performing his part." This rule was adopted by Selborne, L.C., in the *Mersey Steel and Iron Company* v. *Naylor Benson and Co.*(2)

Having regard then to the circumstances of the present case, it is not possible to hold that the appellants' conduct amounted to a *renunciation* of the contract or to an *absolute* refusal of future performance. Several of their letters, those of the 1st, 7th, and 25th May, and of the 27th June, show that they were most anxious that the entire contract should be performed. It was only natural that they should have so desired, seeing that the market was steadily rising. They were at first averse to granting an extension of time, but in this they did not go beyond their rights under the contract. It is no doubt true that they broke the contract in withholding payment of proportionate price on 3,000 bags, but the respondent intimated to them that he could not arrange for the purchase of 2,000 bags unless the time was extended to the 20th June. This extension they were not bound to grant, and the failure to purchase them gave them reason to apprehend that they might sustain loss by having to pay dead freight and penalty. Exhibit V shows that they hesitated to pay only because the respondent had not bought 2,000 bags. As matters then stood, the

(1) L.R., 9 C.P., 208. (2) L.R., 9 App., Ca., 434.

respondent had over Rs. 2,000 with him in excess of the value of the 3,000 bags purchased by him. He stated in his letter of the 3rd May that he would have purchased the 2,000 bags if he had been paid. Why did he then ask for an extension of time only seven days before? The correspondence conveys the impression that, on the one hand, the appellants intended to withhold payment of the balance of price until the respondent was in a position to assure them that he could purchase the 2,000 bags in time for their shipment on board the *Macedonia*, and that no heavy loss would be entailed on them; while the appellants, who were unable to arrange for their purchase owing to the then state of the market, took advantage of the postponement of payment for which his own conduct gave occasion, to set himself free from the remainder of the obligation, especially when the letter of the 1st May suggested disastrous loss as the probable consequence of his failure to arrange for the purchase of 2,000 bags. Whatever counter-claim the respondent might then have had for the delay in payment, and for breach of that portion of the contract which relates to it, the appellants' conduct does not amount to a renunciation of the contract or to an absolute refusal of future performance. The result then is that the decree will be varied so as to award Rs. 875 instead of Rs. 500 as damages, that the appeal will be allowed to this extent only, and that the memorandum of objections and the rest of the appellants' claim will be dismissed.

We give the appellants the costs of this appeal.

Attorney for plaintiffs—*Wilson.*

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

QUEEN-EMPRESS

against

ADEMMA.*

1886. March 29.

Penal Code, s. 312—Miscarriage—With child—Stage of pregnancy immaterial.

A woman is with child within the meaning of s. 312 of the Indian Penal Code as soon as she is pregnant.

Revision Case 43 of 1886.